INTRODUCTION

The legal order of the Czech Republic has recently been in a rather difficult situation. Although the process of its transformation, i.e., its return to a standard democratic system, started in 1989, it has not yet come to its termination. The present shape of the legal order takes the form of recodifications that have been drafted and already partly implemented (cf. the Labour Code) in almost all areas of private law, criminal law, and procedural administrative law. This internal process is simultaneously confronted, on the supranational level, with the needs of a further harmonization of the Czech legal order with EC/EU law, while facing the challenges of major projects of unification as well as the need to react to the realities of global developments with the aim of reducing its risks.

The necessity of reacting to the requirements which are placed on the development of law and which were faster in the 1990s than the basic and applied research in law, led to a group of projects devoted to the research of Czech law concerning its determinants and developmental needs.

Among the significant projects for dealing with the situation of Czech law in the current developmental stage – mainly in the context of the entry of the Czech Republic into the EU and the effect of this historic step on the Czech legal order and the individual subparts of its system – consists of a five-year research project entitled "European Context of the Development of Czech Law after 2004". This is a broad project of basic research in the field of law, based on the team cooperation of both experienced and young, gifted researches from the Czech Republic and abroad, who are involved in various European research initiatives and projects. The research project, started in 2005 and centered at the Faculty of Law, Masaryk University in Brno, has gone through several stages, which aimed:

- to process and analyze, both on the general level and on particular topics, the situation in the field of Czech law arising as a result of the accession of the Czech Republic to the EU;
- to prepare a theoretical and methodological conception for dealing with the impact which the accession of the Czech Republic to the EU has had on Czech law as a whole.

The results of the previous stages of the research project were published in monographs, journal articles, and studies, as well as proceedings from conferences, seminars, and workshops. Some of the results were also published in a concise form in the English version of the journal *Časopis pro právní vědu a praxi* – volume IV/2006, published by the Faculty of Law, Masaryk University.

At present, the outcomes of another stage of the research project have become available: these mainly concern the formulation of conceptual solutions to the impacts of the accession of the Czech Republic to the EU, as they are discussed in the individual topics of the research project.

For the benefit of basic legal research as well as the wider community of lawyers, the current issue of the journal *Časopis pro právní vědu a praxi*, published by the Faculty of Law, Masaryk University, presents a major part of the results of the research project from 2006 to 2008. Further results of the team are provided in special volumes of the research project (published annually by the Faculty of Law), as well as in proceedings, monographs, articles, and studies of particular sub-teams and individual researchers. The final outcomes of the research project will be published in a new series of monographs by the Faculty of Law, Masaryk University.

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ARTICLES

The Process of Europeanization and the Formation of the European Legal Space

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The changes of political systems in Eastern Europe at the end of the 1980s contributed to the strengthening of efforts aimed at deepening the process of European integration. For a long time, these efforts have been affected by political, economic, and social factors constituting the social and political situation in the development of Europe and the world in the second half of the 20th and at the beginning of the 21st centuries. While European integration at the beginning of the 1950s was explained mainly in reference to economic interests, EU members nowadays unequivocally accept the fact that European integration is also a political process aiming towards the formation of a political union as the highest phase in the process of integration, where the bodies of the integrated group perform not only a common economic policy but also extend their activities into the spheres of foreign, security, defence, and internal policies. The EU, thus, simultaneously represents a form of a legal and political space *sui generis*.[1]

The following exposition will mostly be methodological. Its aim is to deal with the main concepts that are characteristic of the current development of the EU. The first part of this article focuses on the term "Europeanization", with the aim of explaining it as the core of European integration. At the same time, the relationship between Europeanization and globalization will be investigated, as well as the way in which these processes are reflected in the formation of the European legal space. This space tends to be described as a multi-centric legal system. The second part of this article points out the difficulty of a theoretical description of such multi-centric relations by means of the traditional categories of "legal order" and "legal system". The article concludes with a discussion of possible models of legal interpretation, which is considered as the generator of legal communication in the multi-centric system of law.

1. The process of Europeanization as a manifestation of European integration

Recently, the expression "Europeanization"[2] has started to be used quite frequently in connection with the process of European integration, extended mainly as a result of the Treaty of Amsterdam. Although the social sciences were using this term as early as the 1980s and 1990s, it started to be commonly used only after 1999. The conceptual framework of this expression, however, goes beyond the area of the European Union and its member states, expressing also the wider influence of the EU on countries standing aside from the immediate process of European integration.

The term "Europeanization" has not been used uniformly. This is also because the concept has many "faces" and directions in which it operates both "internally" towards the EU and "externally".[3] A more precise delimitation of the term was attempted by J. P. Olsen, who formulated five basic senses of this term. According to Olsen, the term "Europeanization" is used to refer to:[4]

The changes of the external territorial borders of the EU by admitting new member states, which become Europeanized in the course of the process.

The development of executive institutions on the level of the EU. These represent central management and political co-ordination, and are equipped with formal legal institutes and a normative order capable of enforcing binding decisions, sometimes with the help of sanctions.

The penetration of the European dimension into the national and sub-national systems of executive power.

The export of political organization and political power beyond the borders of the EU.

The political project striving to arrive at a unified and politically stronger Europe with a more significant political position.

Olsen's overview of the understanding of the term of "Europeanization" captures the multiple senses of the term as well as the multi-dimensional nature of the process of Europeanization occurring, above all, in four areas:[5]

- Europeanization of policies – the effect of membership in the EU on the shape of public policies of the individual member states.
- Institutional adaptation – the change of social and political institutions in EU member states.
- Europeanization of law – this includes not only the formation of European law but mainly the convergence of the national legal systems of the individual member states and states striving for EU membership. It becomes indirectly reflected also in the field of international law.
- Transnational cultural diffusion – this consists in the extension of cultural norms, values, ideals, identities and patterns of behaviour within the EU and their spread beyond the borders of the EU.

The discourse on the dimensions of Europeanization is also reflected in the topics of scholarly research into this process. Significantly, the European University Institute in Florence, which has been focusing on the study of European integration and the process of Europeanization since 1972, has four divisions: economy, the history of civilization, law, and social and political sciences.[6] Clearly, the field of European studies, next to legal science, is enriched mainly by the disciplines of political science, international relations, and economics.

From among the wide range of definitions of the concept of "Europeanization", at present probably the most cited and suitable is the definition provided by Claudio M. Radaelli. In his view, Europeanization consists of *the processes of formation, extension and institutionalization of formal and informal rules, procedures, political paradigms, styles, ways of "doing things" and sharing of opinions and norms which are first defined and consolidated within the political processes of the EU and subsequently incorporated within the logic of domestic (national and sub-national) discourse, political structures and public policies.*[7] At the same time, however, Radaelli does not limit Europeanization to a unidirectional process directed towards nation-states; rather, he conceives of it as a two-directional process of mutual influence between national and European public policies.

2. Globalisation as a framework for Europeanization

The process of Europeanization cannot be seen separately from the wider notion of world-wide *globalisation*, which has been described by Zygmunt Bauman as "the state of human existence condensed by temporal and spatial compression."[8] Globalisation refers not only to the global market and the globalising economy, but also to a complex social and political process with an internal structure,[9] whose implications affect, on one hand, economic, political, social, and cultural areas of life, and, on the other, the field of law. In its manifestations and implications, globalisation creates a framework for the ongoing process of Europeanization.

The German sociologist Ulrich Beck characterises globalisation as a process leading to the undermining of nation-states and their sovereignty, since they are becoming mutually connected by means of supra-national agents, their power potential and networks.[10] In this respect, late modern societies are characterised by the irreversibility of their *global nature*, arising from globalisation and manifested by the formation of a world-wide society. Globalisation is an expression of the fact that no state, country, or social group can shut itself off from others; as a result, various economic, cultural, political, and legal forms may clash. The process of globalisation then essentially causes the world to become a single social system in which all are interconnected in multiple ways and depend on each other. At the same time, however, such a union of social relations is not integrated by means of some kind of state policy. The developing global society exists without the form of a world state, without world rule, and with numerous manifestations of global disorganisation.[11]

Economic, political, and legal relations that are transgressing the boundaries of individual countries significantly affect the lives of inhabitants of such countries and the human population as a whole: some fundamental problems of human life, such as reaction to environmental devastation or protection from terrorism, necessarily acquire a global character. Globalisation – as well as reactions to globalisation and its implications – strengthens *tendencies towards pluralism* in national, religious, ideological, cultural, political, legal, and social areas, as well as *weakens the sovereignty* of individual nation-states.

The process of globalisation brings about trends towards *universalisation*, i.e. the generalisation and unification of institutions, symbols, and ways of behaviour, including dress code, human rights, and democracy. On the other hand, globalisation paradoxically leads towards *particularism*: the fragmentation of the sovereign nature of the state and the strengthening of attempts to renew local social identities, reflec-

ted in a return towards nationalism and autonomy (cf. Quebec, Catalonia). The consequences of the weakening of the sovereignty of individual states, combined with global transnational integration, the non-existence of effective institutions of a wider global management, and the generally existing lack of legitimacy for rising global authorities, call for a more cosmopolitan definition of nationality and a stronger assertion of political and cultural pluralism rather than multiculturalism.

Thus, globalisation necessitates a broad discourse on the nature of freedom, democracy and human rights in the globalising world. Sometimes the process of globalisation is looked up to with high hopes; e.g. former UN General Secretary Kofi Annan expressed his conviction that globalisation – due to its rapid changes - brings a world-wide challenge to the area of fundamental human rights and freedoms.[12] By contrast, Ralf Dahrendorf, for instance, has warned of the fact that globalisation always simultaneously means the disappearance of democracy,[13] where the global results in the end of nation-state. One is, thus, led to ask the question: How realistic is the idea of the possible existence of a *transnational state* replacing the nation-state? Ulrich Beck believes that such a transnational state would be a sort of response to globalisation. This would be a two-sided hybrid model connecting features that had previously appeared to be mutually conflicting. The transnational state would, thus, be non-national and non-territorial, but it would not be inter-national or supra-national either. It would be a "glocal" state,[14] i.e. a province of the world society.[15] In his later works, Ulrich Beck describes the paradoxes of politics in the global world, where the boundaries of national and international spheres within the cosmopolitan political realism are being newly negotiated in an entirely open game of meta-power. Ulrich considers globalisation to be a historical transformation in which the distinction between the national and the international is being cancelled out within the framework of a hitherto blurred environment of the power of internal world politics.[16]

3. Globalisation of law

As an internally structured technological and social process of transnational co-operation, globalisation is significantly reflected in the area of law. *Globalisation of law*, as one of the areas of ongoing globalisation, is a reaction to the growing interconnection between manufacturing, economic, political, cultural, and social relations that are being formed across individual political, national, and cultural units. While its purpose is to bring *stability and legal certainty* to such relations, globalisation of law may be perceived as *a general process of the internationalisation of internal law.*[17] It may, however, also lead to the confrontation of local legal practice and transnational legal principles and practices which are striving to assert themselves.[18] In connection with globalisation, Beck mentions the rise of legal populism in Europe and other parts of the world as a reaction to the absence of any stance towards the world whose boundaries and foundations have started moving.[19] This is because a typical feature of globalisation resides in the fact that it does not have any tangible and clearly defined centre of power: globalisation processes are, essentially, *not governed by anybody*, and it is impossible to state who – if anybody – is responsible for it. In the post-national age, the mono-centric power structure of competing nation-states is being replaced with *polycentric politics*, whose implementation is characterised by a large group of competing – or co-operating – state and transnational actors without any single one of them having the main say.

The consequences of globalisation on the level of political decision-making are likewise reflected in the area of law. Until recently, traditional legal theory reflected solely two levels of law: national (internal) law and international public law. In the past few decades, these two levels of law have been supplemented by transnational law, represented mainly by European law but also other legal systems. In this connection, the British legal theorist William Twining, in his book *Globalisation and Legal Theory*, points out that normative regulation reflects all levels of social (legal) relations, and that it is useful to distinguish between the following regulations: global, international, regional, transnational, inter-communal, state, sub-state, and non-state local.[20] This division, based essentially on a geographical perspective, is only one of several possible divisions. Its aim is to point out the existence of non-state law and the fact that the above-mentioned different levels of legal regulation do not express a simple vertical hierarchy. Frequently overlapping, these normative orders express a phenomenon referred to as *legal or normative pluralism.*

Globalisation of law finds its expression not only in the area of parallel multi-level law-making and law application, but also in the change of operation of the entire field of law, including the way legal professions are exercised. The change of American law firms and their international expansion have, for instance, been documented in several US studies.[21] While, in 1949, there were only 5 law firms in the USA with more than 50 lawyers, the figure rose to more than 287 in 1989. In 2000, there were more than 150 law firms employing more than 250 lawyers, out of which 57 law firms had more than 500 lawyers and 7 law firms had more than 1,000 lawyers each. These large law firms are gradually building networks of branches in centres of world economy, specialising in legal advisory for large corporations. A similar development is occurring in the Czech Republic. One of the largest law firms in the country is the American company White & Case, with more than 30 lawyers and 10 tax advisors employed in

its Prague branch and almost 2,000 lawyers working for it world-wide. The existence of these giant law firms with extensive networks of branches in many countries comes as the result of a growing demand for legal services that provide comprehensive legal assistance in transnational transactions.

4. *Europeanization as a response to globalisation?*

Globalisation may be characterised as a universal transnational or world-wide process of integration, bringing both positive and negative effects. In this connection, there occurs *a confrontation between the global and the local*, where the trend towards localisation – as a reaction to globalisation – enforces attempts aimed at *regionalisation* in its numerous political and legal forms. The aim of such regionalisation is also a way to describe the development of European integration.

In this context, Ulrich Beck deals with the issue of whether there is some way out of the trap of globalisation and some protection from its adverse effects. This may be assured, in his opinion, by a supranational body of the size of the European Union, which is the only body that could restore the democratically controlled social and political ability to act among co-operating states.[22] It is only a strong and democratic EU that could be a real player in the game of globalisation. According to Snyder, the relationship between Europeanization and globalisation may be described as a relationship between both friends and rivals.[23] In other words, these are two complementary and partially overlapping processes, which both strengthen and compete with each other.

On closer inspection, the relationship between these two processes – globalisation and Europeanization – can be expressed as follows: Europeanization is a process of economic, political, and legal regional globalisation whose dominant institutional architecture has become the European Community/European Union.[24] It is this institutional anchoring of European integration that helps Europeanization to turn the otherwise generally applicable world-wide globalisation trends into an actual phenomenon existing in real life. Europeanization, therefore, needs to be seen – unlike globalisation – also as a political project following certain preset goals and agendas.

The institutional anchoring of the European integration process, combined with political decision-making, finds its expression in the EC/EU law, which reacts to the most significant economic relations formed through the process of globalisation. The legal tools applied within the Europeanization process, thus, perform a wider and more important role than the essentially non-institutionalised manifestations of legal globalisation.

5. *Europeanization of law as an instrument in the process of the integration of Europeanization*

While EC/EU law is an important manifestation, means, and outcome of the process of Europeanization, the process of Europeanization may be described as being clearly apparent in the *Europeanization of law.* This consists not only in the making and implementing of European law, but also the Europeanization of sources of law, the concept of human rights and the state of law, judicial activities, interpretation of law, legal procedures and methods, as well as in the manner of legal thinking.[25] The Europeanization of law is, thus, reflected in the entire area of EU law as well as EU politics, increasingly modifying the national legal space.

European integration is significantly organized and implemented by legal forms and legal institutions. The Europeanization of law is mostly manifested by means of the Europeanization of sources of law, thereby overcoming the traditional image of "the national law-maker" who uses legal means to regulate – essentially in a unified manner – the entire relevant extent of legal relations. By contrast, we are witnessing an ever-increasing number of sources of law – a phenomenon referred to as *the multi-centricity of sources of law.*

These sources of law include, in addition to internal state law, what is comprehensively called *European law*. In a more narrow sense of the word, the expression *acquis communautaire* is often used in this connection, even though the term is not quite unequivocal. *Acquis communautaire* – understood as everything that has been attained within the European Community, mainly in law – is a set of all rules, mostly of a legal nature and in any form (including individual acts in law) that has become the "property" of the EC. *Acquis communautaire* represents everything that the members of the Community – mainly its new members – must relate to and respect because it is the convergence and harmonisation of national legal systems with EC law, aimed at creating a compatible legal space, and the approximation of institutions, procedures, and policies that represents the crucial agenda of the EU. As Robert Ladrech points out, the answers to the challenges raised by the process of European integration, and the variability of approaches and results of this process in the individual countries, depend on whether a given country has a unitary or federal structure and what the long-term traditions of political culture are like, as well as on the balance between the public and private sectors, the patterns of co-operation and competition between political parties, and many other aspects.[26]

6. Communication as a medium of the European legal space

As stated above, one of the aims of European integration is the formation of a common legal space. These efforts have met with various receptions by legal theorists. Some of them are highly sceptical in regard to Europeanization, perceiving it as a highly controversial project that will lead to crisis and chaos in national legal systems. Others consider EU law as a "uniquely mixed pedigree" from which no real unity can ever arise.[27] By contrast, optimists unequivocally interpret this process as a challenge leading to new models of law. They believe that Europeanization – similar to globalisation – results in the formation of a multi-centric system of law characterised by the co-existence of various non-hierarchically organised centres of adjudication. The legal space will be formed by network relations that de-territorialize national legal orders.

The difference between these two approaches is often interpreted as a clash between the structural and functional conceptions of law, or, more specifically, the positivist and systemic conceptions of law. The structural approach tends to be characterised by a hierarchical view of law, while the functional approach is characterised by a network arrangement of legal relations.[28] Although this assessment describes a certain trend in the knowledge of law, it represents some simplification in connection with the endeavour to describe the Europeanization of law. The subject matters of the structural or functional approaches are relatively easy to grasp, because they are always related in some way to social behaviour or some activity. In the case of the Europeanization of law, no reference to the object is directly observable. Therefore, it is important to create a common legal space, i.e. something that can be hardly described by means of traditional categories such as the legal norm, legal order, legal system, etc.

An evidence of the insufficiency of the notions of system and order for the description of the European legal space is furnished by a decision by the European Court of Justice referring to the Agreement on the European Economic Community. The aim of this agreement was interpreted differently in different languages. In English, the aim is expressed as a way towards the formation of a legal system to integrate parts of the legal systems of the individual member states. In French, in contrast, the aim of the agreement is to achieve one's own legal order (*ordre juridique*) to be integrated into the legal systems of the individual member states. To complicate the matter even further, the German version uses yet another combination of the terms "system" and "order", stating that the aim is to form one's own legal order that will be accepted by the legal orders of the member states.[29]

The formation of the European Union makes it even more difficult to describe the legal space using the terms "order" and "system'. Within the EU, only those economic relations which had formed the basis of the European Community cease to be the object of legal regulation. Similarly, the removal of borders under the Schengen Agreement called for the formation of legal rules and regimes (procedures) which control the flow of information, goods, investments, migration, and crime, rather than specific forms of economic activity. The draft of the Constitution for Europe reveals that the European legal space should be formed in harmony with the social order striving to implement traditional humanistic values. This will result in a strengthened interconnection and applicability of human rights, not just as values that need protection but as real, achievable aims for EU life.

Objects that are subject to legal regulation within the European space take the form of flows and rules. Their movement and operation do not occur in a vacuum; they are enabled thanks to a specific communication infrastructure which can hardly be controlled from the centre of some state.[30] One is led to ask how this network of flows and rules of communication, which is likened to a system of "nerves" of the European legal space, operates. What form of communication has the decisive role? These are questions which will underlie the structure of the present legal theoretical account. The following exposition will outline only some of the issues and problems.

7. What is the object of interpretation in a multi-centric system of law?

One of the basic preconditions for EU membership is the harmonisation of national law with European law. The implementation of European directives and rules significantly disrupts the communicative homogeneity of individual national legal systems with the aim of opening new communicative flows and generating new rules. However, this process is not automatically triggered by implementation. Practice has shown that its operation depends on the understanding and interpretation of European law. In this connection, we could list a whole range of examples of judicial decisions still adopted on the basis of national legal norms, without applying the implemented rules. This is because many judges still perceive EU directives as the manifestation of an expansion of a superordinate order into national legal systems. Their understanding of law as only a hierarchically organised order is, therefore, highly resistant to the new topic – the multi-centric system of law.

What is, then, the object of understanding and interpretation in a multi-centric system of law? Is it European law? But what does this term actually mean?

Current legal theory does not seem to have a clear answer to this question. Numerous definitions stipulate that the core of European law is made up of the law of the European Communities. At the same time, it is being emphasised that the words "community" and "union" are not synonyms. It is recommended that one should distinguish between European law in the narrow and wider senses of the word.[31] Not much help is offered by those definitions, which try to delimit the European space from a functional or structural point of view, i.e. as a system or an order.[32]

The logical question creeps in about how possible it is to understand and interpret once we know that the object is open, variable, and diffused within network relations?

Interpretation still remains an interpretation of the meaning of something for someone. Its mechanism will presuppose the understanding of what was and is, as well as empathy towards the new outlook. But, on what will the prior understanding of the interpreter be based? Will it be based on the national legal order or just the existing legal cases dealt with within the European Union? The search for answers to these questions brings us back to the notion of "European law" and its function in legal thinking.

8. Why do we need the concept of "European law"?

The absence of the concept of "European law" is most strongly perceived in the understanding of fundamental principles of integrity formation in the European legal space. Linguistic problems, as mentioned above, occur in connection with not only the description of the nature of the European legal space but also the interpretation of the fundamental principle of integrity. The English version of the Treaty of the European Union translates the term "integrity" in the sense of "consistency" and "continuity". By contrast, the French version refers to "coherence".

Some authors believe that such a discrepancy is caused by an insufficient description of this principle in the Accession Treaty, requesting that it be made more specific.[33] Nevertheless, although additional features may lead to a better understanding of a given phenomenon, they do not guarantee the understanding of its meaning. This also presupposes a change in the manner of thinking; the current description of the principle of European integration appears to be insufficient to bring about a change in thinking and result in the adoption of some other meaning of the notion of "integration".

The English and the French versions exist as interpretations of different understandings of the operation of one's national legal orders under the conditions of the current process of European integration. The expression "coherence" in the French version points to an understanding of this process not only as the removal of logical discrepancies – which seems to be the meaning of the terms of "consistency" and "continuity" – but also the formation of positive relations between various areas or systems of law.

This different understanding of the principle of integration is not, however, an obstacle preventing the formation of real integrative relations. However, it is not a way to some reduction of one's own national legal tradition, either. Rather, it is a challenge for an extension of the communicative competence of a given language. The process of the Europeanization of law also shows that any understanding of legal phenomena – legal behaviour, acts, rules, or principles – is possible only after understanding their operation (*Rechtswirkung*). From this perspective, the concept of "European law" could perform the function of a reason extending the observation and understanding of the processes of European integration. In brief, the English understanding of the term "integration" would change only as a result of observation of the practical effects of the process of European integration. Nevertheless, it is still not clear what role in the observation and understanding of the world can be performed by a term.

9. What role is played by the concept of "European law" in the practice of interpretation?

Let us deal with this question by answering why we need the concept of law for legal practice at all. According to the English theorist H. L. A. Hart, this should help us to understand the differences between various things or qualities. The concept is then used in a situation where we understand something but are unable to express it.[34] A similar opinion is shared by the German legal theorist R. Alexy. In his view, "concept" does not have any meaning in real legal practice. It becomes urgent where decisions need to be made in unusual cases – the so-called "hard cases".[35] In such situations, the concept fills a gap in law, thereby assisting judges in finding suitable solutions. However, the application of European law by means of national law does not constitute such "hard case" situations.

Both Hart's and Alexy's approaches, however, remind us that the function which the concept of law fulfils is not only epistemic but also practical. Recently, a pragmatic moderation of concepts has been popular with many theorists. For instance, a very interesting pragmatic model of the concept of law has been suggested by the American philosopher R. R. Brandom, on the basis of his theory of inferential semantics. For this purpose, Brandom chose the model of judicial decision-making under the conditions of "strict case law": the judge does not have anything at his disposal

save his own understanding of existing cases. Brandom poses the question of how a judge can make a stable decision in such a situation, arguing that this is possible thanks to responsible application of concepts (words). But what does this mean?

First, Brandom shows that the concept functions not only as a "bridge" between our thinking and the material world. He presents the concept as the ability of our thinking to always conceptualise something.[36] This opinion is not a new finding. What is new, however, is that Brandom probes this process in the following manner: "He moves from what people do to what they mean and think, and from their practical behaviour to the content of their statements and expressions."

Second, the judge must express himself in such a way that his message respects the understanding of other participants in a conversation. The understanding of the other must become a part of his understanding of legal rules and laws. This is what Brandom considers to be the prerequisite of responsible judicial decision-making. The judge does not make stable and correct decisions because this is what he is required to do, but because it is his virtue.

According to Brandom, judicial decision-making based on prior judicial decisions is performed in a similar manner. In this situation, however, the judge adopts in his understanding and language the perspective of a legal authority. The adoption of this position, thus, brings him to reflect on his own practice, whereby he discovers himself as an authority.

Brandom's model of decision-making corrodes the "blind power" of the exclusively set authority by means of the reflexive power of one's own understanding and interpretation of a concept. The use of a concept is not arbitrary but strives for reasonable and successful understanding.

Successful understanding means that the judge respects in his understanding the perspective of other participants in such a way that the participants are simultaneously able to interpret this expression in the same way in which it was understood by the judge. This reciprocity of understandings creates a network structure of legal communication which is based on internal links between all judicial decisions from the past to the present. The adoption of the perspective of other participants results in judicial decisions always being made with respect to the future.

Another element of this model is that participants are not considered merely as objects that are to listen to the judgment of a legal authority. On the contrary, they are perceived as those to whom the law speaks. In this way, Brandom shows that the judge's legal argumentation and interpretation ceases to be an authoritatively prescribed speech; instead, it turns into a decentralized conversation between the parties. The main prerequisite for respecting the judge's authority is the ability to form one's own understanding with view to other people's understanding.

The current differences and conflicts between European and national courts are presented as the result of a lack of mutual respect for decisions of other authorities. Some authors believe that a potential solution could reside in co-operation and coherence in regard to the protection of fundamental European values and principles. Their point of departure is the fact that most of these principles and values, protected by particular legal systems, are simultaneously contained in all European constitutional instruments. But, is the finding of points of contact enough for the creation of a functional European legal space? Will this also be an effective way for the enactment of those cultural and national rights which are contained in only some of the national constitutions?

In the adjudication practice, European integration, however, does not mean only the finding of more universal models of rules and principles guaranteeing fundamental rights and values. This union should be formed by means of a reciprocal understanding of the sense of the fundamental rights regulating the life of EU citizens.

To sum up, Brandom's model makes it possible to deal with the concept of "European law" by introducing a moderation of language-use into legal thinking that leads not only to a deeper knowledge of the processes of European integration, but also to understanding as a way to law's existence.

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[1] HIX, S. *The Political System of the European Union*. Basingstoke: Palgrave, 1999, p. 164.

[2] Less frequently, the English expression "Europeization" may be encountered as well.

[3] Cf. DANČÁK, B., FIALA, P., HLOUŠEK, V. "Evropeizace: Pojem a jeho konceptualizace" ["Europeization: The Concept and Its Conceptualisation"] In DANČÁK, B., FIALA, P., HLOUŠEK, V. (eds.). *Evropeizace* [*Europeization*] Brno: MPÚ MU, 2005, p. 13 and subsequent pages.

[4] OLSEN, J. P. "The Many Faces of Europeanization". *Journal of Common Market Studies*, 2002, vol. 40 (2), p. 921 and subsequent pages.

[5] Srov. k tomu FEATHERSTONE, K. "In the Name of 'Europe'". In FEATHERSTONE, K., RADAELLI, C.M. (eds.). *The Politics of Europeanization*. Oxford: Oxford University Press, 2003, p. 5 and subsequent pages.

[6] See SNYDER, F. (ed.) *The Europeanisation of Law*. Oxford, Portland Oregon: Hart Publishing, 2000, p. 1.

[7] RADAELLI, C. M. "Europeanisation: Solution or Problem?" *European Integration Online Paper*s. 2004, p. 3 [cit. 24. 7. 2008]. Available online at: http://eiop.or.at/eiop/texte/2004-016a.htm.

[8] Cf. BAUMAN, Z. *Globalizace. Důsledky pro člověka* [*Globalisation: Implications for Humans*] Praha: Mladá fronta, 2000, p. 22 and subsequent pages.

[9] GIDDENS, A. *Sociologie*. Praha: Argo, 1999, p. 82 and subsequent pages.

[10] BECK, U. *Co je to globalizace. Omyly a odpovědi* [*What is Globalisation. Mistakes and Answers*]. Brno: CDK, 2007, p. 19.

[11] Ibid., p. 21.

[12] STEINER, H.J., ALSTON, P. *International Human Rights in Context Law, Politics, Morals*. Oxford, New York: Oxford University Press, 2000, p. 1306.

[13] Cf. DAHRENDORF, R. *Hledání nového řádu. Přednášky o politice svobody v 21. století* [*The Search for the New Order: Lectures on the Politics of Freedom in the 21st Century*]. Praha: Paseka, 2007.

[14] The expression "glocal" is a blend of "global" and "local", pointing out that what is "local" has obtained a global aspect and what is "global" comes as an interconnection between local cultures.

[15] Opus cit. sub 10, p. 125 and subsequent pages.

[16] BECK, U. *Moc a protiváha moci v globálním věku* [*Power and the Counterbalance to Power in the Global Age*]. Praha: Slon, 2007, p. 13 and subsequent pages.

[17] Cf. HUNGR, P. "Proces Globalizace a vývoj práva" ["The Process of Globalisation and the Development of Law"]. In: *Teorie práva* (kol. autorů). Praha: Linde, 2007, p. 310.

[18] SCIARRA, S. "From Strasbourg to Amsterdam: Prospects for the Convergence of European Social Rights Policy." In ALSTON, P. (ed.) *The EU and Human Rights*. Oxford, New York: Oxford University Press, 1999, p. 484.

[19] BECK, U., Opus cit. sub 16), p. 11.

[20] TWINING, W. *Globalisation and Legal Theory*. Cambridge, New York, Melbourne: Cambridge University Press, 2006, s. 223.

[21] BURNHAN, W. *Introduction to the Law and Legal System of the United States*. St Paul: Thomson/West, 2006, s. 145 an.

[22] Opus cit. sub 10), p. 182 and subsequent pages.

[23] Francis Snyder is a significant representative of The European University Institute in Florence. See SNYDER, F. "Europeanisation and Globalisation as Friends and Rivals: European Union Law in Global Economic Network." In: SNYDER, F. (ed.) *The Europeanisation of Law*. Oxford, Portland Oregon: Hart Publishing, 2000, p. 293 and subsequent pages.

[24] Cf. JAKŠ, J. "Evropeizace – šance nebo hrozba? Členské státy a architektura EU" ["Europeanization – A Chance or a Threat? Member States and Architecture of the EU"]. In DANČÁK, B., FIALA, P., HLOUŠEK, V. (eds.). *Evropeizace*. Brno: MPÚ MU, 2005, p. 117.

[25] Cf. SMITH, J.M. "The Europeanisation of National Legal Systems: Some Consequences for Legal Thinking in Civil Law Countries." In HOECKE, M.V. (ed.) *Epistemology and Methodology of Comparative Law*. Oxford: Hart Publishing, 2004, s. 229 an.

[26] LADRECH, R. *Europeanization and Political Parties: Towards a Framework for Analysis*. Keele European Parties Research Unit. Keele University. 2004, p. 3 [cit. 18. 4. 2008]. Available on: http://www.keele.ac.uk/ depts/spire.

[27] This is the tone of the speculations of some theorists who, on the one hand, realise the irreversibility of the process of the Europeanization of law, but, on the other, are sceptical about the network model of law that is coming into existence. For more details see, e.g. LASOK, Bridg: *Law and Institutions of the European Union*. 6th edition, Butterworths, 1994 and LOSANO, M.G. "Turbulenzen im Rechtssystem der moderen Gesellschaft-Pyramide, Stufenbau und Netzwerkcharakter der Rechtsordnung als Ordnungsstiftende Modelle." In *Rechtstheorie*, Berlin: Duncker–Humblot, 2007, Vol. 38., p. 12.

[28] The clash is described in this way by e.g. LOSANO, M.G. "Turbulenzen im Rechtssystem der moderen Gesellschaft-Pyramide, Stufenbau und Netzwerkcharakter der Rechtsordnung als Ordnungsstiftende Modelle." In *Rechtstheorie*, Berlin: Duncker–Humblot, 2007, Vol. 38., p. 31.

[29] Ibid., p. 27.

[30] The delimitation of the objects of the process of Europeanization was inspired by those authors who use flows, rules, and infrastructure to diagnose globalisation. For more details, see HEINS, V. "Globalizace a sociální bezpráví. Podmínky a meze humanitární politiky" ["Globalisation and Social Injustice: Conditions and Limits of Humanitarian Politics"]. In. Honneth, A. (ed.) *Zbavovat se svéprávnosti. Paradoxy současného kapitalismu*. Praha: Filosofia, 2007, p. 253.

[31] Cf. HERDEGEN, M. *Europarecht. 6. Auflage*, München: Verlag C.H.Beck, 2004. p. 1-5.

[32] Cf. e.g. LADEUR, K.-H.: "Toward a Legal Tudory of Transnationality – The Viability of the Network Concept." In. *European Law Journal*, Vol. 3, No. 1, March 1997, p. 33-57.

[33] Cf. BESSON, S. "From European Integration to European Integrity: Should European Law Speak with Just One Voice?" In. *European Law Journal*, Vol. 10, 2004, p. 263.

[34] Cf. HART, H.L.A. *Pojem práva* [*The Concept of Law*] Praha: Prostor 2004, pp. 28-29.

[35] Cf. ALEXY, R. *Begriff und Geltung des Rechts*. Freiburg-München 1994.

[36] Cf. BRANDOM, R. R. *Making It Explicit*. Harvard U.P., Cambridge, Mass., 1994, p. 622.

Procedure of Preventive Review of the Lisbon Treaty in the Czech Republic

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In 2001, the Czech Republic adopted the so-called Euro-amendment to the Constitution of the Czech Republic (Constitutional Act No. 395/2001 Sb.),[1] introducing a number of significant changes in the constitutional order from the points of view of international and domestic law (Art. 1 para. 2 and Art. 10 of the Constitution of the Czech Republic – hereinafter "the Constitution"). At the same time, the amendment provided for the possibility of transferring some of the powers of state authorities to international organizations or institutions (cf. Article 10a para. 1), thereby setting the constitutional prerequisites for the accession of the country to the European Union. It also vested the Constitutional Court with the power of preventive review of the constitutionality of international treaties, which had previously not been regulated in the Czech legal system.[2] In this connection, a new part II (Art. s 71a-71e) was included in Act No. 182/1993 Sb. on the Constitutional Court on the basis of its amendment No. 48/2002 Sb.,[3] which regulated the procedure to be followed by the Constitutional Court during its preventive review.

However, this possibility of judicial review, which thus became available for authorized subjects from 1 June 2002, remained unexercised for a long time. It took six years[4] before the Senate decided in April 2008 – after the complicated discussions over the government proposal to approve the ratification of the Lisbon Treaty, amending the Treaty on the European Union and the Treaty establishing the European Community – to file a motion to the Constitutional Court to assess the conformity of the Lisbon Treaty with the constitutional order. Thus, this proposal, submitted to the Constitutional Court on 30 April 2008, became the very first motion for the preventive review of an international treaty to be admitted to the Constitutional Court, and it will be heard. Owing to the progress of the ratification of this treaty in the other EU sates, the future decision of the Constitutional Court is eagerly anticipated, not only by Czech authorities, politicians, and the public, but also EU bodies and those states where the process of ratification has not been finished yet and where it is hoped that the Lisbon Treaty will not come into effect as a result of this decision. This study aims to point out certain procedural issues which the Constitutional Court will have to address in this connection. Issues related to the content are disregarded on purpose, since they are beyond the scope of the present text.

1. Formulation of the text of the Lisbon Treaty and the Constitutional Court

The future groundbreaking decision by the Constitutional Court will have to address a whole range of issues. As indicated by the declarations of the Chairman in the media, what is problematic is not only the actual decision of correspondence or non-correspondence of the Lisbon Treaty with the Czech constitutional order, but also the manner in which the decision is to be arrived at. Prior to the decision itself, the Constitutional Court will have to adopt a position on the interpretation of the 2nd part (Art. 71a-71e) of the Act on the Constitutional Court.

The current situation is similar to the referendum on the Accession Treaty in 2003. During that referendum, Czech citizens had the first opportunity to vote in a referendum on a question that was rather difficult – with respect to how extensive the text of the treaty was. The same holds true now for the Constitutional Court, which is to apply the provision on the preventive review of an international treaty for the first time. Its task is to assess the amended text which is, as regards its formulation, rather complex and unclear, requiring a difficult reconstruction because it is impossible to understand it without the texts of the existing treaties on the EU and EC.[5] In fact, should the task of the Constitutional Court be to assess the constitutionality of an amendment or a revision of a law that would be drafted in a form similar to the Lisbon Treaty, then it should – in accordance with the past declarations of the same court on the formation of clear, intelligible, certain and unequivocal texts of legal regulations in a state governed by the rule of law – arrive at the conclusion that the text is in conflict with such principles. What is needed to solve such a puzzle (as it was expressed by the Austrian Constitutional Court in one of its findings)[6] is diligence and patience.

In the case of the Lisbon Treaty, however, there is a "mitigating circumstance." The authors of this puzzle[7] were so nice that they at least provided us with clues at the end.[8] Thanks to this and our knowledge of the previous numbering systems, we are able to find where the relevant provision is currently located, how it is identified and where it will be placed under the new numbering system. Any failure to do so will result in a confusion of terms. What is also bizarre is that, owing to the special numbering system, the petitioner and the

Constitutional Court will have to agree which of the three versions to use in order to be able to understand each other at all.[9] However, this is not the end: in addition, there are 13 protocols and 65 declarations of the contracting parties in which they assure each other that they are serious about the whole issue and that they do not have any other intentions.

In the case of the EU, this is not just about the frequency of words such "democracy," "values," etc., in the text of the Lisbon Treaty, but is also about the form by which this text makes such values accessible to EU citizens. What is even more significant, however, is the fact that the so-called "European constitutional agreement" of 2004 (the Treaty establishing a Constitution for Europe), which had been turned down, is resubmitted for adoption again, merely cleared of any indications of a future super-state.[10] This is further evidence that the "D plan", i.e., dialogue and democracy is not meant quite seriously in actual reality. But, the warning contained in the Maastricht judgment of the Federal Constitutional Court[11] is still valid: this stated that democracy is not just a formal principle of accountability of decisions ("Zurechnungsprinzip"); by contrast, it should stem from the competition of social forces, interests, and ideas, making the decision-making process of bodies exercising their supreme power and the current political aims clearly visible and intelligible, and the fact that voters can communicate with such a power in their own mother tongues.

2. Formulation of the Senate's proposal

However, the proposal by the Senate of the Parliament of the Czech Republic did not make the role of the Constitutional Court any easier. The extent of the motion was merely three pages,[12] which mostly consisted not of statements or evidence supporting such statements but questions and notes interrogation. Something like that has been unheard of in the previous experience of the Constitutional Court.[13] The formulation of the statement of the ruling (i.e. the very proposal how the Court should decide)[14] raises doubts – in light of the doctrine of the Constitutional Court on being bound by the formulation of the proposal of the statement – whether it satisfies at all the requirements of the provisions in Art. 71e para. 1 and 2 of the Act on the Constitutional Court, specifying the requirements on proposal on statements of ruling in motions to be decided by the Constitutional Court. The Senate's motion is evidently based on Art. 71a of the Act, which, however, merely describes the subject matter of the proceedings. In the form of a question rather than a statement of alleged unconstitutionality, the Senate merely demands that the Constitutional Court decides on the conformity of the Lisbon Treaty with the constitutional order, without unequivocally pointing out the direction in which a decision should be made.[15] The contrary formulation of the proposal of the statement of the ruling (i.e., the expression of conformity with the constitutional order) is hardly conceivable with respect to the purpose of the proceedings, i.e., to prevent the ratification of an unconstitutional obligation.[16] This kind of formulation is possible only in the statement of a Constitutional Court finding (the ratification of a treaty is not in conflict) in which the court expresses its disagreement that an international treaty is not in conformity with the constitutional order. The Senate, however, included various – and quite diverse – versions of the statement in the proposal of its petition. There is no doubt about what a reporting judge would do after receiving a constitutional complaint whose proposal of the statement of ruling would request that the Constitutional Court should decide, in the sense of Art. 87 para. 1 of the Constitution or Art. 82 para. 1 of the Act on the Constitutional Court, about the conformity of an action of public authority with the constitutionally guaranteed rights of the complainant.[17] Either the complainant will have to cure defects of such proposal of the statement by the deadline designated by the reporting judge or the complaint shall be rejected on procedural grounds.

The actual petition gives the impression that the Senate does not consider the Constitutional Court as a court but as to be some kind of constitutional council – a sort of advisory body.[18] Further evidence of the attitude of politicians towards the Constitutional Court is provided by the statement by a member of the Government on TV, demanding that the Constitutional Court "hurry up" so that the ratification process could be continued in September, as well as a statement by another government official that the Constitutional Court "begged" the government for a position on the Lisbon Treaty. Let me just add that this matter does not concern a direct politicisation of the Constitutional Court, as, for instance, in the case of its decision-making on public budget reforms. The incursion of the judiciary into the area of foreign policy is quite in place: this is also because of the nature of the EU and the obligations which arise for the Czech Republic on account of its membership in this (at least so far) supra-national organization.[19] The reason why the title of the present article mentions the procedure of preventive review – as opposed to the petition for review of the accession treaty (Pl. ÚS 1/04) that had been denied entry into the "gates" of the Constitutional Court (being dismissed *a limine fori*, i.e., literally "from the court's threshold") – is that, if the Constitutional Court had adopted a stricter attitude, the petition could already have been relegated into the archives of the Court for reasons stated in the previous paragraph. However, it is questionable whether this might not give rise to suspicions that the Constitutional Court is playing its own game in the form of a delaying tactic, thereby lending support to opponents of the ratification of the Lisbon Treaty. On

the other hand, the objection might be raised that the Court's decision may be on account of the fact that the petition is easier to process in comparison with the high level of debate on the Lisbon Treaty in the Senate.

As a result, a whole range of procedural issues arise in this connection, even prior to the actual decision on the petition itself. These issues deserve to be addressed here, while it is necessary to point out certain new circumstances which – as is usual – are likely to surface during the practical realization of a legal rule. The positions expressed in the commentaries to the Act on the Constitutional Court[20] are, understandably, still considerations *de interpretatione ferenda*. The final word in the contested points will rest on the Constitutional Court, which has decided in this connection not to decide any other issues in the plenary before issuing its decision on this matter. Yet, there is a whole range of issues that need to be pointed out. They include, above all, the issue of the extent of the review, its criteria, procedures for discussion, and the majority vote necessary to adopt a decision. The actual matter of the petition is directly relevant, but the mere description of the individual issues would go beyond the scope of this article, regardless of the fact that certain issues, such as the assessment of a possible intervention into the sovereignty of a state, are basically insoluble with respect to the changes in the understanding of this concept since 1576, when it was introduced in the theory of the state by J. Bodin.[21] The same holds for trying to answer whether, in connection with the acquisition of legal subjectivity, the EU is not, after all, gradually becoming a state body which is prohibited from being delegated some powers on the basis of Article 10a of the Constitution.

3. The extent of the review – the entire Lisbon Treaty or selected provisions only?

It appears from the Senate's petition that the Constitutional Court should adopt a position concerning the Lisbon Treaty as a whole, because it causes a conflict with the characterization of the Czech Republic as a supreme, unified, and democratic legal country, as well as a change in some of its essential elements defined in Article 9(2) of the Constitution.[22] At the same time, the Senate's petition raises several specific doubts about some provisions of the TEU and TFEU. According to the Senate:

1) TFEU establishes a classification of powers that is more characteristic for division of jurisdiction in federal states, by introducing a category of powers exclusive to the Union, which includes entire comprehensive areas of legal regulation (Art. 2a par. 1 of the TFEU). In conjunction with those facts, in the sphere of shared competences (Art. 4 of the TFEU) there is, from the point of view of Art. 10a of the Constitution, a transfer of competences to the Union in a scope that can not be fully determined in advance,
2) the Art. 352 par. 1 of the TFEU, which is not limited to regulation of the internal market, and is thus a blanket norm that permits enacting measures beyond the scope of Union competences, i.e. beyond the scope of transferred powers under Art. 10a of the Constitution,
3) application of a general transitional clause (passerelle) for purposes of changing unanimous decision making to decision making by a qualified majority in a particular area or replacing a special legislative procedure by an ordinary legislative procedure under Art. 48 par. 7 of the TEU is a change of powers under Art. 10a of the Constitution, without that change being accompanied by ratification of an international treaty or the active consent of Parliament. As regards Art. 83 par. 1 of the TFEU, there is no opportunity at all for Parliament to express lack of consent; thus, this can de facto render Art. 15 par. 1 of the Constitution meaningless,
4) international treaties negotiated and approved by a qualified majority in the Council (not unanimously) under Art. 216 of the TFEU would also be binding on member states that did not consent to them, even though the standard ratification process would not take place in these states, and, in the case of the Czech Republic, the opportunity for preliminary judicial review as to whether such treaties are consistent with the constitutional order would also disappear. Therefore, the Senate expressed doubts as to whether this process is compatible with Art. 49 and Art. 63 par. 1 let. b) of the Constitution, and whether there is room to apply these treaties based on Art. 10 of the Constitution,
5) the indirect reference to the Charter of Fundamental Rights of the EU, together with the future accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 6 par. 1 and 2 of the TEU) can lead to lack of clarity about the status of the Charter of Fundamental Rights of the EU (the "CFREU"), and it is not clear whether this construction will strengthen or, on the contrary, lower the standard of domestic protection of human rights enshrined in the Czech Charter of Fundamental Rights and Freedoms (the "CFRF"),
6) there is a question whether Art. 2 of the TEU is consistent with Art. 1 par. 1 and Art. 2 par. 1 of the Constitution (the principle of the sovereignty of the people), in view of the fact that it expands the values on which the Union is established, which could, through a mechanism of suspending membership rights, be used to create political pressure to change domestic legal orders concerning such fun-

damental issues against the will of the sovereign, i.e. the people.[23]

A double problem has, thus, been created for the Constitutional Court.[24] If it assessed the constitutionality of the entire treaty, it could constitute a barrier *rei iudicatae* for other potential petitioners. This is because Art. 71a of the Act on the Constitutional Court contains a construction under which the right to file a petition to the Constitutional Court arises gradually to the individual petitioners in relation to the actual stage of the procedure of giving the consent for ratification (Art. 71a para. 1 of the Act on the Constitutional Court). It appears from previous judicial decisions that this is not possible. Examples may be given of decisions (so far only in the case of legal rules) where the Constitutional Court decided on an overall petition for the cancellation of an entire legal regulation in such a way that it granted the petition with respect to several provisions, not refusing but dismissing the remaining parts of the petition.[25] In this way, the impression might be created of causing an obstacle *rei iudicatae*. However, the position by the Constitutional Court must respect the interconnectedness between the statement and its reasoning (otherwise even a decision by the Constitutional Court might be void). In this case, however, such a problem should not arise because – with a view to the specificity of the statement concerning preventive review under Art. 71e para. 1 and para. 2 of the Act on the Constitutional Court – the Constitutional Court should deal with insubstantial (and even more so with unsubstantiated) allegations in the reasoning of its finding, not in the statement. This should not prevent other potential petitioners from challenging some other provisions of the treaty or even (in my opinion) the same provisions but substantiated with some other, new arguments. The idea that the Constitutional Court will deal in detail with such an extensive and incomprehensible text – once and for all, even without the petition for review meeting the requirements of Art. 34 of the Act on the Constitutional Court – is totally out of the question.[26] This is not a parallel to the criminal notice (complaint) of suspected unconstitutionality; in addition, there is a whole range of other arguments against, mainly the actual raison-d'etre of preventive review.[27] The fact that other potential petitioners are *ex lege* parties to the proceedings (except for the government and groups of MPs or Senators) does not deprive such petitioners of the possibility of filing an independent petition once it is their turn, under Art. 71 para. 1 of the Act on the Constitutional Court, within the process of expressing one's approval.[28]

4. What parts of the text of the Lisbon Treaty should the Constitutional Court review?

There are EU-wide discussions on what is new in the Lisbon Treaty in comparison with the current state. The Constitutional Court is unlikely to be spared such considerations, although these will be engaged from a different standpoint. The preventive review of an international treaty should not be a pretext for a subsequent review of, e.g., the contents of the Accession Treaty of 2003. It will therefore have to be decided what the limits of the preventive review are (i.e., the new situation), separating out the previously agreed or formed legal situation (*acqui communautaire*), in which there would be, from the substantive standpoint, no preventive review. However, the Constitutional Court cannot be required to stake out those areas in EU primary law which – from the position of the Lisbon Treaty – already work, and separate them from new developments introduced under this treaty. This is a rather complex issue, and its critics are typically put down by being told that such specificities are not yet explicitly mentioned in the primary law but are contained in the judicial decisions of the European Court of Justice.[29] Since even similar provisions may obtain quite different contents in new contexts, none of them may be ruled out from the review, save perhaps for derogatory and operative provisions. It generally holds that the challenged provisions are not subject to review.[30] The Constitutional Court will not likewise assess those parts of the Lisbon Treaty (comprising also dozens of protocols and declarations of a general and special nature) which do not concern the Czech Republic. In this connection, the general principle needs to be stated that where a member state gives a free hand to the future European Court of Justice to modify or even create new law, then the question needs to be asked whether it makes sense to engage in an abstract dispute over something that will obtain its specific shape only in its judicial decisions on thousands of pages of complicated texts of primary law. The current ECJ does not ask the question of whether the EU is a state; it behaves as if it were, although what is missing is the proverbial competence exclusivity (Kompetenz-Kompetenz) referred to by Kelsen.

Thus, the Constitutional Court finds itself for the first time in a situation quite different from reviewing the constitutionality of amendments of acts as a subsequent control of the constitutionality of legal regulations. In that area, the court has established quite a consistent doctrine according to which it reviews the content of the original text as modified by the amendment, which does not have an independent existence. In the case of amendments, the court assesses only the formal aspects, such as the observance of the procedure of its adoption and publication (cf. for instance, findings Nos. 30/1998 Sb. and 476/2002 Sb.). The use of this doctri-

ne, however, turns out to be entirely impractical with respect to preventive review, simply on account of the nature of the matter itself.

The form of the Lisbon Treaty as the subject matter of review is related to the provision of Art. 71d para. 3 of the Act on the Constitutional Court, under which the Constitutional Court is not limited to the assessment of the content of an international treaty with respect to the constitutional order. Here, unlike Art. 68 para. 1 of the Act on the Constitutional Court, no assessment is required about whether an international treaty has been concluded by a body which was authorised to do so and whether the process of its conclusion was in conformity with the national constitutional law. I have expressed my opinion on this matter several times, also by raising an objection to the possible conflict between Art. 71d para. 3 of the Act on the Constitutional Court and Art. 87 para. 2 and Article 88 para. 1 of the Constitution.[31] In this connection, let me mention another aspect and formulate a conclusion in the form of a question. All proponents of the ratification of the Lisbon Treaty claim that it does not contain any possibility of a transfer of new competencies from the Czech Republic to the EU. The exclusion of the review of procedural issues therefore hides another problem. In the event that both houses of the Parliament will approve the ratification according to the procedure in Article 49 of the Constitution, i.e., under the conditions of Art. 39 para. 1 and para. 2 of the Constitution (i.e., the majority of the members present) and the President of the Czech Republic subsequently proves to the Constitutional Court that such a transfer happens, would the Constitutional Court be able to state that it may not deal with the breach of the procedure specified in Article 10a para 2 and Article 39 para. 4 of the Constitutional Court (the qualified majority)?[32] In such a case, this will concern not only the self-limitation of the Constitutional Court, which should not review whether the transfer of competencies is or is not in conformity with the interests of the Czech Republic (this is a typical problem in the sense of a "political question doctrine") but also the problem of procedure which does not, in this case, encroach upon the area of international law.

Another issue consists in deciding what benchmark should be used for assessing an authentic international treaty. This will be the first time that the Constitutional Court will apply the provisions on the reference criterion for review, which are not formulated in a uniform manner. The prescribed criterion for the assessment of conformity is, under Art. 71a of the Act on the Constitutional Court, a constitutional law, while Article 87 para. 2 of the Constitution (to which Art. 71a para. 1 refers) stipulates that this should be the constitutional order. The same notion ("the constiturional order") is mentioned in Art. 71e of the Act on the Constitutional Court. This cannot be considered just as a technical mistake; it would be insignificant if the Constitutional Court was not striving to extend the interpretation of the notion of "constitutional order" (cf. the finding No. 403/2002 Sb.).[33] However, it is hardly conceivable that the criterion for the review of an international treaty by the Constitutional Court should consist in another international treaty, be it a treaty on human rights. Since the constitutional order is made up, according to Article 112 para. 1 of the Constitution, of constitutional acts and the Charter, then this particular case will call for the assessment of conformity with a specific constitutional act and its provision, rather than the constitutional order as a whole – unless the Constitutional Court decides to reopen this issue once again. The constitutional order does not have any provisions, as a part of the imprecise formulation in Art. 71e para. 1 of the Act on the Constitutional Court. Should a possible conflict be found, then it does not matter what constitutional provision it conflicts with.[34] The review cannot be limited only to Article 9 para. 2 of the Constitution (so-called "material core" of the Constitution) or Article 1 of the Charter, as it might be possible in the event of an already valid EC and EU law in the sense of the findings of the Constitutional Court concerning constitutionality of the sugar quotas (No. 154/2006 Sb.) and the European arrest warrant (No. 434/2006 Sb.).

5. The effect of the Irish referendum on the procedure of the Czech Constitutional Court

Decision-making in the field of international politics necessarily leads to the necessity of reacting to other contracting parties, which is not customary in other areas of the jurisdiction of the Constitutional Court. In this case, this concerns the issue of the Irish referendum, which turned the Lisbon Treaty down. As a consequence, the Constitutional Court might have found itself facing a new question, arising to it, just as in the case of some other constitutional courts in connection with the previous[35] European constitutional treaty, which was turned down in referenda in France and the Netherlands. However, in this case, the situation is different,[36] and the Constitutional Court did not have reason to discontinue or stop the proceedings because the contractual process still continues. Apart from that, discussions constantly tend to overlook the provision in Article 48 para. 5 of the new numbering of the EU treaty, which anticipates such a situation.[37] This provides that, if the Lisbon Treaty is ratified by four fifths of member states within two years after its conclusion, and if one or more member states meet obstacles while ratifying it, the issue will be dealt with by the European Council. It is, therefore, anticipated that, in order to assess the situation, the process will have to be concluded in all of the 28 contracting parties of the ratification process (the EU itself and its member states),

because without this, the European Council cannot look for possible solutions.

6. What will the Constitutional Court decide and by what majority

It is not quite clear from the prayer of the Senate's petition what statement the Senate actually requests. This does not unequivocally arise even from the special provision in Art. 71e of the Act on the Constitutional Court. This proceeding is different from judicial review of legal regulations because it essentially concerns the pronouncement of an authoritative position on the constitutionality of an international treaty. Its aim is to block the potential ratification (Art. 87 para. 2 of the Constitution), not the process of ratification. The question the Constitutional Court is addressing in this case is not how many and which provisions, but whether the ratification is possible or not. This is one of the reasons why the second division (Art. 71a – 71e) does not contain an explicit reference to the first division (Art. 64–71) of the special part of the Act on Constitutional Court (control of constitutionality and legality of enactments). Approval is given to an international treaty as a whole because it may be ratified only in its entirety.[38] Should even a single provision of this treaty be found unconstitutional, this will not change the result in any way. There is a parallel with the two houses of the Parliament: just as they can only approve or dismiss the ratification of a treaty (Art. 108 para. 6 of the Rules of Procedure of the Chamber of Deputives and Art. 117b para. 5 of the Rules of Procedure of the Senate), the Constitutional Court may only decide in its finding that an international treaty (i.e., not its individual provisions) may not be ratified.[39]

The issue is about the prevention of a possible unconstitutional situation and not about repression, i.e., about the removal of an unconstitutional situation. A conflict with other law is not a problem with respect to the place of such treaties within the application hierarchy of Czech law (pursuant to Art. 10 of the Constitution *conventio derogat legi*). The provision of Art. 71e of the Act on the Constitutional Court does not require the Constitutional Court to state in its finding which provision(s) of an international treaty are considered to be in conflict with the constitutional order; it does, however, require the listing of the specific constitutional provisions with which a conflict is found. In this way, the unconstitutional elements of an international treaty will be indirectly identified (unless this occurs in the statement). It is not, however, impossible (the practice of delivering statements is still developing) that the general statement under Art. 71e(1) of the Act on the Constitutional Court will combine with an enumeration of the problematic provisions of a treaty or, by contrast, an enumeration of those provisions which are found to be constitutionally all right.

It appears (so far only in the literature) that another contested issue is what majority is necessary to carry the decision of the Constitutional Court in this matter. According to one of the opinions,[40] the principle *in favorem conventionis* should be applied,[41] similarly to judicial review of laws. This is based on the prerequisite that the President and the government will be signing treaties that conform to the Constitution and that the contrary needs to be proved. This is based, under Art. 13 of the Act on the Constitutional Court, on the qualified majority (i.e., nine votes). An interesting position is taken by another commentary,[42] which probably favours the standpoint that the qualified majority must be reached in order to express the conformity (or – better – the incontestability) of an international treaty with the constitutional order.[43] In theory, the ratification of the Lisbon Treaty could be blocked by two votes if the quorum is 10 judges or by 7 votes if the quorum is 15 judges. The decision would, thus, be made by the notorious and egregious "relevant minority."[44] It will, therefore, also be important how this issue is clarified.

7. Addendum

During the author's proof of this study the Constitutional Court delivered its judgment. Hitherto it is not at the disposal its full wording.[45] On the basis of the announced parts of the ruling[46] we can state that the most of the procedural questions treated in this study were answered in the first part of the ruling.[47] In this respect, the Court especially pointed out, that it concentrates its review only on those provisions of the international treaty whose accordance with the constitutional order the petitioner expressly contested, and where, in an effort to meet the burden of allegation, it supported its claims with constitutional law arguments. The Constitutional Court also stated more precisely that in this review it did not intend, for a number of reasons, to distinguish between the provisions of the Treaty of Lisbon described as "normatively" old or new, i.e. it reviewed all those provisions of the Treaty of Lisbon that the petitioner properly contested. Important is an additional statement of the Constitutional Court, that it can review whether an act by bodies of the Union exceed the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution, however only in utterly exceptional cases.

Thus, the findings (in a narrow sense) sounds as follows: The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community in Art. 2 par. 1 (originally Art. 2a par. 1), Art. 4 par. 2 (originally Art. 2c), Art. 352 par. 1 (originally Art. 308 par. 1), Art. 83 (originally Art. 69b

par. 1) and Art. 216 (originally Art. 188l) of the TFEU, as amended by the Treaty of Lisbon, in Art. 2 (originally Art. 1a), Art. 7 and Art. 48 par. 6 and 7 of the TEU, as amended by the Treaty of Lisbon, and the Charter of Fundamental Rights of the European Union is not in conflict with the constitutional order.

Thus, the story of the Lisbon Treaty will continue. If the process of approval of the ratification was successful in both the Senate and the Chamber of Deputies, there will be waiting President Václav Klaus at the end.[48] According to him, any discussion on when the Lisbon Treaty will be passed or rejected by the Czech Republic is pointless now because of the Irish referendum.[49]

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[1] The following abbreviations in this study will be used: „Sb." as Collection of Laws, the Czech official journal for promulgation of legal enactments, "TEU" as "the Treaty on European Union", "TFEU" as the Treaty on the Functioning of the European Union, "the Constitution of the Czech Republic" as "the Constitution".

[2] The legal system of the Czech Republic does not allow for a subsequent constitutional review of international treaties. However, the decisions of the Constitutional Court have already shown that this should not obstruct the protection of fundamental rights of individuals by means of constitutional complaints. Cf. the finding II. ÚS 405/02 of 2003 (available at nalus.usoud.cz in Czech or at www.usoud.cz in English) on the issue of Slovak pensions paid to Czech citizens.

[3] The English versions of the Constitution of the Czech Republic, the Act on the Constitutional Court and other regulations are available online at: http://www.psp.cz/cgi-bin/eng/sqw/hp.sqw?k=31.

[4] In actual practice, there has only been one petition filed for reviewing the conformity of the international treaty on the accession of the Czech Republic to the EU. This, however, could not be heard (Pl. ÚS 1/04, cf. nalus.usoud.cz) because it was filed after the deadline for its submission. In the case of the "European constitution," the expected proposal could not even be filed because of the failure of the proposal in the national referenda in France and the Netherlands. The attempt of the President to start proceedings on the "European constitution" was dealt with by the Constitutional Court "in front of the gates": informally, in the form of a letter, which is a suitable manner of responding to a letter.

[5] It seems as if this unintelligible form was meant to cover up the fact that the Lisbon Treaty takes over a significant part of the "European constitution" and should simultaneously serve as a prevention against holding referenda on a text which cannot be grasped without the consolidated texts of both treaties.

[6] This is the so-called Denksporterkenntniss from 1994 (G 135/93 VfGH), which concluded that a legal regulation is in conflict with the principle of the legal state if "In order to find out its sense, extensive knowledge of constitutional law, qualified legal expertise and experience, as well as archivists' diligence are needed" or where the understanding depends on "exceptional methodological abilities and a certain pleasure of solving puzzles."

[7] T. Oppermann: Die Europäische Union von Lissabon. DVBl., 2008, vol. 8, p. 476 uses the fitting description as "an unreadable monster" (ein unlesbares Monstrum).

[8] However, if common people read Article 5 of the Treaty, which explains the secrets of the numbering system, the changes in referencing, etc., they will not be really encouraged to read on, especially if they encounter the "horizontal changes" specified in Article 2 which further obfuscate the text.

[9] Otherwise it might review the constitutionality of provisions identified differently from the petitioner. It will be only the official, i.e., the "consolidated," text of both new treaties that will make the primary EU law again user-friendly for EU citizens. This version, however, was published in the *Official Journal of EU* only on 9 May 2008 (208/C 115/01), i.e., at a time when the Senate's petition had already been submitted to the Constitutional Court.

[10] For a detailed analysis, see: House of Lords. European Union Committee. The Treaty of Lisbon: an impact assessment. HL Paper 62-I (The Report) a 62-II (Evidence). The literature states that 95 to 99 per cent of the content of the European constitutional treaty has been taken over ("saved"). For more details, see e.g., Terhechte, J. Ph.: Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag? EuR, 2008, No. 2, p. 189, which gives the figure as 95 per cent. J. P. Bonde, in the electronic version of his study, New name – Same content. The Lisbon Treaty – is it also an EU Constitution? 2nd ed. 2007, p. 8 (http://www.j.dk/exp/images/bondes/BOOK_New_name_-same_content_EN.pdf), offers the opinion of A. Stubb, a Finnish representative at inter-governmental conferences for the preparation of the treaty, that the commonality of both texts is 99 per cent. Cf. also Bergmann, J.: Bericht aus Europa: Vertrag von Lisabon und aktuelle Rechtsprechung. DÖV, 2008, No. 8, p. 305-309. It may basically be said that analyses agree in numbers. What they differ in is just the conclusion whether this constitutes a success (the saving of the European constitutional treaty) or a failure to respect the opinions of EU citizens.

[11] Detailed description and documentation is provided in Winkelmann, I.: Das Maastricht-Urteil des Bundesverfassungsgerichts vom 12. Oktober 1993. Berlin 1994.

[12] Its text was included in the annex to the decision No. 257 from the 33rd meeting of the Senate's Committee for EU affairs. The senate approved this proposal during its meeting on 24 April 2008, with the majority of 48 votes, with 4 votes against (out of 70 senators present).

[13] An example of how thorough a proposal in such a serious matter may be can be provided by the situation in Germany: the motion by MP P. Gauweiler (this includes other issues in addition to the constitutional complaint) has over 300 pages; S. Hassel-Reusing's constitutional complaint has 114 pages; D. Dehma's complaint has 63 pages; the motion by Die Linke has 61 pages. Not intending to criticize that honorable institution, the extent of the proposal of the Senate is surprising, especially with a view to what excellent experts the Senate has, what attention was paid to this Treaty in its bodies, and what the level of the plenary debate was.

[14] The formulation of the statement of the ruling (terms of the judgement) is called „petit" in Czech. The Czech theory of procedural law traditionally distinguishes between such

a „petit“ and the giving reasons for it. The Senate requests in its proposal of the statement of the ruling (petit) that the Constitutional Court should decide “in the sense of Art. 87 para. 2 of the Constitution, as amended by the constitutional acts No. 395/2001 Sb., and Art. 71e of the Act No. 182/1993 Sb., on the Constitutional Court, as amended by the Act No. 48/2002 Sb., on the conformity of the Treaty with the constitutional order.”

[15] The Constitutional Court is not the state’s notary; therefore, any proposal may only request the court to declare non-correspondence. In the opposite case, the Constitutional Court will not turn down anything (just as it will not cancel anything in the event of granting the motion), it will simply – with a view to the nature of the preventive nature of the review – declare correspondence, thereby dismissing the motion. For more details, see Filip-Holländer-Šimíček: Zákon o ústavním soudu. Komentář [Commentary to the Act on Constitutional Court]. 2nd ed. C. H. Beck, Praha 2007, pp. 485-487. It will therefore be interesting to observe how the Constitutional Court will deal with this formulation.

[16] Of course, one may come across this in the practice of constitutional courts, e.g., where someone wants to convince someone else about the constitutionality of, for instance, a law. However, a constitutional court will be requested to cancel such a law as unconstitutional, although it will be expected that such a petition will be turned down, thereby confirming the constitutionality of such an act.

[17] I.e., being asked to choose himself whether to agree with the petition in full or in part, or whether to dismiss it in full or in part. By all means, the proposal of the statement shall be definite and unequivocal. Its formulation in such a form is the most important task of the petitioner.

[18] In the case of treaties, the government may, in pursuance to Article 24 of the EU Treaty and Article 300 of the EC Treaty, ask for an opinion from the European Court of Justice.

[19] On the other hand, one cannot fail to see the application of the possibility to defer the ratification of the Lisbon Treaty by means of a petition to the Constitutional Court. Unlike the so-called concordat with the Vatican, which was “removed” by a decision of the Chamber of the Representatives, the majority of Senators did not refuse to give their approval but referred the matter to the Constitutional Court.

[20] Cf. Filip/Holländer/Šimíček: *Zákon o Ústavním soudu. Komentář* [*Commentary to the Act on Constitutional Court*]. 2nd ed. C.H.Beck, Praha 2007, pp. 457-489 and Wagnerová, E. a kol.: Zákon o Ústavním soudu s komentářem [The Act on Constitutional Court with a Commentary] ASPI, Praha 2007, pp. 3298-315.

[21] Bodin, J.: Six Books of the Commonwealth. Oxford 1955. Cf. mainly chapter 10 of the first book on the properties of sovereignty (p. 40n).

[22] To be correct, the Senate does not claim this (see above); it actually just asks the question whether this is not the case, although the relevant section of the petition does not finish with a question mark. The possible ratification of the Lisbon Treaty is challenged but not explicitly.

[23] President Václav Klaus, as a party to the proceeding according to art. 71c of the Constitutional Court Act supported the Senate’s arguments. According to his opinion, the Lisbon Treaty is at variance with the spirit of the Constitution and its "material core" and will push the EU closer to a federative state. The remaining party to the proceedings, i.e. the Chamber of Deputies of the Parliament represented by its Chairman Miloslav Vlček took rather neutral position. In contrast to the President’s argumentation, the Government rejected the Senate’s objections and tried to give reasons for conformity of the Lisbon Treaty with the constitutional order.

[24] Regardless of the fact that the entire petition would have to be divided among several reporting judges, just as in the case of judicial review of the constitutionality of the Act No. 261/2007 Sb. on Reform of Public Budgets.

[25] This was the case in a few findings as e.g., the finding No. 131/1994 Sb. (concerning the Act No. 229/1991 Sb., on Land, as subsequently amended), the finding No. 410/2001 Sb. (concerning the sugar quotas) as well as the finding No. 2/2008 Sb. (concerning the Act No. 261/2007 Sb., on Reform of Public Budgets).

[26] The Constitutional Court uses the following formulation: “Where the petitioner in the proceedings on the review of norms cannot bear the burden of alleged unconstitutionality, such a petition must be considered as in conflict with Art. 34(1) of the Act No. 182/1993 Sb., and thus as incapable of being discussed with respect to the issue in the matter” (finding No. 512/2004 Sb.). One can object to the transfer of terms from civil proceedings (i.e., “contested” and “uncontested” proceedings) into the abstract review of an international treaty which has not yet been ratified.”

[27] Cf. Filip/Holländer/Šimíček: op. cit. p. 483. Wagnerová, E. a kol.: op. cit., p. 312, tentatively admits that the Constitutional Court could carry out a “remaining” review with the result of creating the situation *rei iudicatae*.

[28] In this case, this concerns mainly the President of the Czech Republic, whose position on the Senate’s petition (available online at www.hrad.cz) specifies the significant problems of the subject matter of the proceedings. This would be possible if the Constitutional Court decided that the Lisbon Treaty is in conformity with the constitutional order and if the process of approval of the ratification was successful in both the Senate and the Chamber of Deputies.

[29] A suitable example consists of the development of judicial decisions of the US Supreme Court and its doctrines of *residual powers* of states and, above all, *implied powers* of the federation. The latter provided inspiration for the European Court of Justice as early as 1956 (cf. the decision in Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community. – Case 8-55 – derivation of the competence to conclude international treaties from the competence to regulate a certain issue within the EC).

[30] Unlike Poland and Great Britain, the Czech Republic did not negotiate any exceptions. Its declarations concerning the Charter of Fundamental Rights of the EU are merely parts of the textual organization of the Lisbon Treaty, with individual states confirming that they have understood the text properly.

[31] Cf. Filip/Holländer/Šimíček: op. cit. p. 481n.

[32] In this connection, I emphasize the procedural aspect rather than the content. One cannot, however, fail to consider the Protocol on the application of the Charter of Fundamental Rights of the EU in Poland and Great Britain, the role of the future Court of Justice of the EU as an engine for integration, and the well-known doctrine of the Czech Constitutional Court, which deals not with individual issues but with everything “in aggregate” (cf. the finding No. 64/2001 Sb. on the election reform). This (i.e., the rule of “what is too numerous becomes excessive”) is what the extensive argumentation of MP Gauweiler is clearly based on (cf. his petition to the German Constitutional Court).

[33] Cf. Filip, J.: Nález č. 403/2002 Sb. jako rukavice hozená ústavodárci Ústavním soudem. Právní zpravodaj, roč. 2002, No. 11.

[34] The term "conformity" (or "accordance") is not suitable for this kind of relation, because international treaties do not constitute executive instruments for the constitution. For the purpose of preserving constitutionality, it is sufficient that an international treaty is not in conflict with the constitutional order. Some other construction is not, because of the nature of the matter, even conceivable.

[35] This is, however, relative, since the vast majority of its provisions form a part of the Lisbon Treaty.

[36] Not only according to the famous dictum that, in the case of disapproval by such a big member state as France (moreover, prior to national elections), it is bad luck for the treaty, while in the case of disapproval by a small member state, it is bad luck for such a member state.

[37] It is literally taken over from No. IV-443 of the past European Constitutional Treaty. The commentary (Note No. 4, p. 621), however, expresses doubts about the meaning of such a provision. Now we know it: identical content is submitted again under a new and camouflaged label.

[38] The ratification cannot take the form of a proposal of the statement of the ruling in the Senate's petition, from which it is not clear whether the treaty is, in the Senate's opinion, problematic or not.

[39] For more details, see Filip/Holländer/Šimíček: op. cit. p. 484-489.

[40] Filip/Holländer/Šimíček: op. cit. p. 72.

[41] Pursuant to Art. 10 of the Constitution if an international treaty provides something other than that which a statute provides, the treaty shall apply.

[42] Pospíšil in Wagnerová, E. a kol.: op. cit. p. 314.

[43] This is the logical consequence of the opinion that the Constitutional Court may review not only the contested parts of a treaty but also the rest. Wagnerová, E. a kol.: op. cit. p. 312.

[44] Cf. the finding of the Constitutional Court 3/96 of 1996 (available online at http://nalus.usoud.cz) on electoral deposits and the various opinions in this matter. If the required qualified majority of 9 votes is not reached, the over-voted minority is giving the reasoning of the ruling of the Court.

[45] The abstract of the ruling has been published yet on the web of the Constitutional Court (http://angl.concourt.cz/angl_verze/doc/pl-19-08.php).

[46] According to the tradition originated from the period of the Austro-Hungarian monarchy, the judgments of the Constitutional Court are called „nález" in Czech, what is matching to the term „finding" in English or "das Erkenntiss" in German.

[47] The ruling as announced was unanimous and without any form of a separate vote, thus the deliberations sub 6 concerning the qualified majority has remained in the meanwhile merely a problem of theory.

[48] Immediately after the Court's decision the President expressed its hope, that a new motion will be submitted by a group of Senators or Deputies. He discerns a lot of another new and profound reasons the Constitutional Court did not deal with. In such a case the new motion in the same matter is not excluded (so-called inadmissible petition in sense of *res iudicata*).

[49] Standpoint of the President that concerns the future potential signature of instruments of ratification of the Lisbon Treaty is coincident with the position of the President of Poland L. Kaczyński. They both would probably sign the Lisbon Treaty only if it were ratified by Ireland.

European Law on Zoning and on Project Approvals in the Czech Republic

Study of Early Application of Supranational Law in a New Member State

Filip Křepelka*

1. Introduction

There is case law in Czech administrative courts regarding the participation of the public on zoning and project approvals based on the application of European Community law.[1]

Reading these judgments, however, reveals an uncertainty related to the application of this supranational law in the Czech Republic. This paper describes and analyses the grounds, consequences, and possible solutions of this situation.

2. Environmental policy and law of the European Community

The environmental law of the European Community has developed in the last decades into a specific branch of this supranational law.[2]

The reasons for the legislative engagement of the European Community[3] on environmental issues are manifold.

Firstly, there are global and continental risks to the environment. These need to be addressed by interna-

tional action. As a supranational structure established for the integration of European countries, the European Community can serve this task more effectively than other international organizations.

Another justification is the economic integration of member states. Producers in countries with lower requirements can beat with cheaper prices those producers that must comply with higher standards. Thus, competition would be unfair.

The European Community contributes to the development of social standards. Environmental protection improves the conditions of living. The right to an undamaged environment gradually becomes perceived as a fundamental right. Many Europeans are in favour of enhanced protection of the environment. A new ideology – environmentalism – emerged in Europe and enjoys a considerable influence in several member states.

Representatives of member states often criticize environmental standards of the European Community, perceiving it as a threat to economic development. Nevertheless, they have agreed with the establishment of a common environmental policy. They also mostly agree with such legislation in the Council. Therefore, I suspect that they transferred the competence for environmental issues to this supranational polity due to the unpopularity of inherently restrictive environmental law.

Certainly, the continent-wide level of government can avoid local pressures for reprieves from environmental standards. From this point of view, it can be more effective. Indeed, federal legislation is also the principal source of environmental standards in the United States.[4]

3. Zoning and Project Approvals in European Community Law

There is a large body of legislation of the European Community on environmental issues. Among them, two directives are important for zoning and project approvals that impact the environment.

The first is Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.[5] The second is Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended with Directive 2003/35/EC.[6]

Both directives specify standards outlined in the Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (known as the Aarhus Convention) of the United Nations Economic Commission for Europe.[7] The European Community is a contracting party to it, together with most member states, including the Czech Republic.

The most demanding requirement of this legislation is the access to courts for the concerned public.[8] Traditional rules for standing are inapplicable, because numerous individuals and groups can be concerned.[9] Totally open access to courts, however, threatens to delay, unduly, any project. It is hard to balance this.

4. Decentralization of the formulation and application of European Community law

Formulation and enforcement of most laws within the European Community law is broadly decentralized.

Most standards are set with directives.[10] They are expected to be transposed with the laws of member states (national laws). Therefore, their application is mostly indirect and only covert. Only compliant national laws are expected to be applied.

This wide use of directives is related to the broad decentralization of enforcement. The law of the European Community is rarely applied by its own institutions and agencies. Most standards are to be enforced by administrations, or by the judiciaries of the member states. The activity of European institutions is usually limited to supervision and coordination of enforcement by authorities of the member states. The European Community can, thus, be described as "a head without a body."

Directives are a prevalent tool of European environmental policy. Enforcement of shared environmental standards is left to member states. The role of the Commission (Directorate-General for the Environment) and of the European Environment Agency[11] are limited to support and coordination.

5. Principles addressing consequences of decentralization

This decentralization of both formulation and enforcement of European standards causes troubles unknown in states that formulate and apply their laws directly.

There are numerous examples of the failed transposition of directives in particular member states due to lack of will or capacity.

Therefore, the Court of Justice has gradually developed and refined its doctrine of direct effect. A directive that lacks appropriate and timely transposition can be claimed by affected individuals, against the various member states, to have failed.[12]

Furthermore, the Court of Justice has repeatedly required an indirect affect. Directives should be taken

into consideration if relevant national law is to be interpreted.[13]

Both effects can cause a departure from the usual interpretation and application of national law. Therefore, they create considerable complications for member states, their institutions, and the public. Law becomes more complicated than it ever was.

The Court of Justice has repeatedly underlined that the authorities of member states cannot deprive the standards of the European Community of their efficacy. According to the principle of equivalence, European standards should be at least protected comparably to similar standards established by national legislation.

On the other hand, there is a broad acceptance of procedural autonomy. The European Community takes into appropriate consideration different structures and procedures established by member states for application of national Europeanized and European law.

All these features resulting from legislative, executive, and judicial decentralizations are relevant for European environmental policy, in general, and for European standards for public participation and access to courts in environmental matters, in particular.

6. Zone and Project Planning in member states in general

Many member states have established standards and procedures for zoning and for approval of projects affecting the environment decades before the involvement of the European Community. They continue to use and to develop these according their political and administrative traditions. Albeit, European standards can introduce significant changes.

In other member states, however, zoning and public approval of projects that are risky for the environment are quite a new phenomenon. European law is often an important impetus for the creation of appropriate legislation. Legitimacy of these standards can be compromised with this introduction "from Brussels".

It should also be mentioned that zoning and project approval is a competence which is vested to different levels and branches of government, including directly elected bodies on the one hand and specialized independent agencies on the other. The European Community can hardly intervene in the related distribution of competences if it relies on member states. Therefore, European standards for zoning and project approvals, including access to courts, are formulated vaguely.

7. Zoning and Project Approval in the Czech Republic

There is a long tradition of zoning and a developed legal framework for approval of environmentally sensitive projects in the Czech Republic. Its origins can be traced to the late Austrian-Hungarian Monarchy and to pre-war democratic Czechoslovakia. Nevertheless, the key features of these mechanisms were established during the period of socialism, under different economic, social, and political conditions.[14]

Czech zoning and construction law has recently been re-codified.[15] It is, however, hard to claim that this re-codification is sufficiently radical to meet all the requirements and expectations of the public.

8. Modernization, Environmentalism, and Judicialisation

After the collapse of socialism, Czechoslovakia and subsequently the Czech Republic quickly developed environmental law that included legislation on the environmental impact assessment of projects.

Nevertheless, the process of environmentalization stopped half way. New factories, highways, and other projects are promoted by politicians and usually backed by the population. Environmentalist groups have limited influence. They are successful mainly on the local level in ad-hoc coalitions with neighbourhood associations that fear the impact of projects on their living conditions. Using the political process, only a few projects were ever stopped or significantly curtailed and improved based on environmental considerations. There is also visible rejection of environmentalist ideas in the Czech Republic.

Czech environmental law, especially its standards for zoning and project approval, is gradually judicialized. Certainly, this tendency has been slowed by lengthy proceedings, unstable legislation, and weak mechanisms for the settling of case law.

The system of the administrative judiciary was reformed in 2003. *Nejvyšší správní soud* (the Supreme Administrative Court)[16] was created as the highest authority for administrative matters. Regional courts serve as inferior courts.

Even before this reform, the Czech judiciary was confronted with actions against decisions related to the environment. Most judgments show a reluctance to decide them. The standing of environmentalist groups and neighbourhood associations was denied entirely, or it was limited to actions against procedural shortcomings of previous administrative proceedings.

A Czech legislator is usually not keen to provide guarantees to the above-mentioned groups and associations. There are few provisions that explicitly grant

procedural rights for them.[17] Many legislators fear considerable delays and undue burdens to already overloaded courts.

9. Entry of European Community law into the Czech Republic

After a decade of economic, political, and administrative modernisation and stabilisation, the Czech Republic acceded to the European Community in 2004.

There are permanent troubles with the implementation of the law of the European Community in the Czech Republic. Directives are often transposed verbatim, instead of being properly understood as regards their requirements, including the margin of appreciation left to member states. Conciliation of their standards with the interests of the Czech Republic is often neglected. Regulations are also inappropriately accompanied with Czech legislation.

Since accession, there is only limited experience with the law of the European Community. Few authorities apply it routinely. For most judges and officials, this supranational law, which consists of hundreds of legal texts, is remote and obscure. Furthermore, legislation was not translated properly and timely. Judgments of the Court of Justice are rarely available in the Czech language even now. Therefore, everybody was and is forced to rely on texts in foreign languages that are often understood inappropriately.

10. Judgments on Zoning and Approvals Based on European Community Law

In recent years, Czech environmental activism has been aided by a non-governmental organisation that provides excellent legal services: *Ekologický právní servis*.[18]

It contributes to the continuous flow of actions and complaints against various decisions on projects affecting the environment. Argumentation starts to focus on standards set by the law of the European Community and international law, especially rights to information, to public participation, and to access to courts.

There are few judgments that have confirmed such access to a considerable extent. The most famous it that of *Nejvyšší správní soud – New Runway of Airport Praha-Ruzyně*.[19] Access to court was granted thanks to the perceived direct effect of the Aarhus convention. The zoning ordinance of the capital was labelled as a measure of a general nature and, thus, was reviewed by the court.

Nevertheless, this activist judgment was reversed quickly by a judgment of the extended chamber of the same court in the case *Motorway Pohořelice-Mikulov*.[20] It is based on the assumption that the Aarhus Convention sets the framework. Therefore, it should not be directly applied. This refusal of standing obviously disappointed Czech environmentalist groups and neighbourhood associations opposing particular projects with possible adverse effects on the environment.

Nevertheless, the previously mentioned, new legislation for zoning and construction already established access to the court to everybody who feels affected by zoning decisions categorized as measures of a general nature.[21]

The court also underlined the preliminary nature of the outcomes of environmental impact assessment in its decision on *Additional Motorway Lane around Brno*.[22] Resulting opinion serves only as a final decision. This final decision can be challenged before the court. The court claimed that the European standard for this environment impact assessment is formulated clearly in the directive. Therefore, it rejected the call for requests for a preliminary ruling.

11. Analysis of the grounds of development and turbulences

The above-mentioned judgments of the Supreme Administrative Court and several other judgments of it or of regional courts show considerable uncertainty related to the importance of the law of the European Community.

They show a wide range of approaches to this new supranational law: from entire ignorance to eager application of the law. Vaguely formulated standards and principles are difficult to apply alongside national law.

Nobody should expect quick homogenization of case-law. Cases are usually decided by small chambers comprised of three judges. Proceedings in Czech courts are lengthy. Czech legislation is complicated, messy, and subject of numerous changes. There are also reasonable doubts regarding the soundness of case-law. Judges often hesitate to respect it and try to bypass their views. The consequence is a messy application of law.

12. Reluctance to Launch Preliminary Rulings

There were reasons for references for preliminary ruling in the above-mentioned cases. Provisions on access to courts in both directives have not yet been interpreted by the Court of Justice. Interpretation of their relevant provisions is difficult, due to their general wording. Furthermore, the Supreme Administrative Court is generally perceived to be the court of last

resort in the Czech administrative judiciary.[23] Therefore, it requests it if there is no *acte éclaire* or *acte clair*.

There is, however, no such request among the several requests for preliminary rulings made by Czech courts. Probably, there are widespread fears of further delays.

Indeed, comparison shows the Europe-wide reluctance of courts in other member states to request preliminary rulings on these issues.[24] Most courts seem to strive for considerable procedural autonomy. Therefore, they hesitate to induce judicial activism of the Court of Justice in these issues related closely to their operations. There is widespread denial of direct applicability of the Aarhus Convention and a lack of will to apply or to take into consideration both directives.

After all, the transposition of both directives seems to be troublesome for many member states. Almost all elder member states face actions of the Commission before the Court of Justice. Coverage of new member states seems to follow.[25]

13. Impracticable Czech Legislation on Zoning and Approval of Projects

Zoning and approval of projects affecting the environment is complicated in the Czech Republic. Three levels of zone plans are adopted by various political bodies of state, regional, and local government. There are several types of subsequent decisions: a decision on localisation of building and several decisions related to construction. Other measures, including the results of environmental impact assessment, can be easily added to the list. These decisions, adopted in a broad span of time and often without any knowledge under which financial and technical conditions the project will be realized, if at all, can be theoretically brought to courts by disagreeing activist groups and neighbourhood associations. It should be underlined that projects clearly denied by the majority of the population of a government entity are usually not approved at all. Judicial challenges affect projects which are strongly rejected only by minorities.

Judges often perceive these judicial actions as obstacles for decision-making and tend to reject them. If it is necessary, due to the wording of supranational and international laws, they mention that subsequent decisions will be judiciable. Thus, no actual judicial control is necessary. Due to the length of planning and a usual shortage of public money, we often await these steps for years. Therefore, it remains unclear whether judicial control would be really available to activist groups and to neighbourhood associations in the late phases of project planning.

14. Comparison with Other Member States

Other member states of the European Union have adjusted their laws more to the requirement of conciliation of the different interests and the opinions of the public.[26]

For example, there are integrated proceedings for big projects that have significant impacts on the environment in Germany and Austria. In Germany, there is legislation that establishes a plan for building a motorway. Everybody knows, however, that this plan, adopted as an act of parliament, is not the final decision on the project. Nevertheless, political conflicts are often cleared already in this phase of decision-making. Subsequently, there is one integrated proceeding for the whole project (for example, for the indivisible section of motorway[27]), which includes an assessment of impacts. Approval of the project can be challenged before court only once. Certainly, such proceedings are extremely complicated and demanding. Nevertheless, they focus on substantive and important procedural issues more than in the recurring cases before Czech courts.

Special tribunals, or judicial panels together with specific procedures, are developed for judicial control of zoning and for approval of environmentally sensitive projects because traditional mechanisms are perceived to be unsuitable.[28]

15. Understanding of Environmental law including particular requirements

Environmental law related to the use of land and to environment-sensitive projects consists mainly of competing principles and requirements. Decisions include assessment. Therefore, the political aspect of these cannot be excluded, as it can be done, to a great extent, in criminal, civil, or other administrative law.

There are also many misunderstandings related to the requirements set by directives and the Aarhus Convention. I suggest that the requirements for public participation are often met with the decision-making of directly elected bodies, i.e., assemblies of municipalities, towns and regions. Judicial control, if it is required at all, should respect the inherent political nature of zoning and the approval of environmentally sensitive projects.

16. Conclusions on Zoning and Project Approvals

I am convinced that Czech zone planning should be profoundly reorganized to meet the requirements of the above-mentioned supranational and international law and – understandably – to remain functional. The pur-

pose of standards for zoning and the approval of projects is the conciliation of different economic, social, and political interests with compromises accepted by the general public and not threatening particular segments of the population in proceedings where politics and rights cannot be entirely separated within an appropriate time. It should not cause never-ending legal clashes. This outcome does not even serve the interests of the minority that is in favour of a more effective protection of the environment.

Czech legislators, who are expected to take appropriate consideration of international and supranational law, should study the solutions of other member states, especially countries that have successfully combined a high-level of protection of the environment with long-lasting economic prosperity and, finally, have similar traditions of law and government. These are, above all, close neighbours: Germany and Austria.[29]

17. Conclusions on interaction of Czech and European law

The cumulated application of Czech legislation and standards set by supranational and international laws has visible limits.

Principles of application of European Community law, which look nice in the judgments of the Court of Justice and in textbooks on European law, justify almost every solution with competing principles and with a direct and indirect effect of directives.

I am afraid that European law regarding access to courts in environmental disputes reveals an unbearable complexity of international, supranational, and national laws.

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[1] I will write about the European Community in this paper. All law belongs to the first pillar of the European Union. Readers unfamiliar with it should take into consideration that the European Community forms the oldest and the most important component of the European Union. The law of the European Community only has supranational features. The Lisbon Treaty, however, expects a merger of these entities with same membership of 27 member states.

[2] Several monographs have been written about this, for example Lee M., *Environmental Law – Challenges, Change and Decision-Making*, Hart Publishing, Oxford – Portland, 2005.

[3] This policy has base in articles 174 – 176 of the Treaty establishing the European Community.

[4] For an overview, see "Environmental Policy of the United States" in English Wikipedia. This engagement, however, does not exclude the more rigorous policy of several states.

[5] OJ L 107, pp. 30-37. Deadline for transposition was 21st July 2004.

[6] OJ L 156, pp. 17-25. Deadline for transposition of amending the directive was 25th June 2005.

[7] For further information about the Convention, see http://www.unece.org/env/pp. The Convention was adopted in 1998. It came into force in 2001; for the European Community in 2005; for the Czech Republic in 2004.

[8] Article 9 of the Aarhus Convention and article 10a inserted into directive 85/337/EEC with directive 2003/35/EC. On the other hand, directive 2001/42/EC does not require access to courts for the concerned public.

[9] See Lee M. (cited above), p. 139-144.

[10] See article 249 Treaty establishing the European Community.

[11] See http://www.eea.europa.eu.

[12] Landmark judgments of the Court of Justice; Ratti (148/78) and Marshall (152/84) described and analysed these in every textbook of the European Community / European Union law.

[13] Judgment Marleasing (C-106/89) is also frequently invoked and analysed.

[14] In the last three decades, *zákon č. 50/1976 Sb., o územním plánování a stavebním řádu* (Law on Zoning and Construction Rules) was applied and adjusted.

[15] *Zákon č. 183/2006 Sb., o územním plánování a stavebním řádu* is applicable since 2007.

[16] See web pages in English at http://www.nssoud.cz. In 2004 – 2008, I was adviser for European law at this court. This paper is based on my experience with its decisions. Nevertheless, the opinions expressed are my own.

[17] *Zákon č. 100/2001 Sb., o posuzování vlivů na životní prostředí* (Law on Assessment of Impacts on the Environment) entitles (§ 23(9)) associations of citizens and non-profit companies that declare their engagement to participate in various proceedings related to environment impact assessment. A new tool for the engagement of the public is a repre-sentative commissioned by a certain number of citizens of a region or municipality that have objected.

[18] (In English) Environmental legal service. See http://www.eps.cz.

[19] Judgment 1 Ao 1/2006-74 (18th July 2006).

[20] Order 3 Ao 1/2007-44 (13th March 2007).

[21] According to the new legislation for zoning, various plans are labelled as measures of a general nature (*opatření obecné povahy)* which can be challenged directly before the Supreme Administrative Court. The Court clarifies the standing in these proceedings in the line of recent judgments.

[22] Order 3 As 48/2006-52 (9th January 2008)

[23] Article 234 (3) Treaty establishing the European Community.

[24] Use the search form at http://curia.europa.eu for both adjudicated and pending cases relating to directives 2001/42/EC and 2003/35/EC for consultation of the actual situation. In September 2008, there are only the first few references for preliminary rulings.

[25] The Czech Republic has already faced an inquiry by the Commission. Representatives of environmental activism are convinced that it does not comply with the requirements of directive 2003/35/EC. See web pages of the European Environmental Bureau (http://www.eeb.org), Černý P., *Czech Republic – The Aarhus Convention in Operation: Quick Scan*, pp. 1-15.

[26] Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (http://www.juradmin.eu) organized a colloquium (Leipzig, Germany, 2006) that analysed the impact of European environmental legislation on road planning. Country reports and a summarizing general report can be found there.

[27] German legislation for the construction of federal long-distance roads is provided with a special law (*Bundesfernstrassengesetz*). According to §§ 17–17d of this law, integrated procedure is necessary for the construction of a new motorway. This procedure finishes with a planning decision (*Planfeststellungsbeschluss*).

[28] The above-mentioned German legislation for the construction of federal roads provides for special rules relating to judicial review. For expedited approvals, projects in East Germany were limited to one instance (see article § 17e of *Bundesfernstrassengesetz*)

[29] Especially, the national policy of territorial development should be adopted as law by the Parliament of the Czech Republic, as it has been in Germany. On the other hand, ad hoc legislation for faster approval of particular sections of motorways should be avoided.

Intersections and Passing

Consideration about application of conflict-of-law rules, uniform law rules and of non-state rules of legal regulation

Naděžda Rozehnalová*

I. Introduction

Explanation: The name opening our paper is not purposeless. It pursues a specific aim – to show existence of various groups of legal rules regulating or being able to regulate contracts including a foreign (international) element and in the same time to point out existence of horizontal[1] and vertical relationships between these rules. In consideration of the required scope of the paper, it is possible only to outline these issues, namely even in a situation when we limited the subject-matter of the paper to the issues of a single contractual type – international purchase agreement.[2]

Justifying the need: At the first sight, the area of legal regulation of private legal relationships with an international element represents an ill-arranged and non-transparent network of legal rules in terms of their various origin (their sources) and various nature (their sources and manner of creation). It is difficult for a person not being devoted to the concerned area to find a clear application rule for them and hence identify mutual relationships and subordinations. This comes in addition to the various view of the law determination before general courts and before arbitrators. The issue of conflict law is in addition sensitive to the approach of the procedural international law. This relationship may fundamentally affect the hearing of a specific case. Hence this respect cannot be left out either.

Aim: The objective of the paper is to point out to existence of individual groups of rules and methods of regulating the monitored relationships, their mutual relations, namely in relation to what applies before the courts in the Czech Republic. In consideration of the different theoretical starting points in arbitration, we shall put these issues aside.[3] The expression "monitored groups of rules" shall mean:

- conflict-of-law rules as rules determining law in private legal relationships with an international element,
- uniform law, i.e. uniform substantive legal rules directly regulating rights and obligations of the parties,
- the lex mercatoria[4] as the law of international merchants, which differs from the two foregoing groups by its origin. It is not based on legislative activities of a state or states. These rules come into existence either spontaneously, in practice, or they represent a result of activity of entities other than the state (ICC in Paris, business unions, academic activities). It is considered to include also rules, which are indeed created by international organizations but are not included in an international treaty (UNIDROIT Principles of International Contracts).

II. Private International Law – a Universal Solution?

Introduction. The starting point of our thoughts is one the components of the private international law – the conflict of law rules. The reasons are the following. In contrast to the uniform material, substantive law, the conflict law is not able to settle relationships with an international element in a uniform manner at this stage of its development.[5] However, it is capable of solving them in a complex manner, in their full extent. In contrast to the law of non-state origin (the lex mercatoria), no doubts are cast on its existence. Hence it is possible to use it as a starting point for thoughts about the basic possible applications of both other groups of rules.

Let us remind ourselves of the function performed by this discipline[6]: to determine the legal system, by which the legal relationship with an international element will be governed. This definition, following for example from the Czech Private International Law Act (hereinafter referred to as "PILA"), is narrower than the doctrinal approach to the private international law.[7] It even anticipates the applied method – i.e. the method ensuing from the hypothetical collision of legal systems when examining the legal relationship. The conflict-of-law rule and the connecting factor included therein form a connection between the examined legal relationships and the subsequently applied legal system. This predominantly European, continental approach maintained from the times of Savigny represents only seemingly simple and trouble-free set of rules. The effect of procedural law on one side and the development in the doctrinal area on the other side including the influence of the American approach bring about the differences. These are demonstrated not only in the formulations of the conflict-of-law rules but also in other issues like examination of the foreign law that is to be applied on the basis of the conflict-of-law rule, its ascertaining etc. This applies not just to national systems of the conflict law but it may affect also the system of the unified conflict law. This approach may have its influence also on the other groups of rules, which we monitor. Therefore it is suitable, before we proceed to define the relationship to the other monitored groups of rules, to mention the relationship the procedural and conflict law from the points of view of the Czech law.

Interaction of the substantive, conflict and procedural rules of law. The issue of interaction of the conflict and procedural laws has a fundamental importance for the area of applying a foreign legal system. A conflict-of-law rule and the substantive law applied on the basis of such rule's reference are used in a specific decision-making process. It is not possible to think of law treatment separately from a specific procedural framework. The conditionality of application of conflict-of-law rules and substantive legal rules by the standards specified within the law of the forum is indisputable. Issues of this type, as we state hereinbelow, affects in the specific case the course as well as the final result of the proceedings. Since 1989, when on the departments addressed also this issue in Santiago de Compostela, a number of articles as well as publications have appeared which have been trying to examine these very issues on comparative basis.

As shown by comparative studies, there is a high probability of the different "procedural" understanding of the conflict-of-law rules and their understanding on the basis of the applied legal system.[8] Only briefly on how this relationship may be characterized in terms of the Czech law:

1. **Are conflict-of-law rules of the forum applied to relationships, which fall under the applicability of the private international law, ex officio or facultatively, i.e. according to the judge's discretion or only on the motion of the parties?** It is unquestionable that rules of the conflict law form a part of the Czech law, or the law applicable on the territory of the Czech Republic respectively. Hence there is not reason – unless they determine liberty of their application themselves – to treat them in a manner different from other legal rules, i.e. they are applied in the extent of their applicability (Section 1 of PILA). Neither the Czech literature nor the known cases resolved by the Czech courts mentioned a consideration of facultative application of conflict-of-law rules. The fact that the conflict law would not be applied and this resulting into application of another law should in case of review lead to cancellation of the judgment.
2. **How is the foreign law treated - as the law or as a fact to be proved?** From the point of view of the Czech law, the foreign law is considered law and hence the principle *iura novit curia* applies also in this case. The new draft private international law act expressly mentions this principal.[9] Nevertheless, the doctrine never cast doubts on treatment of the foreign law as the law. Hence the judge has been obliged to ascertain the contents of the foreign law by all available procedural means.
3. **It is possible to review incorrect application of the foreign law by Czech courts?** The Czech doctrine mentions application of law as it is applied in the concerned state, to which is belongs. These days, this principles is mentioned expressly also in the new draft act. In the event of incorrect application of foreign law, the current doctrine as well as literature approve of the review. There is however no case known as yet from judicial practice.

In the context of the relationship to the groups of rules, which we monitor, the following questions may be put:

1. If the subject-matter of interest of the private international law is to settle conflicts, how can we define these conflicts? Are they conflicts of legal systems of states and has there been a move towards the practice before certain arbitrators and this conflict may be understood also as a conflict between state legal systems and the group of rules of non-state origin? The standpoint to the question will help us take a stand to the lex mercatoria as the so-called law of international merchants. It will allow us to state whether the lex mercatoria or non-state means are directly applicable or only in the context of mandatory rules of the applicable law (determined by the parties by means of the choice of law or otherwise).

2. What is the relationship between various sources of regulation of the conflict-of-law and substantive rules? Is the method of regulation important too? In consideration of the various sources of regulation of the international purchase agreement, this viewpoint is naturally important too.

ad 1. The issue of applying the lex mercatoria or individual rules of non-state origin accompanies the area of relationships with international element as of the sixties of the last century. A number of works[10] has provided their opinion both on the issue of rivalry between the conflict law and the lex mercatoria and on the issue of possible application of the lex mercatoria or individual rules when applying the conflict-of-law method. The fact is that until the end of the last century, discussions addressed almost exclusively proceedings before arbitration courts.

As concerns the Czech law, the provision of Section 9 of PILA did not admit any doubts on application of the state law. The doctrine was negative also as regards the option of direct application. The only possible application of individual rules of non-state origin was their application within mandatory rules of the applicable law. The situation did not change after accession to the Convention on the Law Applicable to Contracts[11]. Neither language versions nor the literature to the Convention allow direct application of the lex mercatoria or individual means of non-state regulation.

An improvement in this issue is brought about only by the so-called Green Paper[12]. Therein the Commission – for the sake of the future conversion of the Convention into a Regulation – put also questions concerning the possible direct application of international treaties (for example those which have not become valid) and trade terms. The draft regulation of 2005[13] did not allow application of the lex mercatoria but it permitted application of individual non-state regulations like the UNIDROIT or PECL Principles of International Contracts. The proposal clearly reflected the effort to make use of the work of Landa's groups. It is a fact that following discussions, representatives of the states did not recommend this solution. Rome I Regulation does not include this option anymore, not in relation to the lex mercatoria or even to the above-mentioned sets of legal standards. Only the preamble of the new Regulation expressed the will to consider the option of their application in the future[14]. Even though it does not follow from the wording that direct application is concerned, it is obvious that it should be this one. Indirect application, i.e. within the mandatory rules of applicable law, is beyond controversy possible even today.

The following conclusion can be made: Neither the wording of the Rome I Convention or of the Rome I Regulation nor the provisions of the national law allow an option of direct application of the lex mercatoria or a set of legal standards of non-state origin. Their application is possible only within the mandatory rules of the otherwise applicable law (determined by choice of law of the parties or as a substitute law). Point 14 of the Preamble to the Regulation I does not mean any change in this respect. However, it shows a path to follow – a regulation with the same nature of rules as in the UN Convention on Contracts for International Sale of Goods – i.e. with directory nature of rules or an option of exclusion.

ad 2. The rules (conflict-of-law or substantial) we monitor can be included in various sources. A conflict of sources of regulation affected also by the purpose of the rules[15] requires at least the basic information on its perception in terms of the law valid on the territory of the Czech Republic. Hence in the concerned case, one may consider applying:

- **Rules of national and international origin (act v. international treaty).** This conflict is addressed in Article 10 of the Constitution. In accordance with this Article, published international treaties, whose ratification has been approved by the Parliament and which are binding on the Czech Republic, form a part of the legal order. If the international treaty determines anything differently from an act, the international treaty shall apply. In terms of the issue of private law, in which we are interested in, one may encounter rules of identical wording and different interpretation. This problem caused by differences in the accents on interpretation methods on international or national level accompanied by the emphasis laid on autonomous and uniform interpretation may cause problems. In this case, authors from the area of private international law tend to the preferential application of the international treaty.

- **Rules of national and European origin**. The basic principle of the European law is the application precedence to the national law established by judgments of ECJ. From this point of view an express provision in the new draft of PILA is very interesting. This provision expressly mentions the precedence of directly applicable provisions of the European law if they are inconsistent with the provision of law. This provision seems suitable to us not in cases where Regulations or

Directives are concerned but rather in issues included in the establishing Treaties. This would allow preferential application of another standard that specified in the new PILA.

- Conflict of rules of European and international origin. As concerns the issue of law applicable to contracts, which we follow up, this is a relationship between the Rome I Convention and the Rome I Regulation. This relationship is unambiguously solved in Article 24 of the Regulation. As concerns bilateral treaties on legal aid, the regulation of possible conflicts is included in Article 25 par. 2 of the Regulation.

- Conflict between international treaties. In the area of the purchase agreement, which we follow up, we may encounter this type of conflict only after the Rome I Convention became valid. In the past, the Czech Republic was not a party to a bilateral treaty including conflict-of-law rules. In the monitored area, the UN Convention on Contracts for International Sale of Goods and the Convention on Law Applicable to Contractual Obligations may hence get into conflict in the field international purchase agreements. The basic starting point for a solution thereof is the nature of the conflict as a conflict of international treaties. The very wording of both Conventions does not prevent application (Article 21 of the Rome Convention, Article 90 of the Vienna Convention) of the other one of them. The Czech literature points out the applied method and its ability of more effective regulation. Without any other considerations, it is applied preferentially within the scope of its applicability.

Conclusion: As concerns the issue of relations between individual sources as they have been mentioned, there are no problems either in the literature or in practice. As concerns the relationship between the Rome Convention and the Vienna Convention, the Czech court unambiguously solve it by preference of the rule, which includes uniform substantive rules.

III. Uniform Substantive Law and its Relations

Uniform rules of substantive law mean such rules, which are the result of universal unifications processes. It is true that after decades of efforts to create unified regulation, the results are limited. In the field of substantive law, the most pronounced is the activity of UNCITRAL. It is represented both by model acts and by international treaties. The most successful result is the UN Convention on Contracts for International Sale of Goods and the

Convention on the Limitation Period in the International Sale of Goods.

In the area, which we monitor, we may ask the following questions:

1. Is there in addition to the basic principle of preference of uniform substantive rules to the conflict-of-law one also another aspect of their mutual relationship?

2. As concerns application of the lex mercatoria or individual non-state means of legal regulation, what are the options of their application?

ad 1. At the basic level, we defined the relationship as a relationship of application preference of individual rules. Nevertheless, this statement has also other aspects just as regards our example of the international purchase agreement regulation. It is the following:

a) Special reference rules, which means the rules intentionally referring, together with the reference, to the law of the state as well as to CISG. I mean the case mentioned in Article 1.1.b). Even in the event when the conditions of Article 1.1.a) are not met and the Convention is applied directly and preferentially, its application is not excluded either. We may consider Article 1.1.b), which reflects the fact that CISG forms a part of the law valid on the territory of the state, to which refers the conflict-of-law rule. The rule thereby indirectly extends the applicability of CISG. The Czech Republic filed a reservation to this Article. This type of Convention shall not be applied before Czech courts.

b) Additional conflict-of-law rules. They shall be applied in cases when the Convention excludes certain issues from its regulation (Articles 4, 5) or where there are gaps in the regulation (Article 7.2). The conflict-of-law rules of the forum shall be applied either directly (Articles 4, 5) or where there are no general principles, on the basis of which it would be possible to regulate the relationship (Article 7.2).

Conclusion: Mutual intersections of conflict-of-law rules and uniform substantive rules are a reality in the field of regulating private legal relationships with an international element. On one side, the create networks of regulations, which are difficult to understand of a laic, on the other hand, however, this compromise allowed adopting of the Convention.

ad 2) The issue of the relationship between Vienna Convention and the lex mercatoria has several aspects. This relationship was concisely described by Audit[16] who said that: "*Despite their differences, the Vienna Convention and the lex mercatoria do not compete for the status of being the exclusive source of law for international trade. Although the rules of the Convention are approved by states, they operate in conjunction with international trade usages and the principle of contractual autonomy*". Mutual relationships are allowed on the basis of:

a) The directory nature of the Convention as a whole as well as its individual rules (Article 6). On the contractual basis, it is possible to refer to any grasp-

able legal rule of non-state origin. In consideration of the wording of Article 4, it remains questionable however whether a direct reference to the lex mercatoria as a whole would be valid. In our opinion, such type of reference would be "verified" by return by means of the conflict-of-law rules of the forum. Hence a direct replacement is not possible on the level of substantive law.

b) The regulation of international trade usages in Article 9. This type of a non-state mean can be applied both on basis of an inclusion directly to the contract or on the basis of hypothetical will of the parties. Also in this case, only individual rules may be grasped, specifically those one, which may be qualified as trade usage or international trade usage, not as the lex mercatoria as a whole.

Conclusion: The Vienna Convention allows an extensive application of individual non-state means of legal regulation. Application of the lex mercatoria while applying the principle of autonomy of the parties' will is not possible. Such clause would be verified by return via the national legal system due to Article 4.

IV. Existing and Potential Relationships

In this paper, we made an attempt to indicate various levels of and mutual relationships between legal rules intended to regulate private legal relationships with an international element. We can state the following:

- Basic construction line consisting of the state law. As concerns both the sources and the methods of regulation, the application hierarchy is clear.
- Effect of autonomy of the parties' will. It affects application of rules of non-state origin both in terms of the conflict-of-law method and in terms of the direct method. Specifically, we can mention the following:

a) Influenced application of uniform substantive rules, namely as concerns the exclusion of application of the rule as a whole and as concerns exclusion of an individual rule (see Article 6 of CISG). Application of another rule (created by will of the parties, a non-state rule of legal regulation, the lex mercatoria as a whole) is however limited by Article 4 of CISG.

b) Option to choose the state law without restrictions (see Article 3 of the Rome I Regulation and the Rome I Convention). Nevertheless, application of rules of non-state origin is possible only within mandatory rules of the applicable law (state).

Direct application of the lex mercatoria is in all cases determined by the standpoint of the state law, whether upon application of the conflict-of-law method or the direct method.

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[1] Horizontal relationships shall mean the case when the rules of the same legal force get into conflict and it is necessary to decide on the application precedence.

[2] Similar representation of the said groups of rules may be noted also in relation to another contractual type – international contract of carriage.

[3] The proceedings before arbitrators differ in a number of aspects. The doctrine reflected in the regulation, opinions of arbitrators sharing various theoretical positions, greater extent of autonomy of the contracting parties' will, less intensive relationship of arbitrators to the territory of the state, in principle non-reviewable decision-making about the law applicable in the proceedings before arbitrators, all this requires for the different commentary of this subject matter. See: Rozehnalová, N.: Rozhodčí řízení ve vnitrostátním a mezinárodním obchodním styku. Praha:ASPI CODEX. 2008, p. 54–60.

[4] There are severel approaches to the conception of lex mercatoria. See for example: Goldmann, B.: Lex mercatoria, Forum international No.3, 1983. Goldštajn, A.: The New Law Merchant Reconsidered, Festschrift Schmitthoff, 1973. Goldštajn, A.: The New Law Merchant, Journal of Business Law, 1961. Langen, E.: Transnational Commercial Law, Leiden, 1973. Rodríguez López A.M.: Lex Mercatoria and Harmonization of Contract Law in the EU, DJOF Publishing, 2003. Rozehnalová, N., Transnacionální právo mezinárodního obchodu, Brno, 1994. Rozehnalová, N.: Lex mercatoria - teorie či fikce, Právník, 11, 1998. Schmitthoff, C.M., The Law of International Trade, its Growth, Formulation and Operation, in: The Sources of the Law of International Trade, London, 1964. Schmitthoff, C.: M., Nature and Evolution of the Transnational Law of Commercial Transaction, in: The Transnational Law of International Commercial Transaction, 1982. Teubner, G.: Global Law without a State, Dartmouth, 1997.

[5] There is no ideal solution built on universal basis agreed for example in an international contract.

[6] See the definition of Section 1 of Act No. 97/1963 Coll. on Private and Procedural International Law (hereinafter referred to as PILA): *The purpose of this Act is to determine, which legal system is to be applied to civil, family, labour and other similar relationships with an international element, to regulate the status of foreigners as well as to determine the procedure of Czech judicial bodies when regulating and deciding on these relationships and thereby contribute to international cooperation.*

[7] See for example Kučera, Z.: Mezinárodní právo soukromé, Brno: Doplněk, 2004, P. 17 – 26.

[8] In foreign literature see for example: Geeroms, S., Foreign Law in Civil Litigation, Oxford, 2003. Hausmann, R., Pleading and Proof of Foreign Law– a Comparative Analysis, the European Legal Forum, 1- 2008.

[9] Private International Law Act – Draft from November 2008, art. 24.

[10] See for example v. Bar, Ch., Mankowski, P, Internationales Privatrecht, München, 2003, p. 75 et seq . Boele-Woelki, K., Principles and Private International Law, ULR, 1996, p. 652 et seq. Lando, O., Conflict-of-Law- Rules for Arbitrators, Festrichrift Zweigert, 1981. p.157 et seq. . Lando, O., The Lex Mercatoria in International Commercial Arbitration, ICLQ,

1985, p. 747 et seq. López Rodríguez, A.M. Lex Mercatoria and Harmonization of Contract Law in the EU, Copenhagen, 2003. In Czech literature see for example: Kučera, Z. op.cit. 7, p. 206 et seq. Rozehnalová, N., Střelec, K, Zásady mezinárodních smluv UNIDROIT, lex mercatoria a odvaha k aplikaci, Časopis pro právní vědu a praxi, 2004, č. 1, s. 45 a násl. Salač, J. Nástin vývoje a význam, Právník, 1998, p. 498 et seq.

[11] The Rome Convention on the law applicable to contractual obligations (1980).

[12] COM(2002) 654 final Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation.

[13] COM(2005) 650 final 2005/0261 (COD) Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I).

[14] Preamble, Article 14: If the Community adopts the rules of contractual obligations including the standard terms of contract by means of a suitable legal tool, such tool may determined that the contracting parties are allowed to apply these rules.

[15] Here the objective is to determine the legal system and only subsequently to regulate the conduct of the parties to a private legal relationship, or directly to regulate the conduct of subjects of a private legal relationship.

[16] Audit, B., The Vienna Sales Convention and the Lex Mercatoria, in: Thomas E. Carbonneau ed, *Lex Mercatoria and Arbitration*,., Juris Publishing 1998, pp. 173-194.

Information as a Medium of Law

Radim Polčák*

Information and entropy

Cybernetics tends to be described as the science of systems control, process management, manmade organisms, etc. Although all that is true, lawyers will most likely appreciate the simple and brilliant definition by Neff, who states that cybernetics is about the nature of life and its artificial simulation.[1]

At present, cybernetics is known as a theoretical and, more often, an applied science of a technical nature. It is for this reason that it is not especially interesting to lawyers – who find it of interest only when it brings something useful to facilitate the routine legal practice. Originally, however, cybernetics was at the boundary of natural sciences and philosophy, as is attested by the preoccupations of Norbert Wiener, the founder of the discipline. His publications deal not only with specific technical issues but also with the actual conception and orientation of the discipline from the point of view of philosophy. The original goal of scholars in the field was, as mentioned above, to understand the nature of life and attempt its artificial simulation. If the most visible sub-fields of cybernetics today consist of robotics and mechanical engineering, then this is a continuation of the original course, i.e., the inspiration by life and the construction of its artificial (i.e., manmade and inorganic) simulations.

The research of living organisms has been, since the very beginning, led by the effort to discover their unique features in comparison with non-living, inorganic nature. It was discovered that life, unlike everything else, is not subject to the second law of thermodynamics, i.e., entropy.

Entropy, as a universal law, causes that any system, when left without any interference, gradually loses its organisation and starts to disorganize. Lawyers – for whatever reason – frequently use the example of flat beer (cf. cited in a previous article by the author)[2]: if a pint of beer is properly drafted, i.e., organized in the glass, it has a certain degree of internal organization. However, the beer loses this with the passage of time, i.e., the beer becomes flat, loses its taste,[3] etc. Similarly, various chemicals have their half-life: after the passage of such a period of time, the chemicals disintegrate into their components (which are subject to further disintegration).

Entropy is essentially a thermodynamic law, which means that this phenomenon is, physically, related to the temperature of a given object. One may, thus, easily conclude that entropy can be subdued by freezing a given object. When frozen, it will not be affected by anything and will remain identical forever. If we, thus, succeeded in freezing the beer to absolute zero and keep it at such a temperature, it would retain its (excellent) qualities forever.

The notion of entropy in relation to living organisms is explained in an excellent way by the Nobel Prize winner for physics Erwin Schrödinger.[4] He states: "Let me first emphasize that it is not a hazy concept or idea, but a measurable physical quantity […] At the absolute zero point of temperature (roughly -273°C) the entropy of any substance is zero. When you bring the substance

into any other state by slow, reversible little steps […] the entropy increases by an amount which is computed by dividing every little portion of heat you had to supply in that procedure by the absolute temperature at which it was supplied – and by summing up all these small contributions. […] You see from this, that the unit in which entropy is measured is cal./ °C."

It might be objected that every living organism grows old and that all life ends in death. This is, of course, true for every individual organism, but life itself does not have a natural tendency to perish. By contrast, it tends to develop and evolve. This tendency is manifested by the procreation of living organisms, their generational evolution reacting to changing conditions,[5] etc. It is not accidental that the strongest instincts of living organisms include the sexual urge and the instinct for self-preservation. These are, in actual fact, not incidental urges of single individuals but natural manifestations of life as such.[6]

Leaving aside speculations about the strength of life to face entropy,[7] let us focus on what means life uses towards such an end. In other words, what tools may stop entropy or even lessen its effects. The answer to this question is quite simple: the tool is information. According to one of the definitions of information, it may even be considered as a direct opposite of entropy. Norbert Wiener himself writes the following about information: "Just as the amount of information in a system is a measure of its degree of organization, so the entropy of a system is a measure of its degree of disorganization: and the one is simply negative of the other."[8]

Information as a proposition and as a rule

It is not surprising that information operates similarly in natural processes and social environments. One may not describe the situation in terms of the laws of thermodynamics, but the organizational role of information among people is the same as it is anywhere in living or non-living nature. Any social system where information is created, processed, and distributed is more organized, adaptable, and, consequently, more likely to survive and reproduce.

If Hume's system[9] is used, one may distinguish between two types of information: information that describes reality (i.e. the 'is') and instructions (i.e., information about the 'ought'). Information about reality ('is') is given the value of truth, which indicates, next to the quality of the information itself, its ability to organize the system of its addressees. Whenever an addressee receives truthful information, her ability to react to the external environment is thus increased, while the probability of a wrong decision is reduced. A typical example consists of weather forecasts: where the information is truthful, the addressees of such information are more likely to choose appropriate clothing and, consequently, be safer, more efficient, or more satisfied.

The second type of information consists of information that describes obligations rather than reality, i.e., rules. Even such information has a crucial role when organizing social life, because it is also on its basis that society is internally organized. At the same time, however, this does not concern only norms assembled within the particular normative systems, but also other rules such as principles, policies, standards, etc. In this sense, law may be seen as one of the systems of rules which is characterised by its regulatory nature, state origin, and mechanisms of state enforcement. Other systems of rules, such as social and ethical rules, may have a self-organizational nature (unlike law), having their origin as natural or spontaneous and with different mechanisms for potential sanctions.

The information dichotomy has its stable place in law as well: the processes of authoritative application of law typically deal with the issue of finding the facts and their subsequent legal classification, i.e., the specification of corresponding *ad hoc* duties.[10] While information about facts makes our decision-making more precise, enabling us to adapt our efforts to the circumstances of a given case, normative information provides outcomes for its prospective authoritative solution.[11]

From the point of view of information theory, the entire process of the application of law may be seen as an information procedure. The input information consists of the findings about the facts of the case and information about the rules, the output produces – after a sufficient processing – information about the *ad hoc* normative consequence. If one wanted to specify the procedure further, then the following will be the sources of knowledge on the side of the legal act:

- Evidence (in the event of facts that can be proven)
- Evidence of the presumption + legal norm (in the event of presumed facts, i.e., assumptions and fictions)
- Archives (in the event of known facts)

Based on the above-mentioned, one may discover the obvious problem of applied information theory of law quite easily. The founder of modern cybernetics Norbert Wiener was inspired by the methods of mathematical logic[12] and his followers – including those in the field of legal cybernetics – drew on the same kind of inspiration. A logic whose organizing principle is truth and truth value, however, operates only with the binary conception of truth. Propositions may thus be only described as either true or false.

The binary conception of truthfulness is well-suited for didactic examples of the type "It is 5 o'clock" or "It is raining outside." Life, however, does not bring propositions which can be labelled as one-hundred-percent true or one-hundred-percent false. Such information is

then assessed by a probability assessment, i.e., we treat them as metaphors. From the point of view of mathematic logics, these are not propositions (they cannot be classified as true/false) but are often the only thing we have for ascertaining the facts of a case. Even such didactic examples as "A mole can fly" can almost always be made relative,[13] regardless of such statements as "I am a faithful husband" or "I did not want to break the chair against his head." This indicates that the information conception of factual information makes sense only where we process such information on the basis of both the probability of its intended meaning and its truth value (i.e., not with the ambition to simply state whether it is true or false).

The problem of the representation of reality by means of formal features (propositions, expressions) is also discussed in the excellent Czech four-volume monograph titled *Artificial Intelligence*. The book states that[14]

> "probably universal statements made in common life have numerous implicit (unstated) assumptions which often cannot, despite the best of efforts, be enumerated. This includes, for instance, all kinds of exceptions which are one of the sources making everyday thinking free of monotony. Of course, such experience motivated the formation of other formal systems, such as non-monotonous logics.

Another problem […] consists of the uncompromising character of the only two permissible truth value formulas – true and false. It is very often the case that our judgement is based on a probabilistic assessment of the situation. In such a case, it is necessary to consider a much broader scale of possible values – this generalization is dealt with by fuzzy logic."

Similar to propositional calculus in the event of factual information, the information theory law operates with deontic logic as a method of processing information whose nature concerns obligation. Instead of categories like true/false, it operates with the binary contrast of valid/invalid.

Even if one disregards the permanent problem of the interpretation of legal rules, one must conclude here as well that the methods of logic – in this case deontic logic – cannot grasp and process the law in its complexity. As with propositions, one cannot assign the categories valid/invalid to a whole range of rules. The category of absolute validity/invalidity can be assigned only to ideal norms but not to legal principles, standards, and other categories forming the inseparable part of the system of law.[15] Evidence of the above-mentioned may be, for instance, the point of contact between the otherwise competing theories of legal principles by Ronald Dworkin and Robert Alexy, i.e., the logical distinction between the legal principle and the legal norm. While the norm may be assessed in terms of the binary contrast valid/invalid, the principle cannot be assigned such values on account of its fundamental nature.[16]

Moreover, as long as the final implication of the validity of law is its binding nature, the binary model of assessment cannot be used. Again, the absolute dichotomy of binding/not binding appears only in the case of ideal norms, while practical legal norms often manifest features of relative argumentative binding nature.[17] The use of the methods of logic is again not ideal in this case; their application is eventually limited to a relatively small group of legal problems.

These conclusions were consistently refused by the logic-oriented branches of legal thinking, heavily represented in former socialist Czechoslovakia. The *prima facie* simplicity and logicality of Communist legality were the bases for frequent straightforward publications, where quite obvious conclusions were derived by logical deductions (often quite complicated). As late as 1985, one may, thus, come across explanations – spread over fifteen pages of text – about why a judicial decision is "the function of the given facts of the case (Ss), and the normative regulation of the given facts of the case, i.e., the legal situation (Np), and the judge's procedure when assessing the facts and law of a case (Hsp)." This surprising and truly genial conclusion is supplemented with the final statement that "the elaboration and assessment of the individual arguments of this function, including its values, would require an entirely separate elaboration due to its complexity."[18]

The fundamental points of departure of information conception of law

Summing up the above-mentioned, the information theory of law represents a theoretical reflection of the organizational nature of the system of legal rules. The information conception of law is, thus, based on the assumption that law consists of a set of state information of a prospective nature (obligations) that regulates the life of human communities. Given this perspective, all legal procedures have the character of collecting, processing, and distributing legal information.

Legislation may then be characterised as the processing of information about the needs of society into the form of the organizing information, i.e., the law. Even the judges may, in this sense, be seen as processors of information about a case and the law, from which they subsequently construct an imperative for the parties and, in the case that the decision is published, also a general rule. We may thus, for instance, form the following sequence of steps through which the legal information flows:

> *Social order – a politician (who formulates the social order) – legislative intent (the infor-*

mation source communicated within the framework of the drafting of laws) – legislator (who transfers the legislative intent into individual provisions of the law) – lawmaker (who discusses and passes the law) – collection of laws (the information source communicated to the public) – judge (who interprets the law) – judicial decision (information source communicated to the parties) – recipient of the decision.

It is clear that the definition of law as an information system is problematic as regards the basic disproportion between the ideal (theoretical) category of information and its (practical) communicable form. In connection with the legal norm, Kelsen mentions the necessity of separating the norm and the form, through which the former is manifested and communicated, i.e., the normative utterance.[19] In other words, an analysis must separate the content of a law and its text – in the sequence above, one must further distinguish between the content of the social order and the legislative intent on the one hand, and the content of the judicial decision and its written text on the other. The reason is simple: the limitation of the linguistic means of the law to simple expressions, i.e., the monotonous representation mentioned above.

In comparison to other disciplines aiming to provide society with organizing information,[20] the law suffers from a painful deficit of means for its expression. Because of its ambition to be monotonous and to have mathematical (or rather, logical) precision, the legal system has deprived itself of the opportunity of using practically all common means of expression available elsewhere, except for simple language. Thus, the addressees of legal norms cannot understand their duty or the liability of their offences from the imposing fresco painting or the tones of a musical composition, and not even by means of figurative language conveying legal information. It is then rather difficult to transfer an ideal rule (be it a simple norm) into the form of a terse linguistic expression. It is also for this reason that the law basically avoids numerous statements made *expressis verbis.*[21] Where the legislators attempt a precise expression of a given meaning, this often results in "a cold sauce," as in the following example:[22]

> Section 9(c) of the Regulation No. 331/1997 Sb.: "[For the purposes of these Regulations] a cold sauce or dressing is understood to be any liquid or emulsified product used as a taste supplement to food and salads, produced, above all, from edible oils, thickeners, stabilizers, emulsifiers, vegetable, fruit, spices, and milk products."

Just as we are forced to shape ideal rules into often unsuitable linguistic expressions, so we must fit individual pieces of legal information – regardless of their complexity – into simple logical categories of "true/false" or "valid/invalid." The reason for this is the above-mentioned attempt to ensure simple expression and objective precision of the law, which would, among other things, also enable the subsequent automatization of legal information processes.

Both of these problematic issues, i.e., the curtailment in law of means of expression and the limitation of qualifying legal information into simple binary categories, constitute a not insignificant threat to law and its quality (including its actual legitimacy). On the other hand, these tendencies stand witness to the formation of simple causal mathematical-logical methods for the processing of legal information. Thus, the logical and logic-oriented conception of law enables its encoding into a form which can be processed by machines, thereby opening the door for tempting the possibility of replacing the live processors of legal information (lawyers, policemen, etc.) with tireless machines.

Since law – be it on the theoretical, legislative, or applied levels – consistently and successfully resists such trends, it is apt to ask what makes it so. Despite politically-motivated attempts to tie law up with simple categories and then hand it over to machines, there has been no situation when it could be stated that law will suffer being tied up in such a way. The reason why law is naturally idealistic (not formal) and why it refuses to accept the simple categories of validity and truthfulness may consist – once again – it its information nature. Thus, we are completing a circle and coming back to information as the fundamental unit of law and its natural properties.

A final note on the value nature of information and the information society

As mentioned above, law may be conceived of as an information system which takes over certain generic properties of its fundamental unit, i.e., information. Although information is a simple message, sometimes even a simple number, one watches in amazement the properties manifested by systems organized on the basis of information. Some remarkable effects also occur in any place where spontaneous formation, processing, and exchange of information is allowed, i.e., in the context of the information society.

Thus, it is not theoretically but empirically that we arrive at the surprising conclusion that the information society is not, *per se*, valueless. Regardless of regions or political backgrounds, one may see that where information exchange is not hampered, the physical and logical information infrastructure leads to the development of natural fundamental social values. Without having to introduce such values into the information society actively and on purpose, they appear against the background of common, everyday communication. The analysis of information exchange – be it the transmission of information about the weather, the exchange of

greetings, the communication of what is new in one's personal life, or student advice about examinations – this leads to the conclusion that such particular communication results in the complex tendency towards equality, decency, order, solidarity, etc.[23]

The somewhat pompous but still rational conclusion that follows from all this is that letting individuals communicate freely means, among other things, providing for the opportunity to develop the fundamental values of human society. This conclusion is a paradox, because both the information infrastructure and the Wienerian mathematical-logical method of processing information are, in themselves, valueless. The fact that the information society, which comes into existence with their help, has a strong value-oriented nature leads us to speculate that such values are the complex effects of information and its unexpressed, yet natural content. Just as information was connected with life at the beginning of this article, so can it now be connected with the fundamental values of human society.[24]

The above-stated natural connections are not, of course, welcome in political systems based on authoritative government and the suppression of such values. Authoritative regimes did not take long to understand that a free exchange of information means a direct threat to the non-democratic state establishment. It is, thus, clear that states with authoritative governments strive to limit maximally the possibilities of mutual interpersonal communication, common elsewhere, such as the various services of the internet. Where it is impossible to block access to the information infrastructure, regimes will at least attempt to monitor the mutual information exchange and interfere in such situations which lead to explicit manifestations of the values mentioned above. Even in these cases, however, the natural character of information is so strong that information channels – wherever it is at least possible – are kept open, allowing a maximum passage of information.[25]

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[1] Cf. Neff, V. *Filozofický slovník pro samouky* [*Self-Study Dictionary of Philosophy*]. Praha: Mladá fronta, 1993, p. 84.

[2] Cf. Kühn, Z., Bobek, M., Polčák, R. *Judikatura a právní argumentace* [*Case-Law and Legal Argumentation*]. Praha: Auditorium, 2006, p. 143.

[3] It must be stated in this connection that this criterion may be rather subjective and is used merely for illustrative purposes. It is indisputable that there are numerous beer brands which are not negatively affected by going flat. On the contrary, when one lets such beer (prior to pouring it down the drain) go flat a bit, it might even seem that its taste is slightly improved.

[4] The citation is taken over from Schrödinger's brief book *What is Life* (Cambridge: Cambridge University Press, 1992). The book is available online at <http://home.att.net/~p.caimi/Life.doc>.

[5] The ability to adapt is even considered by some authors to be the most important property of life – cf., among other, Grand, S. *Creation – Life and How to Make It*. Cambridge: Harvard University Press, 2001, p. 104 and subsequent pages.

[6] These instincts may be observed not only in the case of living organisms but also in their individual elements. It may be striking to observe the effort to survive and reproduce at the most basic level of life, i.e. the individual parts of the genetic code – for more details, see, for instance, the fascinating discussion of the human genome in Ridley, M. *Genom*. [*The Genome*] Praha: Portál, 2001, p. 109 and subsequent pages.

[7] Theoretical physics, for instance, tends to be of the opinion that the momentum that causes the movement is the mysterious effect of complexity – cf., for instance, the popular publication by Peter Coveney and Roger Highfield – see Coveney, P., Highfield, R. *Frontiers of Complexity: The Search for Order in a Chaotic World*, New York: Fawcett Columbine, 1996.

[8] Cf. Wiener, N. *Cybernetics: Or the Control and Communication in the Animal and the Machine*. Cambridge: MIT Press, 1961, p. 11.

[9] For the basic distinction between 'is' and 'ought', see Hume, D. *A Treatise on Human Nature*. Project Gutenberg, 2003. Available online at <www.gutenberg.org/etext/4705>.

[10] Obviously, the ascertainment of the facts of the case and its subsequent inclusion within the hypotheses of the relevant norms does not represent some a kind of rigid sequence. Rather, it is a two-way complex process of gradual formation of the legal reflection of the reality – cf., e.g., Holländer, P. *Filosofie práva* [*Philosophy of Law*]. Plzeň: Aleš Čeněk. 2006, p. 206 and subsequent pages.

[11] Such a solution, in turn, becomes another form of organizing information, because, depending on its quality, it brings another regulation into the law. This principle underlies not only legal systems based on precedent but also continental judiciary, which operates with the argumentative binding nature of previous judicial decisions.

[12] Wiener pays homage to Leibnitz in his major book by stating: "If I were to choose a patron saint for cybernetics out of the history of science, I should have to choose Leibniz. The philosophy of Liebniz centers around two closely related concepts -- that of a universal symbolism and that of a calculus of reasoning." See Wiener, N. *Cybernetics: On the Control and Communication in the Animal and the Machine*. Cambridge: MIT Press, 1961, p. 12.

[13] In this case, the propositional character of such a statement may be dismissed by pointing out that if a person manages to catch a mole in a garden, then teaching it to fly is not so difficult – even such a statement cannot actually be subjected to a true/false value and does not constitute a "proposition."

[14] Mařík, V. Štěpánková, O. Lažanský, J. *Umělá intelligence*, 1. díl [*Artificial Intelligence*, Volume 1]. Praha: Academia, 1993, p. 97.

[15] Cf. Dworkin, R. M. *Když se práva berou vážně* [*Taking Law Seriously*]. Praha: OIKOYMENH, 2001, p. 43.

[16] For a comparison of the two conceptions of legal principles with an emphasis on logical distinction, see Holländer, P. *Filosofie práva* [*Philosophy of Law*]. Plzeň: Aleš Čeněk, 2006, p. 143 and subsequent pages.

[17] As an example, one may mention the binding nature of stabilized judicial interpretation, i.e., judicial decisions – a ru-

le formed or modified by judicial decisions becomes binding to such an extent that, when changing it, arguments must be given for any such change. The binding nature is not, however, absolute, as in the case of a precedent; it merely concerns the duty of the court to deal with such a rule in its arguments. For more details, see Kühn, Z., Bobek, M., Polčák, R. *Judikatura a právní argumentace* [*Case-Law and Legal Argumentation*]. Praha: Auditorium, 2006, p. 39 and subsequent pages.

[18] This is the actual (and only) conclusion of the article by Steiner, V. Logická formalizace právních norem a vztahů [*Logical Formalisation of Legal Norms and Relations*]. Právník, Volume 124, 1985, No. 11, p. 1008.

[19] Kelsen literally states the following: "A norm, which is the sense of a volitional act, is the meaning of the sentence, which is the product of the act of speaking, whereby the sense of the volitional act moves towards its expression. We must similarly distinguish the act of finding, whose sense is a proposition, from the act of stating, whereby the sense of the act of finding is expressed." Cf. Kelsen, H. *Všeobecná teorie norem* [*The General Theory of Norms*]. Brno: Masarykova univerzita v Brně, 2000. p. 175.

[20] Such disciplines include, for instance, fine arts, dance, film, and television broadcasts.

[21] Thus, for instance, there is no definition of the signature. Although it is one of the most frequently used legal institutes, its shape is not delimited anywhere, and it thus not, paradoxically, a typical legal institute.

[22] The "cold sauce problem" is elaborated in a sophisticated way by Dworkin, who describes the interpretative dilemmas of unhappy Hercules – cf. Dworkin, R. *Law's Empire*. Oxford: Hart Publishing, 1998, p. 313 and subsequent pages.

[23] In this connection, it must be admitted that opinions differ in regard to the issue of whether to actively code fundamental values into the information structures of the information society. For a discussion of the defence of the natural ability of the information society to create and protect such values, see for instance in Polčák, R. "Code and Complexity: Can the code stand Lessig's challenges?" in *Medien und Recht International Edition*, Volume 4, 2007, No. 3, p. 9 and subsequent pages. For the contrary opinion, see Lessig, L. *Code V.2*. New York: Basic Books, 2006, p. 6.

[24] An artificially created information environment (cyberspace) may serve as an excellent model for the information society. The manner of organization of social groups within cyberspace by means of implicit values is described by Pierre Lévy, *Cyberculture*. London: University of Minnesota Press, 2001, p. 165 and subsequent pages.

[25] See, for instance, the operation of citizen information structures in such countries as Belarus and China.

The System of Principles of Private Law

Jan Hurdík, Petr Lavický*

Introduction

The phenomenon of principles of law – both principles in general and principles of private law – tends to enjoy irregular scholarly attention that occurs in sinusoidal forms.

At times of (positivist) emphasis on written or even codified law, principles tend to be overlooked. What rules the law – as regards theory, legislation, and practice – is a verbalised formal system of written legal rules. Such periods of belief in the omnipotence of written law tend to be regularly followed by periods of doubt and the acknowledgement that even ideal legislators are unable to take into account all conceivable situations. This finding often has an empirical nature and follows from the mistaken belief that the more detailed, thorough, and extensive the text of a law is, the more effectively it will work in practice.[1]

Maxims, principles, values, etc., are undoubtedly concepts that have been undergoing such a dramatic development over the past few decades that they can hardly be compared with other legal concepts. While a few decades ago, these concepts were quite marginal in Czech and Slovak contexts (and not only there), recent years have been characterised by a *hypertrophy of principles*, formulated on the most diverse levels of the system of law, as well as on various stages of production and the application of legal regulation. Principles have become an almost ever-present phenomenon affecting *intra legem* and *secundum legem* situations, dealing with gaps in law, conflicts of rules, and legislators' silences on various issues. However, they have also been used to describe the value insufficiency of the system of legal rules, supplementing real life with what the unavoidably partial system of legal norms leaves out.

From a historical perspective, these principles mostly came into existence spontaneously[2] and *ex post* as an expression of the feeling of injustice when assessing certain situations only under the rules of written law (*summum ius-summa iniuria).* To a significant degree, this trend still persists; consequently, new principles are being constantly created, producing both derivative (partial) and generalising principles. This development

results in a relative complexity of principles, which are listed quite haphazardly or according to custom. Quite disparate principles are, thus, presented alongside each other, differing in nature, degree of applicability, and importance for private law. This cannot be described as a systematic approach.

The present article, given this context, does not aim to analyse individual principles of private law; instead, it tries to *arrange the existing private law principles into a functional system.* Using a procedurally genetic paradigm, it aims to formulate a system based on fundamental values resting in the actual roots of private law regulation.

Variability of the set of principles

As mentioned above, principles mainly seek a solution to the discrepancy between written law and justice – or what we describe in these terms – and what the goal of law should be, regardless of the way in which it may be described. This discrepancy is a reflection of the conflict between the counter forces of a given epoch in the development of society. The different ratio between social and liberal forces in particular stages of the social development contains the answer to *the question of whether a set of legal principles that is forever valid can be found.* It seems that the answer will not be positive, also with view to the acute tension between liberal and socially oriented types of economic, sociological, political, and legal thinking and practice. We are witnessing permanent progress in the areas of pure values and legal techniques. Even such a stable principle as the principle of democracy – which is only rarely subject to any doubt about its belonging to the universal principles – has been changing its content ever since the times of Socrates (whose trial has become one of the first witnesses of the crisis of democracy), regardless of whether it comes in the form of changes in institutional or mental infrastructure of these principles.[3]

Last but not least: as P. Holländer summarises it,[4] the development of the conception and function of legal principles is determined by the constant conflict between natural law and legal positivism, as the key historical branches of legal (theoretical and practical) thinking.

The catalogue of legal principles is, thus, not determined a priori; by contrast, it changes in the course of history. What is changeable is not only the actual enumeration of principles but also their content. This means that it is *impossible* to set up *a stable system of principles of private law;* what can be formulated is only a system corresponding to the values on which a given society is based.

The application of the genetic process paradigm

The temporal variability of the set, content, and system of principles corresponds to changes that occurred in the past decades in the field of methodology in science. In the second half of the 20th century, modern science formulated the so-called *procedurally genetic paradigm*, which views the universe as a process occurring in irreversible temporal dimensions and as a base for order arising from chaos. It is this *finding of the irreversibility of time*, as a genetic feature of understanding reality, that allowed the application of this paradigm in science as a whole, including the humanities. It appears that the partial theories of individual fields of science can be unified into a functional whole and may be validated beyond the substantive paradigm – which limited science for centuries – by having applicability even for "non-natural sciences". Scientific knowledge is applied on the basis of the new paradigm to biological, social, and cultural developments without any methodological limitations.[5]

If the above-mentioned paradigm is valid generally for all fields, then it must hold also for law, as a scientifically grounded reflection of the reality of social relations in models of reality.[6] *Within the sense of the procedurally genetic paradigm, law constitutes a vector with its own points of departure and its temporal and spatial orientations.*[7]

Individual and social dimensions of humans

Within the disciplines of philosophy, Christian doctrine, and human sciences, humans – or, to be more precise, their schematized and reduced form referred to by means of the concept of "*person*" – were studied, in the following two dimensions:

- *individual* (Descartes, Locke, Kant, and others), and
- *social and relational* (Hegel, Durkheim, but also entire fields of science, such as sociology and personalism[8]).

Both dimensions form a base for an elementary characterisation of humans – this already seemed clear to Saint Augustine: "*Homo sum et inter homines vivo*". [9]

If *the goal of law is considered to be the finding and regulating of the dimensions of humans and the dimensions of their positions within society,* then the dialectic base is constituted by precisely these dimensions, whose dynamic interaction contains both the decisive conflict of law and the substance and goal of (private) law: the maintenance or restitution of a dynamic balance in the relations between the participating persons. This is also where the source of human principles is located.

For more than two hundred years (most notably in the form of the French Revolution), this base was used to formulate a pair of basic values – raised into the status of fundamental rights – with each dimension of humans having one of the values:

- *freedom* as a modern expression of the individuality of humans entering society,
- *equality* as a modern expression of the conditions of the integration of humans.[10]

While the accentuation of the principle of freedom is an expression of the individual dimension of law from the points of view of both its aim and the process of its assertion, the implementation of the principle of equality introduces the relational dimension into law, which is further raised onto a qualitatively higher level thanks to the principle of "brotherhood" (*fraternité, Brüderlichkeit*), currently termed as the principle of solidarity.

Since freedom and equality are the basic values of private law, the private law regulation builds on these principles by minimising any limitations of the freedom of humans and citizens.[11] This means that there is not a horizontal relation between freedom – or other principles that support the principle of freedoms – on the one hand, and principles representing values leading to a (legal) limitation of freedom, on the other. Instead, the principle of freedom and its group has an a priori position with respect to the principles limiting freedom. No matter how blurred this dimension may become in the dimensions of private law regulation, it is still – potentially or actually – present. A substantial part of private law principles follows this schema by *belonging to one of the two groups:* either supporting or limiting the freedom of humans, although this is often mediated many times through legal techniques. This schema is also followed by *methods* of private law regulation ("everything is allowed that is not expressly forbidden", dispositivity, etc.). After all, these *genetic relations are respected* even by those *principles that do not, at first sight, belong to any of these groups* and seek their place among them (e.g., proportionality, democracy, good manners, good faith). The genetic relations are commonly encoded in the mechanisms through which these principles assert themselves (i.e., in trying to find the minimum of limitations of the freedom of individuals).

The above-described hierarchical construction of private law principles is manifested not only on the level of private law as a relatively unified systemic whole but also on *its lower levels:* thus, property law is based on the freedom of ownership and followed by its limitations, to which the relevant principles correspond (e.g., the prohibition on the misuse of ownership); contract law is based on the freedom to contract and supplemented by limiting principles and rules (e.g., *pacta sunt servanda*); and, after all, even liability is based on the freedom of an individual to act, which is limited by liability limitations based on certain principles of this sub-field (e.g., *neminem leadere* and *casum sentit dominus*).

The partial conclusion may, thus, be drawn that freedom and equality constitute the two fundamental values of private law regulation. At the same time, there are very close links between the two values, since equality limits freedom on the one hand but also allows its real assertion on the other (cf., the saying under which "the law of the stronger is the worst injustice"). For this reason, freedom and equality must be seen as points of departure for the system of private law principles.

Freedom and equality as points of departure for private law principles

These considerations allow the identification of two basic groups of private law principles:

1. The first group is based on human *freedom*, supported, maintained and developed by a whole group of other principles, paremies, normative sentences, etc.

2. The second group *is* and simultaneously *is not* based on *equality* in the actual sense: this is a dilemma rocking the whole system. Equality is an approximative value, asserting itself in combination with *equity* in the broadest (linguistic) sense of the word, i.e., also as equality but also as a concept impossible to define.[12] Equity, thus, becomes a wider category that subsumes equality. Should continental law satisfy the expectations of the reform process leading it out of the crisis identified more than fifty years ago,[13] then one of the solutions consists in the removal of the rigidity of continental legal regulation by transferring the focus of its development into the area of legal practice (application) which must be equipped with suitable instruments and methods to start and deepen this process. This also means the necessity of creating space for *equitable decision-making*. All this also justifies the implementation of principles into the system of private law.[14]

However, should private law enjoy a well-constructed system of values and institutes, then *its value base* – statistically speaking – *rests on three pillars:*

1. freedom;
2. equality (with a tendency towards solidarity), where these two pillars represent antipodes that are moderated;
3. reasonableness as a tool for the balancing out of the extent of interventions into personal freedom and the extent of the assertion of the principle of equality (of opportunities, weapons, or goals).

Arrangement of the system of private law principles

The organisation of the system of private law principles may take various forms depending on the criteria chosen for the arrangement.[15]

What matters most for the text that follows is the distinction of *axiological principles* into internal and external depending on what values they represent. While *external principles* are the carriers of non-legal values (freedom, equality, equity), *internal principles* rest on values dependent on the nature of the regulation (this mainly concerns legal certainty). External principles aim towards attaining the goal of private law regulation, i.e., on the most general level, the balance of the interests involved. This aim tends to be identified with the attainment of justice from the value perspective. However, any practical realisation of an aim guided by external principles (i.e., the attainment of justice) is conditioned by the use of a certain technique of legal regulation. The values on which it is based express the internal principles.

From a different perspective, internal and external principles may be characterised as *fundamental principles*, with some further *additional principles* that may be added to them. The latter represent the manifestation of the former in the area of private law regulation. An example of a fundamental external principle is freedom; its additional principles are the principle of "everything is allowed that is not forbidden" and the principle of the autonomy of the will.

Combinations of the above-stated criteria may be used to formulate the system of external and internal principles, as well as fundamental principles and additional principles, in the following way:

External principles	
Fundamental principle	**Additional principles**
Freedom	Individual autonomy (autonomy of the will) Everything is allowed that is not forbidden Dispositivity *Vigilantibus iura*
Equality	Equal opportunities Ban on discrimination Protection of the weaker party (consumer, tenant, etc.)
Balancing – equity	Reasonableness (proportionality) Good manners *(Good Faith and Fair dealing)* Ban on abuse of law Democracy Rationality

Internal principles	
Fundamental principle	**Additional principles**
Legal Certainty	Protection of good faith (in the psychological sense of the word) Ban on (true) retroactivity Protection of rights acquired Legitimate expectations Transparency Protection of rights of thirds persons Prevention *Pacta sunt servanda*
Efficiency	

The overall system of private law principles may be expressed as follows:

I. external principles

a) freedom
   - the principle of individual autonomy (autonomy of the will)
   - the principle of "everything is allowed that is not forbidden"
   - the principle of dispositivity of private law regulation
   - the principle of *vigilantibus iura scripta sunt*

b) equality
   - the principle of equal opportunities
   - the principle of a ban on discrimination
   - the principle of the protection of the weaker party

c) equity
   - the principle of reasonableness (proportionality)
   - good manners (good faith in the objective sense, fair dealing)
   - the principle of a ban on the abuse of law
   - the principle of democracy
   - the principle of rationality

II. Internal principles

a) Legal certainty
   - the principle of protection of good faith (in the subjective – psychological sense of the word)
   - the principle of a ban on retroactivity
   - the principle of the protection of rights acquired
   - the principle of legitimate expectations
   - the principle of transparency
   - the principle of the protection of the rights of third persons
   - the principle of prevention
   - the principle of *pacta sunt servadta*

b) efficiency

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[1] Z. Kühn suitably points out the practically unusable Prussian Landrecht, which contains more than 17,000 highly casuistic paragraphs (including the rule that what was said about a fence from wooden sticks applies to a fence from metal grilles). Kühn, Z.: *Aplikace práva ve složitých případech. K úloze právních principů v judikatuře* [*Application of Law in Complex Cases: On the Role of Legal Principles in Judicial Decisions*] Praha: Karolinum, 2002, s. 247.

[2] With certain exceptions typical of some important epochs which managed to formulate their political and legal programmes, such as the period of the legal and political declarations at the beginning of modernity.

[3] Schultz, U. (ed.): *Velké procesy. Právo a spravedlnost v dějinách* [*Major Trials: Law and Justice in History*]. Vydání první. Praha: BRÁNA, spol. s r.o., 1997, pp. 21-25.

[4] Holländer, P.: *Filosofie práva* [*Philosophy of Law*]. První vydání. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2006, pp. 17-63, 139-176.

[5] Král, M.: *Změna paradigmatu vědy* [*Change of the Paradigm of Science*]. Filosofia Praha, 1994, p. 60.

[6] Hurdík, J.: *Institucionální pilíře soukromého práva v dynamice vývoje společnosti* [*Institutional Pillars of Private Law in the Dynamism of a Changing Society*]. Praha: C. H. Beck, 2007, s. 12n.

[7] For more details, cf. Král, M.: *Změna paradigmatu vědy* [*Change of the Paradigm of Science*]. Praha: Filosofia, 1994, p. 15.

[8] Cf. Durkheim, E: *Les formes élémentaires de la vie religieuse*. 5. vydání, Paříž: PUF, 1968, p. 386n. Mounier, E.: Œuvres, sv. I, Paříž, 1934.

[9] ["I am human and I live among humans"] Cited after d´Ippona, A.: *Gaetano lettieri*, Milano: Edizioni San Paolo, Cinisello Baldami, 1999.

[10] The third value the French Revolution – *fraternité* – (substantially similar to equality) failed to stand the test of time when confronted with the liberal development of European society in the 19th century, and disappeared, only to be rediscovered in the 20th century, as the principle of solidarity.

[11] Knapp, V.: *Co je dovoleno a co zakázáno* [*What Is Permitted and What Is Forbidden*]. Právník 1, 1990, p. 27.

[12] Mazière, P.: *Le principe d´égalité en droit privé*. Aix-en-Provence: Presses universitaires d´Aix-Marseille, 2003, mostly p. 49 and subsequent pages.

[13] Cf. Oppetit, B.: *Droit et modernité*, Paris: PUF, 1998, p. 99 and subsequent pages and the sources cited therein.

[14] Cf. the notion of principles "shining through" the legal order – Holländer, P.: *Filosofie práva* [*Philosophy of Law*]. 1. vydání, Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, s. r. o., 2007, p. 154.

[15] E.g., according to *methods* leading to the formulation of principles, one may distinguish between principles formulated through *deductive* methods (i.e., a principle is specified from general points) and *inductive* methods (i.e., a principle is a generalisation of a set of rules of conclusions from experience). Some authors also list a combination of both methods. See Trimidas, T., op. cit., pp. 1-2.

According to the *material or formal sources of law*, one may distinguish, among others, historical principles (with the special role of Roman law), custom-law principles, comparative principles, principles formulated by means of constitutional regulations, principles formulated by means of acts (exceptionally also by means of subordinate legislation), principles formulated by means of the judiciary (Czech, foreign, European), and principles formulated by means of scholarly literature.

According to the *mechanism of operation* in the process of realisation and application of law, one may distinguish between principles forming points of departure (operating as points of departure or prerequisites of a set of legal rules –

e.g., good faith in the psychological conception or legitimate expectations), and target principles (the values they bear are applied in the actual process of realisation or application of law – e.g., the principle of democracy).

According to the extent of operation in the field of law, one may distinguish between general legal principles, private law principles, principles of individual fields of private law, sub-field principles, cross-section principles (and, within them, also cross-section principles between disciplines, fields, or sub-fields of law).

According to the *centrifugal or centripetal orientation*, one may distinguish between extensive principles (within the Czech system, these are understood to be those that are derived from and support the freedom of the individual) and restrictive principles (limiting the freedom of the individual).

Chapters from the Development of the Unification of Private Law

Karel Schelle – Renata Veselá – Ladislav Vojáček*

he aim of the present article is to point out certain stages in the unification of private law. Understandably, the analysis starts with a discussion of Roman law as the basic source of law for mostly Continental private law. This is followed by the effect of natural law on modern codifications. The text then discusses some effects on post-war development, mainly in Eastern Europe, that eventually turned out to be a "blind alley". The article forms a preliminary study for an extensive monograph that the authors are presently working on.

1. Roman law as the basic source of European private law

"Roman law is not the philosophers' stone which is there to be found. European legal thinking cannot be understood merely by reading texts from Antiquity and admiring the juristic erudition of Roman lawyers. What also needs to be studied is what actually followed: without subsequent developments, Roman law would never be what it is today."[1]

This is why it is necessary, when searching for the origins and points of departure of European legal culture, to start from historically attested sources. The actual term "private law" (*ius privatum*) appeared in one of the best-known legal documents of Antiquity – *Digests*. Their author – Domitius Ulpianus, one of the most significant Roman lawyers – defined the difference between private and public law by describing private law as affecting the protection of personal interests, while public law is oriented towards the Roman state and its activities (D, 1, 1, 1.2).[2] Ulpianus's definition has been frequently invoked and cited until the present day (probably as often as it has been questioned, mainly by legal theorists). The fault that critics find with it is a simplification aiming towards the external markers of both terms rather than towards their content. The fundamental objection typically raised against Ulpianus is his failure to define the fundamental difference between private and public law, namely the principle of the equality of subjects.

The real content of the terms of public and private law was, however, dealt with only much later. This occurred in the period when the modern civic society started to develop, i.e. at the age characterized by the formation of modern legal systems. The Middle Ages – as well as the medieval legal order – were based on quite different principles, and did not differentiate between private and public law. The notion of the differentiation between private and public law has become unequivocally accepted by the so-called "Continental legal system" (where it found its classic elaboration in 19th-century European jurisprudence), while Anglo-Saxon law has not, to a similar extent, taken this distinction into account.

When identifying the sources of European private law – or, as the case may be, European legal culture – emphasis will always be placed on the history of European Continental legal culture and Continental jurisprudence. This originated as early as the Middle Ages, when "legal jurisprudence" – in the general sense of the word – started developing, although its interest became focused, quite early, mostly on property law relations, i.e. an area typical for private law. The foundations of modern legal jurisprudence in Europe can, thus, mostly be understood as the foundations of the legal jurisprudence of modern private law. In other words, this science had a real European character; it was a supra-national science; and, in this sense, it was developing into a kind of general theory of law and, above all, private law. As a result, the history of private law in Europe is – as may be repeated once again – far more the history of this legal science and far less the history of individual legal regulations. This supra-national European legal jurisprudence – which was both

a legal science, in the general sense of the word, and a private law science – was a real force uniting the intellectual world of the past and forming, until the present day, the intellectual basis for the modern legal culture in civilized society.[3]

Clearly, the development of modern legal jurisprudence on the European Continent, though resting on medieval foundations and eventually reaching out mostly towards private law issues, was not straightforward. Although legal jurisprudence had its problems (as well as ups and downs) during various historical epochs, it has agreed – with respect to what has been mentioned before – on one basic idea: the basis of modern legal jurisprudence, and thus the modern European Continental legal system, needs to be unambiguously seen as a renewal of interest in Roman law. This renewal of interest can be traced back to as early as the 11th century and is evident in the immediately following centuries, notably in the Italian medieval schools of Roman law.

Another, although somewhat different, direction of European legal jurisprudence is "legal humanism", which was typical mainly for the development of legal culture in France but also, among other, in the Netherlands. This was very soon joined by another significant influence: the rationalist natural law, where – according to the general opinion of legal historians – some points of contact can be identified with French legal humanism. On one hand, the legal/theoretical postulates taken from rationally conceived natural law did significantly affect the European legal jurisprudence of private law; on the other, they never entirely severed the connection with its Roman-law roots. Thus, natural law – passed on and applied in a rationalist way – was the decisive factor in forming a new legislative production whose tangible outcome consists in systematically conceived laws for the particular branches of law. These codifications, some of which occurred as early as the 18th century, represent the foundations of what is referred to as the "modern" – and frequently still valid – legal systems of present-day European countries. At the same time, however, there was a paradoxical outcome: the paths of European jurisprudence began to diverge permanently, while, until the 18th century (or, rather, the turn of the 18th and the 19th centuries), they still retained a relative unity. Nevertheless, once again the unifying force of common legal jurisprudence came to life: in Germany. The task there was to overcome the political and legal fragmentation of the country, with an important role being played by the branch of legal theory called "German pandects". To somewhat simplify the situation, German pandects became somewhat a general theory of law, and might be considered as precursors of the legal positivism that became the crucial branch of legal theory in European legal culture in the 19th century.

It is generally acknowledged that the traditional civil codes of the Continental legal system that came into existence at the beginning of the 19th century (Code Civil and ABGB) have internal organizations different from codes arising from later periods (namely the Swiss ZGB, which does not even have a general part; and the German BGB). It is, however, evident that all these codes stem – in various ways – from various legal schools, and, consequently, from various methods extracted from Roman law. It seems that the internal structure of civil law (so common nowadays) has been directly inspired by Gaius's traditional division of law (sometimes referred to as the "Gaius System") into *personae – res – actiones*. Although, understandably, scholars of Roman law disagree on this matter,[4] this basic framework for the arrangement of private law in modern European codifications was offered by the above-mentioned German pandects from the beginning of the 19th century. This is also reflected, among others, in the common division of European civil codes into both a general part and sections dealing with real rights, rights of obligations, family (marital) law, and inheritance law. The author and the source of this division are both known to us: this organization of civil law, abstracted from pandect law, was first offered in 1807 by the German pandect scholar G.A. Heise, in his book *Grundriss eines Systeme des gemeinen Civilrechts zum Behufe von Pandektenvorlessungen*, and it was commonly accepted and acknowledged in his day.

The drafting and publishing of the Code Civil, however, predated Heise's classification: his book was published three years after the publication of the Code Civil. Given its date of publication, in Austria the classification may have been known. However, since it did not affect ABGB, then either the pandect law was unknown or else it was impossible to take it into consideration during the final stage of the codification process (ABGB was passed on 1 June 1811). It is likewise possible that Zieller did not adopt Heise's conception.[5]

The idea of the undoubted effect of Roman law (albeit in a recycled form) on civil law was not ruled out by any of the legal experts who had been researching this topic for years. Thus, for instance, Czech professor Krčmář writes: "The Civil Code is built (and there can be no doubt about it) on Roman law, although it is based on law that developed through the reception and transformation of Roman law north of the Alps, i.e. on the so-called *Usus Modernus Pandectarum*. As far as some of its parts are concerned (e.g. marital law), the code is based on canon law and some other features, cf. Lehnhooff, Aufllosung p. 82. The basis for some of its institutes derives from modern sources, with Czech and Austrian law being used frequently. In this respect, the institution of public books needs to be pointed out. Other modern codifications are also taken into account, mostly the Prussian Landrecht, which served as the

model for some of the provisions. In addition, the civil code has some features that are not to be found in any older legal order, so one is justified here in talking about the authors' creativity … These features, as well as the overall nature of the code, are the result of its authors; the leaders – first Martini, then Zieller – are true children and significant and highly educated representatives of the Enlightenment, being filled with the epoch's postulates and tendencies. The civil code reflects numerous ideas that were common in the then science of natural law, namely the conviction that all law stands on strong and unchangeable foundations, as well as the attempt for law to be just, i.e. to be the same for everybody, to meet the requirements of equity, to be appropriate for the country for which is it issued, and to be clear, intelligible, and complete – where completeness is the result not of case studies but of reductions to general and clear concepts."[6]

On the other hand, not even a dogmatic adoption of a clearly "Roman-law understanding" of the system of law would have been acceptable. The perfection of and the thousands of years of tradition that provide the roots of European legal culture should be acknowledged. Yet, one must respect the subsequent historical development that has occurred in all areas of social life. In any case, the raising of doubts and the search for new possible arrangements of society – including the legal framework for its operation – are nothing new. The Continental legal system, which was unquestionably influenced by the Roman heritage, has never been a dogma and has not been considered as a cure-all for the imperfections of law as such. This is, once again, evidenced by the words of Prof. Krčmář: "As mentioned above, the Roman-law system cannot be considered as perfect when interpreting civil law. It is hardly possible to create any system free of faults. The matter is explained as follows: the suitability of the system may be judged from various perspectives; necessarily, the arrangement of the matter according to one perspective will manifest some faults when judged from anther perspective. Where the majority sticks to the Roman law system, this may be justified only by stating that the system is probably more suitable in certain regards than to those which it omits. It is clear that new legal institutions that develop over the course of time will make the faults of the system appear more and more visible, since the original system did not have a suitable place for them."[7]

2. *The effect of natural law on the formation of modern European codes*

One of the decisive sources of private law was the theory of natural law, i.e. the belief that ideal law is independent of the state and arises from reason and human nature. The ideas regarding natural law have undergone a complex development. They first appeared in Antiquity (Socrates, Plato). In the Middle Ages, natural law was considered a kind of divine law (Thomas Aquinas), but the heyday of this approach was the 17th and the 18th centuries, when it had a substantial effect on the codification processes in Europe. The old philosophy obtained a new form as a result of its rationalist conception.

The natural-law conception of principles as inalienable, with eternal rules that pre-exist valid law and arise from reason itself, is represented mainly by Thomas Hobbes. He dealt with the natural-law conception of law in his books *On the Citizen* and *Leviathan*, more than 300 years before Dworkin and Alexy formulated their theories. The notions of natural law and natural laws form the starting point of Hobbes' famous notion of social contract. Every human has the natural right to enjoy his or her powers of self-preservation. The right of self-preservation is connected with the right to the means of self-preservation, i.e. everybody has a right to everything and the claims of individual people inevitably clash. It is clear, however, that the eventual war of "all against all" will not ensure self-preservation. Thereore, natural law comes as "the prescription of good reason on what to do or what to refrain from in order to preserve life and limbs". Hobbes arrives at all his approximately twenty natural laws by rational argumentation, derivation from some other law, or reduction ad absurdum. All natural laws can be, according to Hobbes, encapsulated in a single formula: "*Do as you would be done by*". Natural laws are binding in one's consciousness: whoever follows them acts justly. They are binding in the outside world only when humans can obey them safely, otherwise they would find themselves in conflict with the natural law of self-preservation; people would not be reasonable if they followed the laws and ended up as the prey of the unjust. Natural laws as orders of one's reason are unchangeable and eternal, because it is impossible for war to preserve life and for peace to destroy it.

The reason for elaborating on Thomas Hobbes here is that his specific formulation of natural laws may, thanks to their content, also have some effect on modern readers. Logically, the first natural law urges us to "seek and preserve peace". The way to peace, which Hobbes uses to construct the social contract, is indicated by the second law: "That a man be willing, when others are so too, as far-forth as for peace and defense of himself he shall think it necessary, to lay down this right to all things, and be contented with so much liberty against other men, as he would allow other men against himself." The laying down, i.e. the giving up, of one's rights is actually constituted in the form of the contract, which is the subject of the third law: "Let people perform agreed contracts", which is the source and reason of justice. The only injustice is a violation of the contract; where there is no contract, everybody has a natural right to everything in the world; and, as

a consequence, people cannot act in an unjust manner. These three laws are crucial.

Hobbes' natural laws may be understood as principles on which every system of positive law is based. Such a conception of legal principles grounded in natural laws has, however, become outdated.

The person whose work meant a crucial move towards the rationalist school of natural law was Hugo Grotius. In his opinion, the law and state are of terrestrial origin. The state is created on the basis of a social contract between people.

The school of natural law was programmatically oriented towards overcoming old law and creating new law. In reality, however, codifications based on natural law were not quite so new. What was new was the systematic character and general terms on which the relevant codes relied. Their particular institutes were derived from the heritage of Roman law.

The modern doctrine of natural law was prepared by Immanuel Kant – mainly in his work *Kritik der praktischen Vernunft* (1788) – who was himself strongly influenced by Jean Jacques Rousseau. Unlike the official doctrine of natural law (represented mainly by the above-mentioned Hugo Grotius, Pufendorf and Christian Wolf), the modern doctrine of natural law affords the axiom of unchangeability and eternity only to the fundamental leading principles, i.e. the ideal of justice, equality, and freedom limited by the purposes of society, and is strongly opposed to all natural-law attempts to assign the axiom of unchangeability and eternity to every single individual legal rule.

3. Post-war trends of integration

When power in Central and Eastern Europe passed into the hands of the Communists after the Second World War, the continuity of the Czechoslovak legal order was broken in a significant manner. The impulse for the change, however, did not primarily come from domestic developments, but came from the outside; and its effect on the legal orders of other countries resulted in the specific approximation of law in practically the whole Soviet bloc.

The new understanding of the role of the state and law in society affected the fundamental functions of the state, common law formation, the drafting of basic codes (or "codexes", as they were then referred to under the Soviet model), as well as the application of law by courts and other bodies.

The official conception of the state and law stemmed from materialist teachings on the relationship between the economic base and the social superstructure. The economic base consisted of the economic order of society in a given stage of its development. The social superstructure included the political, legal, religious, artistic, and philosophical opinions of society and their corresponding political, legal, and other institutions. According to Marxist theory, the economic situation at any stage of development has a counterpart in a particular superstructure that changes in relation to changing economic conditions. In other words, the base is the determining factor, while the superstructure is derived from the base. Marxism, however, did not see the relationship between the base and the superstructure unilaterally, and did not consider the superstructure as merely the product of the base. The individual components of the superstructure are, on one hand, primarily determined by the degree of development of economic relations; but, on the other, they follow their own specific rules. They are, therefore, relatively autonomous and may – or must – have a retroactive effect on the base. This is actually what Marxism considered to be the main sense of the superstructure: to petrify the corresponding economic base. The relative autonomy is particularly noticeable in the following parts of the superstructure: religion, science, culture, and the arts. By contrast, a close link to the base – which is important in this context – is manifested by politics (represented by the state in its institutionalized form) and the law.

The most characteristic feature of this conception of the state and law consisted in emphasizing the class aspect in all spheres of social life. Law was considered to be the "expression of the will of the ruling class, whose content is determined by the material living conditions of this class" (the Reasoning Report to the Civil Code of 1950). Marxist theorists and politicians always pointed out that the state and law of the past always represented the interests of the ruling minority, serving as the tool for putting down the majority (without any rights or with just formally equal rights), while the socialist state and law were created by the working majority of society, headed by the working class, in order to protect their interests. That is why the state and law were supposed, in the interests of the ruling majority, to strengthen the new economic and social arrangement, to protect the working majority from members of the former ruling classes and other enemies who might try to subvert the socialist society, and to involve actively the working majority in the exercise of state power. Because similar social and economic relations existed in these so-called "People's Democratic Countries" (or such similar relations were, at least, supposed to come into existence), it was considered natural that the law in such countries would also be very similar; namely that it would manifest features similar to those of the law of the Soviet Union, where the socialist "production base" had been under construction for more than three decades, and where the socialist law had been coming into existence derivatively from such a base.

The fundamental reason for the approximation of law in those countries that were within the sphere of the political influence of the Soviet Union was the conviction, derived from Marxist-Leninist teachings on the state and law, that the previously valid law was entirely unsuitable for the new social situation and that the only actually usable source was law in the Soviet Union. This also predetermined the Communists' relationship towards domestic law. On one hand, the Communists voiced declarations about "progressive national traditions"; but, on the other, they did not include the traditions of Czech law – save for a few rare exceptions – within such traditions. According to party ideologues, it was necessary to part with the previously valid ("bourgeois") law as well as the application approaches that had been more or less continually developing since the Enlightenment. A typical example of the refusal of the domestic "bourgeois" legal tradition was the discussions involving the introduction to the 1953 volume of the journal *Právník* [*Lawyer*], which partly discussed the journal's history,[8] as well as the discussions about the articles by Václav Vaněček and Viktor Knapp, which dealt with the history of Czech jurisprudence.[9] Although the introduction and the articles by these two authors criticized bourgeois law, they were themselves fiercely criticized for having found certain progressive features in it.

The belief in the incompatibility of "bourgeois" law and the law suitable for the period of the transition from capitalism to socialism caused a very quick reformation of Czechoslovak law. Though Soviet models were drawn from by the drafters of regulations during the period immediately following the change of power in February 1948, the main role in the reformative process was played by regulations issued within the so-called "two-year legal plan" (1949-1950). Explicit mention needs to be made of the *Act on the Protection of the People's Democratic Republic* and the *Act on the Popularization of the Judiciary*.

The regulations adopted during the "two-year legal plan" were mainly drafted by the Ministry of Justice. The party representatives had two main objectives for the proclaimed reconstruction of the legal order: to form a uniform legal order in Czechoslovakia, and – what is crucial in this context – to create a new, socialist, "unexploitative" law inspired by the Soviet model. Its regulations were to express, in a legal form, the political and economic postulates of the "socialist reconstruction" as it was proclaimed by the Communists.

The "two-year legal plan" gave rise, as a result of an incentive by the party leadership, to uniform codes and other regulations that were to become the stepping stones of future Czechoslovak law. As early as 1949, the National Assembly passed an entirely new Family Code. The year after, six more codes followed (here listed chronologically): the Criminal Code and the Rules of Criminal Procedure, the Criminal Administrative Code and the Rules of Criminal Administrative Procedure, the Civil Code and the Civil Rules of Court Procedure. While drafting these codes, special emphasis was placed on utilizing the Soviet experience, because "the so-called legal science and legal practice in capitalist countries has gotten into a blind alley", while "Soviet lawyers have elevated the issues of theory and practice of law to unrivalled heights, having enriched jurisprudence with important new findings" (quotes from a legislative training session in 1951). The persons recognized as the most acknowledged authorities included A. V. Venediktov, author of the book *State Socialist Ownership*, and the diplomat rector of Moscow University, *A. J. Vyšinskij*, who was also known as a notorious prosecutor. The extent of the uncritical adoption of Soviet models is attested by the statement of the Minister of Justice, Štefan Rais: "It is a smaller mistake to take over a Soviet legal regulation as is, than fail to take it over altogether."[10]

There were four professional committees within the codification department (one for substantive civil law, one for civil law procedure, one for criminal law, and one for special purposes, i.e. for the codification of the law of bills of exchange, law of cheques, stamps, samples, copyright law and business law), and a political committee. The codification committees were assisted by specialized departments. The coordination section worked to harmonize the codification work within the ministry, and oversaw cooperation with other ministries. The study section kept itself up-to-date on professional literature and law-making, mainly in the Soviet Union but also in other so-called "People's Democratic Countries", commissioning translations of scholarly studies, textbooks, and codes. The language committee was in charge of the grammatical, syntactic, and stylistic quality of drafted texts. In addition to the employees of the codification section, approximately five hundred people participated in the drafting of the codes; almost half of them did not have any education in law. The legal professions were represented by several university professors, more than a hundred judges and prosecutors, fewer than twenty attorneys, two notaries public, and numerous clerks.

The main tool for the take-over of experience from the Soviet Union and other countries became the publication of a book edition entitled *New Legal Order*. The Ministry of Justice began publishing this edition as early as 1949, launching the first issue with the declaration that it will "inform our public mainly of the Soviet law, which is becoming a great model and a rich source of experience to all people's democratic countries on their path to socialism,"[11] as well as of the formation of the new legal order in other people's democratic countries.

The new legal orders of the "People's Democracies" mostly came into existence as the result of the legislative efforts of the bodies of individual countries. A spe-

cific process that at first seemed to have good prospects with a view to the anticipated strengthening of the Soviet bloc but eventually failed to be implemented was apparent in the preparation of the act on family law. This consisted of direct international cooperation: the said act was drafted by Czechoslovak and Polish lawyers together. As a result, both countries had almost identical regulation of family law relations in the 1950s.

The Civil Code No. 141/1950 Sb. was – similar to the epoch in which it was drafted – full of paradoxes. What was emphasized in its conception of individual institutes was no longer the interest of an individual but the interest of society. Despite the forced sovietization of the Czech legal system, the code still retained a high legislative level. It distinguished between several kinds of ownership, preferring socialist ownership. This was social or communal ownership was afforded special protection. At the same time, the code respected private ownership to a significant degree, and regulated some types of contracts that were later consistently repressed. It did not formally distinguish regulation between citizens and organizations, but it already preferred socialist ownership. It was based on a significantly narrowed conception of ownership rights, because it did not incorporate provisions concerning family law, cooperative law, and employment law, which were regulated by special regulations. On the other hand, the Civil Code newly contained some provisions previously belonging to business law, e.g. the regulation of procurement, unfair competition, forwarding agency contracts, forwarding contracts and marginally also securities.

Soviet regulations also became the model for the drafting of the new Rules of Civil Procedure of 1950 (the Act No. 142/1950 Sb.): these were based on the civil code of procedure of RSFSR of 1923. It is indisputable that the new code was positive in removing legal dualism. It also replaced all the previously valid civil rules of procedure. As a result, the entire field of civil procedure (trial proceedings, execution proceedings, bankruptcy proceedings, also contentious and non-contentious proceedings in first instance trial proceedings), which had been previously fragmented among a whole range of regulations, came to be better organized.

The code essentially refused a distinction between contentious and non-contentious proceedings, but it failed to create totally unified proceedings. For this reason, the general provisions of the first part of the act were followed by a regulation of the individual special types of proceedings. The code substantially strengthened the position of prosecutors in civil proceedings. Prosecutors could enter into any case at any time; and, on the basis of a later amended text, even file a petition for the commencement of proceedings in any matter (this was possible only in certain issues, according to the original wording of the code). The rules of civil procedure were based – within the sense of the Act on the Popularization of the Judiciary – on the principle of material truth as the fundamental principle affecting the content of other procedural principles that were traditional – at least in their name.

The drafters of the new Criminal Act No. 86/1950 Sb. and the Rules of Criminal Procedure No. 87/1950 Sb. partly drew on unfinished re-codification work from the period of the so-called "First Republic". In this sense, they not only continued their former attempts to unify criminal law for the entire country, but also picked up the ideas about a uniform regulation of administrative criminal law, a unification of military criminal law and the general criminal law, and a unification of disciplinary law and law of transgressions. In spite of this, the drafters mostly used Soviet legal regulations as their model, which came to be reflected mainly in the regulation of some of the key provisions: the delimitation of the purpose of the criminal act, the conception of criminal liability, the definition of a crime, and the definition of the purpose of punishment (as well as numerous procedural institutes).

Also in 1950, the National Assembly – in reaction to the worsening international situation and in similarity to the legislative bodies of the other countries in the Soviet bloc – supplemented the criminal act with the Act for the Protection of Peace No. 165/1950 Sb. This act provided for a term of imprisonment for anybody "who attempts to subvert the peaceful coexistence of nations by enticing or promoting war in any way, or supporting military propaganda in some other way."

The Soviet model also retained its strength in the years that followed. This can be attested, for instance, by the reactions of party bodies who justified the need to amend some of the unsuitable regulations – adopted during the "two-year legal plan" and requiring quick amendments – by claiming that the Soviet model had been applied insufficiently and without a creative approach.

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[1] Urfus, V.: *Historické základy novodobého práva soukromého* [*Historical Roots of Modern Private Law*], Praha, 1994.

[2] "… Publicum ius est, quod ad statum rei Romanae spectat, privatum quod singulorum utilitatem; sunt autem enim quaedam publicae utilia, quedam privatim. Publicum ius in sacris, in sacerdotibus, in magistratibus consistit privatum ius tripertitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus …"

[3] Urfus, V.: *Historické základy novodobého práva soukromého* [Historical Roots of Modern Private Law], Praha, 1994, p. 2.

[4] Cf. e.g. GAIUS. *Učebnice práva ve čtyřech knihách. K vydání připravil, z latinského originálu přeložil a úvodní studii napsal Jaromír Kincl* [*The Institutes of Law in Four Books*], Brno, přetisk prvního vydání, 1981, p. 19.

[5] Knapp, V.: *Velké právní systémy* [*Major Legal Systems*], Praha, 1996, pp. 127-128.

[6] Krčmář, J.: *Právo občanské I. Výklady úvodní a část všeobecná* [*Civil Law: I: Introduction and General Part*], Praha, 1929, pp. 22-23.

[7] Krčmář, J.: *Právo občanské I. Výklady úvodní a část všeobecná* [*Civil Law: I: Introduction and General Part*], Praha, 1929, p. 38.

[8] Introduction, *Právník*, Vol. 92/1953, pp. 1-4.

[9] Vaněček, V.: "Představitelé české právní vědy v letech 1882–1900" ["Representatives of Czech Jurisprudence 1882-1900"]; Knapp, V.: "Vědecký vývoj Antonína Randy" ["The Scholarly Development of Antonín Randa"], *Právník*, vol. 92/1953, p. 28 and subsequent pages, and p. 45 and subsequent pages. Vaněček's article was a chapter from his book *České právnictví za kapitalismu* [*Czech Law under Capitalism*], Praha, Nakladatelství ČSAV, 1953.

[10] Cited from *O právu a jeho tvorbě* [*On Law and Law-Making*], Praha, 1951, p. 125.

[11] Serebrovskij, V. I., Svěrdlov, G. M.: *Tři studie o sovětském rodinném právu* [Three Studies on Soviet Family Law] Edice Nový právní řád, č. 1, Praha, Orbis 1949, unpaginated, p. 5.

Delimitation of Consumer Protection in Czech Law in the Context of the European Consumer Acquis

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Introduction

The system of consumer protection may be classified from several points of view. The most elementary classification distinguishes between private law protection and public law protection. While private law protection is provided for mainly in the Civil Code No. 40/1964 Sb., as subsequently amended, and in other legal regulations containing norms governing private law relations – such as the Act No. 99/1963 Sb., the Rules of Civil Procedure, and the Act No. 59/1998 Sb. on Liability for Damage Caused by Faulty Products, the public law protection of consumers is to be found mainly in the following legal regulations:

- the Act No. 634/1992 Sb., on Consumer Protection;
- the Act No. 64/1986 Sb., on Czech Commercial Inspection;
- the Act No. 526/1990 Sb., on Prices;
- the Act No. 146/2002 Sb., on State Agricultural and Food Inspection;
- the Act No. 110/1997 Sb., on Foodstuffs and Tobacco Products;
- the Act No. 102/2001 Sb., on General Safety of Products;
- the Act No. 22/1997 Sb., on Technical Requirements on Products;
- the Act No. 40/1995 Sb., on Regulation of Advertising
- the Act No. 455/1991 Sb., on Trades; and
- the Act No. 143/2001 Sb., on the Protection of Economic Competition.

Criminal Code No. 140/1961 Sb. defines the offence of "harm caused to a consumer" (Section 121) as an act committed by anyone who "causes damage to the property of another person in a not insignificant amount by harming a consumer by, above all, cheating him as regards quality, quantity, or weight of goods, or who launches products, works, or services on the market in a large extent, concealing any of their significant faults. Any such person shall be punished by a term of imprisonment of six months to three years or the prohibition of activity or a monetary punishment." The Criminal Code also deals with consumer protection in its provisions defining some economic crimes (Chapter II of the Criminal Code).

When dealing with the distinction between private law protection and the public law protection of consumers, one may note that the boundaries – or, to be more precise, the legal regulations – do not often draw a strict line of separation between them. For instance, Section 39 of the Civil Code declares as null and void all legal acts that are either in conflict with law (*contra legem*) or try to circumvent it (*in fraudem legis*). Although the Civil Code is a typical private law norm, it declares as null and void not only those legal acts that are made in conflict with the mandatory norms of

private law but also those that contravene the mandatory norms of public law. Similarly, the Consumer Protection Act affects private law relations, although it is a typical public law regulation (cf., for instance the ban on the conclusion of purchase contracts, donation contracts, and other contracts where their indirect subject matter[1] consists of a dangerous product that may be mistaken for foodstuffs, cf., Section 7a).

The Consumer Protection Act describes the basic duties of suppliers (as defined in Section 52 of the Civil Code) as follows: to sell honestly, i.e., to sell in the correct weight, measure, or amount and to allow consumers to verify the correctness of such data; to sell products and services in the prescribed quality, the quality stated by the seller or the usual quality. The price must be negotiated in harmony with price regulations; it must be correctly charged and must be rounded in case of cash payments. Suppliers are expressly required to observe good manners ("The seller may not act in conflict with good manners when selling goods and providing services, primarily not discriminating the consumer in any way", as provided in Section 6 of the Consumer Protection Act). Any discrimination of consumers is offered as an example of such immoral behaviour.

The Consumer Protection Act prohibits any production, import, export, offer, sale, and donation of dangerous products that may be mistaken for foodstuffs, as well as any offer, sale, and export of products or goods intended for humanitarian purposes.

The key provision protecting consumers in the Consumer Protection Act is Section 8, which prohibits any deception of consumers (e.g., by incorrect, non-attested, incomplete, imprecise, ambiguous, or exaggerated data, as well as by any non-disclosure of information, etc.). In connection with the general clause prohibiting consumer deception, it needs to be pointed out that where any behaviour deceiving consumers is classifiable as unfair competition, one may seek redress not only on account of liability for breach of a legal duty – thanks to consumer protection (under the Consumer Protection Act) – but may also seek protection within the context of business competition (under the Commercial Code).

Another important provision overlapping with the private law protection of consumers is contained in Section 9 of the Consumer Protection Act on information duty. The duty to inform is one of the key duties placed on suppliers (typically in the case of "distance contracts" defined in Sections 53 (3), (4), (6) and 53a of the Civil Code).

Private law protection of consumers mostly has a subsequent nature, while public law protection is mainly preventive. Public law protection typically does not require any active behaviour on the part of the consumer, but the consumer has little authority over possible proceedings. By contrast, private law protection usually requires the consumer to take active steps and become involved in the proceedings.[2]

Although the overlap of consumer protection under private law and public law is quite clear in the legal system, the mutual harmony and conceptual interconnection (e.g., of terms, institutes) is not entirely unproblematic.

The grounding of consumer protection in private law regulations

The basic private law regulations governing private law relations are the Civil Code and the Commercial Code. The most elementary aspects of the private law protection of consumers could be identified in the "actual protection of consumers" in private law relations arising mainly from legal acts, i.e., consumer obligations (cf., the Civil Code, the Commercial Code, and other regulations), consumer protection within business competition (cf., the Commercial Code and other regulations), and analysable from the perspective of substantive law and procedural law.

An explicit legal foundation of consumer protection in Czech private law has been developing since the 1990s. Amendments to existing legal regulations (mostly the Civil Code) implemented consumer protection directives in the Czech legal system. Although the legal regulation prior to the implementation of directives could – and did – serve for consumer protection, the general provisions tended to be used for this purpose (most typically Section 39 of the Civil Code providing for 'immoral agreements', which could be characterised – from the point of view of consumer protection – as immorally advantageous to one of the contracting parties – the supplier).

However, it would be wrong to assume that consumer protection got into the Czech legal system only as a result of implementation of EC consumer protection directives. In a certain way, the pre-1989 consumer protection (e.g., the sale of goods in shops, as defined in Section 612 and subsequent sections of the Civil Code) was stricter than is currently required by EC law (namely Directive 1999/44/EC). This was, however, a fragmentary, case-by-case protection, since the general principle of consumer protection (cf., Section 55 of the Civil Code, Directive 93/13/EEC, and Directive 2005/29/EC) was not introduced into the Czech legal order.

The first step of Czech legislators when implementing the private law protection of consumers was to adopt a new contractual type of travel contract in the Civil Code. This occurred on the basis of Act No. 159/1999 Sb. on Some Conditions for Business Activities in the Field of Tourism, effective from 1 October 2000, whereby Directive 90/314/EEC was implemented.

This amendment to the Civil Code, however, was just a partial assertion of consumer protection because neither the Civil Code nor the Commercial Code had previously been operating with the notion of the "consumer". The provision on the sale of goods in shops uses the terms "buyer" and "seller" (though a specific one), while the contracting parties to the travel contract are referred to as "customers" and "travel agencies". The consumer as a specific contracting party requiring special protection has been present in the Czech Civil Code only after the passage of amendment No. 367/2000 Sb., effective from 1 January 2001, whereby the Directives 93/13/EEC, 97/7/EC and 85/577/EEC were implemented into the Czech legal order. The amendment introduced the pair of terms "consumer" and "supplier", defined a "consumer contract", provided for a general protection of consumers, and added a special provision protecting consumers when concluding agreements by distance and in other than usual business premises.

The Commercial Code did not escape the legislators' attention when providing for the protection of consumers in private law. Act No. 370/2000 Sb., effective from 1 January 2001, introduced consumer protection in the Commercial Code, e.g., by banning the exclusion – by mutual agreement – of applying those consumer protection provisions that are contained in the Civil Code. This is because the Commercial Code had previously contained consumer protection only within provisions prohibiting unfair competition of entrepreneurs (Section 44 and subsequent sections).

A special provision on timesharing contracts was introduced into the Civil Code by Act No. 135/2002 Sb., effective from 1 July 2002, whereby Directive 94/47/EC was implemented.

In 2002, an extensive amendment of the provision on the sale of goods in shops within the context of Directive 1999/44/EC was carried out (by adopting Act No. 136/2002 Sb., effective from 1 January 2003).

In 2002, an essential amendment of general provisions protecting consumers in the Civil Code was adopted (Act No. 56/2006 Sb., effective from 8 March 2006). The provisions on consumer contracts (Part I, Chapter V of the Civil Code) were supplemented with provisions on agreements on financial services concluded at a distance – these were essentially shifted from the Securities Act (Section 44b-44i of Securities Act No. 591/1992 Sb., prior to its amendment by Act No. 56/2006 Sb.). The provisions on agreements on securities concluded at a distance were incorporated into the Securities Act (Part 2, Chapter V) by an amendment in the form of Act No. 257/2004 Sb.

In 2008, Act No. 36/2008 Sb. implemented into the Czech legal order the Directive of the European Parliament and of the Council 2005/29/EC on Unfair Commercial Practices towards consumers in internal markets, amending the Directive of the Council 84/450/EEC, the Directives of the European Parliament and of the Council 97/7/EC, 98/27/EC and 2002/65/EC, and the Regulation of European Parliament and of the Council (EC) No. 2006/2004 (Directive on Unfair Commercial Practices). Changes were made mainly in the Act on Consumer Protection, which presently contains an express ban on unfair business practices, which subsumes, among other, aggressive and deceptive practices. Changes also occurred in the Commercial Code in connection with a ban on comparative advertising – or, more precisely, permitting it under certain conditions (comparative advertising is allowed in case the seller uses any of the unfair business practices defined in the Act on Consumer Protection).

The implementation of Directive 2005/29/ES in the Czech legal order has not become, however, reflected in the Civil Code, which cannot be considered as correct. Thus, for instance, the issue of a real offer, which is to be explicitly forbidden in the context of Directive 97/7/EC, Directive 2005/29/EC, and the legal regulations of EU member states, is essentially allowed in the Czech Republic: consumers are simply not obliged to return the subject matter of any unsolicited supplies back to suppliers (cf., Section 53(9) of the Civil Code).

In addition to amendments of the two fundamental codes regulating private law relations, i.e., the Civil Code and the Commercial Code, some independent legal regulations on consumer protection have been adopted as well. This concerns, above all, Act No. 59/1998 Sb., on Liability for Damage Caused by Faulty Products (effective from 1 June 1998) and Act No. 321/2001 Sb., on Some Conditions for the Conclusion of Consumer Loans (effective from 1 January 2002).

Apart from special regulations protecting, among others, also consumers, there are special provisions within some other regulations offering consumer protection, e.g., Act No. 37/2004 Sb., on Insurance Contracts Amending Related Acts (the Insurance Contract Act), as subsequently amended.

From the above-mentioned outline, one may conclude that private law regulation of consumer protection seems to be rather scattered in various regulations. A similar method of implementing directives occurs in, e.g., Estonia, which has adopted a general act on consumer protection, has implemented some directives into its Civil Code, and has passed special acts implementing specific consumer protection.[3]

It is worth noting in this connection that the draft version of the new Civil Code avoids the issue of consumer protection[4] (save for some exceptions, e.g., accessory contracts, late payment charges, unfair competition, sale of goods in shops) on the grounds that consumer protection will be subject to a special law.

The currently valid Civil Code includes consumer protection among its general provisions (Part I, General Provisions), which cannot be considered as a structu-

rally correct solution. Since contracts form one of the reasons for the formation of obligations (Section 489 of the Civil Code), it would be more suitable to respect the system of the Civil Code and subsume consumer protection within the general provisions of law of obligations (Part VIII, Law of Obligations). Another solution might be to adopt a special law providing for a complex protection of consumers in private law relations (this is the case in, for instance, Slovakia, where private law consumer protection is contained within Act No. 108/2000 Z.z. on Consumer Protection in Door-to-door Trade and Home-Shopping Sale).

An analysis of the actual provisions in Sections 51a-62 of the Civil Code does not, in our opinion, reveal any system:

- Section 51a CC: consumer contracts – general issues
- Section 52 CC: general definitions of consumer contracts
- Sections 53–54 CC: distance contracts
- Sections 54a–54d CC: distance contracts for financial services
- Sections 55–56 CC: general consumer protection
- Section 57 CC: consumer contracts concluded outside the supplier's customary business premises
- Sections 58–62 CC: time sharing (contracts to use a building or its part on a timeshare basis)

The general provisions (Section 52 CC) are followed by a legal regulation of specific consumer contracts (distance contracts, distance contracts for financial services) and further general provisions (Sections 55-56 CC) offering general protection to consumers, i.e., having a direct connection to Section 52 CC). What follows is a legal regulation of specific consumer contracts.

It would be logical – in order to preserve the systematic progression from general to specific – to deal with the general regulations first, i.e., rearrange the provisions as follows: the current provisions in Sections 51a, 52, 55 and 56 should be followed by special regulation, as delimited by the current provisions in Sections 53-54, 54a-54d, 57, 58-62. (Moreover, time-sharing might be more correctly included in provisions dealing with the regulation of leases.)

The unsystematic character and the fragmentation – both in the Civil Code and the actual regulation of private law protection of consumers – are highly typical of the attitudes of Czech legislators towards consumer protection in the Czech legal order.

Consumer contract

Consumer contracts involve, within the sense of Section 52(1) of the Civil Code, contracts of purchase, contracts for specific work, or other contracts provided that the contracting parties are the consumer on the one hand and the supplier on the other.

Prior to the amendment of the Civil Code by Act No. 56/2006 Sb., amending Act No. 256/2004 Sb., on Business in Capital Markets, as subsequently amended, and other related legislation, Section 52(1) of the Civil Code delimited the consumer contract as follows: "contracts of purchase, contracts for specific work and other contracts regulated in Part VIII of this act." The amendment removed the limitation on the subject competence of consumer protection in private law relations. A highly debated issue was, among others, the question of whether there is subject competence of legal relations arising from, e.g., innominate contracts or some contracts regulated by the Commercial Code.

Referring to the definition of the consumer contract *de lege lata*, it may be claimed with confidence that the provisions of consumer contracts will apply to all private law relations arising from both nominate and innominate contracts, be they regulated by provisions of whatever private law regulations, as long as the contracting parties involve the consumer and the supplier. This concerns not only legal relations which are exclusively subject to the regimes of the Civil Code or the Commercial Code, but also legal relations established by contracts defined (and named) in other legal regulations, e.g., the Act on Ownership of Flats (i.e., legal relations established by a construction agreement and an agreement on the transfer of ownership of a unit[5]).

The legal regulation of consumer contracts will apply to legal relations according to the legal instruments effective at the time of the making of the legal act giving rise to such relations. Thus, for instance, where a construction agreement was concluded prior to the effective date of amendment No. 56/2006 Sb., it cannot be considered as a consumer contract because it was not regulated in Part VIII of the Civil Code.[6]

A consumer contract does not have any prescribed form. Its form depends on the relevant contract type. A consumer contract can, thus, be concluded as a written, oral, or implied agreement.

A consumer contract may be characterised as a bilateral, addressed legal act giving a legal reason for a synallagmatic legal relation between a consumer and a supplier (i.e., a consumer law relation).

A consumer contract does not represent any special type of agreement[7]; what is decisive for determining whether a certain contract is a consumer contract or not is the nature of the parties to the contract. The subject matter (i.e., the classic element for general agreements) is entirely irrelevant.

On the most general level, a debate may be led about the suitability of the concept of "consumer contract". The individual language versions of EC directives approach the notion in two ways. The French, Spanish, Portuguese, and Italian versions use the term "contracts concluded with consumers" *(les contrats conclus avec les consommateurs, los contratos celebrados con consumidores, contratos celebrados com os consumidores, contratti stipulati con i consumatori),* while the German, English, Polish, and Czech versions operate with the term "consumer contract" *(Verbraucherverträgen, consumer contracts, umowa konsumencka, spotřebitelská smlouva).*

From the point of view of legal theory, the term "contract concluded with a consumer" is more precise because it is a contract concluded with a specific party to the contract.

Consumer contracts may be classified into general consumer contracts (Section 52 of the Civil Code) and special consumer contracts. The latter are further divided according to the manner in which they are concluded (contracts concluded at a distance, contracts concluded outside the supplier's customary business premises).

Distance contracts for financial services – concluded at a distance or by means of distance communication – may be characterised as distance contracts but, at the same time, as a special type of distance contracts because they are consumer contracts whose subject matter is financial services.

Conclusion

Since private law protection of consumers in Czech law *de lege lata* is quite fragmented and unconnected, the exact classification of the consumer contract is crucial, mainly in order to find out which provisions of the Civil Code or some other legal regulation will regulate a private law relation established under the contract. The mutual relationship of such provisions also needs to be taken into account because where a certain obligation falls within the applicability of several directives protecting consumers, it is impossible to exclude the applicability of some directive by applying another. In other words, the legal relation is regulated by all directives on consumer protection which may be applied (*C-423/97 Travel Vac SL v. Manuel José Antelm Sanchis*).

Apart from the general provisions protecting consumers (Sections 52, 55 and 56 of the Civil Code), a special consumer legal relation will also always be regulated by provisions regulating special consumer obligations. Where, however, it expressly follows from the nature of the provision that both or, as the case may be, all of the provisions regulating the special consumer relation cannot apply at the same time, the principle of *lex specialis derogat legis generalis* will apply. This concerns, for instance, time-sharing contracts concluded by means of distance communication. Such a legal relation will be regulated by the general provisions on the protection of consumers (Sections 55 and 56 of the Civil Code) since it is a legal relation established on the basis of a consumer contract, and the provisions of the Civil Code on consumer contracts concluded by means of distance communication (Sections 53-54 of the Civil Code) and time sharing (Sections 58-65 of the Civil Code). What will also apply in such a case will be provisions regulating leases (Section 663 and subsequent sections of the Civil Code), obligations, legal acts, etc. However, where the contract is concluded outside the supplier's customary business premises, only provisions on general consumer and time sharing will apply because provisions on consumer contracts concluded outside one's customary business premises do not apply to leases [Section 57(4)a of the Civil Code].

By way of conclusion, it needs to be noted that the draft proposal of the new civil code neither rectifies the sad situation nor strives to improve it.

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[1] "… what the specific behaviour of subjects of civil law focuses on, i.e., the subject matter of a specific social relation regulated by civil law. The amendment to Civil Code No. 509/1991 Sb. specified – in view of the new social developments – the conception of the subject matter of civil law relations in such a way that it considers things to be the subject matter of such relations where the nature of the things, law, or some other property value makes it possible (Section 118(1))." Fiala, J. et al.: *Občanské právo hmotné* [*Substantive Civil Law*], 3rd edition. Brno, Doplněk, 2002, pp. 96–97.

[2] Kanda, A., Matejka, J. "Spotřebitelské smlouvy a jejich význam v informační společnosti" ["Consumer Contracts and Their Importance in the Information Society"]. In *Pocta Martě Knappové k 80*. narozeninám, Praha: ASPI, 2005, s. 162.

[3] Pisuke, H., In Wilhelmsson, T., Tuominen, S., Tuomola, H. *Consumer Law in Information Society*. 1st ed. The Hague/ London/Boston : Kluwer Law International, 2001, pp. 36-37.

[4] "A fragmentary, case-by-case regulation of consumer protection by means of a detailed take-over of the normative content of the relevant European directive is not, however, anticipated by the code. According to the proposed intention

of the code, so-called 'consumer law' should be regulated – similarly to Austria and other countries – by a particular law. The reason for this solution consists in the instability of legal regulation in this area since amendments are very frequent." *The Draft of Civil Code*, commentary to Sections 361-370, p. 72.

[5] Similarly to Section 612 and subsequent sections of the Civil Code, cf. the Judgment of the Supreme Court of 27 July 2006, ref. No. 33 Odo 1314/2005.

[6] The Judgment of the Supreme Court of 26 February 2002, ref. No. 25 Cdo 1957/2000, published in the *Set of Decisions of the Supreme Court*, Balák, Púry et al., vyd. C.H.Beck Praha, 2002, vol. 14, ref. No. C 1028; also the Judgment of the Supreme Court of 28 July 2004, ref. No. 32 Odo 1155/2003; and the Judgment of the Supreme Court of 29 November 2005, ref. no. 33 Odo 1351/2004.

[7] Named contracts, expressly regulated contracts, nominal contracts. For details, see Fiala, op. cit., p. 525; Knappová, M., Švestka, J. et al.: *Občanské právo hmotné,* Svazek II., třetí aktualizované a doplněné vydání [*Substantive Civil Law*, volume II, 3rd ed.] Praha: ASPI Publishing, 2002, pp. 32–34.

Effect of European Directives on Legal Regulation of the Limited Liability Company in the Czech Law

Jarmila Pokorná*

1. Introduction

A limited liability company has the basic features of capital companies. But compared to the joint stock company, which is a typically capital company, it shows certain features evoking a personal company (for example a change of the memorandum of association may be still realized by an agreement of all members, members may be bound by the memorandum of association to execute the objective, for which the company was established, by means of their personal activities). Hence the limited liability company is on the border between capital and personal companies and it represents an interim form, which combines the advantages typical for both groups of companies – members of the limited liability company do not assume unlimited liability for the company obligations but they are not alienated from the company to such extent that they would not be known to the company and the company management would be assumed by third persons.

The legal regulation of this form of company allows a relatively speedy and cheap establishing of this company, it provides considerable freedom for a special regulation of internal relations of the company in its memorandum of association and it allows administering of internal matters of the company with lower costs than in case of the joint stock company.

This nature of the limited liability company makes this company very attractive for various types of business but its advantages are also abused in practice. Limited liability companies are sometimes established for property operations damaging persons, with whom the company enters into legal relationships. Hence a question arises whether to tighten up the legal regulation at the expense of restricting some of the advantages of this form of the company or whether to rather strengthen the information position of the members and third persons upon decision-making. When solving this issue, an important role may be played also by European Directives, which inter alia perform also the protective function, the objective of which is to create environment of legal certainty in Member States for investors as well as business partners of companies.

2. Limited Liability Company and European Directives Harmonizing the Legal Regulation in Member States

Express requirements of harmonizing the regulation of a limited liability company in Member states are imposed only by the Twelfth Council Directive on single-member private limited liability companies (89/667/EEC). For the purposes of establishing such company, the member states are obliged to admit and in the same time adopt by means of its legislation minimum protective elements, which the Directive includes.

The legal regulation of the limited liability company is further affected by Directives that in general create the environment of legal certainty for entrepreneurs. These are the First Council Directive No. 68/151/EEC followed by the Eleventh Council Directive No. 89/666/EEC concerning disclosure requirements in respect of branches opened in a Member State by certain types of companies governed by the law of another state. The First Directive regulates the obligation to

disclose basic information about trading companies and tools of such disclosure, manner of acting on behalf of the company and invalidity of the trading company. The Eleventh Directive prescribes what instruments and data have to be published in relation to branches opened in a Member State by companies governed by the law of another Member State.

The legal certainty strengthening is supported also by the so-called accounting Directives, which usually include the Fourth Council Directive No. 78/660/EEC on the annual accounts of certain types of companies, the Seventh Council Directive No. 83/349/EEC on consolidated accounts and the Directive No. 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts.

Other Directives address their requirements to harmonization of the legal position of joint stock companies. Their reflection in the legal regulation of limited liability companies results in approximation of both forms of the companies and in this sense also in unification of legal regulation. This is however not always a benefit in terms of practical usability of the limited liability company as in this way, its main advantages may be suppressed – the simple and directory legal regulation.

Joint stock companies are addressed by a group of Directives regulating procedure of dissolving the company without liquidation and passage of its property and members to a legal successor of the company: the Third Council Directive[1] regulates the procedure of fusion by merger and consolidation with emphasis on protection of shareholders and third persons, the Sixth Directive[2] regulates requirements imposed on harmonization of opposite procedures – divisions of trading companies and the objective of the Tenth Directive[3] adopted at the instance of judgments of the European Court of Justice[4] is to simplify performance of cross-border mergers of various types of capital companies, which are governed by legal systems of various Member States. The Directive is not limited only to a joint stock company but it concerns all forms of capital companies in Member States.

Requirements concerning protection of members and third persons follow from the Second Directive[5], whose subject-matter is focused only on joint stock companies and starts from the theory of registered capital. These days, this Directive is subject to reforming interventions and its wording is being successively amended.

Therefore the effect of harmonization Directives on the legal regulation of the limited liability company in individual member states may vary – it might be minimum if only those requirements are respected, which are addressed directly to the concerned form of companies or generally safeguard legal certainty of the relations with trading companies of any forms. However, if within legislation of Member States, the limited liability companies were subject to certain requirements laid down by Directives only for joint stock companies, the rules of their establishment and internal relations may be considerably different.

3. Effect of European Directives on the Legal Regulation of the Czech Limited Liability Company

3.1 Single-Member Company

As of amendment of the Economic Code by Act No. 103/1990 Coll., the Czech legal regulation admitted existence of a single-member limited liability company (Section 106n par. 1 of the Economic Code). Nevertheless, the legal regulation lacked any closer details on functioning of such company. It originated from the period almost identical to the period of issuing the Twelfth Directive that was adopted on 21 December 1989 and laid down a deadline for adoption of its principles by 1 January 1992. This date is in the same the date, on which Act No. 513/1991 Coll., the Commercial Code became effective in the Czech Republic. Although the Czech Republic was not a Member State of the European Community then, the content of the Directive was out of doubt taken into consideration when preparing the wording of the Code. The modern history of the limited liability company in the Czech Republic admitted also the single-member form of this company from the very beginning.

The Twelfth Directive on single-member limited liability companies does not address problems of the legal regulation of a single-member company comprehensively. Its basic objective expressed also in its preamble was to coordinate safeguards in relation to members and third persons. This focus of the Directive is expressed in the following principles:

1. The company may have a single member either upon its establishment or as a result of concentrating all business shares in one pair of hands. The Member States may adopt special regulation as regards natural persons as single members of several companies and participation of single-member companies in other single-member companies;
2. Concentration of all shares in the hands of a single member in the course of the company existence has to be published in the relevant register.
3. The single member performs the competency of a general meeting and his decision has to be executed in writing; contracts concluded between the company and the single member have to be executed in writing too.

The Directive does not address other possible issues of a single-member limited liability company and it leaves their solution fully up to national legal systems.

Single-Member Company

The first principle is transposed in the Czech legal regulation in the provision of Section 105 of the Commercial Code. The Code allows existence of single-member limited liability companies and for the purposes of preventing establishment of chains of single-member companies founded actually on the basis of one investment, it imposes a ban on the limited liability company to be further a sole founder of a company of the same type. A single-member limited liability company may not be a sole member of another company of the same legal form either. If this happens in the course of the company existence, it is a reason either for dissolution and liquidation of the company or for any provision bringing another member into the company (for example division and assignment of a part of the business share of the single member, decision to increase the registered capital by a new investment of another person). The Code does not expressly determine any sanction in the event that as regards such inadmissible single-member company, the single member did not adopt any measure to correct the illegal state of his company. It would be probably necessary to apply the general regulation of Section 68 par. 6 of the Commercial Code and it would be the court that would decide in the company dissolution on the basis of the reason specified under subsection c) – prerequisites required by law for company establishment ceased to exist.

The statutory restriction applies also the natural persons as members – they may be the sole member of a limited liability company but only in three companies.

The said prohibitions apply also to foreign entities that would like to establish a limited liability company according to the Czech law with a registered office on the territory of the Czech Republic. The effect of the prohibitions on foreign single-member limited liability companies is questionable, however, if their personal status is governed by a legal system other than the Czech one and this legal system did not make use of the permission ensuing from the Directive. If such foreign single-member limited liability company wanted to establish also a single-member limited liability company according to the Czech law, the prohibition would apply. The other way round (a Czech single-member limited liability company is establishing a foreign single-member of the limited liability company according to the law of the state, which did not make use of the possibility of restriction), the provision of Section 105 par. 2 of the Czech Commercial Code shall not apply[6].

If the Directive states, as one of its objectives, to allow limited liability of an entrepreneur for his obligations, the Czech legal regulation (Section 106 of the Commercial Code) does not distinguish between the multiple-member and single-member companies. The statutory liability obligation is imposed on members of the limited liability company only in a limited extent: the liability is limited in terms of its amount – the sum of amounts of the unfulfilled investment obligation of all members as incorporated in the Companies Register. In the same time, the liability is limited in term of time – the statutory liability of the member for obligations of the limited liability company shall last only until all members fully meet their investment obligation and this fact is incorporated in the Companies Register. Their statutory liability for the company obligations shall cease to exist as of this fulfilment and incorporation of this fulfilment in the Companies Register in final and conclusive manner. The incorporation of payment of the whole investment has constitutive effects in this case. The paid up but unincorporated investments do not cause termination of the liability obligation. If the registered capital was increased in the course of the company's existence and member or new members respectively assumed the investment obligation, the rules of statutory liability of members would be applied again even though prior to the decision to increase the registered capital, all investments had been paid up and their payment incorporated with the Companies Register. Although the Code lacks an express rule for the so-called old obligations, the statutory liability applies also to the member who becomes a member only during the existence of the company, for example by means of the business share transfer or inheritance.

Information Obligation

The public approach to information included in the Companies Register protects in particular third persons who are able to get basic information about the internal structure of the company and adjust their own business decisions to these facts. The fact is that a single-member company raises an increased risk for the creditor as it lacks standard control mechanisms[7] ensuing from the competency of the general meeting. When all decision-making processes are concentrated in the hands of a sole member, who is in the same time a corporate agent, there is a risk of speculative disposals of property when the company may become only a fictitious entity deprived of its assets. Hence third persons should receive at least information about the fact that the company is a single-member one or that all decision-making competencies are executed by a single member respectively.

The second principles ensuing from the Directive is not implemented in the Czech legal regulation of the limited liability company by an assent legal rule. It is achieved by the common operation of the provision of

Section 119 of the Commercial Code, which allows concentrating of all business shares in the hands of one member during the company existence, and the provision regulating entries into the Companies Register. According to Section 36 subsection c) of the Commercial Code, as regards the limited liability company, one shall register the name and residence or the business name and registered office of the company members, the amount of the member's investment and the volume of its business share. In connection with the provision of Section 32 par. 3 of the Commercial Code imposing an obligation to file a motion to incorporate registered data without undue delay after emerging of the decisive legal fact, this provision represents a sufficient set of rules, by whose means it is possible to realize the requirement laid down by the Directive.

Competency of the Single Member

Also as regards a single-member company, it is necessary to distinguish between the body that creates internal will of the company (the sole member) and the body that demonstrates the will on the outside (the statutory body) and has the executive powers in common operation of the company's undertaking. As concerns a single-member company, such cases are not exceptional when both bodies are represented by the same person. It may also happen that the same person will act on behalf of the company and in the same time it will be a contractual partner of the company. The Twelfth Directive admits all the said modifications of the internal organization of a single-member company. Nevertheless, it requires the written form for decisions of the single member as well as for his acts towards the company.[8]

In the Czech legal regulation, the implementation of the said rules is concentrated in the provision of Section 132 of the Commercial Code. If the company has only a single member, it is excluded by the very nature of this situation to make decision with the aid of the general meeting. Its decision-making competency is vested in the single member. If the single member is to decide within the competency of the general meeting, formal rules concerning convening and decision-making of the general meeting shall not apply. No chairman or recorder is elected in this case and therefore the Code prescribes, on the basis of requirements laid down in the Twelfth Directive, formal essentials similar to minutes from the general meeting – written form and signature. The form of notarial record is prescribed only for decisions on matters specified in the provision of Section 127 par. 4 of the Commercial Code and further in all cases where a notarial record is taken of a general meeting resolution (for example Section 141 Clause 1 of the Commercial Code). As no general meeting is held, it will be probably necessary to accept the conclusion that in this case, this is a notarial record of an act of the single member.

In terms of the subject matter, the provision on the prohibition of execution of voting rights is excluded therefore the single member is authorized to render decisions even when the investments has not been fully paid up.

The invalidity of the single member's decisions in the area of the general meeting competency is examined according to the rules on invalidity of general meeting resolutions. Decisions not executed in writing will be invalid. The invalidity has to be proclaimed by court on the motion of persons specified in Section 131 par. 1 of the Commercial Code.

The corporate agent of the company, should he differ from the single member, is bound by the member's decision as concerns the agent's conduct therefore he should be notified of the decisions of the single member. The same requirement applies to the Supervisory Board accordingly. Provision of the information relationship between the single member and corporate agents of the company as well as the Supervisory Board is safeguarded by the obligation to deliver decisions of the single member executed in writing to them. In the same time the Code does not anticipate any right of corporate agents and members of the Supervisory Board to participate in decision-making of the single member but on the contrary, it regulates their participation as an obligation should the single member require it.

If the single member is simultaneously a corporate agent of the company, it will be probably impossible to prevent cases when contracts will be concluded between this member as a legal or natural person and the company as legal person different from the member. Conclusion of such contracts is allowed by the provision of Section 132 in its paragraph three and it requires their written form with an officially verified signature or form of notarial report on the single member's act. Foreign members can make use of verification at diplomatic offices of the Czech Republic or also verification by the relevant body of the concerned case on the basis of a treaty on legal aid respectively.

The Twelfth Directive allows in its Article 5 par. 2 for the Member States to waive the requirement of written form or specifying contracts in the minutes as long as current transactions are concerned concluded under usual conditions. Nevertheless, the Czech regulation did not make use of this possibility of making common commercial relations easier.

3.2 Directives creating environment of legal certainty for entrepreneurs and other persons

The requirements of the First and the Eleventh Directives apply to the limited liability company on the basis of the regulation included in Part One, Chapter

Three of the Commercial Code, which includes provisions about the Companies Register (regulation of the obligation to publish information on trading companies). The same Part, Chapter One, Division Four includes rules of acting on behalf of trading companies. General rules, which concern acting on behalf of the company in the period between its establishment and incorporation, and also the rules concerning invalidity of the company, form part of the statutory text specified under Part Two, Chapter One, Division One of the Commercial Code, which includes provisions about trading companies.

The so-called accounting Directives represent the basic standards for the system of accounting regulations, which starts from Act No. 563/1991 Coll., on Accounting. The audit of accounts and requirements imposed on auditors are specified in Act No. 254/2000 Coll., on Auditors.

The said system of rules shall apply also to the single-member limited liability company. Hence its legal regime does not include any variances that would have to be emphasized. Analysis of this part of the legal regulation would exceed the scope of our paper hence we refer to other sources, which address the concerned issues.[9]

3.3 Directives Intended for Regulation of Joint Stock Companies

As concerns this portion of the Conventions, the condition and development of the legal regulation in the Czech law was predetermined by the system of the Commercial Code. Exclusion of general issues common for all companies and their inclusion into Part Two, Chapter One, Division One of the Commercial Code did allow considerable shortening of the overall extent of the regulation but in the same time resulted in the fact that certain requirements of the European Directives intended only for joint stock companies were embodied into this systematic part of the Commercial Code and hence their effect was extended to all forms of trading companies.

As regards the limited liability company, this applies in particular to the regulation of creating and protecting the registered capital, which reflects the requirements of the Second Directive. The provision of Section 59 par. 2 of the Commercial Code expresses principles ensuring for the numerical value of the registered capital incorporated in the Companies Register to be actually covered by assets of the company. In this respect, problems were caused in particular by non-monetary investments, in relation to which company sources could have been fictitiously overestimated. Therefore it is determined in Section 59 par. 2 of the Commercial Code that the subject-matter of investment has to be connected with the intended line of business or activities of the company and its economic value must be ascertainable and eligible of being expressed in numbers. Investments resting in the members' activities for the company are forbidden as it is difficult to evaluate them objectively except for the fact that the very execution of activities or services does not meet the requirement for the subject-matter of the investment to be property. The Commercial Code at this point reacts to the requirements laid down in Article 7 of the Second Directive.

Another system of rules starts from Article 10 of the Second Directive and it determines the requirement of evaluating non-monetary investments by a report of an independent expert appointed by court. Also in this case, the aim of the regulation is to ensure objective evaluation of the non-monetary investment and to prevent its overvaluation. The amendment of the Second Directive by the Directive No. 2006/68/EC of the European Parliament and of the Council in its newly inserted Article 10a determines when the Member States do not have to evaluate the non-monetary investments by an expert. These rules will be supplemented to the Commercial Code by its amendment that is to be passed by the end of this year. The said amendment should further admit also the so-called financial assistance, which was forbidden by now by Article 23 of the Second Directive. It should be possible to provide an advance, loan, credit or other monetary performance or to provide security for the purposes of acquiring shares in the company both in the joint stock company and in the limited liability company.

Special rules for investments and creation of registered capital are laid down in the subsequent regulation of the limited liability company, which also includes special rules for a single-member company. In the provision of Section 111 par. 2, the Commercial Code requires complete fulfilment of the investment obligation assumed by the company founder and expressed by him in the founder's deed prior to incorporation of the company with the Companies Register. The regulation makes use of the provisions of the preamble of the Twelfth Directive, according to which the Member States may freely determine the rules preventing possible dangers ensuing from the fact that the company has only a single member, and focus these rules in particular to secure payment of the registered capital.

The content of the subsequent provision Section 119 of the Commercial Code, which regulates a change of the originally multi-member company to a single-member one is also focused on the obligation to pay up the investments. When following the establishment of a multi-member company, the number of its members falls to such extent that this company changes into a single-member one, the provision of Section 119 of the Commercial Code protects the legal certainty of third persons and lays down an additional deadline, in which the single member is to decide whether he will

extend the number of members of the company by a transfer of a part of his business share or whether he will pay up the remaining monetary investments (the non-monetary investments have to be fully paid up before incorporation of the registered capital with the Companies register according to the provision of Section 59 par. 2 of the Commercial Code).

Another group of Directive, which we mentioned at the opening, included Directives on mergers and divisions of trading companies. Requirements of the Directive regulation are once again focused in particular on joint stock companies. Nevertheless, other forms of companies cannot be excluded from their application because transformations often affect several companies of various forms. The Czech legal regulation of this area has experienced complicated development, whose current result is Act No. 125/2008 Coll., on Transformations of Trading Companies and Cooperatives, which regulates the said processes with all forms of trading companies known in the Czech law and which applies also to cooperatives. The Act kept the reached standard of harmonization. As against the existing regulation in the Commercial Code, however, it includes significant simplifications of the system as well as procedure upon transformations. The regulation of Act No. 125/2008 Coll. shall be applied to single-member as well as multi-member limited liability companies. Detailed analysis of individual transformations exceeds the scope of this paper.

4. Conclusion

The predominant and decisive portion of the valid legal regulation of the limited liability company in the Czech law corresponds to the standard anticipated by the European Directives. If some portions of the legal regulation have not been harmonized, only partial elements are concerned, which are not decisive in terms of the complex legal regulation.

Other changes provoked by requirements of the Directives may be expected only in connection with a reform of the whole law of trading companies within the European Community[10], whose initial results can be seen in partial amendments of certain Directives[11].

The newly adopted standards are focused rather at simplification of the legal regulation, removal of direct orders and prohibitions and strengthening indirect forms of regulation, which emphasizes autonomy of will of the entities (increased importance of information and its availability, support to regulation of internal relations in companies in memoranda of association and articles of association). Hence the clasp of regulation of the limited liability companies and the joint stock companies, which is considerable in the Czech legal regulation and which may represent an unnecessary administrative burden on limited liability companies might not be perceived as a negative. A positive example of this clasp it the possibility of financial assistance as it is proposed these days, which is to allow entry of new investors even to the limited liability companies.

Instead of substantial changes provoked by the Directives, one may expect rather pressure on simplification of the limited liability company regulation caused by competition of legal systems (statue shopping), in which the founders choose for the personal status of their trading company the legal system of such state of the Community, which suits them the best in terms of the costs of incorporation and administration of the company. Mutual collisions of legal systems of individual Member States may very considerably affect the development of legal regulation in each of these states and result in absolutely unconventional legislative solution.[12] Also in this respect, investors look for legal regulation in such state where the system of legal regulation allows saving of costs. It is a question that will have to be discussed in detail in close future whether these tendencies will not lead to a reduced standard of protection of third persons.

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[1] Directive No. 78/855/EEC based on Article 54 (3) (g) of the Treaty (now Article 44 par. 2 subsection g) of the Treaty) concerning mergers of public limited liability companies, amended by Directive No. 2007/63/EC of the European Parliament and of the Council of 13 November 2007 amending Council Directives 78/855/EEC and 82/891/EEC as regards the requirement of an independent expert's report on the occasion of merger or division of public limited liability companies.

[2] Sixth Council Directive No. 82/891/EEC based on Article 54 (3) (g) of the Treaty (now Article 44 par. 2 subsection g) of the Treaty) concerning the division of public limited liability companies. The Directive was amended by the Directive No. 2007/63/EC of the European Parliament and of the Council of 13 November 2007 amending Council Directives 78/855/EEC and 82/891/EEC as regards the requirements of an independent expert's report on the occasion of merger or division of public limited liability companies.

[3] Tenth Directive No. 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

[4] Judgment in C – 411/03 SEVIC Systems AG.

[5] Second Council Directive No. 77/91/EEC on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty (today Article 48 of the Treaty), in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent. This Directive was amended by the Council Directive No. 92/101/EEC and

the Directive No. 2006/68/EC of the European Parliament and of the Council No. 2006/68/EC of 6 September 2006.

[6] For details on this issue see DĚDIČ, J. A KOL., *Obchodní zákoník, komentář* [Title in translation: *Commercial Code, Annotation*], Part I, Polygon, Praha, 2002, p. 959 et seq.

[7] DĚDIČ, J., ČECH, P., *Evropské právo společností* [Title in translation: *European Law of Companies*], BOVA POLYGON, Praha, 2004, p. 521.

[8] Ibid., p. 522.

[9] Details concerning the given issues as regards the state and problems of harmonization are included in the publication DĚDIČ, J., ČECH, P., *Evropské právo společností* [Title in translation: *European Law of Companies*], BOVA POLYGON, Praha, 2004, from p. 277. Detailed explanation of individual provisions of the Commercial Code, which we mention in this paper, can be found in particular in annotation literature: DĚDIČ, J. A KOL., *Obchodní zákoník, komentář* [Title in translation: *Commercial Code, Annotation*], Part I, Polygon, Praha, 2002, KOBLIHA, I., KALFUS, J., KROFTA, J., KOVAŘÍK, Z., KOZEL, R., POKORNÁ, J., SVOBODOVÁ, Y., *Obchodní zákoník. Komentář* [Title in translation: *Commercial Code. Annotation*]. Linde, Praha 2006, PELIKÁNOVÁ, I., *Komentář k obchodnímu zákoníku II. část, § 56–260* [Title in translation: *Annotation to the Commercial Code, Part II Sections 56-260*], Linde Praha 1995, PELIKÁNOVÁ, I., *Komentář k obchodnímu zákoníku, 3. Díl, A. Doplněk k prvému a druhému dílu, novelizace obchodního zákoníku zák. č. 142/1996 Sb. a zák. 94/1996 Sb., B. Obchodní závazkové vztahy, § 261 – 408* [Title in translation: *Annotation to the Commercial Code, Part 3. A. Supplement to Part One and Two, Amendment of the Commercial Code by Act No. 142/1996 Coll. and Act No. 94/1996 Coll., B. Commercial Obligations, Sections 261-407*], Linde Praha 1996, ŠTENGLOVÁ, I. PLÍVA, S. TOMSA, M. A KOL., *Obchodní zákoník. Komentář* [Title in translation: *Commercial Code. Annotation*]. ed. 11, C. H. Beck Praha 2006.

[10] Communication from the Commission to the Council and the European Parliament of 21 May 2003 - Kom (2003)284.

[11] First Directive amended by Directive No. 2003/58/EC of the European Parliament and of the Council of 15 July 2003, Second Directive amended by Directive No. 2006/68/EC of the European Parliament and of the Council of 6 September 2006, Third and Sixth Directives amended by Directive No. 2007/63/EC of the European Parliament and of the Council of 13 November 2007 amending Council Directives 78/855/EEC and 82/891/EEC as regards the requirement of an independent expert's report on the occasion of merger or division of public limited liability companies.

[12] An example may be the development in Germany where the scope of use of the legal form of the English Private Limited Company brought about a radical reform of legal regulation of the German GmbH (Gesellschaft mit beschränkter Haftung). See for example the articles RÖMERMANN, V., Der Entwurf des „MoMiG" – die deutsche Antwort auf die Limited, *GmbHRundschau* 2006, No. 13, p. 673 and WESTHOF, A. O., Die Verbreitung der englischen *Limited* mit Verwaltungssitz in Deutschland, *GmbHR* 2007, No. 9 p. 478.

Internal Governance of Associations in the Czech Republic and in the Netherlands

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I. INTRODUCTION

The current Czech law and the Dutch legal regulation, could be said, contain two different approaches with respect of the regulation of the internal governance of associations.

In the Czech Republic, the Act no. 83/1990 Coll., on Association of Citizens leaves the issue of the internal organisation of associations up to their articles, merely specifying that the information about the bodies forms is an essential element of articles of association. It provides that, at the time of establishment, the minimum internal organisational structure of an association needs to be specified with respect of the purpose of a particular association.[1]

This regulation is explained with reference to internal autonomy of associations but it is, to a certain extent, in conflict with the protection of justified interests of members and the protection of third party rights.

It appears from the general civil law regulation that the fundamental defining characteristic of all legal persons, i.e. associations included, is the existence of a statutory body which makes external acts in the name of an association. Without this, the existence of an association would be hardly imaginable. The following bodies tend to be commonly established: a supreme body (general meeting), an executive body (the management board) and a controlling body (supervisory board or controller).

It is, however, possible for an association in the Czech Republic to have, due to the existence of only a very general legal regulation, a single body – one which represents the association in external matters.

The Dutch Civil Code, by contrast, specifies quite strictly which bodies must and may be established and also sets up the rights and obligations of such bodies, including some provisions on the manner of appointing and dismissing, as well as the requirements placed on individual members of the bodies and their rights and duties.

The text below is a comparison[2] of the current Czech and Dutch legal regulations which govern this area. This article, however, also contains a summary of basic changes contained in the outline proposal of the new Civil Code[3], which should be, if adopted, the fundamental basis for the law of associations in the Czech Republic.

II. THE SUPREME BODY

The supreme body of an association is mostly the general meeting of all members of the association. As a general rule the members of an association are participants of this general meeting (an assembly of an association, a congress of an association, a convention, etc).

Such a body may typically take crucial decisions concerning the actual existence and activity of the association; it is vested with the most important rights (e.g. to appoint and recall members of the management and the controlling body, deal with membership issues, decide upon the termination of existence of an association).

The Czech Act on Associations of Citizen does not specify any rules for existence, convening and decision-making of such a body and leaves their formulation up to the articles of association.

In the Netherlands, the law provides that all members must have voting rights in the general meeting,[4] but most authors agree on historical and practical grounds that an association may also have a category of members without voting rights[5]. All members have one vote, unless the articles of association regulate otherwise.[6] The general meeting of members as the supreme body of the association has several mandatory competences: the right to appoint, suspend and dismiss the members of the management body,[7] to receive the annual report - including the balance sheet and statement of income and expenditure - of the management board,[8] the amendment of the articles of association,[9] to decide about the conversion of the association into another type of legal person,[10] to decide about the merger with another association[11] and about the splitting of the association[12], as well as to dissolve the association.[13] The general meeting also has, according to Art. 2:40 of the Dutch Civil Code, all competences regarding the association that have not been assigned by the law or the articles of association to other bodies.

The management board convenes the general meeting and the chairman and secretary of the management board have similar positions in the general meeting, unless otherwise regulated in the articles of association.[14] The law presupposes the personal appearance of the members at the place of meeting. The articles of association may regulate that there is a meeting of delegates instead of a general meeting.[15] This happens mostly when the number of members is too high to have an orderly or efficient meeting. Often the members are then divided into sections and the delegates are appointed per section. The meeting of delegates has the same competences as the general meeting of members. That means that members who are not delegates have only the right to vote for a delegate or to be voted as such.

III. THE MANAGEMENT BODY

The management body is needed for managing and seeing to everyday matters. Its task is 'management' in the broad sense of the word (performance of internal tasks) and 'external representation'. It may consist of an individual (a president) or a group body (management board of an association, committee of an association).

Its operation is determined in the Czech Republic mainly by articles of association; unless provided otherwise, the general regulation contained in Section 20 of the Civil Code shall apply if it is the statutory body of an association.

The appointment and dismissal of members of the management body of an association is not regulated in the Act on Association of Citizens, and is left up to the regulation in the articles. The main task of the management board is to manage the organisation. The legal regulation does not expressly provide for any rights or duties on the part of members of the management board and leaves this issue entirely up to the articles of association.

By contrast, in the Netherlands, the appointment of members of the management body (board) of the association is regulated in the law. There is also given space for individual variation.[16]

Normally the general meeting allows the possibility to all of its members[17] to directly or indirectly[18] participate in the voting process. It is allowed that the articles of association regulate that less than half of the management board are appointed by others than members. Normally the members of the management board are chosen from among the members, but the articles of association may rule that members of the management are outsiders.[19]

The competence to *dismiss* the members of the management body (board) of an association is given to the body that has appointed the members of the management. It seems practical to assume the general meeting may also dismiss a member of the management board when the appointing body does not do so, when the concerned member of the management board does not function well.

The law describes for the association the task of the management - manage the legal person.[20] It thus has to do everything that, according to its purpose and stated means helps to realize the purpose of the legal person.

Legally the management board has a representative power for the organization.[21] The management board of an association has duties towards the general meeting of members: it has to care for the proper convening – and informing – of the general meeting of members, for an orderly general meeting of members[22] and for the execution of lawful decisions, taken at that meeting. The management board of an association is (for the greatest part) appointed by the general meeting of members and is responsible to that body. The management board has to render annually an account of its activities to the general meeting of members[23] and to establish the annual balance sheet and statement of income and expenditure.[24]

The articles of association may regulate that the general meeting has to approve of certain acts of the management board. The management board of an association does not have the competence to take decisions in situations that are not regulated in the articles of associations. According to art. 2:40 of the Dutch Civil Code, this competence lies with the general meeting of members. Of course, in urgent situations, the management board can take (provisional) measures. The management board also has to make proposals in case of structural changes of the organization like conversion, [25] merger[26] and splitting.[27]

IV. THE CONTROL BODY

The control body tends to be established mainly in order to secure supervision of economic activities of the association.

The supervisory body of an association in the Czech Republic, if established under the articles, mainly makes sure that the means of the association are used in harmony with its purpose and goals. It may consist of an individual (controller) or a group body (a controlling or a supervisory board). Its establishment is not mandated by the law even in those cases when the association is the recipient of subsidies from public budgets, which is somewhat counter to the principles of protection of public interests. However, if an association wants to be transparent, then the existence of such a body is more than desirable.

In the Netherlands, articles of association may also establish other bodies to which specific competences can be assigned that the law does not obligatory confer to bodies regulated by law. The supervisory body (board or individual body) is not a mandatory body, but is created in bigger associations and associations with an enterprise. The law takes the existence of a supervisory board in certain rules into account.

The members of the supervisory body have the task to review the annual report, with balance sheet and statement of income and expenditure, and sign this, together with members of the management board.[28] The articles of association may assign more competences to the supervisory body. In general, the task of the supervisory body is to supervise the policy of the management board and the general course of affairs of the association and, if relevant, its enterprise and to advise the management body. The members of the supervisory body have to perform their task in the interest of the association and its enterprise.[29] The articles of association may assign the supervisory board the right to suspend the members of the management board and to convene a general meeting of members to decide about the dismissal of them. Different from what one would think, the supervisory body has not automatically the competence to represent the association in case of conflicting interests between the board (members) and the association. It may receive this competence in the articles of association.

The regulation of the appointment and dismissal of the members of the supervisory board is left to the articles of association. Mostly this is the competence of the general meeting of members.[30]

V. OTHER BODIES

Both in the Czech Republic and in the Netherlands, some other bodies may also be created by the articles of association. These include a competition committee, a ballot committee etc.

In addition, in the Netherlands, in case that the association has not a supervisory body and in case that the annual report, balance sheet and statements of income and expenditure are not accompanied by a statement of a registered accountant[31], the general meeting of members appoints an audit committee of at least two members.[32]

VI. INTERNAL GOVERNANCE IN THE PROPOSAL OF THE NEW CZECH CIVIL CODE

In spring 2005 and again in 2008, the draft version of the new Czech Civil Code was published in the form accepted by the Ministry's re-codification committee and submitted to legal professionals for a wider discussion. Under the approved legislative intent, the first part of the draft proposal sets the legal regime of legal persons in a general manner, as well as the specification of the regulation of the corporate and foundation[33] types of legal persons, including the legal forms of associations, foundations, endowment funds and institutions. There is the intention that the Act No. 83/1990 Coll. on Associations of Citizens should be cancelled, the regulation of associations should be shifted into the Civil Code and the legal form of association should serve as a general regulation for legal persons of the corporation type. The proposal takes over some aspects from the currently valid legal regulation of associations (Act No. 83/1990 Coll.). Other features are 'borrowed' from the legal regulation of cooperatives and other business companies.[34]

The proposal brings a whole range of changes concerning internal governance of associations. The proposed regulation in the new Civil Code relies on the traditional triad of bodies of associations. The obligatory bodies should be: the supreme body (a meeting of members) and the management body – either collective or individual (a committee, a director). The existence of the body of a control and review nature is not obligatory only if an association (in the articles) wishes so.[35] The proposal also includes the possibility of establishing an arbitration committee.

As regards the position of the supreme body of an association (i.e. the general meeting), the proposal delimits, in a mandatory way, its minimal competence, the manner in which it is convened and managed, the preparation of the relevant documentation, the rights of members of association in connection with the members' meeting and the invalidity of a resolution.[36]

Legally, the position of the management body of the association is regulated by the proposal by the principle that the supreme body of an association (i.e. the general meeting) must have either direct or indirect effect on the appointment of such a body. In other cases, the legal regime of this body of the association should be determined by the general regulation of the legal position of statutory bodies, which is common for all types of legal persons.

The duty to create a control or revision body is not included, even in respect of the future, as an obligatory requirement in the draft proposal of the new act.

However, mostly, any association which wishes to be a recipient of subsidies and loans from public budgets should, establish such a body in order to supervise its proper management and its transparency[37].

The draft proposal also includes the new possibility of establishing an arbitration committee, which is authorised to settle disputes between members and the association, including to decide on dismissing a member from the association. An objection may be filed against the decision of the commission, which is then decided upon by a court. A decision by the arbitration committee may, if certain conditions specified by law are satisfied, be directly enforceable.

The final shape of the new regulation of private law is presently still being discussed among professionals, legislators and politicians.

VII. CONCLUSIONS

To conclude, there is a clear distinction between the Czech and Dutch conceptions of internal governance of associations.

On the one hand, the Czech Act on Association of Citizens leaves the regulation of internal relations entirely and exclusively up to the provisions in the articles. The Dutch Civil Code, on the other hand, specifies quite strictly which bodies must and may be established and also sets up the rights and obligations of such bodies, including some provisions on the manner of appointing and dismissing, well as the requirements placed on individual members of the bodies and their rights and duties.

The absence of rules for the internal organisation (i.e. by a dispositive regulation that would be applied unless the articles of association provide otherwise) gives rise to a number of disputes and stalemate situations in actual practice.[38] This is mainly the result of insufficient delimitation of powers of the individual internal bodies established in associations.

The draft proposal of the new Czech Civil Code contains, sometimes following the model of the Dutch Civil Code, a whole range of provisions regulating the position of internal bodies of the association.

The proposed regulation is, however, relatively extensive and sometimes too influenced by the regulation of internal relations of business companies, which the author of this article does not consider to be optimal. Although the explanatory note to the draft proposal proclaims the freedom of associations when regulating their internal relations[39], the law sets a relatively strict regulation which appears too complex for the purposes of associations (especially small and medium size associations).

The regulation of the internal organisation of associations should, on the one hand, respect the broad conception of autonomy and self-governance of associations but, on the other, the law should provide at

least some basic internal structure of the association, mainly in order to provide protection to members and to forestall the possible creation of disputes concerning competencies.

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[1] See Art. 6 Section 2 of the Act on Association of Citizens, which provides the following: The articles shall disclose: …d) its bodies, their establishment and determination of said bodies and its members authorized to act in the name and on behalf, of the association…

[2] Any comparison of legal regulations always needs to take into consideration the cultural and historical differences in the development of the relevant countries. The extent and content of the legal regulation then follows from the political situation and the level of the legal culture of the given states.

[3] Eliáš, K, Zuklínová, M: Consolidated version of the proposal of the New Civil Code from 30. 6. 2008, www.justice.cz, cited 8. 9. 2008.

[4] Art. 2:38 of the Dutch Civil Code

[5] E.g. minors, members on the waiting-list for an allotment, members who have not yet qualified in certain aspects. A minor may exercise his voting rights unless the articles of associations state otherwise. In the last case the legal representative may vote for the minor. See art. 2:13 s. 2 of the Dutch Civil Code.

[6] Art. 2:38 s. 1 of the Dutch Civil Code

[7] As stated at the beginning, this rule is allowed in the articles of association.

[8] Art. 2:48-49 of the Dutch Civil Code

[9] Art. 2:42-43of the Dutch Civil Code

[10] Art. 2:18 of the Dutch Civil Code

[11] Art. 2:317 of the Dutch Civil Code

[12] Art. 2:334m of the Dutch Civil Code.

[13] Art. 2:42 s. 4 of the Dutch Civil Code.

[14] See art. 2:41 s. 1 and art. 38 s. 2 of the Dutch Civil Code

[15] Art. 2:39 of the Dutch Civil Code

[16] Art. 2:37 s. 1-3 of the Dutch Civil Code.

[17] Certain types of members may not, according to the articles of association, have the right to vote.

[18] This may be via regional or sectional electors, but the electors could also be the directly appointed members of the supervisory board.

[19] Art. 2:37 s. 1 of the Dutch Civil Code

[20] See art. 2:44 s. 1 and 2:291 s. 1 of the Dutch Civil Code

[21] For more details, see art. 2:45 and 2:292 of the Dutch Civil Code. As in the case of public and private companies (and other legal persons) the association or foundation has only limited possibilities to object to third parties that the members of the management board have not represented the legal person in accordance with the articles of association. See more about this in Dijk-Van der Ploeg: Van vereniging en stichting, coöperatie en onderlinge warborgmaatschappij, 4th edition, 2002, p. 171.

[22] The chairman of the management board normally chairs the meeting of the general meeting of members. The chairman of the meeting has the right to establish that a decision is made and – in case of an oral proposal – the content of the decision. See art. 2:13 s. 3 and art. 41 of the Dutch Civil Code

[23] Art. 2:47 of the Dutch Civil Code

[24] Art. 2:48 of the Dutch Civil Code

[25] Art. 2:18 of the Dutch Civil Code

[26] See art. 2:312 of the Dutch Civil Code (concerns all legal persons).

[27] See art. 2:334f of the Dutch Civil Code (concerns all legal persons).

[28] Art. 2:48 s. 1 of the Dutch Civil Code

[29] This is the description of the task of the supervisory board of the public and closed companies limited by shares: art. 2: 140/250 s. 2 of the Dutch Civil Code

[30] Compare Rechtspersonen (Legal persons), (loose leaf), Stille, Vereniging, art. 48 nr. 5.

[31] Or an accountant-administration consultant

[32] See art. 2:48 s. 2 of the Dutch Civil Code

[33] The new term 'foundation' ["fundace" in Czech] is not a synonym for 'foundations' [nadace in Czech], but a general designation of some property base devoted to a specific social purpose.

[34] Many debatable issues have already been discussed with the main drafter of the proposal and subsequently modified in such a way that they correspond to the needs of the non-profit sector.

[35] See Art. 239 of the draft version of the general part of the Civil Code, in: Eliáš, K, Zuklínová, M: Consolidated version of the proposal of the New Civil Code from 30. 6. 2008 2008, www.justice.cz, cited 8. 9. 2008.

[36] See Art. 222- 238 of the draft version of the general part of the Civil Code, in: Eliáš, K., Zuklínová, M: Consolidated version of the proposal of the New Civil Code from 30. 6. 2008, www.justice.cz, cited 8. 9. 2008.

[37] The granting of subsidies is partly regulated by law and partly a matter of the policy of the central or local government authorities. The funding conditions are mostly not set down by law. The grant rules are set by individual ministries and public funds, e.g. the State Fund for the Environment, the Grant Agency of the Czech Republic etc. After the reform of the public administration carried out at the beginning of the new millennium, the situation has improved. Nowadays, even regional units and municipalities have their own policies on providing subsidies.

[38] For more details on this issue, see e.g. Telec, I.: Spolkové právo [Law of Associations], C. H. Beck, Praha, 1998, p. 132.

[39] The explanatory note mentions the specification of the "statutory minimum"; associations may regulate their competences beyond this minimum.

Current Legal Regulation and Perspectives of Conclusion of Business Contracts in the Czech Republic

Karel Marek*

Abstract

Although we positively evaluate the part of the Commercial Code that regulates business obligations, there are duplications and problems that are solved by interpretation in compliance with the extending number of international treaties and developing EC law.

The use of commercial terms, business customs, and additional clauses is extending at the expense of regulations. We think this is correct.

Key words

civil law, the Civil Code, commercial terms, business law, the Commercial Code, business obligations, source of law, rule of law, principles of the Commercial Code, public procurement

Introduction to tenders

A new act about tenders was published as Act No. 137/2006. [1] The Act came into effect on 1st July 2006.

The temporary and final provisions of Act No. 137/2006 solve the relation to the previous regulation in Act No. 40/2004, which came into effect on 1st May 2004.

§ 158 of Act No. 137/2006 states that public procurement, public tenders for proposal, the review procedure of operations made by a contracting authority, and sanction procedures initiated before the effectiveness of the Act will be finished according to the previous legal regulation (§ 158 par. 1).

The review procedure of operations made by a contracting authority and sanction procedures that started after the effectiveness of the Act and are interrelated to public procurement or public tenders for a proposal pursuant to par. 1, will be ruled in compliance with the previous legal regulation. Review according to par. 1 is paid in conformity with the previous legal regulations (§ 158 par. 2).

It is clear that, for some time (we think 24 to 36 months, but it is impossible to express the time with a fixed date), we will use both regulations side by side: this means Act No. 40/2004 for "old" tenders, and Act No. 137/2006 for "new" ones.

Suppliers are provided with a chance to do a large amount of business thanks to tenders. A large portion of social dispensable resources is realized by tenders. "Tenders form relative stabile business relations with secure financing. The entrepreneur who gets the business has a minimal risk not to receive payment."[2] The new directives and national regulations try to contribute to a non-discriminatory and transparent procedure.

In general, it is required that one have a simple, transparent, and non-discriminatory procedure, and it is preferred that it be able to be reviewed in a quick and easy way.

The conceptual solution of the new Act is similar to the previous legal regulation.

The main reason behind the preparation of the new Act was to assure transposition of directives No. 2004/17/EC and 2007/18/EC into the Czech system of law and to eliminate some deficiencies in the foregone regulation.

The European directives regulate in detail the under-limit methods of public procurement. Under-limit public procurement is only regulated by the principles of transparency and non-discrimination. Our previous and new legal regulations describe under-limit methods of public procurement that are contrary to the directives. In the new Act, there is a special, simple procedure for under-limit tenders.

The new principles of legal regulation are:

- simplification of public procurement
- elimination of problems as well as consideration of the practical experiences achieved through implementation and application of Act No. 40/2004
- clarification of basic terms
- detailed specification of procedures
- establishing the position of subjects offering post services among sector contracting entities
- implementation of common shopping subjects
- establishing the possibility of the conclusion of a framework agreement for a public contracting entity
- constitution of a competitive dialog

- establishing an electronic procedure for public procurement.[3]

In our opinion, the publication of the new Act is welcomed. On the other hand, it has been only a short time since the publication of the previous act. We think praxis will take some time to understand the new regulation.

A new act about concessions was issued at the same time as the regulation of tenders. This act contains many links to the Act of tenders. Although there was the possibility to publish both regulations as one act, in the end this was not done.

Act No. 137/ 2006 governs awards of:

- supply,
- services,
- works.

In fact, public supply contracts, public service contracts, and public works contracts will not be concluded, but civil or business contracts will be.

Procedures finish at the conclusion of business contracts[4] (allowed by the Act in some cases), framework agreements (unnamed contracts pursuant to § 269 par. 2 CC), and often realisation contracts (named contracts in accordance to § 269 par. 1 CC, or unnamed contracts pursuant to § 269 par. 2 CC).

Business contracts in public procurement – in contrast to general legal regulation – are concluded in compliance with specifications that include commercial terms, and for a pecuniary interest and in writing (in general, these conditions need not to be met). If it is a tender, a contract change must be done in writing (if the change is possible according to the Act).

Business contracts are not concluded only in the procedure for the award of public works contracts, public supply contracts, and public service contracts, but in general beyond this procedure. The relevant legal norms must be kept.

About the conclusion of business contracts

The aim is to introduce and analyse the current business legal regulation.

The conclusion of business contracts often has many mistakes, such that there are contracts which are void and which are valid but with deficiencies. We can improve this state of things by introducing the following basic questions.

It is necessary to find out if it is a business contract. Business contracts have their types enumerated in § 261 par. 3 CC or conditions stated in § 261 par. 1 CC or in § 261 par. 2 CC, or parties agree on the regulation according to § 262 par. 4 CC.

Business contracts are concluded between (among) entrepreneurs or non-businessmen. Non-businessmen are governed according to § 262 par. 4 CC.

In other cases, civil contracts are concluded (including contracts pursuant to § 261 par. 7 CC).

Discussion and results

The legal regulation of business obligations appears in the Third Part of the Commercial Code, which means § 261–755 CC. This regulation is mainly dispositive, and parties can depart from or exclude it, except for cogent norms that are enumerated in § 263. In Par. 1, the norms are enumerated; in Par. 2, the norms are defined.

In the Commercial Code, some provisions refer to the others (similar or adequate use). In our opinion, it will be better if a dispositive norm refers to another dispositive norm, and vice versa with cogent norms. However, there are situations where a dispositive norm (the norm not enumerated in § 263 CC) refers to a cogent norm. We believe that this "dispositive" norm is impossible to exclude or change. So, we title it as a *mediated* (or *secondary*) *cogent norm.*

A contract conclusion in the Commercial Code is regulated in § 269–275 under the title "Some Provisions about Contract Conclusion." This means that these questions belong among those that are partly regulated. The base of the legal regulation is in § 43 -51 CC, and for business obligations stands for what is stated either in § 269–275 CC.

Contracting parties

- can use one of the contract types cited in the Commercial Code (e.g., to conclude a contract of purchase whose subject of the contract is a good, a contract of sale of a company, a contract of work)
- can use one of the contract types cited in the Civil Code (see § 261 par. 6 CC) if the contract type is not contained in the Commercial Code (e.g., a mandatory contract, a contract of purchase for real estate, a general lease contract, etc.)
- can conclude (see § 269 par. 2 CC) an unnamed contract, which means it is not one of the contract types (e.g., a contract of cooperation, a contract of concurrence, a contract of action, etc.).

Parties in business obligations cannot use one of the contract types from the Civil Code (see § 1 par. 2 CC) if the Commercial Code regulates the contract type, e.g., a contract of work.

The basic rule of a contract conclusion that must be fulfilled is an agreement about the whole content of the contract. The exception in a contract conclusion is an

acceptance of a draft contract made by a certain operation (fulfilling conditions stated in § 275 par. 4 CC).

The contract types contained in the Civil Code must have their essential parts stated in the Code. Contracting parties must also be determined.

In the case of unnamed contracts, contracting parties must also agree on the content, which means to state the rights and duties of the parties. The provisions of Head I, Third Part of the Commercial Code are used for unnamed business contracts (that is, a general business obligation regulation) but not (according to § 269 par. 1 CC) provisions of one of the contract types (which is similar to the content) without agreement. Thanks to the principle of contractual freedom, it is possible to agree on the use of contract regulation.

The contract types contained in the Commercial Code must have their essential parts defined in the basic provision of each contract type. The basic provision determines the essential parts of a contract. It is not important at all if the provision is titled (e.g., in the case of a contract of purchase or a contract of work) or not (e.g., in the case of a mandatory contract or a contract of business representation). The basic provisions are the first provisions of the contract types in Head II, Third Part of the Commercial Code (e.g., the essential parts of a contract of purchase are: seller and her/his obligation to deliver good, good, obligation of the seller to transfer ownership, buyer and her/his obligation to pay a purchase price, and an agreement about the purchase price – that is, a fixed purchase price or a way of stating the purchase price if it is not clear that the contracting parties would like to conclude the contract without the purchase price) or in Head III, Third Part of the Commercial Code (see contract of exclusive sale).

The unnamed contract pursuant to § 51 Civ.C. is impossible to conclude in business obligations (the Commercial Code has its own regulation of the unnamed contract and the conclusion of the unnamed contract regards § 51 Civ.C. traverse the § 1 par. 2 CC).

Some contracts have to be in writing according to the provisions in the Commercial Code, e.g., bank contracts or contracts about the transfer of real estates (which must be in writing on one document, and ownership is transferred by real estate deposit), or pursuant to a special act (e. g., a licence contract for the subject of industrial property which must be in writing, and enforcement of law becomes valid by registration in a relevant register of the law).

The written form can be an agreed by contracting parties – where the act does not state it. If a contract is conducted in writing, its changes should be in writing, but this must be negotiated (see § 272 CC).

If a business is not marginal, we would recommend a written form also in cases in which the form is not stated.

In general, it is suitable to describe in a contract the contracts meaning and purpose. These provisions can help with the identification of the character of the good according to its kind, if it is not defined in the contract; it is possible to take advantage of the provisions about the defeat of purpose of the contract; putting in use provisions about the foreseeing of damages (in the case of a breach of contract) can help with the application of the moderate law of contractual fine, etc. [5]

It is recommended eventually to define terms in reference to § 264 par. 2 CC and the agreement that business commons define used terms.

Provisory instruments can be used in contracts (e.g., contract fine, guarantee or bank guarantee, or use of a procedure that increases a secure of filling (e.g., letter of credit).

It is also recommended to use provisions about billing and provisions about paying, and the cap on interest for delayed payments in case of delay.

Then it is possible to conclude payment (see § 473 CC) and currency clauses (see § 744 CC).

The arbitrator clause (see Act No. 216/1994) enables the rendering of a decision by an arbitrator (see www.soud.cz).

If a contract refers to an appendix (which is an integral part of a contract), it is better to cite the appendix before the signatures of the contracting parties. Then there will be no doubt that an enclosure is part of the contract.

Provisions of contract can define the part of the contract that is ruled by commercial terms (§ 273 CC) and the other part governed by additional clauses (§ 274 CC).[6]

It is possible to think of a common content of international treaties and national regulations in other countries that admits a “free” conclusion. For example, the acceptant consents to the essential parts of a contract and proposes a change of some inessential parts (e.g., a reference to some commercial terms), then, when the offeror does not express her/his disapproval in time, the assumption is that the contract, concluded in wording proposed by the acceptant, will be fulfilled.

* * * *

The European directives about tenders regulate in detail public procurement procedures; in the case of under-limit tenders, the directives are limited only by the principles of transparency and non-discrimination. Our new legal regulation – meaning Act No. 137/2006 – in contrast to these directives, describes under-limit methods of public procurement; there is an effort to shorten time limits, to have less administration, and to simplify procedures.

If we attempt to compare the trends of legal regulation of the European Community and the new Czech legal regulation (Act No. 137/2006), we can say that the main streams formed by the regulation of the EC correspond with the principles stated for the new Act.

Concession contracts are not regulated in the new Act about tenders but in the individual Act No. 139/2006, which in many cases refers to the new Act about tenders. It is a question whether only one act about tenders and concessions was more suitable.

The new Act is about one-third more capacious than the previous legal regulation. It is difficult for a common user of the Act to find "bridges", connections between certain provisions that interrelate. Publications – e.g. commentaries or texts of the Act with a commentary – can help users.

The use of commercial terms, business customs, and additional clauses (see § 264, 273, 274) to the detriment of regulation in an act is correct.

In the last few years, there has been continuous work on the recodification of private law. The aim of this work is a new civil code and a new general legal regulation of business obligations, which means commercial code or commercial act.[7]

There can be doubted whether it makes sense to analyse the topic of contractual business law that arises from contemporary legal regulation. Mr. S. Plíva answers this question in his publication Business Obligations,[8] and he is, in this sense, persuaded. We consent with his opinion. Discourses about the issue are still useful. The new civil code is partly prepared, but the Code will not come into effect in the foreseeable future.

This article about contractual business law is influenced not only by the current proposal of the new civil code, but also by the European development in civil law.

We are particularly interested in the area of civil law. European civil law is neither civil law valid in the member states in the European Community nor the principles of the jurisdictions. European civil law is understood as the relevant norms of communitary law.[9]

It is typical that only a few particular questions in European civil law are regulated and that European civil law does not form an integrated system. A "European civil code" that could close the law of member states does not exist. There are questions about it. It seems that there is a possibility to compose a "Join reference framework" about questions of contractual business law. This is acceptable. If the "Join reference framework" were a recommendation, it would also be a great starting point for legislators for contracting parties.

Today, the direction that aims at an approximation of civil – private law – is an approximation of private projects. For example, UNIDROIT belongs to such projects.[10]

We should respect European trends and anticipate legal continuation and review of the valid legal regulation in the process of the formation of the new civil and commercial code. It is important to deepen comparative research.[11]

This does not mean that we can draw from the experience of finished legislation works.

We can also analyse current legal regulation of the contract types of the Third Part of the Commercial Code. Most of the text of the Act can be used in recodification.[12]

The final preparation of a European civil law whose base is the civil code is too far into the future. Nowdays we can expect fragmentary edits to the actual partial problems.

In the area of European secondary law, a huge amount of coordination work has already been done. It is known that newer directives are replacing older ones, through the incorporation method.

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[1] In the Slovak Republic was also published the new Act No. 25/2006 about public procurement. – See Moravčíková, A. "The New Act No. 25/2006 about Public Procurement." In: Moravčíková, A.: *Liability and Risk with Running a Business*. Verlag Dashofer Bratislava 2005.

[2] Plíva, S.: *Business Obligations*, ASPI Prague 2006, 1st edition, p. 49.

[3] Poremská, M.: "Electronic Tenders and Their Security," *Legal Studies and Practice Journal*, No. 3/ 2006, p. 250 - 257.

[4] Details in, e.g., Krč, R.; Marek., K.; Petr, M. *The Act about Public Procurement and the Concession Act with Commentary*, Linde Prague 2006.

[5] Poremská, M.: "Compensation for Damages by Using Modern Communications and the Internet," *Legal Advisor*, No. 6, 2007

[6] Details in, e.g., Bejček, J.; Eliáš, K. and team: *The Course of Business Law*, Prague, C. H. Beck, 3rd edition. Bejček, J.; Hajn, P.: *How to Conclude Business Contracts*, Linde Prague, 2004. Ovečková, I. and team: *The Commercial Code, Commentary*, Iura Edition, Bratislava, 1995. Patakyová, M.; Moravčíková, A.: *The Commercial Code, Economical and Legal Adviser of a Business Man*, No. 5 – 6/2002. Štenglová, I.; Plíva, S.; Tomsa, M. and team: *The Commercial Code, Commentary*, Prague, C. H. Beck, 10th edition, 2005.

[7] To these questions see Pelikánová, I.: "The Proposal of Civil Legal Regulation," *Legal Forum*, No. 10/2006, p. 347.

[8] Plíva, S.: *Business Obligations*, ASPI Prague, 1st edition, 2006.

[9] The same see Hurdík, J.; Fiala, J.; Lavický, P.; Ronovská, K.: The Base and the Tendencies of Development of Civil Law after the Entrance of the Czech Republic into the European Union, Symposium of the European Context of Development of Czech Law after 2004, AUMBI 2006, p. 156 atc.

[10] For details, see, e. g., Šilhan, J.: European Contractual Law, Legal forum No. 11/2006, pp. 381-389. Čech, P.: "Some Other Notes to the Limitation of Damages," *Legal Forum*, No. 12/2006, p. 429.

[11] Pelikánová, I.: "The Proposal of Civil Codification," *Legal Forum*, No. 10/2006, p. 343-354.

The proposal of changes of the Third Part of the Commercial Code see Bejček, J.; Eliáš, K. and team: *The Course of Business Law, Business Obligations, Stocks and Shares*, C. H. Beck Prague, 1996, 2nd edition 1999 and 3rd edition 2003; Bejček, J. *Business Obligations* (general regulation and contract of purchase), MU Brno, 2nd edition, 1994, p. 217 ect. To the changes of provisions in Pelikánová, I.: *Commentary to the Commercial Code*, 3rd, 4th and 5th edition, Linde Prague, 1996, 1997, 1999, 959 p.

Predatory pricing

Josef Bejček*

1. Introduction

The price naturally reflects not just the amount of work vested into the goods[1] but it is affected also by a number of other immaterial circumstances (fashion, consumer preferences[2], branded and unbranded goods, effects of promotion, marketing and advertising campaigns, "price of special preference" – *pretium affectionis*, season effects, sales "campaigns" various rebates[3] and likewise). Hence there is a whole number of reasons why there are fully justified, exceptionally low prices.

The relationship between the price and the quantity and quality of performance is self evident. Undiscriminatory volume rebates are in principle admissible also on the side of the dominants and monopolists provided that certain conditions are met and provided that they are not binding (and hence also an exclusionary) effect.

Arbitrary and occasional discounts provided by a subdominant entrepreneur or competitor are discriminating in relation to those members of the market, who do not enjoy the advantage of such discount. Nevertheless, they are not illegal and on their own, they do not accomplish unfair competition either. It is in principle a matter of discretion of such discriminating competitor whether it will undergo the risk of reduced credibility with other customers who do not enjoy such advantage (and perhaps the risk of losing them). The competitor proceeding in this way has to cover the loss of the "extra discount" provided on selective basis either from its profit or by means of increasing prices for other partner, which will in the end discourage his partners however. The market itself will correct such pricing differentiation.

A low price for lower quality of performance does not raise legal concern either as long as the at least declared lower quality corresponds to the exceptionally low price. The exceptionally low price of the non-quality goods is economically even multiplied by the loss from complaint claims.[4] The quality has to be examined not by the narrow perception of the qualities of material of the subject-matter of performance. Branded goods of the same or comparable quality to the "generic" goods will be usually more expensive.[5]

An exceptionally low price may be a kind of bonus in a hazardous contract (an aleatory contract).[6] This is emphasized also by the rule that as concerns these contracts, the rule of shortening by more than a half [7] may not be applied.

2. Predatory Pricing in Antitrust Law

The pricing policy of the *dominant* firm can take two basic problematic forms:

- Either the dominant is trying to push back the competitors by intentional reduction of prices below its costs in such manner that the competitors cannot face such devastating prices and after the competitors are forced to leave the market, the dominant shall compensate the loss incurred in the course of the previous price war by increasing the price to an above-competitive amount; one can see at the first sight, the double effect of this procedure and the difficulty[8] of differentiating between the generally advantageous price reduction in favour of consumers from the devastating (only a short-term) price reduction with a predatory intention that will in the long term turn against the consumers in the form of a price increase. In addition, it is hardly possible to raise serious objections against the effort of the more successful ones to get rid of the less effective competitors. The problem rests in particular in the fact that "if you are hunting a predator and shoot the competitor, you'll damage the consumer".[9] As stated by the Supreme Court of

USA, low prices are advantageous for the consumer regardless of the manner of their specification and as long as (!) they are above the level of predatory pricing, they do not pose a threat to the competition.[10] I am not addressing low prices as a result of applying rebates, which is a special and extensive issue.[11]

- Or the monopolist (which is a "supra-category" of the dominant) charges excessively high prices, which he could not reach on a competitive market. This variant is addressed also in the following chapter.

2.1 Are there theoretical arguments for an action against the predatory pricing?

Low prices are generally connected with the consumer and social welfare so it may seem a little bizarre when there are any authoritative interventions against them at all.[12] In certain cases, however, prices may be low to such extent that they damage not just the less effective competitors (which is a necessary result of competition as the "creative destruction") but also the competition itself. Hence the problem is how to reliably distinguish between the loss incurred by or pending to the competitors and the loss incurred by or pending to the competition.

The basic objection rests in the fact that a short-term devastating price reduction increases prosperity only temporarily while as a result of long-term damage or exclusion from the competition, the prosperity is reduced also in the long term. Predatory pricing presumes a short-term loss of the predator and in the same time a reasonable expectation that after the competitors leave the market, who did not sustain the price pressure, the predator will be able to increase prices in such manner as to reach higher profit than before. Predatory pricing is a very risky procedure as losses or lost profit as a result of its application has to be outweighed by the existing (current) value of the future growth of profit; for this reason, it is only rare and cases, when it is successful, are even much rarer. [13] Low prices that perhaps force out certain competitors from the market might also result from higher efficiency of a larger firm that enjoys economies of scale and scope.[14] Competitive behaviour, which is demonstrated by application of below-cost-prices, has to be distinguished from the predatory pricing in particular by the context, in which it is performed.[15]

Some authors[16] state that an enterprise may force out a competitor by devastating prices for several reasons:

1) a large firm[17] sustains larger losses than a small one, a unit loss is multiplied;
2) the exclusionary pricing is worth considering only in the event the "victim" will really leave the market; it may not happen, however as when the assets of the undertaking do not disappear from the market physically, the former owner may put them into operation once again after the price increase or they are acquired by someone else;
3) the exclusionary pricing anticipates that the predator has a "deep pocket" (enough sources to overcome the period of devastating prices) while his victim does not – but the victim may get third person's capital to overcome the difficult times;
4) in order for the predator pricing to be a reasonable strategy, it must be not just feasible but also a more profitable strategy than other possible alternatives (for example than a merger that would retain high profits in the industry).

The success of the price predator depends in particular on whether there are high or unsurmountable barriers to entry the market, from which the competitors are being pushed e out. If there are none, having forced out competitors and subsequently having increased the prices above the competitive level by the pricing predator, other interested persons might enter the market (or perhaps repeatedly the formerly forced-out competitors) and prevent the price increase to the above-competition level. Consumers would benefit from the lower (below-cost) prices in the "predatory period" and from the subsequent competition too.[18]

A dominant may establish by its aggressive price policy a reputation of a predator[19] and hence build a barrier for entering the market even though there are no other (legal, technological, economic) barriers or they are low. This might affect also other markets, on which the dominant operates so that the potential competitors' entry to the market might be more difficult or made impossible at several markets and this increases the price level at several markets.

Nevertheless, not every conduct of the dominant, which discourages from entering the market can be considered predatory;[20] for example implementation of a new technology and its patenting or introduction of a new product to the market or various promoting campaigns for new products and likewise.[21] Such argument, however, may in principle not include the fact that the predator is generating efficiencies by this procedures. Even if some efficiencies could be possibly generated in a specific case, they would be hardly the least restrictive way of reaching them and they would be hardly transferable to the consumer in the long-term for the purposes of outweighing the loss caused to the competition by the predatory activities (which is a prerequisite of the exception from the ban of abuse, which is currently being discussed as a future option).[22]

On the other hand, under certain circumstances, one may be discouraged from entering the market (actually and in the same time intentionally) by the dominant's prices, which are not below-cost ones (for example a sufficiently low price, still not a below-cost one, which prevents adequate return of investments, may turn investor's interest to another market, which offers a promise of higher income). Low prices represent the costs of opportunity – the predator as well as his victim could sell the goods for a higher price if there were no predatory activities.[23]

The theory of predatory prices, on which are administrative as well as judicial decisions based, is founded on two prerequisites:

- sacrificing short-term profit (the predator does not have profit, he is in a loss, his price is below costs), and on
- the ability to increase the profit in the long term thanks to the greater market power after the success of the predatory activities (i.e. not only to compensate the loss, which would make not economic sense, but to increase the profit and generate interest on the loss as a debt of past investment– future uncertain profit have to bear interest according to the relevant interest rate[24]).

If the anticipated price predator in a dominant position generates profit in the course of the period of his aggressive pricing policy, it may not be accused of predatory activities as no one can prove that he would generate higher profit than if his conduct would have been different. It does not matter at all that the dominant forced a smaller and less efficient competitor out of the market – the loss of welfare as a result of such leaving the market by the inefficient firm will not be considerable. It is not verifiable to accuse the dominant of predatory activities (the dominant does not charge prices below its costs) and it would result in legal uncertainty and arbitrariness. After all, it may lead also to the loss of welfare if the dominants, fearing similar accusations, requested a higher price (in order to have a higher profit margin as an argument against accusations of predatory pricing) than were it not for this potential threat.[25]

On the contrary – if the competitor suffers loss due to low prices, it may be a predator but not necessarily as there is a number of various reasons why it is legitimate for the dominant to sell below its costs (sale of short-lived goods, sale support for additional assortment and likewise).[26]

2.2. Partial Issues

2.2.1. Costs of the Dominant

The very amount of the dominant's costs, which are to be examined as decisive in relation to the price, is also a subject-matter of disputes. Round the world (despite a number of reservations and specifying variants[27]), one usually applies the so-called Areeda/Turner test[28]. The best criterion of below-cost prices should be the marginal costs[29]. From the practical point of view, however, it is recommended to apply a kind of inaccurate substitution of marginal costs, namely average variable costs.[30] Areda/Turner test anticipates that

- the price at the level of AVC or above this level shall be considered legal without an option of proving the contrary. This should naturally apply also to the price above the total average costs (ATC);
- the price below AVC but above ATC should be conditionally considered legal with an option for the plaintiff or an antitrust body to prove the contrary; the European Court of Justice (ECJ) also starts from this premise: the so-called "AZKO rule ".[31] According to this rule, prices below AVC shall be in all cases considered an abuse of dominance and the prices below the average total costs (ATC) but still above AVC shall be considered in this manner only of the exclusionary intention of the dominant is proved.[32] This rule is too strict however as for example as regards introductory (starting) prices, the price under AVC is absolutely natural and justified and on the contrary pro-competitive (a new product is being introduced, a new competitor is entering). The courts of first instance also admitted this and it adjudicated[33] that under certain circumstances, the dominant could sell with a loss;
- the price under AVC should be considered illegal but its setter would be allowed to prove the contrary.[34] An objective justification of the price loss have to be admitted in certain situations even with the dominant – even the dominant surely has the right to get rid of the stock, react to the conduct of competitors or (if it is less expensive) to keep in operation an enterprise during a short-term drop of demand by means of loss-prices rather than to close it and to start again after a certain period of time.

In Europe[35] (France, Spain, Italy, Ireland, Luxemburg, Belgium, Portugal, Greece...), there is a number of regulations forced by lobbying interest groups of small- and middle-sized businessmen, which in special areas ban the below-the-cost prices, cheap advertising and promotional sales, gifts for consumers, "two for one" and retail discounts under a certain limit. These regulations are applied regardless of the market power

and reason of the discount (see the Czech regulation in Section 2 of the Prices Act). The risks of such procedures endangering the competition are obvious; protection of smaller entrepreneurs should be solved by other tools of the public policy (fro example tax allowances) that are not so dangerous for the competition and in the end for the consumers´ welfare.

The problems arise also when ascertaining average costs. In a number of industries, loss periods are repeated periodically or haphazardly which do not stay away even from the dominant member of the market. It is not an economically reasonable solution to leave the market so that below-cost prices are charged, which however may not mean that the dominant is planning to force out or to "discipline" his competitors at the market. Prices, which cause short-term losses to the dominant, may be an indicator of the predatory pricing, but not necessarily.

The Czech regulation in the Act on Protection of Competition [36] forbids the dominant to abuse its position by long-term offering and sale of goods for unreasonably low prices, which does or may result in a disturbance of competition. In consideration of the fact this provision has not been used so far, one may only deduce that the criteria of adequacy or inadequacy as well as other attributes of the predatory pricing will be compatible with the current practice of European bodies.

2.2.2. Predatory Intention

In addition to the below-cost price, a typical feature[37] of predatory activities is the existence of a predatory intention. "Strong expressions" of businessmen in their internal correspondence and communication ("to disqualify" a competitor, "to destroy" him and likewise) may not be a legally relevant proof of such intention. Such manager is worth much greater suspicion who claims he wants to have good relations with the competitors – it is only correct to investigate him for collusive conduct. On the other hand, it is hardly possible to disprove existence of an explicit plan of disqualifying the competition by means of temporary sacrifice of the profit. The very intention certainly cannot be decisive but if there is one, "it may help the court to interpret the facts and to anticipate the effects".[38]

Since in the normal competition, the existence of a competitor is always subjectively trouble-some, there is a problem with identification of what is already the exclusionary intention and what is still a pure demonstration of general competitive rivalry. Therefore the economy anticipates objectification of the intention test – the thing is that the intention to exclude somebody out of the market is not considered commercially sensible if the exclusion was not actually reached – it is certainly better and ascertainable in contrast to the chase for "hemannish" statements in the internal correspondence of the deemed predator.[39] Still it is certainly worth recommending for decent companies rather to refrain from sending threats and creating memoranda on the intention to destroy the competition as they can be used as an evidence in an antitrust investigation. The evidence of a clear predatory strategy and not only of an internal communication on expulsion of the competition is suspicious (and it increases the chance of intervention by the antitrust authority).[40]

2.2.3. Compensation of Losses

The test of predation presupposes an examination of the ability of the deemed predator to compensate its losses in the long term from the period of the price exclusion of the competitors (it is an intention or at least a possibility to do so). Hence the test of the loss compensation concerns a special and partial components of the predatory intent – the predatory intent not including the possibility of later compensation of the losses represents a contribution to the social welfare – the dominant reduced the prices…..

In the USA, the compensation of losses is considered an integral condition of proving the predatory conduct (or also a concealment or a "curtain" for the courts for dismissing the accusation of the deemed predatory activity).[41] On the other hand, as a necessary piece of evidence, ECJ requires for the dominant to have a real chance to compensate incurred losses. Such evidence is considered sufficient which proves only the probability (!) of the fact that the predatory pricing will exclude the dominant's rival out of the market.[42] This is in my opinion quite hazardous, too due to its indefiniteness as the markets keep changing and the deemed predator cannot forecast when the competitor will finally leave the market and whether it will do it at all (whether for example it will not provide temporary sources that will help him survive the low prices). Due to this very fact, the deemed predator takes a great risk as any economic "calculations" are impossible; one may perhaps apply only very rough probability estimates.

From the point of view of the European doctrine and decision making, it does not matter whether the dominant has actually compensated its loss or it is doing so at the moment or whether it e was able to do it ex ante(!). An ex post excuse that in the end, the dominant did not make it (perhaps due to the fact that the victim proved to be a stronger competitor or because a speedy reaction of an antitrust authority crossed the intention before it could have been realized), cannot be accepted as a (would-be) legally relevant bonus for the predator. If the price reduction by the dominant is motivated by generating higher profit or reduction of loss, it should not be considered predatory.[43] The criticism of the narrow approach to the predator's costs[44] nevertheless

objects that the below-cost sales by a strong undertaking have to be examined in terms of the "opportunity costs" rather than in terms of absolute data about the costs; real costs of the dominant connected with the predatory activity might be easily overestimated.

It is particularly difficult to diagnose possible predatory activity when a new comers enter the market: the general (!) reaction to that is usually reduction of prices by the existing members in comparison with the previous period (due to the fact that the introductory prices of the new comers are usually lower than the current market prices). How shall we distinguish a reaction of this type from the predatory price reduction? There might be mistakes of both types (a competitive reaction is qualified as predatory activity, and the predatory activity is considered a standard competitive reaction). As it will be difficult to bear the burden of proof, the fears of predatory activity will be probably correct only if the dominant is not able to provide the antitrust authority with a trustworthy economic justification of his procedure.[45]

These days, the compensation of loss sustained during the period of low prices under the average variable costs is considered an integral part of the predatory test in the USA[46] and the European judgments tend to its as well.[47] A defence on the basis of inability to compensate the loss may not be reliable for the above-mentioned reasons – ECJ has ruled[48] that under specific circumstances of one case, it was not suitable to request evidence of the fact that the deemed predator had had a real chance to compensate its losses. According to the Court, it must be possible to punish the predator any time there is a risk of excluding the rivals..

In one opinion, the strategy leading to a short-term lowering of consumer prices which is not followed by the corresponding higher price in the long term, should not be considered an anti-competitive one.[49] It is disregarded, however that a number of price-predators do not act hoping in a future monopoly profit but only with the aim of keeping the settled level of oligopolistic prices that might be disturbed by an aggressive rival.[50]

2.2.4. Loss of Consumers

It is not required to prove the loss of consumers incurred a result of the predatory pricing. It would be also difficult if not even impossible. In the short term, prices fall during the price exclusion and the horizon of their subsequent growth aimed at (super)compensation of the predator's loss may be very long. Moreover, in certain cases, the predator even fails to get to this stage for various reasons – but his conduct is not the less dangerous to the competition. The anti-competitive conduct of the predator may not be excused by the fact that in the end the consumer had profit from it (or from the predator's lack of success respectively) as the prices actually did not rise (see the foregoing paragraph). On the other hand, according to Motta (in the quoted work) it should be admitted as evidence of efficiencies justifying the price below-costs, that the deemed predator is active at complementary markets.

Usual conduct at the competitive market is when an incumbent firm reacts to the price reduction after the entry of a new comer, who usually makes use of lower "introductory" prices. This should not be automatically (per-se) prohibited even to the dominant already operating at the market – if it could not react adequately, it would distort the market conditions and damage the competition (ineffective competitors would be motivated to enter the market) and simultaneously the consumer welfare.

2.2.5. Price Self-Defence

Price reduction as a reaction to competitive prices is therefore possible but not below the level of the average variable costs. While certain types of losses are justifiable for a prospective competitor entering the market, this does not apply automatically for the current (and in particular dominant) member of the market. On the contrary, even a dominant may reduce the price down to the level of his average variable costs even though he undermines the position of a small competitor or a new competitor thereby. A contrary rule would grossly distort the market and purpose of the competition.

2.2.6. Prices in High-Tech Industries

Low prices in "High-Tech" industries have further economic justification regardless of the respective dominance of the one applying it. These industries have often a network nature and they achieve significant network externalities (the extent of the network attracts other members; the successful firm is the one who takes control over the network even though its rival may have perhaps a technologically more advanced solution). Fixed costs are high and the marginal ones insignificant.[51] The one who starts building a network wins – one talks of the first mover advantage. Nevertheless, winning means spending of great efforts and investments from the very beginning, even at the price of a loss as the slight initial advantage can, by means of the "snow-ball" method, extend into a significant dominance at the market.

Hence the competition is the most intensive at the very beginning – then one competes not at he market, which is only appearing, but rather for the market itself. Until the would-be competitors are at this stage (and there is no ex ante dominance), one cannot talk of the predatory pricing at all (the basic condition, i.e. the dominant position at the market, is not met). However, if one of the market participants has acquired a domi-

nant position and tries to strengthen or keep it by means of the predatory pricing, the law should prevent it from doing so and the dominant should be punished for it regardless of the fact that a network industry is concerned.

Another case is the possibility of making use of the dominance on one market to acquire domination also at the "neighbouring" market with complementary goods. To this end, one may use of the predatory pricing at the neighbour-market together with the tying of products.[52] The answer to such situations is not automatic and it requires thorough analyses. If complementary products are concerned, will their provider actually be interested to request lower prices for the consumer welfare (in order to stimulate the demand) than if this was done by two separate competitors?[53] How does the consumer's interest comply with the fact that he or she has to buy tied products for a lower unit price upon hypothetical separation of the products but for a higher price than the price of one single product would be (which is however not supplied separately – full-line forcing), which the consumer is interested in ? Given the complementary nature of the markets, is it really more probable that this will be for the consumers´welfare? It is not unnecessarily and a priori dangerous - as regards the competition - when a great competitor tries to enter a new product market – his marketing, technological, research and development, financial and other capacities probably allow him to do what a small competitor could not. Nevertheless, I do no doubt that the predatory pricing does not belong to legal methods of getting established on a new market.

3. Assessment and Standpoints

If we strictly insist on the test of the below-cost price in connection with the requirement of the loss return, it may result in a fact that a number of aggressive price conduct damaging the competition may remain unpunished. The proposal[54] to replace these two tests with two basic questions (1. Has the deemed predator dominant or monopoly market power? 2. Is there a credible theory that would prove the predatory activities by means of facts corresponding to the theory – including the predatory intent?) has nevertheless the disadvantage of unpredictability, low legal certainty and arbitrary nature.

In the eyes of the public, predatory activities are probably the most striking form of discrimination by strong competitors at the market. In practice it has been proved however[55] that it occurs only rarely as it is a very expensive strategy for the predator that can be substituted by less striking strategies with the same impact.

Any simplifying unambiguous rules in the form of theses from physics[56] have no place in the antitrust analysis of the predatory pricing. There is no place here for a simplifying approach only on the basis of examining average variable costs either and judicial decisions do not maintain this approach either – the thorough examination of conditions of entering the market has the decisive importance. The predatory strategy is not credible when these conditions are easy or are not made more difficult by means of predatory activities.

There is a suspicion[57] that these days, antitrust decisions in this respect protect rather the competitors than the competition. The border between the exclusionary conduct of the dominant and usual hard competition by means of a better economic performance is not very distinct and its assessment depends on a number of factual circumstances of the particular case. Hence it is not possible to rely on a single "pseudoexact" indicator of the predatory pricing as it may happen that as a result of this, laws will be used to disturb and undermine the competition instead of its protection.[58]

The are two possible scenarios[59] of incorrect application of the anti-trust regulations: incorrect accusation and incorrect non-accusation. Incorrect intervening because of predatory pricing may be costly as it constrains the price competition, i.e. the main battlefield of the competitive conduct. In the course of time, by means of market powers operation, its costs will be probably not reduced (in contrast to the costs of the incorrect non-intervening[60] into the anti-competitive conduct).

As regards low predatory prices, two types of mistake appear – mistake I (incorrect accusation) and mistake II (incorrect acquittal). As regards the incorrect accusation, the social cost might be the lost motivation of the dominants to invest and to innovate as by means of the price regulation ex post, means may be taken away from them (or not awarded to them respectively), which they need for the economic recoupment of past investments and to finance other innovations. Social welfare is hence reduced due to the lower ability to innovate and to decreased incentives to risky entrepreneurial conduct. As regards the incorrect acquittal, an allocative inefficiency may emerge and in case of foreclosed markets with high entry barriers, these effects may not be only short-term ones at all.

Any exceptional price that differs from the "current price" established usually by the market, is a subject-matter of the ad-hoc casuistic and value (out-of-law) grounded considerations, which only with difficulties find a reliable and unambiguous verification tests, whether public or private legal ones.

The general criteria of correctness and fairness of the content of legal behaviour apply. They involve mutual bargaining power of the partners and hence include also the protection of the weaker party, not exclusively of the final consumer in all cases but instead of the entrepreneurs (competitors), too.

In the conditions when the market self-regulation does not work, one shall simulate hypothetical market conditions and compare possible prices of substitutable goods that would be achieved under similar business terms under an workable competition.

In some respect more accurate tests of price "correctness" are available in the public legal price regulation and in the ex post regulation of the conduct of dominants who abuse the prices to exclude the others out of the market (or to prevent entry of would-be newcomers to the market) or to exploit participants of the market. Both exceptionally high and exceptionally low prices and rebates are subject in particular to examination of their economic impact on the competition and consumers. Value judgments of correct or fair conduct are not excluded in these cases either. A normative value judgment specified and concretized by judicial decision or by a decision of the relevant administrative authority body is a more suitable tool of the price correction than an ex ante price regulation, whose both direct and indirect costs might be tremendous.

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[1] This was notices by A.Smith and developed by K. Marx...

[2] Such thought is also possible that in this connection, the exceptionally low price might be even the unfair business practice in accordance with Annex No. 1 to (the public legal) Act on Consumer Protection (Act No. 634/1992 Coll., as amended). A business practice is inter alia misleading if the entrepreneur

- offers for purchase products or services for a certain price without stating the reasons, on whose basis the consumer will become convinced that he will not be able to provide, himself or through another entrepreneur, a supply of the said or equal products or services for the price valid for the concerned period and in a reasonable amount in consideration of the nature of the product or service, in the extent of the advertisement and the offered price (inviting advertising);
  (If the consumer was invited to a speedy purchase in this manner for an exceptionally low price, it forms the subject-matter of the *public legal* ban in the interest of protection of the consumer's free will);
- ... untruly states that the product or service will be offered only for a limited period of time or that they will be offered only for a limited period of time under special conditions with the objective of making the consumer make an immediate decisions without providing him with a reasonable period necessary for an informed decision. (Motivation of the regulation as well as the manner of protection are similar).

[3] Sales campaigns and provision of rebates are subject also to public legal regulation of the competition protection. For details see Bejček, J.: Cenová diskriminace a tzv. dvojí ceny v evropském a českém kontextu [Title in translation: *Price Discrimination and the so-called Dual Prices in European and Czech Context*], Právní fórum 2008, No. 5, pp. 181–192. It is a standard in market economies that the option of season sales is regulated and synchronized in such manner that their spontaneous development does not disturb economic competition and that they provide better information comfort also to the consumer: sales campaigns are organized in one period so that the consumer can make a reasonable decision in the real time with the knowledge of all relevant discounts and he does not risk that he would miss a more advantageous offer by waiting for a later, even more advantageous one.

[4] Cf. Section 424 of the Commercial Code, according to which the seller is not liable for those defects in goods about which the buyer knew or ought to have known at the time the contract was concluded due to the circumstances under which it was concluded, unless such defects affect properties which under the contract the goods are supposed to have.

[5] A problem may be the so-called suspiciously low prices – it is naive to rely just on the lower price as an indicator of lower quality and the higher price as an indicator of the higher quality; a sophisticated distributor might sell even low quality for higher prices just to prevent any suspicion of being suspiciously cheap. On the other hand, first-class goods can be often purchased for very low prices.

[6] Cf. Sections 167 – 1268 of ABGB.

[7] Section 934 of ABGB.

[8] Looking for a standard that would differentiate competitive prices of the predator ones, is addressed for example in Sullivan, E.T. – Harrison, J. L.: Understanding Antitrust and its Economic Implications, LexisNexis, 2003, p. 313 et seq.

[9] Elzing, K.G. – Mills, D.E.: Predatory Pricing and Strategic Theory, Georgetown Law Journal, 2001.

[10] Supreme Court of the USA in case of State Oil Co. v. Khan 522 U.S. 3, 15 (1997), a motto adopted from the hading of the book Kasten, B.: Höchstpreisbindungen , Nomos Verlag, Baden-Baden, 2003.

[11] Cf. Bejček, J.: paper quoted in footnote 3, pp. 181–192.

[12] As early as in 2000, the German Bundeskartellamt forbade the German undertakings Wal-Mart, Aldi Nord and Lidl to sell certain products from the field of basic foodstuff under the applicable acquisition price and ordered them to increase the price of the goods. It stated inter alia that the benefit of under-cost prices for the consumer is not only temporary (after removal of competitors from the market, concentration rises) but also insignificant. From the middle- and long term, the remaining competitors have a greater space for price increases not only as regards a few campaign products but the whole assortment. Restricting the competition by unfair damaging of middle-sized undertakings is however permanent and perceivable. According to the statement of the office chairman U. Böge, the main purpose was to prevent forcing out the independent entrepreneurs from the market by unfair price strategy of large undertakings with a great market power event though in a fair competition, they would be successful. Cf. http://www.bundeskartellamt.de/wDeutsch/aktuelles/Aktuelles.php, of 8 September 2000

[13] Sullivan, E.T. – Harrison, J. L., quoted work, p. 315.

[14] *Economies of scope and scale.*

[15] Cf. Sullivan. L.A. – Grimes, W.S.: The Law of Antitrust: An Integrated Handbook, Thomson West, 2006, p. 159.

[16] Mc Gee v r. 1958, quotation according to Motta, M.: Competition Policy, Cambridge, 2004, p. 413 et seq.

[17] According to the subject-entrepreneurial approach, which has nothing in common with the narrow approach to the business name as an identification pursuant to the Com-

mercial Code. The wider or multi-meaning term "undertaking" is used accordingly.

[18] Cf. Bishop, S. – Walker. M. The Economics of EC Competition Law, Sweet & Maxwell, London 2002, p. 220.

[19] This is the case of Microsoft, whose reputation according to the judgment resulted in the fact that potential competitors did not even try to compete with it. Cf. ibid., p. 224.

[20] As emphasized by Bishop, S. – Walker. M.: ibid., p. 222.

[21] Cf. DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary contracts, December 2005, Article 95.

[22] Cf. ibid, Section 133 in connection with Section 8.

[23] Cf. Sullivan. L.A. – Grimes, W.S.: ibid. p. 168. I am of the opinion, however, that no objections may be raised against such "predatory activities" as it is pro-competitive, rationalizing and in favour of the consumer.

[24] Bishop, S. – Walker. M.: ibid., p. 221.

[25] In Sullivan, E.T. – Harrison, J. L., p. 316, there is an illustrative example of the judgment of the Supreme Court of the USA of 1986 (Cargill v. Monfort of Colorado, Inc., 479 U.S. 104): the plaintiff raised objections against the merger of two of his competitors who might have used predatory pricing and reduce the prices to the level of their costs or only slightly above this level in order to get a larger market share. If the plaintiff had wanted to remain competitive, he would have to reduce the prices as well –he would not have been forced out of the market but his profit rate would have been affected thereby. The court, however, did not identify with the threat of predator pricing and it did not find any breach of antitrust regulations either as the real threat of reduced profit was created not only due to the reduced competition but on the contrary due to an increased competition.

[26] Motta, M.: Competition Policy, Cambridge, 2004, p. 446.

[27] It is for example recommended to apply criteria of average total costs (ATC). The total costs include the fixed and the variable costs. Cf. Joskow, P.L. Klevoric, A. K.: A Framework for Analyzing Predatory Pricing Policy, Yale Law Journal, 89 (1979), pp. 213–270, quotation according to Motta, quoted work, p. 448. Another approach (Bolton, P. et al.: Predatory Pricing: Strategic Theory and Legal Policy, Georgetown Law Journal 88 (2000), pp. 2239-330) once again requires examination of the average incremental costs (AIC), which include the addition to the output used for additional predatory sale and reflect also any fixed costs incurred due to extension of new sales. These costs are probably a more accurate criterion, however, it is difficult to ascertain them in practice.

[28] Areeda, P.E. – Turner, D. F.: Predatory Pricing and related Practices under Section 2 of the Sherman Act, Harvard Law Review 88 (1974), p. 716 .

[29] These are costs, by which the total costs rise as a result of the addition to the output. Prices below these costs guarantee that the undertaking does not maximize the short-term profit. It is a type of variable costs as it follows from their very definition that the fixed costs may be affected by changes at the output.

[30] *Average variable costs* (AVC) - this is a sum of all variable costs classified by the output as a substitute of "marginal costs". The reason of the compromise is the fact that the addition of marginal costs per unit of an output cannot be ascertained from the current books as these usually end with monitoring of average variable costs.

[31] According to the case AZKO C-62/86 AZKO v. Commission (1991) ECR I-3359 (1993), according to Bellamy & Child, European Community Law of Competition , 6th Ed., Oxford 2008, p. 956.

[32] This is a controversial statement as the intention to force the competitor out of the market is not anti-competitive itself but on the contrary, it is imminent to the competition process. It is difficult to restore the state of someone's mind and economists are not qualified for examinations in this very field – cf. Faull, J – Nikpay, A.: The EC Law of Competition, 2nd Ed., Oxford University Press 2007, p. 376.

[33] T-83/91 Tetra Pack v, Commission (1994).

[34] This is a conclusion of Motta in the quoted work, p. 449.

[35] According to the Motta's quoted work, p. 453

[36] Cf. Section 11, par. 1, subsection e) of Competition Protection Act.

[37] I refer to and paraphrase Motta's approach, quoted work, pp. 449–453.

[38] Judge Brandeis, quotation according to Sullivan. L.A. – Grimes, W.S.: quoted work, p. 172. Ibid., on p. 173, another witty statement of the judge Easterbrook is mentioned who admonishes to caution when judicially intervening with the business: "Wisdom drops far behind the market.... Lawyers know less about business than people whom they represent... A judge knows even less about business that the lawyers .." (Easterbrook: The Limits of Antitrust, 63 Tex. L. Rev. 1, 5 - 1984).

[39] Cf. Korah, V.: An Introductory Guide to EC Competition Law an Practice, 8th Ed., Oxford – Portland Oregon 2004, p. 157.

[40] So for example in the case AZKO, the predator threatened the competitor at two meetings that he would apply below--cost prices unless the competitor would withdraw from the market and in addition, a detailed plan existed describing measures to be adopted by AZKO in such instance (cf. DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary contracts, December 2005, Article 113, Note 71).

[41] Sullivan. L.A. – Grimes, W.S.: quoted work, p.169.

[42] Cf. Faull, J – Nikpay, A.: quoted work, p. 379.

[43] Bishop, S. – Walker. M., quoted work, p. 233.

[44] Cf. Sullivan. L.A. – Grimes, W.S.: quoted work, pp. 164–165. For example the producer may have large stock of unsaleable goods of a certain type (for example the type of TV); the most important question – regardless of the production costs of the goods – is: how to use this stock to maximize revenue? It may turn out that it is impossible to sell the goods for a price corresponding to the costs spent. Market sale with a great discount damaging the competitors will limit the costs of lost opportunity to the difference between the amount of the price after discount and the highest price possible, for which the goods might be sold.

[45] Ibid., p. 234.

[46] Cf. the case Matsushita Electric Industrial Co. v. Zenith Radio Corp. (1996). The predatory pricing of Matsushita in the USA as criticized by the competitor and supported by sales on the domestic market in Japan would last for many years and assumed losses would be so extensive that it would not be possible to hope in their return even if Matsushita gained a monopoly. The action for predatory pricing was dismissed as the supposed predatory activity did not have a reasonable economic sense.

[47] Cf. C-395/96P Compagnie Maritime Belge NV and Dafra-Lines v Commission of the EC (2000). See Bishop, S. – Walker. M., quoted work, pp. 237-238.

[48] Tetrapack II, C- 333/94P, 1997, par. 41–45.

[49] As in Bishop, S. – Walker. M., ibid., p. 238.

[50] Cf. Sullivan. L.A. – Grimes, W.S.: quoted work, p. 163.

[51] Cf. fixed costs of covering the territory with a signal of mobile telephones and marginal costs connected with operating of another individual mobile phone which are close to null.

[52] Reducing product differentiation, leveraging. Cf. for example connecting the operation system with the system of VMP players.

[53] As Motta claims in the quoted work on p. 453. In addition, he says that supplies of two products from the same monopolist are usually more advantageous for the consumer than if he received the same products from two various monopolists.

[54] Sullivan. L.A. – Grimes, W.S.: quoted work, p. 174.

[55] According to Utton, M.A.: Market Dominance and Antitrust Policy, 2 nd Ed., Edward Elgar, Cheltenham 2003, p. 124.

[56] The Czech language does not have a one-word expression for the German "*Faustregel*" or English "*rule of thumb*".

[57] Utton, M.A.: ibid.

[58] Similarly Schulz, N.: Wettbewerbspolitik, Eine Einführung aus der industrieökonomischer Perspektive, Mohr Siebeck 2003, p. 174.

[59] Cf. Hylton, K. N.: Antitrust Law - Economic Theory and Common Law Evolution, Cambridge University Press, 2003, p. 214.

[60] If the predator activities are not sanctioned, the market remains in the natural original condition so that the threat of competitors entering the market restricts monopolist prices. On the contrary, an incorrect sanction discourages from competitive conduct both the current as well as the potential members of the market. Courts are not equipped for complete analysis of all predator strategies described in economic literature. If (cf. ibid) courts proceed in such manner that they consider any of the options described by the theory to be predator activities, an incorrect sanction for a non-existing conduct is more probable.

"Acquis communautaire" and the National Legal Practice

(With Respect to the "Ad Hoc Competitor")

Petr Hajn*

The winged expression "acquis communautaire" does not refer only to the facts that the individual EU member states apply the immediately effective norms of Community law, that the European directives are properly transposed, and that the decision-making practice of the European Court of Justice is being respected. A significant body of normative solutions, decision-making principles, and purposeful procedures is also provided by the legal practice in the individual member states, i.e., by practices of norm-making, legal advisory, company law, judicial judgments, and administrative decisions. The present article points out how the familiarity with two Austrian decisions could have facilitated and speeded up the decision in a Czech case, whose nature was not unique.

The case of using a part of song lyrics for an advertising slogan[1]

Recently, Czech courts adjudicated a dispute concerning an advertising campaign in which the defendant (B.) advertised a concrete mixer. The billboard advertising the product was dominated by a photograph of the technological machine and contained information about its price, guarantee, and supplier. In addition, the billboard showed a wall, a picture of a woman, and a prominent text reading "bake…" [upeč…] and continuing one line underneath with the words "…a wall, for instance" […třeba zeď].

This billboard was challenged for breach of copyright law in a suit filed with the Regional Court in Brno. The judgment of the court – under No. 23 C 22/2005-58 of 16 December 2005 – started from the fact that the plaintiff (Z.S.) was the author of the lyrics to the famous song "Put one brick to another" [Dej cihlu k cihle] (popularly known in the Czech Republic also under the title of "Doing" [Dělání]). The plaintiff's lyrics contain, among others, the following verse: "bake some bread, for instance, build a wall, for instance" [upeč třeba chleba, postav třeba zeď]. The advertisement thus used, without the author's approval, a part of the said lyrics, which are commonly brought to mind to those people who perceive the billboard and know the text of the song.

As regards the legal qualification, the court based its decision on the fact that the text of the said song constitutes a "work" in the sense of Act No. 121/2000 Sb.

on Copyright and Rights Related to Copyright, as subsequently amended and as amending some other laws (hereinafter referred to as "the Copyright Act"), and that Section 2 (3) of the Copyright Act protects, among other, parts of a work. Where a part of a work is used for advertising purposes, the author of the work must issue an approval for such a use. The first-instance court found it quite indisputable that the advertisement for the product did use a part of the plaintiff's work and that the text could cause a wide segment of the public to think of the text of the song "Put one brick to another." In this way, the defendant unlawfully infringed on the plaintiff's authorship rights because the wide public, including artists, may have believed that the plaintiff had given his consent to the defendant for the purpose of using a part of his work. The defendant was, thus, sentenced to the payment of the amount of CZK 200,000 to the plaintiff and the publication, at her own expense, of an apology printed in a nation-wide newspaper and worded as follows: *"Apology. In an exterior billboard placed in September, our company used the phrase "Bake…a wall, for instance" to advertise the sale of a mixer of construction materials. By this act, we made the unauthorised modification and use of a part of the song lyrics "Put one brick to another," which reads "Bake some bread, for instance, build a wall, for instance." We hereby apologize to Mr. Z.S., the author of the text of the song "Put one brick to another." B., k.s."*

The defendant's appeal was heard by the Supreme Court in Olomouc. Its judgment of 13 September 2006, ref. No. 1 Co 64/2006-93, started by stating the fact that the fundamental authorship rights include the right to the inviolability of one's work and the right to give approval to any disposal with one's work, as well as the right to reasonable satisfaction where an unauthorised infringement of copyright law occurs. Such an infringement was found by the court to consist mainly of any alteration of a work, or some other interference with one's work, without the author's approval and any use of and disposal with a work without a licence having being provided. In the opinion of the appeal court, the advertising slogan copies, in its entirety, a part of the plaintiff's text. The conclusion – that it is a part of the lyrics of the song "Put one brick to another" – is justified also thanks to the presence of dots in the slogan because it is obvious that a part of the text was omitted. Because of the familiarity of the song with the general public and the uniqueness of the text, it was not possible – in the opinion of the appeal court – to arrive at anything else than the conclusion that the advertising slogan uses a part of the plaintiff's song lyrics. By using the disputed billboard, the defendant, thus, infringed unlawfully on the plaintiff's work and violated his authorship rights to the lyrics of the song "Put one brick to another."

Thus, the appeal court upheld the judgment of the first-instance court by accepting its opinion that the unauthorised use of the plaintiff's work gave rise to the plaintiff's right to satisfaction, while deeming the form and manner of apology as reasonable with respect to the infringement. In addition, the unauthorised use of the work without the author's approval resulted in the defendant's unjust enrichment. Its amount was set on the basis of information about the amounts of usual payments for the use of one's work for advertising purposes on billboards.

The defendant did not accept this judgment and filed an appellate review to the Supreme Court of the Czech Republic. Her main argument was that the disputed advertisement did not accompany the text with the music, while the plaintiff's text forms an inseparable whole with the music. The agreement between the text of the song and the text of the slogan was considered as insignificant in the defendant's petition, allegedly a chance combination of three words of the advertising slogan with three words of the song lyrics. What was significant from the legal perspective was mainly the argument that the text "Bake… a wall, for instance" does not meet the statutory elements of a work, being neither a work nor its part but merely individual words from which statutory features of a work cannot be deduced. Such words could not – according to the opinion expressed in the petition for appellate review – determine any individualization of a work with respect to copyright law.

The plaintiff's position on the petition for appellate review stated that the ruling of the appeal court was correct. The correspondence between the advertising slogan and a part of the plaintiff's lyrics could not be accidental. The results of the plaintiff's creative activities were, thus, clearly used for the defendant's advertising purposes.

In its judgment (see Note 1), the Supreme Court found the appellate review as admissible. It stated that the crucial issue in the case was whether the said text of the advertising "slogan" for the concrete mixer unlawfully infringed on the authorship rights of the plaintiff as the author of the lyrics of the song "Put one brick to another" (also known as "Doing"). The Supreme Court referred, among others, to the following sections: Section 2(1) of the Copyright Act, which provides for the general characterisation of a work that is subject to copyright law, Section 2(3) of the Copyright Act, which provides what parts of a work are covered by copyright law and under what conditions, and Section 2(4) of the Copyright Act, which deals with the issue of a processed or translated work. For the purpose of the said dispute, these provisions state that copyright law protects, among others, works of art, which constitute the unique result of creative activities of the author and are expressed in any objectively perceivable form … regardless of its extent, purpose or significance. More-

over, copyright law protects also parts of a work as long as they meet the general characteristics of a work, pointing out that further re-working cannot affect the rights of the original author. The judgment also cited extensively Section 1(6) of the Copyright Act, which provides a negative definition of a work that is subject to copyright law.

The judgment of the Supreme Court further extensively presented the key ideas on which the protection under copyright law is based, relying on the work of the major Czech copyright law expert I. Telec[2]. The judgment states and emphasizes that "copyright law is special protective law, rather than some universal or some 'collective' protective law (system) – as it appears from its nature. That means that *"the subject matter of copyright law may be only whatever corresponds, with respect to meeting all the statutory elements of a work according to the Copyright Act, to the said functional nature of this private law,"* which is present in all the statutory conceptual elements of its subject matters.[3]

On the basis of this and some other general findings about the nature of copyright law, the appeal court arrived at the conclusion that "when assessing whether the defendant infringed on the plaintiff's authorship right or not, it was necessary to reliably establish whether the use of the disputed (though minimal) text really did have the character of an intermediate use of the plaintiff's work (which is, in the public consciousness, known as a song, i.e., a composition with a closed form and based on a verbal text), or whether this concerned the re-working of the plaintiff's work or whether it is none of these two cases. What must be taken into account is that this case does not concern the protection of an actual topic or idea of a work or its part, but the author's creative – and, thus, protected – activity consisting in the manner in which this topic was processed in its internal and external forms. The solution of this issue requires, among others, a professional expertise which the present court cannot perform itself. Given this situation, the conclusions of the appeal court (as well as the first-instance court) appear as premature where they already admitted that the plaintiff's authorship rights had been infringed."

On the basis of the above-mentioned consideration, the Supreme Court quashed the judgments of the first-instance court and the appeal court and returned the matter to the first-instance court for further proceedings. Before commenting on this decision, two decisions of Austrian courts will be pointed out in matters whose facts and legal assessments invite an interesting comparison with the Czech case.

The case of a melody processed for advertising purposes[4]

The plaintiff in the next case was the famous composer, lyrics writer, and musician Stevie Wonder. The defendant was an Austrian advertising agency which prepared a promotion campaign to celebrate the anniversary of its client (an important banking institution). The campaign included a radio commercial with background music and a "congratulations" song with the text "Happy Birthday," which was identified by the plaintiff as an imitation of the well-known song "Happy Birthday", written by the plaintiff. The plaintiff sought a court judgment and an injuction forcing the defendant to refrain from the use of the plaintiff's musical work "Happy Birthday" for advertising purposes – even in a processed or modified form – unless it obtains the plaintiff's approval for such a use.

The plaintiff's case relied on the provisions of the Austrian Copyright Act and the general clause in Section 1 of the Austrian Act on Unfair Competition. Both the first-instance court (in its decision HG Wien of 21 August 1995, 38 Cg 101/95d) and the appeal court (in its decision OLG Wien of 19 December 1995, 3 R 205/95) confirmed the plaintiff's case. They based their decisions on the qualification of the case according to the law on unfair competition. The judgment of the appeal court stated that "acting against good competitive manners" is anybody who – without a significant effort on their part – simply takes over in whole or in part the result of the work of another, thereby competing with such a person that achieved – after expending efforts and expenses – the result as the first one. When qualified according to the law on unfair competition, this concerned a parasitical use of the results of another person's work. The court based its reasoning on the fact that the defendant used for advertising purposes a part of a song whose music and lyrics were written by the plaintiff, drawing on the general public knowledge of the song. Differences in rhythm, harmony, tempo, and interpretation of the song were considered as indecisive by the court as long as the average listener – careful and uneducated in music – could be under the impression that it is the same song. This is what represented the parasitical use of the performance of another person. The plaintiff faced – in the opinion of the court – both financial and non-financial loss because the public could form the impression that he gave the approval to the use of his song as an advertising congratulation on the anniversary of the bank.

The court dealt in an interesting and inspiring way with the pre-requirement of the existence of a competitive relation that needed to exist between the plaintiff and the defendant in order to justify the qualification of the whole matter as a case of unfair competition. *The court deduced that the plaintiff, as the author of the original song, had been in the position to be able to offer it himself for advertising relations. Therefore, an ad hoc competitive relationship arose between him and the advertising agency in this particular case*. The court did not deal with the issue of whether protection under copyright law might be applicable in this case, although it did admit the possibility of such a qualification. In the court's opinion, it was enough – in order to ban the contested act – that it indisputably contravened the general clause of the Austrian Act on Unfair Competition, which was by itself sufficient for the ban.

By contrast, the Austrian Supreme Court (in its decision specified in Note 4), in its position as the review court, assessed the matter mainly from the point of view of copyright law. Basing its decision on the general acoustic impression from both disputed compositions, it considered as insignificant certain changes in harmony present in the commercial song. At the same time, the court formulated important general ideas that go beyond the dispute and which may be inspiring for the above-mentioned Czech case. Thus the court stated, above all, that *the question of whether a given work enjoys protection under copyright law is a question of law that is up to the court's assessment. To make the assessment, it is essentially enough that the disputed work is submitted to the court. In the case of musical works, this includes the notation and a recording as prima facie evidence. This is because any evidence can be considered as "visible" evidence if it is commonly accessible to human senses, including acoustic evidence*.

A work worthy of copyright law protection was deemed by the court to be any result of creative intellectual activity in which the personality of the author is manifested and whose uniqueness differentiates the work from other works. In the case of musical works, the creative uniqueness consists in the individual aesthetic strength of expression. Where a dispute concerns an alleged plagiarized work, correspondences in the creative parts of the works are decisive. A correspondence in the characteristic part of the refrain represents an infringement of copyright where – despite deviations in individual features – the overall impression is identical and the similarity of both works is clearly perceptible. Such a reworking then requires that it be approved by the author of the original work. *The possibility of a free reworking is allowed only where the features of the original work on which the new work relies are entirely backgrounded. Free use of an authored work presupposes that the original work is neither taken over nor reworked and that the original was not used as a model or a base but served merely as an inspiration for one's own creative work.*

These considerations led the Austrian Supreme Court to conclude that the defendant did interfere with Stevie Wonder's authorship rights by reworking his song "Happy Birthday" and using it in its advertising campaign. The Supreme Court also stated that this legal assessment does not rule out a suit in the same case on the basis of some other legal titles, i.e., under the law of personality protection or the law on unfair competition.

The case of advertising photographs used by another competitor [5]

The plaintiff (a business company) was a manufacturer of sunglasses supplied by means of wholesalers and general importers. The company had photographs made of three well-known sportsmen, who were shown in the photographs as wearing glasses manufactured by the plaintiff.

The defendant was a seller of sunglasses in Austria. She included the said photographs in her advertising materials, after slightly altering them (probably electronically). Such use of the photographs had not been approved by the plaintiff or the sellers or wholesale agents authorised to issue such an approval.

The plaintiff applied to the court for a dilatory claim and the corresponding securing motion (a petition for an injunction). She sought that the defendant be forbidden to use commercially the disputed photographs and their parts (extracts) for advertising purposes. The action was substantiated by reference to the provisions of the Austrian Copyright Act and by pointing out that the take-over of the photographs from the advertising prospectus of someone else is against good manners in the sense of the general clause in the Austrian Act on Unfair Competition.

The defendant claimed that the action is inadmissible as far as the plaintiff referred to original copyright since only a natural person can constitute an author. In addition, the plaintiff failed to evidence the rights of usage to the said photographs. The defendant objected that she obtained the said glasses together with the advertising materials from a salesman in an EU country, while the salesman had, in turn, obtained them from a wholesale agent mentioned in the claim. She further stated that an infringement of the authorship rights of a third person cannot be prosecuted according to the law on unfair competition.

The first-instance court (in its decision LG Steyer 4 Cg 181/05h of 23 December 2005), did not grant the injunction request under the reasoning that it had not been specified from whom the plaintiff obtained the claimed rights of usage. The court did not even grant

the plaintiff's reference to the general clause in the Austrian law on unfair competition, whose application – in the court's opinion – was excluded by the existence of the special regulation under copyright law.

By contrast, the appeal court (OLG Linz, in its decision No. 4 R 18/o6d of 26 January 2006) did grant the injunction requested by the plaintiff because it considered it as verified that the plaintiff had the rights of usage to the said photographs. It decided so on the basis of the plaintiff's affidavit on the acquisition of usage rights, even though the affidavit included neither any data about the author of the disputed photographs nor any specification of the manner in which the usage rights were transferred to the plaintiff. The court argued that the proceedings concerning the preliminary injunction do not require such "full evidence". It stressed the fact that the defendant did not attest usage rights to the disputed photographs in any way whatsoever.

The defendant filed a petition for a review of this decision with the Austrian Supreme Court. According to the court's opinion (identified in Note 5), it was not possible to base the dilatory claim on copyright law because the plaintiff did not sufficiently attest her usage rights to the said photographs. The court of review, however, agreed with the plaintiff as regards her reference to the general clause of the Austrian Act on Unfair Competition. This differed from the opinion of the first-instance court, which had ruled that any application of the law on unfair competition is out of the question in the said case as long as there is a special regulation under copyright law. It admitted that copyright law affords exclusive rights only to certain persons (authors and subjects authorised on the basis of usage rights), while not specifying any general norms of behaviour. At the same time, however, it stated that the mere take-over of the results of another person's work for advertising purposes is in conflict with the general clause on unfair competition. The facts of the case were characterized by the Supreme Court as follows: The plaintiff had photographs made for her advertising materials, which meant – because of the nature of the persons photographed – significant financial expenses for her. The defendant took such advertising materials over only in a slightly modified form, thereby saving on costs that she would have had to expend on obtaining photographs of such prominent persons.

The Austrian Supreme Court argued mainly by stating that *the mere take-over of the results of another person's work, which are not specially "protected," may, where some other conditions are met, constitute behaviour in conflict with the general clause on unfair competition. Such a protection is not excluded by the fact that such results of work or any part thereof may also be subject to protection under copyright law with respect to certain persons*. This merely means that in some cases – where the plaintiff benefits from the point of view of the special regulation – it is not necessary to apply the qualification according to the general clause on unfair competition. The law on unfair competition, however, supplements – under certain conditions – the protection provided under laws of intellectual property, mainly copyright law. This, however, could not be applied in the said case because *the plaintiff did not sufficiently attest the facts required for allowing her protection under copyright law. The defendant, by contrast, interfered within the plaintiff's legal sphere by taking over her advertising material. Such a take-over is to be particularly denounced where it concerns an individual and unique result of work. In the event that the uniqueness is such that it might even enjoy protection under copyright law, any take-over of the result of another person's work must be considered as against good manners*. In the given case, this did not concern the mere infringement against the right of another person because the plaintiff was also affected in her competitive position.

In his extensive commentary on this provision, Walter[6] expresses the fundamental idea of the said decision as follows: the general clause of the Austrian Act on Unfair Competition provides a protection to a certain performance against its take-over for competitive purposes. Such a protection is given also where such rights cannot, for special reasons, be applied or where the plaintiff did not assert them. At the same time, Walter points out the two contrasting opinions on this issue. Some experts believe in the fundamental freedom to emulate where there are no special regulations limiting such a freedom, while others claim that protection under the law of competition serves also the purpose of complementing the not entirely complete and perfect system of special rights. Walter himself holds a compromise position, claming that two basic situations need to be distinguished. If the special protective laws do not provide a sufficient protection against the imitation of the performances of others, then law on unfair competition performs a supplementary role in the protection of such acts. However, it is a different case where protection against imitation is not afforded under special rights because it arises from the legislators' decisions and values applied in the legislative process. Then, there is no place for supplementary protection by means of law on unfair competition. This typically concerns situations where protection under special rights is no longer provided because the period specified for such protection has expired. The temporal limitation of such protection is based on the balancing of interests carried out by legislators who connect the expiration of the protective period of time with the right for a free emulation[7]. After the expiration of this period, the protection based on personality rights or the law on unfair competition may be admissible – in Walter's opinion – only under exceptional circumstances.

Notes on the judicial decisions in these cases

All three cases discussed above involved the parasitical usage of works of others in one's advertising activities (i.e., in the course of behaviour of a competitive nature), which could result in material or ideal damage to the original authors of such works. The plaintiff's cases and injunctions were most easily (even in the Czech dispute) qualified according to the law on unfair competition. In the case of the congratulations song, the authorship rights of another person were most likely concerned; while in the case of the sunglasses advertisement, such a qualification was not sufficiently evidenced, even though it could not be ruled out. In the Czech case (the use of a part of song lyrics as an advertising slogan), the possibility of seeking protection under copyright law seemed to be self-evident, but it eventually turned out to be legally equivocal. In all cases, however, there was always a potential conflict with both law on unfair competition and copyright law.

In the Austrian cases, the plaintiffs based their claims on both of these legal qualifications. The plaintiff's case in the Czech dispute was not properly anchored; it stood – metaphorically speaking – "on one leg," being argued only with respect to copyright law, although such a legal qualification was being challenged by the defendant from the very beginning and need not have been, for that reason, quite indisputable. Moreover, the Czech legal regulation did not rule out an action due to unfair competition. This appears already from the general clause on unfair competition in Section 44 (1) of the Commercial Code – the Act No. 513/1991 Sb., as subsequently amended ("the Commercial Code"). According to this provision, unfair competition in business relations is such behaviour which stands counter to good manners of competition and may cause harm to other competitors or consumers. The competitor is defined in Section 41 of the Commercial Code as a natural or legal person participating in business competition (a participant in business competition), regardless of whether it is an entrepreneur or not. Therefore, there need not be any intermediate relation between, on the one hand, the subject that is parasitical on the results of work or the popularity of someone else, and, on the other, another subject whose efforts resulted in creating the work.

The possibility of such an interpretation is also attested by the Czech decision-making practice, which makes it possible to apply the conception of the ad hoc competitor. The decision of the High Court in Prague, ref. No. R 3 Cmo 328/94l, states that "business competition cannot be narrowed down to competition between the directly competing producers or providers of service who regularly (i.e., not on an ad hoc basis) offer the same or similar service. The pre-condition for unfair competition is not the repetitiveness or regularity of one's acts, just as it is not the awareness of the unfair competitor that his acts constitute unfair competition."[8]

In the Czech case, another qualification was possible, namely the one provided for in Section 48 of the Commercial Code, where unfair competition extends to "the parasitic use of the reputation of a company, products, or services of some other competitor with the aim of obtaining a benefit – which the competitor would not be able to obtain otherwise – for one's own business activities or the activities of someone else." The term "product" used in this provision may analogically be extended to commercially applied products of intellectual creation, i.e., the song titled "Doing" in the said case, or, to be more precise, the text of the song.

If the plaintiff in the Czech case on the misuse of a part of song lyrics had suggested to the court that the dispute be qualified not only under copyright law but also under the law on unfair competition, he could have improved his chances of winning the case. The solution might have been simplified and the rather suprising decision of the Supreme Court of the Czech Republic might not have occurred: the court's decision cancelled the decisions of the lower courts and the case was returned to the first-instance court so that an expert opinion could be formed on the disputed issue of whether the defendant infringed on the plaintiff's authorship rights or not.

There is also the question of whether the lower courts could themselves decide the matter under the law on unfair competition or not since they are not generally bound by the qualification offered by the plaintiff. However, in order to meet the requirements of a certain legal qualification, the plaintiff would have to produce a corresponding statement and possibly evidence. In this case, this would mainly be the deduction that he could have and would have disposed of the lyrics of his song for commercial (mainly advertising) purposes, thereby assuming the position of the ad hoc competitor.

While such a statement was not made by the plaintiff, the lower courts could have proceeded in accordance with Section 118(a) of the Act No. 99/1963 Sb., as subsequently amended (the Rules of Civil Procedure). Where the presiding judge believes that the matter might be assessed differently from the party's legal opinion, this law provides for the judge's possibility of requesting the relevant party to supplement the description of the decisive facts in the necessary extent. This provision must be applied even to situations where a matter might be qualified "even differently" from the party's legal opinion.

It would have been quite easy for the plaintiff to qualify the matter under the law on unfair competition (as indicated above) since the evidence was very clear. Such a legal qualification would also have made the case easier to process since the parasitical use of an unspecified "performance" by someone else is subject

to less strict legal demands than the use of such a performance, supposed to meet the requirements of a work in the sense of the Copyright Act.

It cannot, of course, be ruled out that the lower courts did not perceive any need to consider any other legal qualification in the event that they were unequivocally convinced about the clear qualification under copyright law, regardless of the fact that the defendant questioned it. Such a conviction of the lower courts may have been the result of their opinion that the case did not concern so much the undisputed take-over of several words from song lyrics but mainly the author's personality rights under Section 11(3) of the Copyright Act, providing for the integrity of his work (i.e. the entire song lyrics) and his *right to give consent to any change or any other interference with his work.*

Regarless of these speculations, it remains a fact that the decision-making in many legal disputes could be made simpler, faster, cheaper, and often more just if all those involved in the settlement of such disputes, including the legal representatives of the parties, were not too entrenched within their own legal specializations and were willing to consider a broader range of possible legal solutions. *Quod erat demonstrandum.*

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[1] The case was reported by the journal *Právní rozhledy*, C.H. Beck, Praha, Vol. 21/2007, p. 795 and subsequent pages. The journal published – without any commentary – the judgment of the Supreme Court of the Czech Republic of 30 April 2007, ref. No. 30 Cdo 739/2007. This article is based on the text of the judgment obtained by the author directly from the Supreme Court of the Czech Republic. The latter text, however, differs from the text published in the journal in one small but not insignificant detail (see below).

[2] Cf. Telec, I. *Autorský zákon (komentář)* [*Copyright Law: A Commentary*]. C. H. Beck, Praha 1997.

[3] The text is emphasised in the actual judgment of the Supreme Court of the Czech Republic but not in the version published in the journal. As a result, the considerations which led the Supreme Court of the Czech Republic to arrive at its decision are less intelligible.

[4] The case was described by Walter, M. M. in a commentary on the decision of the Austrian Supreme Court (OGH of 12 March 1996; 4 0b 9/96), Medien und Recht 5/94, p. 202 and subsequent pages.

[5] The case was described by Walter, M. M. in a commentary on the decision of the Austrian Supreme Court (OGH of 20 June 2006; 4 Ob 47/o6z), Medien und Recht 1/2007, p. 28 and subsequent pages.

[6] See commentary mentioned in Note 5.

[7] The same conception is applied also in the judgment of the Supreme Court in Prague, ref. No. 3 Cmo 40/2004 of 20 September 2004. One of its legal sentences (which even the resolution of the Supreme Court concerning the appellate review, ref. No. 32 Odo 1889/2005, used) runs as follows: "The feature of conflict with good manners is not a permanent feature for certain acts, mainly where law on unfair competition should enable the entitled party to achieve, in a certain sense, a monopolous position in the market. Such a position, created for instance by the launch of a new product which significantly enriches the competitive offer, may be allowed to a competitor only for a certain period of time but not once and for all. The same also applies to industrial rights: they also create exclusive position for the owner of the rights for a limited period of time, and the same holds as regards the protection of competitors from unfair competition." In Horáček, R., Macek, J. *Sbírka správních a soudních rozhodnutí ve věcech průmyslového vlastnictví* [*A Collection of Administrative and Judicial Decisions in Industrial Property Issues*]. C. H. Beck, Praha 2007, p. 219.

[8] In Macek, J.: *Rozhodnutí ve věcech obchodního jména a nekalé soutěže* [*Decision-making in Trade Mark and Unfair Competition Disputes*]. C. H. Beck, Praha 2000, p. 68.

Tention between legal, biological and social parentage in the light of the best interest of the child

Zdeňka Králíčková*

1. Introduction

The aim of the paper is to discuss the question whether *the natural right of the child to know his/her origin*, parents, siblings and relatives, is respected in the Czech Republic *according to the existing as well as the designed law*.

The Czech Republic is a signatory of a number of *international human rights conventions* that are directly applicable pursuant to Article 10, *the Constitution of the*

Czech Republic.[1] First, it is necessary to mention *the United Nations Convention on the Rights of the Child* which protects the natural right of the child to life, the right to know his/her parents (i.e. natural rights – hence his/her origin), the right to have their care, the right to keep his/her family relations (Articles 6, 7 and 8).[2] A wider framework of the given issue is provided by the *Convention for the Protection of Human Rights and Fundamental Freedoms* passed by the Council of Europe.[3] The Convention, and in particular *the case law of the European Court of Human Rights* concerning *the Article 8 protecting privacy and family life*, creates room for a new, human-rights conception of family law.[4] Also through *the Charter of Fundamental Rights and Freedoms* the Czech Republic avows *the European tradition of commonly shared values of humanity* and *recognizes inviolability of natural rights of individuals* and provides *protection from an unauthorized infringement of private and family life* (Article 10, Section 2).[5]

After long years when the Communist doctrine (after 1948) propagated social relationships at the expense of natural rights of individuals the law in the Czech Republic *is coming back to the philosophical foundations* on which the *General Civil Code* (hereinafter *the ABGB*)[6] was built up[7]. That important code was drawn up on *the principle of child's origin*. For its time it was a progressive piece of work when compared with the French *Code Civil* built up on the theory of recognition of the child by his/her parents (sic!). Many authors hold the view that it was undoubtedly due to the natural law school which had special significance for the origin of the *ABGB*, especially from the humanistic standpoint.[8] The natural law idea of one mother and one father of the child, which fully corresponds to natural laws,[9] should be respected especially today when the *Czech family law is gaining a human rights dimension*. Let us note that *the draft of the new Civil Code* respects many philosophical *human rights values* developing them generously, and not only in the second part dealing with family law. Nevertheless, there are some *particulars* which invoke an impression that the idea of discontinuity with the preceding legal order has not been fully realized.[10]

The above mentioned measures taken by the Czech Republic in the area of human rights show *in general* that the Czech Republic is determined to respect the *European trends of the development of private law, or family law*, one of which is undoubtedly the constitutionalization, i.e. a process of a consistent protection of human rights and freedoms in all law-related situations.[11, 12, 13]

Regarding the *human rights dimension of family law* and its *constitutionalization* the law literature often analyzes the issue of the *child's rights*, which is linked with looking for *a balance between biological, legal and social parenthoods*, and also connected with institutes of foster care.[14] Due to this all-European trend family rights in many countries undoubtedly gain a new dimension.[15] We may only add that constitutional courts, or general courts, of many countries take these fundamental rights seriously.[16] Family rights, despite being different in particulars, thus become very *similar in their essence* due to the human rights dimension.[17] The purpose of family rights cannot be anything else than protection of the weaker, harmony and balance. From the standpoint of legal philosophy family rights actually come closer to one another even if many skeptics see this issue differently.[18]

What is the *real situation* of protection of natural rights of children in the Czech Republic?[19] When examining closer the *particulars* of the given issue some *paradoxical* facts come up to the surface. *The natural right of children to life, their right to know their origin and the right to have constant family ties* established in the *Convention on the Rights of the Child* (cf. Articles 6, 7 and 8) sometimes gets – because of the existing law – into a *conflict* with *their parents' rights* established by law. Of course, *according to the existing law* the parents do not have the so-called *right to give up their child*, i.e. to establish such a state when the child becomes the so-called *legally free*. However, it happens frequently that the legal state established by the lawmaker prevents the biological and social realities from getting in harmony with the legal state, or vice versa, regardless of the child's interests and his/her biological parents being in harmony or not. The following lines are therefore devoted to a *critical view* of the *existing legal regulation* of determining and denying motherhood and parenthood in relation to the prepared *recodification* of the Civil Code and in the light of the *decision practice of the European Court of Human Rights*.

2. Mater semper certa est!

The *ABGB* unconditionally respected the principle of *mater sempter certa est*. Pursuant to the ABGB the identity of the mother was indubitable in the spirit of the above mentioned philosophical foundation. It was evidenced by the birth and the *principle of the child's origin* was thus fully realized. By this important act the enlightened lawmaker reacted strongly and categorically to the ominous practice established by the principles and previously effective regulations according to which a mother of an illegitimate child did not have a duty after the birth to disclose the name of the procreator or her own name (sic!) when the child was recorded in the record of births. *Ratio legis* of the court decrees consisted undoubtedly in the idea of preventing abortions and murders of newborns.[20] But let us take the historical, political, social and religious contexts into account.

The ancient Roman law principle of *mater simper certa est* respecting the fact of birth is *traditionally* considered in the Czech environment as a basis for creating the *status relationship mother – child* even if it has been expressly introduced into the modern legal order only recently by the so-called Great Amendment to the Act on Family (cf. Act No 91/1998, Coll.).[21] The principle was respected even when assisted reproduction with the help of egg donation appeared due to the development of reproduction medicine and when the biological, or genetic, reality was not in harmony with the legal state. We may only add that despite the lawmaker's saying nothing for a long time there was an obstacle to the development of the so-called surrogate motherhood on a commercial basis in the form of conclusions of an ethical commission from the 1980s. By this rights of the woman who gave birth to the child were strengthened and with that also predictability and certainty. Nevertheless, rights of the mother need not be and frequently are not identical with rights of the child. Especially today, when a big emphasis is laid on protection of natural rights of the child it is necessary to look for answers to the following questions: (a) is the regulation according to the existing law in harmony with the right of the child to know his/her origin and (b) has the child of the early 2000s the right to know he/she was conceived by the method of assisted reproduction and that his/her legal mother is not his/her biological mother?[22] *According to the designed law* it would be desirable to regulate the issue of motherhood more precisely and to give protection to the natural right of the child to know his/her origin, but not at the expense of the status situation.[23] An inspiration might be the German constitution pursuant to which a child may take steps *to find out his/her genetic origin*, which will not influence his/her status, though.[24]

As for the principal negative elements of the Czech legal order concerning motherhood it is necessary to point out an Act pursuant to which *the mother has a right to hide her identity in connection with birth*.[25] The Act was adopted on the initiative of members of parliament in 2004 without going through the standard legislative process. This piece of legislation did not change the Act on Family, which expressly establishes the principle of *mater semper certa est*, but amended without any conception the Act on People's Health, the Act on Records of Births, Name and Surname and the Act on the Public Health Insurance. Therefore *experts came to the conclusion* that the child, whose mother wants her personal data not to be revealed at the birth, has a mother but only does not know her identity; he/she may then demand that "an envelope with mother's personal data" should be opened, for example in the procedure about determining parenthood (cf. Section 80, Sub-Paragraphs a/o, Rules of Procedure).[26] We may only criticize the meaning of haphazard and non-conceptual private bills[27] creating a completely unsatisfactory state undermining pro-family behavior, disrupting the legal consciousness and, last but not least, negating the traditional centuries-old conceptions of enlightened philosophers.

Moreover, both experts and the general public tolerate the abandoning of unwanted babies in the so-called baby-boxes with a reference to idealistic concepts aiming at preventing murders of newborns and thus return to the past.[28] We may only add that in such cases the child cannot be denied the right to bring a *status action for determining motherhood* if he/she has knowledge of who is his/her mother (cf. Section 80, Sub-Paragraphs c/o, Rules of Procedure). A lot of criticism has been provoked by that as well as by other sensitive issues that may be approached differently.[29] According to the designed law this problem should be solved satisfactorily.

3. Pater semper incertus?

The Czech legal regulation of parenthood is established on *traditional* legal ideas which are based merely on *likelihood*. Anyway, in the ancient Rome the principle of "pater incertus" was applied, too.

Is it proper to stick to the tradition with roots in the *ABGB*? Has the modern legislature reacted sufficiently to the development in the area of science, in particular genetics? No. The legal regulation of parenthood has been left in constraints of ideas that originated at the time when it was not possible to determine the father with certainty. The above mentioned 1998 Great Amendment to the Act on Family did not pay much attention to this issue. In the opinion of many it made it even more complicated.[30] However, the current theory and practice do not deal very often with questions of whether sticking to this strict law based on traditions *protects parenthood*, whether it is the legal or biological one. Even less frequently – which is alarming – we ask a question whether by sticking to the old conception *the child's rights and legally protected interests are not infringed*, too, in particular the natural right of the child to know his/her origin. However, it should be admitted that the Czech regulation of parenthood does not defy the conception of older European regulations. These regulations establishing the legal presumption of parenthood were made, though, in the days when legitimacy of the child was highly valued and when methods of assisted reproduction and paternity tests were still in their infancy. The child's rights as well as human rights in general were virtually non-existent.

In the course of time the Czechoslovak, or Czech, lawmakers only made *partial changes* in the legal regulation of parenthood dating back to the early 1960s (cf. Act No 94/1963 Coll. on Family, hereinafter AF). The Act on Family was amended only very little in connection with adopting the possibility of artificial

fertilization (cf. Act No 132/1982 Coll.). The regulation established in Section 58, Paragraph 2, AF, has been criticized many times, especially for its brevity.[31] Other changes were brought about by the year 1998. Following the decision practice of the *European Court of Human Rights* concerning the Article 8, *Convention for the Protection of Human Rights and Fundamental Freedoms*, in the case of *Keegan vs. Ireland*,[32] the above mentioned Great Amendment introduced provisions aiming at *strengthening the status of the man who thought himself to be the child's father, even against the will of the mother* who had given consent to the adoption of the child in the given thing. The provision of Section 54, Paragraph 1, AF, was added to by the active legitimacy of the alleged father to bring an action for determining fatherhood. This *strengthened the child's right to know his/her origin and natural family*. Nevertheless, *the third presumption keeps to be based on sexual intercourse at the time at issue* (cf. Section 54, Paragraph 2, AF) even if it would be better to consider *the fact of genetic relationship in connection with the social reality as the basis for a court ruling about determining fatherhood*. Such a conception would certainly correspond more to *the Strasbourg decision practice concerning the Article 8, Convention for the Protection of Human Rights and Fundamental Freedoms*, giving protection to privacy and family life.

The above mentioned Amendment to the Act on Family further established the possibility to consider fatherhood of the mother's husband as excluded on the basis of the agreeing declaration of the child's mother, her husband and the man who thinks himself to be the child's father (cf. Section 58, Paragraph 1, AF). The wording of the Act provoked a negative reaction from the part of the experts even if the intention of the drafters had been undoubtedly praiseworthy.[33] The prevailing interpretation is that such a declaration, which may only be made by the persons mentioned in the Act during the procedure about denying fatherhood, may only function as evidence that the fatherhood of the mother's husband is excluded but not as an agreeing declaration of the parents about determining fatherhood.[34] The regulation with its contradictory interpretation and application does not make the situation easier for anyone. The child's right to know his/her origin as soon as possible is not fully respected by this approach.

The above mentioned Amendment also substituted the wording *"the interest of the society"* with *"the interest of the child"* in Section 62, which is interpreted by the Supreme Public Prosecutor's Office "traditionally" in the spirit of the General direction of the Supreme Public Prosecutor's Office No 6/2003 on the procedure of public prosecutors in examining prerequisites of an action pursuant to Section 62 or 62a, Act No 94/1993 Coll. on family as amended by Act No 91/1998 Coll., even if the development in the area of human rights should be respected. A new provision of Section 62a was also introduced into the Act on Family giving rise to interpretation and application problems since the very beginning. According to the existing law it is established that the Supreme Public Prosecutor may bring an action for denying fatherhood of the man whose fatherhood was determined according to the second presumption by the agreeing declaration of the parents even before the expiry of the six-month preclusive periods of the parents established by the law if the determined man cannot be the child's father and if it is in the apparent interest of the child and in harmony with provisions guaranteeing fundamental human rights.

A partial conclusion in this issue could undoubtedly be the statement that within the above mentioned Amendment to the Act on Family *no conceptual change of the Act on Family occurred*, in particular concerning *the establishment of the child's right to deny fatherhood of the recorded father, the prolonging of the so-called denying periods* for the child's parents written in the record of births, *the excluding of the Supreme Public Prosecutor's Office* from private law matters and *a new attitude to fatherhood* in general (taking DNA tests into consideration). No attention was paid to *defects of will manifestation* in connection with the establishing of the second presumption, in particular *an error*, despite the fact that in a number of works experts criticized these defects resulting from the removal of family law relationships from the Civil Code.[35]

The legislative development in the area of paternities was finished last year by the establishment of *the so-called first and half presumption* which reacted to a high number of children born outside wedlock and which was for the benefit of a man who gave his consent to an artificial insemination of his partner. Nevertheless, this novelty gives rise to interpretation and application problems, too.[36]

It is possible to give a considerably large *list of problematic provisions* as an answer to the question *what prevents establishing, preserving and protecting harmony in status among the closest family members and what impedes a wider protection of the child's right to know his/her origin*.[37]

The point is that the lawmaker has:

a) not expressly established the child's right to deny fatherhood of his/her father written in the record of births in accordance with the right to know his/her origin guaranteed by the Convention on the Rights of the Child,
b) not revised considerably short preclusive periods for the parents written in the record of births for denying fatherhood established on the basis of the first and second presumption,
c) not dealt with quite an unsystematic and rarely applied right of the Supreme Public Prosecutor's Office to deny fatherhood established on the basis

of the first and second presumptions in the cases when preclusive periods for denying fatherhood expired for the parents written in the record of births,

d) not taken into consideration how easy it is to use DNA tests in connection with rulings about determining fatherhood on the basis of the third presumption which were made by courts on the basis of the sued men's "failing to bear" the burden of proof in procedures at a time when DNA tests were not available and which established the problem of *res iudicata*,

e) not taken into consideration the possibility of artificial insemination of the wife after the husband's death,

f) not reacted satisfactorily to the increase of the number of unmarried relationships and children born out of wedlock due to assisted reproduction, and not guaranteed stabilization of their status,

g) not dealt with the possibility of the so-called passive legitimacy of more men who could be fathers of the child,

h) not expressly enabled denying and determining fatherhood within one procedure in the situation when the so-called written state in the record of births does not correspond with the biological one and there is a will to solve the problem within the shortest time as possible after the birth of the child,

i) not regulated the issue of will manifestations in establishing the second presumption and in particular the so-called simulated fatherhood,

j) not reviewed the conception of three presumptions, in particular the third one which is based on sexual intercourse at the time at issue, i.e. on probability, even if it could be based on a DNA analysis, i.e. on high probability bordering with certainty,

and thus not fulfilled his duty to protect natural rights of the child to know his/her parents and to achieve an equilibrium among biological, social and legal parenthoods.

We hold the view that this issue must be considered *in the spirit of its human rights dimension*, especially *in accordance with the decision practice of the European Court of Human Rights* concerning the Article 8, *Convention for the Protection of Human Rights and Fundamental Freedoms.* This approach does not apply only to an interpretation and application of the existing legal regulation but also to considerations about the designed law, in particular the Civil Code under preparation whose second part should include a family law regulation.

First of all it is necessary to emphasize that the child has the right to know his/her origin according to the Convention on the Rights of the Child (cf. Article 7, Paragraph 1). He/she has the right to know his/her parents. This natural right of the child, which is only protected by the Convention, should be a *priority* in any activity of the state – whether it may be the legislative, judicial or executive one. It is not decisive whether these rights are executed by the child himself/herself or by his/her parents. *It is always the child and consistent protection of his/her natural rights what matters.* It is not decisive on which presumption the fatherhood is determined. We believe that the existing law, under which the child is not actively legitimated to denying fatherhood of his/her father, is in conflict with the child's natural right to know his/her origin. In connection with fulfilling the child's rights there is a question whether the child should be given the right to deny fatherhood of his/her father only in the case of the first and second presumptions, or whether the right to bring a suit for denying fatherhood should be extended to those cases when the paternity issue has been decided by the court according to the third presumption, however, in the situation when a DNA test as evidence has not been carried out. We are aware of the fact of *rei iudicata*, but in accordance with the decision practice of *the European Court of Human Rights* in the case *Paulík vs. Slovakia* we may only agree with the conclusion that *"a lack of a procedure by which it would be possible to bring in balance the legal state and the biological reality in denying fatherhood is in the given case in conflict with interests of the persons involved and, in fact, is not beneficial for anyone."* [38]

The extent of this paper does not allow a deeper analysis of the problems touched upon in the above mentioned overview of issues *according to the designed law*.

Nevertheless, let us pay attention to the issue *of reassessing the conception of presumptions of fatherhood in favor of a certainty based on DNA.* As mentioned above, the construction of presumptions of fatherhood is based on such a state of knowledge when it was not possible to determine positively the child's father. The question remains whether it is necessary and reasonable to follow such a conception *according to the designed law*. *Unfortunately, the draft of the new Civil Code does not know an alternative* in this matter. Inspiration for considerations according to the designed law may found in the work *Model Family Code*[39] which sets up the so-called *intentional parentage*, thus replacing the system of presumptions that is a product of its time according to the author.[40] However, if the determination of fatherhood was not made on the basis of the autonomy will of the child's parents it is necessary to guarantee the child's rights by the dictum *"The child's father is the man determined by the court as a genetic parent"*. In our opinion, this would provide a better protection for the rights of the alleged father as well as the natural rights of the child. Nevertheless, *we are aware of the problem which may be provoked by strictly preferring the biological parenthood to the social one*.

As for other problems that the draft of the new Civil Code omits or deals with insufficiently, we may say that *the draft of the new Civil Code unfortunately sticks to continuity – it continues to involve the Supreme Public Prosecutor in private law paternity matters leaving the periods set for denying fatherhood untouched, i.e. for six months only*.

4. Conclusion

We hold the view that the whole matter has to be considered *in a complex manner*, in the spirit of *its human rights dimension*.[41] Finally, we may add that the amended or completely new legal regulation should strengthen *the natural right of the child to know his/her origin* in connection with the principle of *mater semper certa est* and to replace the principle of *pater incertus* with the principle of *pater semper certus est* as it is already possible with the available technology at the beginning of the 21st century. This would undoubtedly provide protection not only to parents' rights but in particular to *natural rights of the child*.[42]

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[1] Cf. the Constitutional Act No 1/1993, Coll., the Constitution of the Czech Republic.

[2] Cf. the information of the Federal Ministry of Foreign Affairs No 104/1991 Coll.

[3] Cf. the information of the Federal Ministry of Foreign Affairs No 209/1992 Coll. Towards that *Haderka, J. F.*: The impact of rules of the Council of Europe on the modern family law. Právní praxe, 1994, No 9, p. 507, *Requena,, M.*: Activities of the Council of Europe in the area of family law. Právní praxe, 1999, No 2/3, p. 132 and further, *Čapek, J.*: The European Court and the European Commission of Human Rights. Praha, Linde, 1995.

[4] Viz *Berger, V.:* Judikatura Evropského soudu pro lidská práva. (Decision practice of the European Court of Rights) Praha: IFEC, 2003.

[5] Compare the resolution of Czech National Council No 2/1993 Coll. on declaration of the Charter of Fundamental Rights and Freedoms.

[6] See the *Allgemeines bürgerliches Gesetzbuch* (the *ABGB*, Austrian Civil Code) from 1811 which was adopted after the establishment of the Czechoslovak Republic by the so-called reception rule (Act No 11/11918 Coll. of Laws) into the legal order of the new state. In the Czech lands it was in force until 1 January 1950 when a new Civil Code came into effect (the so called Middle Code).

[7] For details, see the key work by *Kubeš, V.:* Filosofický základ a celková výstavba obecného zákona občanského z roku 1811 a vládního návrhu občanského zákona. (Philosophical foundations and the overall makeup of the 1811 General Civil Code and the government bill of the new Civil Code) Vědecká ročenka právnické fakulty Masarykovy univerzity v Brně, XIV. (1936–1937), p. 37 and further.

[8] For example a comparative study influenced by the liberal atmosphere of the Prague Spring *Másilko, V., Vaněček, S.:* Určování otcovství v evropských právních řádech. (Determining fatherhood in European legal orders) Komparatistická studie. Praha: SEVT, 1969, p. 47.

[9] Ibid, p. 76.

[10] *Eliáš, K., Zuklínová, M.:* Principy a východiska nového kodexu soukromého práva. (Principles and foundations of the new Code of Private Law) Praha: Linde, 2001. Konsolidovaná verze viz ww.justice.cz dne 1. září 2008. (See a consolidated version form 1 September 2008 on www.justice.cz).

[11] In the Czech Republic this conception is based on application of Article 41, Constitution of the Czech Republic, pursuant to which "*The fundamental rights and freedoms are protected by the judicial power*". A *mandatory legal rule* results from this provision according to which the fundamental rights and freedoms are protected by the judiciary and there is no possibility for a restrictive interpretation according to which the protection should only be provided by the Constitutional Court. Lawyers commonly speak of *horizontal constitutionality* in this respect.

[12] See for example *Kühn, Z.:* Budování horizontálního konstitucionalismu: tři středoevropské strategie. (Building up horizontal constitutionalism: three Middle-European strategies) In *Tichý, L. (ed.):* Základní lidská práva v jednotlivých právních odvětvích. Grundrechte und einzelne Rechtsgebiete. Praha: Univerzita Karlova, 2006, p. 93–104.

[13] Towards this a key work by *Holländer, P.:* Ústavněprávní argumentace. Ohlédnutí po deseti letech Ústavního soudu. (Constitutional law argumentation. A glance back at ten years of the Constitutional Court.) Praha: Linde, 2003.

[14] Towards this, see in particular *Van Bueren, G.:* Children Rights in Europe. Strasbourg: Council of Europe 2007.

Further, see papers in proceedings from the conferences organized by the Commission on European Family Law held in Amsterdam in 2006, especially *Forder, C., Saarloos, K.:* The Establishment of Parenthood: A Story of Succesful Convergence? In *Antokolskaia, M. (ed.):* Convergence and Divergence of Family Law in Europe. Antwerpen – Oxford: Intersentia, 2007, p. 169 ff., and national reports in proceedings from the XVIIth Congress of the International Academy of Comparative law held in Utrecht in 2006 in *Schwenzer, I. (ed.):* Tensions Betwen Legal, Biological and Social Conceptions of Parentage. Antwerpen – Oxford: Intersentia, 2007.

[15] Cf. *Stalford, H.:* Concepts of Family Law under EU Law – Lessons from the ECHR. Int´l J. L. & Pol´y & Fam., 2002, p. 410. *Caracciolo Di Torella, E., Masselot, A.:* Under Construction: EU Family Law. European Law Rev., 2004, p. 32; also *Pintens, W.:* Europeanisation of Family Law. In: *Boele-Woelki, K. (ed.):* Perspectives for the Unification and Harmonisation of Family Law in Europe. Antwerpen-Oxford-New York: Intersentia 2003, p..3 and further.

Towars this, see especially the collection of proceedings and final evaluations form the international conference held in Amsterdam in 2006 and organized by *Commission on European Family Law (CEFL)*, see *Antokolskaia, M. (ed.):* Convergence and Divergence of Family Law in Europe. Antwerpen-Oxford: Intersentia 2007.

[16] Cf. especially the finding of the Constitutional Court of the Czech Republic from 20 February 2007, File II US 568/06. Further, see diploma theses defended at the Law Faculty, Masaryk University, especially the thesis by *Martin Blažek*

entitled Family law in the decision practice of the Constitutional Court available at www.law.muni.cz, Archives of School-Leaving Works for 2007/2008 (as of 3 June 2008).

[17] Cf. the following papers representing the development in selected countries in which a similarity of trends may be seen.

As for the Netherlands, see *Vlaardingerbroek, P.:* General Trends in Dutch Family Law. The Continuing Influence of Human Rights Conventions upon Dutch Family Law. In *Taekema, S. (ed.):* Understanding Dutch Law. Den Haag: Boom Juridische vitgevers (BJu), 2004, p. 217 and further; and also *Sumner, I., Forder, C.:* Bumper Issue: All You Ever Wanted to Know about Dutch Family Law (and Were Afraid to Ask). In *Bainham A. (ed.):* The International Survey of Family Law. 2003 Edition, Jordan Publishing Limited, 2003, p. 263 and further.

As for England and Wales, see *Welstead, M.:* Influence of Human Rights and Cultural Issues. Ibid, p. 143 and further.

As for France, see *Ferré-André, S., Gouttenoire-Cornut, A., Fulchiron, H.:* Work in hand for the Reform of French Family Law. Ibid, p. 163.

As for trends and our topic, see especially *Dethloff, N.:* Improving the Position of Women in German Family Law: The Violence Protection Act of 2002 and Landmark Decisions in Maintenance Law. Ibid, p. 187 and further, and *Dethloff, N., Kroll, K.:* The Constitutional Court as Driver of Reforms in German Family Law. In Bainham A. (ed.): The International Survey of Family Law. 2006 Edition, Jordan Publishing Limited, 2006, p. 217.

[18] Cf. selected passages from *Antokolskaia, M.:* Harmonisation of Family Law in Europe: A Historical Perspective. A tale of two millennia. Antwerpen-Oxford: Intersentia, 2006.

[19] Cf. for example *Králíčková, Z.:* Popírání otcovství a subjektivní přirozená práva dítěte (Denying parenthood and natural rights of children). Bulletin advokacie, 2007, No 5, p. 32 and further. Přirozené právo dítěte znát svůj původ a jeho ochrana v českém civilním právu (The natural right of children to know their origin and its protection in Czech civil law). In *Ficová, S. (ed.):* Ochrana práv maloletých. Univerzita Komenského: Bratislava, 2007, p. 68 and further. For details, see *Hrubá, M.:* Lidskoprávní aspekty procesu slaďování biologického a právního rodičovství (Human rights aspects of the process of harmonizing biological and legal parenthoods). Sborník z konference Dny veřejného práva. Dostupný v elektronické verzi na www.law.muni.cz (A collection from the conference Days of Public Law. Available at www.law.muni.cz. As of 3 June 2008).

[20] Cf. the court decree from 5 November 1788 and another one from 19 February 1820.

[21] Cf. also *Haderka, J.:* Otázka mateřství a otcovství od účinnosti zákona No 91/1998 Sb. Právní praxe, 1998, No 9, p. 530 ff (The question of motherhood and parenthood since the Act No 91/1998 coming into effect).

[22] Cf. Sections 27d – 27h, Act No 20/1966, Coll. on care of people's health as amended by Act No 227/2006 Coll. on human embryo and stem cell research and related activities and a change of some related Acts. Towards this in detail, see *Frinta, O.:* Asistovaná reprodukce – nová právní úprava (Assisted reproduction – a new legal regulation). Právní fórum, 2007, No 4, p. 123 and further.

[23] Towards this, cf. www.justice.cz from 1 September 2008.

[24] Cf. Articles 1 and 2, Constitution of the Federal Republic of Germany, and also Section 1591, German Civil Code, establishing that the mother of a child is a woman giving birth to the child, and Section 256, German Rules of Procedure, establishing that the child may take steps to find out his/her genetic origin. Cited according to *Kohnen-Trawny, I.:* Postavení rodičů dítěte při osvojení a právo dítěte na znalost svého původu (spojeno s otázkou anonymního porodu) (The position of parents when adopting a child and the child's right to know his/her origin – linked with the issue of anonymous birth). In: Sborník příspěvků ze semináře „Rodina a práva osobního stavu (statusová)". Správní právo, 2003, No 5–6, p. 293.

[25] See the Act No 422/2004 Coll. changing the Act No 20/1966 Coll. on care of the people's health as amended.

[26] Towards this, see *Hrušáková, M., Králíčková, Z.:* Anonymní a utajené mateřství v České republice – utopie nebo realita? (Anonymous and hidden motherhood in the Czech Republic – utopia or reality?) Právní rozhledy, 2005, No 2, p. 53 and further.

[27] Towards the issue of private bills as one of reasons of the current state of the Czech legislation, see *Zoulík, F.:* Úvaha o naší současné legislativě. Ve službách práva. (Considerations about the current Czech legislation. In the service of the law.) Sborník příspěvků k 10. výročí založení pobočky nakladatelství C. H. Beck v Praze. Praha: C. H. Beck, 2003, p. 1 and further.

[28] See *Zuklínová, M.:* Několik poznámek k právním otázkám okolo tzv. baby-schránek (A few notes on legal aspects of the so-called baby-boxes). Právní rozhledy, 2005, No 7, p. 250 and further. See in particular the conclusions that are not flattering for the Czech Republic and its legislative practice.

As for the operators of the so-called baby-boxes and relevant statistical data, see www.statim.cz from 1 September 2008.

[29] As for literature on motherhood, see e.g. *Melicharová, D.:* Určení a popření mateřství, problematika surogačního mateřství (Determining and denying motherhood, questions of the surrogate motherhood). Zdravotnictví a právo, 2000, No 7 – 8, p. 24 and further, and from among the older works, see *Fiala, J., Steiner, V.:* Teoretické otázky určení mateřství podle československého práva (Theoretical problems of determining motherhood according to the Czechoslovak law). Právník, 1970, No 1, p. 33, and *Haderka, J.:* K některým problémům určení (a popření) mateřství (Towards some problems of determining and denying motherhood). Bulletin advokacie, 1979, červenec – září, p. 14 and further.

Towards the issue of motherhood, or parenthood in general, cf. the cardinal work by *Radvanová, S.:* Kdo jsou rodiče dítěte – jen zdánlivě jednoduchá otázka (Who are the parents of a child – only a seemingly simple question). Zdravotnictví a právo, 1998, No 5, No 6, No 7–8, and *Haderka, J.:* Otázka mateřství a otcovství od účinnosti zákona No 91/1998 Sb (The problem of motherhood and fatherhood since the effectiveness of the Act No 91/1998, Coll.). Právní praxe, 1998, No 9, p. 530 and further.

[30] See *Králík, M., Svák, J.:* K právní možnosti změnit pravomocné soudní rozhodnutí o určení otcovství (Towards the legal possibility of changing an ordinary court ruling about determining parenthood). Jurisprudence, 2007, No 3, p. 51 with references to other works.

[31] Cf. a number of works by *Jiří Haderka,* an overview in *Hrušáková, M. a kol.:* Zákon o rodině (The Act on Family). Komentář (Commentary) 3rd ed., Praha: C. H. Beck, 2005.

[32] See the judgment from 25 May 1994, 16/1994/411/ Series A, No 209. A legal sentence could be as follows: An adoption of the child born out of wedlock and against the will of his/her father breaks Article 8, Convention for the Protection of Human Rights and Fundamental Freedoms. See *Haderka, J.:* Případ Keegan versus Irsko (The case of Keegan vs. Ireland). Právní rozhledy, 1995, No 8, p. 311 and further.

[33] For example, *Haderka, J.:* Ke vzniku a základním problémům novely zákona o rodině v r. 1998 (Towards the origin and the basic problems of the Amendment to the Act on Family in 1998). Právní praxe, 1998, No 5, p. 269 and further.

[34] Cf. *Hrušáková, M. a kol.:* Zákon o rodině (Act on Family). op. cit., p. 253.

[35] Cf. for example *Haderka, J.:* K některým potížím s druhou domněnkou (Towards some difficulties with the second presumption). Správní právo, 1998, p. 327 and further, *Langer, P.:* Právní povaha souhlasného prohlášení rodičů podle § 52 ZOR a právní důsledky jeho vad (Legal nature of the agreeing declaration of the parents pursuant to Section 52 AF and legal consequences of its imperfections). Právní rozhledy, 2005, No 18, p. 667 and further.

[36] Cf. Act No 227/2006 Coll. on human embryo and stem cell research and related activities and on a change of some related Acts. Towards this in detail see *Hořínová, A.:* Otazníky nad přijetím zákona o výzkumu na lidských embryonálních kmenových buňkách (Questions about the adoption of the act on human embryo and stem cell research). Právní rozhledy, 2007, No 3, p. 101 and further .

[37] The author identifies with a number of inspiring opinions concerning the issue of paternity in *Pavelková, B., Smyčková, R., Srebalová, M.:* Otcovstvo (Paternity). In: Sborník příspěvků ze semináře „Rodina a práva osobního stavu (statusová)". Správní právo, 2003, 5–6, p. 319 and further, and *Winterová, A.:* Určení otcovství nad rámec zákonných domněnek (Determining fatherhood outside legal presumptions). Ibid, p. 314 and further.

[38] Cf. the ruling from 10 October 2006, Complaint No 10699/05 concerning the right to respect to privacy and family life, prohibition of discrimination and the right to peaceful enjoyment of property.

For details, see *Kopalová, M.:* Právo na popření otcovství na základě nově zjištěných biologických dat (The right to deny fatherhood on the basis of newly found biological data). Právní fórum. 2007, No 1, appendix, p. 1 and further, *Bálintová, M.:* Možnosť zapretia otcovství v kontexte práva na rešpektovanie súkromného života (The option of denying fatherhood in the context of the right to respect to private life). Justičná revue, 2007, No 4, p. 527 and further., *Králík, M., Svák, J.:* K právní možnosti změnit pravomocné soudní rozhodnutí o určení otcovství (Towards the possibility of changing an ordinary court decision about determining fatherhood). Jurisprudence, 2007, No 3, p. 46 and further.

[39] Cf. *Schwenzer, I., Dimsey, M.*: Model Family Code. From a Global Perspective. Antwerpen – Oxford, Intersentia, 2006, and a review of the author in the journal Právník, 2007, p. 1142 and further.

[40] *Model Family Code* deals not only with family law in European countries but also with family law regulations worldwide. The author was looking for inspiration, in her own words, for example in the family law of New Zealand, Australia and Canada. Various solutions may be revolutionary for a number of European experts in Roman Law. According to the author, *Model Family Code* is an important step forward because it goes beyond *the common core of all solutions*, i.e. it attempts to find *the best solution*. In doing so *Model Family Code* strives to overcome various discrepancies in national systems of family law that have evolved in a sort of *patchwork* over years and to create an autonomous and consistent system of family law based on modern solutions – models that could be followed by national lawmakers.

[41] Towards this, see e.g. *Králíčková, Z.:* Evropský kontext vývoje českého rodinného práva po roce 2004 (The European context of the development of the Czech family law after 2004). In *Hurdík, J., Fiala, J., Selucká, M. (eds.):* Evropský kontext vývoje českého práva po roce 2004 (The European context of the development of the Czech law after 2004). Sborník příspěvků z workshopu konaného na Právnické fakultě MU dne 26. 9. 2006 (Collection of papers from a workshop held at the Faculty of Law, Masaryk University on 26 September 2006). Brno: Masarykova univerzita, 2006, pp. 202–222.

[42] Towards this, see *Svák, J.:* Základy európskej ochrany ľudských práv (Foundations of the European protection of human rights). Svazek 2. Banská Bystrica: Univerzita Mateja Bela, 2002.

Labour Law of the European Communities in the Czech Labour law after Recodification of the Labour Code

Zdeňka Gregorová*

The labour law of the European Community was reflected in the Czech labour law at the time when the Czech Republic was preparing for its accession to the European Community by means of fundamental and extensive amendments of the then Labour Code, i.e. Act No. 155/2000 Coll. and certain other legal acts.[1] In the following paper, we shall pay attention to the reflection of the EC labour law into the new Labour Code, i.e. Act No. 262/2006 Coll., the Labour Code, as amended (hereinafter referred to as the "Labour Code").

General Issues

The basic starting point for examination of the reflection of EC labour law into the Labour Code is the

definition of subject-matter applicability of this legal regulation. In its provision of Section 1 subsection c), the Labour Code itself determines that it processes relevant regulations of the European Community. The comment to the said provision provides a summary of Directives processed in the Labour Code.[2]

Another starting point is the question how the new Labour Code ensures that the parties of employment relationships do not depart from the provisions which reflect the regulation of the Community labour law, by means of a contract.

According to Section 2 paragraph 1, the Labour Code rests on the principles that "everyone may do anything which is not forbidden by law". In this way, the labour law addressed, after a long period of time, the constitutional principles embodied in Article 2 paragraph 4 of the Constitution of the Czech Republic and in Article 2 paragraph 3 of the Charter of Fundamental Rights and Freedoms. The said principle is expressed in such way that rights and obligations in labour relations may depart from the Labour Code provided that such derogation is not expressly prohibited by the Code or provided that the nature of the Code's provisions does not imply impermissibility to depart therefrom. The express and absolute prohibition of contractual derogation from the provisions of the Labour Code is specified in the provision of Section 363 paragraph 2 of the Labour Code as it includes an exhaustive list of provisions, from which the parties of labour relations may not depart. To me, however, the regulation included in the annex to the sentence one in the provision of Section 2 paragraph 1 – it is possible to depart "provided that the nature of this Code's provisions does not imply impermissibility to depart therefrom" - seems rather problematic. It is clear from this provision that there are also other legal rules included in the Labour Code, which are of mandatory nature but their identification is a matter of the user's discretion (and in the end a matter of a judicial decision). Let me remind you at this point, the same way as my colleagues Bělina a Pichrt[3] did when they were considering only the draft Labour Code, the thought of Viktor Knapp about the mandatory and directory law: "The easiest way of distinguishing between ius cogens and ius dispositivum is when it is clearly said in the act as in Section 263 paragraph 2 of the Commercial Code. In other cases, in particular in Civil and Labour law, it is more difficult."[4] In consideration of the fact that the new Labour Code should contribute to liberalization of labour relationships and application of the liberty of contract in much greater extent, it will be in my opinion difficult for users (employers and employees), who were used to the current method of legal regulation (mandatory provisions and injunctive rules), to consider when they may depart from the legal regulation because the nature of the provision allows this. In its judgment of 12 March 2008 concerning the motion to cancel certain provisions of Act No. 262/2006 Coll., the Labour Code (hereinafter referred to as the "judgment of the Constitutional Court"), even the Constitutional Court admitted that "interpretation of such relatively inexplicit concept may out of doubt raise problems in the area of labour relations; it will not be often possible to solve these problems in a manner other but by an amendment of the concerned provisions of the Labour Code."[5] On the other hand, however, it did not find the given provision unconstitutional and it states that this provision could be classified as a relatively inexplicit legal rules that are common even in other areas of law and do not cause any significant interpretation problems there.[6]

Another prohibition is formulated only relatively as according to the provision of Section 2 paragraph 1 sentence two of the Labour Code – "It shall not be possible to depart from the provisions of Section 363 paragraph 1, which transpose the relevant EC regulations; however, this shall not be applicable where such derogation is in favour of an employee." The provision of Section 363 paragraph 1 of the Labour Code is a very detailed enumeration of individual provisions of this Act, which reflect EC regulations[7]. Nevertheless, it does not follow from the provision itself that it is a provision of mandatory nature, not allowing any derogation. In our opinion, the prohibition of derogation from the provision of Section 363 paragraph 1 of the Labour Code may not be derived even by application of the general prohibition of Section 2 paragraph 1 sentence one because it does not follow even from the nature of the examined provision that one may not depart from it. Therefore the regulation included in the provision of Section 2 paragraph 1 sentence two of the Labour Code is necessary, which subordinates the provision of Section 363 Clause 1 to the relative prohibition of derogation. This prohibition allows the contracting parties to agree on regulation different from the one included in the provisions specified in Section 363 paragraph 1, nevertheless with the restriction that the agreed other (meaning different) regulation has to be in favour of the employee. We leave aside the fact that the possibility of derogation defined in this was will probably represent a certain problem for the practice and in the end, it may result in the increasing number of labour disputes and on the other hand we emphasize that retaining of the option of a different regulation is compatible with EC legal regulations, which in most cases leave the states with an option of more favourable regulation. The conclusion of unconstitutionality of the examined provision was not reached by the Constitutional Court either as it dismissed the motion to cancel this provision.[8]

In conclusion of this general part, we may summarize that the reflection of the Community labour law is ensured on the Labour Code in such manner that the reflection itself forms a part of the subject-matter applicability of the Labour Code and further by the fact that

it is impossible to depart from specific provisions of the Labour Code, in which the EC regulations are processed, except for cases when a different regulation would be in favour of the employee.

In the next part of this paper, we shall address certain specific issues of the reflection of the Community law in the Czech labour law and we will follow the defined range of issues in the previous work, which addressed the original Labour Code.[9]

Equal Treatment

Directives regulating equal treatment[10] are reflected in particular in the provision of Section 16 of the Labour Code; the same follows also from the provision of Section 363 paragraph 1 of the Labour Code while from the whole provision of Section 16 (3 paragraphs), only paragraphs 2 and 3 are considered provisions processing EC regulations, not paragraph 1.

In the provision of Section 16 paragraph 1, the principle of equal treatment is expressed as an employer's obligation to safeguard equal treatment for all employees as regards their working conditions, remuneration for work and other emoluments in cash and in kind of monetary value, vocational training and opportunities for career advancement.

The provision of Section 16 paragraph 2 expresses a prohibition of any form of discrimination. Nevertheless as concerns definition of the terms such a direct and indirect discrimination, harassment and sexual harassment, instruction to discriminate and incitement to discrimination including specification of instances when different treatment is permissible, it refers to the Antidiscrimination Act. The Labour Code itself only specifies that discrimination shall not mean a different treatment owing to the nature of occupational activities, which are to be carries out. Such differentiation naturally has to be necessary for the work performance and "the objective followed under this exception must be legitimate and the requirement must be adequate" (Section 16 paragraph 3 sentence one of the Labour Code). Discrimination shall further not be deemed to occur in case of taking measures aimed at levelling out disadvantages following from the fact that a natural person belongs to a groups defined by any of the reasons specified in the Antidiscrimination Act (Section 16 paragraph 3 sentence two of the Labour Code). Alike the Labour Code itself does not (unlike the original one) regulate the means of protection against discrimination in labour relations and it also refers to the Antidiscrimination Act.

We might consider the said regulation sufficient and corresponding to the relevant Directives but there is "one little mistake" - there is no Antidiscrimination Act.[11]

Despite the missing legal regulation that would in general include EC regulations, there are certain partial provisions in the Labour Code, which reflect the principle of equal treatment, however, in all instances only in relation to a specific concept – this is for example the provision of Section 110 par. 1, which lays down the principle of equal treatment in relation to remuneration, namely as follows: "All employees employed by one employer are entitled to receive equal wage, salary or remuneration according to an agreement for the same work or work of same value". Similarly, we may find an application of the equal treatment principle in relation to the working conditions (maternity and parental leave, adjustment of working hours and others).

The Community regulation is partially reflected in the area of equal treatment and prohibited discrimination in the provision of Section 14 par. 2 of the Labour Code which expresses the ban on the employer to discriminate an employee in any way or put his at some disadvantage only because the employee claimed protection of his rights ensuing from the labour relations.

Hence a considerably complex and more accurate reflection of the Community regulation of equal treatment and prohibited discrimination is still only the provision of Section 4 of Act No. 435/2004 Coll., on Employment, as amended (hereinafter referred to as the Employment Act"). Nevertheless, according to Section 4 par. 1 of the quoted Act, the said regulation applies only to equal treatment to employment, not to working conditions, remuneration and vocational and career promotion.

The solution of the said situation is difficult. In the pending period, it possible is in our opinion to start from the provisions of the Employment Act and to apply the said provision (Section 4) *per analogiam iuris* also to a more detailed definition of terms forming the content of the prohibited discrimination also in the labour relations regulated by the Labour Code. An argument in favour of the similar procedure might be in particular the specification of the subject-matter of the labour law, which regulates both the relations concerning realization of the right for employment and the relations, in which the employment is realized – labour relations. We may deduce from this that if the definition of terms forming the content of the prohibited discrimination applies to legal relations concerning the approach to employment, these terms within the same definition might be applied also in legal relations, in which the right for employment is realized and the principle of equal treatment and prohibited discrimination applies too.

Nevertheless, we cannot do with making use of the provisions of the Employment Act applied *per analogiam iuris* over and over again. The legal regulation has to reflect the provisions of the Community law in their full extent, i.e. in relation to the principle of equal

treatment and prohibited discrimination as well as working conditions, remuneration and vocational and career promotion. It is naturally possible to wait for another draft of the Antidiscrimination Act, however, in consideration of the fact that this draft has been twice unsuccessful in passing through the legislative process, a speedy solution cannot be expected. In our opinion, a solution applied directly in the Labour Code would be more efficient as the provisions of Sections 16 and 17 would be supplemented with a subject-matter definition of terms from the area of prohibited discrimination as well as with direct regulation of legal means, which the employees might apply to protect themselves against discrimination.[12] One may consider also an amendment of the Employment Act that would extent the application of Section 4 not only on the approach to employment but also to other areas. But in terms of certain purity of legal regulation, this solution would not be pure in our opinion as the Employment Act does not affect the very basic labour relations, in which dependent work is realized.

Working Conditions

The regulation of working hours and rest periods is reflected in part IV, provisions of Sections 78 to 100 of the Labour Code (working hours and rest periods), further in part IX, provisions of Sections 211 to 223 (leave). In the same time, the provisions of Section 78 par. 1 subsection a) to f), k) a l), Section 79 par. 1, Section 79a, Section 82, Section 83, Section 84a, Section 85 par. 2 and 3, Section 86 par. 3, 88 par. 1 and 2, Section 90, Section 90a, Section 92 par. 1, 3 and 4, Section 93 par. 2 sentence two and par. 4, Section 94, Section 96 par. 2 as well as Section 213 par. 1, Section 217 par. 4 (as regards parental leave), Section 218 par. 1, and Section 222 par. 2 sentence one and par. 4 are in accordance with the provisions of Section 363 par. 1 such provisions, which transpose the relevant EC regulations. In accordance with the provision of Section 2 par. 1 sentence two of the Labour Code, one may not depart from these provisions except for derogation in favour of the employee. In my opinion, this regulation is compatible with the rules defined by the Directive. A certain problem may be the examination of the issue whether the total weekly working hours laid down in the Directive No. 93/104/EC means working hours including the overtime work in total – i.e. a sum of all possible work engagements of an individual – or a limit of working hours with inclusion of the overtime work laid down for one employment relationship. A more general conclusion is getting closer to the first one of the interpretations. The logics of this interpretation may be seen also in the fact that the total limit of work engagement is not only to protect the employee and provide space for his rest but also in general provide space for solution of employment issues – the concerned limit opens space for employment of other people. In our opinion, the limit of working hours including the overtime work is defined in our legal regulation in the latter meaning. This conclusion may no longer be deduced from an express provision of Act as it used to be on the original Labour Code when it followed from Section 69 of the original Labour Code that when an employee entered into several employment relationships, the rights and obligations ensuing from them were considered individually unless the Labour Code or other legal regulations determined otherwise. We are still able to deduce from the provision of Section 78 of the current Labour Code that all definitions of legal terms in the area of working hours are defined in the relationship employee-employer and not as a summary of all work engagements. In addition, the limit of working hours according to our legal regulation may not include the working hours ensuing from an agreement to perform work or from an agreement to complete a job.

Protection of young people has been fully harmonized and the Directive is reflected in all corresponding provisions – working hours, special working conditions, medical care, ban on child work.

The legal regulation of the fixed-term employment relationship was fully harmonized[13] in the original Labour Code and it is still fully harmonized also in the new one, namely in the provision of Section 39 of the Labour Code while par. 2 to 6 of this provision are considered provisions transposing EC regulations according to Section 363 par. 1 and one may not depart from them except for derogation in favour of an employee (Section 2 par. 1 sentence two of the Labour Code). In this connection, it is necessary to remind that this type of employment relationship is included to the so-called precarious labour relations in EC materials – i.e. those with restricted employee protection. In comparison with this situation, the fixed-term employment relationship in our legal regulation cannot be considered a legal relationship with restricted employee protection as except for its limited term, this employment relationship is governed by the general regulation of the employment relationship and the employee protection is not restricted therein.

The legal regulation of the employment relationship for less working hours is fully harmonized too. In contrast to the characteristics in EC, this employment relationship cannot be considered a “precarious” one with restricted employee protection as also in this case, the general regulation of the employment relationship applies.

Securing the objectives defined in the Council Directive No. 91/533/EEC is reflected in the provision of Section 37 of the Labour Code where the employer is bound by the obligation to notify employees in writing of their fundamental rights and obligations ensuing for the employee from the concluded employment relation-

ship. The quoted provision is also one of those according to Section 363 par. 1 and Section 2 par. 1 sentence two of the Labour Code (see above). Because most essentials required by the quoted Directive are usually included in the arrangement of the employment contract, specification of data required by the Directive in a written employment contract is considered fulfilment of the obligation to inform employees. In certain cases when the relevant concept cannot be regulated by contract, a reference to the relevant provision of legal regulation is sufficient to meet the obligation to provide information. Hence the legal regulation is fully harmonized.

Posting of Employees to Perform Work on the Territory of Another Member State of European Union

For the purposes of implementing the Council Directive No. 96/71/EC concerning the posting of workers in the framework of the provision of services, new regulation of Section 319 (cf. Section 363 par. 1 of the Labour Code) was included into the Labour Code. The regulation is thereby in principle harmonized. Still it is possible to express certain reservation as regards this regulation. According to Section 319 par. 2 of the Labour Code, the rule of the minimum length of annual leave and the rule of maximum wage shall not apply if the period of posting the employee to perform work within the framework of transnational provision of services in the Czech Republic does not exceed 30 days in total per one calendar year. The said exception shall not be applicable if such employee is posted by an employment agency. It is questionable whether the exception from application of the rule of the minimum length of annual leave and the rule of maximum wage, which the Czech legal regulation defined in uniform manner, is fully compatible with requirements of the concerned Directive. The fact is that the Directive specifies possible exceptions in relation to various situations and in various durations. The Directive allows an exception from the rule of the minimum length of annual leave and the rule of maximum wage in two cases:

- the first one is represented by assemblies or first installations of the goods if they form a substantial part of the contract on the goods delivery and are necessary to put the delivered goods into operation and if they are performed by experienced or specialized employees of the supplier undertaking and the time of posting does not exceed 8 days (Article 3 par. 2 of the Directive),
- the other one is a small extent of works to be performed (Article 3 par. 5 of the Directive). The criteria for assessment of works of small scope are to be determined by the Member State that wants to apply the said exception.

In other cases, only one exception from the rule of maximum wage is possible if the period of posting does not exceed one month (Article 3 par. 3 and 4 of the Directive).

In our opinion, the scope of the exceptions as they are formulated in the provision of Section 319 par. 2 of the current Labour Code is wider than acceptable by the examined Directive[14]. If we start from the presumption that the defined period of 30 days per calendar year represents the specification of the "works of small scope", the exception ensuing from the provision of Article 3 par. 5 of the Directive would be used in this way. Within this rule, however, it would not be possible – in our opinion – to post an employee to perform "the first assembly or the first installation of the goods (provision of Article 3 par. 2 of the Directive) as the scope of posting for this purposes is considerably shorter in this case (8 days). On the other hand, it is possible to consider the question whether the scope of works of 30 days per calendar year is a "work of small extent".[15] It is however possible to deduce that the Czech legal regulation did not make use of the possible exception only from the rule of minimum wage according to the provision of Article 3 par. 3 and 4 in the event that the term of posting is not longer than one month in the course of one year (provision of Article 3 par. 6 of the Directive). In consideration of the posting of one month in the course of one year with an exception from the rule of minimum wage (not admitting the exception from the rule of minimum paid leave), a question arises once again whether the diction used in the Czech legal regulation in the provision of Section 319 par. 2 of the current Labour Code is actually consistent with requirements of the Directive. What is the difference between the work of small extent defined by 30 days per calendar year (an exception from the rule of minimum wage and the minimum leave) and the posting for the maximum of one month (only an exception from the rule of minimum wage)?

The current regulation however – much like the legal regulation in the original Labour Code – does not express the requirement of temporary basis of posting, which is the characteristic sing of employee posting within supranational provisions of services. In accordance with judgments of the European Court of Justice (hereinafter referred to as "ECJ")[16], it is not admissible to restrict the duration or frequency of employee posting for supranational provision of services by a general restriction but the requirement of temporality should be expressed.

The negative definition of the scope of the Directive application (provision of Article 1 par. 2 of the Directive) has not been reflected unfortunately – just like in the original legal regulation.

Social Protection of Employees

The regulation of collective dismissals of employees in Section 62 of the Labour Code is fully harmonized with requirements ensuing from the relevant Directive. According to Section 363 par. 1, the provision of Section 62 is considered a provision transposing EC regulations and it is impossible to depart from it pursuant to Section 2 par. 1 sentence two of the Labour Code unless the derogation is in favour of the employee. In our opinion, however, it follows from the nature of this provision that one may not depart from it (Section 2 par. 1 sentence one of the Labour Code).

Social protection of employees upon transfers of undertakings, parts of undertakings, transfers of activities or parts of activities is regulated both in the concept of the Transfer of Rights and Obligations from Labour Relations in the provision of Section 338 et seq. of the Labour Code and with reference to a special legal regulation.[17].

Employee protection in case of employer's insolvency is safeguarded by the very legal regulation included in Act No. 118/2000 Coll., on Employee Protection upon Employer's Insolvency, as amended. The legal regulation is fully harmonized.

Technical and Health Protection of Employees

EC Directives for the area of safety and health protection at work are reflected in a large number of regulations, in particular implementing and technical ones, the examination of which exceeds the scope of this paper. The basic framework is included in part V, in the provisions of Sections 101 to 108 of the Labour Code.

Conclusion

In our opinion, **o**ne may conclude from the abovementioned specific analyses that most issues regulated by the secondary law of EC and concerning performance of dependent work, the Czech legal regulation in the Labour Code is sufficiently harmonized. The precise inclusion of the equal treatment principles and the prohibited discrimination directly to the Labour Code still remains a great problem. The said insufficiency is even more serious due to the fact that the principle of equal treatment and prohibited discrimination represents a fundamental principle of labour law.

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[1] These issues were addressed for example in the work Gregorová, Z., Pracovní právo a právo sociálního zabezpečení [Title in translation: *Labour Law and Law of Social Security*], in Evropský kontext vývoje českého práva po roce 2004, MU, Brno 2006, p. 353 et seq.

[2] These are the following Directives listed in the quoted comment:

Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship,

Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies,

Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP,

Council Directive 97/81/EC of 15 December 1997 concerning Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC,

Council Directive 94/45/ES of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees,

Council Directive 97/74/EC of 15 December 1997 extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees,

Council Directive 2006/109/EC of 20 November 2006 adapting Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertaking and Community-scale groups of undertakings for the purposes of informing and consulting employees, by reason of the accession of Bulgaria and Romania,

Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community,

Article 13 of the Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees,

Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses,

Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services,

Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC,

Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time,

Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work,

Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship,

Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work,

Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC),

Council Directive 92/85/EEC of 19 November 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC),

Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women,

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

Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions,

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation,

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation,

Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organization of the working time of persons performing mobile road transport activities,

Council Directive 2005/47/EC of 18 July 2005 on the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector,

Article 15 of the Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.

[3] Bělina, M., Pichrt, J., Nad návrhem nového zákoníku práce [Title in translation: *On the Draft of the New Labour Code*], Právní rozhledy No. 11/2005, p. 384.

[4] Knapp, V., O právu kogentním a dispozitivním (a také o právu heterogenním a autonomním) [Title in translation: *About Mandatory and Directory Law (and also about Heterogeneous and Autonomous Law*], Právník No. 1/1995, p. 1.

[5] The judgment of the Constitutional Court was published under No. 116/2008 Coll., for details on the mentioned see p. 1470, clause 199.

[6] Ibid.

[7] The provision of Section 363 paragraph 1 of the Labour Code reads: "The provisions by which the transposition of the EC law is implemented are: Sections 2 par. 6, Section 14 par. 2, Section 16 par. 2 and 3, Section 30 par. 2, Section 37 par. 1 to 4, Section 39 par. 2 to 6, the introductory wording in Section 41 par. 1 and in its subsections c), d), f) and g), Section 47 consisting in the wording "where on termination of maternity leave (in the case of a female employee) or on termination of parental leave (in the case of a male employee) in the scope for which a female is entitled to take maternity leave, such employee returns to work, the employer shall place this employee to his/her original job and workplace", Section 53 par. 1 consisting in the wording "the employer may not give notice to his employee " and subsection d), Sections 62 to 64, Section 78 par. 1 subsections a) to f), k) and l), Section 79 par. 1, Section 79a, Sections 82, 83, 84a, Section 85 par. 2 and 3, Section 86 par. 3, Section 88 par. 1 and 2, Sections 90, 90a, Section 92 par. 1, 3 and 4, Section 93 par. 2 sentence two and par. 4, Section 94, Section 96 par. 2, Sections 101, 102, Section 103 par. 1 subsections a) to h), j) and k) to the end of par. 1, par. 2 to 5, Section 104, Section 105 par. 1 consisting in the wording "if an industrial injury occurs, the employer within whose undertaking this injury has occurred shall investigate the causes and circumstances of the injury, par. 3 subsection a), 4 and 7, Section 106 par. 1 to 4 subsections a), c), d), f) and g), Section 108 par. 2, 3, 6 and 7, Section 110 par. 1, Section 113 par. 4, Section 136 par. 2, Section 191 consisting in the wording "an employer shall excuse the absence of an employee from work during a period of taking care for a sick child whose age is below 10 years or taking care for another household member according to Section 115 of the Civil Code in the cases laid down in Section 25 of the Sickness Insurance Act or in Section 39 of the Sickness Insurance Act and for a period of taking care of a child younger than 10 years due to the reasons laid down in Section 25 of the Sickness Insurance Act or in Section 39 of the Sickness Insurance Act or due to the reason that a natural person who otherwise takes care of a child could not take care of this child because this person underwent a medical examination or treatment in a healthcare facility and this could not be arranged outside the employee's working hours", Sections 195, 196, Section 197 par. 3 resting in the wording "parental leave under subsection 1 is granted as of the day when the child has been taken into foster care until the day when the child reaches the age of three years. If a child has been taken into foster care after the attainment of three years of age but before reaching the age of seven years, there shall be the right to parental leave of 22 weeks. If a child has been taken into foster care before it is three year old and parental leave of 22 weeks would expire after the child reaches three years of age, parental leave shall be granted for 22 weeks as of the day of taking the child into foster care", Section 198 par. 1 to 3 as regards parental leave, Section 199 par. 1, Section 203 par. 2 subsection a), Section 213 par. 1, Section 217 par. 4 as regards parental leave, Section 218 par. 1, Section 222 par. 2 sentence one and par. 4, Section 229 par. 1 consisting in the wording "vocational practice shall be considered as work performance for which an employee is entitled to a wage or salary", Section 238 par. 2 and 3, Section 239, Section 240 par. 1, Section 241 par. 1 and 2, 245, Section 246 par. 2 sentence one, Section 276 par. 1 sentence one and par. 2 to 5, Section 277 consisting in the wording "the employer shall create at own costs the conditions, which will enable the employees' representatives the proper exercise of their function", Section 278 par. 1 to 3, par. 4 sentences two and three, Section 279 par. 1 subsections a), b), e) to h) and par. 3, Section 280 par. 1, Section 281 par. 5, Sections 288 to 299, Section 308 par. 1 as regards its introductory wording and subsection b), Section 309 par. 4 and 5, Section 316 par. 4 consisting in the wording "the employer may not require from an

employee the information in particular of" and subsections a), c), d), e), g) and h) and further in the wording "the above shall not apply where there is a cause for it consisting in the nature of work to be performed provided that the requirement is adequate", Section 319, Section 321 par. 3, Section 338 par. 2, Section 339, Section 340 and Section 350 par. 2 (Section 2 par. 1 sentence four)."

[8] Judgment No. 116/2008 Coll., p. 1471, clause 204.

[9] See the work specified in the note No. 1.

[10] The following Directives are concerned:

Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women,

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

[11] For more details concerning the adoption of the Antidiscrimination Act see for example Dvorská, O., Zásada rovného zacházení, zákaz diskriminace a jejich uplatňování v pracovním právu, disertační práce [Title in translation: *Principle of Equal Treatment, Prohibited Discrimination and their Application in Labour Law, Doctoral Thesis*], 2008 published at http://is.muni.cz/thesis.

[12] The said manner would be easier also due to the fact that an important amendment of the Labour Code is under preparation.

[13] For details see Gregorová, Z., Některé proměny pracovního poměru na dobu určitou [Title in translation: *Certain Changes of the Employment Relationship for Definite Period of Time*], in sborník Pocta Antonínu Kandovi, Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., Plzeň 2005, p. 288 et seq.

[14] The quoted provision determines that the provision on minimum wage per calendar year and on minimum wage, relevant guaranteed minimum wage and extra pay for overtime work shall not apply if the term of posting an employee to perform services in the Czech Republic does not exceed in total the period of 30 days per calendar year. This shall not apply if the employee is posted to perform work within transnational provision of services by an employment agency.

[15] The original wording of the Directive uses the term "the amount of work to be done is not significant".

[16] See judgment in C-215/01 (Bruno Schnitzer), CELEX 62001J0215, in which ECJ stated: "Services according to the Contract may cover services of wide nature, including those provided on long-term basis, even for several years if for example the mentioned services are provided in connection with construction of a large building… None of the provisions of the Contract allows to generally determine the duration or frequency, on the basis of which the provision of a service of a certain type of services in another Member State cannot be longer; such restriction cannot be considered a provision on services according to the Contract…"

[17] For details see Gregorová, Z., Převod podniku a přechod práv a povinností z pracovněprávních vztahů v komunitárním a českém pracovním právu [Title in translation: *Transfer of Undertaking and Passage of Rights and Obligations from Labour Relations in Community and Czech Labour Law*], Právník No. 10/2008 p.

Judicial review of administrative discretion in the Czech Republic in the view of development, including europeisation effects

Soňa Skulová*

1. Introductory note

In the field of judicial review, a specific area is reviews of those decisions of administrative bodies that are issued within their discretionary power (administrative discretion). The above-mentioned specific feature is given by the character of the relative freedom of decision-making, typical of discretionary power, and also by the character and structure of criteria that control administrative discretion.

Other, more generally based specifics of judicial review (compared to internal review inside the public administration system) result from the relation of executive power and judicial power which is supposed to control public administration's decisions from its independent positions. Another factor is the necessity to ensure limitation of the performance of that part of public power that is in the competence of public administration in relation to the rights and interests of individuals.

The aspect of lawfulness of public administration is solved, monitored or controlled within judicial review at the most general level. In the specific area of administrative discretion and its judicial review, this criterion can have more levels, i.e. it can dispose of much different content from a simple conformity with a simple specific rule to convenience with a complicated structure of legal criteria or standards.

The historical development of the judicial review of discretionary power has been based on this screen from about the last quarter of the 19th century until these days and it is not finished yet. In this long-term development, a certain trajectory (although not quite linear) of its individual points can be seen. It results from a certain logic of increasing demands for the legal state quality in the environment of a particular state (states) and, in the last decades, also in the European environment.

In this short essay, I will try to outline the development in this field in the Czech Republic, which resonated, in a specific way, but not always continually, with the above-mentioned more general trends. The influence of europeisation processes for the given development in the recent period at both legislation and application levels is unquestionable.

First of all, I would like to give several notes to the current context of review of administrative decisions in the legal environment of the Czech Republic. We distinguish reviews inside the public administration system, i.e. reviews executed by administrative bodies, usually at hierarchically higher positions. The basis of this regulation is in the Code of Administrative Procedure (Act No. 500/2004 Coll., as amanded). Another stage of review can be judicial review, in which review within administrative justice[1] takes the main role. Some kinds of decisions have been recently entrusted to the review competence of ordinary courts[2]. The Constitutional Court has a specific role in relation to administrative discretion.

2. *About the development of the theoretical bases of judicial review of the administrative discretion*

To understand the current legal regulations and the situation in the judicial review of discretionary power, at least a glimpse at its roots, as well as thought constructions that it was based on cannot be omitted. Then we can watch whether and how they were reflected in the development and the current legal regulation of administrative justice or other fields of judicial review.

The problems of administrative justice are regularly included in the field of legal guarantees (or guarantees of lawfulness) of public administration or, in their broader framework, in the control of public administration. This is also the case of our legal context where we understand the term “administrative justice” as judicial reviews of administrative decisions. The detailed and comprehensive analysis of administrative justice represents an excessive topic[3], of which we will only focus on its advised part or aspect, i.e. the review of administrative discretion.

Enforcement of the idea of administrative justice related to the application of the theory of separation of powers and the principles of a legal state which brought a qualitatively different positions and relations of the executors of public power and the addressees of its operation. It was necessary to guarantee the restriction of public power within legal limits in both the content and the forms of its realization. This requirement was formulated quite intensively for such cases when executive power intervened in the sphere of public subjective rights. [4]

A more complicated problem for determining the limits and rules of judicial review of administrative decisions is the area of discretionary power when the law itself establishes a free discretion for an administrative body, i.e. the possibility to choose its own, according to its opinion the most suitable decision from more possible decisions, i.e. at a certain stage of the decisions-making process (sometime at its beginning) to choose from among different solutions (procedures), and each of them should be within the framework set by law.

And the role of the court that is (was) supposed to review the lawfulness of such decision is then more difficult. At the beginning, it was necessary for each administrative justice system to resolve the question as to whether ever or in what extent and relation to a legal regulation the court should review an administrative decision based on free discretion. This problem was one of the crucial ones in the development of administrative justice, typically in the system of continental law.[5]

Already the classics of Administrative Law have expressed their opinions on the extent of judicial review. For example, Merkl distinguished, in the intentions of the traditional separation of powers and also of the content of the term “legality”, review as regards lawfulness and also review of an administrative body’s discretion (i.e. the purposefullness of administrative acts in the widest sense). According to his opinion, the review of discretion is a step further than the review of legality and it represents a strong span of administrative justice, if not a deviation beyond the framework of the idea of administrative justice, because, among others, it deprives administration of all its freedom and subjects the entire administration not only to criticism, but also to the will of justice.[6] However, he admits a possible determination of certain types of administrative acts, which would be subjected to review, or certain types of a breach of law. Merkl regards the cases of review of exceeding the limits of free discretion (in conformity with our current concept of administrative justice) as a special case of the review of legality, because each excess of free discretion intervenes in the sphere of legal binding of the administrative body and it thus establishes a breach of law.[7]

The above-mentioned case means at the same time an excess of the framework of power of the entity executing public administration set by law.

Already in the conditions of a modern state, Macur formulated a conclusion that discretion is not the opposite to lawfulness and that these terms do not exclude each other. According to him, the positive legal criterion of their differentiation should not be absolutised. For the current situation and conditions, we can agree with his conclusion that *the point reached by the legal binding of administrative discretion may be followed by a judicial review* even if the positive law excludes the review of purposefulness. It means that the possibility of judicial review ends only where the binding of free discretion by law ends.[8]

The determining factor for setting the extent and content of review of administrative discretion is the legal framework by which administrative discretion is *bound* (particularly as regards its *limits*, i.e., with a certain licence, its quantitative aspects) or *controlled* (particularly as regards criteria determining its content, i.e. qualitative aspects).

3. About the development of judicial review of administrative discretion

What was the specific development of solution for this aspect of judicial review?

Originally, the Austrian administrative court was based on the above-mentioned original theory that if courts judged in the matters of administrative discretion, they would not be any different from administrative bodies. [9]

The so-called "October Act" (Act No. 36/1876 of the Empire code of laws), on establishment of an administrative court, as amended, set in its Section 3, letter e) exclusion of administrative discretion from judicial review.

After several amendments, which did not affect our area of interest, and the rich judicature activity of the Austrian administrative court[10], the October Act was incorporated in the Czechoslovak legal order by Act in essence No. 3/1918 Coll., on the supreme administrative court and on solving competence conflicts ("November Act"). In the field of setting the judicial review of discretion, a formulation change was made when the matters in which decision-making was made by free discretion were removed from the review exclusion.

However, this change did not mean a substantial change in conception, i.e. establishment of full review of administrative discretion, because the main purpose of the law – protection against unlawful decisions or measures of administrative bodies was retained. The newly established legal status meant also the possibility of judicial review of administrative acts issued according to free discretion if they were found unlawful. According to M. Mazanec, the purpose was to retain the court's right built by judicature to examine the legal limits of free discretion and to find out if it has any support in files[11]. [12]

The regulation of administrative justice of 1918, cancelled in 1952, continued, almost without replacement, by the legal regulation of 1991 (Act No. 519/1991 Coll.) amending Act No. 99/1963 Coll., Code of Civil Procedure, in its fifth part.

This legal regulation of administrative justice, cancelled in between, was based to large extent, in relation to administrative discretion, as well as the entire restored concept of administrative justice, on the traditional (the first republic's) regulations, including the conceptions of the above-mentioned issues.

A special provision, directly and expressly related to the judicial review of administrative discretion, was Section 245, paragraph 2, Code of Civil Procedure: "In decisions which an administrative body issued based on a free consideration (administrative discretion) permitted by law, the court only reviews whether such decision did not depart from the *limits and criteria* set by law."[13]

Another element limiting the review of free discretion of administrative bodies was the provision of Section 248, paragraph 2, letter c), which excluded decisions on requests for performance to which there is no entitlement or on requests for removal of the rigour of law from judicial reviews.

A large area of cases of decision-making with administrative discretion thus remained outside judicial review.

The then judicature had to cope with not an exceptional absence of *criteria* for the application of administrative discretion[14] in legal texts. Also the Constitutional Court gave its opinion on the question of legal criteria[15].

As regards determining the *limits* of administrative discretion, the situation was always significantly more favourable.

It is clear from what has been stated so far that the legal determination of limits and aspects (criteria) for the application of administrative discretion, for *all* cases of its application in the regulation of administrative law was actually the key question for the relation of administrative decision-making and judicial review.[16]

Even if the current regulation of the extent of cognition of administrative discretion does not use expressly the term "aspects (criteria) of administrative discretion set by law" any more, their existence, in a wider dimension than only particular legal regulations, is indubitable and necessary and they must be taken into account in administrative discretion and judicial review.[17]

However, it is necessary to mention another aspect of the review of administrative discretion in administrative justice. Breaking the legal framework of administrative discretion or non-observance of criteria for its application, to be worth reviewing in administrative justice, must also represent a *violation or threat of the subjective right of the claimant*, i.e. the addressee of the original administrative decision.

The review itself of lawfulness of an administrative act is not the aim of judicature, but its means to find out whether the subjective law was broken by an administrative body's decision or whether the challenged violation of right did not occur.[18] Also the previous legal regulation was based on this. The claimed break of administrative discretion must have meant an intervention in the claimant's subjective rights, and not in another area, for example, in the rights of other persons or in a certain public interest protected by law.

The current legal regulation of administrative justice does not differentiate from this conception in the question of action legitimacy of individuals[19].

However, in a separate provision it gives the possibility of public interest protection based on an action against entities authorized by law, in particular determined public power bodies[20]. It must be pointed out that a breach of public interest could occur, undoubtedly, based on or in connection with an *abuse of administrative discretion* or, more generally, with an *incorrect free consideration*, in this case incorrect in the meaning of a breach of the general obligation to follow, in the performance of public administration, public interest as one of the substantial aspects of administrative discretion, i.e. the principle of administrative bodies' activity as set in the Code of Administrative Procedure as the general code of public administration's operation.[21]

4. *About the current regulation of judicial review of administrative discretion within administrative justice and according to the fifth part of the Code of Civil Procedure*

In the concept of European administrative law, the term "legality", or more correctly "lawfulness", should be understood in wider dimensions than it used to be traditionally. For european context R.Pomahač says that it means conformity with the constitution, general legal principles, written law and secondary legislation, common rules of international law immediately effective in the national law, judge-made law and with internal directives if they can be appealed before the court[22]. [23]

According to the principle of lawfulness, an unlawful act must be cancelled.[24] This implies the current requirement for the extent and depth of judicial review.

The new regulation of administrative justice appears to be a sufficient source for a really active pressure of courts on improvements in administrative proceedings.[25]

According to the diction of the valid Code of Administrative Justice, Act No. 150/2002 Coll., its purpose is the provision of *judicial protection for the public subjective rights of individuals and legal entities* in the way set by this law and under conditions set by this law or a special law[26].

According to this regulation, in connection with administrative discretion, *illegality of an administrative body's decision* may consist, among others, in that the administrative body *has broken the limits of administrative discretion set by law or that it has abused administrative discretion*[27]. As early as the time when the law was adopted, some authors stated that in this provision the sphere of discretionary decision-making of administrative bodies opened, in an almost revolutionary way, to judicial review.[28]

The regulation of review of administrative discretion is expressly related exactly and only to the "decisions" of administrative bodies. It does not mean, however, that the review of administrative discretion in the above-stated intentions could not be applied also in other cases subject to judicial reviews.[29]

The term "illegality", or its desired opposite "legality", as already pointed out, should be interpreted as a more general term "*lawfulness*". The review of lawfulness in the traditional, narrow meaning, can (and already must) be designated as the minimum, although for its importance the basic extent of review proceedings. The Code of Administrative Procedure (Act No. 500/2004 Coll.) establishes the full extent of the term "lawfulness", i.e. conformity with the entire legal order including international conventions which are its part in the meaning of Article 10 of the Constitution.[30]

The breaking element in the setting of judicial review is the effect of the requirement of the so-called full jurisdiction (within the meaning of Section 6, paragraph 1, European Convention of Human Rights and Fundamental Freedoms[31]), which has been introduced as a general principle.[32]

It takes effect in relation to consideration or complementation of the question of facts enabling the court to repeat evidence or complement evidence produced by an administrative body[33].

Another of its effects is not, however, unlimited. Nor does the current regulation of judicial review in administrative justice (according to the Code of Administrative Justice) generally enable a court to take the role of an administrative body and to replace its free discretion with its own discretion, it only reviews it in that direction as already mentioned, i.e. whether it did not break the limits set by law or whether it was not abused.

However, administrative courts have obtained full jurisdiction in the matters of actions filed to punishments imposed for an administrative offence, specifically *to withdraw it or to reduce it* (unless there are reasons for cancellation of the decision) if it was imposed to an apparently disproportionale degree[34]. Here the court may replace an administrative body's discretion with its own discretion. Reviewing, i.e. judicial review of decision-making of administrative bodies on *matters that fall to the area of private law*[35] , has been caught outside the framework of administrative justice. These matters currently fall to the competence of ordinary courts which review them indeed in full jurisdiction, because they may fully hear the same case[36], and the court is not bound by the facts of the case as found by an administrative body[37].

Probably the most interesting and also the most complicated problem within the judicial review of administration discretion appears to be the above-mentioned newly established term *abuse of administrative discretion*.

In examining whether administrative discretion has been abused, the judicial review will not keep to the "mere" aspects set by law, understood in the meaning of aspects of a particular legal regulation of the given case of administrative discretion (which in addition, as has been mentioned, can be sometimes "absent"). Also criteria acting from higher levels of administrative power, of a more general range, disposing of directly "principal" nature must also play the role. [38]

As V. Vopálka stated, the judge would have to consider in a more modern way on the terms of legality, in a wider way on lawfulness, correctness of decisions… [39]

The term "lawfulness" really have started to "overgrow" its traditionally (or rather historically?) understood boards and it starts to be necessary to see its content not only in administrative law regulations, but also in constitutional standards and international agreements, and maybe in other components.

In relation to the activity of public administration, also the term *"good governance (administration)"* has started to be profiled, as we encounter it in the law on Public Rights Defender (if we are looking in the Czech legislation) and what is becoming the standard of the modern European administrative environment.

Constituting the cited term and individual principles and rules, which make up its content, is, among others, the results of effect of standards contained in some international conventions, of which particularly in the European convention, in the judicature of the European Court (former Commission) for Human Rights established on its base. In this field, also the Constitutional Court has profiled significantly. The activity of the Council of Europe in this field is non-negligible. And in the field of particularly economic relations it is also the law of EC/EU including the judicature of the European Court of Justice, and the Court of First Instance, which also applies the general principles within the limits of its jurisdiction.[40]

5. In conclusion – about the "principal" role of courts, i.e. about the question of effect of the principles of the "European" Administrative Law

According to L. Pítrová and R. Pomahač, constitutional justice is inherently connected with the idea of hierarchic arrangement of primary and secondary sources of law and with enforcing the priority of fundamental rights, while administrative justice is based, in particular, on the principle of legality, proportionality, limited discretion, legitimate expectation, and similar legal tests.[41] According to the cited authors, it is more expected from administrative justice that with its control activity it will protect the *legal correctness* (emphasized by author) of everyday, common decision-making in the cases of public administration.[42]

The above-mentioned role of administrative justice implies a really wider concept of criteria according to which the decision-making of public administration is considered than lawfulness was traditionally understood in this country (within the meaning of conformity with legal regulations).

It means that the model of the so-called "black box" the content of which is not examined by a judge is no more acceptable in the current situation and according to the valid legal regulation for the establishment of judicial review of administrative discretion, as it was well characterized by M. Mazanec[43] in the previous legal regulation, because the judge is to be now interested in what takes place "inside" the decision-making of public administration. As already reasoned, concordance with the legal order includes also the *correctness of application* of its individual components.

The relevant principles and rules which direct mainly into the content aspect of decisions are the test of correctness of applying individual legal regulations related to a particular case of administrative discretion.[44]

In this respect, the new term, gradually taken up by recent judicature, *"abuse"* of administrative discretion (Section 78, paragraph 2, Code of Administrative Justice) can be interpreted as an *incorrect application of administrative discretion*.

In the case of an abuse of administrative discretion, it is always also an *incorrect application of public power*, i.e. the application of public power in a different *way* or to different *purposes* than assumes the wording, purpose or meaning of not only the appropriate applied legal regulation, but also of the relevant parts of the entire legal order, including fundamental rights and

freedoms or other legally protected values at the constitutional and international levels.

If, in the case of breaching the right of an individual in the field of public subjective rights which is also the constitutionally protected right, a remedy is not established within a review through authorized channels or within administrative justice or civil proceedings according to the fifth part of the Code of Civil Procedure, the protective role of the Constitutional Court starts against the decision of public administration that is "incorrect" at the level of constitutional regulations (and international conventions acc. to Art. 10 of the Constitution).

The activity of the Constitutional Court thus has created, in a legally binding form, additional qualitative requirements for decision-making and, especially, the execution of public administration authority and for the public administration-citizen relationship.

This is particularly important in the sphere of discretionary authority, as these are situations where exact legal aspects for decision-making are not given, it is necessary to follow more general principles that should ensure the correctness of adopted solutions.[45]

In the Czech conditions, the above-emphasized complementary relation of constitutional and administrative justice takes effect in it in the field of decision-making of public administration established on the so-called free discretion.

However, the decisive role in enforcing the legal principles of good governance is in administrative justice.[46]

Courts (Administrative Courts and Civil Courts when examining the decisions of Public Adminsitration) have been caught in a situation where they are forced to find the necessary criteria for the purpose of consideration of legal correctness of public administration's conduct or the results of its activity without them being specified in the relevant laws establishing the competence of courts in these matters.

Although at the turn of the millennium, it was difficult to argue for the principles, and especially the „leading" ones for the sphere of adminsitrative discretion - the principles of proportionality or legitimate expectations at an administrative authority or during a judicial review (if one had ever known what these terms meant), the high time came to specifically formulate major qualitative standards for the decision-making procedure of administrative authorities (if not for the general requirements of the rule of law and the constitutional principles, so for the reasons that the time of admission of the Czech Republic to the EU was approaching, and not only sporadic cases from the Czech Republic were submitted at the European Court for Human Rights, some of them having been launched at administrative authorities).

In this situation, adoption of a new Code of Administrative Procedure in 2004 must have been welcome (Act has been in force since 2006). From our point of view, in particular the first, general part of the law is important as it contains the so-called basic, general principles of public administration activity and has a general application for the execution of public administration. Thus the principles are not only of a procedural, but partly also of a material character (in some aspects they control the content of adopted decisions).

Here we find a certain catalogue of legally binding principles of modern public administration including the principle of proportionality and the principle of legitimate expectations (although not explicitly designated as such, but described quite adequately).[47]

And the new, above-mentioned regulations of judicial review enable (generally said) the review in the case of a breach of the monitored principles. As regards the principle of proportionality, such cases may be encountered [48]. There are still some diffidences and certain constraints in arguing and applying a breach of the principle of legitimate expectation, although in certain cases the principle is applied in terms of arguments[49].

Judicature has also, on general level, defined the term "abuse of administrative discretion"[50], which can be considred as a significant moment in the long-time process of the development of the judicial review of Public Administration, in the context outlined above.

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[1] According to the regulation established by Act No. 150/2002 Coll., Code of Administrative Justice, as amended.

[2] Executed by Act No. 151/2002 Coll., by which the Code of Civil Procedure was changed and amended.

[3] From the wider range of literature in Czech relating to the topic, I will mention, e.g. Macur, J.: Správní soudnictví a jeho uplatnění v současné době *(Administrative justice and its application in the present time)* Brno, Acta Universitatis Brunensis, Masaryk University, 1992, Mazanec, M.: Správní soudnictví (Administrative Judiciary), Prague, Linde, 1996, Hácha, E.: entry "Supreme Administrative Court" (Volume II, p. 827–880), "*Administrative Judiciary*" (Volume III, p. 589–605), in Slovník veřejného práva československého *(Dictionary of Czechoslovak Public Law)*, Brno, 1929-1948, Krejčí, J.: Zásada právnosti státních funkcí a zásada zákonnosti správy *(The principle of lawfulness of state functions and the principle of administration lawfulness)*, Prague, by edition of the publisher of the magazine Moderní stát *(Modern state)*, 1931, Bažil, Z.: Neurčité pojmy a správní uvážení při aplikaci norem správního práva *(Indefinite concepts and administrative considerations in applying administrative law standards*), Prague, Acta Universitatis Carolinae, Iuridica 6/1992.

[4] Merkl, A.: *"By fulfilling the requirement of administrative justice, guarantees are created that the will of the nation expressed in laws will be realized in administration, not*

influenced by uncontrolled and irresponsible officials." The most cogent argument which, according to the cited author, speaks for the existence of administrative justice, is the argument that administrative justice is a legal-technical means with which the activity of dependant (administrative) bodies is subject to the review of independent (judicial) authorities and which enables that an award of the court eliminates impermissible influences that may have affected the administrative officer due to his legal and political dependence in executing a legal act. - in Obecné právo správní (*General Administrative Law*), Volume II, Orbis, Prague – Brno, 1932, p. 215, 217 and following.

With regard to the current reality, it should be added that these impermissible influences need not only result from a possible legal and political dependence of administrative officers, but also from the side of various private interests.

[5] For more information on the model or real ways of solutions in individual, particularly European legal systems or orders see, for example, Pítrová, L., Pomahač, R.: Evropské správní soudnictví (*European Administrative Judiciary* (Volumes 1 and 2), Prague, C.H.Beck, 1998, Delamy. H.: Judicial Review of Administration Action, A Comparative Analysis, Dublin, Sweet Maxwell, 2001, Halliday, S.: Judicial Review and Compliance with Administrative Law, Oxford and Portland, Hart Publishing, 2004, Hertogh, M., Halliday, S. (eds.): Judicial Review and Bureaucratic Impact, international and interdisciplinary perspectives, Cambridge, New York, Cambridge University Press, 2004.

[6] Merkl, cited work: p. 231 and following.

[7] Merkl, p. 233.

[8] Macur, J., cited work, p. 50.

[9] Bažil, Z., cited work, p. 8 and following.

[10] "Substantial forms of administrative proceedings", as the model of later regulations of administrative proceeding, were based on it.

[11] Mazanec, M.: Správní soudnictví *(Administrative Justice)*, Linde, Prague, 1996, p. 29.

[12] In connection with the cited law it should be useful to point out to the institute of *legal principles*, unfortunately not introduced in practice, which were supposed to be adopted by the extended board of the Supreme Administrative Court to enforce its steady opinions or their change. The cited first republic's regulation is connected, to certain extent, to the institute of the so-called *substantial rulings* of the Supreme Administrative Court which is to be used for lawful and uniform decision-making of administrative bodies and also its *statements* which are to be adopted within the interest of uniform decision-making of courts in administrative justice (see Section 12, paragraph 2 and Section 19 of the Act No. 150/2002 Coll., Code of Administrative Justice, as amended).

In this respect, the critical comments on inconsistency of judicature and its insufficient influence on the quality of public administration's decision-making were healed, to certain extent. Conf. Mikule, V.: "Význam správního soudnictví pro všeobecnou právní kultivaci veřejné správy" *(Importance of administrative justice for the general cultivation of public administration)*, in Správní právo, 1997, No. 3, p. 137 and following. This apart from others, lead to cancellation of the regulation of administrative justice of 1991 by the Constitutional Court in its finding No. 276/2001 Coll.

[13] The Constitutional Court to the determination of the then conception of the review role of courts: "...the administrative discretion itself is only subject to an ordinary court's review as to whether it did not depart *from the limits and aspects set by law* (emphasized by author), whether it is in compliance with the rules of logical consideration and whether the premises of such discretion were found by proper process proceedings... if these conditions are fulfilled, an ordinary court is not entitled to deduce different or opposite conclusions from the same facts." (III. Constitutional Court 101/95, in Collection of Findings, p. 354.).

[14] This situation was problematic for both the administrative body itself and the court. But because at least general aspects are necessary for a review, this drawback restored the sensitive problem of applicability of analogy in the public-administrative law, sometimes even the question of analogy with the provisions of regulations of private law (conf. e.g. the judgment of the High Court in Prague, ref. no. 6 A 12/94-16, which concluded that *"...in decision making on the obligation of a legal entity to pay a sanction for an administrative offence in the field of private law (i.e. liability of an administrative offence), the administrative office is governed, unless otherwise expressly stated, by similar principles as the court in the field of private law in decision making on their general liability for damage (sic!)."*

[15] E.g. in the ruling in case III. Constitutional Court 101/95: *"...as regards administrative discretion, the judicature of ordinary courts agreed on an opinion that the law creates criteria according to which and within their framework a choice may be made including selection and finding those facts of a particular case that are not anticipated by an administrative standard, but by a discretion of an administrative body they are recognized necessary for the choice of its decision..."*

However, the situation is more complicated in those cases when the legal regulation left on the discretion of an administrative body to determine a criterion for its particular decision according to which it would decide. This case was solved by the Constitutional Court, for example in the case of I. Constitutional Court 116/96 *("...the question of selecting a suitable criterion for determining the pension tax base must enable observance of the basic principles of tax proceedings set in the provisions of Section 2, Act No. 337/1992 Coll., on administration of taxes and charges, as amended."* It was then on the (administrative) court to consider in the further review proceedings whether the current criteria were or were not chosen within "administrative discretion" in the meaning of Section 245, paragraph 2, Code of Civil Procedure.

[16] This conclusion was also suggested by judicial act No. 3, supplement to the magazine Správní právo *(Administrative Law)* No. 3/93: *"Administrative discretion can be reviewed by a court and an administrative body cannot act quite arbitrarily; it would be in conflict with the character of public administration as a by-law activity and an activity governed by law. However, determination of administrative discretion by law does not mean its complete negation. The law creates criteria according to which and within its framework, the choice can be made including selecting and finding those facts of a particular case that are not anticipated by an administrative standard, but by a discretion of the administrative body they are recognized as necessary for the selection of its decision."*

[17] This results from the application of the criterion "abuse of administrative discretion" which is used in the crucial provision of Section 78, paragraph 1, Code of Administrative Justice.

[18] Macur, J., cited work, p. 37 and following.

[19] Conf. the regulation of legitimacy of action included for individual types of actions in Sections 65, 79 and 82, and of

proposal for annulment of the measures of a general nature in Section 101a Act No. 150/2002 Coll., as amended.

[20] The law set so on the administrative body (no body was authorized by law until that time), then the Attorney General and "he who is expressly authorized by a special law or an international convention that is part of the legal order" (conf. Section 66, paragraph 1 to 3, Code of Administrative Justice).

[21] See Section 2, paragraph 4, Act No. 500/2004 Coll., as amended.

[22] See Pomahač, R.: Zásady správního řízení a evropské právo *(Principles of administrative proceedings and European law)* (To the bill of the new Czech law on proceedings before administrative bodies), Evropské a mezinárodní právo *(European and International Law)*, 2001, No. 3, p. 38.

[23] Within the bounds of the written law the term „juge-made law" should be understood not in the menanig of precedent, but as an accordance with the principle of legitimate expectations and legal certainty.

[24] Pomahač, R., cited work, p. 38.

[25] See also Vopálka, V. in Pocta Vladimíru Mikule *(Honour to Vladimír Mikule*, on his 65th birthdady), C.H.Beck, Prague 2002, p 275.

[26] Section 1, Act No. 150/2002 Coll.

[27] Conf. Section78, paragraph 1 of the cited law.

[28] Baxa, J., Mazanec, M.: Reforma českého správního soudnictví *(Reform of the Czech Administrative Justice)*, in Právní rádce *(Legal Advisor)*, 2002, No. 1, p. 10.

[29] It can also be an *unlawful intervention, instruction or forcing of an administrative body* (which is not a decision), if the party's rights were to be cut, but on condition that the intervention or its consequences last or its repetition threatens (Section 82 of the cited law), and obviously an *unlawful measure of a general nature* (Section 101d). For the so-called *unlawful inactivity* of an administrative body (if a decision in the case alone or a certificate is not issued), how the law counts on it also as a variant of a breach of subjective rights, a review of administrative discretion will probably not come to consideration generally, due to the claim of right to act (conf. Section 79, paragraph 1.).

[30] Conf. Section 2, paragraph 1 of the cited law.

[31] Published under no. 209/1992 Coll., as amended by protocols no. 3,5 and 8.

[32] Baxa, J., Mazanec, M.: Reforma českého správního soudnictví *(Reform of the Czech Administrative Justice)*, Právní rádce *(Legal Advisor)*, 2002, No. 1, p. 10.

[33] See Section 77 of the Code of Administrative Justice.

[34] If, however, such a decision can be made based on the facts of a case, to which the administrative body kept and which the court complemented possibly with its own evidence in not fundamental directions. Conf. Section 78, paragraph 2 of the cited law.

[35] If an administrative body has decided *"according to a special law on a dispute or on another legal case which results from civil-law, labour, family and trade relations"* and if the administrative body's decision has become legally effective, the same case may be heard on proposal in a civil trial. See Section 244, paragraph 1, Code of Civil Procedure.

[36] If it finds out that the given case should be decided differently from the decision of the administrative body, *the court itself will decide in the form of a judgment* – Section 250j, Code of Civil Procedure.

[37] See Section 250e of the cited law.

[38] For inspiration, it is useful to draw, and it is already doing so, from foreign sources. For example, in the German law an abuse of administrative discretion is seen in its application for an unlawful purpose or that its execution is based on incorrect motives or that for its application irrelevant findings were taken into consideration. It is, however, typical that with one and the same case, more forms of abuse of discretionary power can be found. The forms of abuse of discretion can be deduced from abundant court judicature and they often consist in breaching some principles such as the principle of (material) equality, principle of proportionality (and within it also of suitability, expedience, necessity), the requirement of impartiality (objectiveness) arising from the principles of equality, and the principle of legitimate expectations. They thus move within the framework of the so-called principle of good governance. Singh, M.P.: *German Administrative Law in Common Law Perspective*, Berlin, Springer, 2001, p. 159-176.

[39] Vopálka, V., ibid.

[40] *„Far from being merely a fact-finding tribunal, the CFI has made its own mark in the case law. In some areas, it has applied a higher standard of scrutiny than hitherto applied by the Court of justice, adopting a more critical stance towards the discretion of the Community institutions and requiring more exacting standards in their decison-making.*"– Tridimas, T.: The General Principles of EU Law, 2nd edition, Oxford University Press, 2006, Oxford, New York, p. 9.

[41] Pítrová, L., Pomahač, R.: Evropské správní soudnictví *(European Administrative Justice)*, p. 36.

[42] Ibid.

[43] See Mazanec, M.: Neurčité právní pojmy, volné správní uvážení, volné hodnocení důkazů a správní soud *(Uncertain legal terms, free administrative discretion, free evaluation of evidence and administrative court)*, Bulletin advokacie *(Advocacy Bulletin)*, 2000, No. 4, p. 12. The situation as regards insufficiency of fulfilment of Section 6, paragraph 1, European Convention, was characterized and criticised also by P. Hrdina in his article "Přezkoumatelnost rozhodnutí správních orgánů vydaných v rámci diskreční pravomoci" *(Possibility to review administrative bodies' decisions within discretion power)*, Právní rozhledy *(Legal Views)*, 1999, No. 4, p. 184 – 190, and he compared it to an absolutely different situation in the German regulation of judicial review.

[44] In this respect, quite appropriate seems to be inclusion of the criterion *"correctness"* for the consideration of public administration's decisions within the regulation of the fifth part, Code of Civil Procedure, solving judicial review of decisions in the cases of the so-called private-law nature.

[45] It is the Constitutional Court that has become the first institution in the conditions of the Czech Republic which began to apply argumentation by using legal principles, including the principles of proportionality and legitimate expectations (although more frequently in the field of legislative acts – for the first time comprehensively in the case Pl. ÚS 4/94, then Pl. ÚS/15/96, Pl. ÚS 16/98, III. ÚS 256/01, and other), including unwritten principles (for their legal liability see grounds of the finding Pl. ÚS 33/97).

The Constitutional Court admittedly drew inspiration particularly from the European Court for Human Rights and selected constitutional or supreme courts of European states.

It also applied the paradigm of constitutionally conform interpretation of ordinary laws and the paradigm of penetrating constitutional principles throughout the entire rule of law – not excluding the public administration sphere (III. ÚS 139/98). See more in Holländer, P.: Ústavněprávní argumentace, ohlédnutí po deseti letech Ústavního soudu *(Constitu-*

tional-law based argumentation, a glance back after ten years of the Constitutional Court), Linde, 2003, Praha, p. 37-39.

[46] Identically, Vopálka, V., cited article, p. 272.

[47] See Section 2–8 Act no. 500/2004 Coll., Administrative Procedural Act, as amanded.

[48] See, e.g., judgement of the Supreme Administrative Court no.4 As 71/2006-83.

[49] See, e.g., judgement of the Supreme Administrative Court no. 398/2004, of the Collection of Decisions of the Supreme Administrative Court.

[50] See, for example, decisions no. 906/2006 or 950/2006 of the Collection of Decisions of the Supreme Administrative Court.

Negative error in law concerning non-claimed and claimed non-penal elements of the body of a crime

(national and European law aspects)

Vladimír Kratochvíl*

Abstract

The paper explains first of all the keywords and then analyzes – selectively – the main problems within the general and special parts of the Czech Criminal Code (according to the existing law and according to the designed law). The text deals with concrete implications of differentiation between a negative error in law concerning normative and descriptive elements of the body of a crime, or the non-claimed non-penal element and the claimed non-penal element, for criminal responsibility. It includes some recommendations for solving this problem giving some comparisons with foreign countries and a view from the European law perspective.

Key words

Error in law, error in criminal law (error of the perpetrator of a crime), error in fact, error of law, positive and negative error, normative element of the body of a crime and descriptive element of the body of a crime and error about them, non-claimed non-penal element and claimed non-penal element and error about them, European criminal law, penal law, European penal law.

I. Introduction

The issue of an error of the perpetrator of a crime, still not sufficiently dealt with in theory, has various "treacherous points" including the problem mentioned above in the title of this paper – negative error in law about normative and descriptive elements of the body of a crime, or as analyzed hereinafter – negative error in law concerning both *non-claimed* and *claimed* non-penal elements. It is an issue on the "boundary" of error in *fact* and error in *law*. This issue fundamentally relates to criminal liability of the perpetrator not only "according to the existing law" (the brackets are used here because the existing regulation of criminal law of adults does not expressly mention their error)[1] but also according to the designed law. It is topical and sensitive especially in connection with certain kinds of crime, i.e. with overlaps to civil, commercial, financial, tax and other areas of law. Consequently, an interpretation and application of the bodies of related crimes cannot do "without help" of these non-penal legal branches and their basic formal sources. This fact is linked with the question of knowledge, or ignorance, of the content of these sources of law from the part of the perpetrator of the above mentioned crimes, i.e. especially pursuant to Chapter II and IX of the special part of the Criminal Code.[2] It is also important for prosecution authorities to handle the above mentioned non-penal sources of law and to work properly with them. It is also connected with knowledge, or ignorance, of sources of European law.

II. The basic concepts

Negative error in law concerning the normative element of the body of a crime

Referring to R 10/1977 and R 28/2002 and File 11 Tdo 732/2005 the *normative* element of the body of a crime is an element expressed by a *legal* concept, relationship or institute included in a *non-penal* legal regulation that is *not claimed*[3] by the *Criminal Code* in its provisions by the so-called "reference" or "generally". The text of the Criminal Code only takes over a concept from the outside, or establishes unlawfulness of an act as its element derived from other non-penal regulations without claiming them in the described manner; for example in Section 213 "legal duty to maintain… the other person" in the sense of the Family Act, in Section 185 "getting a fire arm… ammunition without license"[4] in the sense of the Act on Arms and Ammunition, in Section 247 "another's thing" in the sense of the Civil Code, in Section 255 "duty imposed by law" or in Section 276 "superior", "higher" in the spirit of Zákl-1, etc.[5] Negative error in law concerning a "*non-penal* normative *non-claimed* element" is then considered in the same manner as error in *fact*. However, if the "*non-penal* normative element" is *claimed*, i.e. included in a non-penal legal regulation which is *claimed* by the Criminal Code by "reference" or "generally", e.g. the element of "prohibition established by the Act on Foreign Currencies" in the sense of Section 146, or "dangerous waste" mentioned in Section 181e, Sub-Section 1, in the sense of the Act on Waste, "insolvency proceedings" in the sense of the Insolvency Act in Section 126, Section 89, Sub-Section 20 (as amended by Act No 296/2007 Coll.), or "regulations or rules of (guard) duty" in Section 285, etc., then an error about them is considered as error in *law*.[6]

Negative error in law concerning the descriptive element of the body of a crime[7]

The descriptive element of the body of a crime is then an element with which the *Criminal* Code itself, or a *non-penal* legal regulation claimed by the Criminal Code by the above mentioned "reference" or "generally", defines, i.e. describes a certain element of the body of a crime; e.g. "bribe" in Section 162a, Sub-Section 1, "grievous bodily harm" in Section 89, Sub-Section 7, and in Section 224, "public servant" in Section 89, Sub-Section 9, Section 162a, Sub-Section 2, and Section 156, "child" in Section 216b or "rules of business" in Section 127 established in the respective commercial legal regulation claimed generally, etc. Negative error concerning these elements is error in *law*. This shows that even here we may differentiate "*penal* descriptive" and "*non-penal* descriptive" elements; then within the framework of the *non-penal* descriptive elements we may distinguish the *claimed* ones and the *non-claimed* ones, i.e. included in regulations not claimed by the Criminal Code, e.g. the "accounting book" mentioned in Section 125, which is also important to take into consideration when negative errors in law of the perpetrator about them are judged since this last case is considered to be error in *fact*.[8]

III. The basic problems from the viewpoint of the general and special parts of the Criminal Code according to the existing law

III. 1. Judging a negative error in law about a non-claimed non-penal element

The mode of judging a negative error in *fact* applies to negative errors in law about non-penal rules including elements of the bodies of unlawful acts which are *not claimed* by the Criminal Code despite the fact that the Code takes over legal concepts and institutes from them; e.g. the perpetrator does not know that a thing which he takes from someone is de iure, pursuant to the Civil Code, "someone else's thing", R 38/1961. Such a negative *subsumptive* error in law[9] is then judged in the same manner as a negative error in fact, i.e. according to the principle of *ignorantia facti non nocet*. In other words, such cases of error in law are considered according to the principles of negative error in fact as an error – in the current terminology of the theoretical literature and the case law – about the "normative element" of the body of a crime; comp. the above mentioned R 10/1977 and R 28/2002.

III. 2. Judging a negative error in law about a penal and a claimed non-penal element

According to the court practice and the case law which distinguish an error in penal and non-penal rules[10] (here in the sense of legal regulations), an error about the content of *penal* rules included in the *Criminal Code*, or in other laws (i.e. in its direct or indirect amendments), does not excuse the perpetrator – this is based on the principle of *ignorantia iuris nocet*. The same applies to the content of the rules that we find in primary and secondary *statutory instruments* to the *Criminal Code*; comp. for example the Act No 167/1998 Coll. or the government decree No 114/1999 Coll. The above mentioned legal regulations are rules which are claimed by the Criminal Code in the common provision of Section 195, or whose adoption is presupposed by it, so as such they are actually a regulation that falls within the ambit of the following group, too.

The same approach is in the case of an error about *non-penal* rules *claimed* by the Criminal Code with its *referring* or *general* provisions; see for example the content of copyright law sources, i.e. the Copyright Act in connection with Section 152; R 9/1997-II, or claiming commercial law provisions in Section 127 (generally) or the Foreign Currency Act in Section 146 (by reference) or the above mentioned Act No 167/1998 Coll. and the government ordinance No 114/1999 Coll.

III. 3. Implications of different consideration of negative errors in the sense of III. 1., 2. for criminal liability of the perpetrator

In both cases these are negative errors in law considered each time in a different manner, which has fundamental implications for criminal liability of the perpetrator, the "neuralgic" point being the "*non-penal* element" and the manner in which the Criminal Code approaches it. A negative error in law about the non-penal element of the body of a crime included in a non-penal regulation not claimed by the Criminal Code ("*non-claimed non-penal* element") excludes intention and intentional negligence, including criminal liability if it is preconditioned by these forms of fault. On the other hand, a negative error in law about the penal and non-penal elements of the body of a crime, this time included in a non-penal regulation claimed by the Criminal Code ("*non-penal claimed* element"), is bad for the perpetrator as it does not excuse him. Therefore confusion of one error with the other is not desirable. In the case of confusion of a negative error in law about the non-penal non-claimed element with a negative error in law about the penal, or claimed non-penal - which is more likely - elements leads to an incorrect conclusion about the criminal liability of the perpetrator if he is held liable exclusively for an intentional crime (e.g. pursuant to Section 185, Sub-Section 1)[11], or if an act is criminal only because of intentional negligence (e.g. pursuant to Section 255a). If it were an error of the opposite nature, i.e. confusion of a negative legal error about the penal or non-penal claimed element with a negative error about the non-penal non-claimed element, it would lead to the judgment of impunity or a more lenient sentence for the perpetrator although he should be found guilty of the respective criminal act.[12]

III. 4. Criteria for distinguishing non-claimed and claimed non-penal elements and their legislative expression

If confusion of an error about the *non-penal* <u>*non-claimed*</u> element with an error about the *non-penal* <u>*claimed*</u> element is not desirable – in certain cases there are harsh consequences for the perpetrator – the criminal legislation should consistently and clearly distinguish between these two kinds of elements in the wording of the Criminal Code. Without such a guideline the above mentioned difficulties in the criminal court practice will probably continue. It follows from the described particular cases (comp. footnotes 11 and 12), even if they are not a representative pattern, that there is a tendency rather to confuse the non-penal non-claimed elements (e.g. "customs duty", "tax", etc.) with the non-penal claimed elements and, consequently, to confuse the negative error in fact with the negative error in law. It takes place probably due to the fact that these non-penal legal concepts are, sort of, automatically but incorrectly, considered as "hidden" claiming of a non-penal legal provision by the Criminal Code[13]. This may also be due to the difficult differentiation of normative and descriptive elements as it is stated in the foreign literature mentioned above[14] if we took non-penal non-claimed elements as "normative" ones and non-penal claimed elements as "descriptive" ones. There is a cardinal question then: how can one reliably know that the Criminal Code really claims another non-penal legal regulation and that it is then a negative error in law and not an error considered as an error in fact?[15]

IV. The basic problems from the viewpoint of general and special parts of the Criminal Code according to the designed law

The same questions are examined in this part as in Part III taking into consideration the new positive regulation of the perpetrator's error in law[16]. A negative error in law about the *non-claimed non-penal* element will be considered in the same manner, i.e. as a negative error in fact, even after the adoption of the new Criminal Code[17]. No other approach may be deduced from the provision of Section 18 of the draft mentioned above or from the explanatory note to it. As for the negative error in law about the *claimed non-penal* element, there is a change which follows Section 19 of the draft. After all, this is substantiated by the wording of the explanatory note to the provision: "The proposed regulation of error concerns illegality as an element of a crime in the sense of Section 13, including illegality resulting from the rules <u>*claimed*</u> by the *Criminal Code* as *non-penal* ones. The *description itself of elements of crimes in the Criminal Code* will apply the principle of "ignorance of the Criminal Code is no excuse. … As for *non-penal* legal regulations and legal rules contained in them, whose application the *Criminal Code* <u>*would not claimed*</u> … the draft Criminal Code preserves the existing concept, i.e. considering these cases as negative errors in *fact* (*italics by V.K.*)[18] The original wording of the explanatory note, i.e. before the co-

mmentary procedure, related an excusable error in law also to the content of the Criminal Code itself, i.e. to punishability of a crime. Its new wording, i.e. after the commentary procedure, preserves validity of the existing principle *ignorantia iuris nocet* regardless of the nature of error in law (excusable – non-excusable), in relation to the content of the Criminal Code itself. Resorting to an excusable error is only possible in the case of ignorance of the content of non-penal rules claimed by the Criminal Code (by reference or generally). Here we are getting close to the German and Austrian approaches, if only because those legal regulations of error in law were a certain model for Czech draftsmen[19]. Nevertheless, despite this otherwise positive movement forward (thanks to the adoption of the construction of excusable – non-excusable errors), there may still be problems mentioned above "according to the existing law", i.e. problems connected with different consequences of negative legal errors about both non-claimed and claimed non-penal elements, and also risks of their confusion and difficulties in seeking criteria for expressing clearly in the legal wording this or that type of element of the body of a crime.

V. Negative error in criminal law concerning non-claimed and claimed non-penal elements from the viewpoint of the European criminal law[20]

From the viewpoint of *criminal law - European* (hereinafter also "CLE") a negative error in law about the "*non-claimed and claimed* non-penal elements" also includes an error about legal concepts and institutes …contained especially in *secondary* sources of European law - both "communitary" and "EU" law:

1. EC law (1st pillar of TEC): The given issue is connected with indirect influence[21] of European law on the Czech criminal law in the context of communitarization of European law and its manifestation in national criminal laws[22]. The indirect influence of European law connects the cited source with the existence of "…those bodies of crimes which have general or referential dispositions."[23], i.e. with the provisions of the Criminal Code containing "non-penal elements *claimed*" generally or by reference. "The mentioned bodies of crimes …may refer to non-penal rules …, i.e. to *implemented* legal provisions …or to *directly applicable* rules of European law if they take precedence over the national legal regulation…"[24] For example, the body of the crime of disposal of waste (Section 181e, Sub-Section 2), which is to be claimed generally[25], claims not only the respective national law on waste but also the *regulation* of the European Council No 259/93 on supervision and control of transportation of waste within the EC. A negative error in law about the above mentioned law will then be considered according to *ignorantia iuris nocet*.[26] On the other hand, the error about the "*non-claimed* non-penal element" would fall within the ambit of the principle of *ignorantia facti non nocet*; e.g. the body of the crime of "organizing and enabling illegal crossing of the state border" (Section 171a) implemented the *directive* of the EC Council No 20002/90/ES which defines assisting in unauthorized entering, crossing and residing. Ignorance of this directive should not then be considered as a negative error in fact, which would mean the perpetrator's impunity under the condition of exclusively intentional punishability of the given act. From the viewpoint of the "*non-claimed* non-penal element" it should be irrelevant if concepts and institutes from a non-penal regulation are only "borrowed" through it by the Criminal Code or if they are – as obligatory – taken over, i.e. due to the obligatory implementation of the European law. Anyway, it is a transfer from another non-penal legal regulation into the Criminal Code which does not claim that legal regulation provided of course that the mentioned regulation is a real legal act of both *non-penal* and *substantive* nature. As a "directive", i.e. a legal act of the 1st pillar – the communitary one – I think that it has that nature. However, it should be objected that Section 171a is not a classic provision of the Criminal Code as it only "borrows" a certain legal concept or institute from a non-penal legal regulation without claiming it. On the contrary, being an implementation provision[27] it includes the above mentioned directive so that its purpose would be achieved in the national law. It does so with the help of elements (concepts) that are established in Section 171 and designated as *criminal* elements. Therefore a negative error about them should be considered according to the principle of *ignorantia iuris nocet*; see hereinafter the identical manner of considering a negative error in law about *criminal* elements of the bodies of crimes implementing framework decisions of EU law. So the question remains open to a certain extent even if I hold the view that, because of the comparable nature and purpose of communitary "directives" and EU "framework decisions", consideration of negative errors in law about them should be subject to a single regime if they have been implemented in the national criminal law – i.e. to the principle of *ignorantia iuris nocet*.

2. EU law (3rd pillar of TEU): In this context the analyzed problem is related to indirect impact of the European law which depends on *Euro-conforming* interpretation of the national criminal law,[28] i.e. such an interpretation that takes into consideration not-yet-implemented *framework decisions* so that the fulfillment of their purpose in the national law of a EU member is ensured already in this stage. From the standpoint of the "*claimed* and *non-claimed* non-penal elements" the situation is rather simple but at the same time paradoxically connected with various possible compli-

cations. The point is that the analyzed problem requires an overlapping of the Criminal Code and a legal regulation, i.e. also the European law, which is of *non-penal* nature whereas the above mentioned framework decisions are undoubtedly of *penal* nature. However, it should be noted that regarding Footnote 8 framework decisions of criminal *procedural* nature are also considered to be non-penal ones. Therefore, regarding the nature of the given issue, the content of these framework decisions – of criminal *substantive* nature, even if not yet implemented, will be the *penal* one, or elements contained in them will be of this penal nature. A negative error about them should therefore fall within the ambit of the principle of *ignorantia iuris nocet* in contrast to an error concerning framework decisions of the above mentioned procedural nature. Framework decisions already implemented do not present any problems in that respect, either, as the mentioned error in law is again considered as an error about the *penal* element of the body of a crime within the national law. On the other hand, this simplicity paradoxically means that there are rather great requirements on perpetrators of crimes, i.e. on their subjective features, which is due to the indirect impact of the EU secondary law. This applies despite the fact that "according to the existing law" the Czech law does not require the relationship of fault and punishability itself of an act because not only the Czech one but also the above mentioned national legal regulations or theoretical approaches to negative errors in law in relation to *punishability* of an act stick to the unrestricted principle of *ignorantia iuris nocet*. This complication and the related increased demands on work with sources of national criminal law cannot be avoided of course by the prosecuting and adjudicating bodies.

Due to the abolition of the three-pillar structure of the EU connected originally with the *Treaty establishing a Constitution for Europe* (2004)[29], now with the *Reform Treaty (2007)*[30], the existing intensity of the process of communitarization of the III. pillar of TEU will probably increase. More importance is then attributed to the approaches mentioned above in connection with the communitary law rather than with the EU aspects, without the content being considerably changed. But it does not mean that the indirect impact of the existing secondary EU law related to framework decisions would disappear completely. "Regulations" and "directives" mentioned by the Reform Treaty, i.e. in the sense of Article 249 of TEC, are not changed in the content or terminology. However, directives are likely to take over the role of the existing framework decisions. At the same time the newly formulated types of legal acts of the European secondary law suggest that they should "take care" of the existing EC and EU matter. As such they are also likely to start to deal with the issues analyzed in this paper in order to make it not only more varied but also, logically, more complicated.[31]

From the viewpoint of *European law - criminal* (hereinafter also "ELC") a negative error in law about the "*claimed* and *non-claimed* non-penal elements", i.e. an error about legal concepts and institutes, should be dealt with in ways that are offered so far only by model projects of the supranational ELC, i.e. "European model criminal code" and "Corpus Juris 2000".[32]

VI. Conclusions and recommendations

This paper, restricted in extent, cannot naturally give an exhausting answer to relatively fundamental questions hinted in its title. Nevertheless, at least some basic conclusions and necessary recommendations according to the existing law may be worded as follows:

- a negative error in law about *non-claimed non-penal* elements is considered as a negative error in fact according to the principle of *ignorantia facti non nocet*; *intention* and *intentional negligence* will be excluded;
- a negative error in law about *claimed non-penal* elements is considered as a negative error in law according to the principle of *ignorantia iuris nocet*; if the perpetrator's error is *excusable,* the perpetrator is acting without guilt or his acting is not based on culpability (Draft of the Criminal Code of the Czech Republic, 2008);
- a negative error in law about *penal* elements of the body of a crime is considered as a negative error in law according to the principle of *ignorantia iuris nocet* regardless of the nature of the error as excusable or not-excusable; the perpetrator's guilt or culpability will not be excluded;
- the nature of *non-penal* elements *not-claimed* and *claimed* by the Criminal Code from the viewpoint of the *national* and *European law* must be expressed by the lawmaker in the text of the Criminal Code in as much a *consistent* and *unambiguous* manner as possible.

Note:

A revised Czech version of this paper ("Negative error in law concerning normative and descriptive elements of the body of crime") was included in the proceedings from the international conference organized by the Department of Criminal Law on 14 February 2008 at the Faculty of Law, Masaryk University: *New phenomena in economic and financial criminality – national and European law aspects.*

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[1] Unlike Section 11, Sub-Section 1, Para b), Act No 218/2003 Coll. as amended On Criminal Judiciary for Youth (hereinafter also „ZSM").

[2] Act No 140/1961 Coll. as amended, Criminal Code (hereinafter also „tr. zak."). If there are citations of sections without any specifications hereinafter they are citations from the Criminal Code.

[3] *Roxin, C.* Strafrecht. Allgemeiner Teil, Band I, Grundlagen der Aufbau der Verbrechenslehre, 3. Auflage, München: C. H. Beck, 1997, pp. 252-253 and further.

[4] *Novotný, O., Vanduchová, M. a kol.* Trestní právo hmotné – I. Obecná část. (Substantive Criminal Law – I. General Part.) 5., jubilejní, zcela přepracované vydání. Praha: ASPI, 2007, p. 228. *Šámal, P., Púry, F., Rizman, S.* Trestní zákon. Komentář. II. díl. (Criminal Code. Commentary. Volume II) 6. vyd. Praha: C. H. Beck, 2004, pp. 1135-1144 does not mention, either, that the provision 185 is of blanket nature in spite of citing R 28/2002. In other places it is expressly written; for example on page 968 in connection with the provision of § 152.

[5] Comp. *Červenka, L.* Poznámka k problematice omylu v trestním právu. (A note on error in criminal law) Trestní právo, 1997, No 12, p. 18; *Šámal, P.* Judikatrura k omylu v trestním právu. (Case law concerning error in criminal law) Soudní rozhledy, 1998, No 10, p. 256; *Šámal, P., Púry, F., Sotolář, A., Štenglová, I.* Podnikání a ekonomická kriminalita v České republice. (Entrepreneurship and economic crime in the Czech Republic) 1. vyd. Praha: C. H. Beck, 2001, p. 257, 258; *Šámal, P., Púry, F., Rizman, S.* Trestní zákon. Komentář. I. díl. (Criminal Code. Commentary. Volume I) 6. vyd. Praha: C. H. Beck, 2004, p. 48; *Solnař, V., Fenyk, J., Císařová, D.* Systém československého trestního práva. Základy trestní odpovědnosti. Podstatně přepracované a doplněné vydání. (System of Czechoslovak criminal law. Foundations of criminal lability. Revised and ammended edition.) Praha: Orac, 2003, pp. 130, 305; *Kratochvíl, V. a kol.* Trestní právo hmotné. Obecná část. (Substantive criminal law. General part.) 3. vyd. Brno: MU Brno, 2002, dotisky 2003, 2006, p. 271; *Kratochvíl, V.* Recenze: Marek, K. Smluvní obchodní právo. Kontrakty. (Review: Marek, K. Contractual commercial law. Contracts.) 2. vyd. Brno: Masarykova univerzita, 2006, Právní rozhledy, 2006, No 11, p. 601; *Novotný, O., Vanduchová, M. a kol.* Trestní právo hmotné – I. Obecná část. (Substantive criminal law) 5., jubilejní, zcela přepracované vydání. Praha: ASPI, 2007, p. 255; see also *Fuchs, H.* Österreichisches Strafrecht. Allgemeiner Teil I. 6. überarbeitete Auflage. Wien, New York: Springer – Verlag, 2004, p. 111 and further.

[6] *Šámal, P., Púry, F., Rizman, S.* Trestní zákon. Komentář. II. (Criminal Code. Commentary II) díl. 6. vyd. Praha: C. H. Beck, 2004, p. 1114.

[7] The above mentioned distinction, i.e. whether it is a purely normative or purely descriptive element is not an absolute one. Normative elements have "something" from description in them; e.g. "insult" requiring consideration not only in the social context but also its perception in the acoustic form or on the basis of its material fixation. On the other hand, descriptive elements are not free of any value content; e.g. "dispossession", "building", "human being" or "thing" are interpreted in disputable cases with the help of normative criteria from the viewpoint of penal-law protection. The differentiation of normative and descriptive elements into non-penal and penal, quite complicated itself, would then make explanations about errors about them even more complicated being combined with rather an unnatural differentiation into normative and descriptive. There is another, more essential, aspect, i.e. *whether the Criminal Code claims or does not claim a non-penal legal regulation and an element of the body of an act included in it regardless the fact whether the element claimed or non-claimed is normative or descriptive.* Therefore I will stick to this aspect hereinafter and it requires a respective terminology – in order not to make the text overloaded I will then use concepts "non-claimed non-penal element" and "claimed non-penal element".

[8] However, a specific problem is the element of "witness" in Section 175, Sub-Section 2, Criminal Code, defined in Section 97, Act No 141/1961 Coll. on Criminal Procedure as amended, Rules of Criminal Procedure (hereinafter also "tr. ř"). The point is that this legal concept "borrows" from the Rules of Criminal Procedure without the Criminal Code itself claiming this legal regulation. Therefore it should be considered as a non-claimed non-penal element of the body of the crime of "false evidence", including an error about it. On the other hand the "non-penal" nature of the regulation out of which the Criminal Code takes a normative element of the body of a crime is only connected with a *substantive* legal regulation. Therefore the Rules of Criminal Procedure should also be seen as a "non-penal" legal regulation , i.e. one standing "outside" the Criminal Code.

[9] *Solnař, V., Fenyk, J., Císařová, D.* Systém československého trestního práva. Základy trestní odpovědnosti. (System of Czechoslovak criminal law. Foundations of criminal lability.) Podstatně přepracované a doplněné vydání. Praha: Orac, 2003, p. 305; *Roxin, C.* Strafrecht. Allgemeiner Teil. Band I. Grundlagen Aufbau der Verbrechenslehre. 3. Auflage. München: C. H. Beck, 1997, p. 408.

[10] *Červenka, L.* K problematice právního omylu v trestním právu. (On questions of error in law in criminal law). Bulletin advokacie, 1989, No. 3, p. 19.

[11] Comp. the above mentioned File 11 Tdo 732/2005 Coll., No 5/05, p. 279: The element "without licence" of the body of the crime of unlawful possession of arms pursuant to Section 185, Sub-Section 1, does not express in any case a reference to the Arms and Ammunition Act as it is stated in the reasoning of this decision but expresses the very normative element of the cited body of a crime. In the given case the court took the offender's ignorance of the above mentioned non-penal legal provision as a negative error in law without releasing him from liability for the given crime. However, it should have been taken as an error in a normative element of this body of crime which, as a negative error, excluded the offender's intention so he should not have been held criminally liable for the exclusively intentional possession of arms. The same problem in connection with the crime of avoiding tax, charge or similar obligatory payment pursuant to Section 148 was solved by the Supreme Court in its judgment File 5 Tdo 411/2006.

[12] For example, the offender does not know that he must not torment his dog to death despite the fact that it is his own dog (Section 203, Sub-Section 2); such a negative error in law will undoubtedly be considered as an error about a *non-penal* non-claimed element ("tormenting an animal to death" in the sense of the Act on Protection of Animals against Torturing"), i.e. as an error in fact although the Criminal Code itself describes, or defines, what is criminally liable ("tormenting an animal to

death"). So it is not a non-penal non-claimed element but a criminal one (see *Šámal, P., Púry, F., Rizman, S.* Trestní zákon. Komentář. II. (Criminal Code. Commentary II.) díl. 6. vyd. Praha: C. H. Beck, 2004, p. 1223, R 6/2002).

[13] The decision File 11 Tdo 732/2005 even mentions an "indirect reference" to a non-penal provision contained in the body of a crime pursuant to Section 185, Sub-Sectin 2, letter b), Criminal Code, in spite of it not being referential. So this uncertain concept prevents a consistent distinguishing between claimed and non-claimed non-penal elements with consequences already mentioned above.

[14] Např. *Roxin, C.* Strafrecht. Allgemeiner Teil, Band I, Grundlagen der Aufbau der Verbrechenslehre, 3. Auflage, München: C. H. Beck, 1997, p. 253.

[15] The limited extent of this text only enables to outline possible *criteria* of the required distinguishing. In my view they may be seen in the manner of *expression* of the respective element of the body of a crime regardless of its normative or descriptive nature as well as in the use of *non-penal terminology*. I mean by "the manner of expression" whether a text of the Criminal Code uses terms of a *larger* impact for designating an element of the body of a crime, such as a "generally binding legal regulation" (Section 127), or "legally protected rights to an author's work" (Section 152), or "Act on Foreign Currency" (Section 146), or if a *narrower* term is used, for example "constitutional order" (Section 93), "accounting book" (Section 125), "tax" (Section 148), "expert" (Section 175), etc. If that narrower term is a term from a *non-penal* legal field, which includes Rules of Criminal Procedure, too (see Footnote 8), we may say that it will be a *non-claimed* non-penal element of the body of a crime. On the other hand, in other cases (of a larger impact…) we would meet *claimed* non-penal elements of the body of a crime. This includes a situation where the Criminal Code itself expressly mentions in its commentaries in the general part claiming to a non-penal regulation; Section 89, Sub-Section 19, 20 as amended by Act No 296/2007 Coll. I am aware of a certain imperfection of this approach but seeking other criteria and their specification could gradually bring light to these issues. There I consider them open, of course. An inspiration may also be found in foreign approaches (Austria, Germany) which could not be mentioned here due to the restricted extent of the paper.

[16] *Šámal, P.* Osnova trestního zákoníku 2004 – 2006. (A Draft of the Criminal Code 2004-2006) Vydání první. Praha: C. H. Beck, 2006, pp. 55 – 57. Sněmovní tisk č. 410/0, část č. 1/9, 2008.

[17] *Kratochvíl, V. a kol.* Trestní právo hmotné. Obecná část. (Criminal Substantive Law. General Part.) 3. vyd. Brno: MU, 2002 (reprint: 2003, 2006), pp. 249, 271. The explanatory note to the draft says: "As to non-penal legal regulations and legal rules contained in them whose application is *not claimed* by the Criminal Code (*italics by V. K.*), it will be necessary to consider their relevancy to a committed crime. The draft Criminal Code preserves the existing conception, i.e. considering these cases as negative errors in fact."

[18] Důvodová zpráva k návrhu trestního zákoníku ČR 2007, přijatému vládou na jejím jednání 13.–14. 12. 2007, (Explanatory note to the draft of the Criminal Code ČR 2007 adopted by the government on 13-14 December 2007) p 23; accessible from www MS ČR (cit. dne 5. 1. 2008).

[19] See Section 9 of Austrian and Section 17 of German Criminal Code.

[20] On the concepts „European criminal law" and „criminal law – European" and „European law – criminal" see *Kratochvíl, V.* Trestněprávní rozměr smlouvy o Ústavě pro Evropu a jeho význam pro evropské trestní právo; rakouské zkušenosti. (Criminal law aspect of the Agreement on Constitution for Europe and its significance for European criminal law; Austrian experience) Právník, 2007, č. 3, pp. 274 - 276.

[21] More on this concept can be found in *Púry, F.* Vliv evropského práva na trestní postih některých negativních jevů v podnikání. (Impact of European law on criminal prosecution of certain negative phenomena in business) Trestněprávní revue, 2005, č. 9, p. 221 and further.

[22] More details in *Kratochvíl, V.* Tendence ke komunitarizaci evropského práva, její projevy a prosazování v trestním právu hmotném a procesním ČR. (Tendency to communitarization of European law, its manifestations and implementation in the Czech criminal substantive and procedural law.) In: Hurdík, J., Fiala, J., Selucká, M. Evropský kontext vývoje českého práva po roce 2004. (The European context of the development of Czech law after 2004) Brno: AUBI, No 305, 2006, p. 93 and further. *Čakrt, F.* Nástin komunitarizace v rámci III. pilíře. (An outline of communitarization within the III. pillar) Trestněprávní revue, 2007, č. 1. *Čakrt, F.* Spolupráce v oblasti trestního práva a vnitra v kontextu vznikající Reformní smlouvy. (Cooperation in the area of criminal law in the context of the arising Reform Agreement) Trestněprávní revue, 2007, č. 10, p. 285.

[23] *Púry, F.* Vliv evropského práva na trestní postih některých negativních jevů v podnikání. (Impact of European law on criminal prosecution of certain negative phenomena in business) Trestněprávní revue, 2005, č. 9, p. 224.

[24] Ibid.

[25] *Šámal, P., Púry, F., Rizman, S.* Trestní zákon. Komentář. (Criminal Code. Commentary) II. díl. 6. vyd. Praha: C. H. Beck, 2004, p. 1112.

[26] This is related to the publication of such a regulation in a member state language if that language is one of the EU official languages. Even if lack of such a translation does not affect *validity* of the given regulation it cannot be used against an *individual*, even if published in the Official Journal of the EU in another language, but it can be applied to the state. For more detail see *Petr, M.* Účinky oficiálně nepřeložených pramenů komunitárního práva. (Effects of the officially not-translated sources of the EC law) Právní zpravodaj, č. 1/2008, p. 16.

[27] Comp. Act No 178/2007 Coll.

[28] The judgment of the full ECJ panel from 16. 6. 2005 on C-105/03, Maria Pupino, EUR-Lex – 62003J0105. Towards the same issue see also *Špicar, P.* K povinnosti eurokonformního výkladu českého práva a k rozšíření jeho dopadu na oblast III. pilíře Evropské unie. (Towards the duty of the Euro-conforming interpretation of Czech law and broadening its impact on the area of III. pillar of the EU). Trestněprávní revue, 2005, č. 10, p. 253-259; *Tomášek, M.* Cesty k eurokonformnímu výkladu v trestním právu. (Ways to the Euro-conforming interpretation in criminal law.) Trestněprávní revue, 2006, č. 7, p. 200-203; *Killmann, B.-R.* Die rahmenbeschlusskonforme Auslegung im Strafrecht vor dem EuGH. Juristische Blätter, 2005, č. 9, pp. 566–575. Of course, the requirement of indirect impact also concerns directives (comp. *Tichý, L., Arnold, R., Svoboda, P., Zemánek, J., Král, R.* Evropské právo. 3. vydání. Praha : C. H. Beck, 2006, pp. 306–307.).

[29] *Syllová, J., Pítrová, L., Svobodová, M. a kol.* Ústava pro Evropu. Komentář. (Constitution for Europe. Commentary.) 1. vyd. Praha: C. H. Beck, 2005, p. 11.

[30] *Francová, J.* Co nového by Evropské unii měla přinést

„Reformní smlouva“. (What should the Reform Treaty bring to the EU.) Právní zpravodaj, 2007, č. 12, p. 5.

[31] This characteristic feature, or the internal tendency of the European law to ever more increasing complexity despite efforts to restrict it, is an obvious danger to this legal system. At a certain critical point of complexity of the legal regulation its weakened functionality or even disfunctionality may appear. This risk is even more apparent if the complexity begins to grow in contacts between the given legal system and another system. And this is the problem of the European law “contaminated” by the law of member states, or vice versa, the problem of national law influenced by the process of Europeization.

Delmas-Marty, M., Vervaele, J. A. E. Corpus Juris 2000. Trestněprávní ustanovení za účelem ochrany financí Evropské unie. (Criminal law provisions to protect finances of the EU.) Překlad do češtiny: J. Fenyk, S. Kloučková. Brno: Vyd. Sypták, 2001, p. 19.

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