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Judicial control of the acts of the President in the Czech Republic

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In the system of law, the President, or the Head of State in general, is traditionally perceived as an institute of Constitutional Law. However, everything is subject to changes and therefore the President became a subject of the Administrative Law as well. Most recent case related to this issue is a dispute on not-appointing the judicial candidates to the function of judges. The President refused to appoint the candidates markedly younger than 30 years of age, which is a statutory condition, while he did not use the statutory exception for the group of nominees from the ranks of judicial candidates, which was a possibility but not necessity for the group of candidates from the ranks of judicial candidates. Other categories of lawyers were not granted a statutory exemption [2]. The question is: **Is the President an administrative body and are Presidential acts subject to a judicial review in the administrative judiciary proceedings?** The Supreme Administrative Court [3] provided a positive response to this question, though its decision is not widely respected.

To establish the jurisdiction of the administrative judiciary, the Supreme Administrative Court had to subsume the President under the concept of an administrative body, because the Court is primarily determined to review the administrative bodies' individual legal acts. The Codes of Administrative Judicial Procedure provide that *courts of administrative justice decide on complaints against decisions made in the sphere of public administration by an executive authority, the autonomous unit of a local administrative authority, as well as by a natural person or legal entity or another authority if entrusted with decision-making about the rights and obligations of natural persons and legal entities in the sphere of public administration (hereinafter "administrative authority")* [4]. For the purposes of jurisdiction of the administrative judiciary, the definition of an administrative body is therefore determined by two aspects: first, it is primarily an Executive body (organizational point of view) and secondly, it has to be concerned with a review of actions in the public administration field, as the sole condition of being an Executive authority is not sufficient.

1 The President and the Executive power

There are other theoretical concepts of classifying the position of the President in parliamentary democracy than those which classify the President as a part of the Executive power. Peter Kresák exempts the Head of State from its traditional ranking as the Executive power and specifies it – under the influence of Bagehot and Redslobe – as a neutral power, which is not supposed to be regarded as a part of the Executive power, but as a specific unit of power which settles possible disputes between the Executive power (the Government) and the Legislative power (the Parliament). This concept invokes the neutral position of the Head of State also in the political sphere.[5] However, this is virtually incompatible with the nature of presidentship. Being simply a non-party individual does not imply that the person on the Presidential post is politically neutral. Political neutrality is affordable for a monarch who is delegated to his/her office by mechanisms which are not associated with direct or indirect support of political parties. Also Václav Pavlíček argues that arguments classifying the President of the Republic as a part of the Executive power in order to consider his/her acts to be the acts of the Executive power lack legal ground. The lack of legal ground is concluded from a comparison of the Constitutional Charter of 1920, where the President is ranked as a part of the Executive power, with the Constitution of 9th May 1948, where the position of the President was regulated in a separate

[1] Doc. JUDr. Zdeněk Kouselka, Ph.D., Supreme Public Prosecutor's office of the Czech Republic.

[2] Article 60, Section 1 of Act No 6/2002 Coll. on Courts of Justice and Judges, as altered by Act No.192/2003 Coll. and by Art.X of this Act.

[3] The Supreme Administrative Court Decision N.605/2006 in the Collection of The Supreme Administrative Court Decisions (4Aps 3/2005) and Decision of 21.5.2008, 4Ans 9/2007-197.

[4] Section 4 para. 1 let. a) of the Codes of Administrative Judicial Procedure N. 150/2002 Coll.

[5] Peter Kresák: *Forma vlády v SR* (The form of Government in the Slovak Republic), in collective volume Aktuální problémy parlamentarismu (Current Problems of Parliamentarism), Masaryk university Brno 1996. Accordingly Karel Klíma and coll.: *Komentář k Ústavě a Listině* (A Commentary on the Constitution and the Charter on Rights and Freedoms), Plzeň 2005 or Lubor Cibulka: *Ústavné základy vzťahov prezidenta SR a vlády SR* (Constitutional Basis of Relations between the President and the Government in the Slovak Republic), in collective volume Postavení prezidenta v ústavním systému ČR (Position of the President in the Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 180.

head. The position of the President is virtually the same under both documents.[6] Nevertheless, the systematic placing of the President in both the Constitution of Bohemia, Moravia and Silesia and the Constitution of Slovak Republic in the head called "The Executive power" is evident. However, the notion of Executive power is not always the same.

Systematically, the position of the President is accommodated in one Chapter of the Constitution together with the Government – the Chapter called "The Executive power". The fact that the Head of State is a part of a branch of power, while the supreme body of this power is an organ different from the President (the Government), gives rise to a certain contradiction.[7] Vladimír Zoubek deals with this contradiction by arguing that, in a narrow sense, the Executive power – the supreme body of which is the Government – consists of the Government, Ministries and other administrative bodies. The concept of the Executive power in a narrow and a larger sense seeks to joint the theory of the Head of State as a neutral power with the systematic ranking of the President as a part of the Executive power. It leaves the President within the Executive power but emphasizes the distinction between the President and the rest of the Executive power (its Governmental branch). The President is not a part of the Executive power in a narrow sense.[8] The Constitutional Court of the Slovak Republic characterized the relationship between the President and the Government as relatively dominant under similar constitutional arrangement.[9] As a result, the original characteristic of the Government in the Slovak Constitution has been changed from the "highest" Executive power body to the "supreme" Executive power body. In mountains, there are always several summits while one of them is the highest one. Similarly, the notion of the highest executive power body implies that all the other executive power bodies are subordinated to it, while the supreme body is important but at the same time there can exist other bodies which are not subordinated to it. There can be several supreme bodies. Similarly, there are three supreme bodies in the Judicial power: the Constitutional Court, the Supreme Court and the Supreme Administrative Court. Perhaps, one could claim that the Constitutional Court is the highest body because it has authority to abolish all other courts' decisions (although it continually emphasizes, that it is not the fourth instance of the judicial proceedings). However, such a hierarchic relationship does not exist between the Supreme Court and the Supreme Administrative Court; they are both supreme Judicial power bodies.

The question is whether, with the concept of the Executive power in a narrow and a larger sense, the Executive power in the Codes of Administrative Judicial Procedure is to be perceived in a narrow or a larger sense as classified by the Constitution. Unfortunately, the Supreme Administrative Court judgment does not deal with this issue. Considering that it reviewed an Act of the President, it may be implied that, while the Court did not provide arguments about theoretical concepts concerning the position of the President in parliamentary democracy (which would be suitable for a judgement reviewing an act of the President), it perceives the Executive power in the Codes of Administrative Judicial Procedure pursuant to the concept of the Executive power in a larger sense.

In the First Republic of Czechoslovakia, a dispute also existed concerning the possibility of considering acts of the President as administrative acts which are subject to a judicial review. Some believed (Hoetzel, Weyr) that certain acts were subject to the Supreme Administrative Court's judicial review, while others opposed this idea (Sobota).[10] The dispute was settled by the Supreme Administrative Court when it rejected a complaint against the decision of the President on early retirement as inadmissible.[11] The legislator reacted by amending the law which allowed for the possibility of reviewing acts of the President. However, it provided that a legal action could not be taken directly against the President, as the President was represented by a competent Minister.[12]

2 The President and the public administration

The second condition required in order to establish the jurisdiction of the administrative judiciary is an activity in the field of public administration. Again, there is a variety of possible interpretations. It is necessary to emphasize that even though the President is an Execution power body, his rights are not limited to this sphere only. Similarly, the Parliament, which is a Legislative power body, has many competences which are not part of its legislative activity – e.g. establishing other State authorities (Government confidence vote, election and appointing into certain functions) or exerting control powers (supervision of usage

[6] Václav Pavlíček: *Prerogativy nebo správní akty prezidenta republiky* (Prerogatives or Administrative Acts of the President of the Republic), in collective volume Postavení prezidenta v ústavním systému ČR (Position of the President in the Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 134.

[7] Art. 54 para. 1 and Art. 67 para. 1 of the Constitution of the Czech Republic N. 1/1993 Coll. (hereinafter referred to as "The Constitution of Bohemia, Moravia and Silesia"). Art. 101 para. 1 and Art. 108 of the Constitution of the Slovak Republic N. 460/1992 Coll. (hereinafter referred to as "The Constitution of the SR"). In Slovakia, the Government was originally referred to in Art. 108 of The Constitution of the SR as the supreme body of the Executive power, until altered by the Constitutional Act N. 90/2001 Coll.

[8] Aleš Gerloch, Jiří Hřebejk, Vladimír Zoubek: Ústavní systém ČR (The Constitutional Order of the Czech Republic), Praha 1993, p. 107.

[9] Resolution N. 5/93 of the Collection of Judgements and Resolutions of the Constitutional Court of 1993–1994 (Zbierka nálezov a usnesení Ústavného súdu), p. 30.

[10] Jiří Hoetzel: *Akt správní* (Administrative Act), in Slovník veřejného práva československého (Dictionary of the Czechoslovak Public Law), vol. I, Brno 1921, p. 34n. František Weyr: *Československé právo ústavní* (Czechoslovak Constitutional Law), Praha 1937, p. 191. Emil Sobota and coll.: *Československý prezident republiky* (The Czechoslovak President of the Republic), Praha 1934.

[11] Judgement of the Supreme Administrative Court N. 19 745/22 of 14.10.1933. Pavel Rychetský: *Soudní přezkum aktů prezidenta republiky* (Judicial Review of the Acts of the President), in collective volume Postavení prezidenta v ústavním systému ČR (Position of the President in the Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 149.

[12] Section 2 para. 2 of the Act N. 36/1875 of the Reich Law Establishing the Administrative Court altered by Act N. 164/1937 Coll.

of the intelligence technology, the closing account of the State Budget). The well known organizational and functional methods of approach could be used in this respect. For example, from the organizational point of view, the community (municipality) authorities are the bodies of local self-government administrative units, while from the functional point of view they could be considered as state administration bodies (if they exercise the delegated powers of the community), or as self-government administration bodies (if they exercise separate powers of the community). ***The President of the Republic does not act only as an executive power body but also as the Head of State.***[13] The concept of the Head of State includes exercise of all powers, or more precisely exercise of individual acts within these powers which are provided for in the Constitution and statutes. From the functional point of view, signing an act or using a suspensive veto is a part of the legislative process. In these cases the President does not act as an administrative body carrying out public administration but as a subject of the legislative process which is regulated by the Chapter of the Constitution dealing with the Legislative power. Similarly, the President's right to grant pardons and amnesties represent the powers of a Head of State, who has significant competences within the Judicial power as well. The 1920 Constitutional List explicitly subsumed these rights under the Judicial power.[14] From the organizational point of view, the President is classified as an Executive power body. However, from the functional point of view, it is not possible to subsume all of the acts falling within his/her competence automatically into the sphere of public, or more precisely, state administration. While concerning certain competences this fact is not disputed, disputes will take place in relation to some other competencies.

The relationship of the President as the Commander in Chief of the Armed Forces and the Ministry of Defense, which is a central administrative body for state administration of the army, may serve as an example.[15] The President is the Commander in Chief of the Armed Forces.[16] This results in a special relationship with the Minister of Defense, who has competence over the state administration of the Department of Defense but does not have the competences of the Supreme Commander. In practice, it is difficult to determine which particular acts are the administrative acts and which are the commander acts. Despite the variety of theoretical perspectives on the border between commander competence and administration of the armed forces[17], if in doubt, it is necessary to give priority to the supreme commander's competence. This follows form the fact that the armed forces are built upon the concept of a single command and hierarchical obedience and disturbance of this principle threatens the armed forces' combat efficiency.

The acts of the President may be perceived not as the public administration acts but as the constitutional acts of the Head of State also in the field of the Executive power. Appointing or not appointing a judge is not an act of a mere state administration but a constitutive act of the Head of State concerning the personnel basis of the Judicial power.

3 Authoritative and non-authoritative administration

Moreover, in the field of public administration it is necessary to consider whether an act represents authoritative or non-authoritative administration. When performing the public administration, the State or other public law corporations act as legal persons and carry out common private law activities. This competence of the public administration is not subject to a review by the administrative judiciary, as its review falls within a jurisdiction of the civil judiciary. In this respect, a judgement of the Constitutional Court, which increased the number of disputable judgements on judiciary, as it abolished the Supreme Court judgement on the disciplinary procedure held against a public prosecutor, is relevant.[18] The Court held that the relationship between the public prosecutor and the State, including its termination, is an employment relationship, where both parties have an equal legal position. This was an important question, since the constitutional complaint against the Supreme Court

[13] Art. 54 para. 1 of the Constitution of the Czech Republic N. 1/1993 Coll., Art. 101 para. 1of the Constitution of the SR N. 460/1992 Coll.

[14] Section 103 of the Constitutional List introduced by the Act N. 121/1920 Coll. Also F. Adler asserts that some of the President's rights fall within the legislative power while others fall within the Judicial or Executive power – see Slovník veřejného práva československého (Dictionary of the Czechoslovak Public Law), vol. III, Brno 1934, p. 543 et seq.

[15] Section 16 of the Act on the Establishment of Ministries N. 2/1969 Coll.

[16] Contemporary regulation which is in force in Bohemia, Moravia and Silesia provides the President, according to the Czechoslovak tradition, with the supreme command not only over the army, but over all the armed forces. Shortly after formation of the independent Czechoslovakia, the temporary constitution provided that the President was the Supreme Commander of the Army. This was altered by the Act N. 271/1919 Coll. as a position of the Supreme Commander of all Military Forces. This regulation was taken over into the Constitutional List of the 1920 which conferred to the President the right of the Supreme Command over all the military forces, which is a larger concept than the army. It was also taken over into the Constitution of the 9th May 1948. The Constitution of the 1960 used a new term "Supreme Commander of Armed Forces" instead of "Military Forces". This was virtually taken over also by the Czech and Slovak Constitution. Thus the Czech Constitution refused a limited concept of the Supreme Command only over the army, which was established in the Constitution of the Slovak Republic of the 1939. The relevant provision of the Constitution employs the term "Supreme Commander of Armed Forces", so it is an independent individual function which is, pursuant to the Constitution, performed by the President on the basis of virilism. Pursuant to the Military Service Act, the armed forces consist of the army as its fundamental element, of the public armed corps, which are determined by the Government, and – in the time of emergency – also of the public security corps. Section10 let. b) of the Act N. 37/1918 Coll. and its alteration by Act N. 271/1991 Coll. Section 64 para. 1 subpara. 10 of the Constitutional List. Section 38 para. 1 let. i) of the Constitution of the Slovak Republic 1939. Section 74 para. 1 subpara. 12 of the Constitution of the Czech Republic 1948. Art. 62 para. 1 subpara. 11 of the Constitution N. 100/1960 Coll. Art. 61 para. 1 let. k) of the Constitutional Act on the Czechoslovak Federatin 1968. art. 102 let. j) of the Constitution of the Slovak Republik.

[17] Zbyněk Šín: *Jmenovací a pověřovací oprávnění prezidenta 2* (Appointive and Delegation Powers of the President 2), in Právní rádce (Law Advisor) N. 4/1995, p. 8.

[18] Judgment N. 79/2006 of the Collection of Judgments and Resolutions of the Constitutional Court (I ÚS 182/05).

judgement was lodged by a district public prosecutor who had held the position of a disciplinary public prosecutor before.[19] The opinions of the Supreme Court and the Supreme Public Prosecutor's Office for the Constitutional Court provided that the disciplinary procedure has a public law nature and that the Chief Public prosecutor acts as a public authority body which is not entitled lodge a constitutional complaint.[20] Therefore the constitutional complaint should have been refused. However, the opinion of the Supreme Public Prosecutor's Office i.a. permitted for a potential interpretation that the relationship of the public prosecutor and the State is an employment relationship which can be terminated, i.a., by removing the public prosecutor from his office in the disciplinary procedure. In this case the Supreme Public Prosecutor does not act as a public authority. He/she acts as an employer on behalf of the State in the employment relationship. The State can lodge a constitutional complaint if it is in a position of legal person, including the position of employer, when it does not act from a position of power.[21] The Constitutional Court identified itself with this opinion as it admitted the complaint.

The disciplinary procedure is also a part of an employment relationship, which is regulated in the Labour Code unless the Public Prosecutor's Office Act does not provide for otherwise.[22] However, it is necessary to accept that, specifically in relation to the disciplinary procedure, such interpretation is at least unexpected. In the employment law, elements of private law overlap the elements of public law while, especially in the case of public prosecutors and judges, the elements of public law in the private law employment relationship are strengthened. The disciplinary procedure, which has a nature of a punitive disciplinary procedure with adequate subsidiary use of the Codes of Criminal Procedure[23], represents an element of public law. However, despite its public law characteristics, the Constitutional Court acknowledged the disciplinary procedure to be a part of a basically private law employment relationship, where the state acts as a legal person (not as an authoritative subject of the public authority) and has an equal legal position with the employee, which includes the benefit of protection by the Constitutional Court in the constitutional complaint proceedings.

The Constitutional Court's decision implies that the relationship between the public prosecutor and the State is primarily an employment relationship. This relates to determining the substantive-law essence of an employment relationship, however, it has also procedural consequences relating to the courts' jurisdiction. Resolution of disputes related to employment relationships falls within a jurisdiction of the District Courts' Senates consisting of one judge and two lay judges who are elected by local councils (a labour-law senate),[24] unless the law provides for a different jurisdiction, e.g. in the case of disciplinary procedure.

The Constitutional Court's decision has interesting consequences for proceedings in cases concerning the judges. The function of a judge is also performed within an employment relationship.[25] The Labour Code and other labour-law legislation shall be applied adequately to the employment relationships of the judges.[26] In contrast to public prosecutors, the Courts and Judges Act provides only an adequate use of a special labour-law legislation. However, this does not imply any change to the definition of their relationship with the State as a private law employment relationship with legal equality of the parties. Also the judges of the Constitutional Court perform their functions in an employment relationship which is regulated by the Labour Code, unless the Constitutional Court Act provides for otherwise. Moreover, in the case of judges of the Constitutional Court, the application of the Labour Code is not even reduced by the concept of adequacy.[27] If, according to the Constitutional Court, the disciplinary procedure which terminates the function of a public prosecutor or a judge is an act of labour law, then similarly the appointment of a judge or a public prosecutor is also an act of labour law.

However, the Supreme Administrative Court, without any reference to the legal opinion of the Constitutional Court, derived its jurisdiction also over the disputes on the basis of an entitlement to sue, which is not necessarily linked to the existence of specified public substantive rights of the plaintiff, as it is sufficient, if it affects the legal sphere of the plaintiff, which, by itself is a vague concept. The Supreme Administrative Court repeatedly held an attitude which enables it to broaden the

[19] District Public Prosecutor of Plzeň-město (the city of Pilsen) Antonie Zelená lodged a constitutional complaint as a disciplinary public prosecutor, despite the disputable legal opinions. Section 8 para. 3 let. d) of the Act on the Proceedings Concerning Judges and Prosecutors N. 7/2002 Coll.

[20] On the impossibility of lodging the constitutional complaint by public autority bodies see Jan Filip, Pavel Holländer, Vojtěch Šimíček: *Zákon o ústavním soudu, Komentář* (The Constitutional Court Act, Commentary), Praha 2001, p. 297.

[21] Resolution N. 24/2004 of the Collection of Judgements and Resolutions of the Constitutional Court (IV. ÚS 367/03). In this resolution the Constitutional Court admitted a constitutional complaint of the State, represented by the Ministry of Foreign Affairs, against the judgement concerning an immediate termination of employment relationship. However, the Court then refused the complaint for other reasons.

[22] Section 18 para. 6 of the Public Prosecutor's Office Act.

[23] Section 25 of the Act on the Proceedings Concerning Judges and Prosecutors.

[24] Section 7 para. 1 and Section 36a para 1 of the Civil Procedure Act N. 99/1963 Coll. A similar approach was adopted by the Prague Metropolitan Courtwhen, in the administrative judiciary, it rejected an action against a decision of the Ministry of Health in the case of removing the director of an institution receiving contributions from the State Budget from office by the Resolution N. 1007/2007 of the Collection of Resolutions of the Supreme Administrative Court (reference number 5Ca 139/2006-80). Therefore, the case concerning cancellation of the Minister of Justice's decision which removed the President of the District Court Praha-Západ from office on the 3rd February 2005 was decided in June 2005 also by the Prague Metropolitan Courtwhich had no jurisdiction in the administrative judiciary. However, the Minister accepted the court's decision and has not used remedial measures.

[25] Section 84 para. 1 of the Courts of Justice and Judges Act N. 6/2002 Coll.

[26] Section 84 para. 4 of the Courts of Justice and Judges Act N. 6/2002 Coll.

[27] Section 10 of the Constitutional Court Act N. 182/1993 Coll.

sphere of its jurisdiction almost unlimitedly.[28] Therefore the Supreme Administrative Court's decision on not appointing the judicial candidates to the function of judges[29] intervenes into the sphere of the labour courts, not the administrative courts. No employer, not even the State, is obliged to employ someone only because he/she has an interest in acquiring certain function. Together with the judicial candidates, the legal conditions for being appointed to the function of a judge are met by thousands of public prosecutors, attorneys-at-law, articling attorneys-at-law, assistants of judges, assistants of public prosecutors or court distrainers, their candidates and articling clerks. The judicial candidates do not have a priority to be appointed to the position of a judge over the other lawyers who meet the statutory conditions for being appointed a judge.

When taking labour-law related decisions concerning the judges, the President does not, according to the legal opinion of the Constitutional Court, act as an administrative body, but as an individual who in the position of an employee on behalf of the State as a legal person in an employment relationship. The employment relationship of the judges and the public prosecutors is more affected by elements of public law, which however do not change its labour-law essence. This could be qualified as being close to a service relationship, where the administrative courts have jurisdiction but only if the law explicitly provides for it.

However, such conception, which represents a logical implication of the Constitutional Court's opinion, does not correspond with the Courts of Justice and Judges Act. The Courts of Justice and Judges Act provides for a subsidiary use of the Code of Administrative Procedure in the proceedings concerning a relocation of judges.[30] The Code of Administrative Procedure are used for the authoritative – not the private law – decision-making of the State. Therefore, if the law provides for the use of the Code of Administrative Procedure, it concerns the public law decisions of the State, but not the private law decisions. This approach served as a basis for the Chairperson of the Regional Court and a group of judges of the Ústí nad Labem Regional Court who, in 2006, disagreed with a relocation of a judge from the District Court to the Regional Court and asked the Supreme Prosecutor to bring an administrative action in public interest against the decision of the Minister of Justice concerning this relocation for representing a violation of law.[31] The decision was canceled by the new Minister of Justice.[32]

The Constitutional Court's decision is even more surprising when applied analogically to judges and the acts of the President towards them. Appointing judges and selected judicial officers is regulated in the Constitution.[33] It is difficult to accept that when the Head of State carries out his/her constitutional competence, he/she does not act as a state authority body but as an individual acting on behalf of the employee.

4 Deciding on the basis of a proposal

The Supreme Administrative Court fabricated that, on the basis of a legal practice, a sort of proceedings is initiated by the delivery of a nomination to the function of a judge to the President. The President shall act without unreasonable delay, while the candidates have a legitimate expectation that a decision upon their nomination will be taken. Although the Court does not specify the type of proceedings, if it identified the President as an administrative body in order to establish its jurisdiction over the matter, presumably it meant the administrative proceedings. However, neither the Courts of Justice and Judges Act nor the Constitution provide that somebody nominates the candidates for the function of judges to the President. Unless it is explicitly regulated by law, it is certainly possible for anyone to address any kind of proposal to the President. However, from a legal point of view, such a proposal will only qualify as an inducement which the President may consider but is not obliged to do so. It will not qualify as a petition, which does not have to be admitted but must be considered. The Supreme Administrative Court fabricated that the Government's proposal was addressed to the President on the basis of a custom. However, the Government has not discussed any nomination of the candidates for the function of judges. The constitutional practice solely provides that the Government discusses the candidates before their appointment and makes a recommendation for countersignature to the Prime Minister. It is a resolution of recommendation, as the countersignature is an individual right of the Prime Minister, not a collective right of the Government. This recommendation is addressed to the Prime Minister, not to the President.[34] The judicial candidate does not participate in the discussion in the Government. The candidate is not even provided with any official information on the matter. He/she can obtain information from the Government website like anybody else. Moreover, on their commencement of employment, the judicial candidates sign a declaration which provides that

[28] The decision of 21. 5 2008 4 Ans 9/2007-197 was based on a Resolution of the Large Senate of the Supreme Administrative Court N. 906/2006 of the Collection of Resolutions of the Supreme Administrative Court (6A 25/2002).

[29] Judgement of the Supreme Administrative Court 4 Aps 3/2005, 4 Aps 4/2005 and 4 Ans 9/2007.

[30] Section 73 para. 2 of the Courts of Justice and Judges Act.

[31] The Supreme Public Prosecutor's Office 1NZC 509/2006 and 1 NZC 510/2006.

[32] Decision of the Minister of Justice Jiří Pospíšil of the 7th November 2006 which, in a summary proceedings pursuant to Section 97 para. 3, Section 98 and Section 178 para. 2 of the Codes of Administrative Procedure N. 500/2004 Coll, cancelled the decision of the Minister of Justice Pavel Němec of 28. 6. 2006 N. 321/2006-PERS-SO/3.

[33] Art. 62 let. e) and f) and art. 63 para 1 let. i), para. 2–4 of the Constitution N. 1/1993 Coll. For appointing and recalling the President and Vice-President of the Supreme Administrative Court applies Art. 63 para 2 of the Constitution.

[34] Michal Bartoň: *Rozhodování prezidenta republiky na návrh a rozhodování s kontrasignací – několik poznámek k rozhodnutí NSS ve věci justičních čekatelů* (Decision-making of the President of the Republic on the basis of a proposal and decision-making with countersignature – a few comments on the Supreme Administrative Court decision in the case of judicial candidates), in collective volume Postavení prezidenta v ústavním systému ČR (Position of the President in the Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 120–125.

they acknowledge they have no legal entitlement to be appointed to the function of judges. Therefore, a successful passing of the judiciary examination cannot raise a legitimate expectation of a decree of appointment.

A constitutional practice may significantly broaden the text of legal regulations and the Constitution but it must not replace it. The custom is not a binding legal usage, in the case of which it is accepted that the latter legal custom derogates the former one. The Constitution provides that the competence of administrative bodies is determined in the legislation.[35] As regards the petition, which obliges the administrative body which it is addressed to consider the petition at least, it is an exercise of the competence of the body that addresses the petition. Such an exercise of competence must have an explicit legal basis. For instance, anyone can address an inducement to the Supreme Public Prosecutor to bring an administrative action in public interest. Such inducement may be taken into consideration, however, it is not an obligation. It is only the Public Defender of Rights who is legally entitled to address this inducement. The Supreme Public Prosecutor is not obliged to admit this inducement, nevertheless, he/she is obliged to reason its rejection.[36] **A custom cannot give raise to the existence of a Government body's competence which is not anticipated by the legislation or by the Constitution**. A very different situation concerns appointment of the Governor of the Czech National Bank by the President, where the Constitutional Court used a constitutional practice for interpreting the appointive power of the President[37]. In that case, the constitutional right of the President to appoint members of the Bank Board of the Czech National Bank and the legal right of the President to appoint the Governor and the Vice-Governor of the Czech National Bank were not disputed. The constitutional practice only concerned the question of whether the latter right of the President is independent and subject to countersignature or whether it follows from the former right and is not subject to countersignature.

The Supreme Administrative Court further fabricated that, in the relationship between the President and the Government, the final decision belongs to the Government in the cases when the countersignature of the President's decision is required. However, the continuous practice indicates the opposite. The President has rejected a number of proposals which the Government and both Chambers of the Parliament are entitled to raise, e. g. inducement of the Government to remove a member of the Czech Securities Commission from office or nominations for State Decorations.[38] From the legal point of view, a **proposal** is an initiative of one subject towards another subject, while the addressed subject has the right to take a free decision on the proposal. If an initiative has to be admitted by the addressed subject, then it is not a proposal but an order. **The President is not bound by any orders**[39], unless the Constitution explicitly provides for otherwise.[40]

4.1 Instances of non-appointment by the President on the basis of a proposal

4.1.1 Appointment of a member of the Government

The President appoints and recalls the Prime Minister and other members of the Government, entrusts them with the direction of individual ministries and accepts their resignations. The President is obliged to recall the Government from office when it receives a non-confidence vote in the Chamber of Deputies of the Parliament or when its proposal on confidence vote is dismissed. The non-confidence vote concerns only the collective responsibility of the Government, not a responsibility of its individual members. This differs from the Slovak legislative regulation which retained an individual responsibility of Ministers to the Parliament, which had been applied in the Czechoslovak Federation. It fully corresponded with the rule of Parliament, a system of government which was applied at that time.[41] The President is constitutionally free to appoint the Prime Minister while, of course, the political reality has to be taken into account. Other members of the Government can be appointed and authorized to manage the individual Ministries only on the basis of a proposal of the Prime Minister. However, decision on appointment is an act of the President and represents an expression of his/her will. Therefore he/she is entitled to dismiss the Prime Minister's proposal and require a new one.[42] The will of the President must not be absent, as he/she is legally responsible for appointing the Government and may be charged with treason. The legal responsibility exists only in relation to office holders who can use their will to influence the decision.

Contrary opinions,[43] which are based on an assertion that the President cannot dismiss the Prime Minister's proposal

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[35] Art. 2 para. 2 and Art. 79 para. 1 of The Constitution of Bohemia, Moravia and Silesia. Art. 2 para 2 of The Constitution of the SR.

[36] Section 66 para. 2 of the Codes of Administrative Procedure N. 150/2002 Coll. Section 12 para. 7 of the Public Prosecutor's Office Act N. 283/1993 Coll. Section 22 para. 3 of the Public Defender of Rights Act N. 349/1999 Coll.

[37] Judgement N. 285/2001 Coll.

[38] Section 8 of the State Decorations Act N. 285/2001 Coll.

[39] Art. 101 para. 1 of The Constitution of the SR explicitly provides that the President is not bound by any orders.

[40] Resolution of the Chamber of Deputies and the Senate of the Parliament of the Czech Republic on the impossibility of performing the function of the President. Art. 66 of the Constitution of Bohemia, Moravia and Silesia.

[41] Art. 116 para. 1 and 3 of the Constitution of the SR.

[42] Accordingly Jan Bárta: *Prezident republiky a jeho pravomoci v ústavním systému* (The President of the Republic and his Competences in the Constitutional System), Právník (The Lawyer) 2/2007, p. 141–142.

[43] For a contrary opinion, however not constitutionally reasoned, see Jiří Pehe in his opinion "*Prezident může se jmenováním vlády otálet, avšak neudělá to*" (The President can delay the appointment of the Government but he will not do it) in Slovo 15.7.1998, p.2 and Václav Pavlíček in his opinion "*Zeman jede dnes do Lán se seznamem ministrů*" (Zeman is coming to the Lány castle with a list of ministers) in Slovo 16.7.1998, p.2. Formulation of the Art. 62 let. a) and Art. 68 para. 2 of the Constitution of Bohemia, Moravia and Silesia is different from Art. 74 which provides for an obligation to recall a member of Government on the basis of a proposal of the Prime Minister.

on appointing the Ministers, use arguments about the essence of parliamentary democracy. However, the parliamentary democracy as a form of Government is based on the fact that the Government is responsible to the Parliament but it is not a Committee of the Parliament. Constitutionally, its existence rests on two authorities – the Head of State (appointment) and the Parliament (vote of confidence). Both conditions have to be met in order to provide for a stable functioning of the Government, while for a short-term functioning an appointment by the Head of State is sufficient (e.g. in the cases of dissolving the Parliament or appointing a transitional Government). If the Government was dependent only on the Parliament and the Head of State could not express his/her will in appointing its members, then it would not be a parliamentary democracy but a rule of Parliament, where the Parliament is a supreme body of the unified state authority, not only of the Legislative power. However, this system of Government, which was applied in the Czechoslovakia in 1960–1962, mostly as a virtually one-party totalitarian system (1960–1989), was not adopted by the succession states of Czechoslovakia.

The attitude of the President Václav Klaus of October 2005, when he conditioned the appointment of David Rath to the function of Minister of Health by his resignation on the function of the President of the Czech Medical Chamber and was rejecting the Prime Minister's proposal on his appointment until this step was taken, may serve as an example of a negative attitude to appointing a member of Government on the basis of a proposal by the Prime Minister. The President appointed Rath only on the 4th November 2005 after his condition had been met. In the meantime, the Vice-Chairman of the Government Zdeněk Škromach was authorized to temporarily manage the Ministry and he appointed Rath to the function of the First Deputy Minister of Health. In June 2004, the President Václav Klaus also rejected the proposal of Prime Minister Vladimír Špidla (Czech Social Democracy Party) on the appointment of Zdeněk Koudelka (Czech Social Democracy Party) to the function of the Minister of Justice. He agreed with the proposal, however, due to worsening of the Prime Minister's position in his own political party, he decided to recall the act of appointment which has already been scheduled and wait, as the demission of the Prime Minister was expected. The demission took place within a few days. The President accepted it on the 1st July 2004, when a new Government of Stanislav Gross (Czech Social Democracy Party) was appointed. On the 4th August 2004, the President authorized the Prime Minister in demission, Špidla, to manage the Ministry of Justice.

It is a well-known fact, that in 1993 the Slovak President Michal Kováč refused to appoint Ivan Lexa (Movement for Democratic Slovakia) to the function of the Minister of Administration and Privatization of the National Property on the basis of a proposal of the Prime Minister Vladimír Mečiar (Movement for Democratic Slovakia).[44] The disapproval of the President was partly evaded as after accepting the demission of the former Minister, Ľubomír Dolgoš (Movement for Democratic Slovakia), the President authorized the Prime Minister Mečiar to manage the Ministry since the 22nd June 1993. The Government appointed Lexa to the function of an Assistant Secretary of the Ministry and he was practically in charge of the Ministry until the Government fell in March 1994. The Slovak Constitutional Court in Košice provided that without an expression of the President's will, no formation or cessation of membership in the Government cannot take place, and that the President is obliged to consider the proposal of the Prime Minister but not to admit it.[45] In Bohemia, Moravia and Silesia, the Constitution obliges the President to admit Prime Minister's proposal on removing a member of the Government from office.[46]

In 1953 in the chancellor system of Germany, the President of the Federal Republic Theodor Heuss in 1953 also rejected the proposal of the Chancellor Konrad Adenauer to appoint Thomas Dehler to the function of the Minister of Justice.[47] In Austria, the President Thomas Klestil refused to appoint some Ministers of the far-right Freedom Party who ere nominated in 2000 by the Chancellor Wolfgang Schüssel to his first coalition Government. However, this happened during preliminary consultations whereas Schüssel was aware of the controversy of his coalition partner, who has been diplomatically boycotted by the EU. Schüssel wanted to ensure an agreement with the President on the personal composition of the Government in advance.

4.1.2 Appointing other public officials

On the 13th June 2006 Václav Havel refused a proposal of the Chamber of Deputies of the 25th October 2002 on appointing both the President of the Supreme Audit Office, Lubomír Voleník, and its Vice-President František Brožík. The reasoning of the decision provided that the President wanted to receive proposals from the newly elected Chamber of Deputies (elec-

[44] The President has not given reasons for the non-appointment: „Pán Lexa nesplňa predpoklady na vykonávanie tejto funkcie a nemá ani moju osobnú dôveru". (Mr. Lexa neither meets the conditions for performing this function nor enjoys my personal confidence). In Budování států (Building of states) N. 6/1993, International Institute of Political Science of the Faculty of Law, Masaryk University, p. 13 and N. 7/1993, p. 17. Slovak Wikipedia, subject word "Ivan Lexa".

[45] This decision settled a dispute between the President Michal Kováč and the Prime Minister V. Mečiar concerning removing the Minister of Foreign Affairs Milan Kňažko from office. In this situation, the Art. 116 para. 4 of the Constitution of the SR does not explicitly provide for an obligation to recall Ministers on the basis of a proposal of the Prime Minister in contrast with Art. 74 of the Constitution of Bohemia, Moravia and Silesia. This interpretation is applicable also today in relation to appointing members of the Government. Resolution N. 5/93 Zbierky nálezov a uznesení Ústavného súdu 1993–1994 (of the Collection of Resolutions and Decisions of the Constitutional Court of the Slovak Republic of 1993–1994), p. 30.

[46] Art. 74 of the Constitution of Bohemia, Moravia and Silesia.

[47] T. Dealer (FDP) had nevertheless performed this function in the first Adenauer's Government in 1949–1953. The successor of President T. Heusse (1949–1959), President Heinrich Lübke (1959–1969) accepted the proposal of Konrad Adrenauer (CDU) on the appointment of members of the Government. However, he expressed his political distance from the proposed minister of nutrition, agriculture and forestry Werner Schwartz (CDU, 1959–1965) and minister of foreign affairs Gerhard Schröder (CDU, 1961–1966). Roman Herzog: commentary to/on art. 64 of the Organic Statute of the Federal Republic of Germany, Maunz-Düring: Grundgesetz – Kommentar C. H. Beck 1983.

tions of the 14th – 15th June 2002). Finally, Voleník was appointed whereas Brožík was not. If the President is allowed to dismiss a proposal of the Chamber of Deputies, then he is definitely allowed to dismiss a proposal of the Prime Minister, because in the parliamentary republic, the Prime Minister does not have a stronger position than the Parliament or its Chamber, to which the Government is responsible to. The President is even entitled to dismiss proposals on appointment or removing from office which are subject to countersignature. This is demonstrated by the President Václav Havel's refusal of March 2000 to remove a member of the Presidium of the Czech Securities Commission, Tomáš Ježek, from office on the basis of the Miloš Zeman Government's proposal. The power of the President to dismiss the proposal is fully supported by the distinction of the legislative regulation on appointing and recalling the President of this (today already abolished) body and the President of the Czech Statistical Office and of the Office for the Protection of Competition. The Presidents of these bodies are appointed and removed from office by the President on the basis of a proposal of the Government, in contrast with the presidents of other central administrative bodies, who are appointed directly by the Government. The purpose of this distinction is to ensure more independence from the Government. The Government may have interest in a "modification" of unfavourable statistics or in influencing the control over its own public procurements by the Office for the Protection of Competition. If the President was to be a mere notary who stamps decisions of the Government, then an introduction of this difference in appointing and recalling the Presidents of central administrative bodies would not make any sense. There is no such difference between the representatives of central administrative bodies in Slovakia as all of them are appointed by the President.[48]

On the 30th January 2002 the President Václav Havel refused (postponed ad infinitum) to appoint Peter Mikulecký to the function of the Rector of the Hradec Králové University. Mikulecký was nominated to this function by the Academic Senate of the University on the 25th October 2001. Havel refused to appoint him because of dubiousness concerning his lustration. Finally, Mikulecký gave up his nomination on the 11th March 2002.[49] This competence of the President of the Republic is subject to countersignature.[50]

It is an unchangeable political fact that the Government has to reckon/count with the supposed negative reaction of the Head of State concerning a nomination for an appointment. The Slovak case of appointing Ivan Lexa to the function of the President of the Slovak Information Service. Lexa was first nominated by the Government to the function of the first President of this Service already in 1993. The President Michal Kováč refused this nomination and in April 1993 Vladimír Mitro was appointed the first President of the Slovak Information Service.[51] For the second time, the Prime Minister Vladimír Mečiar wanted to appoint Ivan Lexa to this function in 1995. A negative attitude of the President Michal Kováč to the appointment of this person had been known before as he refused to appoint him to the function of the President of the Slovak Information Service and a Minister too. The Government therefore enforced an amendment of legislation. The right to appoint the President of Slovak Information Service was passed from the President to the Government, which was authorized to do so on the basis of a Prime Minister's proposal.[52] This enabled the appointment of Ivan Lexa. It is also known that on the 6th June 2006 the Slovak President Ivan Gašparovič refused to appoint Vladimír Tvarožka to the function of the Vice-Governor of the National Bank of Slovakia. Tvarožka was nominated by the Government with the consent of the National Council of the Slovak Republic.[53] The President reasoned his decision by asserting a lack of the required five-year financial praxis as he did not acknowledge his function of an adviser of the Vice-Chairman of the Government for the Economic as an appropriate practical experience in the field. The Hungarian President László Sólyom refused in June 2007 a Government's proposal to grant State Decoration to the former Prime Minister Gyulo Horn because of his defending participation in suppressing the 1956 uprising.[54] The President's attitude was confirmed by the Constitutional Court.[55]

Concerning the appointment of generals by the President on the basis of a proposal of the Government and with the countersignature of the Prime Minister, the case of the Chief of Police Vladimír Husák, who was nominated to be appointed a major-general, is relevant.[56] The police action against a 1st May demonstration had been criticized before the appointment scheduled on the 8th of May 2006 and the President dismissed

[48] Art. 102. para 1 let. h) of the Constitution of SR.

[49] Peter Mikulecký had a negative lustration certificate enacted in 1995; in 2002 the Ministry of Interior enacted a new lustration certificate which was positive. However, the first negative certificate has not been explicitly abolished.

[50] Art. 63 para. 2 and 3 of the Constitution of Bohemia, Moravia and Silesia. Section 10 para. 2 of the Higher Education Act No. 111/1998 Coll.

[51] Budování států (building of States) No. 4/1993, pp. 12–13.

[52] Section 3 para. 2 of the Slovak Information Service Act No. 46/1993 Coll., in the wording of the Law No. 72/1995 Coll. By the law No. 256/1999, the power to appoint the executive manager was given back to the President of the Republic who makes the appointment on the basis of a Government's proposal.

[53] Section 7 para. 2 of the the Slovak National Bank Act No. 566/1992 Coll.

[54] Horn's older brother was killed by the rebels and in the interview for a German magazine Horn described his participation in the anti-Soviet militia as a defence of the legitimate order.

[55] The Constitutional Court stated that the President in not obliged to award State Decorations to everyone who is proposed by the Government, he/she does not have to "ravish" his/her conscience (the moral integrity of the President is to be protected). The President is entitled to examine whether the proposal to award State Decoration in not contrary to the constitutional value order. The decision of the Hungarian Constitutional Court AB282/G/2006.

[56] Resolution of the Government No. 187 of the 22nd February 2006.

the Government's proposal. Actually, the Prime Minister Jiří Paroubek asked the President to do so, although the Government did not take its proposal back. Also the Slovak President Ivan Gašparovič dismissed the Government's proposal to appoint the Director of the Prison and Judicial Guard Marie Kreslová a general. The President refused to specify his reasons.

5 A statement of reasons in the decisions of the President

In order for any decision of the President to be subject to a court review, it has to be reasoned. However, it is a constitutional custom that the President does not enact his decisions in the course of administrative proceedings and that he usually gives no statement of reasons or, better to say, it is up to his/her discretion. It is a custom to provide a short statement of reasons for awarding State Decorations but not for their non-awarding. Only if it is explicitly provided for in the Constitution, the President must provide a statement of reasons for his/her conduct, which is the case of returning an Act to the Chamber of Deputies (a suspensive veto).[57] In other cases, the President provides no statements of reasons for his decisions, which is good, as some of the decisions may be politically sensitive – e.g. non-appointment of an ambassador who was proposed but the *agrément* was withdrawn, revoking of an ambassador, awarding State Decorations etc.

6 Non-enforceability of decisions of the administrative courts

The President of the Republic has an extensive material immunity and is accountable only to the Constitutional Court in the treason trial.[58] Any other sanction of the President is inadmissible. If we define the **immunity not as a personal privilege but as a protection of the exercise of the President's function**, then this special accountability to the Constitutional Court has to include not only the President's personal conduct but especially the decisions which represent an exercise of his/her constitutional powers. This constitutional conception/understanding of the President leads to the effect the President shall not be perceived as an administrative authority but as a purely constitutional institution.

The courts have sense as the State bodies that are entitled by State power to decide legal disputes; the enforceability of their decisions is essential. Non-enforceability of the statement of claims in a suit gives reason for a rejection of the suit. Only in the criminal law there are exemptions from the principle that a court judgment must be enforceable – this is in the case of deciding upon a complaint concerning a breach of law which is lodged to the detriment of the accused, where the court can only find that the law was violated by the preceding final decision of the Court or of the Public Prosecutor but it cannot abolish the illegal decision (an academic judgment).[59] This follows from the principle of the prohibition of a change for the worse and from the principle of equal position of parties to the dispute, as the complaint can only be lodged by the State represented by the Minister of Justice. Similarly, there exists an extraordinary possibility to continue – on the proposal of the accused – in the court proceedings even after the pardon or amnesty of the President had been granted. In this case, the Court can decide only on the question of culpability but cannot impose a penalty.[60]

The essence of the decision-making process of the Courts rests in the enforceability of the Court's sentence, in case it should not be executed voluntarily. From this point of view, it is surprising that the Supreme Administrative Court has derived its jurisdiction over the case concerning the appointment of judges, although it has admitted the possibility that its decision represents only a moral challenge for the President.[61] Of course, it is not a mere moral challenge, as the State authority or the Court is not moral bodies but bodies of power. However, let's assert that it is a challenge, i.e. a recommendation. We come to the conclusion that the Courts do not decide, according to the classic categorisation, by judgements of constitutive and/or declaratory nature that are enforceable, in case the sentence should not be executed voluntarily, but also by newly discovered judgements of a recommendatory nature. The Supreme Administrative Court has "usurped" the power to judge the Head of State within the framework of administrative judiciary without having the instruments necessary for enforcing its decision. The classical mode of decision enforcement cannot be employed in relation to the President because nobody but the Constitutional Court is entitled to impose a penalty to the President. Whereas the defective conduct of the President of the Republic was found to rest in a failure to act, i.e. a non-monetary performance that nobody else can substitute by a substitutive performance, it is not possible to enforce the judgment by imposing disciplinary penalties because the President of the Republic cannot be subject to such penalties. The essence of a competence is the execution of power. If the Supreme Administrative Court had "usurped" the authority to judge the President without any possibility of enforcing its judgments, it is not an execution of its power but powerlessness. This fact shows that the administrative courts are not designated to review the acts of the President (i.e. to judge the President) because they lack the authority to provide for a potential enforcement of their decisions. Thus, the President of the Republic does not have to comply with the decisions of the Supreme Administrative Court as they are not enforceable by power.

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[57] Art. 50 para. 1 of the Constitution, Act. No. 1/1993 Coll. Václav Pavlíček: *Prerogativy nebo správní akty prezidentand republiky* (Prerogatives or Administrative Acts of President of the Republic), in collective volume Postavení prezidenta v ústavním systému ČR (Position of the President in the Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 146.

[58] Art. 54 para. 3 and Art. 65 of the Constitution No. 1/1993 Coll.

[59] Sections 268–269 of the Penal Proceedings Code No. 141/1961 Coll.

[60] Section 11 para. 3 and Section 227 of the Penal Proceedings Code No. 141/1961 Coll.

[61] Judgement of the Supreme Administrative Court No. 905/2006 in the Collection of Judgements of the Supreme Administrative Court (4Aps 3/2005).

The Constitutional Court is the state body which is entitled to judge the President in various types of proceedings. If someone disputes the character of the acts of the President for being in conflict with the Constitution and therefore violating the person's fundamental rights and freedoms, including the right to hold public offices, he/she may turn to the Constitutional Court and lodge a constitutional complaint. This was the case of the Chairman of the Supreme Court of the Czech Republic Iva Brožová who disagreed with the President's decision on her removal from office. Although the President cannot be removed from his office in the proceedings on a constitutional complaint, as in the case of treason proceedings before the Constitutional Court which is initiated by the Senate, the Constitutional Court has better opportunities to control the President than other courts. In the case of the Chairman of the Supreme court, the Constitutional Court has decided first to abolish a part of the Courts and Judges Act which concerned the competences of those who appoint the court officers to remove them from office as well [62]. It was the part of the Act that the President has relied upon when removing the Chairman from her office, and consequently abolished the removal the Chairman of the Supreme Court from office itself.[63] Moreover, the Constitutional Court seems to be more suitable for assessing the acts of the Head of State because judging the President is an important matter not only in the legal respect. Therefore a wider range of judges should stand behind the decision. This is possible in the case of the Constitutional Court which, being aware of the importance of disputes to which the President is a party or just a subsidiary party, has devolved the proceedings on constitutional complaints upon the assembly of 15 judges even though the statutory competence belongs to the Senate.[64] However, this procedure is not possible at the Supreme Administrative court which has 30 judges but decisions are taken by 3-member senates only. Consequently, only two judges can take a decision on questions of principal constitutional importance. Decision-making in the Senates of the Supreme Administrative Court is not constructed for dealing with fundamental constitutional relationships within the State.

Even the jurists who accept the possibility of a judicial review of the acts of the President prefer a review by the Constitutional Court and not by the administrative courts.[65] This is the case notwithstanding the fact that the Constitutional Court has rejected the constitutional complaint in the given dispute as being premature.[66] The resolution seems rather to be the means of getting rid of the case, as the Courts has not dealt with the merits of the case. Also in Poland (appeal of the Board for Television and Radio Broadcasting) or in Germany (dissolving the Bundestag) [67], the acts of the President have been reviewed by the Constitutional Courts.

On the contrary, some favour the conclusion that no Court is entitled to review the non-appointment of a judge because there is no legal title for being appointed. If there is no subjective right to be appointed to the function of a judge, it is not possible to interfere into the constitutionally granted rights and the jurisdiction of the Constitutional Court concerning the constitutional complaints proceedings is not established.[68] This upholds the original standpoint of the Prague Metropolitan Court which characterised this act of the President as a constitutional, not a administrative, act which is therefore not subject to the judicial review in the administrative proceedings. The Court therefore rejected the suits.[69] It was forced to change this standpoint only as the consequence of the Supreme Administrative Court's legal opinion which was legally binding for the Metropolitan Court.

7 Conclusions

The judicial review of the acts of President of the Republic can be exercised by the Constitutional Court. It is not correct to issue judgments of a recommendatory nature. The President of the Republic is primarily a constitutional institution and not an administrative body. The President does not pass decisions in the administrative proceedings and is a custom that he provides no statement of reasons for his/her decisions. A legal custom cannot replace a legal condition in establishing the competence of a state authority, which also concerns the entitlement to address proposals that have to be considered by the recipient.

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[62] Judgement No. 397/2006 Coll.

[63] Judgement No. 159/2006 of the Collection of Collection of Judgements and Resolutions of the Constitutional Court (II.ÚS 53/06).

[64] Art. 1 para. 1 letter e) of the Communication of the Constitutional Court No. 185/2008 Coll.

[65] Aleš Gerloch: *K problematice postavení prezidenta republiky v ústavním systému ČR de constitutione lata a de constitutione ferenda* (On the position of the President of the Republic within the constitutional system of the Czech Republic *de constitutione lata* and *de constitutione ferenda*), in collective volume Postavení prezidenta v ústavním systému ČR (Position of the President in the Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 39.

[66] Resolution of the Constitutional Court of the 24th November 2005, I.ÚS 282/05. In a similar dispute concerning a judicial candidate the Court passed the Resolution of the 20th December 2006, I.ÚS 284/05.

[67] Eliška Wagnerová: *Prezident republiky a Ústavní soud* (The President of the Republic and the Constitutional Court), in collective volume Postavení prezidenta v ústavním systému ČR (Position of the President in the Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 102.

[68] Vladimír Sládeček: *Prezident republiky a soudní moc: ustanovování soudců* (The President of the Republic and the Judicial Power: Appointing the Judges), in collective volume Postavení prezidenta v ústavním systému ČR (Position of the President in the Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 39. Michal Bartoň: *Rozhodování prezidenta republiky na návrh a rozhodování s kontrasignací – několik poznámek k rozhodnutí NSS ve věci justičních čekatelů* (Decision-making of the President of the Republic on the basis of a proposal and decision-making with countersignature – a few comments on the Supreme Administrative Court decision in the case of judicial candidates), in collective volume Postavení prezidenta v ústavním systému ČR (Position of the President in the Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 124.

[69] Resolution of the Prague Metropolitan Court of the 16th June 2005. File No. 5Ca 148/2005-9, Resolutions 7Ca 146/2005-21 and 6Ca 145/2005.

Private law reformation in the Czech Republic

Jan Hejda [1]

The Czech Republic and its historical ancestors on our area till Austro-Hungarian Empire have gone through several developmental turning points and their subsequent changes in the field of the private law. Each from successive changes of private law reflected political, social and cultural situation of our country.

Historical development

The first significant turning point was the General Civil Code [2] from 1811 from the time of Austro-Hungarian Empire. After the break-up of the Empire, the General Civil Code was adopted as a reception rule for the Czechoslovak Republic in1918. Dominant features of the Code were chime of the Roman law and natural law ideals [3]. The quality of the work was proved by the fact, it remained till 1950 on our area and e.g. certain parts are still valid in Germany and Austria. The text of ABGB was prepared by a considerable team of authors and the work took many years. Significant inspiration in the Roman law played an important role in quality and durability of this legislative work.

Permanent validity cannot be expected even from the best private law code. As the ABGB was applied from 1918 as an adopted code from Austro-Hungarian Monarchy and being so, it was accepted by recipients from the view of the monarchy and in the spirit of the political situation frequently subconsciously refused. As soon as in 1920 an opened discussion about initiating work on a national private law code.

The question was how to do preparation works. One possibility was to create a completely peculiar, uninspired by anything significant, code. The next possibility was to find inspiration in a foreign example, there were several that time [4]. The first assumption was not to rise from the Continental legal system and not to tend towards Anglo-American legal system, as its approach does not harmonize with mentality of a new state formed in the middle of Europe. On the other hand, the differences among the Codes, even in limits of the continental system, were significant. The most noticeable were between the taxonomies of the French Code, German Code or e.g. Swiss Code. The Swiss codification differs from the French or German in Civil law Code commercialisation. However, the French and German legislation differ significantly in their value conception, legislation language and expression style. While the French Code Civil is distinguished by free expression and important appeal for ethical and moral aspects of the society life; the German Code is inspired by Prussian traditions, and distinguished by strict and stiff formulation, evidently tending to the perfect formulation accuracy. From the view of consideration of the national codification, it was decided in the beginning of the 20th century to choose ABGB as an inspiration source in the spirit of traditions. In 1937 a bill of the Civil Code arose from legislation work. As a result of slow, but significant and firmly anchored political changes, the bill even was not discussed, and naturally was not adopted afterwards. The bill remained in the same form as an inspiration for next generations.

The next significant legislative act was, from the view of extent of the work, Act No 141/1950 C. of Laws, which originated as a result of so called "law biennial". It resulted in relevant narrowing of legal regulations, leaving out of many, for private law essential, legal institutes and generally marked deterioration of private law in the Czechoslovak Republic.

As many deepening particularly political changes came up, this, so called "Medium Code" was soon replaced by a Socialist Civil Code. The Code passed as Act No 40/1964 C. of Laws. This civil code significantly diverged from ideas of natural law as it was based on ideas of socialist legislative models.

Present situation in the area of private law

Provision § 1 Art. 2 of the Civil Code says: *"Civil Code regulates property relations between natural and legal persons, property relations between these persons and the state, as well as relations resulting from the right to protection of persons, unless otherwise provided for these civil law relations."* The first provision of an act usually defines purpose and meaning of the act and value basis at the

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[2] Algemeines Bürgerliches Gesetzbuch.

[3] About that e.g. *Eliáš, K.,* Návrh českého občanského zákoníku, Obrat paradigmat, Právní rádce č. 1/2010, ECONOMIA a.s., Praha 2010.

[4] Except for ABGB from 1811, particularly Code Civil from 1804.

same time. It was the same with the Civil Code from 1964. The value hierarchy was evidently following:

- Property relations between natural and legal persons,
- Property relations between these persons and the state,
- Persons' protection.

It is obvious, that this Civil Code was focused on property relations and then, subsequently, persons' protection. This Civil Code is still in force for the Czech Republic and its content is following:

- General provisions,
- Absolute rights,
- Liability for damages and unjustified enrichment,
- Right of heritage,
- Obligation law.

The code apparently resigned on many fields, from the view of values as well as content, presented in other civil-law codes. Jurisprudence acquired several legal precepts defining the content of private law, especially civil law. One of the most important precepts is differentiation of law duality – private and public. In limits of the private law, a precept of its unity is respected. It results in, inter alia, dividing of civil law into general civil law and its special branches, particularly commercial law, law of incorporeal estate, family law, bill of exchange and cheque law, and labour law. On basis of that particularly Family Act, Labour Code, Commercial Code and other originated.

Progress of works related to private law reform in the Czech Republic

Soon after political situation change in November 1989, it became clear, that other significant changes will follow. The most significant were social and property changes. Legislative changes, besides others, obviously had to reflect changes that had come. Legislative changes should follow particularly adjustment of our legal system to practical needs of common life as law should not obstruct common people's lives, but serve them.

Civil Code was not the only legal act which exigently changed significantly. Deep social changes, as well as free market development enabling entrepreneurship of natural and legal persons, assumed changes of a complex character. It resulted in contemplation of not necessity of huge legislative changes, but of their way of their effectuation. There were two possible forms of legislative changes effectuation. The first form was series of law amendments making the most essential and necessary alterations; the second form was a complex change of the legal system.

The Minister of Justice, Otakar Motejl, played a significant role in private law legislation changes preparation. On his own initiative, many experts, particularly from the branch of private law, were approached. Processing and proffering basic ground, how future private law should look like, were the first task for them. From proposals presented the proposal of Prof. JUDr. et Dr. Karel Eliáš was acknowledged the most eligible. During negotiations with him and Doc. JUDr. Michaela Zuklínová, they agreed on private law changes in the Czech Republic implemented by the two authors, and Doc. JUDr. Michaela Zuklínová would process the passages of family law and lease agreement. The number of authors was shockingly low in comparison with other states where such a change of legislation system took place in last fifty years; however the deadline was unexpectedly short for processing such an extensive legislation change. Whereas in Netherlands for example, a new private law codification was originating nearly 50 years, ours should have been processed in less than 10 years.

The authors, abovementioned, presented a proposal of the main points of future Civil Code schema even in 2000, and it got a form of the intended subject of the law, which was submitted for the government's approval 31st January 2001. At the same time recodification committee consisting of 45 experts from theory and practise was set up with both authors. There were other 9 subcommittees focused on special particular parts of the Civil Code. All the committees should be the first opponent of the presented proposal and they have discharged the function up to now. For both authors insistence, many meetings, conferences and public discussions were arranged to discuss the proposed schema, which continuous updates were published. Except for the discussion abovementioned, many particular specialised forums were arranged, pursuing particular issues one by one. Thanks to the authors' collective, discussion was held also with organisations protecting their members' interests, in spite of the fact, that in time the authors acquired often contrary communication and opinions, depending on which group of persons were the issues discussed with.

Gradual versions of the main points[5] and proposal schema were published in parts and afterwards as a whole in books, magazines[6], and on web sites[7]. The aim of these publications was clearly to attract the experts to join the discussion about the schema. A very significant aspect was a practical test of the schema viability through non-professionals taking part in the discussion as well. As the texts of the Civil Code proposal and related legal regulations have been repeatedly published up to the present time, it enables to draw qualified conclusions about its form, contents and potentially controversial issues.

The progress sequence was following:

- 1995 – Active discussion about recodification works initiation
- 1996 – The first recodification concept publishing
- 2000 – Intended subject-matter of the Civil Code
- 2001 – Intended subject-matter publication and approval

[5] *Eliáš, K., Zuklínová, M.,* Základní principy a východiska nového kodexu soukromého práva, Praha: Linde 2001; *Eliáš, K.,* Nad legislativním záměrem zásad obecné části nového občanského zákoníku aneb kterak se promeškávají historické příležitosti, Právní rozhledy, No 1, 1996.

[6] *Eliáš, K.,* Prvních sto jedna, Právní rozhledy 10/2001.

[7] Particularly servers: www.justice.cz, www.juristic.cz, www.leblog.cz.

- 2002 – Recodification working committee formation
- 2002 to 2008 – Discussing the recodification proposal and its changes
- 2006 to 2007 – Unofficial consultation
- 2008 – Official consultation and comments debating in the recodification committee
- 2009 – Recodification proposals submitting to the Government of the Czech Republic and to the Czech Parliament.

Idea basis of the private law reform

It was necessary to clearly identify the extent, which should be incorporated before the text of the Civil Code schema would be conceived. The idea of the authors collective was to create a schema based on Czech own traditions, although in similar cases it comes into consideration to adopt time-proven legal provisions of the countries similar in culture, social and political system. This does not mean that the schema should differ from European standards. On the other hand, there is no will to adopt legal provisions, often used as a model for other countries (especially the post-soviet countries) codification. The most significant inspirations for many European countries represent German and Dutch civil codes. The German legislation exactly and to a considerable extent sternly and casuistically regulates the civil material in the spirit of traditions.

Within EU states legal regulations, there may be noticed two different trends – codification and decodification. Decodification should be understood as a state, when many particular issues are set aside from the civil code and are intended for a special separate legal regulation. This trend of the post-Soviet countries is represented, as mentioned, by our present legal regulations.

On the other hand, codification should be understood as a state, when the civil code, as the main private law regulation, incorporates all essential matters of an ordinary life and traditional parts of civil law. It is possible to imagine that the civil law code may contain legal regulations of the family law, copyright and industrial property law, commercial law, competition and commercial papers law, consumers' law and registered partnership regulation.

From the point of view of EU member countries, we may see both attitudes applied in a comparable range. Opinions have appeared that codification is a dominating trend of the 20th century, but the domain of the 21st century should be the decodification process. The Italian Codice civile and the Dutch code have set out for the way of codification in the 20th century. The authors' intent was an explicit effort for codification. In accordance with repeated authors' proclamation, the process of codification lies in family law incorporation into the civil code, which is considered the right method from the beginning. The question is whether the schema should codify e.g. valuables, labour law, consumer protection, registered partnership etc.

From the beginning the authors presented the effort to codify using traditional EU legal regulations as a model. However the effort was not a detailed and coherent concentration of all parts of civil law, but a summary of essential traditional parts of civil law regulations. Especially in the days of particularly commercial law followed by a phenomenon called legal systems competition[8], it is necessary to compare traditional and stable legal systems' contents. The authors aim is not to codify civil law in its maximum possible extent as particularly Italian and Dutch codes did, but to codify the traditional regulations, which are incorporated in majority of similar EU states codes.

Our historical development, from the view of the civil law, offers contrary phenomena. On one hand ABGB regulating civil law material in a wide extent, on the other hand, there are particular civil law regulations in the 20th century. As abovementioned, the authors' collective was through a political decision entrusted with a new schema creation inspired by the schema from 1937 in reasonable extent. As the schema from 1937 was in many respects inspired by ABGB, the present works may be called recodification. This may be a certain arch return to the traditional understanding of civil law extent on the historical area of the Czech Republic. That means that the aim is to regulate general civil law issues and the partial issues will be regulated in its particulars by a special legal regulation.

The final intent of the authors' collective, in the sense of the Civil Code (which should become the main private law code) proposal contents, is its following structure:

I. General part
II. Family law
III. Absolute property rights
IV. Relative property rights
V. Conflict provision
VI. Common and final provisions.

However, really particular special issues, such as commercial corporations' law, consumers' protection, employment relationship etc, will stay extra this legal enactment.

Let us believe that in this way, the Czech Republic will find its place among developed legal states and that its new private law code will stand rigorous criticism of especially EU member states, whose nationals may be in many aspects significantly impacted.

[8] The legal systems competition, showing for particularly fiscal reasons in the area of commercial law, is an effort to induce especially commercial corporations to settle registered offices in the area of a country offering the most favourable legal regime for commercial corporations.

Intellectual property rights and their enforcement in the Czech Republic

Radka MacGregor Pelikánová [1]

1 Introduction

Intellectual property is an asset based upon human knowledge and ideas of a crucial importance and with an increasing economic potential. The Czech law, just as the law of the majority, if not all, developed countries, has clearly reached the state of a genuine recognition of the fact that various types of creations of the mind are able to be a subject matter of the ownership *sui generis* and deserve an appropriate legal regime fully reflecting its specific nature. The Czech Republic is a party to a myriad of international conventions, treaties and agreements designated to unify, or at least improve, the reciprocal protection of intellectual property. In addition, the Czech Republic is a member of the European Union. Naturally, Czech law mirrors these international and European commitments [2] and, *prima facie*, can be considered as principally implementing them in a rather satisfactory manner. However, a closer review demonstrates several issues, notably regarding the practical aspects of the enforcement of intellectual property rights in the Czech Republic and the insufficiency of traditional measures and instruments.

Taking into consideration the dramatically increasing impact and value of intellectual property and its strong inclusion in various investments and cross-border projects, it appears to be instructive for Czechs as well as foreigners to be aware about the Czech conceptual understanding of intellectual property (1.), the basic source of its regime in the Czech Republic (2.) and subsequently about its enforcement, while using classical (3.) as well as new remedies (4.)

1. The concept of intellectual property and its protection within Czech law

The roots of Czech law can be traced back to Roman Law and consecutively the major codes from the 19th centuries, especially the Austrian Allgemeines Bürgerliches Gesetzbuch (ABGB). Therefore, the Czech legal system is a typical example of the continental, European, regime, relying on written statutory acts and expressly recognizing ownership as a subject matter of a right in re. Therefore, the owner enjoys an absolute right effective toward any and all third persons concerning the owned asset regardless if it is an item, a right, or other asset. Considering the subject matter of the ownership, three principal categories of ownership can be distinguished – ownership of movable items, ownership of real estate and so called intellectual property ownership.[3] The last mentioned does not involve typical "*res*",[4] but rather intangible assets whose definition and legal classification are rather complex and strongly influenced by international agreements and conventions signed and ratified by the Czech Republic, by E.U. law as well as by the Czech purely internal legal statutes and ordinances.

The Czech valid regulation apprehends under the Law of the intellectual property especially the Copyright, Invention and Patent Law, Design Law, Denomination and Designation Law. The typical characteristic of intellectual property is its independence upon the material substance to which it is linked. Therefore, a simultaneous use in various places by different people – the so called potential ubiquity – is not precluded, and does not have any impact on the deterioration of the involved intellectual property *per se*.

In principal, two types of intellectual property can be identified – industrial property and other intellectual property, which is sometimes mistakenly designated as ownership of pieces of art. The first type can, but does not need to, involve a creative element. Therefore, the Czech law discerns a creative industrial property (primarily inventions and patents, additional protection certificates, utility models, topography of semiconductors and industrial designs) and non-creative industrial property (especially trademarks, appellations of origin right, denominations). The second type of intellectual property involves various artistic rights (copyright protected work, art and artistic performance, database) and other rights and assets. The last mentioned have not been previously subject to any standard classification, even if they have always been perceived as capable of industrial use without a material substance and as rep-

[1] JUDr. Radka MacGregor Pelikánová, Ph.D., LL.M., Attorney-at-law.

[2] Announcement of the Ministerium of foreign affairs Nr. 7/1995 Coll., on the conclusion of the European Agreement establishing the association of the Czech Republic to the European Communities, especially Art. 67 about the commitment of the Czech Republic to continue in improvement of the protection related to the intellectual property rights.

[3] Knap, K., Kunz, O., Opltová, M. Industrial rights in international rights. Academia, 1988, p. 8.

[4] Randa, A. Ownership right, LIT3CZ, ASPI, 1.1.1900.

resenting different levels of creativity and originality (business secret rights, know-how rights, good-will rights). The growing particularity of the last mentioned suggests the replacement of the classic Czech division of intellectual property into two types (industrial and copyright) with a division into three types (industrial, copyright and other intellectual property). In addition, an extending view includes into other intellectual property the domain of unfair competition.

2 Principal sources of the Law applicable to intellectual property

Similar to other European countries, in the Czech Republic there is no unified intellectual property law, but instead a detailed body of laws governing intellectual property and intellectual property rights. As mentioned above, the Czech Republic is a party to the most important international and European intellectual property conventions, treaties, and agreements which directly or indirectly build and influence the Czech Law applicable to intellectual property along with purely national Czech statutes and ordinances.

The first group of sources of intellectual property regulations valid in the Czech Republic flows from the participation of the Czech Republic in a number of international conventions, treaties and agreements, such as the Paris Convention,[5] the Berne Convention,[6] the Madrid Agreements,[7] the Nice Agreement,[8] the Lisbon Agreement,[9] the WIPO Convention,[10] the PCT Treaty,[11] the TRIPS Agreement,[12] the Geneva WIPO Treaty[13] and WPPT.[14]

The second group of sources of intellectual property regulations valid in the Czech Republic results from the European intellectual legal framework, i.e. the Munich EPC[15] and the body of EU law represented by a myriad of regulations and directives. To the former belongs a.o. the trademark regulation,[16] the indication regulation,[17] the design regulation,[18] and the agricultural indication regulation.[19] The latter are represented by a.o. the copyright directives,[20] the intellectual property rights enforcement directive,[21] and the intellectual property rental right directive.[22]

The third and last group of sources of intellectual property regulations valid in the Czech Republic represent Czech national general statutes, such as the Constitution[23] and related Acts, the Civil Code[24] and Commercial Code[25] and a myriad of specific Acts, statutes and ordinances for each pertinent type of intellectual property. Therefore, each and every particular intellectual property asset and its related rights enjoys a general regime and protection along with a special one.

The specific legal basis in the Czech Republic is included in particular statutes, which for copyright protection is the Copyright Act,[26] for patent protection is the Patent Act[27] and the Ordinance,[28] for utility model protection the Utility Model Act,[29] for design protection the Industrial Design Act,[30] for trademark protection the Trademark Act[31] and the Ordinance.[32] The Part V.II. (Art. 44-54) of the Czech Commercial Code contains the provisions regarding the Czech unfair competition law, namely the prohibited activities from a non-exhaustive list, such as misleading advertising and designation, creation of the likelihood of confusion, parasitism on reputation, bribery, defamation,

[5] Paris convention for the Protection of Industrial Property from 1883.
[6] Berne Convention for the Protection of Literary and Artistic Works from 1886.
[7] Madrid Agreement for the repression of false or deceptive indications of source on goods (agrément against false and misleading origin information) and Madrid Agreement concerning the International Registration of Marks from 1891.
[8] Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks from 1957.
[9] Lisbon Agreement for the protection of appellations of origin from 1958.
[10] Convention establishing the World Intellectual Property Organization from 1967 (WIPO).
[11] Washington Patent Cooperation Treaty from 1970.
[12] Agreement on Trade-Related Aspects of Intellectual Property Rights from 1994 (TRIPS).
[13] Geneva WIPO Copyright Treaty (convention on copyright and audio recordings) from 1996 (WCT).
[14] Geneva WIPO Performances and Phonograms Treaty from 1996 (WPPT).
[15] Munich Convention on Grant of European Patents from 1973 (EPC).
[16] EC No. 207/2009 (previously 40/94) on the Community trade mark.
[17] EC No. 1107/96 on the registration of geographical indications and designations of origin.
[18] EC No. 6/2002 on Community Designs.
[19] EC No. 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.
[20] 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission and 2009/24/EC on the legal protection of computer programs.
[21] 2004/48/EC on the enforcement of intellectual property rights.
[22] 2006/115/EC on rental right and lending rights and on certain rights related to copyright in the field of intellectual property.
[23] Act No. 1/1993 Coll., Constitution of the Czech Republic.
[24] Act No. 40/1964, Civil Code (CC).
[25] Act No. 513/1991 Coll., Commercial Code (ComC).
[26] Act No. 121/2000, Coll., the Copyright Act.
[27] Act No. 527/1990 Coll., the Patent Act.
[28] Ordinance No. 550/1990 Coll., for proceedings regarding.Inventions and Industrial Designs.
[29] Act No. 478/1992 Coll., Utility Model Act.
[30] Act No. 207/2000 Coll., the Industrial Design Act.
[31] Act No. 441/2003 Coll., Trademark Act.
[32] Ordinance No. 97/2004 Coll., to implement the Trademark Act.

comparative advertising, breach of trade secrets, and persistent threats to human health and environment.

3 Traditional enforcement measures and remedies

Czech law has traditionally recognized two basic kinds of protection measures designed to assist the intellectual property owners or beneficiaries – civil action and the application for preliminary measures which can be brought before Czech civil courts in accordance with the Civil Proceeding Order[33] and criminal action which can be brought before Czech criminal courts in accordance with the Criminal Proceeding Order.[34] Claims included in these actions arise out of the above mentioned special legal basis, i.e. various Czech intellectual property statutes, as well as the Criminal Code.[35]

Based on the Copyright act, the infringement of copyright can be litigated by Civil Courts through actions on injunctions against the infringement, for removal of the impediment, for material (and immaterial) damages, return of the enrichment caused by the copyright infringement and for destruction of the copies. Similarly, the industrial property owner or beneficiary may sue the infringer before the Civil Courts to refrain from such use of the intellectual property, pay compensation for damages, and destroy the product that is the subject matter of the industrial property and that is in the possession of the infringer. In the case of an unfair competition act, the concerned person may claim an injunction to stop the unfair competition practice. Furthermore, the claimant may request reparation of the negatively affected status, damages, restitution of unjust enrichment and an appropriate satisfaction of damages. In principle, regional Civil Courts have jurisdiction for suits involving these claims.

The Criminal Code comprises Part VI about economic criminal acts which include subpart 4 about criminal acts against industrial property rights and copyrights. The infringement of copyright is subject to criminal sanctions, such as being sentenced by a prohibition of activities, confiscation, and fine or an imprisonment of up to two years, in extreme cases up to eight years which can be further extended up to ten years for forging beaux art works. Similarly, the violation of trademark and business denomination rights or other industrial property rights, i.e. rights to a protected invention, industrial design, utility model and topography, can result in criminal sanctions, such as up to two years of imprisonment, prohibition of activities and confiscation. The length of the imprisonment can be extended up to eight years in grave cases, namely when either the infringement causes a significant enrichment of the infringer or the act reached a major proportion.

The criminal sanctions pertinent to the unfair competition are determined by the preceding subpart of the Criminal Code, namely Part VI subpart 3 on criminal acts against mandatory rules of market economy and circulation of merchandise in a relation with abroad. Such an infringement may be sentenced by a prohibition of activities, confiscation, and fine and imprisonment of up to three years, in extreme cases up to eight years.

4 New enforcement measures and remedies

Doubtless, the inveterate and ongoing issue of the inefficient, ineffective and fractioned protection of intellectual property and intellectual property rights and of the weak enforcement measures has created a strong need across all continents to search for a new approach and more flexible, dynamic, and more assertive methods and instruments. The Czech Republic has addressed this trend by the enactment of a statutory act No. 221/2006 Sb., on the enforcement of industrial property ("Enforcement Act"). This "breakthrough" act implements the above mentioned directive 2004/48/EC on the enforcement of intellectual property rights ("Directive") and expressly states that it regulates legal instruments serving for the enforcement of industrial property rights. In principle, it does not derogate the prior, traditional, regulation, but it exists along with it.

With some exaggeration, the Enforcement Act can be perceived as a unification and extension document. It proclaims for all subject matters of industrial property a unified extent of rights and claims available in the case of an infringement.[36] Furthermore, it enlarges the group of claims, i.e. it introduces additional rights (e.g., the right on information) and broadly defines the potential claimants as well as defendants. Finally, it simplifies the proceeding position and situation of the claimant by offering the lump sum enumeration of the suffered damage and unjust enrichment and by clearly setting the judiciary competency, namely by granting an exclusive power to decide about claims from the Enforcement Act to one single court in the entire Czech republic, the Municipal Court in Prague.

The co-existence of the Enforcement Act with the general regulation as well as traditional regulations related to various subject matters of the industrial property creates a crucial question of choice with obvious answers. The owners and beneficiaries are logically inclined to enforce their intellectual property rights "via" the Enforcement Act[37] while at the same time the alleged infringers and other "defendants" aspire to avoid the new regime and instead return to the classical venue containing a plentitude of obstacles and complications for the plaintiff party. Since in principle the opening shot belongs to the negatively affected owner or beneficiary, a non abridged interpretation of the scope of application of the Enforcement Act plays a crucial role for him. In other words, the affected person makes all efforts to prove that the Enforcement Act applies to whatsoever intellectual property, and the person on the adverse side will try to show that the Enforcement Act covers only the industrial property, or even only certain (but not all) assets and aspects of the industrial property. Since there is not yet any consistent body of case law in this respect, and even the professional press

[33] Act No. 99/1963 Coll., Civil Proceeding Order.
[34] Act No. 141/1961 Coll., Criminal Proceeding Order.
[35] Act. No. 40/2009 Coll., Criminal Code.
[36] Slováková, Z. Enforcement of industrial properte rights according to the new regulaion. Právní zpravodaj, Nr. 7, 2006, p. 2.
[37] Koukal, P. Enforcement of trademark rights. Právní zpravodaj, č. 11, 2006, p. 6–7.

does not provide a clear answer, the fight over the definition of intellectual property and industrial property is burning.[38]

The Enforcement Act does not include any explicit definition or clear indicators regarding industrial property. The only hint is embodied in the footnote Nr. 2 which refers to the Patent Act, the Act on topographies, the Utility Model Act, the Industrial Design Act, the Act on appellations of origin and the Trademark Act. The commercial denomination or business name,[39] unfair competition,[40] commercial secret,[41] know-how,[42] good-will, etc. are not mentioned. A significant number of Czech lawyers deduce from their omissions the intent of the legislature to exclude them from the scope of application of the Enforcement Act.[43] Such a conclusion without any further supporting arguments seems to be imperfect and potentially misleading. As the Czech Constitutional Court clearly and correctly stated "the footnotes and explanation notes are not normative,"[44] they are mere legislative supportive instruments intended to improve the lucidity and the orientation within legal regulations. In addition, the legislative report of the Czech Government to the Enforcement Act,[45] explicitly refers to the Directive whose principal goal is to reduce, if not obviate, any differences in instruments for the enforcement of intellectual property rights in the European Union and so contribute to the success of the internal market. Further, the parallel implementation through Act Nr. 216/2006 Coll. modifying a.e. the Copyright Act and the Civil Proceeding Order tends to support the conclusion that the ultimate goal is a broad implementation of the Directive, i.e. that the Enforcement Act should cover all remaining intellectual property (everything else other than the copyright) regardless of the terminology used.

Conclusion

Unambiguously, the Czech Republic must assure a legal regime friendly to intellectual property owners and beneficiaries. One of its crucial elements should be its efficiency and effectiveness, no infringement should remain without any matching legal reply and sanction possibility. Traditional instruments, regardless whether originating from the international or European or merely national Czech law, do not match recent high aspirations. Thusly, new methods and instruments are required. In this respect, the Directive constitutes a way to go, maybe even a final solution. The Enforcement Act correctly makes an attempt to follow it, but at the same time demonstrates a set of deficiencies and imperfections. In the absence of steadily established and commonly accepted case law and professional interpretation, the scope of the application of the Enforcement Act remains partially obscure, and potential claims seem to run certain risks with their enforcement by this venue, which is definitely deplorable. Hence, the mandate of the Directive to the member nations to provide comparable and sufficient enforceability of intellectual property rights is not fully addressed by the Czech Republic, and the insufficiency and inconsistency of the Czech formalistic approach is exposed. It cannot be stressed enough that, down the road, the Czech legal community must work aggressively on the improvement of intellectual property protection and facilitating the enforcement of intellectual property rights. Only then can the Czech Republic demonstrate its' commitment to follow the international and European standards in this area, as well as create a better business environment which deserves a particular consideration especially in the time of economic crisis.

[38] MacGregor Pelikánová, R.: What definition of industrial property do we need? Právní fórum, ASPI, 2/2009, p. 45–57 and Hák, J. Do we need a definition of industrial property? Průmyslové vlastnictví, Nr. 4, 2008, p. 109.

[39] § 8 ComC.

[40] § 44 section 1 ComC.

[41] § 17 ComC.

[42] Malý, J: Business with intanglic assets; 1st Edition, Prague, C.H.Beck, 2002, Chapter 5.1.

[43] Horáček, R: To some questions of the application scope of the Act Nr. 221/2006 Sb.; Obchodní právo 11/2007, p. 2–11.

[44] E.g., II.ÚS 485/98 from 30.11.1999 in http://nalus.usoud.cz/Search/ResultDetail.aspx?id=31733&pos=1&cnt=4&typ=result.

[45] Legislative report of Czech Government to the Enforcement Act, PSP 1110/0 from 8.9.2005 in http://www.psp.cz/sqw/text/tiskt.sqw?O=4&CT=1110&CT1=0.

Croatian Context of the Right of Establishment

Ivona Ondelj [1]

INTRODUCTION

Freedom of establishment presents one of the main freedoms, declared and regulated in the Chapter II "Right of establishment", Articles 49 to 55 of the Treaty of Lisbon [2] (previously 43 to 48 of the Treaty establishing the European Community) requiring in general the removal of obstacles and restrictions on the right of companies and individuals to maintain a permanent or settled place of business. The definition of establishment determines it as the actual pursuit of an economic activity, through a fixed establishment in another Member State for an indefinite period of time [3]. According to the Treaty, the concept of establishment is very broad, considering it allows an EU national to participate on a stabile and continuous basis in the economic life of a Member State, which is other than his state of origin, and also to profit there from, while contributing to economic and social interpenetration within the EU in the area of activities as self-employed person.[4] According to the Advocate General, temporary nature of the activities in question has to be considered not only in the light of duration of the provisions of the service, but also of its regularity, periodicity or continuity, so the fact that provision of the services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the service in question.[5]

The first paragraph of the Article 49 requires the removal of restrictions on freedom of establishment for primary, but also for a secondary type of establishment, while the second paragraph determines that this freedom consists also of the right for self-employed persons to pursue their activities on the levelled and equal way as the nationals of a Member State in which they are established..

The right of establishment carries great importance within the EU, considering it enables the branches to use production capacity with lower costs of production, to market and to offer their products, as well as, to adopt their production to the needs of the market on one side, and on the other also individuals as entrepreneurs have guaranteed choice and freedom of mobility, including their right to choose the best place for running business or practicing profession. Considering the enlargement of the European Union and the market opening process, on the side of EU towards the new states, as well as on the side of new states towards the EU market, it can be said that the right of establishment acquires central place in this process.

The text elaborates interesting aspects of the right of establishment of an undertaking, with special focus on the procedure, duration, costs and other specific aspects of the establishment of limited liability company, as the "most popular" type of the undertaking established in the Croatia. Special situation on "unlike use" of the right of establishment of limited liability company has been elaborated as well.

RIGHT OF ESTABLISHMENT – CROATIAN ASPECTS

I. Croatian legal frame and few general notes

The right of establishment of persons and undertakings in candidate countries, such as Croatia, has been shaped through the broad spectra of legal provisions, framed by main obligation of Croatia, to adjust its legal system to the European standards. In this context, Croatian obligations have been mainly shaped by the Articles 48–55 of the Chapter II Establishment of the Stabilisation and Association Agreement [6] (in further text: SAA) with the Republic of Croatia (in further text: Croatia), which has been signed at 29.10.2001., and has entered into force at 01.02.2005. Here should be mentioned also the Annex VI of the SAA, which refers to the Title V, Chapter I, next to the crucial Article 69 of the SAA, which establishes the obligation for Croatia to comply its legal system with the Community acquis. Further elements of legal framework, which is relevant for this

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[2] Consolidated version of the Treaty on the European Union and the Treaty on the Functioning of the European Union, (2010/C 83/01) is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0001:0012:EN:PDF> (State: 21.05.2010).

[3] EJC, Case 221/89, 25.07.1991, [1991] ECR I-3905, para. 20 (The Queen v Secretary of State for Transport/ Factortame).

[4] EJC, Case 55/94, 30.11.1995, [1995] ECR I-4165, para. 25 (Gebhard/Consiglio dell'Ordine degli Avvocati e Procuratori di Milano).

[5] EJC, Case 55/94, 30.11.1995, [1995] ECR I-4165, para. 27 (Gebhard/Consiglio dell'Ordine degli Avvocati e Procuratori di Milano).

[6] Stabilisation and Association Agreement, <http://www.mei.hr/download/2001/08/02/SAACouncilProposal.pdf>, (State21.04.2010).

elaboration have been placed in the Stabilisation an Association Agreement Implementation Act[7], Companies Act[8], also Court Register Act[9], Bylaw on the procedure of registration in Court Register[10] and Court Fees Act[11].

At the beginning, it is very important to point out that according to the Article 612, Paragraph 1 of Companies Act, foreign undertakings, as well as foreign sole traders are granted the same rights and obligations as the ones from the Croatia, considering they fulfil all requirements according to the Croatian Law. This means that they are completely levelled in business activity with domestic natural and legal persons in Croatia.

It should also be mentioned that Croatian Law requires foreign undertakings intending to start the business activity at Croatian territory, to establish their branch or subsidiary, according to the Article 612, Paragraph 2 of Companies Act. This relates also to sole traders, considering their registration in the Croatia is necessary requirement for performing business there. This condition has to be fulfilled by all foreign undertakings and sole traders (which equally relates to those from European Union) as well, in order to be allowed to pursue an activity on permanent basis in the Croatia. In the case of establishment of the branch the difference in treatment has been made between the nationals of the EU Member States and the nationals of other third countries, considering in the case of last ones the existence of the principle of proportionality has been requested.

A distinction towards business established in European Union, providing services only temporary, is very clearly visible, considering they are allowed to provide their services in the Croatia, only on the basis of contract or agreement with Croatian company in a way of sending their services by post, telephone or fax, or in the electronic form to a customer. In order to make this distinction as clear as possible, through the latest amendments of Companies Act from the year 2009, the legislator has given the negative definition what should not be considered as the business activity within the meaning of relevant article. Interesting is that in order to create such definition of provision of services on temporary basis, the legislator has specifically stressed that the relevant criteria for determination of the scope of these terms have to be found in well-established EU case law. In this way, the direct acknowledgment of the strength of the EU judicial interpretations have been expressed, being stressed as the main source for the future judicial practice in Croatia.

Implementation of different treatment is reduced on minimum, considering it requires strict necessity, resulting from legal or technical differences, or as regards financial services, for prudential reasons.[12] From used wording differences should be made as rare as it could be possible.

II. Establishment requirements

Companies Act regulates the procedure of establishment of a foreign undertaking, branch or subsidiary and a foreign sole trader. This elaboration is going to be focused on main aspects of the establishment of the undertaking (especially limited liability company), through the main legal requirements, costs and expected duration of the procedure, all in order to evaluate the level of the provided freedom of establishment for nationals of Member States, as well as the flexibility of the market entry and exit.

The submission of the registration, certified by public notary, to the court, determines the start of the whole registration procedure. The registration contains request for entering the data into the Court Register, or to change already entered data.

In order to establish a branch in the Croatia, the registration should be submitted with all documents needed according to the Croatian Law[13]. As it has been mentioned before, the difference in treatment has been made between the nationals of the Member States[14] and the nationals of other third countries in a way that the last ones are needed to provide an evidence[15] on the existence of the principle of proportionality. Whether or not such proportionality exists with relevant state, would be confirmed by the Ministry of Justice.[16]

According to the Companies Act, the procedure and the right of establishment of an undertaking in the Republic of Croatia by foreign undertakings and foreign physical persons requires submission of the registration to the Court Register of the authorised Commercial Court, together with the following documents: decision on the appointment of the director; a state-

[7] Stabilisation and Association Agreement Implementation Act [author's translation], Official Gazette Nos. 51/01, <http:// www.nn.hr>.

[8] Companies Act, Official Gazette Nos. 111/93, 34/99, 121/99, 52/00, 118/03, 137/09 <http:// www.nn.hr>.

[9] Court Register Act, Official Gazette Nos. 1/95, 1/98, 30/99, 45/99, 54/05, 40/07 <http:// www.nn.hr>.

[10] Bylaw on the procedure of registration in Court Register [author's translation], Official Gazette Nos. 10/95, 101/96, 62/98, 123/02, 94/05, <http:// www.nn.hr>.

[11] Court Fees Act, Official Gazette 26/03, <http:// www.nn.hr>.

[12] Article 52 of the Stabilisation and Association Agreement, <http://www.mei.hr/download/2001/08/02/SAACouncilProposal.pdf>, (State21.04.2006).

[13] The following documents are needed: an abstract of the register in which the establisher has been enrolled, indicating the establishers legal form, and the time of enrolment (with registration number, the type of business activity, persons who are entitled to represent the establisher, together with the determination of their authorisations); or in case such enrolment is not obligatory in the country of the establisher, valid documents about the establishment, officially certified according to the legal provisions of the country, in which the establisher has registered the seat, which indicate legal form of establisher, and the time of establishment; the decision of establisher on the establishment of the branch; further also a copy of Memorandum and Articles of Association, deed of partnership or statutes of the establisher, officially certified according to the legal provisions of the country, in which establisher has reiterated seat; and finally officially certified summary of the annual report of the establisher. All these documents should be officially translated into Croatian language.

[14] As well as nationals of the countries belonging to the World Trade Organisation.

[15] The sufficient evidence would exist if the Court Register does not refer any further action to be done, in order to prove the existence of proportionality principle.

[16] See for more the Article 613, para. 6 and 7 of the Companies Act.

ment of appointed director, that he/she accepts appointment; certified signature of a person, who is authorised representative of the undertaking; declaration (if there is only one establisher) or a deed of partnership (in case of several establishers), concerning the establishment of the company, including the most important data like the name and the seat of the company, etc.; description of business activity, in accordance with National Classification of Economic Activities; certificate of the payment of equity capital, considering the minimum equity capital requirement for a limited liability company and joint-stock company, which is 20.000,00 HRK, or 2.778,16 EUR for limited liability company, and 200.00,00 HRK, or 27.781,64 EUR for the joint-stock company.

III. Service HITRO

The whole procedure of the establishment of the undertaking or craft in the Croatia, has been simplified through the introduction of the new service "HITRO" of the Croatian Government. It has been introduced in May, 2005, through the establishment of so called HITRO offices as parts of the Financial Agencies (FINA)[17] all over the Croatia (61 offices). The main intention has been the simplification and greater efficiency of the communication between citizens or business subjects with state administration, through easier access to certain information on one place. It is available on the Internet as well, on www.hitro.hr, where the information are available in Croatian and English language. This service has generally simplified the access to the relevant information on how to establish the craft or undertaking, but only in the form of limited liability company. Considering limited liability company is "very popular" form of undertaking established by foreign establishers, probably this fact has prevailed in the concept of introduced service as well. As far as the establishment of the craft or limited liability company are concerned, this service has contributed to the reduction of the establishment costs,[18] but also to the more efficient procedure, considering it has reduced the duration of the procedure from almost 40 days in the year 2004,[19] to the 24 hours today.[20]

Considering the technical limitations of the text, this elaboration will deal with starting a limited liability company and some specific moments arising in relation to it. The service HITRO has divided the establishment process into four main steps. Firstly, it is necessary to find a name for a company, where the service HITRO provides help for the establisher through its employees, who will check the availability of the proposed name in the Court Register data base. Here has to be pointed out that this is only the half of the service, considering some very complicated issues can arise relating the name of the company, and its compliance with Croatian legal requests, which will be explained later in the text. The next step relates to the verification of the documents by public notary, while the third step encompasses the submission of the documents and payment of fees (submitted at the HITRO.HR counter, while the payment of the fees can be also done in FINA's branch). Final step is collection of documents and opening of the account (the Decision on Entry in the Court Register and the Notification of Classification pursuant to the National Classification of Activities containing the assigned business identification number are collected at the HITRO.HR counter, where exists further possibility to make an official stamp and open a business account, but only with banks in the case of which FINA handles account opening procedure. Furthermore, necessary registration for health and pension insurance can be handled here as well, although all other procedures concerning tax institutions have to be dealt separately). According to all this it can be pointed out that the project HITRO has contributed to the significant extent to the "centralization" of the fulfillment of registration requirements on one place. With a purpose of further simplification of the procedure in whole, the official website of the HITRO contains summarized guides for the establishment of Limited Liability Company, with helpful workflow as well.[21]

Further improvement introduced through HITRO service can be seen in open access to the various data basis which can be necessary during the establishment process. In that way the open access is granted to cadastral data[22], data on tax forms and tax returns[23], data on pension[24] and health service[25], and to central register of insured persons[26] through the official website of HITRO service. What can be seen as serious shortcoming in the case of foreign establishers, is that only official website on tax system is available in English language, while all others are only available on Croatian language.

IV. Costs and duration of establishment procedure

The costs of registration can be distinguished into several categories.

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[17] Croatian Financial Agency – FINA operates within e-business, financial mediation, cash operations, business information, archiving, electronic signature authorization etc.

[18] Before that, foreign establishers have mainly used expert legal help (for example lawyers offices), what has significantly influenced the costs of establishment.

[19] Croatia 2005 Progress Report, European Commission, COM (2005) 561 final, p. 42. <http://www.delhrv.ec.europa.eu/uploads/dokumenti/3a87bfc3ab7e5d6740a3a4b1aef3e26a.pdf> (State: 12.05.2010).

[20] See for more Lider Press, Poslovni tjednik, 11 May 2005, <http://www.liderpress.hr/Default.aspx?sid=75220&to=Printable.ascx> (State: 12.05.2010).

[21] See for more HITRO <http://www.hitro.hr/Default.aspx?sec=43> (State: 12.05.2010).

[22] E-katastar is available on <http://katastar.hr/dgu/ind.php> (State: 12.05.2010).

[23] E-tax is available on <http://www.porezna-uprava.hr/> (State: 12.05.2010).

[24] E-pension is available on <http://e-prijave.mirovinsko.hr/ep-prijave> (State: 12.05.2010).

[25] E-health is available on<http://www.hzzo-net.hr/> (State: 12.05.2010).

[26] E-regos is available on <http://www.regos.hr/default.aspx> (State: 12.05.2010).

The court fees for registration are regulated by the Court Fees Act, by tariffs. The fee for the application form amounts 100,00 HRK or 13,89 EUR, and the same fee is charged for the enrolment of the main branch established by a foreign person, or for the enrolment of only one branch in the Republic of Croatia established by a foreign person.[27] The fee for the enrolment of an establishment is 300,00 HRK or 41,67 EUR, and 150,00 HRK or 20,84 EUR, for the enrolment of the change of data.[28] The fee for the application form for the enrolment of a branch is 100,00 HRK or 13,89 EUR, and 250,00 HRK or 34,73 EUR for the enrolment of a branch, and the fee for the change of data is 100,00 HRK or 13,89 EUR.[29] Further costs arise through the payment of a deposit capital (for Limited Liability Company minimum is 20.000,00 HRK or 2778.16), next to the obligation to publish registration enrolment in the Official Gazette of the Republic Croatia, amounting 900,00 HRK or 125,02 EUR.[30]

Important is that the Court will not start procedure until an applicant prepay the registration fee and publication costs.[31]

At the end, it is necessary to mention the fee for getting statistic number according to the National Classification of Economic Activities, by State Office for Obtaining of statistic number, which means precisely registration according to the National Classification of Economic Activities, by State office for Statistics, amounts 55,00 HRK or 7.64 EUR, and it presents last condition, for undertaking to be authorised to start its business.

Further costs, like costs of public notary services, legal services, official translations can not be determined, considering they depend of the various circumstances, and some of them are just eventual.

In order to ensure the more efficient registration procedure, duration of registration can be finished within 24 hours. Of course, sometimes it can take longer, having in mind that legal provision oblige the court to issue decision on registration within 15 days, from the day of filing application and necessary documents[32] (presuming that the application has been filled with all required documents). This term can be prolonged only in the case of existence of so called "reasonable grounds"[33]. In case the application is not valid, and does not have everything what the court needs in order to proceed, this term starts at the day of acceptance of valid and well-documented application, by which is also enclosed the court decision, ordering an applicant to fulfil or amend the application. The possibility of registration of the company using electronic way (Internet)[34] makes the whole procedure even more efficient.

It can be concluded that in this way the right of establishment has been released of unnecessary bureaucracy, making Croatian business climate more attractive for foreign entrepreneurs. To this fact contribute a lot the projects like e-Company, which ensures online registration of limited liability companies, through the intention of making all Court Registers available through HITRO.hr offices or Public Notary offices within Croatia, so the establishers are able to register their company within 24 hours.

COMPANY NAME AS POTENTIAL PARADOX

Interesting issues in establishment of the undertakings, are regulations about the name of the company, branch, subsidiary and sole trader, considering they can make registration procedure longer, and more demanding, as well as, they can produce some paradoxes, for their further image and presentation. This is particularly important for the new companies which fight for their place on the market, considering they need recognizable name, which can be easily remembered and can present the business of the company in the proper way.

According to the protection of distinction between names of undertakings, as well as their branches, subsidiaries, and sole traders, expressed through Article 14, and Article 29 of the Companies Act, the name should express the individuality of the company, so the principle of exclusivity can be wholly implemented. In order to explain named paradox, it is necessary to explain minimal, and optional content of the name, including, the language and possible way of creation that name.

With all obligatory contents of the name of the company (regulated in the Companies Act through positive enumeration) such a name has to contain for a public companies words "javno trgovačko društvo", or "j.t.d.", in its short name, for limited partnership "komanditno društvo", or "k.d.", for joint-stock company, words "dioničko društvo", or "d.d.", and for limited liability company words "društvo sa ogranicenom odgovornošću", or "d.o.o.", for economic interest grouping "gospodarsko interesno udruženje", or "g.i.u.".[35]

The principle of exclusivity has been stressed again through these provisions, considering, some additional content in the name of the company is possible, but only if it cannot create disarray in business and operation of undertakings.

According to the Article 26 of the Companies Act, the branch is allowed to make business under its name, considering this name should contain a name, or short name of the undertaking, objects of company, and designation showing that it is a branch, considering all other provisions, relying on the undertaking, will be applied also to the branch.[36]

As far as the name of the company, the Article 20 of the Companies Act determines some rules on how the name should

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[27] Tariff No. 25 of the Court Fees Act, Official Gazette 26/03, <http:// www.nn.hr>.
[28] Tariff No. 26 of the Court Fees Act, Official Gazette 26/03, <http:// www.nn.hr>.
[29] Tariff No. 27 of the Court Fees Act, Official Gazette 26/03, <http:// www.nn.hr>.
[30] http://www.nn.hr/sluzbeni-list/oglasnik-jn/2004/NN OglasnikJN0407.pdf#search='Cjenik%20Narodne%20Novine' (State: 21.04.2006).
[31] Article 79 of the Court Register Act, Official Gazette Nos. 1/95, 1/98, 30/99, 45/99, 54/05, <http:// www.nn.hr>.
[32] Article 53 of the Court Register Act, Official Gazette Nos. 1/95, 57/96, 1/98, 30/99, 45/99, 54/05, 40/07, <http://www.nn.hr>.
[33] Article 29 of the Court Register Act, Official Gazette Nos. 1/95, 57/96, 1/98, 30/99, 45/99, 54/05, 40/07, <http://www.nn.hr>.
[34] Article 10a of the Bylaw on the procedure of registration in Court Register [author's translation], Official Gazette Nos. 10/95, 101/96, 62/98 i 123/02, 94/05, <http://www.nn.hr>.
[35] Article 13 of the Companies Act, Official Gazette Nos. 111/93, 34/99, 121/99, 52/00, <http://www.nn.hr>.
[36] Article 27 of the Companies Act, Official Gazette Nos. 111/93, 34/99, 121/99, 52/00, <http://www.nn.hr>.

be made, as well as on the used language. It has been established that the name should be in Croatian language and in Latin Writing, allowing only exceptionally the possibility to form the name with foreign words. These exceptions relate to the foreign words which present a name of the member of the undertaking, or other undertaking, or present the trademark or service mark of an undertaking member, or his/her undertaking registered in the Croatia. For example, Adriatic Automobile Corporation (A.A.C.), Jersey can put this words in the name of the undertaking whose cofounder is. Then again, some words which are common in Croatian language, considering no other Croatian word exists for them in Croatian language (as for example the word "leasing") can be used in the name of undertaking. These undertakings are allowed to mark their objects of company, using foreign word as exception. The words in Latin or Greek language, which can be used in order to point out the objects of the company, can be used as well. Finally, the exception can be made in the case of existence of specific provisions, which allow foreign words to be used in the name. The most common example, are travel agencies, and the word "tours" in the Tourist Trade Act of Republic Croatia.[37]

In practice, although this can sound not so important, founding a suitable and possible name for the undertaking, can be really hard, and can make the registration procedure longer, and more exhaustive. At first sight, simple regulation appeared in practice as very complicated one. Using words from Greek or Latin languages, demands usually written explanation, with various kinds of proofs, such are excerpts from various encyclopaedias, history books and so on, leaving the final interpretation and decision to be made by the court register judge. Such practice can be very arbitrary and questionable considering the effects on the efficiency of the procedure. At the other side, the name is the main part of the recognition and individuality in business, so it should be unique and easy to remember, which goal can appear very hard to be realised, considering named demands. Usually, while looking for appropriate name, the foreigners are advised to use their personal name, actually their last name as the company name. Such advices aim on reduction of the possibility for their registration application to be rejected, as well as risks of prolonging the procedure (presuming that all other documentation is submitted according to the regulations).

As very good example of all before said can be used the limited liability company registered for making business in tourism and catering. This company has been registered under the name Hipsagh i Csikos d.o.o., Zmajevac in thn Court Register in Osijek (registration number: 060199212).[38] Considering the name of the company has been created with the last names of the owners Csikós Gábor and Hipságh László Zsolt, it presents an excellent example of the name which is very hard for pronunciation in Croatian language. It is also far from being recognizable, and far from referring to the type of business activity of the company. It can be easily concluded that for the company with the name like this, functioning on the Croatian market can be somewhat difficult.

"UNLIKE USE" OF THE RIGHT OF ESTABLISHMENT

The Croatia has experienced specific sort of use of the right of establishment of limited liability companies. Before the latest amendments of the Act on Ownership and other Real Rights[39] (made with a purpose of complying relevant provisions with the requests made by the Stabilization and Association Agreement)[40], according to which the conditions for acquiring of a real estate have been equalized between nationals of Member States and Croatian nationals,[41] the establishment of limited liability company has been very usual way of acquiring the real estate in the Croatia. In numerous cases this right has served as a screen for purchasing the real estate, considering it was faster and less bureaucratic way, compared to buying a piece of land through the procedure, established for this purpose. Foreigners have used this bypass, in order to avoid dozen of papers and demanding administration of requesting various forms of licences and authorizations of authorised organs. Having in mind the ease of the establishment of Limited Liability Company, as well as the amount of the minimum required stock capital of 2.778,16 EUR which has to be paid in, combined with the short time needed for registration procedure (around 7 days in that time), as well as very convenient possibilities of termination of undertakings existence, such use of the right of establishment has appeared as an excellent way to acquire a real estate in Croatia.

As the result of such practice, the Court Registers in Croatia have been faced with a large number of registered limited liability companies. Official statistics, which Croatia has offered through Information provided by the Government to the Questionnaire of the European Commission about registered undertakings, have shown the state till the year 2003 with 190 public companies, 114 limited partnerships, 2204 joint-stock companies, 92725 limited liability companies and 67 economic interest groupings.[42] Relatively new statistics indicate that the number of newly registered companies declined by 27% in the year 2009, while the stock of active business has increased by 5,4%.[43]

Such practice has not facilitated the real purpose of the right of establishment to be fulfilled, while Croatian economy has not benefited from it either. However, such practice has lost on its popularity after the newest legal amendments, which have granted the acquirement of real estates on equal footing for

[37] Gorenc, Vilim/Slakoper, Zvonimir/Filipović, Vladimir/Brkanić, Vlado: Commentary of Companies Act, Third Edition, Zagreb 2004, Article 20, p. 31.

[38] Available at <https://sudreg.pravosudje.hr/Sudreg/pages/pretragaRegistra.faces> (State 21.05.2010).

[39] Act on Ownership and other Real Rights, Official Gazette Nos. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, <www.nn.hr>.

[40] Stabilisation and Association Agreement, <http://www.mei.hr/download/2001/08/02/SAACouncilProposal.pdf>, (State 21.06.2010).

[41] See for more the Article 358a of the Act on Ownership and Other Real Rights, Official Gazette Nos. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, <www.nn.hr>.

[42] See for more the official website of Croatian Government at www.vlada.hr.

[43] See for more Croatia 2009 Progress Report, European Commission, COM (2009) 533 final, p. 23, <http://www.delhrv.ec.europa.eu/files/file/progres%20report/CROATIA%202009%20PROGRESS%20REPORT.pdf > (State: 21.06.2010).

Croatian nationals and nationals of Member States, considering the whole procedure has been simplified and made easier.

CONCLUSION

Well-known right of establishment plays a great role within the European Legal Order, but also out of it, in legal orders of candidate States. Through various obligations and adjustments of national legal systems, associated states acquire greater possibilities for development and opening of their markets. If granted in a proper way, the right of establishment facilitates greater competitiveness of market flows, as well as more dynamic business environments.

The Croatia as the state incorporated deeply into the process of European integration, has upgraded the freedom of establishment, as well as the right of establishment of an undertaking or a craft, through gradual process of harmonization of its legal order. Nowadays nationals of Member States have been completely levelled with Croatian nationals in exercising of the right of establishment of undertakings, subsidiaries, branches, crafts. There can be seen some differences in treatment between Member States nationals and nationals of third countries, which stress more favourable treatment of the nationals of Member States, as well as their open access towards the starting the business in Croatia. Non-discrimination principle is in its large part protected and provided, although legal provisions of SAA provide the possibility for Croatia to implement temporary measures, in order to protect specific economic branches. Furthermore, certain measures of unequal treatment are allowed from both Parties, if they can be justified with strict necessity.

Elaboration of the legal requirements, which are necessary for establishment of the undertaking in Croatia, together with expected costs and duration, point out significant improvements in flexibility of market entrance. The fact that court registration procedure has been made more efficient, especially through the introduction of on-line registration procedures, as well as projects like HITRO and e-Company, has facilitated a lot the right of establishment to be granted in its full sense. Of course, certain shortcomings have stayed, considering all these improvements refer only to the establishment of a limited liability company or craft, as well as majority of data basis and information remain available only in Croatian language.

Some specific issues relating to the company name, as well as previous practice of "other use" of the right of establishment, have to be taken into consideration as well, in order to be able to improve the existing gaps.

The obligations, which Croatia has taken over through the provisions of SAA, require complete adjustments of its legal system and facilitation of the right of establishment for the legal and natural persons from Member States. Further changes remain to be done, ensuring less bureaucracy and more efficiency. Implementation of the SAA requires also intensive changes in professional education of all involved in relevant procedures. The need of being familiar with the acquis communautaire, require educated legal profession and state administration, which is ready to provide efficient service.

Having in mind all before said, it can be concluded that Croatia has a great challenge in front of itself, carrying big expectations and further amendments in this area.

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On the Long Road towards a European Civil Code

Milan Jančo [1]

'Lorsque les progrès ont accru les besoins, diversifié les transactions et multiplié les intérêts, il arrive toujours un moment chez une nation, où le grand nombre des lois rendues pour y satisfaire ne présente plus qu'un inextricable labyrinthe, où l'esprit du juge s'égare au milieu d'un nombre infini des dispositions en désordre, souvent opposées entre elles. Alors, suivant les formes de gouvernement du peuple qui est réduit à cette nécessité, surviennent soit un prince, soit des magistrats qui ordonnent la refonte de la législation.'

(F. Portalis, *Essai sur l'utilité de la codification*, in J.-E.-M. Portalis, *Discours, rapports et travaux inédits sur le Code civil*. Paris, 1844, II)

1 Setting the scene: Once upon a time...

...there was an idea of a code. A common civil code for Europe. An idea just as simple as it is complicated. An idea that has been both fascinating and appalling Europe for a few decades now. But what if this idea is nothing but a cliché that has somehow found its way into the academic corridors of European universities and settled down there, in the academic world, tucked away in the scholarly universe and detached from the real world? Is it not just a fashionable concept feeding on false enthusiasm of an 'even closer European integration'? Is it not just a passing fashion that appeared as a *dernier cri* of a somehow weird atmosphere of the *fin du sičcle*, but then inevitably lost its ground with the turn of the century? *'Et si le moment européen était déjŕ passé?'* [2] What if there is really no more room for this idea in the contemporary structure of Europe that still seems to be stuck in an excruciating struggle for its own fate?

The idea of creating a European Civil Code is the most ambitious and the most comprehensive initiative in the field of private law unification in the European Union. This paper deals with the long path of European Private Law that can possibly lead to such a unified code. It is a way whose rather humble beginning dates back to the 50's and which started to develop its institutional dimension in the 90's, which years saw the boom of this fashionable concept. Even though the enthusiasm of the 90's seems to have already faded away, the idea of a European Civil Code is still present in the European academia. Moreover, like a phoenix rising from the ashes, it appears to have gained new impetus with the advent of the Draft Common Frame of Reference. Therefore, it is by no means futile to look more closely at this somehow elusive phenomenon even at a time when the progress of European integration seems to have reached its apex, let alone its expansion in terms of further harmonization or even unification of private law in Europe. This long road toward a unified European Civil Code is a road with many unforeseeable obstacles, straits and crossroads. Nonetheless, it is a way on which European Private Law is, sometimes at a slower and sometimes at a faster pace, moving: thus, undoubtedly, moving forward.

Even though the idea of a European Civil Code is rather commonplace or even notorious, it is convenient to provide a brief outline of this idea in terms of time and space. In other terms, to set the scene in which this phenomenon has been and is situated.

The idea of creating uniform private law, originating in the field of comparative law, can be traced back to the 50's.[3] A few decades later, it was reinforced by the setting up of the Commission for European Contract Law (1980). The 80's also brought further academic developments in European Private Law.[4] The process of creating a common civil code for Europe gained an institutional dimension with a groundbreaking resolution of the European Parliament in 1989.[5] Another resolution followed in 1994.[6] Intensive activities in this field began in 1999. In that year, the European Council emphasized the issues of civil law

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[2] A. Wijffels, *Le Code civil entre ius commune et droit privé européen*, Bruxelles, Bruylant, 2005, V.

[3] See e.g. K. Zweigert, *Die Rechtsvergleichung im Dienste der europäischen Rechtvereinheitlichung,* Zeitschrift für ausländisches und internationales Privatrecht (1951), and R. Sacco, *Il problema dell'unificazione del diritto in Europa*. Nuova rivista di diritto commerciale, diritto dell'economia, diritto sociale (1953).

[4] See H. Kötz,*Gemeineuropäisches Zivilrecht*, in Festschrift für Zweigert, Tübingen, 1981, 481; H. Coing, Europäisches Privatrecht, Band I (München, 1985) and Band II (München, 1989).

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[6] Resolution on the harmonization of certain sectors of the private law of the Member States. OJ C 205, 25.7.1994, p. 518.

harmonization in Europe in its Tampere Conclusions.[7] In 2000, the European Parliament stressed the significance of further harmonization of civil law for the internal market.[8]

The turn of the century brought both a major change and a decisive step forward in the field of institutional harmonization of private law in the European Union. In 2001, the Commission restricted the scope of private law harmonization to contract law and, in this respect, it announced four strategies.[9] In the same year, the European Parliament expressed its amazement at this restriction of the harmonization process and its hope that contract law would be harmonized in the European Union no later than 2010.[10] The direction taken by the Commission in 2001 was specified in 2003, when the Commission proposed, *inter alia*, to adopt a Common Frame of Reference.[11] This initiative was welcomed by the European Parliament in the same year. [12]

In 2004, the Commission suggested that the Common Frame of Reference be adopted as a non binding instrument no later than 2009 and a parallel general optional instrument be prepared, as well. However, the Commission emphasized that it did not intend to create a European Civil Code harmonizing European contract law.[13] In 2006, the European Parliament announced that 'even though the Commission denies that this is its objective, it is clear that many of the researchers and stakeholders working on the project believe that the ultimate long-term outcome will be a European code of obligations or even a full-blown European Civil Code'.[14] The European Parliament also emphasized the importance of further harmonization for the internal market and expressed its support of a broader Common Frame of Reference, which should, in the long term, become a binding instrument.[15]

The Green Paper on the Review of the Consumer Acquis[16] and the Second Progress Report on the Common Frame of Reference[17] implied that, whilst the Commission prefers to deal with the inconsistency of the acquis, the European Parliament supports a general instrument in the field of contract law. The Second Report also showed some connection between the Common Frame of Reference and the horizontal consumer rights directive.

In 2008, the European Parliament welcomed the presentation of the Draft Common Frame of Reference to the Commission at the end of 2007 and emphasized the fact that the Common Frame of Reference could go well beyond a mere legislative tool and could result in an optional instrument.[18] The European Parliament is the greatest advocate of the European Civil Code, whilst other Community institutions do not appear to share its enthusiasm in this field.[19]

It cannot go unnoticed that the idea of creating a European Civil Code has been transformed into the idea of creating a (Draft) Common Frame of Reference. Therefore, it can be dubbed as a 'European Civil Code in a disguise'[20]. Be it a disguise, a camouflage, a distracting maneuver or an act of appeasement (mainly with respect to the outright critics of the idea of a European Civil Code), it is beyond doubt that the Draft Common Frame of Reference has currently the greatest potential to constitute a decisive step in the field of making[21] and developing European Private Law. However, the question is whether the Draft Common Frame of Reference, in the wording presented to the Commission, can actually succeed in achieving the ambitious objectives set by the Commission and by its drafters and whether it really is the right step in the field of European Private Law capable of moving European Private Law, which is on the road (leading towards a certain European Civil Code in the long run) forward.

There are many avenues of European Private Law; there is a myriad of ways to explore it. Therefore, this paper cannot and does not have the pretention to provide an all-embracing overview of what European Private Law was, is and can or even will be. The long road towards a European Civil Code mentioned in the title is the *leitmotiv* of the paper,[22] but this road cannot be

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[7] Tampere European Council 15 and 16 October 1999 Presidency Conclusions (http://www.europarl.europa.eu/summits/tam_en.htm), point 39.

[8] European Parliament resolution on the Commission's annual legislative programme for 2000. OJ C 377, 29.12.2000, p. 323.

[9] Communication from the Commission to the Council and the European Parliament on European Contract Law. COM(2001) 398 final.

[10] Minutes of the session from 12 to 15 November 2001 published in the Official Journal of the European Communities. OJ C 140 E, 13.6.2002, p. 538.

[11] Communication from the Commission to the Council and the European Parliament. A More Coherent European Contract Law. An Action Plan. COM(2003) 68.

[12] European Parliament resolution on the Communication from the Commission to the European Parliament and the Council — A more coherent European contract law — An action plan. OJ C 76E, 25.3.2004, s. 95.

[13] Communication from the Commission to the European Parliament and the Council. European Contract Law and the revision of the *acquis*: the way forward. COM (2004) 651 final.

[14] European Parliament resolution on European contract law and the revision of the acquis: the way forward. OJ C 292E, 1.12.2006, p. 109.

[15] European Parliament resolution on European contract law. OJ C 305E, 14.12.2006, p. 247.

[16] Green Paper on the Review of the Consumer Acquis. COM (2006) 744 final.

[17] Second Progress Report on the Common Frame of Reference. COM (2007) 447 final.

[18] European Parliament resolution on the common frame of reference for European contract law (17 July 2008).

[19] Cf. A. S. Hartkamp, *Een Europees BW? Niets om bang voor te zijn! Of toch?* Nederlands Juristenblad (2007), 2482.

[20] M. W. Hesselink, *The European Commission's Action Plan: Towards a More Coherent European Contract Law? In European Review of Private Law* (2004) 4, 397–419, 401.

[21] One cannot but agree with the conclusion that *'European private law will always be in the making'* – see J. M. Smits, *The Making of European Private Law: Toward a Ius Commune Europaeum as a Mixed Legal System*, Intersentia, Antwerp, 2002, 274.

[22] The title of this paper is, obviously, an allusion to the international classic dealing with the future of European Private Law: *Towards a European Civil Code*, published by Kluwer/Ars Aequi in three editions (1994, 1998 and 2004). However, to reflect the fact that the enthusiasm of the 90's leading to that publication has faded away in some way, nowadays, when dealing with the idea of a European Civil Code, it is appropriate to imply that the road towards a European Civil Code is rather long.

mapped, described or captured as such, since it is far too complicated and elusive. That is why one can only point out certain selected aspects of this imaginary road, which provide only a partial view of this complex issue, but it is the many partial aspects that provide the bigger picture. If one tries to write on such a complex topic as the road of the European Private Law towards a European Civil Code, one faces two options: either one is amazed at the majesty of this topic, overwhelmed by all information and possible approaches and solutions and subsequently frustrated, or, while recognizing and deferring to the greatness of this topic, one attempts to chip in with a few ideas that are by no means groundbreaking or revolutionary, but can be inspiring and can lead to further discussion.

Following the second approach, this paper aims to sketch a few lines concerning several partial aspects of the long road towards a European Civil Code. These aspects include the question of codification against the background of the postmodern condition and multicentrism of law (Part 2), the necessity of a European Civil Code (Part 3) and the significance of convergence or divergence of European legal cultures, in particular of the civil law and common law traditions (Part 4). The last part of this paper formulates certain conclusions regarding the feasibility of unification of law by means of a European Civil Code and its possible consequences and outlines the possible role of the (Draft) Common Frame of Reference in the process of creating a European Civil Code.

2 La condition postmoderne: A postmodern code?

Let us begin with a very simple question of what we mean by a 'code' in the context of a 'European Civil Code'. Do we mean a classic code found in national legislations, a binding source of law that is as comprehensive as possible and contains relevant rules that are concrete enough to be applied in practice? In this meaning, the classic code is the result of the modernist effort to create a universal, comprehensive and foreseeable source of law, which should be a rather stable or even static piece of legislation. Or do we mean a code different than classic national codes, some sort of unconventional piece of legislation, or even an unconventional source of both legislation and case law (jurisprudence) specifically tailored for European needs? If such a code were to be based on a concept distinct from the concept of codification found in national legislation, it would have to be rather unique, or even revolutionary in terms of lawmaking. It should then reflect the peculiarities of codifying private law beyond national legislation, at a supranational level.

The answer of most laymen but even of many lawyers would be quite straightforward: a code is a code as we know it, be it French, Dutch or European. The idea of national codification seems to be so inextricably intertwined with the conventional, and thus prevalent, ways of legal thinking that it applies even to making a code at the European level. If a European code were not to be a written, comprehensive, binding and stable source of law, i.e. if it were not to meet the requirements and expectations related to national codes, it would not be a code at all. Many lawyers captured in the dimensions of national legal thinking would call such a source of law a European concoction, a utilitarian Brussels caprice deprived of any legal logic. In other words, it would be no 'real' (i.e. nation-style) code, but some sort of a 'quasi-code'. As will be shown later, national legal thinking seems to have formed the logic of the Draft Common Frame Reference and therefore one has to ask whether this instrument can be the right solution for European Private Law.[23]

And then, of course, there is the infamous postmodern situation. What to think of it in the context of codification? J. F. Lyotard's *La condition postmoderne: rapport sur le savoir* of 1979[24] seems to have triggered a series of trends and movements that are also related to law and thus, inevitably, to the issue of codification. If we live in a situation where the modern metanarratives are deprived of their universal legitimacy and are reduced to *petits récits* involved in their trivial and unpretentious *jeux de langage* resulting in unsolvable *différends*, can there be such a thing as a code feeding on the modernist ideals of unity and uniformity? Can such a modernist code be legitimate in the postmodern situation emphasizing plurality and individuality?

The obvious question in this respect is whether there is such a thing as a postmodern situation and a postmodern turn[25] at all and whether postmodernity is not a pseudohistoric category based on false interpretation of modernity,[26] in which case modernity still continues and the modern ideals based on the Enlightment plan should be upheld and developed.[27] Obviously, there is no 'one right answer' to this question, since postmodernity is a continuation of modernity. In J. F. Lyotard's own words, the postmodern is '*undoubtedly part of the modern*'.[28] According to U. Mattei, 'it is possible to find modern attitudes within the post-modern and vice versa without denying that post-modernism is the paradigmatic condition of contemporary western societies'.[29]

Another issue raised by the postmodern ideas presented in the last few decades is the specific impact of postmodernity and postmodernism on law. Indeed, postmodern ideas have found

[23] See J. M. Smits, *The Draft-Common Frame of Reference, Methodological Nationalism and the Way Forward,* 4 ERCL 2008 (3), 270–280.

[24] J. F. Lyotard, *La condition postmoderne: rapport sur le savoir*, Paris, Minuit, 1979. See also D. Harvey, *The Condition of Postmodernity. An Enquiry Into the Origins of Cultural Change*, Blackwell Publishing, 1989; F. Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism*, Duke University Press, 1991.

[25] Cf. S. Best, D. Kellner, *The Postmodern Turn*, Guilford Press, 1997.

[26] Cf. C. Calhoun, *Postmodernism as Pseudohistory,* in Waters, M. (ed.), *Modernity. Critical Concepts. Volume IV. After Modernity*, Taylor & Francis, 1999, 188.

[27] Cf. J. Habermas, *Modernity Versus Postmodernity*, in Waters, M. (ed.), *Modernity. Critical Concepts. Volume IV. After Modernity*, Taylor & Francis, 1999, 5 (originally published in New German Critique, 1981).

[28] J. F. Lyotard. *The Postmodern Explained. Correspondence 1982–1985*, Minneapolis, University of Minnesota Press, 1993, 12.

[29] U. Mattei, *The European Codification Process: Cut and Paste*, The Hague, Kluwer Law International, 2003, 82.

their way into legal thinking and are represented in particular by the *Critical Legal Studies*[30] movement. U. Mattei, characterizing Harvard as *'the Mecca of contemporary Western culture'*, claims that '[j]ust like Glossators and Commentators from Bologna, Humanists from Montpellier, Natural lawyers from Salamanca, and Roman-Dutch lawyers from Leyden, Critics have managed to diffuse their message from Harvard in a remarkably influential way'.[31] However, not only legal thinking has embraced postmodern ideas; postmodern traits can also be found in lawmaking and jurisprudence. According to E. Bárány, in a more and more heterogeneous society, we call the law 'a legal order' or 'a legal system' only because we are used to doing so. The impact of postmodernity on law can be seen in the decreasing material and partly formal unity of positive law. The pluralism of this postmodern situation disintegrates the unity of law, which is also caused by the lack of uniformity in lawmaking and the application of law. Unlike modernity, in which the link of the law with the state was obvious, postmodernity moves the state from the top to the centre of the hierarchy of governance, which is led by international and supranational organizations.[32]

Moreover, even national law is not uniform anymore and cannot be identified with the nation, since societies are heterogeneous even in one state. According to J. M. Smits, the end of nation states should mean the end of one national law and legal pluralism should exist not only on European, but also on national levels.[33] The law does not correspond with von Savigny's *Volksgeist* or *das gemeinsame Bewußtsein des Volkes*,[34] since there is no national spirit or conscience of the people, but a plurality of nationalities, identities and opinions, including opinions concerning the law. This plurality is also reflected in Article 3:12 *Burgelijk Wetboek*, which refers to *'de in Nederland levende rechtsovertuigingen'* in context of *'redelijkheid en billijkheid'*. J. H. Nieuwenhuis points out that this biological metaphor of various legal opinions 'living' in a certain place reflects 'the biodiversity of legal opinions' instead of one *Volksgeist*, which are not permanent, but come into existence, develop and cease to exist.[35]

As mentioned above, the postmodern phenomena of law include multicentrism of law related to multi-level governance, i.e. plurality of sources of law lacking coherence or even coordination, and plurality of interpretation of law, which also lacks coordination and unification in certain respects. The legal space of the European Union is an excellent example of both these phenomena. European legislation created outside and above the Member States is viewed as a foreign element imposed upon the national legal order, which, however, is binding and therefore must be applied and complied with. Thus, law is made on different levels without sufficient coordination or even in a competing position.[36] There is no need to emphasize the fact that European legislation is fragmentary and often lacks coherence. Moreover, a common ethos is often missing, such as in the case of European private law. For these reasons, obviously, such multicentric legislation is liable to be interpreted and applied in various ways, rather than to pursue a clear common goal. The rather awkward structure of the European judiciary, which lacks a hierarchy necessary for uniform interpretation and application of law, and the peculiar symbiosis of the courts of the European Union and national courts,[37] only reinforce the impression that law cannot and is not interpreted and applied in a uniform manner.

Let us now return to the very idea of a European Civil Code. Can we draft a European Civil Code in the sense of national codes as we know them? The most probable answer is no. Even C. von Bar, the president of the Study Group on a European Civil Code, criticized for his immoderate pursuit of the detached *ideé juridique européenne*, concedes that not even he believes in a classic European Civil Code like national codes.[38] M. W. Hesselink, speaking with enthusiasm of a new European legal culture,[39] also claims that there will never be a European Civil Code in the traditional meaning, which will replace the national codes.[40] According to T. Wilhelmsson, 'a unification process based on the ideology of the traditional codifications must obviously be an anachronism, at least to some extent'.[41] In the context of the postmodern condition, U. Mattei and A. di Robilant claim

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[30] See e.g. M. Kelman, *A Guide to Critical Legal Studies*, Harvard University Press, 1990; C. Douzinas, P. Goodrich, Y. Hachamovitch, (eds.) *Politics, Postmodernity and Critical Legal Studies. The Legality of the Contingent*, Routledge, 1994. See also A. Altman, *Critical Legal Studies: A Liberal Critique,* Princeton University Press, 1993.

[31] U. Mattei, *The European Codification Process: Cut and Paste*, fn. 28, 87.

[32] E. Bárány, *Posun vymedzenia práva a úloha pojmov prirodzené právo, právne princípy, spravodlivosť a ľudské práva (I),* 88 Právny obzor (2005), 4, 305–311.

[33] J. M. Smits, *Multiculturalisme en Europees privaatrecht: een pleidooi,* NTBR 2000, 289–292.

[34] See F. C. von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*, Heidelberg, 1814.

[35] J. H. Nieuwenhuis, *Hoe is het begrip van burgerlijk recht mogelijk? Drie vormen van voorstelling: ruimte, tijd, gewicht*, Mededelingen van de Afdeling Letterkunde, Nieuwe Reeks, deel 71, no. 6, Amsterdam, Koninklijke Nederlandse Academie der Wetenschappen, 2008, 17.

[36] For the perspective of the new Member States, see e.g. E. Łetowska, A. Wiewiórowska-Domagalska, *The Common Frame of Reference – The Perspective of a new Member State*. ERCL, 2007, 3, 277–294, 281.

[37] See e.g. C. Joerges, *On the legitimacy of Europaenising Private Law: Considerations on a Law of Justi(ce)-fication (Justum Facere) for the EU Multi-Level System*, in A. S. Hartkamp et al., *Towards a European Civil Code. Third Fully Revised and Expanded Edition*, Nijmegen, Ars Aequi Libri, 2004, 159–190.

[38] C. von Bar, *Coverage and Structure of the Academic Common Frame of Reference*, ERCL (2007), 3, 350–361, 352.

[39] See M. W. Hesselink, *The New European Private Law. Essays on the Future of Private Law in Europe*, The Hague, Kluwer Law International, 2002.

[40] 'Natuurlijk zal er nooit een Europees Burgerlijk Wetboek in klassieke zin komen, een wetboek dat bijvoorbeeld het Nederlandse BW volledig zou vervangen' – M. W. Hesselink, *Een Europees Burgerlijk Wetboek door de voordeur*, Nederlands Juristenblad (2007), 39, 2484.

[41] T. Wilhelmsson, *Private Law in the EU: Harmonised or Fragmented Europeanisation?* ERPL (2002), 1, 77–94, 86. In that sense also H. Schulte-Nölke, *EC Law on the Formation of Contract – from the Common Frame of Reference to the 'Blue Button'*, ERCL (2007) 3, 332–349, 342, and S. Grundmann, *European Contract Law(s) of What Colour?* ERCL (2005) 2, 184–210, 206.

that '[n]obody believes anymore in the monopoly of the code between the sources of law so that it will have to compete in different legal systems with a plurality of other local formants of different comparative strengths'.[42]

Thus, it is common understanding that a European Civil Code cannot be a classic, traditional code like the national codes as we know them. Will it then be a code at all? Perhaps yes, but an unconventional one, reflecting our postmodern condition, a 'postmodern code'. But isn't the very term 'postmodern code' a *contradictio in adiectu*, an oxymoron? Can there be such a thing as a postmodern code? Should the inherently modernist idea of codification not be abandoned in postmodern times? Strictly following the 'postmodern paradigm', one would necessarily agree that such an idea is incompatible with the postmodern pluralism and individualism. As argued by N. Irti, the modernist idea of codification has its postmodern counterpart, which is just the opposite – decodification; therefore, he calls the postmodern condition *'l'età della decodificazione'*.[43]

However, postmodernity and postmodernism have marked law only to a certain extent.[44] In its very nature, law is a modern instrument, seeking not only freedom and individualism, but also justice, equality and legal certainty which is in contrast with the postmodern small discourses that are all equally legitimate and therefore cannot be 'oppressed' by 'one right answer'. Indeed, even though current law has certain postmodern traits, it is a modernist invention, which needs to preserve its modernist traits, if it is to be a foreseeable and reliable regulatory instrument rather than a postmodern collage of contradictory opinions. The modernist idea of codification has not vanished from legislation, even though it is *prima facie* incompatible with the postmodern spirit of our times.

In contrast, the codification process successfully achieved in the Netherlands in 1992 with the *Nieuw Burgerlijk Wetboek*, or the current codification processes in the new Member States, such as the Slovak Republic, the Czech Republic, Hungary and Poland,[45] clearly show that the idea of codification has not gone into oblivion, but is still present in legislation. It even seems that it is more necessary than ever. The reason is that the current postmodern condition of law and legislation constitutes a *'rhizome'*, which is *'the icon of postmodernism'*, characterizing *'the theoretically nomadic condition of post-modern thought'*.[46] Unlike the critical movement in the United States, postmodernism in the European context becomes conservative, adapts to this *'rhizome'* and preserves and even appreciates the status quo.[47] According to U. Mattei, to change this *status quo*, certain modern ideas have to be preserved even in the postmodern situation. One of them is the idea of a binding European Civil Code.[48]

The conclusion we can draw from the above considerations is that, despite certain postmodern traits of law, it is by no means futile to deal with the idea of creating a European Civil Code. Be it a 'postmodern code' or a 'modern code' in a postmodern setting, it is clear, that this code cannot be a classic national-style code, that it has to be special, unconventional. This much is clear, but when it comes to identifying the unconventional characteristics of such a specific supranational code, the question becomes rather tricky. It is because the very concept of a supranational code is abstract and elusive. One could even claim that it is a concept which has to be invented, and therefore cannot yet be described and characterized.

Nonetheless, it is possible to outline at least approximate traits such a code could or should have. U. Mattei maintains that the postmodern European Civil Code should be based on 'a duplicity of canons', it should have 'a modernist functional structure' consisting of mandatory rules, which should, however, co-exist 'with a post-modern aggregate of narrative default rules which might well be different from one country to the other and which perform the function of making the code contextual and reflexive of local values and style'.[49] The mandatory rules should contain 'the actual political options and the minimal conditions for a market to be common'.[50] U. Mattei recognizes 'the power of the rhizome'; '[t]here is no need to avoid using it as a justification of the most unbearable lightness of the post-modern condition: the return to formalism and the market as a governing agency rather than an institution to be governed'.[51]

To sum up, according to U. Mattei, Europe needs a civil code containing a certain minimum of binding rules, completed by 'narrative' default rules. The 'duplicity of canons' would be represented, on the one hand, by binding rules (a modern element) and, on the other hand, by default rules (a postmodern element). In this dualistic structure epitomizing the modern and postmodern canons, the modern binding element has to limit injustice or even chaos resulting from the postmodern 'rhizome'. Obviously, the problem is how to define the scope

[42] U. Mattei, A. di Robilant, *The Art and Science of Critical Scholarship. Post-modernism and International Style in the Legal Architecture of Europe*, ERPL (2002) 1, 25–59, 59.

[43] See N. Irti, *L'età della decodificazione*, Milano, Giuffré, 1979.

[44] See e.g. J.M. Smits, *Privaatrecht en postmodernisme. Over recht en tijdgeest, toegelicht aan de hand van enige civielrechtelijke fenomenen*, 23 Recht en Kritiek (1997), 155–171.

[45] See e.g. M. Jurčová, *The Influence of Harmonisation on Civil Law in the Slovak Republic*, Juridica International, 2008, 1, 166–172; K. Ronovská, *Civil Law in the Czech Republic: Tendencies of Development (Some Notes on the Proposal of the New Civil Code)*, ERPL (2008), 1, 111–120; J. Hurdík, J. Fiala, *Czech Private Law at the Beginning of the Third Millenium*, Časopis pro právní vědu a praxi (2006), 4, 351–355; L. Vékás, *Integration des östlichen Mitteleuropas im Wege rechtsvergleichender Zivilrechtserneuerung*, ZEUP (2004), 3, 454–476.

[46] U. Mattei, *The European Codification Process: Cut and Paste*, fn. 28, 98.

[47] Id., 98–99.

[48] Id., 102.

[49] Id., 103.

[50] Id., 105.

[51] Id., 105.

of the binding rules in such a supranational code. Furthermore, it seems that this double-canon structure is just a postmodern description of classic national-style codes. Thus, the postmodern European Civil Code presented above is basically a classic code characterized in postmodern and, albeit eloquent, rather vague terms.

But can we only speak of a code in terms of legislation? What is then the role of jurisprudence? How to reflect the fact that the current complex and incoherent legislation requires the judge to be much more than *la bouche de la loi*, and actually to make law, even though this role is, in civil law systems, usually camouflaged as interpretation of law?[52] The increasing role of the judiciary and its case law should not be neglected in the drafting of the European Civil Code. According to A. Chamboredon, '[t]he method of European contract law codification should consider case law as a source, which is, at least, equivalent to the law produced by the legislation of Parliament. This is not impossible if one accepts the principle of an 'open textured rule of law', a familiar concept in the practice and doctrine of common law.'[53] A. Chamboredon considers a code built with 'open textured rules' as 'the only acceptable concept' for a European Civil Code.[54] According to this author, the Principles of European Contract Law drafted by the Lando Commission 'seem to establish the basis of what could be a code with 'open textured rules', which simultaneously offers guidance for the legislator and the national courts, sufficient autonomy for contracting parties, and a basis for Community law to govern contracts'.[55] Nonetheless, he comes to the conclusion that 'the idea of a European codification, even only for contracts, appears to be still only a utopia', since '[i]t still seems to be excluded that an agreement on new structures and new concepts of substantive uniform law could be reached soon'.[56] As an alternative to the idea of codification, A. Chamboredon proposes to create a 'European ius commune, a law imposed from below'.[57] This skeptical conclusion only shows that the presented concept of an 'open-textured' code mixing based equally on legislation and case law is far too elusive to be captured and described and too abstract and theoretical (at least for the time being) to materialize.

Thus, despite the fact that is quite clear that a European Civil Code should not and cannot be a classic nation-style code, it is rather difficult, if not impossible to characterize and describe such a postmodern European code. In other words, one can say what the code *should not* be, but not what the code *should* be. That is the major problem for the way forward of European Private Law. Attempts to draw a distant vision of a European Civil Code as an unorthodox concept that has to be invented can be inspiring, but are rather vague and cannot lead to immediate results. Therefore, it is necessary to concentrate on more concrete instruments and possibilities of using them in the process of drafting a European Civil Code. These will be discussed in more detail in the last part of this chapter dealing with current developments and the near future of European Private Law. Before getting to those more specific questions, it is necessary to examine the rationale of a European Civil Code, i.e. why it should be adopted.

3 Ratio codificationis: free market, social justice and beyond

Obviously, it is impossible to set up an exhaustive list of reasons why or why not a European Civil Code should be adopted. Nonetheless, it is possible to outline several groups of arguments that are involved in the discussion about a European Civil Code. These include, in particular, economic arguments, political arguments, arguments related to diversity of law and legal culture and, last but not least, the question of competence.

First of all, it should be pointed out that, in essence, European integration is based on an economic rationale and its reasons are essentially economic. Therefore, it is quite natural that unification of law in the form of a European Civil Code should be primarily justified by economic reasons. In this respect, one speaks of the notorious elimination of transaction costs in cross-border transactions, which, in the end, should facilitate free trade and provide benefits both to undertakings and consumers. If a European Civil Code can actually bring about such an elimination of transaction costs with all its benefits, it should be, beyond doubt, adopted. One could even wonder whether, if the code is beneficial virtually to all parties, why it has not been adopted earlier to remove the obstacles of free trade resulting from legal diversity in the internal market. However, if such a code cannot bring economic benefits, from the economic point of view, there is no reason to adopt it.

Thus, the crux of the economic argument is whether a European Civil Code can bring the economic benefits or not. The members of the Commission on European Contract Law and the Study Group on a European Civil Code[58] claim that diversity in contract law in Member States create at least these 'obstacles to exploitation of the internal market':

a) differences of contract law 'may effectively prevent certain modes of organizing commercial activity in the European market',
b) differences of contract law increase transaction costs, which are passed on consumers,

[52] For an example concerning the application of good faith by the courts on the Continent, see M. W. Hesselink, *The Concept of Good Faith*, in A. S. Hartkamp et al., *Towards a European Civil Code*, fn. 35.
[53] A. Chamboredon, *The Debate on a European Civil Code. For an 'Open Texture'*, in M. van Hoecke, F. Ost (eds.), *The Harmonisation of European Private Law*, Oxford, Hart, 2000, 63–99, 88.
[54] Id., 66.
[55] Id., 92.
[56] Id., 97.
[57] Id., 98.
[58] C. von Bar, O. Lando, S. Swann, *Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code*, ERPL, 2002 (2), 183–248.

c) as a result of diversity of contract law, 'businesses may enter into legal relationships on the basis of a deficient understanding of the legal rules applicable to their commercial relationship',
d) 'the fear of legal surprises in exporting or importing goods or services may be a reason for not risking foreign trade', in particular as far as small and medium enterprises are concerned,[59]

However, it is remarkable that the members of the Commission on European Contract Law and the Study Group on a European Civil Code state that 'the Groups have not undertaken any empirical studies to assess the magnitude' of any of the transaction costs, but they 'consider it to be a safe assumption, supported by anecdotal evidence, that significant cost factors are involved and that these costs factors are operative in practically all sectors of the market economy'.[60] Then, the reaction of P. Legrand stating that this approach to European contract law is 'incredible,'[61] comes as no surprise.

On the other hand, it is necessary to point out that the transaction costs, which would be eliminated by unification of private law, cannot be expressed, and thus, the benefit of a European Civil code cannot be quantified in economic terms. Despite this, F. Gómez is convinced that harmonization would bring benefits in terms of transaction costs, but emphasizes the fact that actual benefits depend on the initiative and active participation of market players, including consumers.[62] However, according to F. Gómez, the current process of harmonization of European Contract Law does not seem to be making good – or enough, at best – use of existing knowledge, both theoretical and empirical, on the effects of incentives created by legal rules on behavior'.[63] The necessity of a behavioral approach in the economic analysis of harmonization of contract law is also emphasized by G. Low. This approach leads to the conclusion that the economic benefits expected from harmonization of law are largely overestimated and lack empirical basis.[64] Similarly, C. Ott and H. B. Schäfer come to the skeptical conclusion that 'there are no clearly identifiable economic reasons to create a European contract law.'[65]

Apart from the difficulties regarding quantification of economic benefits of private law unification, one must not neglect the costs associated with disputes concerning the interpretation of unified regulation until case law regarding this regulation, as detailed as the case law existing at national level, develops at European level.[66] However, the costs related to the adoption of a more efficient solution are one-time costs and in the long term, they may return in the form of savings of costs related to the previous, less efficient solution.[67] Nonetheless, it is rather difficult to identify a more or less efficient solution in the context of various value and political preferences and to demonstrate, at least partially, actual savings of costs on an empirical basis.

However, despite the 'market fetishism'[68] and 'the Commission's neo-liberal rhetoric: long live the freedom of contract!',[69] reducing a European citizen to a *'homo economicus'*,[70] there are also other arguments to justify further harmonization of private law in Europe. A. S. Hartkamp states that he is in favor of a unified contract law in Europe, but 'rather for political and cultural than for sheer economic reasons'.[71]

Indeed, in political and cultural terms,[72] a European Civil Code would be a milestone of European integration. It would mean the achievement of *'a much closer than an even closer Union'*. It would be a symbol of unity, just like unification of law was a decisive trait of state unification in history. But is there the political will to make such a giant leap forward? Even the most eager euro-optimists cannot but concede that, at least for the time being, it would be unrealistic to answer in the affirmative. And even if we do not put such a direct question, it suffices to read between the lines. What I mean is the virtually unanimous

[59] Id., 194–195.

[60] Id., 198–199.

[61] P. Legrand, *Antivonbar*. Journal of Comparative Law (2006) 1, 13–40, at 26.

[62] F. Gómez, *The Harmonization of Contract Law through European Rules: a Law and Economics Perspective*, ERCL (2008), 2, 89–118.

[63] Id., 117.

[64] G. Low, *How and Why We Are (Not) Bothered By the Costs of Legal Diversity – A Behavioural Approach to the Harmonization of European Contract Law,* Tilburg Institute of Comparative and Transnational Law Working Paper No. 2009/8 (www.tilburguniversity.nl).

[65] '... dass es klar erkennbare ökonomische Gründe für die Herausbildung eines europäischen Vertragsrechts nicht gibt.' C. Ott, H. B. Schäfer, *Die Vereinheitlichung des europäischen Vertragsrechts – Ökonomische Notwendigkeit oder akademisches Interesse*, in Ott, C., Schäfer, H. B. (Hrsg.), *Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen. Beiträge zum VIII. Travemünder Symposium zur ökonomischen Analyse des* Rechts (13., 16. März 2002). Tübingen: Mohr Siebeck, 2002, 230.

[66] See e.g. T. HÍstad, *En europeisk civillag och den nordiska kontrakträtten*, in Förhandlingarna vid det 36 nordiska juristmötet i Helsingfors 15–17 augusti 2002, Del 1, 2002 (http://cms.ku.dk//upload/application/pdf/f563aae9/339histad.pdf), 359: 'I den andra vÍgskÍllen mÍste dÍ emellertid ocksÍ fÍ läggas en vikt hänförlig till de kostnader som parter mÍste vidkännas under de mÍnga Ír det kommer att ta innan en ny gemensam European Civil Code genom rättspraxis flÍtt den klarhet pÍ detaljnivÍ som finns i de nuvarande nationella systemen.'

[67] See L. Kähler, *Conflict and Compromise in the Harmonization of European Law*, in T. Wilhelmsson, E. Paunio, E., A. Pohjolainen A. (eds.), *Private Law and the Many Cultures of Europe*, The Hague, Kluwer Law International, 2007, 125–139.

[68] M. W. Hesselink, *The European Commission's Action Plan: Towards a More Coherent European Contract Law?* ERPL 2004, 4, 397–419, at 412.

[69] Id., 415.

[70] Id., 414.

[71] A. S. Hartkamp, *Modernisation and Harmonisation of Contract Law: Objective, Methods and Scope*, Uniform Law Review, 2003, 1/2, 81–89, 82.

[72] The cultural dimension is discussed in Part 4 of this paper.

opinion that the EC Treaty provides no legal basis for a European Civil Code.[73] As interpreted by the Court of Justice, the only eligible candidate, Article 95 EC, seems to be disqualified.[74] After all, it would be apparently unrealistic to interpret the EC Treaty in a way allowing the adoption of a European Civil Code or a less ambitious version thereof. But the extreme emphasis on the fact that the legal basis of codification is absent means that such a legal basis is either very difficult to be created, or even that it is not desired at all. Because if the political will were present, there would be nothing easier than to amend the Treaty and create a clear legal basis. The current procedure is, however, somewhat obscure. The Commission also seems to have opted for an approach that does not emphasize the delicate competence issues and tries to justify the Common Frame of Reference as a tool-box, an instrument to increase the coherence of the *acquis* and to inspire the legislators, rather than to harmonize contract law. The optional instrument, even though mentioned, is mentioned mostly in the last place, as an auxiliary function of the Common Frame of Reference, which is presented rather as a neutral, technical instrument. However, this technical and neutral approach to European contract law is not very persuasive. It is rather ambiguous when it comes to its actual benefits. Moreover, the attempt to create a neutral, apolitical contract law suitable for everybody, is utopian. As S. Weatherhill puts it, 'harmonising contract law is not simply a technical process of market-making; it unavoidably means the shaping of a species of European contract law.'[75]

And even if the European elite came to an agreement that a common civil code for Europe should be adopted, there is still the legitimacy issue, which has become very obvious in the context of the failed Treaty Establishing a Constitution for Europe and the (almost failed) Lisbon Treaty. S. Sánchez Lorenzo points out that the idea of creating a European Civil Code 'is not only hardly feasible, legally doubtable and disproportionate, but it can also be considered undesired and be subject to negative evaluations'.[76] The legitimacy issue is closely associated with the idea of a common European identity. As long as the European citizens view themselves, in the first place, as citizens of their Member States, and only in the second, or even last place, as citizens of the European Union, a European Civil Code cannot be quite legitimate.

Even though there are no clear economic arguments and political will to create a European Civil Code, there is still one more important aspect left – social justice. U. Mattei's message is clear: 'hard code now!' – Europe needs a binding code to express the idea of social justice.[77] '[E]mphasis on softness in the making of European private law is likely to mean lawlessness and a free battleground for exploitive business interests.'[78] 'Postmodernist irony should not hide the truth'.[79] 'Given the available institutional background, a hard European civil Code seems a prerequisite for the development of an effective set of rules of the game capable to keep economic activity under control.'[80] According to U. Mattei, 'the new European Code should be hard, minimal, not limited to contracts,' and its aim should be 'to reflect the social fabric of European capitalism.'[81] This hard code should be minimal 'in the sense of containing only those fundamental principles that can readily be used by courts to force market actors to internalise social costs.'[82] To summarize, in U. Mattei's view, the European Civil Code should be an instrument implementing the idea of social justice at the European level. Similarly, W. Snijders claims that it is not the businesses, but society that needs unification of European contract law to protect itself against business.[83] Obviously the argument concerning social justice is quite the opposite of economic arguments based on elimination of transaction costs.

The need for social justice in European contract law is most clearly conveyed by the 'manifesto' of the Study Group on Social Justice in European Private Law.[84] According to the members of this group, the political process of making European private law should be 'geared towards the achievement of ideals of social justice'.[85] They claim that '[i]t is a mistake to conceive of this project as a simple measure of market building, because private law determines the basic rules governing the social justice of the market order.'[86] However, the problem of achieving

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[73] See J. D. González Campos, *Diritto privato uniforme e diritto internazionale privato*, in P. Picone (ed.), *Diritto internazionale privato e diritto comunitario*, Padova, Casa editrice dott. Antonio Milani, 2004, 61; S. Weatherhill, *Reflections on the EC's Competence to Develop a 'European Contract Law'*, ERPL 2005, 3, 405.

[74] C-376/98, Germany v. Parliament and Council, ECR 2000, I-8419, in particular paragraphs 83 and 84. See also C-380/03, Germany v. Parliament and Council, ECR 2006, I-11573, paragraph 38.

[75] S. Weatherhill, *Constitutional Issues – How Much is Best Left Unsaid?* in S. Vogenauer, S. Weatherhill, (eds.), *The Harmonisation of European Contract Law. Implications for European Private Laws, Business and Legal Practice*, Oxford, Hart, 2006, 89–103, 90.

[76] 'La propuesta de un Código civil Europeo no sólo es poco factible, legalmente dudosa y desproporcionada, sino que puede ser considerada indesable y admitir una valoración negativa'. S. Sánchez Lorenzo, *Derecho privado europeo*, Granada, Comares, 2004, 129, as cited in J. D. González Campos, fn. 72, 61.

[77] U. Mattei, *The European Codification Process: Cut and Paste,* fn. 28, 107 ff.

[78] Id., 119.

[79] Id., 118.

[80] Id., 121.

[81] Id., 107.

[82] Id., 123.

[83] W. Snijders, *Building a European Contract Law. Five Fallacies and Two Castles in Spain*, EJCL, 2003, vol. 7.4, (http://www.ejcl.org/74/art74-2.html).

[84] Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law: a Manifesto*, in Hesselink, M. W. (ed.), *The Politics of a European Civil Code*. The Hague, Kluwer Law International, 2006, 171–195.

[85] Id., 194.

[86] Id., 194–195.

ideals of social justice by means of European private law is that the content and meaning of social justice can vary from country to country.[87]

4 Legal culture: A sublime feud

The question of legal culture in the discussion about a European Civil Code deserves special attention. I have devoted this chapter to such a culture dealing with what I call 'the sublime feud' of the common law and civil law traditions. A 'feud' because the conflict of these legal traditions has virtually always existed and 'sublime' because, especially in the context of academic discussions on drafting a European Civil Code, it has assumed eloquent, even poetic dimensions, taking this 'feud' to a 'noble' level of word play. In other words, this conflict has become somewhat detached from solid ground, drifting toward the nebulous realm of artistic expression.

Firstly, let us try to examine the concept 'legal culture'. J. Smits comes to the conclusion that legal culture cannot be defined as a static element, but as something that is subject to change, that can be learnt by individuals, that it is in other words 'a mental software'. This definition of legal culture implies that it is not immutable and, furthermore, it is not restricted to a particular nation or state, but can be shared by communities both within one state and in several states.[88] If it is so, different legal cultures are not insurmountable obstacles in unification of private law in Europe, since a common European legal culture can be formed and shared by all Europeans. J. Smits points out that legal culture can be an obstacle to unification of law, but only in certain cases, which have to be identified. Given the fact that legal culture can be learnt and not restricted to a specific territory, everyone should be free to choose their own legal culture. The best way to achieve unification is an optional code – '[i]f contracting parties can choose such an optional jurisdiction, it will automatically become clear to what extent a uniform European culture exists in this respect'.[89] Thus, an optional instrument would identify areas in which binding rules could be adopted.[90]

Even if legal culture can be learnt, merged or replaced by a common legal culture, one must question its importance. Is it just 'folklore' or more than that, perhaps even 'heritage' that has to be preserved? According to O. Lando, 'contract law is not folklore',[91] but rather 'a question of ethics, economics and techniques that are common to all Europeans'.[92] However, according to S. Sánchez Lorenzo, cultural and axiological diversities, 'may be something more than folklore', and therefore should not be overlooked in the process of contract law harmonization.[93]

Now let us return to the 'sublime feud' between civil law and common law. There is one author that deserves special attention when it comes to discussing this conflict involved in the discussion about a European Civil Code. This is P. Legrand, undoubtedly the eagerest, and at the same time most eloquent critic and opponent of the European Civil Code, who has elevated the 'feud' between civil law and common law to the 'sublime' level. His main ideas can be summarized as follows: civil law and common law are incompatible and they are not even converging. Therefore the idea of a European civil code has to be abandoned.[94] But it would be a pity to provide such a succinct overview of P. Legrand's ideas, which are formulated in much more eloquent terms, some of which are presented below.

According to P. Legrand, 'it is clear that the diversity in private-law allocations of business risks across European laws reflects diversity in business expectations across national borders which, in turn, translates an 'embeddedness' of economic transactions within local culture.'[95] He criticizes the supporters of the idea of European private law codification and claims that 'the promoters of the convergence agenda' act 'out of wishful thinking or in bad faith'.[96] '[T]hese instrumental strategies wish to efface difference, to erase it.'[97] 'Historically, ever since the second century, if not earlier, civilians have shown themselves to be unrepentant rationalists, impenitent conceptualists, and unashamed formalists.'[98] He characterizes 'the desire to eliminate difference, or to pretend that it is not there, as 'the political correctness *ŕ la européenne*':[99] 'Nowadays, there is only one way in which one can be 'a good European' and it is to support the suppression of local particularism. Any expression of doubt in favour of cultural diversity, any critique of centralising legal integration process is rapidly construed as inimical to the grand European project, its author being branded a reactionary, someone who is on the wrong side of History.'[100] In this context, as he explains, 'by 'Europe', must inevitably

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87 T. Wilhelmsson, *Introduction: Harmonization and National Cultures*, in T. Wilhelmsson, E. Paunio, A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe,* fn. 66, 11.

88 J. M. Smits, *Legal Culture as Mental Software, or: How to Overcome National Legal Culture?* in T. Wilhelmsson, E. Paunio, A. Pohjolainen, A. (eds.), *Private Law and the Many Cultures of Europe,* fn. 66, 143.

89 Id., 149.

90 Ibid.

91 O. Lando, *Optional or Mandatory Europeanisation of Contract Law*, ERPL (2000), 1, 61.

92 O. Lando, *Culture and Contract Laws*, ERCL (2007), 1, 1–20, 18.

93 S. Sánchez Lorenzo, *What Do We Mean When We Say 'Folklore'? Cultural and Axiological Differences as a Limit for a European Private Law*, ERPL (2006), 2, 197–219, 219.

94 Besides the works of P. Legrand cited below, see his *Sens et non-sens d'un code civil européen*, Revue international du droit comparé, 1996, 811; *Against a European Civil Code*, Modern Law Review, 1997, 44; and *Impossibility of Legal Transplants*, MJCL, 1997, 2, s. 111.

95 P. Legrand, *On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations*, ERPL 2002, 1, 61–76, at 67.

96 Ibid.

97 Id., 63.

98 Id., 65.

99 Id., 63.

100 Ibid.

be meant, in a significant way, the immensely profligate bureaucratic and regulationst nightmare concocted and nurtured by unelected officials sitting in Brussels (with the promise of worse to come).'[101] In this respect, S. Weatherhill remarks that 'Legrand's contempt for harmonization has never been more vividly captured that in this onslaught'.[102]

P. Legrand's opinion on the European Civil Code is clear – he considers it to be 'a diabolical idea',[103] which 'epitomizes the advance of European Community bureaucracy – consisting largely of uprooted civil servants and failed politicians often entertaining an ambivalent relationship with their national legal culture – which thrives on abstract generality, on false universals, and on illusory stability and predictability'.[104] 'In this context, the European Civil Code becomes the agent of a dogma of (assumed) administrative efficiency for which particularisms undermine legal regulation. It is meant to instrumentalise legal culture and to make culture subservient to the ethos of fiscal rectitude and commercial advantage. It is the support of a process of normalization which is, effectively, a process of subjugation of the local that becomes stigmatised as deviant.'[105] This approach to law-making, characterized as 'brusselisation of law', 'propounds a distinctly impoverished view of law and of what it is to have legal knowledge'[106] 'Support for a European Civil Code [...] implies an attack on pluralism, a desire to suppress antinomy, an attempt at the diminution of specificity'.[107] Such a 'formalistic and conceptualistic model' as a 'pan-European civil code' reflects, according to P. Legrand, 'a decision to overlook the point of English exceptionalism'.[108] Such a code could not only 'provide an officialised construction of reality', but it would also be able 'to limit alternative visions of social life'; 'the collection of legal norms within the new code would monopolise legal discourse in ways that would arbitrarily, but effectively, exclude alternative views of justice. The common-law rationality would rapidly and decisively find itself marginalised and common-law lawyers would soon be expected to transfer their fundamental epistemological loyalties to the civilian model – an intellectual formation that remains ultimately inconsonant with their sense of justice.'[109] The European Civil Code would represent 'the excommunication of the common-law way of understanding the world and the relegation to obsolescence of its particular insights'.[110] The idea of such a code is, inter alia, 'arrogant, for it suggests that the civilian re-presentation of the world is more worthy than its alternative and is, in short, so superior that it deserves to supersede its alternative'.[111] However, according to P. Legrand, '[c]ivilians must regard the common-law tradition as presenting an alternative for them (in the sense of a contrapuntal cognitive and experiential possibility that is defensible and potentially enriching) as opposed to an alternative to them (in the sense of an inchoate and impertinent apprehension of the legal that must be regretted and obliterated). The civil-law world must recognise in the common-law tradition the existence of a different, equally legitimate approach to the assuagement of the human need for order rather than seen in it nothing more than a peripheral – and, therefore, expendable – phenomenon.'[112]

However, this 'sublime feud' assumes dimensions of verbal attacks against specific authors on a rather personal level. P. Legrand's criticism becomes very personal in his *A Diabolical Idea*, expressly criticizing U. Mattei, A. Chamboredon, but certainly culminates in his *Antivonbar*, an outright attack against the prominent supporter of European Civil Code, C. von Bar. According to P. Legrand, 'Professor von Bar, if you will, is Plato expelling the poets from the Republic. In the present context, the 'poets' appear largely in the guise of common-law lawyers. It is, indeed, primarily the poetics of the common law that defies any pan-European reduction of law to propositional language.'[113] 'To Professor von Bar, the deworlded European civil code is the guardian of rationality, the stern rebuker of idiographic deviations best regarded as belonging to an obsolete era and as surviving into the present under false pretences, properly envisaged, ultimately, as something of a scandal, as a morbid state of affairs yearning to be rectified, as a *blight*.'[114] 'Professor von Bar wants to repress historical and cultural difference in favour of an institutionalised system of concepts and rules that claims to speak all at once and once for all, that asserts unalloyed pan-Europeanism';[115] he is 'pursuing a politics of supremacy by advocating (without any support) the virtues of the civil-law ethos over the common law's, by arguing (without any evidence) that the civil law has revealed more truths, and by promoting (without any data) the view that the civil law offers a richer way to live in the law.'

As mentioned above, P. Legrand's opposition against the European Civil Code is more than clear. However, his striking arguments are based on what I call 'dialectical poetics'. He pres-

[101] Ibid.
[102] S. Weatherhill, *Why Object to the Harmonization of Private Law by the EC?* ERPL 2004, 5, 633–660, 648.
[103] P. Legrand, *A Diabolical Idea*, in A. S. Hartkamp, et al. *Towards a European Civil Code*, fn. 35, 245–272.
[104] Id., 252.
[105] Ibid.
[106] Ibid.
[107] Id., 254.
[108] Ibid.
[109] Ibid.
[110] Id., 255.
[111] Ibid.
[112] Id., 269.
[113] P. Legrand, *Antivonbar*, fn. 60, 20.
[114] Ibid.
[115] Id., 24.

ents the common law and civil law traditions as irreconcilable and incompatible opposites and for fear of hegemony of civil law over common law, he depicts, in poetic words, the beauty of common law. However, the rhetoric of the 'sublime feud' distracts and draws attention from the real life of law, in which the significance of legal culture and differences varies. Therefore, any general statements must be avoided and it must be examined in a specific case whether legal culture can be an obstacle to unification. Like in most cases, the truth is somewhere in the middle, and therefore the differences between legal cultures and, especially, common law and civil law, should neither be neglected nor exaggerated. It must be borne in mind that both civil law and common law cultures are developing and their development, in the long term, leads to a reassessment of fundamentals of both common law and civil law.

5 The way forward: Quo vadis, ius privatum Europaeum?

The conclusion that can be drawn from the above considerations has two aspects. The first aspect is the theoretical and practical assessment of feasibility and necessity of a European Civil Code. The second aspect is related to the contemporary way of developing European private law by means of the (Draft) Common Frame of Reference.

As to the first aspect, the questions I have been dealing with in this paper can be summed up in a few words: Is unification of private law in the form of a uniform civil code theoretically and practically feasible? If it is, why should such a code be adopted? How can this objective be achieved? And the last, quite prosaic question, is, of course, when such a code can be adopted.

Even though the *whether, why, how* and *when* of European private law codification are put in a straightforward manner, it is very difficult, if not impossible, to provide clear answers to any of these questions. The problem of the discussion on a European Civil Code is that the opinions of individual contributors are often focused on certain aspects (e.g. economic, political, cultural or constitutional questions), and as such, without correlation to other aspects, many opinions can seem rather clear and persuasive. Beyond doubt, before drawing any conclusions, it is necessary to consider this issue in its entirety, including all of its aspects. However, one can try to be unbiased and provide an objective assessment of the issue, but the outcome of such an assessment can be, by nature, nothing more than a subjective opinion concurring with other subjective opinions. All answers that I try to provide here are therefore necessarily subjective and do not exclude alternative answers. Plurality of views means plurality of opinions, which is by no means a drawback, on the contrary, in the postmodern spirit, it can even be called richness.

My subjective conclusions based on the above considerations are that unification of private law in Europe in the form of a European Civil Code is theoretically feasible. This is corroborated by the outcomes of academic initiatives (in particular the Principles of European Contract Law and the Draft Common Frame of Reference) based on comparative analysis of European legal orders, combining elements of common law and civil law. It also appears that European legal orders are rather converging than diverging and this tendency is likely to continue in the future.

However, when it comes to practical feasibility of such a code, a clear distinction has to be made between the unification of law and the unification of the rules of law. Unification of rules of law is both theoretically and practically feasible. Nonetheless, unification of law does not seem to be practically feasible. It is obvious that clear arguments in favour of such unification are, at least for the time being, missing. Even if there were such arguments, the political climate does not seem to be beneficial for the idea of a full-fledged European Civil Code. As long as the harmonization measures at the Community level are often viewed as 'a Brussels dictate' and (at least) some legal academics, practitioners, as well as most European citizens, to paraphrase the Trojan horse, fear the *'Communitatem codicem ferentem',* the idea of a European Civil Code will remain only theoretical.

But even if there were sufficient political will to adopt a European Civil Code (which is highly improbable), its consequence would be only unification of the rules of law, not unification of law. Mainly due to differences of legal culture in the various legal systems of Europe, such a code would be necessarily applied in different ways. As long as citizens, lawyers and judges think, decide and act on the basis of their own national or local identities, including, in terms of legal culture, also values and concepts of justice, equity and other fundamental elements of private law, and do not create and embrace a common European identity with and a European legal culture, unified rules of law cannot be applied in a uniform way. Even though there exist certain elements of a European legal culture (in particular as far as the principles of democracy, rule of law, fundamental rights and freedoms are concerned) and this common culture is developing,[116] it is not sufficient to ensure a uniform application of law in all Member States in compliance with the paramount principle of legal certainty. A European Civil Code would not only fail to eliminate differences of application of law in Member States, but it would create a condition of legal uncertainty.[117] Therefore, such a code must be avoided.

Of course, there can be quite opposite answers, but these are based more on the enthusiasm of the theory than on the pragmatism of the practice and virtually devoid of any empirical practice. It is also obvious that one cannot demonstrate without any doubt that a European Civil Code would actually be applied in different ways, but the method of trial and error in such an important issue as the unification of private laws of 27 Member States is not quite appropriate. All harmonization and unification initiatives must be aimed not only at the intended or expected benefits (mainly related to transaction costs), but, first and foremost, they must pursue the principle of legal cer-

[116] See in particular M. W. Hesselink, *The New European Private Law. Essays on the Future of Private Law in Europe*, The Hague. Kluwer Law International, 2002.

[117] See, *inter alia*, H. C. F., Schoordijk, J. M. Smits, *Verleden, heden en toekomst van het privaatrecht*, Ars Aequi, 1999, 800.

tainty. Since a European Civil Code would not be compatible with the principle of legal certainty, its adoption seems to be a utopia, a chimera and a dangerous adventure.[118]

However, European private law has a future. If European integration is irreversible, further harmonization of law in the European Union is natural and inevitable. However, this process cannot be compared to national codification. The process of harmonization or even unification of private law at the European level should be gradual. Even though a certain amount of activity from the Community and national legislators in this process is inevitable, most initiative should be left to the market players, in particular by providing an optional instrument of private (contract) law.

To summarize the first aspect of the conclusion, European Private Law is on its way, and at the end of this road, there may be a European Civil Code as a result of partially organized or spontaneous harmonization, unification and codification of private law. It is quite clear that such a code will not be a classic civil code. However, it is not clear at all how long this road to such an unorthodox code is, and the speed, at which European private law is moving forward on this way, depends on many circumstances, mainly on political decisions. However, irrespective of its form, one could say with a pinch of salt that such a code will come into existence perhaps in this century.

As to the second aspect of the conclusion, it is necessary to examine the role of the most promising contemporary instrument – the Draft Common Frame of Reference – in the process of forming a European Civil Code. Even though this instrument is presented as a technical and completely 'harmless' instrument, which is purely academic and neither a binding nor a political document, the Commission, the European Parliament and its drafters ascribe to it very ambitious goals. It should be a 'tool box' for the Community legislator (in this respect, the term 'construction kit' is perhaps more suitable') [119]. Moreover, it should be a source of inspiration for national legislators. Even though the function of a binding instrument is generally not associated with it, the Draft Common Frame of Reference could be the basis of an optional instrument.

It is obvious that the functions of the Draft Common Frame of Reference are not only numerous, but also quite different from each other. Whilst the functions of a 'tool box' for the Community legislator and a source of inspiration for national legislators are quite technical, the function of a basis for an optional instrument corresponds with awarding the Draft Common Frame of Reference the decisive role in forming the future shape of European Private Law through 'bottom-up' harmonization, and thus possibly outlining the prospective European Civil Code.

But can one instrument meet such various goals at the same time? J. Smits claims that the Draft Common Frame of Reference is based on 'methodological nationalism', which is demonstrated in the idea of comprehensive codification, selection relevant rules and the way of representing law. If the Draft Common Frame of Reference is to be a 'tool box' and not an instrument harmonizing private law in Europe, its structure and contents should not correspond with national codes, but it should take alternative measures, as argued by J. Smits.[120]

The code-like style of the Draft Common Frame of Reference also confirms the view that, even though it is not a European code in the formal sense, it is a code in a material sense, since it is comprehensive, static and based on one level of governance. In other words, the Draft Common Frame of Reference is a *de facto* codification. According to M. Hesselink, such a factual code could cause national legislators to adapt their legislations to this *de facto* code in order to eliminate the tension between the national codification and the (albeit only factual) European codification.[121] Even though such consequences are possible, it is difficult to predict the actual occurrence of such 'induced voluntary harmonization', since the approach of national legislators to the European codification can vary from state to state.

But what about the most ambitious goal of the Draft Common Frame of Reference – to constitute a basis of an optional instrument? Can it deliver what is expected? Spontaneous harmonization of private law in the European Union by means of an optional instrument applied on an opt-in basis is widely accepted as one (perhaps the only) suitable solution of creating a common private law in Europe. However, such an optional instrument must meet other criteria than a 'tool box' or a source of inspiration. If it is to be applied on an opt-in basis (which is the only acceptable solution compatible with the freedom of contract), it must be attractive for contracting parties in terms of clear, but above all detailed and, as far as possible, straightforward and unambiguous rules. In other words, it cannot be formulated in abstract terms allowing diverging interpretations. What the contracting parties want is legal certainty. If the optional instrument cannot meet this paramount requirement, it cannot be attractive for the contracting parties and they will not apply it in their contractual relations. They will instead stick to national legislation, even if it is not originally their own, because, unlike the uncertain optional code, it can provide the necessary legal certainty. In default of legal certainty, any other benefits of an optional code would not be appreciated and it would not be applied at all.

Given the fact that the Draft Common Frame of Reference is drafted in rather general terms (just like its basis, the Prin-

[118] 'Ein obligatorisches Vertragsgesetzbuch ohne eine europäische Rechtskultur, ohne eine europäische Rechtswissenschaft und vor allem: ohne eine europäische Justiz mit entsprechend geschulten Personal ist ein Abenteuer, das kein verantwortungsvoll denkender Jurist befürworten kann.' H. Eidenmüller, *Obligatorisches versus optionales europäisches Vertragsgesetzbuch*, in C. Ott, H. B. Schäfer (Hrsg.), *Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen,* fn. 64, 240.

[119] See C. Herresthal, in Langenbucher, K. (Hrsg.), *Europarechtliche Bezüge des Privatrechts*, 2. Auflage, Baden-Baden, Nomos, 2008, 47.

[120] See J. M. Smits, *The Draft-Common Frame of Reference, Methodological Nationalism and the Way Forward,* fn. 22, 280.

[121] M. W. Hesselink, *The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience*, in S. Vogenauer, S. Weatherhill, (eds.), *The Harmonisation of European Contract Law. Implications for European Private Laws, Business and Legal Practice*, Oxford, Hart, 2006, 63 ff.

ciples of European Contract Law),[122] often allowing diverging interpretations, it cannot meet the criteria of an optional instrument, in particular the requirement of legal certainty or predictability of interpretation. Therefore, it is very doubtful whether the Draft Common Frame of Reference can be a basis of a successful optional instrument capable of playing a major role in spontaneous harmonization of European private law.

The result of the effort to achieve various, sometimes even incompatible objectives, by means of one instrument seems to result in the failure of the Draft Common Frame of Reference to achieve any of them. Indeed, if the Draft Common Frame of Reference is drafted in a way similar to national codes, it cannot be an efficient 'tool box' for the Community legislator, since it is based on national concepts of codification. On the other hand, even though it resembles a national code, the Draft Common Frame of Reference is not detailed enough to constitute a full-fledged source of law governing legal relations as an optional instrument. Therefore, it seems that the Draft Common Frame of Reference is not capable of achieving its ambitious goals and its impact on further harmonization of European private law is rather overestimated; it will be perhaps more humble than expected. It appears that, just like the Principles of European Contract Law, the Draft Common Frame of Reference will remain an instrument of primarily academic importance.

[122] See e.g. Arts. II.-7:301 to II.-7:304 DCFR (Infringement of fundamental principles or mandatory rules) or II.-3:301 – II.-3:302 DCFR (Negotiation and confidentiality duties). The relevant provisions of the European Contract Code (Arts. 6 to 8 and 137 to 155) are much more detailed, and therefore, provide a better basis for an optional instrument than the abstract rules contained in the DCFR.

Rules of Administrative Procedure – the question of procedure language in the Czech Republic

Petr Kolman [1]

Motto: Public administration is a service for the public.

Rules of Administrative Procedure are undoubtedly among the most important legal regulations that the Czech administrative law deals with and in the area of administrative procedure it is the essential regulation. Regarding the importance of rules of administrative procedure I fully agree with V. Mikule who wrote among others: *Rules of Administrative Procedure as a legal instrument regulating proceedings before public authorities has a similar role in a democratic state as Rules of Court Procedure: it regulates certain ways of the exercising of the public power (pursuant to Article 2, Paragraph 3, Constitution, the public power may only be exercised by ways stipulated in legislation) and it is even more important because of the increasing complexity of the social life which is linked with an ever increasing frequency of public law regulations that people come into contact with in their lives.*[2]

Since January 1, 2006, new Rules of Administrative Procedure have been effective in the Czech Republic. My article is focused on the question of procedure language in administrative proceedings.

Whereas the old Rules of Administrative Procedure – i.e. in the Czech Republic the legendary Act No 71/1967, Coll. – did not have a regulation of the procedure language in administrative proceedings, the new RAP already have this urgently needed institute. The absence of a general regulation of procedure language led to the situation when this institute was repeatedly (and it is necessary to say that not always uniformly) regulated by special provisions. The uniform regulation must be taken as a step towards making the whole legal regulation more transparent and towards strengthening legal certainty, i.e. a movement in the right direction.

The Act No 500/2004, Coll., Rules of Administrative Procedure, stipulates that proceedings are conducted and documents are made in the *Czech language*. However, there has been a breakthrough in the domain of Czech in administrative proceedings made by the provision that parties to the proceedings [3] may conduct their case, and documents may be submitted, also in the *Slovak* language. The exceptional legislative position of Slovak is due to the long-term common historical traditions of Czechs and Slovaks and also due to the language proximity which contributes to the general understandability of the Slovak language in the Czech territory. The special position of Slovak is nothing new in Czech procedural regulations, for example the Act No 337/1992 on administration of taxes and fees stipulates in Section 3 that *before the tax administrator the proceedings are held in Czech or Slovak languages. All written petitions are submitted in Czech or Slovak and documentary evidence must be accompanied with an official translation from one of these languages*.

In future, however, Slovak might present certain difficulties, especially to younger workers in the state administration. Here it is worth noting that children nowadays have difficulties in understanding Slovak (for example, in Slovak films) as they have not experienced the common state of Czechs and Slovaks. It is possible that for those potential workers in the state administration some language courses will be necessary that would help them understand parties to the proceedings conducting their case in Slovak.

It is also worth noting that despite the fact that the Rules of Administrative Procedure apply in the whole territory of the Czech Republic the knowledge of Slovak is not homogeneous, of course – the further one recedes from the Czech-Slovak bor-

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[1] JUDr. Petr Kolman, Ph.D., teacher at the Faculty of Law, Masaryk University, Brno.

[2] V. Mikule: Nový správní řád je konečně na světě (New Rules of Administrative Procedure are finally here), Právní zpravodaj č. 9/2004, C.H.Beck, Prague, 2004.

[3] Parties to the proceedings pursuant to the (new) rules of administrative procedure are:
a) in application proceedings the applicant and other affected persons to whom the decision of an administrative authority must apply because of the unity of rights or duties with the applicant;
b) in proceedings by virtue of office the affected persons for whom the decision is supposed to constitute, to change or to abolish a right or a duty or to declare that they have or do not have a right or a duty.
Parties to the proceedings also include other affected persons if they may be directly affected by the decision in their rights or duties.
Parties to the proceedings also include persons determined by a special law. Unless the special law stipulates otherwise they have the position of parties to the proceedings pursuant to Paragraph 2, except for the situation when the decision is supposed to constitute, to change or to abolish a right or a duty or to declare that they have or do not have a right or a duty; in that case they have the position of parties to the proceedings pursuant to Paragraph 1.

der the lower that knowledge usually is[4] even if there is probably a smaller number of proceedings conducted and documents submitted in Slovak there. At the theoretical-legal level I can imagine that if "our" two languages have diverged even more in future (I mean in dozens of years) and the Slovak language have become non-understandable for most citizens of the Czech Republic, it would be necessary to amend the Rules of Administrative Procedure again, i.e. Slovak would lose its *privileged* procedure status. Another piece of this "Czech-Slovak" mosaic is the legislative fact that the Act No 500/2004, Coll., is based on certain principles included in its introductory sections and in this context it seems to me fitting to note the principle from Section 4, Paragraph 1, Rules of Administrative Procedure, that *public administration is a service for the public.*[5] *Anyone who fulfills duties resulting from the power of an administrative authority is obliged to treat the affected persons politely and to accommodate them within his limits*. In my opinion a genuine effort to understand a party conducting his case in Slovak may be one of the right ways to come up to the principle laid down in the above mentioned Section 4, Paragraph 1, Rules of Administrative Procedure.

For example, may a local authority in the Czech Republic[6] make an administrative decision in the *Slovak language*? As mentioned above, pursuant to the Rules of Administrative Procedure parties to the administrative proceedings may conduct their case in Slovak and documents may be submitted in Slovak. However, this only applies to the parties to the administrative proceedings and not to the administrative authorities (or clerks).

For the sake of completeness we should add that persons working in a local authority must, among others, have a command of the *procedure language*, i.e. the Czech language, pursuant to the Act No 312/2000, Coll., on clerks of territorial self-governing units.

Pursuant to Section 16, the new RAP, documents made in a foreign language (i.e. another language than Czech and Slovak) must be submitted by the procedure participant in both the original wording and the officially verified translation into Czech unless the administrative authority notifies the procedure participant that such a translation is not required. The law provides the administrative authority with the possibility that such a *notification* may also be made on its official notice board and for an indefinite number of procedures in future. In the eyes of the administrative law the above mentioned notification is not a decision or ruling but the so-called informal communication of the administrative authority and it may concern either all its future procedures (without limitation) or only certain ones within its power.[7]

Any person declaring that he/she does not have the command of the language in which the procedure is conducted has right to an *interpreter* registered in the register of interpreters whom he/she has to hire *at his/her own expenses*. Here the Rules of Administrative Procedure help accomplish Article 37, Paragraph 4, Bill of Fundamental Rights and Freedoms, i.e. the regulation of the highest legal force. In the above mentioned article the Bill of Fundamental Rights and Freedoms sets forth that the person who declares that he/she does not have the command of the language in which the procedure is conducted has right to an interpreter. It should be noted that this right is even recognized for a person with no citizenship, i.e. the so-called stateless person.

As the popular saying goes, and not exclusively among lawyers, the money is in the first place so let us ask a question: Who pays for the costs of an interpreter in administrative proceedings? In the proceedings for an application the applicant, who is not a citizen of the Czech Republic, hires an interpreter at his own expenses.[8] This rule does not contravene the Bill of Fundamental Rights and Freedoms as this constitutional document does not establishes a duty of the state (or administrative authorities) to meet the above mentioned costs. Nevertheless, I agree with the opinion of J. Vedral, a co-author of the RAP, that in the case of proceedings conducted *by virtue of office (ex officio)*, i.e. in proceedings started by an administrative authority the costs for an interpreter is to be met by the administrative authority itself.[9] Therefore we have to make a strict distinction between ex officio proceedings and proceedings started by the applicant; in the latter case the costs for an interpreter are met by the applicant himself/herself – *the person who is not a citizen* of the Czech Republic.

Another legal exception from the duty of meeting costs for an interpreter is Act No 325/1999, Coll. on asylum. We may say briefly about the specific asylum procedure that the participant to the procedure has the right to use his/her native language or a language he/she is able to understand. For this purpose the Ministry of Interior of the Czech Republic provides him/her with an interpreter *free of charge* for the whole duration of the procedure. The participant is entitled to invite an interpreter whom he/she wishes at his/her expenses.[10] The remuneration for the interpretation and meeting the costs connected with it is stipulated in an agreement between the Ministry of Interior and the respective interpreter. The amount of the remuneration and the related costs is not allowed to go beyond the level established in Act No 36/1967, Coll., on experts and interpreters.[11]

However, let us return to the regulation of the administrative procedure. A citizen of the Czech Republic who is a member of

[4] Even if there are exceptions, for example, there is a relatively large Slovak minority in the capital of Prague.

[5] The introductory sentence was kindly used by the author as a motto of this article.

[6] For example, when the clerk is a Slovak living and working in the Czech Republic.

[7] Comp. Vedral, J.: Rules of Administrative Procedure – Commentary, Bova Polygon, Praha, 2006, p. 146. The author gives an example of limitation to the procedure pursuant to the Building Act.

[8] Comp. Section 16/Para 3, Act No 500/2004 Coll.

[9] Comp. Vedral, J., op. cit. (2006), p. 147.

[10] Comp. Section 22, Act No 325/1999 Coll.

[11] Comp. Section 35, Act No 325/1999 Coll.

an ethnic minority[12] living traditionally and in the long term in the territory of the Czech Republic – see *Act No 273/2001 Coll. on rights of members of ethnic minorities and on changes of some other Acts* – has right to bring a petition and to use the language of his/her ethnic minority before an administrative authority. But it should be noted that in that case the costs of interpreting and translating are met by the *administrative authority*, not by the participant – *a member of an ethnic minority*.

Here it is necessary to note one problem resulting from the EC law. As F. Křepelka rightly pointed out in a paper on the use of languages of EU member states before Czech administrative courts[13] ***the same*** rights are generally given by the EC law to citizens of other EU states as to the natives. As for the use of languages before authorities and courts this principle was upheld by the Court of Justice with, among others, the judgment in *Bickel v. Franz*.[14] If the Poles in the Czech territory have right to use their language before administrative authorities and courts then the same right belongs to the Poles who are citizens of the Polish Republic, at least pursuant to the EC law. However, the Czech Rules of Administrative Procedure recognizes that right *only* for citizens of the Czech Republic. (So not for the above mentioned Polish citizens – this might present a problem in future.)

The new RAP, as a procedural administrative regulation of a modern welfare state, guarantees procedural protection of seriously handicapped persons in order not to lessen their rights due to their worsened procedural position within administrative procedure because of their health condition. Specifically, the law stipulates that deaf persons must be provided with an interpreter of finger alphabet by the administrative authority pursuant to Act No 155/1998 Coll. on finger alphabet. The deaf persons are defined in Section 2 of the above mentioned Act as such persons that lost their hearing before the development of the spoken language and the degree and the form of their hearing handicap do not allow a full development of the spoken language, and further such persons that lost hearing later or that are hearing-impaired and consider the finger alphabet their *primary* form of communication. The above mentioned finger alphabet is in the eyes of the law the Czech finger alphabet (ČZJ) and signed Czech.[15]

The deaf person that does not have command of the finger alphabet must be provided by the administrative body with the so-called *intermediator* who is able to make himself/herself understood with him/her by means of the *tactile language*. It is praiseworthy that the new RAP expressly mention the deafblind persons who were neglected in the Czech legal order for a long time.[16] The deafblind person will be provided with not an interpreter but an intermediator who is able to make himself/herself understood with him /her through the language for the deafblind.[17] (For example, Finger Alphabet or Lorm's Alphabet). An intermediator is appointed under the same conditions as an interpreter of sign language. The administrative authority makes a decision about appointing an interpreter or an intermediator and does not communicate it erga omnes but only to the affected persons.

When comparing the quality of the legal regulation of procedure language in administrative proceedings and, for example, the regulation of "languages" in administrative judiciary – the Czech administrative courts still have to apply the outdated Section 18, Civil Procedure Code[18] despite the existence of relatively new Rules of Administrative Court Procedure – I come to the conclusion that the regulation in the Rules of Administrative Procedure is more elaborate and of higher quality despite the above mentioned partial drawbacks.

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[12] *Ethnic minority* is defined by law as a community of citizens of the Czech Republic living within the territory of what is now the Czech Republic who differ from the other citizens usually by their common ethnic origin, *language*, culture and traditions, who form a numerical minority within the population and at the same time manifest their will to be regarded as an ethnic minority for the purposes of common efforts at preserving and developing their own individuality, language and culture, and for the purposes of expressing and protecting interests of their historically established community. Pursuant to Act No 273/2001, Coll., a member of an ethnic minority is a citizen of the Czech Republic who acknowledges himself to be of a nationality different than the Czech one and expresses a wish to be regarded as a member of an ethnic minority together with other persons acknowledging themselves to be members of the same nationality.

[13] Comp. Křepelka, F.: The use of foreign languages before Czech administrative courts after joining the EU, Správní právo No 6/2007.

[14] Judgment C-274/96 of 24/11/1998, I-07637. A German tourist and an Austrian driver were taken to court in the bi-lingual Italian-German province of Trentino-Alto Adige (South Tyrol) for violating the prohibition of importing weapons and drunken driving. Both of them demanded the trial to be held in German. However, the Italian law in the province allows that only for members the local German-speaking minority. More details in Křepelka, F., op.cit. Footnote 9.

[15] ČZJ is the basic communicative means of the deaf in the Czech Republic. ČZJ is a natural and fully-fledged communicative system created by specific visual-gestural means, i.e. hand shapes, hand positions and movements, mimics, positions of the head and the upper part of the trunk. ČZJ has the basic attributes of a language, i.e. signs, system, double articulation, productivity, peculiarity and history, and its lexis and grammar are settled.

[16] See for example Kolman, P.: Deafblindness as a neglected problem, Slovo daily, 2/5/200, Prague 2000.

[17] Here we may mention, for example, the method of the so-called Finger alphabet. There are one-hand and two-hand finger alphabets. In the Czech Republic the two-hand finger alphabet is mainly used. The person with a total loss of sight recognizes signing in his hand and if he/she has residual sight signing within his restricted visual field is used. Another communicative method is the so-called Lorm's alphabet – a hand-touch alphabet where individual letters of the alphabet are attached to individual places on fingers and the palm so it means actually to write individual letters of the alphabet on the palm, preferably the left one of the receiver. More details at http://lorm.cz/cs/hluchoslepi, run by LARM – Society for the Deafblind.

[18] This issue was thoroughly (and critically) dealt with by Křepelka, F.: Užívání cizích jazyků před českými správními soudy po vstupu do Evropské unie (Use of foreign languages before Czech administrative courts after joing the EU), Správní právo No 6/2007.

Ombudsman and Principles of Good Administration – Czech and European Perspective

Nina Bachroňová [1]

Principles of Good Administration

„Good administration is a new continuously developing term and it needs dynamic perception in the context of circumstances affecting its development. Firstly, the term originates in the European area in connection with European integration and safeguarding fundamental rights.“ [2] It should be pointed out that a certain initiative for the awareness and its codification came from the first European ombudsman, Jakob Söderman. In order to understand the way he reached these principles the function of European ombudsman must be clarified as well as his activity and authority over ombudsmen of European Union member states, the peoples‘ advocate in the Czech Republic in particular.

European ombudsman

In the EU Peoples‘ advocate functions as an auditing body investigating complaints related to maladministration of EU institutions. This institution was established by the virtue of Maastricht Treaty. In 1995 Finn Jakob Söderman was the first person appointed as a head of the institution by the European Parliament. The term of office is five years with the possibility of subsequent appointment. He remained in the office until 2003, when he was relieved by the current European obudsman Nikiforos Diamandouros. People’s advocates seat is in Strasbourg. It is symbolic that the first European ombudsman was appointed in the very year that Sweden and Finland joined the EU.

Field of action of the European Ombudsman covers maladministration of institutions such as European commission [most appeals], Council of Europe, European Parliament, European Economic and Social Committee, Committee of the Regions, European Central and European Investment Banks and European Investment Fund. European Ombudsman investigates complaints of EU citizens who think they were not treated correctly and appropriately or were otherwise mistreated by the EU institutions. A complaint must be filed within two years of the date of emergence of the facts on which the complaint is based, either by post, email or fax. European Ombudsman‘s website is user-friendly, complaint forms are available in all EU languages.

Since the field of action of European Ombudsman is limited solely to EU institutions and bodies, the European ombudsman cannot investigate complaints against national, regional or local administrations in EU member states. In most cases the ombudsman submits recommendations to the concerned institution or transfers the complaint to a regional ombudsman competent in the matter. European ombudsman does not deal with complaints against private subjects (individuals or organizations) and he does not deal with appeals against court decisions and decisions of national ombudsmen. The ombudsman may conduct inquires on his own initiative, however always only within the jurisdiction of the European ombudsman. There are fifty seven people in The Ombudsman`s team, the majority being qualified lawyers able to handle complaints in one of the twenty-three treaty languages. The budget of the peoples advocate is €8.505.770.

Should the Ombudsman find any maladministration, he must inform the institution or the body concerned. The institution thus informed is obliged to send the Ombudsman a reasoned opinion within three months. For each case of maladministration found the European Ombudsman must send a report to the European Parliament and to the institution concerned. By the time the initiator receives a copy of the institution‘s statement to the reported instance of maladministration, the case is in fact in most cases already over. Along with the report the ombudsman receives a letter of thanks from the complaint initiator as the concerned institution has rather acceded to quick settlement than waited for the ombudsman`s final verdict.

„Should the ombudsman decide an EU institution has maladministrered, he has several amendement tools. The first verdict can generally be described as „friendly solution“. In other words, he notifies the institution in question that it should correct on its own. „Critical remark“ issued by the ombudsman can be more decisive as well as it is a report of the case to competent authority with executive power.“ [3]

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[1] Mgr. Nina Bachroňová, Articled clerk, Czech Republic.

[2] Tomoszek, M.; Principy dobré správy v zemích EU, pracovní konference ochránce, 2006.

[3] Shorf, D.; Evropský ombudsman, Týden č. 26, roč. VI, ISSN 1210-9940.

Complaints handled by the European ombudsman have nothing to do with suggestions of national or regional ombudsmen as the European ombusman handles mainly administrative matters, such as inappropriate business travel expenses reporting, unjust enrichment at the expense of the public administration or demanding fees from EU institutions.

The Ombudsman registered a total of 3 406 complaints in 2008, out of which sixty percent were submitted electronically. He was able to help 80% of complainants. The European ombudsman has the right to initiate investigation as well.

Most of the inquires concern the administration of the European Commission due to implementing decisions directly affecting EU citizens. Nonetheless, the European Ombudsman is crucial for the public administration as a whole, because he stimulates its improvement and continuous development. Lack of transparency, including information refusal, and abuse of power are the most common types of maladministration. However, once the Ombudsman intervenes, the inquired institutions quickly adopt amendements. It was thanks to the intervention of European Ombudsman that the European Personnel Selection Office [EPSO], Europian anti-fraud office [OLAF] and also European Court of Justice have all adopted the principle of transparency.

European network of ombudsmen is also considerably relevant to the matter and needs to be mentioned before proceeding to a brief explanation of Good Administration from the EU point of view.

European network of ombudsman

The European network of Ombudsmen consists of almost 90 offices in 31 European countries. Within the Union it covers the ombudsmen and similar bodies at the European, national and regional levels, while at the national level it also includes Norway, Iceland and the applicant countries for EU membership. This network is sort of a collaboration mechanism used by the European Ombudsman to transfer lodged complaints that fall outside his mandate to regional ombudsmen. Members of network may ask the European Ombudsman‘s advice regarding EU legislation or its interpretation whenever dealing with complaints related to it. The network significantly contributes to the public administration improvement; not only through seminars and annual bulletins but also through its daily electronic news service.

In 2008 a comparative study was conducted by the European ombudsman on the law and practise in the member states relating public access to information in databases. „He took inspiration from the results of this study to make specific proposals in relation to the reform of the EU‘s rules on public access to documents.” [4]

Good Administration from the EU perspective

It is already established that the European space has considerable influence on the formation of the principle of Good administration. It is important to empathize that there is no binding legal act in the EU legislation, which would define these principles. That does not however mean there are no documents that deal with the issue, most important among these are Charter of Fundamental Rights of the European Union and The European Code of Good Administrative Behaviour established by the European ombudsman. This part of EU legislation would surely see significant changes should the treaty establishing a constitution for Europe get ratified.

Principle adhered to and applied by the Ombudsman of the Czech Repubic also arose from the code. Resolution approving the code was adopted in 2001 and Jacob Soderman deserves the greatest credit for its formulation. The idea behind the code has first emerged in 1998, when European parliament member Roy Perry proposed formulation of such a document.

The European Code of Good Administrative Behaviour is a vital tool for relations and communication of civil servants and citizen inside EU. The reason for its creation was amount of complaints to the European ombudsman claiming improper conduct of civil servants as well as general strife towards improvement of prior mentioned relations. First the ombudsman proceeded to verify whether any of the European institutions has at least an internal regulation governing these relations. It has proven there are none. The European Ombudsman then drafted the formulation intending it to be athoritative for all EU institutions and presented it to the European Parliament.

He also demanded for the code to be public: “The code will be effective only if it becomes accessible to public and if it contains only rules governing relations between institutions, their officials and the public.” [5]

Several years passed and the European Parliament adopted the resolution approving the code. But what the real status of the Code is? The Charter of Fundamental Rights of the European Union was proclaimed in Nice in November 2000 and it later formed a part of the proposed Treaty establishing the constitution for Europe. The right to good administration is included in the charter and therefore it is a fundamental right (EU Charter of Fundamental Rights, Article 41 matches Constitution, Article II – 101); another fundamental right is the right to refer cases of maladministration in the activities of the Community institutions or bodies to the Ombudsman of the Union (article 43 of the Charter). The code explains to the people how these articles should be understood and interprets how should good administration operates in real.

[4] Výroční zpráva Evropského ombudsmana 2008.

[5] Glotzmann, F.; Evropský kodex řádné správní praxe, Moderní veřejná správa a ombudsman, 2005, str. 52.

Right to good administration
(Article 41 of the Charter of Fundamental Rights)

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:
the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

It is clearly evident that the code, based upon the above mentioned article of Charter of Fundamental Rights, strongly influenced all member states and it also extends and explains that part of the Charter. The code represents a source used by many national ombudsmen while formulating principles of good administration in their respective member countries, incuding the czech ombudsman. Examples of policies covered by the code are the proportionality principle, courtesy principle, reply to letters in the language of the citizen and policy to indicate the name and the telephone number of the official who is dealing with the matter on all documents to identify the person responsible.

Principles of Good administration are also enforced by european courts without regard to the fact, that the principle is not defined by any legally binding document. They are using the principle and are also trying to give it the value and the content. So the question is whetever the principles shouldnt be codyfied into legally binding document, since it is often difficult to judge if a decision of the court is in accordance with mentioned principles, especially because principles adopted in respective member states vary. It is important to realize that should that happen, the currently swift progress of good administration priciple would get hampered and it might even limit court in its effective interpretation and use. So the question is whetever a legally binding document is a necessity for continuous progress of those principles and for Good administration as such as current situation suggests that many countries went a long way towards already.

Three pillars of the european union protecting fundamental human rights are not formed only by EU but also by council of Europe, institution characteristic for not being burdened by past prejudices or traditions and without predecessors. Given these origins the principle is assumed to be supranatural rather then based upon traditions of any of EU member state.

Yet we may observe variations occuring in a specific region or state [often quite helpful and inspiring for neighboing countries]. There are four different traditions to be found in EU. First is the German tradition applied in Germany and also in Czech republic, emphasizing on legislators and generally considering public administration as mere administration of law justice and generally follows German legislation. France represents different tradition in which administration law is percieved as an effective tool for public administration. Main principle states that the administration upholds the law. Yet another tradition may be encountered in the Northern European countries, where the ombusman forms as an independent institution outside the structure of public administration, and where a sort of an aspiration towards Good administration may be noticed for the first time. The last tradition is focusing on an individual, and therefore regulation of relations between institutions and the people. It is prevalent in English speaking countries, which do not have separated networks of administrative courts. Naturally, various combinations of these traditions can be found in many countries.

There is one very interesting fact: Sweden surveyed the state of good administration in other EU coutries using questionaries sent to corresponding national institutions by The Swedish Institute for Public Administration.

„This analysis of course is not the only one, European Council has also made an invaluable part of the job in this regard when it commisioned similar project focused on Concil of Europe member states and EU institutions such as the European ombudsman and the European Parliament.“ [6] The question is if it is necessary to differ Good administration of EU and Good administration of Council of Europe. Since the Council of Europe member states have transfered from totality to capitalism, it might conclude that good administation would not be properly secured. They often respect principles that countries where Good administration is widely accepted do not apply whatsoever.

Council of Europe recognizes the existence of the ombudsmen and another 28 principles as a part of good administration. EU recognizes only 12 principles as fundamental rights to good administration. The following are shared by both: lawfulness, inpartiality, proportionality, equality, right to access to information, the obligation of the administration to give grounds for its decisions, obligation of the administration to communicate its decisions to persons concerned, reasonable time-limit for taking decisions, and some policies concerning fairness EU member states recognize key elements of good administration and most

[6] Tomoszek, M.; Principy dobré správy, pracovní konference ochránce, 2006.

of them are embedded in form of constitutional or law norms. Various researches show very good results when evaluating Czech republic. Czech Republic is considered to have Good administration principle well adopted, sometimes it is even cosidered as one of the most advanced. Following chapter will focus on the situation of good administration principle in Czech republic.

Good administration principle in the Czech Republic

Principles of Good administration were subject of an important summit organized by the ombudsman of czech republic and his office in 2006. The ombudsman has composed document called Summary of Good administration key principles.

Fact that „Range of state functions and duties has changed (for example in social area and in the way it protects human and citizen rights)“ [7] has most certainly influenced the creation of the principle. Right to a good administration clearly originates from the principles of modern democracy, for example demand for lawfullness, qualifications, political neutrality of employees and utility of public administration. Demand for lawfullness, meaning abiding the rule of law, often comes at the cost of delays and obstacles in future proceedings. Because formal administration process upholding the rule of law sometimes prevents simple solution, principle of administration usefullness advises to investigate for the core of the problem instead of providing formal solutions to problems.

Ombudsman`s summary compromises of ten articles, European code of good administrative behavior is one of its sources. However, the summary has slightly wider approach, Otakar Motejl J.D. added predictability, responsibility and approachability of public administration.

As mentioned above, first principle of good administration is lawfullness. The second one is Impartiality demanding equal treatment for all individuals and adressing problems of impartial evaluation of individual complaints. Third article is timeliness requiring reasonable time-limit for taking decisions. Predictability is the fourth. Civil servants are supposed to base their decisions on information obtained from reliable sources and past experience, and apply consistent solutions to similar problems. Fifth is conclusiveness. Administrative officials are expected to inform participants about current advancement in their cases. Officials should also have respect to „communication and intelectual dispositions of a person“.[8] Article six, proportionality, demands that officials uphold the law and respect fair balance between interests of private persons and general public interest. Principle seven is cooperation. It is clear that lack of cooperation leads to unnecesary coplications and causes delays. This principle applies to general functionality of public administration and requires a complex solution. Eight principle is responsibility. It relates to responsibility for a care of an individual administration instances and responsibility for consequences of maladministation in particular. Institutions following good administration should admit their mistakes, accept responsibility, apologize to affected individuals in written form and take take steps needed for amendement. Principle nine is approachability, administering access to information, permitting copying of documents, promoting easy orientation in administration buidings and indicating officials responsible for given documents. Principle ten is Helpfulness. It binds administrative officials to be respectful and polite to the public.

Good administration is on advanced level in Czech Republic and counts as one of the best in Europe in some aspects. Namely Right to be heard and to make statements has only nominal limitations, vast majority of documets are accesible to public, and institutions have binding time-limits for taking decisions. On the other hand there are aspects which require improvement, for example approachability – perharps less formal approach, extension and reorganization of opening hours for public or more extensive use of electronic communication. Responsibility of public administrative officials for failed administrative matters should also be enforced.

This summary is meant as helpful tool for administrative officials and their clients as well as a guide for administration control. The czech ombudsman has sucessfuly defined signs of maladministration and he used these signs to create Principles of good administration. Examples of maladministration relate namely to improper and tardy behavior, failure to understand bad personal situation of the subject and similar.

The summary strives to amend all these problems, and thus institutions following this summary may avoid unpleasant inspections. It would be proper to create a code of conduct based on particular articles of the summary and it would be even better if the final result is legally binding document.

Slovak national ombusman has also approached the issue of relations between institutions and the public in his yr. 2006 annual report. Several proposals were made in the matter, related to the important issue with lack of periodical evaluation of civil servants and insufficient communication between civil servants and public. It should always be kept in mind that good administration exists for the needs of the public. Another very important step for improval of administration is stabilization of the whole bureaucy. Implementation of disciplinary penalties for civil servants unable of cooperation with their colleagues and the public is closely related to that. The ombusman mentions the importance of continuous increase of Law awareness among the people, as it is a premise for effective claiming of civil rights.

Czech good administration principle is part of new code of administrative procedure effective since 1. 1. 2006 500/2004 Coll. New code of administrative procedure differentiates direct (acting individuals) and indirect procedure participants. This speeds up the process {as some process privileges are granted only to direct participants} and other individuals may not misuse those privileges to thwart the process.

The obligation to allow access and copying of materials to entitled individuals is significant advancement from the good administration point of view. Previous version of code of administrative procedures did not include such obligation and some institutions were not willing to comply with it.

[7] Čebišová, T.; Úsilí o dobrou správu – diskuze ke konferenci, 2006.

[8] Souhrn hlavních principů dobré správy – pracovní konference ochránce, 2006.

Maximum time limit for taking decision have also been notably revised in the new code. Individuals have a right to appeal to a higher instance whenever an institution exceeds it. Failure to act within the time limit is considered as inactivity of the institution and provides grounds for higher authorities to take corrective measures. Institutions are required to initiate appellate review no later than one year since the day the appealed decision came into force now; previous limit has been three years.

"If principles are not to be mere fiction, conditions of their real application must be created. Main obstacles from this perspective are represented by:

- the condition of our legislation [in both meanings: enacting of laws as well as results of legislation]
- postponed reformation of public administration, postponed effect of new Civic service law, unclear concept of legal stance of civil servants and neglected management of human resources, all left to its own devices
- insufficient protection of administration against influence of politics with all related threats [corruption in particular] caused by political interference into hiring, promotion and so on, contrary to EU standards." [9]

Conclusion

This article represents sort of review of the issue of a good administration focusing on the role of the ombudsman in this process. Its chapters describe the function of European ombudsman and his benefit for the others, principles of good administration and maladmistration and compares the effort of Czech ombudsman for implementation of these principles into real life with similar endeavors, mainly in EU member states.

It would be most appropriate to eventually get beyond suggestions and incorporate this institution into Czech law. However, first a code of conduct should be formed according to the example of the European ombudsman, which would be recommended to institutions for use. These principles should be developed further in generally binding documents, for example by inclusion of new control authority over upholding the code into one of the law articles concerning the ombudsman. There is no need to further discuss the need for ombudsman for other purposes beside applying the good administration principles although he is already criticized for rather paying attention to the need of an individual than assisting the community in solving problems important for the general public. However individual approach brings all the better results and satisfaction of complainers. Also solution of one small problem often provides basis for solution of similar issues in the future. The ombudsman is also often criticized for the fact, that operation of the institution is expensive. Admittedly it is costly, but the ombudsman provides his assistance for free and by doing so becomes the real protector of the people on the field of bureaucracy and his advice and help is priceless.

The ombudsman needs real authority, as it is his primary weapon. Czech ombudsman handles well this matter and he focuses on amending large amount of improper and wrong administration decisions. Ombudsman should not be judged only by partial lack of success when proposing changes of individual laws, but his work should be viewed as a whole instead, as an entity essential for democratic community assisting other control mechanismsof the state in improving public administration.

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[9] Čebišová, T.; Úsilí o dobrou správu – diskuze ke konferenci, 2006.

A Treatise on the Extent of the Legal Concept of an Animal

Olga Sapoznikov [1]

The first provision of the Czech Act on the Protection of Animals against Cruelty (Act No 246/1992 Coll.) states that animals, like humans, are living beings and are capable of experiencing various degrees of pain and suffering and hence they deserve attention, care and protection by man [2]. But what is an animal? The answer to this question might differ depending on whether it is based on biology, some laws or just common opinion.

In biology, an animal is a living organism belonging to Kingdom Animalia that possess several characteristics that set them apart from other living things, such as: being eukaryotic, usually multicellular, being heterotrophic and generally digesting food in an internal chamber, being generally motile and possessing specialized sensory organs for recognizing and responding to stimuli in the environment [3]. The general public opinion would say a similar thing – basically, everything which can move and eat and is big enough to be seen is an animal. In a general online dictionary, an animal is defined as a living organism characterized by voluntary movement [4]. An elephant, a fish, a goose, a ladybug and a bee are all animals.

The Czech Act on the Protection of Animals against Cruelty defines the animal as "a live vertebrate, other than man, excluding fetal or embryonic forms". Just for the explanation, vertebrates are living creatures with a backbone (spinal column) [5]. Therefore, according to the Czech Act on the Protection of Animals against Cruelty, only backbone living creatures are defined as animals. Bugs, flies, bees, shrimps, worms and many more species are not considered animals.

Although researches done on some invertebrates show that they have a nervous system (of course, of different structure and complicity) and are, probably, able to sense some pain [6, 7, 8], destroying them is not considered to be animal killing according to Czech Act on the Protection of Animals against Cruelty. To make things more clear, if Mr. X burns Mrs. Y's dogs, which are definitely vertebrates, this killing would be considered as animal cruelty under the definition in section 4 para 1 letter O (Act No 246/1992 Coll.). In this example, Mr. X has committed an infraction (according to Act No 246/1992 Coll., section 27 para 1 letter b) and will be penalized by penalty of up to 500,000 CZK (according to Act No 246/1992 Coll., section 27 para 10 letter a). As mentioned before, the invertebrates are excluded from the category "animals" in the Act on the Protection of Animals against Cruelty. So, if Mr. X burns down Mrs. Y's bee hive, he must compensate Mrs. Y for the damage which he had caused her. This act will not be considered as an act of cruelty towards animals. Then, this problem is regulated by the general provisions on compensation for damages, which is included in the Czech civil code. The Act is composed of several parts. The second part (part two) deals with protection of animals during killing, use of anaesthesia and protection of animals at public performances. It includes requirements and methods for slaughter and killing [9] as well as rules of animal protection at a public performance [10]. Promoting cruelty to animals is forbidden in public performances, exhibiting, demonstration, presentation and even on pictures [11]. An infraction committed by a natural person who promotes cruelty to animals [12] can lead to a penalty

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[2] Act No 246/1992 Coll. On the protection of animals against cruelty, as amended by act No 162/1993 Coll., Act No 193/1994 Coll., Act No 243/1997 Coll., finding of the Constitutional Court No 30/1998 Coll., Act No 77/2004 Coll., Act No 413/2005 Coll., Act No 77/2006 Coll. and Act No 312/2008 Coll.

[3] Biology online: http://www.biology-online.org/dictionary/Animal.

[4] On-linedictionary:http://www.google.com/search?hl=en&rls=com.microsoft:cs:IE-SearchBox&rlz=1I7GGLL_en&defl=en&q=define:animal&ei=21rwS_a6DsuUONmXhPwH&sa=X&oi=glossary_definition&ct=title&ved=0CBkQkAE.

[5] http://www.kidport.com/reflib/science/animals/animals.htm.

[6] C. H. Eisemann et al., Do insects feel pain? — A biological view, Cellular and Molecular Life Sciences, 1984: 164–167.

[7] George B. Stefano et al., Enkelytin and opioid peptide association in invertebrates and vertebrates: immune activation and pain, Immunology today, Volume 19, 1998: 265–268.

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[9] Act No 246/1992 Coll. section 5g, Act No 246/1992 Coll. section 5h.

[10] Act No 246/1992 Coll. section 8.

[11] Act No 246/1992 Coll. section 4a letter b.

[12] Act No 246/1992 Coll. section 27 para 1 letter a.

of up to 200,000 CZK[13].Since, invertebrates are not animals, there is no problem of promoting cruelty towards them. Every commercial of some preparate against ants or cockroach on TV is actually promoting their killing. Also, an actor in a movie can, without any problem, step over and crush a bug with his shoe. If he would have stepped on a kitten – it would be cruelty towards animals.

Another topic which can be discussed in the comparison of vertebrates and invertebrates is the protection of farm animals (in this sentence "animal" means a living creature). The protection of farm animals is discussed in part four para 9 of Act 246/1992 Coll. This part of the Act deals with animal welfare during their breeding/keeping on the farm such as: appropriate lighting, appropriate size of groups of animals, appropriate breeding methods and so on. There are no definitions in this law, for example, in case of a farm of snails (that would be later supplied to the French restaurants in the area). The owner of the snail-farm can be guided by the "food laws" such as 852/2004, but, again, the welfare of those snails is not taken into consideration. "Food laws", also called as the "food hygiene package"[14] are several regulations that deal with manufacturing and production of edible products. With regard to public health, the rules from these regulations contain common principles and requirements. Regulation 853/2004 (EC) of the European Parliament and the Council lays down specific hygiene rules for food of animal origin. Section VII of this regulation deals with rules regarding live bivalve molluscs. It also lays down requirements for production areas of bivalve molluscs. In the writes opinion, regulation 853/2004 deals mainly with harvesting of molluscs and handling after harvesting. It does not deal with animal welfare in the harvesting areas (unless it is so bad that the conditions are non-hygienic). Regulation (EC) 852/2004 deals with general hygiene of foodstuffs. It lays down the general rules of hygiene of foodstuffs and the procedures for verification of compliance with these rules. Regulation (EC) 854/2004 of the European Parliament and of the Council lays down specific rules for the organization of official controls of the products intended for human consumption. In its Annex II, it contains rules for official controls for bivalve molluscs, live echinoderms, live tunicates and live marine gastropods placed on the market. The species mentioned above should go through several examinations before placing on the market. These examinations include: organoleptic examinations, freshness indicators, histamine, tests for residues and contaminants, microbiological checks, parasites and poisonous fishery products. Regulation (EC) 178/2002 lays down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety. This regulation states that food should not be placed on the market if it is unsafe.[15] It also lays down responsibilities of food and feed business operators[16]. Food business operators that have a business for mass production of edible invertebrates have to respect the rules of the "food laws" which are basic hygienic guidelines. They don't have to respect the welfare of the invertebrates that they own.

It is interesting that some diseases of non-vertebrates are mentioned on the lists of the OIE (World organization for animal health)[17]. On its website, OIE provides the public and the veterinarians on how to diagnose, stop the distribution and deal with diseases that are on its list. It also provides disease distribution maps, disease outbreak maps and different reports of appearance of the disease. The diseases are divided into diseases of aquatic and terrestrial animals. In the terrestrial diseases we can find, for example, the Acarapisosis of honey bees. This disease is actually an infestation with the honey bee tracheal mite (*Acarapis woodi*), which develops in the tracheal breathing apparatus of the honey bee. An example of aquatic invertebrate on the OIE list is the Infection with Bonamia ostreae. Bonamia ostreae is an intracellular parasite that causes the destruction of the hemocytes of the oisters. The diseases that are mentioned on this list are diseases of economically important species. Occurrence of such a disease can cause large economic losses.

Invertebrates are not found also in the decree which names the animal species requiring special care. This is the Decree 411/2008 which is specifying species of animals requiring special care. Decree 411/2008 stipulates pursuant to section 29 para 1 of Act No 246/1992 Coll. The scope of application of the Decree includes: animal species requiring special care, animals that require special care and need special identification and specimen application for approval of breeding of animals mentioned above. In this decree, the invertebrates are also not mentioned. Animal species requiring special care, according to this decree, belong only to the following classes: Reptilia, Aves and Mammalia. Representatives of the class Reptilia are cold-blooded air-breathing vertebrates with completely ossified skeleton and a body usually covered with scales or horny plates[18]. All poisonous species in this class are considered as requiring special care, as well as all the species of the order Crocodylia (which is one of the orders that belong to the class Reptilia). Members of the order Crocodylia have thick scales and bony plates and are found in marshlands, estuaries, and saltwater. They are mostly of a large size and almost all species pose as potential threats to humans[19]. Birds (Class Aves) are a diverse group of vertebrates; they range in size from the massive Ostrich to the minute Bee Hummingbird. All birds have three basic common features: feathers, beak

[13] Act No 246/1992 Coll. section 27 para 10 letter b, Act No 246/1992 Coll. section 28 para 17 letter b.

[14] Regulation (EC) 852/2004, Regulation (EC) 853/2004, Regulation 178/2002, Regulation 854/2004.

[15] Regulation 178/2002 of the European Parliament and of the council laying down general principles and requirements of food law, Section 4, article 14.

[16] Regulation 178/2002, article 17, article 18, article 19.

[17] http://www.oie.int/eng/en_index.htm.

[18] http://wordnetweb.princeton.edu/perl/webwn?s=reptilia.

[19] http://www.angelfire.com/mo2/animals1/reptile/crocodylia.html.

and furcula ("wishbone")[20]. Birds that require special care are: order Casuariiformes, order Falconiformes (family Accipitridae genus Aquila, Hieraaetus, Pithecophaga, Spizaetus, Hapria and Hiliaetus), order Strigiformes (family Strigidae genus Bubo), Gruiformes (family Gruidae genus Grus) and Ciconiiformes (family Ardeidae genus Ardea, Ardeola and Egretta). The order Casuariiformes is an order of large ratites. Order Falconiiformes includes birds of prey. Many well-known birds, such as hawks, eagles, kites, harriers and Old World vultures are included in this group. Order Strigiformes are the owls. Traditionally, a number of wading and terrestrial bird families that did not seem to belong to any other order were classified together as Gruiformes[21] (examples are cranes, rails and crakes). In class mammalia, the following animals are mentioned: Carnivores excluding domestic dogs, domestic ferrets and wild game kept in captivity. Order Proboscidea which includes the elephants. Order Perissodactyla contains odd-toed ungulates such as tapirs and rhinos (excuding those registered according to act on breeding such as horses, donkeys and mules). Order Artiodactyla (even-toed mammals, excuding those registered according to act on breeding). Even-toed animals are, for example, giraffes. Dangerous invertebrates are not mentioned on the list of the species requiring special care. This way, a person can raise his tarantula in any way he wishes, if it does not endanger the public.

In the author's opinion, the invertebrates should be presented more in the Czech laws. If presented more, the small creatures themselves would be more protected. So far, any person could do whatever he wanted with an invertebrate, even if the invertebrate did not belong to him. Of course, punishing a person for stepping on an ant in the street makes no sense. This killing happens every day as a human mistake which is usually not even noticed. We have to remember that some invertebrates are parasites (fleas, ticks) that must be destroyed for the welfare of vertebrates and even humans. Nevertheless, invertebrates should not be underestimated. They can be important for the environment, important source of income of even dangerous. Killing of one ant might not carry extreme results, but destroying a colony can lead to some environmental changes. Same applies to the destruction of the bee hive. Such destruction can damage the environment and to the budget of the family that owns the hive. Please, don't forget that some of the invertebrates might feel some pain, thus killing them in some non-human ways should be considered as torture. The Czech Act on the Protection of Animals against Cruelty (Act No 246/1992 Coll.) should be extended to protect the invertebrates or at least large groups of invertebrates.

Probably, there should be some guiding regulations regarding invertebrate species requiring special care. Some special rules for owners of dangerous invertebrates should be added into Decree 411/2008 (Act specifying animal species requiring special care). If extended, this act will protect better humans from dangerous invertebrates and also invertebrates from dangerous humans.

[20] http://animals.about.com/od/birds/p/aves.htm.
[21] http://en.wikipedia.org/wiki/Gruiformes.

Tradition of the Czech Constitutional System

Karel Schelle [1]

About ninety years ago, in 1920, first Czechoslovakian Constitution, which considerably affected the development of the constitutional system in interwar Czechoslovakia, was passed. This Constitution also served as a significant model for drafters of the contemporary Constitution. Let's remind ourselves of some of the ideas on which the Constitution was based.

* * * *

The Constitution was based on the theory of separation of powers and natural law theory. Moreover it was grounded on sovereignty of people and fiction of single Czechoslovak nationality and "association with League of Nations.

Its destiny however was considerably complicated. It had been in force until 1948, when replaced by the Constitution of May 9, but its effectiveness can be considered from two different points of view – effectiveness "de facto" and "de iure". "De facto" the Constitution was in force until the Munich Pact, but "de iure" is was effective until 1948.

It was one of the seven democratic European constitutions adapted after the World War I and despite of some controversial provisions, it became a steady pillar of democracy. In the Thirties, Czechoslovakia was the only state, among countries having newly adapted democratic constitutions, in which democratic constitution remained, as due to social instability in certain countries, e.g. Poland, Romania, Austria and Germany, authoritarian regimes were established.[2]

In the heading of the Constitution there was a declaration, which was worded by national democrat Dr. J. Herben and inspired by the American Constitution. In this declaration, there were expressed the motives that had led to adapting Constitution and it also declared that the Constitution and all other laws be exercised in context of our history and modern principles contained in the motto of self-determination and with a goal of joint the League of Nations as an educated, peace loving, democratic and progressive member. The Preamble proclaimed uniformity of Czechoslovak nation, establishment of just order, ensuring peaceful development of the State and general welfare of all citizens. All this was supposed to be done in compliance with modern principles of constitutionality. The Preamble referred to history of a nation and, as well as now the Constitution of the Czech Republic does, it proclaimed devotion to *"all good traditions of the old statehood of the Kingdom of Bohemia and Czechoslovak statehood."*

Despite being a part of the Constitution, the Preamble was not of normative nature. Nevertheless it was often criticized during the era of the first republic and the critique was based on the two following reasons. Members of national minorities did not like the expression "We, the Czechoslovak nation" as the only lawmaking subject in the Constitution and supporters of Slovakian autonomy opposed the principle of Czechoslovak nation, which was used in this document.

This proclamation was followed by an introductory act, which consisted of ten articles. They stated that the Constitution was an act of the highest legal power, which can only be supplemented by acts entitled "constitutional". Further, all acts that did not comply with the Constitution were revoked. The importance of the introductory act is considered from many different points of view by professionals. Some authors look on is as such a provision that modern constitutions call "transitory" or "final",[3] but there are also authors who consider this introductory act as more important than just mere transitory provisions.[4]

Further, there was laid down the competence and structure of Constitutional Court, which was supposed to make decisions about whether laws or the Republic and laws adapted by the Assembly of Carpathian Ruthenia comply with the Constitution. The Constitution also referred to implementing regulations, which were to set out details. It was especially the Act No. 162/1920 Coll. on the Constitutional Court.

The introductory act also included transitory measures for a period between passing the Constitution and constituting

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[2] Zimek, J.: *Ústavní vývoj českého státu,* Brno 1996, p. 37.

[3] For instance. Gerloch, A. et al.: *Ústavní systém ČR,* Praha 1994, p. 17.

[4] See. Zimek, J.: *Ústavní vývoj českého státu,* Brno 1996, p. 39.

[5] This provision was looked on by some members of Constitutional Committee unneeded. Nonetheless F. Weyr was a strong supporter of it saying that despite not having any meaning "de lege lata", this provision did not make any harm to anybody and thus it is okay if it stayed in the text of the Constitution. (Broklová, E.: *První československá ústava. Diskuse v ústavním výboru v lednu a v únoru 1920,* Praha 1992, p. 26).

new bodies of the State power and moreover it laid down some of issues of temporal applicability and others.

In the Chapter I of the Constitution, which is entitled General Provisions, were defined the fundamental principles of the form of Government and its regime. Czechoslovakia was characterized as a democratic republic having an elected President. The basic political and legal principle was *sovereignty of the people* and the people were looked on as the only source of the state power.[5] The territory of the Republic was a uniform and integral unit and its borders could have been changed only by a constitutional act.

This chapter included also provisions defining the status of the Carpathian Ruthenia, which was to get very broad autonomy. Constitution of a special Assembly for this region and an election of a Governor, who would act as a head of the Carpathian Ruthenia, were expected. These principles, however, had never been carried out in the sense contemplated by the Constitution.

While forming the provision on the Carpathian Ruthenia, the lawmakers draw upon the small Treaty of Saint-Germain of September 10, 1919. Comparing the wording of this Treaty with the wording of the Constitution, we however can see that there are a couple of differences. For example, the provision saying that Czechoslovakia shall provide the Carpathian Ruthenia with the broadest autonomy compatible with uniformity of Czechoslovakia was adapted. The peace treaty mentioned an assembly that was supposed to have lawmaking powers (exercera le pouvoir législatif) in linguistic, educational and religious issues and issues regarding local administration and other issues. The Constitution avoided the term of legislative power and instead it used the following definition *"is competent to resolve on laws"*. This definition however was a common subject of discussion of legal theorists.

The peace treaty also included a provision on executive power *"pour les questions d'administration locale"*. The concept of *"administration locale"* was adapted into the Constitution as "local administration", which induced contradictory reactions.

Some of the definitions defining the relationship between President and the Assembly of the Carpathian Ruthenia were not completely thought through. The Constitution set forth an absolute veto against resolution of the Assembly as opposed to the relationship between President and National Assembly where President's veto was only of suspensive nature. There were a number of similar provisions that did not comply with the peace treaty.

A General Statute of the Carpathian Ruthenia was issued by Government in November 1919. However it was only in a form of its resolution and it was not even published in the Collection of Law and especially did not included institutional forms of autonomy. The following years were more or less characterized by a tendency towards establishing general principles of administration valid throughout the whole Republic, which established themselves in connection with the reform of administration in 1927. This was not even altered by the fact that the office of Governor was kept and Governorate Council as an advisory committee was established (confer especially the Government decree No. 356/1920 Coll. and the Act No. 172/1937 Coll.), because the autonomy statute was not realized.

The following chapter regulated legislative power, which was granted to a bicameral National Assembly, which consisted of Chamber of Deputies and Senate. In the context of this, a forfeiture of lawmaking and administrative powers of Country Assemblies was proclaimed.

The Constitution did not allow anyone to be simultaneously a member of both Chambers and it also defined such persons or offices which the incompatibility applied to (members of the Constitutional Court, state service employees could not be Deputies and Senators). The Act No. 144/1924 Coll. contained the details regarding incompatibility of members of the National Assembly.

The Chapter III of the Constitution, regarding executive and governmental power, was introduced by a provision on basis of which it was possible to issue decrees only to implement a law and within an extent of a law. Thus Government was granted a power to issue generally binding legal measures however only secundum et intra legem as it is usual in the democratic regimes. The other provisions of this Chapter were about President.

All governmental and executive powers which were not reserved for President were granted to Government.

The Chapter IV of the Constitution on judicial power contained especially principles common in democratic states following the rule of law. These were principles of independent judges, legality, publicity and verbality of court proceedings, principle of accusation, state's responsibility for a damage caused by illegal decisions, separation of judiciary from administration, a right of every citizen to a legal judge, and others.

The powers of judiciary could have been carried out only by ordinary courts. Nonetheless there were some exceptions regarding criminal proceedings – in extraordinary cases, the Constitution allowed that extraordinary courts may be established – however this applied only to a period stated in a law and under statutory conditions. This excluded the existence of permanent extraordinary courts and ad hoc courts.

Principally, the Constitution adapted the then actual approach to the system of courts – civil issues were dealt by ordinary courts, extraordinary courts, e.g. insurance, labor courts and arbitrary courts, e.g. stock exchange and miner courts. Criminal issues were dealt by general (citizens') and military courts and even the concept of juries was being considered. The judges were appointed for life and they could be transferred, recalled or pensioned against their will only if special cases contemplated by law.

The provision under which judges dealing with a certain legal issues were entitled or to be more precise were obliged to investigate whether a legal act is valid (this applied only to properly announced laws) was very important. If a judge found out that a decree was not valid, such a judge acted as if such a decree had never been issued.

This Chapter also contained provisions on President's powers to grant a general pardon, and excuse or mitigate punishments, etc.

In the Chapter V of the Constitution, there was a broad list of citizens' rights, freedoms and duties. Especially, equality of citizens and occupations was announced. Thus all other residents living in the territory of the State had the same rights.

Titles, except academic ones, could only have been granted for purposes of indicating an office or an occupation, which adapted the wording of the Act No. 61/1918 Coll., which abolished nobility, orders and titles.

Personal freedom was guaranteed and it could only have been limited or taken away on the basis of a law. This applied to residential freedom and privacy of correspondence. The details of this rules were aggrandized the Constitutional Act No. 293/1920 Coll. on Protection of Personal and Residential Freedom and Privacy of Correspondence. The Act No. 300/1920 Coll., as amended, stated the circumstances and causes on the basis of which the abovementioned fundamental freedoms could have been limited. Moreover, freedom of movement over the whole territory of the Republic, right to free enjoyment of an occupation and a chance to leave the Republic for a foreign country were guaranteed as well. There was an explicit protection of private property, which could only have been condemned on the basis of an act and compensation for it had to be granted.

Further, the Constitution included also freedom of press, right to petition, and freedom of assembly and freedom of association between civil rights and these rights and freedom could have been limited only in cases defined in laws. This approach was adapted by Czechoslovakia from the old monarchy. However in some cases, new measures were passed, e.g. as for the freedom of press.

Within a framework of a law, anyone could express their ideas publicly, i.e. in words, by pictures or press and by other means. Especially, a right to scientific research and right to publishing outcomes of such researches and freedom of artist activities were reserved. The details of such guarantees were contained in older laws regarding status of universities and professors, which were supplemented by the Act No. 79/1919 Coll. on Service Relationship of University Professors.

Moreover, freedom of taught and religion, right to exercise any religion, faith, equality of all religions were announced.

In the period of less than twenty years of the so-called First Republic, there were passed eight constitutional acts, by which the Constitution was supplemented without any changes made directly to its wording. It was, for instance, the Constitutional Act No. 234/1920 Coll. on Representation of Siberian Legionaries in the Chamber of Deputies, the Constitutional Act No. 236/1920 Coll. on Naturalization and Losing Citizenship and Right to Residence, the Constitutional Act No. 294/1920 Coll. on Signing Laws and Decrees, the Constitutional Act No. 152/1926 Coll. on Granting Czechoslovakian Citizenship to Some Individuals, and the Constitutional Act No. 102/1930 Coll. on Adjustment of Frontiers with Germany, Austria and Hungary.[6]

[6] On the constitutional development of interwar Czechoslovakia see especially: Vavřínek, F.: *Základy práva ústavního,* 7th eddition, Praha 1933; Weyr, F.: *Československé právo ústavní,* Praha 1937; Weyr, F.: *Ústavní vývoj československý v roce 1938,* Časopis pro právní a státní vědu, 27, 1946, p. 20–36; Neubauer, Z.: *Dnešní ústava republiky Česko-Slovenské,* Všehrd, 20, 1938–1939, p. 33–38. From the so-called socialist sources see especially Laco, K.: *Ústava predmníchovskej ČSR a ústava ČSSR,* I. Bratislava 1966; Rattinger, B.: *Nástin ústavního vývoje předmnichovské republiky,* Praha 1964.

Local Referendum in the Czech Republic – History and Present Days

Jaromír Tauchen [1]

1 Introduction

In connection with the political, social and economic changes that took place in Czechoslovakia after the "velvet revolution" of 1989, there were a number of major changes on the field of public administration too. People's committees were abolished and self-governing municipalities have been established and therefore democratic local self-government was restored. Bringing to life the concept of local referendum has enabled people to participate directly in making decisions about public issues of local importance.

A direct participation in administration of public issues is one of the fundamental political rights of citizens of the Czech Republic. Local referendum enables citizens to take a direct part in administration of public issues however this right applies only to certain areas. Local referendum is an efficient form of direct democracy in which public power is realized directly by such entitled individuals who, by means of local referendum, express themselves on issues concerning future development of a city of village for within the scope of self-governance.

2 A Look at the Past

The very beginning of direct democracy on municipality level may be found already in post war period. After the World War II ended, so-called People's Committees were heads of municipalities. The communist Constitution of 1948 characterized People's Committees as *"bearers and executors of state power in municipalities, districts and regions and are protectors of rights and freedoms of people."* Municipal issues were being dealt more and more by administrative officials than by elected self-governing bodies and such elimination of self-governing function lead to relevant decrease in interest of citizens in operation of People's Committees.

The Government Decree No. 14/1950 Coll. on Organization of Local People's Committees included so-called public debates into the scope of work of People's Committees. The purpose of such the public debates was to resurrect communication of bodies of People's Committees with citizens. According to expectations, citizens were supposed to have a chance to attend such debates and by raising their topics, suggestions, critical reservations and complaints about operation of local People's Committees.

In 1954, the Constitutional Act on People's Committees, which defined People's Committees as local bodies of state power of working peoples of Czechoslovakia, was passed. It is also important to mention the change regarding operation of Commission of People's Committees. The Commissions consisted of elected members of People's Committee they were entitled to establish so-called "board of actives", which were usually led by a member of the Commission – a member of People's Committee and these boards were supposed to make it possible for citizens to participate in operations of People's Committees. Very often, they dealt with complaints made by citizens and watched activities of particular executive divisions.

The Act No. 36/1960 Coll. on Regional Divisions, which contemplated to evolve broad cooperation with citizens, brought big change. People's Committees were to cooperate with other organizations of working people.

Especially so-called public discussions, defined in the Act on People's Committees, were supposed to be held. While performing its tasks, Council of People's Commissions was to use discussion to deal with essential issues, consult certain issues with other social organizations – especially while preparing important decisions of People's Committees. Further, with the aid of deputies, they were to organize Street Committees, Community Committees and Women Committees that were to take care of certain events. This Act also stated that all union members of People's Committees were supposed to hold deliberations with citizens, attend meetings and discussions of citizens with representatives of People's Committees and support activities of citizens by all available means. The leaders of divisions were to take proper care of correct and timely dealing with comments, proposals, complaints and other citizens' issues, which they were entitled to deal with.

The Act No. 69/1967 Coll. on People's Committees even included provisions on consultative referendum. A territorial People's Committee was entitled to decide that prior to making decision on a particular fundamental issue of public life, e.g. zoning, merger of villages or other crucial territorial changes,

[1] JUDr. Jaromír Tauchen, Ph.D., LL.M.Eur.Integration (Dresden); Faculty of Law, Masaryk University Brno, Czech Republic.

such an issue be submitted to citizens so that they could deliberate it as well. Notwithstanding that the procedure of referendum was not expressly defined, these measures were carried out in practice by means of doing polls.[2]

In connection with the changes that took place after November 1989, democratic local self-government in Czechoslovakia was restored. The Constitutional Act No. 294/1990 Coll. of July 18, 1990 amended the Constitution of 1960 and thus created basis for leaving the concept of People's Committees and restoring local self-government. It stated that *"the bases of local self-government are villages (municipalities) and the issues of local self-government are decided by citizens at village gatherings or by means of a referendum or Municipal Board."* The abovementioned article however did not include detail rules on how it shall be hold. Any laws regarding procedures of village gathering have never been passed.[3] Local referendum was also laid down in the Act No. 367/1990 on Villages, which stated that by means of local referendum, citizens decide whether a village should be divided or a couple of villages merged. In the Nineties, the concept of local referendum was set forth in the Act No. 298/1992 Coll. on Local Referendum.[4]

3 The Contemporary Legal Measures for Local Referendum

Under the Constitution (the Constitutional Act No. 1/1993 Coll.), the Czech Republic is a democratic state and the people are the only source of the state power, which is carried out by means of legislative, executive and judicial bodies. A constitutional act may state in which cases the people shall carry out their power directly. A constitutional act on local referendum has not been adapted yet.

The Charter of Fundamental Rights and Freedoms (the Constitutional Act No. 2/1993 Coll.) says that *"citizens have a right to participate in administration of public issues directly or by electing their representatives."* The right to participate in administrating public issues is one of so-called political rights.

Nowadays the concept of local referendum is included in the Act No. 22/2004 Coll. on Local Referendum, which entered into force on February 1, 2004. The Act on Local Referendum regulates referendum on the level of villages only and does not apply to regional referendum (regional referendum has not been defined in laws until this year when the Act No. 118/2010 Coll. on Regional Referendum was passed – this Act is to become effective on January 1, 2011). The Act on Local Referendum also includes a possibility to hold a referendum in only a part of a village territory. Since Prague is considered to be a municipality (village) and a region, such a referendum may be held there as well.

Local referendum may be hold in two cases: obligatorily and nonobligatorily. As for the obligatory holding of referendum, it has to take place when a village (municipality) is to be divided. If it is to be decided whether a city district shall be established or dissolved, local referendum can be held too. However this is nonobligatory.

Every person that has a right to elect a member of Municipal Board of a village is entitled to vote, i.e. it is every individual older that eighteen, who is a citizen of the Czech Republic and is a permanent resident of the village in which the local referendum is held. Since May 1, 2004, every citizen of any member state of the European Union, older than eighteen, is entitled to vote in village elections (and thus this applies to local referendum as well) if such a person is a permanent resident of the village. As well as to election, the principle of secret ballot applies to referendum and it is based on general, equal and direct right to vote.

As opposed to election, local referendum is always as held in one day. The actual day and time of casting ballots is scheduled by Municipal Board. Local referendum has to take place within ninety days from the date of its announcement, which is the first day on which the decision made by Municipal Board was published on official board of relevant Municipal Office.

Only such issues that are subject to the scope of independent powers of municipalities may be a subject of a referendum. The scope of independent powers is generally defined in the Section 35 of the Villages Act, i.e. the Act No. 128/2000 Coll. Thus it covers such situations which are to be made in favor of a village and its citizens if however regions are not entitled to make such decisions and if it is not subject to the scope of powers delegated by a state.

The Local Referendum Act allows two types of referendums: ratification referendum and consultative referendum. The purpose of ratification referendum is to make direct decision about a certain issue that is subject to the scope of independent powers of a village and if such a village is entitled to make a final decision, e.g. decision on how public property should be administered. The purpose of a consultative referendum is to find an approach of a village to a certain issue.

The Act determines a number of questions which cannot be a subject of a referendum, e.g. local fees and village budget, establishing and dissolving village's bodies and illegal questions. Local referendum cannot be on such issues that have already been a subject of a referendum in the last 24 months prior to such a referendum.

Under the contemporary legislation, local referendum may be initiated by Municipal Board or by so-called preparatory committee. Municipal Board can make a decision that local referendum be held if such a decision is supported by plurality of members of a relevant Municipal Board. Holding a local referendum is regarded as executing self-governance, which means that villages have to take complete care of it and any costs have to be covered from their village budget. Local referendum is announced by

[2] Filip, J.: *Ústavní právo ČR*. Brno : Nakladatelství Doplněk, 2003, p. 395.
[3] Filip, J.: *Základní pojmy místního referenda.* Státní správa a samospráva, 1997, No. 24, p. 3.
[4] On changes in self-government in the Nineties see: Schelle, K., Tauchen, J. et al.: The Process of Democratization of Law in the Czech Republic (1989–2009). Rincon (GA) : AICELS, 2009, pp. 154 and others.

publishing a decision about local referendum made by Municipal Board on an official board of Municipal Office. Such a notice needs to be published for a minimum of fifteen days.

Local referendum is also held if a preparatory committee proposed that it be held and Municipal Board that decides whether it should be announced. A preparatory committee has to consist of a minimum of three entitled people. An agent of a preparatory board acts in behalf of such a preparatory committee, as the preparatory committee itself is not capable of carrying out legal acts. A proposal drafted by preparatory committee has to be signed by at least such percent share of entitled individuals that the statute requires for a particular size of a municipality (village). For instance, as for municipalities that have less than 3 000 residents, the proposal shall be signed by at least 30% of entitled individuals. Municipal Board has to options, it either decides that local referendum be announced (if law allows local referendum about the question that was proposed) and, further, it sets a date on which it shall be held or the Municipal Board decides that local referendum not be announced.

The question proposed in local referendum has to be worded clearly so that it would be easy to answer "yes" or "no". For the purpose of local referendum, district commission shall be established and such a commission shall take care of the course of local referendum in a particular district. Especially, it watches over proper process of casting ballots and moreover it counts ballots.

The Act on Local Referendum distinguishes between validity and binding force of a decision adapted by means of a local referendum. Valid decision is a decision that was adapted by means of a local referendum if at least a half of entitled persons recorded in lists of entitled persons attended. A decision that was adapted by local referendum, if supported by majority of entitled persons that actually cast a ballot, is looked on as binding.

The law expressly states that Municipal Board and bodies of a municipality are bound by a decision adapted by local referendum. If Municipal Board or other body of a municipality does not comply with the decision adapted by local referendum which was held in respect to an issue belonging to the scope of independent powers of a municipality, a head of a Region office asks Municipal Board to correct it within two months. If Municipal Board does not follow such a request, Region office informs immediately Ministry of Interior about it and this Ministry then dissolves the Municipal Board in question. A municipality may file an action against such a decision.

4 Conclusion

In the Czech Republic, local referendum enables citizens to participate directly in administration of public issues and thus it shall be understood as an effective form of direct democracy. Citizens express their approach to a particular question that relates to the life in a municipality. Notwithstanding that by means of referendum citizens may participate directly in the decision making process in a municipality, local referendum is not used very often and is more or less exceptional. We will see if region referendum, which can be announced after January 1, 2011, will be used in practice.

Production & Operations Management Strategy of the company

Jiří Myšík [1]

1 Introduction

Who is JST?

We are one of the world's largest manufacturers of electrical and electronic connectors. We are committed to contributing to social progress and innovation for the new age, and to continuing our company-wide efforts from a broader international viewpoint toward the development of all types of systems for connecting electric power and electronic devices.

We are geared towards total efficiency, serving with high productivity, and micron-level precision.

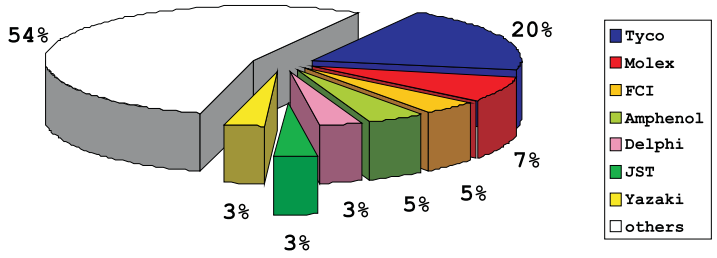
Connector Market and JST's Position

World Connector Market

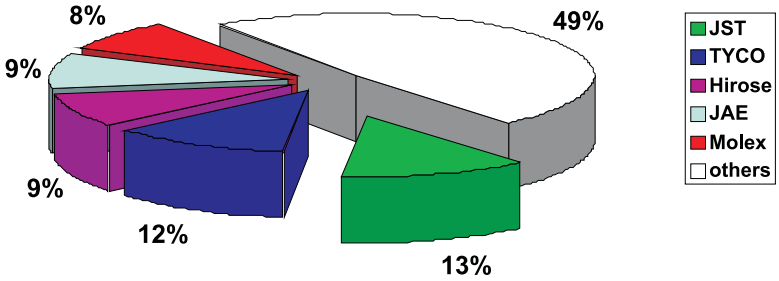
Annual Market Size 2005;
35,484 Million USD

World Rank	Manufacturer
1	Tyco Electronics
2	Molex, Incorporated
3	Amphenol Corporation
4	FCI
5	Delphi Connection System
6	
7	Yazaki
8	Foxconn (Hon Hai)
9	Hirose
10	JAE

World Connector Share



Japanese Market Share



In August of 1984, JST Deutschland GmbH was founded as a wholly owned Subsidiary of J.S.T.-Mfg. Co. Ltd. Osaka/Japan, established in 1957. At the beginning only loose piece terminals were being manufactured and distributed, today JST manufactures and sells all over the world connectors into the Consumer Electronics, Telecommunication, Medical, Camera Industry, Computers. Since 1993 J.S.T. is developing connectors especially for the automotive market and their system supplier. With a special intern organization (the J.S.T.-Automotive Group) J.S.T. will support the automotive market much better in case of design and service. Beside the known quality standards, the J.S.T.-Automotive Group is a competent and strong

[1] Jiří Myšík, MBA, MSc.

partner for design and development of special customer solutions and future oriented technologies. In the year 2005 a new R&D Centre was opened in Bensheim Germany.

The JST Group has always held to the belief that every product we manufacture must excel at meeting the needs of the customer. This approach reflects our steadfast adherence to several principles: to develop products with the utmost speed, to manufacture only the components that demonstrate the highest reliability and quality, to ensure timely delivery trough meticulous processing and inventory management and to reduce costs by improving of efficiency.

We are committed to contributing to social progress and innovation for the new age and to continuing our company wide efforts from a broader international viewpoint toward the development of all types of system for connecting electric pover and electronic devices.

Since our company's founding in 1957, the loyal patronage of our customers has enabled us to achieve substantial growth.

4. Range of products

With this general product portfolio, as well as customized products, we are successful in the following markets

- Telecommunication
- Consumer Electronics (Brown Goods)
- Automotive
- Industrial Equipment
- Office Automation
- Medical Appliances
- Domestic Appliances (White Goods)

As our company name implies, Solderless Terminal, has real significance.

When JST was established in 1957, we were Japan's first manufacturer and distributor of Solderless Terminals.

Our founder Mr. Teiji Takahashi named it as Acchaku-Tanshi, which is used in Japanese Industrial Standard, JIS.

JST's technology of electrical connections, acquired by mass-production of Solderless Terminals, has continued to evolve dynamically, thanks to the development of the electronics industry in Japan.

The same technology has been used for chain terminals and diversified connectors as well as wire terminating tools and machines.

Many of the products that we make connectors for have been made more and more compact over the years.

Ultra thin PC connector for PC memory card, 0.5mm pitch board-to-board connector JMD, 0.5mm pitch FFC (Flexible Flat Cable)/FPC(Flexible Printed Circuit) connector FLZ and many other connectors have been developed and manufactured to comply with the various needs of the market.

JST's connectors have often enabled these dramatic improvements in size and function.

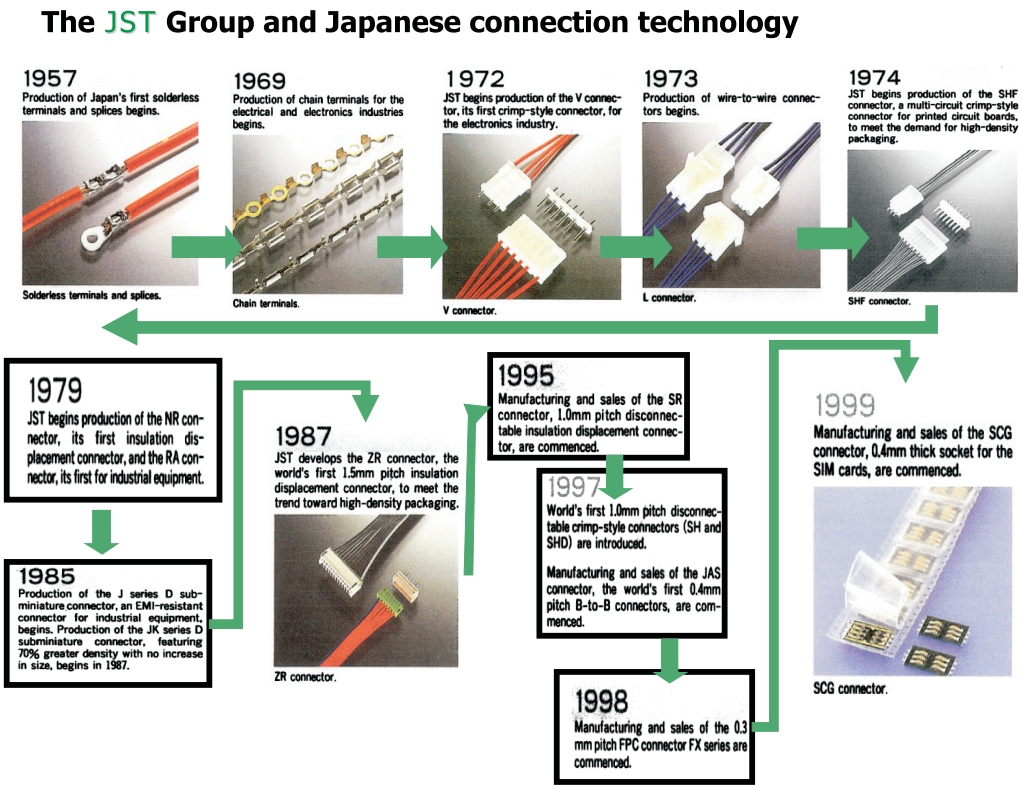
JST has an In-House Production System, from R&D of the product to the final manufacturing process.

We are geared towards total efficiency, serving with high productivity, and micron-level precision.

We started with a small Idea and at the current time we are proud to see backwards and can say this is our way.

I would like try to give you a taste of time in which our Product was developed.

Parallel History of JST Products



Trough our market based sales and development organisation, in which customer information is directly communicated from sales representatives into the development process, we can operate effectively in a flexible and responsive manner to simultaneously develop products and their production equipment prototypes. This applies not only to our development and production bases in Japan, but also to those outside Japan. Our progressive, industry leading approach has resulted in the development of our new and unique connectors.

JST Group is a global player. Except Africa we can be proud on presence on every continent.

Because JST is in Japan founded company the presence in Asia area is the strongest.

In the past twenty years more and more the European market is important. Espetialy on the automotive filed we get want to get more influence.

For your imagination I would like to show the JST as global player. Couple advantages results from the status of global player

- World-wide company / Global player on level of Sales, Production and Engineering.
- Big enough to cope, flexible and attentive enough to care
- Technical innovation
- Flat management structure with capable and motivated team through the complete structure.
- Creation of strong, friendly, human and open relationships.
- Financial situation – No loans – Family owned
- Customer focused

1.1 Solved problem

By quick analyses of production and operations management of our company we realy do not know if our approach to production management have systém or not. We want to know an answer to a question: „What do we do right and what is completely wrong?“ and „How we can improve our production management?“.

We also want to verify if production process, we do intuitively and we think it is the best, is possible to improve.

1.2 Assignment objectives

The objectives of the assigment is an anylyses SBU focuses to connector producing and completing of wire harnesses and its inside and outside environment and to recommend **production and operations strategy.**

After SBU description and its activities I do analyses. I will use standard analytical tolls to evaluate current firm position – SLEPT analysis, Porter five forces and analyses of internal factors.

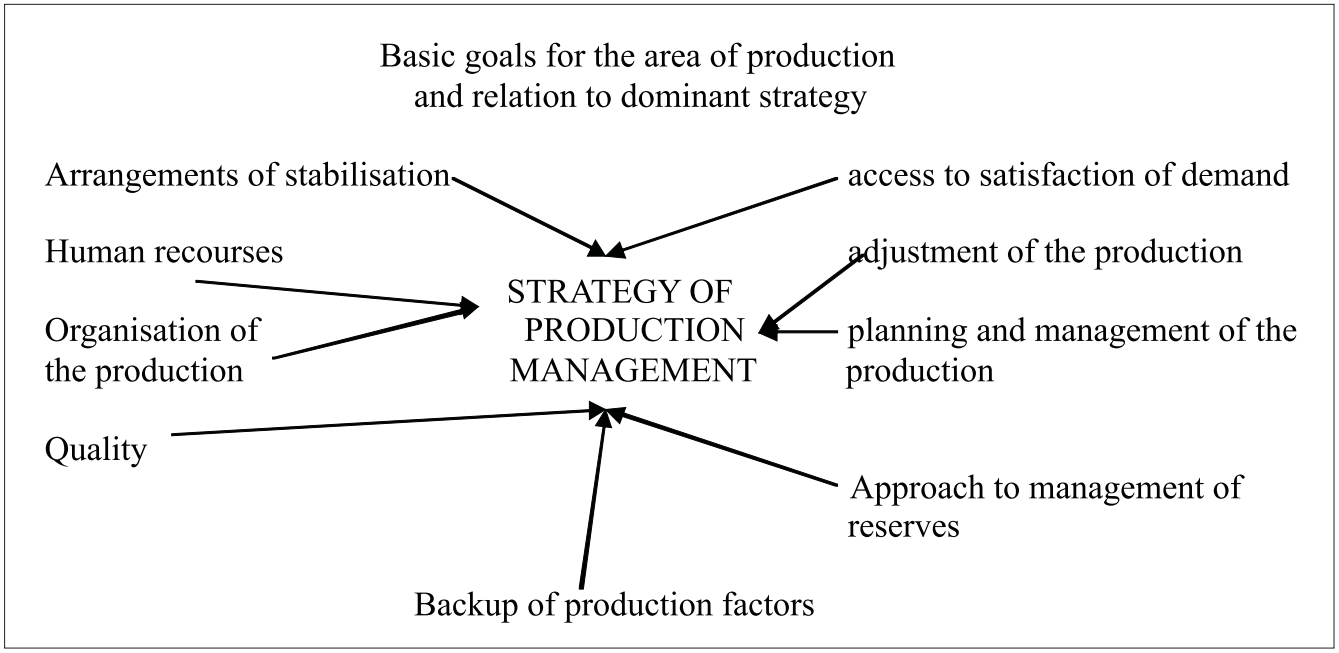
1.3 Theoretical concept of POM

The production and operations strategy primary follows priciples of Corporate strategy and following SBUs strategy and also results of used analyses.

I decided to use B.I.B.S. concept and I will apply this one to POM startegy. The structure is shown on pisture below[2].

[2] Source bibl. 3.

Figure 1-1: POM Strategy approach



2 Analyses

I use only relevant part of analyses [3].

2.1 Identification of superior strategies

The company has a strong focus on quality of services but copartners were not able to express any strategy but strategie exists in unwriten form.

Thus we should say vision of copartens have been a profit and satisfaction of clients with our service and work. Mission is profitability in accord with law, satisfaction of customers and emploeyes and the best quality product. I add a motto (slogan) „be i good connection".

Because there is no corporate and business strategy [4] there is also no production and operations strategy.

As I wrote, there is relevat only SBU focusing to producion of wire harnesses.

Identifining Business strategy of this SBU is not difficult. The goal is to serve to their satisfaction with our service. Defining a generic strategy is easy. It is **cost leadership**. We are focusing on saving money in production process. There is, of course, BUT. We have to keep a quality that brings us new contracts. I also have to say that production management is on high quality because of older of company. It spends most time with workers on the place and manage production directely (centralization).

2.2 The most important objectives of POM

The most important objectives were described in the text above. Those are quality and price. These two characteristics are really the most important.

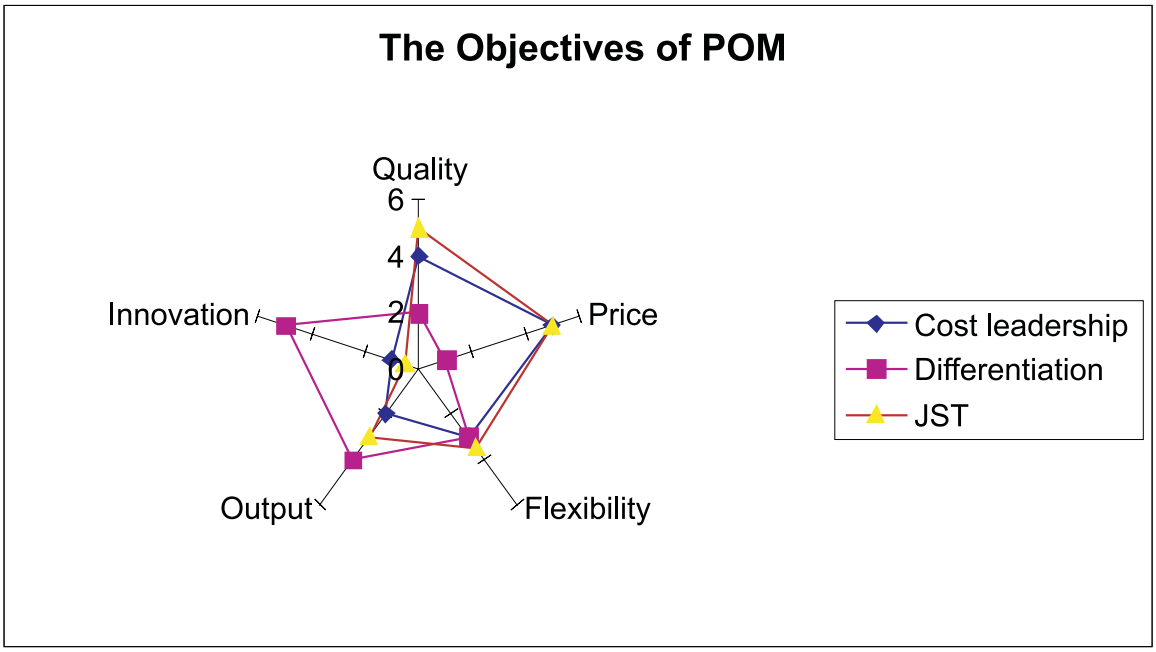
But our approach to quality is getting slightly changed. The reason is product. What is our product? It is necessarily part of each electronic products. The connection between two point transfering data, power, information, impulse... And what is quality? Generally the same as product – good and reliable product used by humans. But I feel that it is only output of quality approach. Our customes feel quality not only like single product but also as personal approach, quality of services and finally our flexibility. This experience forced us in front of question if huge quality during only producing is important or not. The answer is no. It is important only as a part of total quality and left huge quality and we take much more care of choosing right steps during pruduction process and next part of quality than only enormous quality during the whole process to keep the customer satisfait.

If I say we use cost leadership I mean we use most of atributes of it as press to getting expences down, centralization of management, unqualified labor, limited product range, using outsourcing, pull POM, product lay out.

For example I show a diagram [5] compare generic strategy and our firm.

[3] Bibl. 1., p. 39 – 40.
[4] Literature 1., p. 22.
[5] Source Bibl. 2.

Diagram 3-1:



2.3 Analyses of external factors

2.3.1 SLEPT analysis

2.3.1.1 Socioekonomical sector

There is a grow of GDP in our country and low inflatio (2,6% p.a.). It lets steady prices of labour and not difficult prediction of labour price. Despite this factors the state do not want to invest to microelektronic market.

The advantage for business is higher rate of unemployment, our region 6,5%, that presses for steady wyges and it is not so difficult to admit emloeyees. Equall the next advantage is lower wages in electronical branche, app. 12.000 Kč, that caused low labor expence.

O	T
Low labor expence	Decrising State investement to microelectronicery and microelectronic

2.3.1.2 Government sector

As I predicted government reform has got a devastative effects. VAT rate was move up to 19% for microelectronic service. It was placed us to difficult situation. It has basic influence to price of our service and volume of workers in our organization. And, of course, our competitors are not obligated to pay VAT.

The next damangeis a restriction to employ appointed period of time. This opportunity we use quiete strong because of season work. For examle during the fall as preparation for the Chrismas business

But now I really think more devastating situation of czech business by the government. The relationchip and the presece of our politians are sometimes point of some discussion between managers of big companies thinking about some investment in Czech republic.The same situation is under our managers of domestic companies. How should czech firms shelter if they have an example in our polician?

Our business is also under influence of grant rolling in from EU and our government and the money lead to increasing in electronic business.

I percive the politician behaviour, government desicions, in other part of legislation, as absolutely unfit and business environment destroyed. It is in part of taxes (tax weight, write-off terms), social field where redistribution leads to unwilligness to work and find a job and whole social and pensionable systém lead to unstability that demonstrate in one's doubt and finally in a wages press.

O	T
Grants	Politician behavior VAT Tax policy Social policy

2.3.1.3 Technological sector

Technological sector shapes only a little to our business, cuse there is our own technology standing to our disposal. We are able to equip our selfs with the lates kind of technology dedicatet to our produsing and mounzig process.

2.3.2 Porter's five forces analyses

2.3.2.1 The threats of new entrants

There is no problem to entrance to business we should say the threat of new enter firm is huge. There is not problem to obtain all necessary licences and permitions for our business.

O	T
	Huge possibility of new entrance

2.3.2.2 The bargaining power of customers

There is the biggest threat for us. Our company has got big customers and we are depent on staying in business with them The big threat comes from companies like Matsushita corporation or like Philips. The business with them is quiet strong dictating of prices. Also in automotive business is very big presure on price. It garantees big quantity of delivered product but in same time is there a lot of necessary poinzs to be folowed. The price is usually done and than work or „leave".

O	T
	Strong press to price Strong position of customers

2.3.2.3 The bargaining power of suppliers

The negotiation force of suplliers is not too strong. The main part of material are already both by our main company in Japan. There are stron position regarding negotiation and so we can use then as suplier.. There is not any threat of suppliers price press.

O	T
Low negotiation force of suppliers	

2.3.2.4 The threat of substitute produkts

There is theat. As the market is seeing after best price relation to quality and technology. There are company from middle east and mostly from China. This offers a lot of opportunities for other competitors.

In spite of human power know-how and experiences are quiet difficult replaced. We think that there is not too much firm using this knowledge. In spite of human power know-how and experiences are quiet difficult replaced. Equally there is necesary customer care and we still také care of them and oblige them. It is the way how we slim the treat of replacement of our work. Our competitive advance we have got because we eliminate the complain very fast and we have been ready to help when financing of our work have not been sure.

O	T
	Easy subsitution

2.3.2.5 The intensity of competetive rivality

We should say the business environment is oligopol with competitive rim Unhapilly the barrier of enter is really enormous. The power is in bigness and it is caused great negotiate position. The market adjusts so there are the service contractors and than there is a group used as suppliers to contracters. That is the group of small size and middle size firm. Those firms are really worn donw by contractors. The last group is „indipendents". Our company belong to this group and so our direct rivals (for example: Molex, Tyco el. ...). The advantage of our rivals is better knowledges of beeing longer on the domestic market. They have built very good position and work in standard quality. These companies purvey works alone as provider of service for municipality or an alternative seqments.

O	T
	Small size firm Middle size size firm Experienced firms

2.4 Analysis of stakeholders expectation

I next text I choose only the most important stakeholders.

2.4.1 Owners

The owners expect rising of their shares in the company.

2.4.2 Management

The management expects optimalization of POM, reduction of expences, rising of earning, saving of employees, reduction of stock.

2.4.3 Staff

The staff expect higher wages, shorter working hours and more benefits.

2.4.4 Competitors

They expect lower and much more complicated production and operation management that will finish our end.

2.4.5 State authorities

They expect rising of earning and taxes, higher employment.

2.5 POM strategy from life cycle point of view

It is quiet difficult to define point on life cycle curve. We offer service and I think that all aspects correspod to **saturation** part-standartization, unqualified labor, no product change, optimalization and press to getting expences down. I feel there is no possibility to make the product better and offer something more than competitors.

2.6 Analyses of each aspects of POM

2.6.1 Fundamental objectives of POM and sequence to superior strategy

The superior strategies was identified in chapter 2.1. We know that this SBU has cost leadership focus.

The fundamental objectives of production is keeping quality and price. We also try to keep production continous without any sways.

2.6.2 Approach of demand satisfaction

In our business is not any inovation and the product range is limited (if we accept that production is planting trees and consequently protect them againts animals and grass).

2.6.3 Production layout

We use product layout but we have a difference because our product is stable and another part of production is in move.

This bring some complications. One of them is weather (it sounds funny), next is, for example, accessability through terrain. Of course we solved partly this we buyed a 4WD pick-up that usually is able to pass terrain through. Our production has a lot manual work of employees.

2.6.4 Planning and management of production

Planning is proceeding in two level. One is year plan that is very raw and this plan falls down to month plans andin detail to week one.

The principle of planinng is pull and we prefer JIT. We also plan by priority.

2.6.5 Management of Stock and purchasing

The stock management and purchasing I feel as the worse part of production, specialy purchising and works with suppliers. Despite quiet well done plans we order material usually on last moment. It caused extra expence to find suitable material and of course in good and necessary quality.

The stock management is better. We usually use Just in time principle and we have minimum stock give us an opportunity of short reaction time.

S	W
	Purchasing by short disposition

2.6.6 Purchising of production factors

We use single sourcing of suppliers structure and we preffer easy change supplier. We have qiuet spred choice of them. We work on long-term partnership with most of our suppliers and we prefer suppliers with stable quality of their products.

S	W
Single sourcing of purchising Partner ship with suppliers	

2.6.7 Quality management

As I wrote above we changed our quality approach and we left the best quality level to acceptable quality level. It caused lower level of expence to quality. Now we control quality spotly. It is also necessary cause a lot of standards regarding safety and automotive norms.

2.6.8 Organization of production

The organizational structure is only two stage, but there are only two decesion makers. The decesion is centralized to those managers.

2.6.9 Human resources management

The company has strong status in goodwill. We have built goodwill up from the beginning of our existance and we have not slack this goal off during last period of time. It helps us to obtain contract especially from free hand. The suply company is not fixed by endcustomer.

The next advantage is long-standing experience of our workforces It makes easier continuance of work. On the second side there is a lot of long term habits that are complicated to brake up. Generally I should say we have qalified and educated workers in electronic business.

A staff-workers are motivated by new wage system but there is only a little space for creativity. It is only material part of remunerate. But the system was a little bit chanaged to press emploees to team working. There is also team bonus.

S	W
Experienced workers	

2.6.10 Stability aspects of production

This aspect we feel as important and we have some agreements limited the danger of stability.But those agreements are only about outsourcing of labor. We have not any insurance and we are not focusing to stock management – purchising that caused loosing opportinity to buy suitable material

S	W
Elimination of labor	Low stability except labor

2.7 SWOT analysis of the company

Figure 3-1: SWOT analysis

Strengths	Weaknesses
+ Experienced workers + Elimination of labor + Single sourcing + Partnership with suppliers	- Purchasing by short disposition - Low stability except labor
Oportunities	**Threats**
• Low negotiation force of suppliers • Grants • Low labor expence	• Barrier to Lesy ČR • No experience with selling wood • Easy subsitution • Strong press to price • Strong position of customers • Huge possibility of new entrance • Politician behavior • VAT • Tax policy • Social policy • Experienced firms • Middle size firms • Small size firms

3 Proposal of production and operations management

3.1 The most important objectives of POM

The most important objectives of POM follows business strategy. It is keeping quality that brings some job orders to the company and keeping a low price.

Next important objectives is keeping the process as fast as possible because of expences and using the experienced workers.

3.2 Proposal and recommendation by each aspect of POM

3.2.1 Fundamental objectives of POM and sequence to superior strategy

We still keep tha strategies of quality and price as is mantioned in chapter above. There is necessary to monitor our competitors, their price and quality. This activities must run

continuously and it will bring us new look to acceptable quaility and price.

3.2.2 Approach of demand satisfaction

There is no space to improve. There is only possibility to spred the range by outsourcing and selling.At first is neccesary to find a demand of customer.

3.2.3 Production layout

We are not able to change production layout. I only see a possibility in outsourcing in far region. The problems should be caused by outsoursing poeple we do not know and they should damage our quality reputation. We stay in present status.

3.2.4 Planning and management of production

There is also no reason to change present status.

3.2.5 Management of Stock and purchasing

The stock management and purchasing we need to improve level of time-planning and confirmation of purchase. There is necessary to plan purchasing and order promtly we know our request. And we have to confirm our commision including sanction to supplier. The best way I see is to made internal directive.

3.2.6 Purchising of production factors

This chapter is close-knit to previous one. Improve planning and specialy keeping to partnership with present suppliers.

3.2.7 Quality management

There is no reason to change something. What I see as necessary is mentioned in chapter 3.2.1 and it is contunuously monitor competitors quality and adapt and to keep it visibly on higher level of standard. It is also give us possibility to defend agaits new entrance.

3.2.8 Organization of production

I could not find any reason to change. There is only possibility to give a part of responsibility to foreman and he should make easy decision on workplace.

3.2.9 Human resources management

We need to force a team work. This is part that should bring us some money. Of course we have to most of wages on individual perfomance but if we put a part to team work it probably brings us higher total perfomance. We need to slightly change a motivation systém.

3.2.10 Stability aspects of production

We have to stenhten stability in part od insurace and agreement about cooperation in a part of production purchasing (I mentioned it in chapter 3.2.5 and 3.2.6). It is mean starting negotiation with insurance company and another is mentioned in chapter 3.2.5.

3.3 Justification of the purposal by the results of analyses

Weaknesses
- Purchasing by short term disposition – Mentioned in chapter 3.2.5 - Low stability except labor – Mentioned in chapter 3.2.10
Threats
• Smal size firms – Mentioned in chapter 3.2.8 • Easy subsitution – We are have no influence • Strong press to price – Mentioned in chapter 3.2.1 • Strong position of customers – Mention in 3.1 • Huge possibility of new entrance – Mentioned in chapter 3.2.7 • Politician behavior – We are have no influence • VAT – We are have no influence • Tax policy – We are have no influence • Social policy – We are have no influence • Decrising State investement elecronic seqment of market – We are have no influence

4 Conclusion

In the end I have to note down, the copartners have to think about different possibillities and changes. There are much more gaps on the market and these gaps should be use to development of company and it is not only in electronic business. I hope that company got over all crises and we are walking to „sunny future“.

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Overview of the Office for the Protection of the Competition concerning public procurement and rewarding procedures

Andrea Schelleová [1]

This article deals with the administrative proceedings at the Office for the Protection of Competition in Czech Republic. First, I would like to say a few words about functions of the Office for the Protection of the Competition and its structure. Office for the Protection of Competition is not headquatered in Prague amongst the key governmental institutions but in Brno. The reason for that is the operational independence. From 1992–1996 the Office functioned as the Ministry for Competition – the change of the form from Ministry to the Office was caused by the on-going economic transformation and the ministry's role in the privatization process.

The main goal of the Office is to create conditions for the competition to flourish without breaking legal rules and economical rules. We have 3 main areas which our Office handles. *These are*:

1. **Economic competition –** is the main area and we have experts who deals with that field
2. **Public procurement –** is the area where I work. The function of the Office at this field is overseeing and controlling over public procurement and the awarding procedure. The purpose of public procurement review is to use the public funds economically and in accordance with the competition rules. The office has exercised its supervision of this area since 1995. Since big amount of state money (from state budget) is redistributed during the rewarding of public procurement and these money goes to private sector, it is necessary to keep a control over it.
3. **State aid –** this area seems is not that big as the economic competition and public procurement because in our competence is not issuing of the decision about the state aid anymore. This Section mostly serves as the consultant which together with the European Commission supervises the allocation of public funds.

Since the Office for the Protection of Competition is the central body of the state administration, it is entirely independent in its decision making process. The Office is headed by a Chairman who is nominated by the Government and appointed by the President. The term of office for our Chairman is 6 years and he cant serve more than 2 terms. The Chairman may not be a member of any political party of political movement – he must be completely independent from the political world.

Administrative procedures from the view of the czech jurisdiction follow the Czech Administrative Code according to which we have 2-instance system. The awarding procedure of public contracts is regulated by the Act. No 137/2006 Coll. This Act incorporates the relevant legal regulations of the European Communities and provides for:

- procedures for the award of pubic contracts
- design contest
- supervision over compliance with this act
- conditions for the maintenance and purpose of the list approved economic operators and of the system of certified economic operators.

The Act. No 137/2006 Coll. contains the part about "The Supervision over Awarding of Public Contracts". According to this status, the Office reviews lawfulness of practices of the contracting entity with the aim to assure adherence to the 3 basic principles which are:

- transparency
- equal treatment
- non-discrimination

When talking about supervision, we have 6 main competences of the Offices and these are:

a) granting interim measures
b) taking of decisions whether the contracting entity has proceeded in awarding of public contracts in compliance with the Act.
c) ordering corrective measures and inflict sanctions
d) Examination of administrative delicts
e) controlling practices of the contracting entity in awarding public contracts under separate legal regulations (for ex. Code of State Control) – it shall be w/o the interference to competences of other bodies conducting such control under separate legal regulations
f) discharge other tasks where separate legal regulations so lays down

Proceedings on Review of practices of the contracting entity shall be initiated with the Office upon a **written proposal** by the complainant or ex officio.

The proposal must be delivered to the Office and in duplicate to the contracting entity, within 10 calendar days from the

[1] JUDr. Andrea Schelleová, LL.M., Office for the Protection of Competition, Czech Republic.

date of delivery to the complainant of the decision under which the contracting entity has not complied with the objections.

- *if the contracting entity has failed to settle the objections according this Act – there is a special term of 25 days form the date of dispatch of the objections by the complainant.*

The proposal may be filled against all practiced of the contracting entity that preclude or could preclude basic principles and as a consequence of which the rights of the complainer risk being harmed or have been harmed.

Just for your information – **main breaches** of law refer to:

1) tender conditions
2) content of the contract notice or call for competition
3) exclusion of a tender from the award procedure
4) decision on the selection of the most suitable tender
5) use of a certain type of the award procedure

For summary – the **essential conditions of the proposal** are:

- precise identification of the contracting entity
- what action is considered to be a reason of the infringement of the law as a consequence of which the rights of the petitioner have been harmed
- relevant evidence
- what the petitioner claims

If the proposal does not have prescribed essentials, the Office terminates the initiated proceedings. Of course there is always an opportunity to initiate the proceedings ex officio.

When the Office receives the proposal, it initiates the administrative procedure by sending of the announcement to the parties. After that the contracting entity is obliged to send its representation (opinion) to the office within 7 days from the date of delivery of the proposal. Together with this representation, the contracting entity must send the relevant documentation of a public contract to the Office.

Besides the proposal, there is another condition and it is **THE DEPOSIT** which must be send to the Office together with the proposal. The amount of deposit is 1 % of the petitioner's tender price but no less than 50 000Kč and not more than 2 mil. CZK. Where it is impossible to fix the price, the petitioner is obliged to pay the deposit of 100 000Kč.

Because of this duty the Office must announce the number of its bank account on its website. Deposit is the income of state budget if the Office terminates the proceedings for not breaching the law – in other cases we send the deposit back to the petitioner.

The Office can grant the **interim measure** in case it is necessary for maintenance of the purpose of the proceedings. The interim measure can be rather:

a) to impose ban on the contracting entity to conclude the contract in the award procedure
b) to impose suspension of the award procedure on the contracting entity

Sanctions:

1) Corrective measures
2) Fines

Ad 1) First type of penalties (**corrective measures**) is used when the contract has not been concluded yet and the contracting entity breaks law and this breach affected or could affect the selection of the most suitable tender.

The corrective measure can be rather:

a) cancellation of single action of the contracting entity
b) or cancellation of single action of the contracting entity

If the Office does not find and infringement – it terminates the proceedings.

Together with corrective measures the Offices decides about the Costs of Proceedings which shall be payed out by a lump sum set about by the implementing legal regulation. (30 000Kč).

Ad 2) **Fines** are imposed in case of administrative delicts. We have **4 types of delicts**:

a) failing to comply with the procedure laid down by the Act for the award of public contract – even here is the condition of a substational effect on the selection of the most suitable tender. In this case the contract has already been concluded
b) canceling of the award procedure without having met the condition set by the Act
c) failing to produce of keep documentation of a public contract
d) failing to discharge the obligation for publication (on central address of in the Offical Journal of the European Union)

Sanctions for these delicts are as follow:

Ad a) for the first delict – fine up to 5 % of the tender price of up to 10 mil. Kč if the price had not been offered.

Ad b, c, d) for rest of the delicts – fine up to 10 mil. Kč.

The rate of the fine can be doubled if the contracting entity commits the delict repeatedly.

Since we do not have any system for imposing the **fines,** it is just a question of **administrative discretion.** In the decision we have to give all the reasons for imposing the fine which means that we have to say exactly why we have imposed such a sum and what factors were taken into account and if there were several infringements, we have to experess percentage of proportion of each delict on the fine and reasons why. Fines are the income of the State budget. Liability of contracting entity for an administrative delict expires if the Office does not begin the relevant proceedings within 5 years from the date when it got to know about it – not later than within 10 years from the date of commiting the delict.

In case some of the parties are not satisfied with the decision of 1st instance, they can complain against the decision to the Chairman of the Office who is the head of the 2nd instance. Appellate procedure is regulated by the Act. No 500/2004 Coll. (Code of Administrative Procedure).

For the decisions issued by a central administrative body or ministry we have special institute for reviewing these decisions which is called the remonstrance. Chairman decides about the remonstrance on a proposal of the remonstrance commission.

The remonstrance commission shall consist of at least 5 members. The Chair of the commission and other member are appointed by the Chairman of the Office. Members are mostly experts who are not employees of the Office. We have 2 remonstrance commissions for Public Procurement – one in Brno and one in Prague…..

The commission may act and adopt resolutions in panels of at least 5 members and the majority of members present must be expert not employees.

The decision of the Chairman about the remonstrance can be rather:

a) to abolish or alter the decision if that satisfies fully the remonstrance and no harm may be cause to any of the participants unless all of them agree.
b) to dismiss the remonstrance (that is what we do in most cases).

The decision of the Chairman comes into effect with the delivery to the last participant.

Judicial review

In case the party is not satisfied even with the decision of the 2nd instance, it can complain to the court. The bodies which decide matters in the judicial review of administrative decisions are regional courts and the Supreme Administrative Court.

Regional Court in Brno decides on matters of administrative justice in specialized benchces comprised of presiding judge and 2 judges. The proceedings are initiated on the day when the action is delivered to the court. The filling of the complaint does not have suspensory effect.

The court decides on the matter by a judgement and against the decision is admissible the remedy which is called the **CASSATION COMPLAINT**.

The cassation complaint is given to the Supreme Administrative Court where are 2 options of decision on the cassation complaint:

a) if the complaint is justified, the Supreme Administrative Court vacated the decision of the regional court and refers the matter back to the regional court for futher proceedings.
b) If the complaint is not justified, the Supreme Ad. Court rejects it.

For the Office the decision of the Supreme Ad. Court is the last instance of the justice review. Other parties can even after the cassation complaint give the complain to the Constitutional Court.