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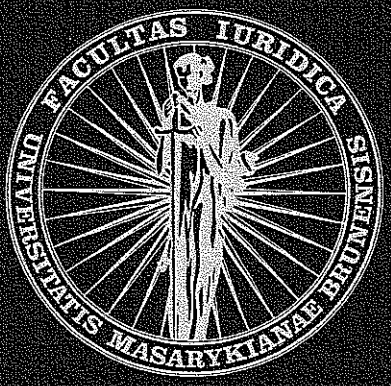

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Introduction

Over the past fifteen years, the Czech legal system has undergone substantial changes. The new social situation after 1989 called for an immediate recodification of the entire system. Moreover, a significant role in this process was played, on the one hand, by the need to harmonize Czech law with the legislation of the European Union and its institutions, and, on the other, by some other European and worldwide trends towards legal unification. Numerous acts were drafted very quickly and often became grounded in past traditions or based upon only a cursory comparison with the legal systems of other countries. So far, it has been only the Constitution and the Commercial Code that have seen an entire makeover; the new Labour Code is ready to come into effect, while the legislation of other branches of law has been merely updated by means of amendments of existing legal regulations. However, such amended acts are no longer sufficient, particularly when one takes into consideration the fast development in the fields of technology and information systems, the changing paradigms in economy, and the new social tasks and global dimensions that modern law needs to increasingly address.

There is thus a growing need to react to the new trends. The general theoretical and methodological points of departure for the modern legal practice have to be addressed, with a focus on legal values treated as individual topics and the uniform conception of all such changes.

Jurisprudence has not, however, dealt with any of these issues on the level of needs. Even such a topical issue as the effect of the entrance of the Czech Republic into the European Union on the Czech legal system and its individual segments has received only a very insufficient treatment in Czech jurisprudence – from both the complex point of view of the entire system and the point of view of the particular disciplines of law. While major legislative changes and the related research mostly focused on the process of the harmonization of Czech law with the law of the European Community, the accession of the Czech Republic to the EU marked the end of this stage, thus opening the space for assessing the resulting state and preparing a higher, more systematic and complex level of functional integration of Czech law with European Community law.

So far, the research in the field of law has been mostly oriented to current and practical issues concerned with the harmonization of the Czech legal system with European Community law as a precondition for the entry of the Czech Republic into the European Union. The pressure exerted by the immediate practical tasks connected with the harmonization has, however, resulted in a lesser attention being paid to a number of issues, such as the complex processing of conditions necessary for the further development of Czech law on the level of basic research and in the long run, as well as its theoretical foundations, the delimitation of general principles and fundamental institutes of law and its systemic parts, their content, and a compatible processing of their linguistic expression on the level of legal communication in the European context.

These issues became particularly acute upon the entry of the Czech Republic into the European Union in May 2004.

In order to seek answers to these problems, the Faculty of Law of Masaryk University in Brno has prepared and, since 2005, has been implementing a five–year research project entitled „The European Context of the Development of Czech Law after 2004", which has been one of the few basic research projects carried out in the field of law after 1989 and based on an extensive team work with partners cooperating both within the Czech Republic and internationally.

The research project – both as a whole and in its particular subtopics – relates to previous research supported by numerous significant grants and carried out at the Faculty of Law of Masaryk University in Brno in the previous years. It thus significantly falls within the scope of the research orientation of the institution.

The aims of the current stage of the research project include, above all, the following:

- to carry out an analysis (both on the general level and within the individual branches of law) of the present situation in Czech law which has arisen as a consequence of the accession of the Czech Republic to the European Union;
- to draft a theoretical and methodological conception of dealing with the effects of the accession of the Czech Republic to the European Union on the Czech law as a whole;
- to prepare a systematic framework for dealing with the effects of the accession of the Czech Republic to the European Union with respect of the particular subtopics.

It is obvious that such tasks may not be approached individually without respecting the current general trends of development of law in the globalizing world. One should disregard neither the development of modern technologies (primarily communication technologies) nor the conditions for seeking the

ways in which law may adequately react to the development of the society in the third millennium. That is why these general preoccupations became a part of the scholarly interest of researchers participating in the project.

This special issue of *Časopis pro právní vědu a praxi*, edited at the Faculty of Law of Masaryk University in Brno, aims to present a substantial part of the research results obtained from 2005 to 2006 and is intended for the wider public of legal practitioners. Other results are gradually being published annually in the form of proceedings of the research project by the Faculty of Law of Masaryk University in Brno, as well as in other proceedings, monographs and journal articles written by individual research groups and particular researchers.

The results which the team has obtained so far represent, above all, the fundamental points of departure and tendencies in Czech law as a whole and in its individual branches. The results pay attention to the needs of the further development of Czech law within ongoing European integration as well as the wider framework provided by both the needs of the actual completion of the modern legal system of the Czech Republic and the changing role of the Czech legal system in the globalizing world of new technologies and changing social relations.

Brno, 15 October 2006 Authors

THEORETICAL AND HISTORICAL SECTION

EU Framework Decision and the Czech Legal Order

Vladimír Týč*

This contribution deals with the relationship of the framework decisions accepted in the Third Pillar and of the international pacts regulating identical subjects and binding the member states from the point of view of the consequences for the Czech legal order.

1. THE SUBJECT MATTER

In connection with accepting framework decisions and their coming into effect, as the EU–law acts very similar to community regulations, a significant problem arose with regard to their relation to the multi–lateral international conventions that had been negotiated before outside of the EU framework and that have the same subject of legislation. In practice, these are mainly conventions from the penal law area, especially the procedural area, where the framework decisions bring different legislation into the relationships between EU states. The framework decision is looked upon as a tool substituting for the clauses of these conventions, which, however, remain to be valid and therefore binding for the member states. The problem lies in the character of framework decisions that are not acts of community law, and therefore the principle of preference does not apply automatically. Member states are thus put in a situation of being bound by two regulations of different content at the same time, while both of these regulations (the framework decision as well as the international convention) claim preferential application.

The above–stated problem is further complicated by the fact that the framework decision does not have an immediate effect; it cannot be applied as such by the domestic authorities and must thus be implemented into the domestic law by national legislature (laws). At the same time, the domestic regulation embodied in the constitution holds, i.e. that an international convention is to have preference over domestic legislations, including the legislation that originated as an implementation of the EU framework decision.

The question is therefore the following: how can both of these principles be combined, i.e., seen through the EU–eyes, how to respect the framework decision without at the same time making the member state violate the obligations following from a multi–lateral international convention?

From the above–said it is apparent that the given problem has two dimensions: the international legislation viewpoint (the relation between the framework

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decision and the international convention) and the domestic viewpoint (the relation between the domestic legislation accepted on the basis of the framework decision and the international convention). Both of these aspects shall now be judged.

2. THE INTERNATIONAL LAW LEVEL

The EU framework decisions present a particular legal regulation of the relevant issues with the applicability exclusively in the EU member states. They are considered to be a necessary and more perfect regulation that is demanded for the functioning of the European „area of freedom, security, and law". They contain regulations that significantly surpass the framework of the regulation agreed upon on the universal or, more often, regional European level in the international conventions whose parties are also non–EU members.

On the part of EU, this is a special particular adjustment derogating the more general bindings contained in the international conventions (this can be clearly read in several statements of the legal section of the Council of EU). The question remains, however, whether the EU framework decision, from the point of view of international law, is qualified to derogate clauses of international conventions, by which its members are bound, albeit this derogation is limited only to the relations between the member states, while it cannot be to the detriment of the bindings of the international conventions in which EU members and non–EU members, are the parties of the particular contact in question.

The problem does not come up in such situations where the international convention itself explicitly offers a solution of such conflict, i.e. supposes and allows for the existence of a particular adjustment. This is e.g. the case of the Article 28 of the European convention on extradition, which supposes different adjustment among some parties of the convention and only requires a formal notification of the depository. It is obvious that such particular adjustment must not influence the position of the remaining parties of the convention.

The situation is more complicated without the explicitly stated possibility of such particular adjustment. The Legal section of the Council admits that this is a problem in the international law. There is no doubt that the framework decisions as well as the acts of the Third Pillar are acts whose basis lies in the international law, and not the community law. In the argumentation, they therefore draw attention to Article 41 of the Viennese Agreement on the convention law that admits the signing of an agreement between some parties of the multi–lateral convention, an agreement that, between those parties, adjusts some issues differently and thus derogates the clauses of the original convention. This is the **change of the original convention**, namely *inter partes*, in this case. The conditions stated in Article 41 of the Agreement are undoubtedly fulfilled: the original convention does not prohibit such *inter partes* change, the rights of the other parties of the convention are not offended, and the change is not incompatible with the subject and purpose of the original convention.

Such argumentation is inadequate in two serious ways. First, it primarily draws upon the fact that the framework decision has to be *regarded as an international convention*, and second, it is based on the *change of the original convention* (i.e. on the discharge of international law obligations), and not on the change of the scope of its *implementation* (while preserving the original obligations, which are not performed).

As for the first question: It is obvious that the framework decision is not an international convention, although it has some of its elements. It is accepted univocally, i.e. by a consensus of the participants (the member states). It is therefore binding for a member state if and only if the state has expressed its consent. It presents an adjustment unified in a certain way and valid for the members, in which respect it is similar to an international convention. It is thus the consenting declaration of will, forming the basis of international law obligations for the participants. The regime of the framework decision is of the international law kind, as the whole of the EU Third Pillar.

On the other hand, there is no similarity from the point of view of the form here. The framework decision is accepted not as an agreement of the member states, but as an act of the Council of the EU, i.e. of an international body. (It is not the act of an international organisation, for EU is not such an organisation.) This act is subordinated to the EU law, which in the Third Pillar holds the features of international law, but with significant modifications. The Council of the EU as a body, not the member states, is responsible for this act. The European Court of Justice may annul the framework decision, in contrast to an international convention, if a reason for its invalidity is given. Another difference lies in the way this act is accepted. The consent of the member state is given by voting in the Council of the EU on the level of the ministers and it represents the final consent of the member state. There is no further domestic consent given, nor ratification, although the change of the domestic legislature follows from it.

Is thus the framework decision an act of an international body or an organisation? It seems to be so, but then it is not a source of the international law, to which it should be subordinated. International law does not allow, without further specification, the obligations of the states by a unilateral act of an international body or an organisation, unless these states had transferred the relevant competences on such a body or organisa-

tion (which is true only in the case of the European Community, the only one having supra–state features). Obligatory unilateral acts of international organisations (outside the European Community) are very scarce and exceptional in practice. Such acts are of a rather technical kind and usually contain rules that belong to subordinate legislation in the domestic law (e.g. the regulation of aircraft operation of the International Organisation for Civil Aviation). There are no known cases (outside the EC) of „imposing" rules on the level of laws to the member states by a unilateral act of an international body or an organisation.

If we want to perform a qualification of the framework decision, i.e. subordinate it under a certain known notion of the international law, we cannot do otherwise than state that it is a *sui generis* act with some features of an international convention and at the same time with some features of a unilateral act of an international body. Such qualification is, however, only of academic value and it is irrelevant for practice,

Let us therefore return to the Viennese agreement on the convention law that works only with the notion of an „international convention". It seems that a more feasible way to reach a useful conclusion will, instead of the qualification of the notion of framework decision, rather be the interpretation of the notion of international convention (agreement), used in the Viennese agreement. Does the Vienna agreement in the Articles 30 and 39–41 refer really only to the international convention as a formal source of the international law that constitutes international legal obligations to the states?

Nowadays the situation is totally different from the 1960s, when this agreement originated. At that time, the states overtook the obligations towards each other solely on the basis of international conventions (if we disregard the international custom and the law of the European Communities, having a totally different nature). At that time, nobody could have foreseen that some states will in future be joined in a very specific and mainly innovatory entity, which the contemporary European Union presents, an entity that will, on the basis of international law, accept laws binding for the member states in a special way different from the classic international conventions. It is only the process, and not the result that is different: the act of this entity presents an internationally unified legal regulation that has been accepted by the expression of will of the participating states on the basis of international law. The aim is the same as with the international convention – the creating of a unified legal regulation binding for the participating states. It is only the process that is different – there are no complicated negotiations and especially the long approving procedure (domestic approval and ratification), albeit at the expense of the democratic aspect of the process (actual exclusion of the national parliaments that are presented with the *fait accompli*).

The linguistic interpretation of the stated clauses of the Viennese agreement will lead us to the conclusion that the Agreement only concerns the international conventions as the classic source of the international law. The linguistic interpretation, however, is not the only interpretation of an international convention. The Viennese Agreement itself contains the rules for the international conventions' interpretation and in its Article 31, par. 1 it puts the linguistic, systematic, and teleological interpretation on the same level. If we opt for the teleological interpretation, we will arrive at the conclusion that the notion of „international convention" has to be interpreted in an extensive way. The purpose of the international convention is the creation of a unified set of rules, or the settling of a certain relation between the states, on the basis of their **identical expression of will**. If this purpose is reached in a different way, then it is only the form that is different, but the essence, i.e. the purpose, remains the same. It is decisive that these unified rules are accepted by a **consensus of the participants and on the basis of international law**, that is e.g. on the basis of an international convention.

From the above–said we can arrive at the conclusion that the notion of „international convention" used in Articles 30 and 39–41 of the Viennese Agreement can be interpreted from the point of view of their purpose in the extensive way, i.e. to include also other international legal instruments for accepting the unified legal regulation between states. Then this clause can be related also to the EU framework decisions, which present such a legal instrument.

In connection with this we can argue that the purpose of framework decisions is not changing of the obligations of the member states, but influencing the content of their domestic legal regulations. This is true, however, the obligation to accept or change domestic regulations is given through international law, which means that the international obligations of the member states are affected in any way – the new domestic regulation is explicitly an outcome of those.

Thus we already get to the *second question*, and that is whether the framework decision really changes or just suspends the international obligations of the existing multilateral conventions. The framework decision asks the member states to proceed in certain issues differently than the international convention asks them to. The international convention, however, still exists and is valid. It cannot be otherwise, since the convention has also other parties, non–EU members. If, hypothetically, the framework decision is annulled and as a result of that also the domestic regulations accepted on its basis are annulled, the member states would undoubtedly automatically return, in their mutual relations, to the original international convention. This means that the framework decision does not present a change of the convention, but that it only

excludes its applicability in the relations between EU members.

For the relation between the framework decision and the convention it is therefore not Article 41, but Article 30 of the Viennese Agreement that is decisive. Article 30 in its par. 4 states that in the relationship between the states that are parties of both conventions (i.e. in our case, of the original convention and the later framework decision) that the later convention, i.e. the framework decision, is decisive (unless the previous convention is compatible with the later one). This clause thus constitutes the priority of the framework decision over the original international convention, which remains valid. To support this conclusion, we might also mention the diction of Article 28 of the European convention on extradition, which speaks of „parties of the conventions that between themselves apply a unified regulation" that thus „exclude the applicability of the Agreement between themselves".

The influence on the international obligations is the following: if the international convention is still valid, but its applicability between EU member states is excluded by the framework decision, it is not the original convention, but the later framework decision that constitutes the international obligation between these states. Not respecting the original convention between member states is thus not seen as violation of international law. Such violation would on the other hand be not respecting the framework decision.

In relationship to other parties of the original convention (i.e. non–EU members), it is always the original convention that is decisive. The framework decision cannot influence their rights and obligations, which is acknowledged and accepted.

3. DOMESTIC (CONSTITUTIONAL) LEVEL

The framework decision is an act that is accepted univocally by the Council of EU with the purpose to bring the domestic legal regulations closer in the area of the applicability of the EU Third Pillar (especially of the penal law). It thus creates a harmonised, or in some aspects actually unified, legal regulation in all member states. As well as the EC directives, the framework decision must be implemented into domestic law usually through legislative measures, while its direct effect is eliminated. The framework decision thus can never be called upon in relation to an individual.

Problems might appear in the relation of the law accepted in this way and a previous international convention. In the previous text, we came to the conclusion that from the international law point of view, the more recent framework decision is to be preferred to the previous international convention, without affected its validity. This is important from the point of view of the examination of the relationship between the implementing legislature and the framework decision and the previous international convention. According to Article 10 of the Constitution, the clauses of this convention are to be preferred to the domestic regulation, albeit of a more recent date.

This constitutes a discrepancy that ought to be solved. If we claim that from the international point of view, the framework decision is to be preferred to the international convention, from the domestic point of view, it would then be logical if the implementation legislation were preferred to the convention. However, Article 10 of the Constitution states the opposite – the priority of the convention.

This question has a quite concrete practical dimension. For individuals, it may sometimes be more advantageous to be subject to the international convention rather than to the legislation coming from the framework decision, which would determine a stricter regime for them. They would thus call upon the use of the international convention on the basis of Article 10 of the Constitution. By the interpretation of this clause, we have to determine whether it really applies also to the conventions whose implementation has been, in the sense of Article 30 of the Viennese Agreement on the law of conventions, in the particular case substituted by the implementation of the framework decision.

Article 10 of the Constitution applies to those international conventions by which the Czech Republic is bound. This notion means that the Czech Republic is subordinated to the clauses of the convention and is obliged to fulfil the obligations following from it. „Being bound" by the convention is, however, not the came as validity. The state does not always and in all situations have to be bound by the valid convention. The state does not have the obligation to fulfil the obligation stated in the valid international convention, whose applicability has for the particular case towards the particular state been eliminated according to the international law. That is exactly the case of Article 30 of the Viennese Agreement – the convention is valid for the state, but in some relationships, it is not applicable. In this sense the state is not bound by it, i.e. is not obliged to implement it with regard to another particular regulation.

We thus arrive to the final conclusion. We cannot call upon the priority of the international convention, whose implementation between the parties has been validly eliminated on the basis of international law. The implementation legislation to the framework decision will thus be applied even when a non–implemented international convention regulating the same matter exists.

CONCLUDING SUMMARY

The framework decisions, although they are not international conventions, present particular regulation of certain questions among the EU members, which had prior to that been regulated by a multi–lateral convention. Such a particular regulation cannot be conceived as substituting the conventional regulation in the sense of full substitution for the original convention by a new instrument. The previous convention remains to be valid, but it will not be used between the EU members, where the framework decision is to be preferred. The obligations to non–EU members who are the parties of the convention remained unaffected.

The conclusion stated can be applied both in the international and domestic levels, i.e. the international convention not being applied between EU members is not, according to the constitution, to be preferred to the implementation legislature to the framework decision.

The Idea of Equality in the Czech and European Law

Miloš Večeřa, Tatiana Machalová, Radim Polčák*

1. FREEDOM, EQUALITY, AND THE PROBLEM OF LEGAL EQUALITY

The constitutions of modern states, international conventions on human rights and supra–national European community law in their essential documents are not based on the neutrality of values,[1] but in their normative clauses they express basic inviolable values of a democratic society, following up especially on the basic human rights and freedoms. These values bear in themselves not only a certain social orientation, but they also fulfil significant social function by securing the continuity of the social development with regard to its values and thus represent the load–bearing construction of the society. These essential values were not accepted only by democratic revolutions and modern democratic constitutions, but also by international conventions on human rights and the „Charter of the Basic Rights of EU" accepted at the end of 2000 in Nice in the form of a political declaration, which was a year later incorporated into the proposal for the „Convention on the Constitution for Europe". In the preamble of this Charter of Basic Rights of EU it says: „The Union, being aware of its spiritual and moral heritage, is based on indivisible and general values of **human dignity, freedom, equality, and solidarity**, it is based on the principles of democracy and respecting the rules of law".[2]

The continuity in values, which has also its historical dimension, from the spiritual values prefers especially the **values of freedom and equality**, representing the essential social ideals, to which the legal–philosophical and legal–theoretical ideas are connected, but also the positive law approaches and political scientific, sociological, economic, and other concepts. All these concepts make the effort to identify, demarcate, and characterise the mutual relationship of the values of freedom and equality.

1.1. FREEDOM AND EQUALITY AS VALUES ANCHORED IN THE LAW

By its position in social and political programmes, the values of freedom and equality represent attractive social and political ideals, but they are also values anchored in the law and also updated values (lived through, factitive) in everyday life of a concrete society. We are interested in the values of freedom and equality especially from the point of view of its legal anchoring, i.e. from the point of view *de lege lata*.

The values in law have the function of a final purpose, as general objectives, at which a person aims. Apart from the terminal values we can also characterise the category of instrumental values, i.e. values as the means by which we reach something important for ourselves. Freedom, then, belongs mainly to the

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[1] Compare e.g. the first judgment of the Czech Constitutional Court, file mark. Pl. ÚS 19/93.

[2] SYLLOVÁ, J., PÍTROVÁ, L., SVOBODOVÁ, M. et al. Ústava pro Evropu (Komentář) [Constitution for Europe (Commentary)]. Praha: C. H. BECK, 2005, p. 126.

terminal values. It is the source of the law and modern law is the tool for the protection of freedom as the possibility of free volitional action, i.e. the lack of enforcement (negative definition of freedom), but on the other hand the demarcation of the realm of freedom, in which nobody is allowed to interfere (positive definition of freedom).[3]

Equality, on the other hand, should rather be included in the instrumental values. It represents one of the basic principles of the hierarchy of the society and of the social relationships, which is, however, based primarily on the formal equality, with regard to the impossibility to reach material equality (physical, mental, and social equality of people). This moment is reflected also in the principle of legal equality. The principle of formal equality is on the one hand empty and value–neutral from the point of view of content, but when related to a concrete legal order it forces us to state explicitly the relevant moments of legal differentiation and coming out of the request for equality before the law.[4] Modern law as the warrant of the right of an individual to freedom is based on equality, namely legal equality, which is one of the axiomatic principles of the law and forms the basis for justice provided by the law.

1.2. EQUALITY AS EQUALITY BEFORE THE LAW

The effort to diminish tensions between the actual inequality of people with regard to their abilities and their social status and between the political ideal of social equality (the idea of social compensation) gained legal expression in modern law in the form of the principle of equality before the law (equality of rights).

The principle of equality before the law as the crucial postulate of the law lies in the effort of the law to create equal (the same) access to the law to the subjects of the law. This objective is reached in law by legislative anchoring and the actual establishment of:

- Formal equality,
- Content requirements of equality.

Legal equality thus contains in it two different components, as already John Stuart Mill noted:[5]

1. Equality before the law.
2. Equality in law.

Equality before the law expresses the equality (sameness) during the application of the law, i.e. that the valid legal norms are applied in the same way and that the irrelevant elements with regard to the content of the legal norm will not be taken into account. Equality before the law may in connection with this be characterised as the principle that given the same relevant conditions, the same legal consequences will arise in all of the judged cases, while the relevant legal order determines which conditions are relevant and which legal consequences should occur in such conditions. The basis thus lies in giving the same protection of law to all the subjects of the law, i.e. preventing the arbitrariness in relation to one of the subjects of the law. For all the same (equal) persons (equality is given by the viewpoints determined by the relevant legal norm) must thus be under the same relevant conditions dealt with in the same way in the given viewpoint of the law. The same (equal) dealing with the same (equal) persons is in fact nothing else than a correct application of the general rule, which fulfils the requirement of formal justice.

Equality in law on the other hand grasps on the contrary the fact that the clauses of the legal norm assert the principle of equality in the content, i.e. legal norms cannot contain any discriminating or privileging clauses, i.e. they determine certain concrete rights and obligations that are the same for all the relevant legal subjects. The principles of equality in the law relates to the determination of borders in which the legal norm is applied, i.e. so that the relevant conditions concerning especially the personal extent norm, not making unjustified differences between the individual legal subjects, are stated. The inequality based on the legal norm might occur especially in the case when a certain group of people would be deprived of a certain law, or the group will be prevented from using the law, or an obligation is imposed on it without a cause. The principle of content equality thus supposes that legal differentiation in the access to certain rights and in the imposed obligations between the legal subjects will not be determined arbitrarily, it, however, does not follow from this principle that everybody must be granted any law or that any obligation should be made softer as it has been done to another legal subject.

The principle of legal equality must be perceived as the enforcement of both of the stated principles. The equality in law as the expression of content requirements of equality speaks of the concrete laws and obligations determined equally (in the same way) to all legal subjects. The equality before the law then expresses equal (the same) approach to all the legal subjects in compliance with the content criteria of equality anchored in the law.

Equality may be looked upon also as a state of non–discrimination, which is usually expressed in the law in the form of the prohibition of discrimination

[3] On this issue see KNAPP, V. Teorie práva [The Theory of Law]. Praha: C. H. BECK, 1995, pp. 14 and foll.

[4] On this issue see WEINBERGER, O. Filozofie, právo, morálka [Philosophy, Law, Morals]. Brno: MU, 1993, pp. 15 and foll.

[5] MILL, J.S. Utilitarianism. In Warnock, M. (ed.) On Liberty. London: Collins, 1962, p. 301.

and is looked upon both as a principle and a basic right.

2. THE PROHIBITION OF DISCRIMINATION AS A WARRANTY OF EQUALITY?

The prohibition on discrimination is made public in constitutions or legal orders with the aim to prevent an exclusion of a certain group of people as a result of not recognising their identity. The creators of the European Constitution also made this step. In the Convention on the Constitution for Europe they filed this prohibition immediately after the requirement of equality before the law.

In Article II–81 on the prohibition of discrimination it literally says: *„Discrimination on any ground such as sex, race, colour, ethnic, or social origin, genetic features, language, religion or belief, political or other opinions, belonging to an ethnic minority, property, birth, handicap, age, or sexual orientation is prohibited."*

The second paragraph then complements this with the statement that *„within the area of application of the Constitution, without violating its special clauses, any discrimination on the basis of citizenship is prohibited".*[6]

From the normative point of view, prohibition always expresses something that is not allowed, something that must not happen. In this sense it means that it is not allowed to disrespect the defined forms of identity. This prohibition is thought to be a necessary prerequisite for the removal of discriminating inequalities.

In the following text, however, we will try and show that this approach is narrow and that in its essence it reproduces the dangerous formalism, which it paradoxically conserves or even deepens the discriminating inequalities between people.[7]

The problem of equality, as was already mentioned in the first part of the contribution, is naturally connected with the issue of justice. From this point of view, the prohibition of discrimination is not only a question of accepting the plurality of cultures, styles of life, etc., but also already about the question of creating the conditions for equality of chances, access to social resources, functions, free communication, etc.

2.1. THE CONDITIONS OF EQUALITY: RECOGNITION, OR REDISTRIBUTION?

Within the legal and political philosophy grounds, it is the question of equality and equal rights that is nowadays being discussed as a problem of the relationship between recognition and redistribution.

„Recognition" implies in itself the Hegelian motive, in which inter–subjectivity is a predecessor of subjectivity. This is put in contrast to the requirement of liberal individualism. Recognition, on the contrary to redistribution, presupposes „morality" as the situation enabling good life and self–realisation of a person. Redistribution is then connected with procedural creation of moral consciousness as a prerequisite to the realisation of good and just relationships.[8]

The question of „redistribution" was of central importance in the projects of egalitarian liberalism. In the second half of the twentieth century this is fully reflected in the situation of democratic nation states. The egalitarian distributive policy to a certain extent pacified the problems arising from the failure of recognition. The question of recognition of variability thus did not result in open conflicts. Their escalation was to a great extent caused by the globalisation process.

The abolition of the traditional borders brought with it trans–cultural encounters. The growing plurality of values and lifestyles led to new political ambitions. The attention of political and legal philosophy thus concentrated on the so–called „struggle for reco-

[6] On this see European Constitution. Convention on the Constitution for Europe. Newsletter 2005, p. 13.

[7] The programmes of the so–called affirmative action are based on this false construction of ideas. In English, the term „affirmative action" is used, which is translated into Czech as „positive discrimination" The word–for–word meaning of the term „affirmative action" is an action that should lead to the affirmation of a certain identity. These programmes require a regulation of the inequalities resulting from cultural or ethnic differences to be anchored in the law.

[8] The category of *„recognition"* (in German Anerkennung) has its origin in Hegel's Phenomenology of Spirit. Through recognition, Hegel explains the process of the constitution of a person's subjectivity: a person becomes an autonomous subject by the recognition of the other subject, by which it is also recognized. On this, see HEGEL, G.W.F. Phenomenology of Spirit. (Fenomenologie ducha) Praha: ACADEMIE, 1964.
In the second half of the 20th century, the existentialists returned to this category. Nowadays, the issue experiences its renaissance especially in the work of a known German philosopher Axel Honneth and also the north–American ethic Charles Taylor. Honneth introduced his concept of recognition in the work „Struggle for Recognition. On the moral grammar of social conflicts". See HONNETH, A. Kampf um Anerkennung. Zur moralischen Grammatik sozialer Konflikte. Frankfurt: Suhrkamp, 1992.
Charles Taylor became famous with his work „Multi–culturalism and the policy of recognition". See TAYLOR, CH. Multikulturalismus und die Politik der Anerkennung. Frankfurt: Suhrkamp, 1997.
On the other hand, the notion „redistribution" is a notion connected with the concept of distributive justice developed by liberalism. The description of its subject matter was recently attempted by a known American theorist J. Rawls in his theory of justice as fairness. On this see RAWLS, J. Teorie spravedlnosti (A Theory of Justice). Praha: Victoria Publishing, 1995.
For more on the comparison of these two categories, see FRASEROVÁ, N., HONNETH, A. Přerozdělování nebo uznání? (Redistribution, or recognition?) Praha: FILOSOFIA, 2004.

gnition" In their contexts redistribution was a marginal issue. The contemporary discourse on equality and equal rights, however, shows that the strategy of the implementation of the idea of equality and justice cannot disregard the thematic work on the relation between „recognition" and „redistribution". Trying to find a solution to this problem caused many clashes of different opinions. The best–known clash that is currently going on is the one between the North–American philosopher Nancy Fraser and the German philosopher Axel Honneth. The core of the problem lies in the question of preventing the remedies of uneven distribution to strengthen the un–recognition, or the remedies of un–recognition to strengthen the uneven distribution.

Fraser suggests a two–dimensional concept of justice that should prevent the reduction of the aims of justice to one of them. At the same time she steps out against any institutionalised strategy leading to the required integration of recognition and redistribution, and in such a way to the remedy of injustice. In connection with this she speaks of „non–reformist reforms".[9] We are to understand this suggestion in the following sense: the implemented reforms shall be governed by the aim of changing the structure of impulses and political opportunities in such a way that they do not give rise to injustice in the long term. The prohibition of discrimination would thus become a useless norm and it would also become unnecessary to anchor any group rights.[10]

The basic presumtion for such strategy is the implementation of participation parity that, according to the author, enables a democratically conducted public discussion. The confirmation of the rights to recognition and redistribution is only possible in the situation of participation parity and the participation parity is the condition of the confirmation of the rights. According to Fraser, however, this is not a move in circles, but reflection that enables the participants of the discussion to understand that they are the originators of justice.[11]

Now we are getting to the point from which the criticism of the two–dimensional conception of justice from the part of Alex Honneth starts. He openly claims to be an adherent of the so–called „normative monism" and thinks that the structure of recognition integrates in itself also the problem of redistribution. In connection with this, he speaks of the plurality of three equivalent principles of social justice.[12] These three principles then should *„during the analysis of struggles and processes of changes normatively inform on the fact which moral requirements can be considered justified"*[13].

Fraser sees the way to the implementation of the equality principle in modern democratic society in connection with the „participation parity" of the reform strategy. Honneth, on the other hand, sees it as a result of historical development on whose basis the structural changes of social integration happen.

2.2. CONDITIONS OF CONSTITUTIONAL WARRANTY OF EQUALITY AND JUSTICE IN THE PROCESS OF EUROPEAN INTEGRATION

In the considerations on the fact when equality and justice are being connected with the way justifiable objectives are articulated, however, the question arises as to how their implementation in everyday life is possible. Both opinions run into the problem of normative warranty of equality and its practical applicability. The solution to this problem is connected especially with political processes of the democratisation of society. In this context, however, the legal dimension of the problem is still standing aside. Essential questions remain unanswered. „What normative form should the constitutional protection have, so that it would effectively guarantee the citizens'equality before the law not only in the process of the proceeding European integration, but also the world globalisation?", „Why the legal protection of equal rights in a constitutional democracy is not sufficient?"

The answer to the first question requires critical judgement of the traditional articulation of the Charter of Human Rights and Freedoms. The formalism of the prohibition of discrimination shows that modern democratic state respecting the rule of law should take a systemic approach to rights.[14] System transformation would lead to such a situation in which both private and public autonomy would be considered to be spheres of equal value in the life of a person. Variability would neither be an obstacle, nor an object of restriction of access to the political and social–economic rights.

[9] Fraser offers the strategy of „non–reformist reform" as the alternative, third way that should overcome the deficits suffered by the political strategies of affirmation as well as transformation. Ibid, pp. 111–119, 120.

[10] Ibid.

[11] Ibid.

[12] Honneth comes out of the perception, as he himself says, that the „subjects in modern societies are, while forming their identities, limited to three forms of social recognition that are based on the principles specific for a given sphere: on the principle of love, equal treatment before the law, and social appraisal." Ibid., p. 233.

[13] Ibid.

[14] The German philosopher and sociologist J. Habermas presented the concept of rights as the system of laws built upon logical genesis in his discourse theory of the law. For more details see HABERMAS, J. Faktizität und Geltung. Frankfurt: Suhrkamp, 1992.

The word „access" has a fundamental meaning here. Thus we have arrived to searching for the answer to the second of the above–stated questions. It is exactly the situation of access, or the chance to have access to the vital sources that integrates in itself the perspective of recognition and redistribution. The prohibition of discrimination in this sense means stopping halfway.

3. THE IDEA OF EQUALITY IN THE LAW OF THE CZECH REPUBLIC AND EC FROM THE POINT OF VIEW OF INFORMATION

The continuing penetration of the society with information technologies causes in law, apart from particular, immediate, and direct effects, also a number of graduate changes of the concept. Among other things, the approaches to the law that instead of its authoritativeness, regulative or outstanding features take notice rather of its organisational or informational character are experiencing renaissance[15]. Any organised structure, including the society, in its essence or in the things that make its base stable and resistant with regard to entropy, is based on a seemingly trivial element – on information. It is, however, the reality of the contemporary society that the word „information" is used for basically any message, i.e. also those that do not fulfil the original definition. We may thus encounter many examples of *contradictiones in adiectis,* as for example „incorrect, redundant, or confusing piece of information[16]" The examples when the (apparent) information does not function as an anti–entropy factor are at the same time very frequent and appear abundantly both in the area of information on the facts that exist and in the area of information on what will or should be, i.e. between the information on norms, which are of special importance for the science of the law.[17]

Practical experience with the application of quantitative information methods in law, and especially rich experience with the formal logic approach to legal norms lead us, together with the knowledge gained during the creation of norms and other forms of participating in the life of information communities, to the necessity to enrich the set of tools of the information approaches to law also with the method assessing the quality of normative and non–normative functions, and this especially with regard to their sense or purpose[18]. Casuistic or classic logical method can namely be meaningful in the process of the application of the law only when the particular norm has been evaluated as having an *ad hoc* character with regard to organising information. As was suggested above, the organisation of a certain system, in this case the system of social relations, is not only a matter of quantity or logical structure of logical information, but in the first place the matter of its quality. At this point it is therefore necessary to deviate a little from the basis of the information methodology of cybernetics, i.e. the branch whose aim was the understanding of the essence of the functioning of living organisms and the imitation of its essence the next step[19] – its founder himself, Norbert Wiener, was a strong adherent of the opinion that the essence of life, or the individual organisational processes that form it, can be understood and described with the use of casuistic methods, or concretely experimental or applied mathematics.[20]

3.1. NORMATIVE CHARACTER OF EC LAW AND THE INFORMATION EQUALITY

There is no doubt that the contemporary legal order of EC countries creates, seen from the above–suggested point of view, a very specific information system. In contrast to the classic system of state normative information it is extended with the community dimension. By this, it gains in size and complexity and with regard to that, also the probability of the occu-

[15] The academician Viktor Knapp is considered to be one of the founders of the notion of the law as an information system. See KNAPP, V. O možnosti použití kybernetických metod v právu (On the possibility to use cybernetics method in the law). Praha: Nakladatelství československé akademie věd, 1963.

[16] Information, however, is in fact defined to be only such a message that leads to the reduction of entropy, i.e. information is only such a message that is correct and necessary – compare WIENER, R. Cybernetics. Cambridge: MIT Press, 1948.

[17] With the use of positivist methodology, it is possible to name this kind of information as normative utterances – cf. KELSEN, H. Všeobecná teorie norem (General theory of norms). Brno: Masarykova univerzita v Brně, 2000.

[18] Convincing arguments to which the Czech Constitutional Court returns again, were presented in the period between the two world wars by a significant representative of the so–called Brno school of normative theory, Professor Karel Engliš – see ENGLIŠ, K. „Kritika normativní theorie." (The Criticism of normative theory). in Brněnská škola právní teorie. Praha: Karolinum, 2003, pp. 203 and foll.

[19] The imitation of living organisms with the use of inorganic substances later became the load–bearing topic of cybernetic research – and the equally significant philosophical dimension of this branch was thus put in the shade, to the harm of the humanities – compare WIENER, N. Cybernetics or Control and Communication. Paris, Cambridge–Mass., and New York: Hermann & Cie., the Technology Press, and John Wiley & Sons, 1948.

[20] In his principal work Wiener thus unequivocally declares to be an adherent of Leibniz's philosophy – Compare ibid, p. 12.0.

rrence of a redundant or a defect element grows. If then the sense of the law, including the EC law, to organise the society, i.e. to reduce social entropy, is taken into account,[21] it definitely makes sense to examine the possibilities of the individual addressees to accept and process the information and also in this context discuss the issues of existential and functional equality of the subjects with respect to the state and its law. The prerequisite for the generality as the definition characteristics of the legal norm is namely, among others, also the accessibility of the information network formed by them,[22] i.e. the equality of the subjects with regards to the access to information on legal norms[23].

In the situations where the subjects have, for whatever reason, relevant legal normative information for the respective life situation, their behaviour is motivated by other biogenic and sociogenic factors[24]. This situation, in the case when the normative character of the law is based on the normative tendencies of other normative systems,[25] does not always have to cause conflicts - the action of the subject is in the vast majority of cases conforming both with the norms of whose existence the subject knows, and with those legal norms, of which the legal subject is not informed. Not even in the case when a conflict arises between the legal norm of whose existence the subject is aware and the concrete action of the subject, it need not be considered an action violating the system of the normative character based on this, not even on the individual scale, but only on condition that the occurrence of such conflicts is exceptional and that the trust in the sense of legal norms on the part of the subject continues[26]. This trust then need not be based on somebody's knowledge or on the subject's awareness of the existence of concrete legal norms – it is sufficient if the existence of the law, its sense and purpose are quite clear to the subject[27].

In the given context, the construction of this type of legal normative trust, i.e. some kind of *„a priori" uninformed belief in the law* above the relatively heterogeneous group of addressees – subjects under the EC bodies' jurisdiction, seems to be a bit problematic. Although material sources of different normative systems are all over EC very similar as far as the basic features are concerned, the pertaining variability of cultural traditions presents an obvious obstacle to the development of EC law in the same line as the legal orders of historic communities, i.e. that it relied on the normative character of the law in the above–outlined sense, i.e. based not on the perfect distribution and individual reception, but on the already mentioned traditional *a priori* belief in the law.

In the previous section, we outlined the topical situation in which the legal normative utterances present in the contemporary EC state embodied also into a supra–state structure with its own legal order form such a complex information system that its mastering is not possible for objective reasons. It is then even less possible to base the normative character of EC law on the already mentioned factual and complete information of all the addressees of the legal norms on their content[28]. From the point of view of information science[29] it seems, however, that the gradual improvement of the methods and technologies of the digital data processing and the growing level of penetration of the European society with the information network services, new possibilities of creating normative systems not on the historic *a priori* belief in the law, but on the belief in the accessibility and transparency of the normative utterances and other normative information on the EC law will arise. This form of the trust in law, which results in the possibility of the EC law to work with even a higher level of normative and effective features, may be based on the provided information on the sense, purpose, and aim of the EC

[21] Reality is a bit different in this sense – on this compare e.g. MANSELL, W., METEYARD, B., THOMSON, A. A critical Introduction to Law, 3rd ed. London: Cavendish Publishing, 2004, pp. 9 and foll.

[22] This principle becomes apparent among others by the obligatory publication of the normative legal acts or in the principle of the prohibition of its retro–activeness.

[23] The approach of the subjects to the discursive processes of the law formation, which is also a significant element of the legal idea of equality, shall not be discussed at this point her.

[24] See NAKONEČNÝ, M. Motivace lidského chování (Motivation of human behaviour). Praha: Academia, 1997, p. 12.

[25] Especially the system of the so–called social or habitual norms and further the system of religious norms – on this compare e.g. MARA, A. Norm Origin and Development in Cyberspace: Models of Cybernorm evolution. Washington University Law Quarterly, No. 78, pp. 59 and foll.

[26] This can be illustrated by an example from practical life – in Bolognese wood, it is by a local directive prohibited to drink alcoholic drinks. An uninformed tourist who decides to take refreshment in the form of lightly alcoholic drink is on the basis of this informed by the present policeman and is asked not to open another bottle after having drunk the open one. Although a normative conflict has occurred here, it did not shake to the slightest extent the trust of the tourist in the sense and objective of French law.

[27] In this sense it is possible to point at a whole number of directives and norms whose sense lies in the building trust in law as well as on similar direction of the decision practice of the courts, especially of the Czech Constitutional Court.

[28] If there is now no expert in the law who could state that s/he knows the whole of the Czech law, it will be even less possible to train all the addressees of the composite norms of the Czech Republic and EC to their full knowledge.

[29] In the original sense here, i.e. as science on the methods of compiling and distribution of information on the law – nowadays, however, this notion is used, especially in the Alpine legal environment, above all for the science on the digital compilation of legal data and also for the information technologies law.

law, followed by the knowledge or merely awareness of the mechanisms and techniques through which the EC law can be generally accessible[30]. While the first aspect of this partially *a posteriori* built belief in law is based mainly on the political and media activity, the second aspect lies primarily in the sphere of interest of legal informatics, especially the development of technological and logical mechanisms through which the information equality between the addressees of the EC law will be reached[31].

[30] Without requiring a higher standard level of pre-understanding – on this notion see ESSER, J. Vorverständniss und Methodenwahl in der Rechtsfindung. Frankfurt am Main, 1970.

[31] Here in the sense of equality in the possibilities to access the EC law when necessary.

Backgrounds of today's convergence of the Czech laws with the EU laws

historical view of laws integration within the European area

Karel Schelle, Renata Veselá, Ladislav Vojáček*

The objective of this research is to show the development of the Czech law after accession of the Czech Republic to the European Union in the historical context. It means to show that the current process of convergence of particular national laws of the Member States is only one stage (although the crucial one for the present development) of the development of the European systems of law. The impacts of the accession of the Czech Republic on the European Union were not only political, economic and social, but also legal. The legal impacts consist first of all in the fact that what has been essentially changing since the accession of the Czech Republic to the EU are not only the sources of law, but also the construction of the Czech legal norms having their origin in the Communitarian laws.

In individual stages of our research we are going to show that the current Czech system of law is a result of a series of impacts having influenced it in the course of its development. These were, at the same time, the impacts having influenced also the systems of law of other nations. The Czech system of laws has, therefore, the same backgrounds as the whole continental system of law. This is supposed to facilitate the present integration system.

The primary common sources for the European legal culture were the Roman law and natural law – *ius naturale*, so we have to begin our lecture with the oldest times.

* * *

"The Roman law is no Stone of Wisdom that only remains to be discovered. It is not possible to understand the European legal thinking only by reading ancient texts and admiring the juristic erudition of Roman lawyers. It is necessary to read also what followed and without which the Roman law would not have been what it is today." [1]

To get to the roots of the European culture of law, it is necessary to start with the historically documented sources. The very term "private law" (ius privatum) is a term appeared in one of the most significant ancient monuments of law, in the Digests. One of the leading Roman lawyers Domitius Ulpianus defined in them the difference between the private and public law by saying that the private law concerns the protection of interests of an individual, whereas the public law is directed at the Roman State and its operation. (D, 1, 1, 1, 2)[2]. The mentioned Ulpian's definition is often cited today as often as it is, on the contrary, especi-

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[1] URFUS,V.: Historické základy novodobého práva soukromého (Historical Fundaments of Modern Private Law), Praha 1994.

[2] *"...Publicum ius est, quod ad statum rei Romanae spectat, privatum quod singulorum utilitatem; sunt autem enim quaedam*

ally by theorists of law, denied. Mostly it is accused of schematising the issue, concentrating on external characters of both terms rather than on the contents thereof. The basic objection against Ulpian is usually the fact that he failed to define the fundamental difference between the private and public law, namely the principle of equality of the parties.

Anyway, the actual contents of the terms "private law" and "public law" was seriously dealt with only much later, at the outset of the modern civil society, i.e. in a period typical of the formation of modern systems of laws. The Middle Ages and the system of laws of that time were based on totally different principles than on the differentiation of the private law from the public law. The thesis of differentiation of the private law from the public law was unambiguously accepted by so–called continental system of laws (and it was classically elaborated by the European legal science in the nineteenth century), whereas the Anglo–Saxon law did not reflect such differentiation.

Examining the roots of the European private law, or the European legal culture, we will always put emphasize on the history of the continental culture of law and continental legal science. Its beginnings can be found already in the Middle Ages, at the outset of the legal science in general sense, although very soon it shifted its interest predominantly to property–right relations, i.e. to the sphere typical for the private law. The fundaments of the modern legal science in Europe can be actually regarded as the fundaments of the legal science of the modern private law. In other words: This science had really European features, being supranational and in this sense in became also a somewhat general theory of law, especially of the private law. That's why the history of the private law in Europe is – as can be said again – far more a history of this legal science and much less a history of individual legal regulations. This supranational European legal science, which was, at the same time, a legal science in general sense as well as a science of the private law, was really a force unifying the intellectual world of the past and still constituting the ideological basis of the modern legal culture of the civilised society.[3]

The development of the modern legal science on the European continent, based on the medieval fundaments and directed afterwards predominantly at private–law issues, was of course not straightforward. Although in particular historical periods it went through many peripetia, dire straits and culminations, the legal science with respect to the above mentioned agrees on one single basic idea. The fundaments of the modern legal science and, as a result, of the modern European continental system of laws must be unambiguously seen in renewed interest in the Roman law, which can be traced back to the eleventh century and the immediately following centuries at Italian medieval Roman–law schools. The next, although a rather different direction of the European legal science is represented by the legal humanism, a direction typical for the development of the legal culture in France, but also in the Netherlands. Very soon, it is supplemented with another very significant impact in the form of the rationalistic natural law, where it is possible to find, according to general opinion of legal historians, some liaisons with French legal humanism. Although the legally theoretical postulates from the rationalistically designed natural law influenced to large extent especially the European legal science of the private law, they have never broken its connection with the Roman–law sources. The rationalistically passed down and used natural law is thus a crucial factor influencing the formation of the new legislation, a concrete output of which are the systematically designed legal branches. Such codifications, first of which were created already in the eighteenth century, represent a fundament of the so–called modern, in many cases still valid law of the states of the present Europe. This paradoxically triggered the final divergence of the ways of the European legal science, which until the eighteenth century or the turn of the eighteenth century still had maintained a relative unity. Once more, however, that time in German relations, like if the unifying force of the common legal science revived. Its task is to overcome not only the political but also the legal diversity of Germany. It was just there that the crucial role was played by the legally theoretical direction referred to as the German pandect. It became, said in plain English, a kind of a general theory of law, foreshadowing the next development in an additional respect – it can be regarded as a predecessor of the legal positivism, which is a determining legally theoretical direction of the European legal culture of the nineteenth century.

* * *

The crucial sources included a.o., as stressed above, the natural–law theories, i.e. the theory of an ideal justice independent of the State, based on the reason and human substance. The ideas of natural law went through a difficult development. For the first time they appeared at ancient times (Socrates, Plato). In the Middle Ages, the natural law was regarded as a sort of divine law (St. Thomas Aquinas). It was however in the period of the seventeenth to eighteenth centuries that the natural–law ideas went through the most massive development, having a decisive impact on codification processes in Europe. The old philosophy took on a new shape as a result of its rational concept.

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 Fundaments of Modern Private Law), Praha 1994, s. 2.

The natural–law concept of the principles as rules that precede the applicable law and are unchangeable and eternal and result from the reason itself, is represented mainly by Thomas Hobbes. More than 300 years before Dworkin and Alexy formulated their theories, he contemplated about natural fundaments of the law in his treatises *The Citizen* and *The Leviathan*. The notions of the natural law and natural rights are the basis of the Hobbes' famous concept of the social contract. The natural right of every man is the liberty each man has to use his own power as he will himself for the preservation of his own nature; that is to say his own life. The right to self–preservation includes also the right to the means of the self–preservation, as a result of which everybody has the right to everything and the rights of people are necessarily in conflict. It is however obvious that the resulting war of every one against every one will ensure the self–preservation to nobody. Then comes the law of nature *"that it is not against reason that a man does all he can to preserve his own body and limbs, both from death and pain."* Approximately twenty particular laws of nature are deduced by Hobbes using rational argumentation, by derivation from other laws or by reduction ad absurdum. All laws of nature can be summarised according to Hobbes in the following rule: *"Whatever you don't want other people to do to you, don't do to other people either"*. The laws of nature are binding in terms of conscience; the conduct of those abiding them is fair. In outside world, they are binding only if a man can abide them safely, otherwise they would contradict the natural right to self–preservation; it would not be reasonable to abide the law making himself a prey to unjust individuals. The laws of nature as rules of the reason are unchangeable and eternal, because war will never preserve life and peace will never destroy it.

The reason why we are talking about Thomas Hobbes now is however his concrete formulation of the laws of nature, the ideas of which can influence even readers of today. Logically the first law of nature is *"seek peace and follow it"*. The path to peace Hobbes afterwards used for construction of the social contract is shown in the second law of nature: *"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 contended with so much liberty against other men he regards necessary for his peace and safety as he would allow other men against himself"*. A form of this waiver of rights is a contract. This is a subject matter of the third law of nature *"that people should keep agreements"*, which is a source and origin of justice. As it is only a breach of a contract that can be regarded as injustice; if there is no contract, then everybody has a natural right to everything and cannot behave in contradiction with justice. These three laws of nature are crucial.

Hobbes' law of nature can be understood as principles constituting a basis for every system of positive law. This nature–law concept of legal principles is however obsolete today.

A personality whose work meant an essential inclination to the rationalistic natural–law school was Hugo Grotius. According to him, the law and the State are of earthly nature. The State is created on the basis of a social contract among people.

The natural–law school was directed, in terms of its programme, at overcome of the old law and formation of a new one. But the natural–law codifications were actually no brand–new codes. What was really new was their system and general terms supporting them. Particular institutes were however derived from the Roman–law heritage.

The natural–law principles, concretely for example in ABGB, were reflected in the famous § 7 reading as follows: *"If the case still remains in doubt, it shall with careful consideration of the surrounding circumstances, be decided according to the principles of natural law"*. In the past, a lot of high–profile legal theorists attempted to construe this provision.[4] A judge not having legal norms on hand shall decide according to natural–law norms then. So natural–law principles must have a status of norms as well.

This question was replied quite succinctly by the authors of the ABGB notes, stating, on the basis of Zeiller and Martini's treatises, that the natural–law principles are nothing else than systematic legal terms. These systematic legal terms were created by Romanistics studies in the course of centuries, so they were regarded as something natural, directly given to human intellect. At the same time, they asked themselves a question whether a judge should follow these systematic terms, using them as subsidiary legal regulations. Modern times views these systematic terms critically, analysing them and depriving them from both the status of norms and the generally binding feature. *"Dogmatism of 18 century was exchanged with relativism of 19 century and now we are entering a critical period, capable of analysing and correctly placing in mind both dogmatic apodictism and relativistic scepticism."*

Two principles were deduced from this:

a) cues as to how to reconstruct a norm from insufficient sources,

b) judge's right to judge also beyond the limits given to him by particular legal regulations or,

[4] KALLAB, J.: Poznámky o základech nových teorií přirozenoprávních (Notes about fundaments of new natural–law theories, Sborník věd právních a státních, 1913; KUBEŠ, V.: "Přirozené zásady právní" a "dobré mravy" v obec. zákoníku občanském. ("Natural principles of law" and "good morals" in general civil code) In: Randův jubilejní sborník; SEDLÁČEK, J.: Přirozené zásady práva (Natural principles of law), Časopis pro právní a státní vědu, I, page 153 et seq.; WEYR, F.: K problému systematických výkladů positivního práva (On the issue of systematic constructions of positive law), Časopis pro právní a státní vědu, IX., page 240 et seq.

if he follows a governing opinion, to decide the particular case at his own discretion, provided that he has no ill will.

Authors of modern codes regard as the fundamental natural right the human liberty. Still the code of Western Galicia contained in §§ 28–33 a list of innate rights. This list was however for political reasons deleted, as the absolutism of that time found such a list quite dangerous, even though it did not concern political rights, limiting itself only to ius connubii and ius commercii. In compliance with absolutistic interests, also the code authors believed that such list was useless, as an educated judge must know natural rights and *"ordinary people might be confused by the general formulation of such natural rights"*. Paragraph 17 contained a burden of proof in a dispute about innate rights. It declared that *"what is typical of innate natural rights, it shall be deemed existing, unless it is proven that such rights are limited by law"*. According to the authors' belief the natural rights are given already by human reason and it is no need for them to be declared by any special law. So the legal presumption of such rights was provided for in § 17.

* * *

As a result of modern reception of Roman law, applying natural law, another period in the process of European integration of laws is started. It is generally acknowledged that internal arrangement of classical civil codes of continental law system formed early in the 19 century (Code Civil and ABGB) differs from that of the codes arisen from a later period (Swiss ZGB, which, moreover, lacks a general part, and the German BGB). But it is obvious that all mentioned codes are more or less based on various law schools, applying methods of receiving the Roman law. As if the today's usual internal system of the civil law directly reflected from traditional Gaius' arrangement of the law, called sometimes as *"Gaius' system" of personae – res – actiones*. Romanists' opinions of this issue are of course different[5], but the basic framework of the private law arrangement was given to the modern European codifications by the already mentioned German pandect of the early 19. century. It also helped a.o. to the today's usual system of civil codes divided into a general part and individual sections dealing with law of things, law of obligations, family law (marital law) and law of inheritance. We know even the author of such arrangement and the publication in which it appeared for the first time. The author was the German pandectist G. A. Heise, who published them in 1807 in the book *"Grundriss eines Systeme des gemeinen Civilrechts zum Behufe von Pandektenvorlessungen"*. This arrangement, abstracted by Heise from pandect law became generally acknowledged.

At the time of preparation of the Code Civil edition, the Heise's arrangement did not exist yet. It was published only three years after the code was published. In Austria, with respect to the date of publication thereof, it could have been known. But either it was not known or at the time that the ABGB codification work culminated (it was announced on June 1, 1811) it could not be taken into consideration, and or Zieller did not accepted this concept.[6]

This theory of doubtless influence of the Roman law (even though in a received form) on civil law was not rebutted either by renown scientists having dealt with it for a long time. For example Professor Krčmář wrote: "The Civil Code is undoubtedly based on the Roman law, though it was developed by reception of the Roman law to the north of the Alps and another one by transformation thereof, based on the so–called Usus Modernus Pandectarum. As far as some sections are concerned (comp. e.g. marital law), the code is based on the canonic law and some other elements, comp. Lehnhooff Aufflosung page 82. Some institutions use domestic sources, especially Czech and Austrian law. In this regard, the institute of public books should be mentioned. Also the codifications of that time are taken into consideration; it was especially the Prussian Landrecht that served as a master for some provisions. In addition, the Civil Code includes some elements that are contained in none of older systems of laws and this is actually a case of creative work of editors ..... Such phenomena and the whole shape of the code as such can be attributed to its editors, the leaders of which, at first Martini and after him Zieller, are true children and high–profile, highly educated representatives of the enlightenment era, filled with the postulates and tendencies of that period. The ideas governing the natural–law theory of that time, namely the belief that all the law is based on fixed and unchangeable fundaments, then the efforts towards justice of law, i.e. everyone should be judged equally, that the law should meet the requirements of equity, that it should be adequate to the country for which it is adopted, that it should be clear and comprehensible and comprehensive, while the comprehensiveness should be achieved by reduction to general and distinctive terms rather than by casuistry; all such ideas are reflected in the Civil Code."[7]

On the other hand, neither the dogmatic inclina-

[5] E.g. GAIUS: Učebnice práva ve čtyřech knihách. (Textbook in four volumes) Edited and translated from Latin original and editorial written by Jaromír Kincl. Brno, reprint of the first edition 1981, page 19.

[6] KNAPP, V.: Velké právní systémy (Major law systems), Praha 1996, pages 127–128.

[7] KRČMÁŘ, J.: Právo občanské I. Výklady úvodní a část všeobecná. (Civil law I. Introductory construction and general part) Praha 1929, pages 22–23.

tion to the purely Roman–law concept of the system of law would be fully acceptable. We can undoubtedly recognize perfection and thousand–year tradition the roots of European legal culture have, but, at the same time, rather than omit we should respect the next historical development existing here like in all spheres of social life. By the way, it is nothing new to doubt and seek new possibilities of society arrangement including the legal framework of its function. The continental system of laws, which was undoubtedly influenced by a Roman heritage, has never been a dogma, has never been regarded as a panacea for imperfectness of the law as such. This is also confirmed by the words of the already cited Professor Krčmář: "As already indicated, neither the Romanist system, generally applied when construing the civil law, can be regarded as flawless. A flawless system can hardly be built. The problem can be explained by stating that the system adequacy can be assessed from various viewpoints and that the treatment of the chosen matter from one viewpoint has flaws when assessed from another viewpoint. But if a majority adheres to that Romanist system, then the system can be justified only by the fact that the system complies with the aspects obviously more important than the aspects that are neglected. It must be admitted that the new legal institutes, which arise from time to time, make the flaws of such system more distinctive, as the system has no suitable room for them".[8]

* * *

By establishment of modern legal codifications, the crucial stage of creation of common fundaments of modern systems of laws was completed. Further development of the European legal culture went already the way of development of particular systems of law and the efforts towards European integration in the field of law depended on success of integration processes in the economic and political field. Such integration was successfully started only after the Second World War and actually culminated on November 1, 1993 by ratification of the Treaty on European Union, known as the Maastricht Treaty. Immediately before that date, there were three European Communities – the European Economic Community (EEC), the European Coal and Steel Community and the European Atomic Energy Community. By effectiveness of the Maastricht Treaty, the EEC of that time was extended with an economic and monetary union and was renamed to the "European Communities". So the history of the EU, as a successor organisation to previous communities, is relatively long. The outset of the efforts towards establishment of close cooperation among Western European states date back to the period immediately after the Second World War, when the European countries facing the aftermath of the war had to solve their problems of restoration of their destructed economies, when Europe was split into two hostile blocks, when the topical issue of further development of Germany had to be solved in order to eliminate a potential danger that Germany may become engaged, for the third time in 20. century, in starting a world war. So gradually, beginning with the so–called Paris Treaty in 1951, treaties leading to more and more close cooperation of member states and extension of such cooperation to other Western European states and territories were concluded. The Maastricht Treaty guaranteed to all citizens the EU citizenship, the Acts on Tariffs and Trades and Movement of Persons and Capital were adjusted on its basis towards gradual achievement of the targets of free movement of goods, persons, services and capital inside the Union.

In the EEC and EC, the law was perceived mainly as an instrument, not as a target of the integration. After foundation of the EU by the Maastricht Treaty, however, a significant change in this field occurred. The Maastricht Treaty incorporates some principle, objectives and tasks, concerning the cooperation in the field of justice and internal affairs, which can be regarded as a basis of a law policy of the EU. At the moment, the autonomous law of the EU, contained in its treaties and acts of their bodies, is an independent system of law, which can be compared neither with international nor national laws. The member states' law contradicting the EU law is inapplicable and the member states have to adjust it to the superior law of the Union or to abrogate it. Such superiority of the EU law is not explicitly stipulated in their treaties, but is based on the legal belief of the member states.

The EU law discerns so–called primary and secondary laws and customary law. The EU primary law, incorporating the basic treaties as amended, is a result of international negotiations of member states convened for the purpose of essential changes in function or structure of the community. The EU secondary law consists of the acts based on the primary law and adopted by the competent authorities of the Union.

And here we are at the outset of the last stage of the integration or convergence of the laws in Europe.

As it results from the depicted backgrounds of the current convergence of the Czech laws with the laws of the European Union, the subject matter of the research is the idea of European integration leading to the EU reality with an emphasis on the role of the Czech element within this framework. At the same time, it is just the integration in the field of laws that will be stressed. The analysed topic is solved applying the historical comparative method.

[8] Krčmář, J.: Právo občanské I. Výklady úvodní a část všeobecná. (Civil law I. Introductory construction and general part) Praha 1929, page 38.

PRIVATE LAW SECTION

Czech Private Law at the Beginning of the Third Millennium

Jan Hurdík, Josef Fiala*

I.

Epoch–making discoveries in various spheres of human thinking, accompanied with reassessment of all previous knowledge, create an image of the current era at the beginning of the third millennium. Labeling it, we often use words like modernity, post–modernity or others. The quantum era of information that has arisen from the field of technical research, namely of the computer science, conquered a considerable part of modern thinking and it seems that there is no sphere of human activity left without its influence.

Yet, it appears that there exists an oasis in the middle of today's chaos in order and order in chaos, which has been spared from being flooded with modernity, and its substantial part rests in still waters of traditionalism that goes two thousand years back. Deep streams of modern philosophy, sociology, quantum mechanics and computer science do not violate its peace. This sphere is shielded from the turbulent social turmoil and upheavals by its appeals to traditional values, vital for the on–going existence of our world and protected as the basic mission. Without such values, this world would – in the opinions of traditionalists – undoubtedly cease its existence.

Although such characteristics might apply to numerous fields of human activity, it is law that is meant here. More precisely, it is that part of the legal system that is most tightly connected to the two–thousand–year old tradition of Roman law. Throughout the history of civilized Europe, it has retained its basic set of instruments and the basis of its conception, as originated in the classical Roman law of antiquity – namely private law.

II.

There are two contradictory tendencies which may be identified as affecting the area of private law in the Czech Republic. The first tendency is marked by the need to overcome the legacy of socialistic orientation of the law between 1950–1989 and the necessity to harmonize the Czech law with the law of the European Union, serving as the precondition for the admission of the Czech Republic to the European Union. This tendency presented legislative bodies with the need of reconstruction of the current private law legislation. The second tendency in private law consists, with respect to its loyalty to traditionalism, in the resistance of any efforts to modernize it and bring it in harmony with the state of today's science and technology.

At first sight private law in the Czech Republic has, in the past decade, been going through a period of remarkable turmoil that seems to be far from finished. Yet, the dimensions of changes in the area of private law can already be described; moreover, it is already possible to see what limits the attempts at modification of Czech private law may reach and, most importantly, what limits will not be breached.

The change of the social system, connected with the removal of the state–governed economy and the restoration of market economy after 1989, eventually provoked the necessary change in both the contents and the system of private law. It was, above all, necessary to clear private law of its political and ideological focus that aimed at reaching the targets of real socialism. This stage was completed between 1990–1992 and as a result, private law has started regulating social relationships among private individuals in a way typical of traditional trends of development of private law in central Europe, introduced namely by the Austrian General Civil Code (1811) and the German Civil Code (1900). These changes were consulted neither with members of the public nor at an interdisciplinary forum. They presented a mechanical return to institutes from previous legal regulations and did not reflect the developmental tendencies and changes in social relationships that occurred in the meantime and there is no doubt about their further development. As a consequence, extensive changes of the Civil Code (Act No. 40/1964 Coll.), the Labor Code (Act No. 65/1965 Coll.) and the Family Act (Act No. 109/1964 Coll.) have taken place. The then Commercial Code (Act No. 109/1964 Coll.), which had served the purposes of socialistic state–governed economy, would not hold under the new circumstances and therefore it was substituted with a new Commercial Code (Act No. 513/1991

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Coll.). The only part of private law system that has remained unchanged and retains its original form is a law regulating the area of international private law (Act No. 97/1963 Coll.).

The above mentioned changes resulted in adjusting the main codes of private law to the immediate needs and orientation of the Czech society. Nonetheless, there has also been a secondary effect, the loss of internal organization and philosophical coherence of the private law system as a whole. Thus, even though the current Czech private law offers partial solutions of legal situations, it cannot persuasively stand for a balanced harmonized system reflecting the values of today's society.

III.

Already during this time, it was obvious that the situation created by the changes of most codes of private law and, in particular, by the adoption of the new Commercial Code in the first half of the 1990s, could not, in the long run, bring a satisfactory solution. Private law of the Czech Republic, as it is currently regulated, does not actually represent anything else but the grafting of legal institutes for regulating relations in a market economy onto the conceptual and systematic basis of socialist branches of law. On the one hand, it was found that if private law is freed from the ideological basis and orientation, it may play its role in various social conditions in a relatively flexible manner and under the most diverse social conditions. On the other hand, it has become apparent that the lack of a homogeneous legal and philosophical basis and the exaggerated adherence to a traditional set of legal instruments resulted in a schizophrenic and inconsistent state of private law. We are witnessing that actual social relations are found to be beyond the scope of regulation given by traditional private law codes. Such situations require a prompt pragmatic reaction of both law–making and law–applying bodies in the form of exceptions to rules, exceptions to exceptions to rules, etc. What is even worse, social relations are (mainly in the case of some activities of global character) governed by rules that are actually not a part of the system of private law itself, as it is traditionally understood. They are influenced by the interests of parties and are asserted without any clear rules set in advance. The response of private law norms to the consequences of change in social relations is troublesome and complicated but, most importantly, non–systemic and lacking a conception. There are even cases to which the law has not been able to respond at all.

Correspondingly, case to case solutions in regulating social relationships, that use traditional legal techniques on the basis of traditional conception of private law, highlight the technical character of legal adjustments that have been and are to be carried out. Disputes in a form of discussions have been taking place since the very beginning of the present system of private law of western and central Europe.

IV.

It was already at that time that, in the area of private law, the need was felt to react to the inconsistency of legislative solutions adopted and initiate – after a period of sufficient preparation – a fundamental reconstruction of private law as a whole. The first team of experts working on the re–codification of private law was formed at the beginning of the 1990s. Soon after, the first projects for the future civil law code were introduced. At the same time, members of the professional public focused predominantly on discussing the following issues:

a) the fundamental form of the private law system
b) harmonizing the Czech private law with the law of the European Union

Other issues connected to the reconstruction of private law only complement the two priorities listed above.

One might object that today, given that the new basic civil law code has not yet been discussed in the Parliament, it is still too soon to start evaluating. Despite that, the general conception of private law, passed by the Government on April 18^{th} 2001 in the form of the intended subject matter of the new civil code, is currently being finished.

The new civil code builds on the basic and insufficiently surpassed division of law into private and public law. This starting point was gained after a hard struggle between creators of the conception and totalitarian traditions of classifying the law according to types of the regulated social relations. This classification did not recognize private law as an independent legal discipline. The contents of private law have been remarkably extended. At first, there are the issues related to the fundamental status of an individual reaching from legal capacities, the right to the protection of personal rights and regulation of intellectual property rights to the matters related to participation of an individual in groups of special legal importance (family). Secondly, there is the regulation of proprietary rights among individuals (ownership, obligations, succession).

Among the individual branches of social relations from the area of private law that are to be found present in the new civil code in significant extent, there are, above all, those relations regulated by the norms of family law, commercial law, labor law and international private law. At this point, we are actually facing the biggest difficulty in passing the new civil code, which is caused by the efforts to create a common uniform code that would cover at least some parts

of all the branches mentioned. Here, we can trace both reasons partly common to all the branches and reasons different for each.

A common reason is represented by the long–lasting refusal to view private law as a whole and to introduce a homogeneous conception of private law, which was typical of socialist or, even better, Soviet conception of the system of law.

Special reasons that are different for each branch presented the greatest challenge in putting the common civil law code through.

Family Law. In European circumstances, family law is sometimes viewed as a special branch of private law, sometimes it is considered to be the integral part of civil law. Creators of the new Czech civil code adopted the idea of unity of civil and family life. They argue that family relations are more of a private character and at the same time, they refuse any stronger but just necessary influence of the state power on them. 1) (Cf. Eliáš, K., Zuklínová, M., Principy a východiska nového kodexu soukromého práva, Linde Praha a.s., 2001, ISBN 80–7201–303–0, pp. 26–28)

Commercial Law. Today's Europe generally considers commercial law as a part of private law. Nevertheless, because of numerous state interventions in this area, it partly requires a special legal regulation. Possibly as a result of the negative experience with the independent existence of both commercial and civil codes from 1992 until the present, the new Czech civil law code, often called a commercialized civil code, aims at unifying the regulation of civil relationships and commercial relations to the largest possible extent. As well as in family and labor law, regulation related to the area of public law that enables state interventions and regulation of company law that is included in the second commercial code of 1991 will be regulated separately.

Labor Law. Similarly to family and commercial law, labor law was burdened with the reaction to its totalitarian conception that showed the tendency to use labor force on the basis of general duty of employment. After a period of aroused emotions, the situation has settled and the proposed civil code shall stay independent alongside the labor code that deals with the area of employment relations. Nevertheless, there is a new legal aspect of applying the civil code as a general means of regulation to all cases that are not covered by specific provisions of the labor code.

International private law. Although it was originally assumed that the area of international private law would be incorporated into the framework of the new civil code, it still operates in a form of an independent collision act. Eventually, the proposed civil code counts with a creation of a separate code that would regulate it.

Civil law. Being a part of the new system, civil law will be turned into general private law that will be applied if there is no specific norm that would regulate particular private relationship.

The system of the proposed civil code is built upon three traditional cornerstones of European private law: family, ownership and contract. 2) (Cf. Carbonier, J., Flexible droit, Paris: L.G.D.J.) Correspondingly to this approach and using the methods of the civil code of Czechoslovakia that was proposed in 1937 but never put into practice, the current proposal of the civil code consists of five parts:

The first part includes the subject matter and basic principles of civil law, regulation of legal status of natural and legal persons running a business, representation, general definition of the subject matter of legal relations, i.e. of 'things' in the legal sense, legal facts and statutory bar.

The second part regulates family relationships, particularly marriage (Chapter I), kinship (Chapter II), guardianship, custodianship and other forms of child care (Chapter III) and it also includes the controversial and frequently discussed institute of registered partnership (Chapter IV).

The third part is devoted to absolute property rights. It comprises proprietary rights, i.e. possession, ownership, easement (Chapter I), and surprisingly, inheritance law (Chapter II).

The fourth part is the largest one as it covers the whole system of obligations. Chapter I provides the general regulation of obligations, their creation, change, extinction and security. Chapter II gives the set of 12 types of contractual obligations. Chapter III deals with tort obligations that are mostly focused on the liability for damage and liability for non–material harm. Lastly, Chapter IV regulates other types of obligations, such as quasi–tort and quasi–contractual ones.

The fifth part completes the contents of the civil code with transitional and concluding provisions.

In comparison to the previous state of affairs, the new proposal implements the following principal novelties:

- establishment of a single regime for a 'thing' in the legal sense; living animals are not included here any more
- reintroducing the *superficies solo cedit* principle
- providing a single regime for natural and legal persons and completion of the Civil Code with a part regulating foundations and corporations
- reintroducing the obligatory regime of an exclusively civil law marriage instead of the former possibility to choose between a civil law marriage and a religious wedding
- strengthening the protection of underage children
- introducing the legal regime of partnership of persons of the same sex

- consolidation of the functional elements of co–ownership
- extending the possibility to acquire ownership from a non–owner
- reintroducing traditional classification of easements
- supplementation of inheritance law with some traditional institutes, such as inheritance contract, etc.
- uniting the general typology of contractual obligations in the civil code; less frequent and specific types of obligations are covered by specific acts, e.g. Commercial code
- establishment of the concept of liability for non–material harm (e.g. psychological suffering) 3) (Cf. Eliáš, K., Zuklínová, M., pp. 286–288)

The project for the new Czech civil code shows obvious limitations. Among the most significant ones, we can trace a remarkable degree of traditionalism, partiality to methods and instruments of regulation used in the past and eventually, its little respect to the dynamic development of social relationships or techniques of their realization. Yet, provided it is passed, the new civil code will represent a remarkable step forward in unification and efficiency of private law both in the Czech Republic and the European Union. Its fundamental goal is implementing the concept of free person, as well as protection of his freedom and of his right to attend to his own development and happiness in such a way as does not damage any other, following a Latin saying: *honeste vivere, neminem laedere, suum cuique tribuere.*

Although it might be objected that it is still too early to pass judgements, it is never too early to raise certain objections to the grand–scale intention of recodifying Czech private law. From the very beginning, it was more than obvious that, despite the well–meant intentions of those involved in the discussions over the conception of private law (Karel Eliáš, Irena Pelikánová, Jiří Švestka, František Zoulík, Antonín Kanda and others, including representatives of family law, labour law, etc.) and some of the expressly made, clear and timely demands to have the sense of this regulation clearly spelled out, the sense is not only not directly included but also difficult to extract. The formalism of the legal regulation and the formalism manifested in legal practice form one of the strong and living attributes of private law. The often confrontational nature of the findings arrived at by general courts and the opinions of the Constitutional Court turn out to be some of the products of such a development.

It seems, however, that such a tendency is not necessarily an inevitable one. By contrast, it appears that this tendency has not been and still is not generally accepted in comparable legal cultures. Thus, for instance, French private law is still grounded in general principles, even formulated *extra legem*, which are not directly provided for in legislation and which are often used to deal with complex legal issues of the present time (cf. for instance the role of abuse of law – *l'abus des drois* – in the law of commercial companies and generally in property law).

The weakening of the value system of private law has some other consequences: the loss of the systemic coherence of private law. Integrating features give way to a practice oriented at deconstructing the system of private law, thereby significantly weakening the holistic function of the private law regulation. The burning need on the part of legislators and courts to strengthen, step by step, the authority of private law as a whole and establish its position as a uniformly operating and unifying social phenomenon is not balanced out by actual practice, which goes in the direction of partial solutions while disregarding the state of the whole. The attempts to strengthen features of safety and eliminate partial risks of modern social relations are performed at the expense of the safety of the system as a whole and the elimination of general risks.

Rapid and extensive changes in the regulation of private law diminish the authority and the internal acceptance of norms of private law, as they are presented at an ever–increasing pace to the members of this society. An important factor, by means of which the legal rules could obtain their authority without the necessary power–based enforcement, has been lost: the conviction, on the part of the majority of the addressees of the respective system of norms, of the necessity to observe such norms and their effect in practice.

The content of private law relations, as the core of private law regulation itself, has become a victim to the frequently criticized post–modern deconstruction and fails to look for points of departure from the post–modern skepticism where other social sciences look for them: in finding general trends of development of social relations, in analyzing their effect on the relation between trust and safety on the one hand and risks on the other hand, and in formulating some general requirements for the shape of private law regulation, i.e. the delimitation of social values needing legal protection, the specification of the degree to which private law should bear on their regulation, their systematic arrangement and their transfer into a normative shape.

CONCLUSION

Vis–à–vis the above–stated tendencies, the reality of the modern world of social relations appears to drag private law too much into the service of its everyday needs. Law as an important cultural phenomenon is gradually disappearing from the current world and its

place is being taken up by a complicated, highly structured and functionally more and more limited set of legal rules which lack a sufficiently coherent orientation to the technical aspect of regulating relations, all to the detriment of supporting the goal of law as a functionally arranged and normatively oriented set of values aimed at achieving a harmonious development of a society comprising multiply emancipated individuals.

Private law has, as a result of the tendencies of modernity, come to face a double pressure:

a) The practical life and the requirements aimed at changing the regulated social relations take it to regulate social relations with the use of legal instruments and legislative techniques which, however, move away from simple models and points of departure of the elementary shape of private law, thereby becoming pragmatic and difficult to orientate in. It is increasingly difficult to identify in them the axiological aim of legal regulation. As a result, the realization and implementation of norms of private law often turns out to be, mainly in judicial practice, self–serving: decisions frequently do not ask or answer the question who should, in a given case, be provided protection by the law or the court. Private law is becoming a set of rules whose actual meanings and goals are rarely investigated and proved and do not become a part of a decision.

b) Private law follows its own value system, which is not private law itself but the values forming the image of personality of modern people. The values of private law are, above all, the values of human individuals. Identifying the value system of law means defining the characteristics of human individuals in the philosophical, sociological and psychological sense and in its multi–layered character as shaped from the antiquity until the present. The substance of this characterization has not been affected by modernity; what is changing, though, is the emphasis on its individual structural parts, i.e. the shape of the final model of the modern human person, capable of actively accepting the modernity and actively transforming it within the spirit of fundamental human values. Modernity thus does not rule out but, on the contrary, confirms the necessity for the private law to return to its most fundamental social prerequisites and aims. Its own (functional) sense is to prevent or, as the case may be, remove (deal with) the risks present in the operation of social relations. The point of departure, upon which it bases its procedures, is the presumption of trust in the social relations regulated by private law. The legal expression of trust is the a priori responsibility on the part of each individual for its own behaviour towards others and equity, understood here as the legal equivalent of honesty.

At the same time, however, the protection and the renewal of the relation of trust are the final aims of regulation in the field of private law. The easing of risks or, as the case may be, dealing with the consequences, then forms the means with trust in the regulated relations being the alpha and omega of private law. Subduing the current shape of legal regulation, in its atomized and complex shape, to the social mission of private law may, at first sight, seem to be an insurmountable task. In my opinion, however, we should step out of the shadow cast by the current shape of private law and return to its actual sense as it transpires (respecting the order of the values stated) from the famous maxim which tends to be forgotten in practice: *Iuris praecepta sunt haec: Honeste vivere, neminem laedere, suum cuique tribuere.*

A comment on the re–codification of the civil law

To the starting points and trends of the development of the Czech civil law after the admission of the CR to the EU.

Josef Fiala*

There is no doubt that civil law is one of the cardinal sectors in all historical types of law; it is characterized through its independence in comparison with other sectors. Its role and function had been historically formed in the times of the dominance of the theories that justify the dualism of law employing the view of interest (see the form ascribed to Ulpian: *"Publicum ius est, quod ad statum rei romanae spectat; privatum, quod ad singulorum utilitatem."*) and ending in division of law into the public and private ones. The develop-

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ment of social links and their structure, though, gradually and unavoidably dissipated the original sharp confines between the private and public laws (even if it is still possible to meet the constructs disregarding this fact in both the legal theory and judicature). The interference of public authority into the typically private law relations securing the socially required degree of legal protection, the protection of the less well–off ones may be the proof such situation. (For further illustration we may cite constituent effects of carrying out of the evidence of real estates for the development of factual law relations – originally serving exclusively for fiscal purposes, the choice among different conceptions of starting miscellaneous authorizations, especially for business – as freelance work, notification, registration and state authorization, consumer protection etc.). The integration of the Czech Republic into the European structure creates a suitable occasion for the contemplation over a number of questions that are connected with the preparation of the Civil Code, where its factual competence belongs as well (especially in relation to the subject of the civil law). It is first of all the question of using the positive experience of other European countries, because the binding norms of EU concern the subject of the civil law only in marginal matters.

The mentioned drifts of events were naturally reflected in the discussions on the definition of the civil law concept. It is observed that generally accepted solution has not been found yet. The justified definition of the civil law concept is narrowly connected wit the definition of the concept of other sectors, especially in the sectors where there is a tradition to rank them in the "bosom" of the private law, i.e. primarily in the family, labour, and commercial laws.

In the Czech milieu the whole problem is even more complicated through the conceptual shifts connected with the social changes that arose in 90s of the last century and that lead radical changes in the Czech judicial code. It has been a common knowledge that the previous concept of civil law accentuated the construction that lead to the regulation of legal relations connected to the area of personal consumption of the citizens, and the other relations, first of all the relations of production, distribution and redistribution were dealt with outside the sphere of the civil law. Therefore the concept of the civil law was defined as a set of legal norms that modified the social relations connected with ownership that arise among citizens, and between the citizens and the organizations, and between the citizens and the state, i.e. the spheres of satisfying personal needs of citizens when using the monetary–goods relations. Even though the elimination of the narrow consumer orientation of the civil law formed in such a way during the period mentioned led to some changes in the concrete legal regulations, it did not eliminate all the deformations. The point of intersection of the tendencies mentioned is the contemporary dismal state of fragmented, full of gaps, and little functioning tangle of different civil law regulations, which can only be remedied through an elaborate conceptual codification of the civil law.

It is absolutely essential to respect the conceptual diversity in the framework of the codifying work and through this also a relative independence of justice and its system on the one hand, and the legislation and its manifestation, i.e. legal regulations, as well as the connections and structure of the legal regulations on the other hand. Jurisprudence and its system are unbiased categories, and it is possible to reveal the system through cognitive human activities more or less successfully. Legislation, on the other hand, may only react to the social need of legal correction of the social relations being developed, and the result of such activities is the complex of legal regulations. This complex, as well as the object of the correction and methodology of individual regulations, may reflect even some subjective elements, including the influence of tradition, and therefore it is of a subjective–objective nature. It enables, in the end, a discussion on whether a particular material will be regulated through a separate regulation, or on creating complex institutes in the secondary structure, etc. This is the reason why the complaints on missing legislation, that are so frequent in the media and on the political scene, show only a conceptual confusion and an absence of adequate knowledge, as well as misunderstanding of the regulative function of the law. These findings mean e.g. that the family law cannot be a part of the structure of the civil law (compare the last objective aim of the civil law, and the published bill of the civil law), and for the same reasons it is not possible to put a sign of equality between the civil law a the civil code. To have the full picture it is necessary to take into account also the system of pedagogical disciplines that can reflect other features.

At the present state of the development of the civil law theory it is possible to qualify the civil law as a complex of legal rules that define the personal and property status of individual subjects (persons), regulate the basic financial circumstances among them, legal principles that the juristic and physical persons follow at their interrelations, both personal and property ones, that are based on the mutually equal status, and also the legal means of rise, securing, change and the end of the rights and duties connected with such relations, and sanctions for the violation of the subjective rights and duties derived from the method of the equality of the subjects. It is obvious that the matter in question is very extensive, and a question arises whether it must necessarily be incorporated into one single regulation or whether it may be divided according to further criteria into a number of mutually interrelated regulations. This interrelation may be of varied nature, there might be regulations that are on the same level of importance or the regulations that

are concerned with the relation of generality and speciality; at the same time the historical experience of a number of European countries with the forming of codes of law is also projected to the problem. I want to emphasize clearly, that I consider any discussion on this level a distraction, a manifestation of diverse political games, because the quality of the legal work must be on the first place. To the same category I rank the considerations whether the code of commerce should be maintained even after the commercial has been codified and in what form. (If there should a new codification or amendment should take place.) For the application practice the quality of legal regulation is far more important.

From all the above-mentioned reasons I consider as utterly necessary to respect the following postulates:

a) All aspects that are common to relations that form the subject of the civil law must be treated consistently, on principle in one only regulation (e.g. the qualification of the term of the civil law relation, description of its elements, including representation, the regulation of legal facts, objective rights, general part of obligations).

b) To judge consistently the importance of the specific features of certain relations, that manifest the diversity in the legal status of their subjects, and after having ascertained sufficient degree of integration of diversity proceed to the modification of specificities, which may be ranked complexly in an instruction that regulates the aspects that belong to the a) group or in a separate code (e.g. modification of property relations in marriage or in the intended registered partnership, the influence of gaining the business licence on the status of the physical and juristic persons in the undertaking relations).

With regard to thus formulated requirements it is obvious that I do not refuse special instruction that regulate the relations among business people, relations among family members, relations among the employees and employers, but only to an extent that is justified through the diversity of such legal relations, where such diversity is not only an ad hoc set of peculiarities, but is biased to be integrated in a proper way. In no case, though, should such special modification be performed through codes, due to the respect for the traditional status of this kind of legal regulations.

Some notes on a draft of the new civil code

THE PROS AND CONS OF THE NEW CIVIL CODE

Kateřina Ronovská*

I. INTRODUCTION[1]

There has been a professional debate going on in the Czech Republic for several years concerning the future conception of civil law and the related issue of drafting a new code[2] to replace the existing regulation, which is no longer suitable.

There is a general agreement that the deficiencies of the current regulation in the field of civil law have to be dealt with not by means of further amendments but by means of "a structural change, i.e. a new codification of private law as a whole"[3]. This is because the current Civil Code and the entire conception of private law significantly deviates from the standards of the continental legal culture as well as the local pre-WWII legal traditions.

The discussions concerning the new conception of civil law have not been concentrated into the past few years – quite on the contrary: certain attempts at the improvement of the situation in the field of private law

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[2] Eliáš, K., Zuklínová M.: Principy a východiska nového kodexu soukromého práva [Principles and Points of Departure for the New Private Law Code], Linde, Praha 2001, p. 107: *"The Civil Code will be reformed in the spirit of a complete recodification. Its content (by preferring a uniform value system), systematic arrangement, selection of terminology, as well as the organization and form of the individual normative provisions will create an overall framework and normative base for the entire area of private law."*.

[3] Knapp, V., Knappová, M., Kropáč, L.Švestka, J.: Nad stavem a perspektivami soukromého práva v České republice [Reflections on the Situation and Perspectives of Private Law in the Czech Republic]. Právní rozhledy č. 3/1995, cf. also Kanda, A.: Několik kritických poznámek k rekodifikaci soukromého práva [Some Critical Comments on the Recodification of Private Law]. Právní rádce č. 2/1999, p 5 and subsequent pages.

may be observed as early as the 1990s. However, more than 15 years have passed without the re–codification of either private law or other legal disciplines, most notably criminal law. Legislators have limited their attention merely on amending the existing regulations, amending the new amendments, etc. Some acts and codes have been amended as many as fifty times and this has resulted in a significant complexity and disorientation on the part of both the lay public and legal professionals.[4]

This said, it might be supposed that the re–codification of the individual branches of law, primarily private law, could lead to a stabilization of the legal system, the renewal of trust in the rule of law and the reinstitution of legal certainty.[5]

The crucial question, however, is whether it is possible and necessary to perform a codification at all, especially with view to the fact that certain phenomena can be perceived in the society which might be best labelled as "favouring de–codification".[6] These include the fast pace of changes, the existence of special legal regulations due to their specificity or group interests, the effect of EC law, etc.

II. ATTEMPTS AT RE–CODIFICATION IN THE FIELD OF PRIVATE LAW

The situation in the area of private law is not currently very satisfactory in the Czech Republic. There is a substantial fragmentation of private law to be found in various legal regulations, which is the result of past times – the so–called "socialist re–codification" in the 1960s. This mainly followed ideological aims, while disregarding such principles as the division into private and public law, the arrangement and internal relatedness of the entire system of private law, etc.

Presently the most important legal instruments regulating private legal relations include the Civil code, the Commercial Code, the Labour Code, the Family Act and the Act on International Private and Procedural Law. In addition, this area is governed by many other legal regulations.

The issue is made more complex by conceptual changes which affected the Czech system of law in the 1990s. The previous conception of civil law concerned mainly legal relations arising in the area of citizens' "personal consumption"; while other legal relations were regulated outside of the field of civil law[7]. The socialist basis of the Civil Code remained unchanged despite its numerous amendments. A conceptual change was brought about by the so–called "major" amendment of the Civil Code (No. 509/1991 Sb.), which modified the Civil Code to the new social situation in the Czech Republic after 1990. However, the amendment was meant, from the very beginning, to serve merely as a temporary tool to be replaced in the future with a complex legal regulation of private law.[8]

The current legal regulation may be characterized by the absence of any systematic structure. However, I believe that the idea of a system is important and forms one of the main reasons why private law should be codified.[9] It cannot be doubted that this is a crucial issue requiring immense care, consistency and responsibility in the process of drafting such codification. The new legislative regulation should function as a fundamental norm and a unifying feature for the entire area of private law.

The first attempt at re–codifying private law (referred to as "the first proposal" below) was made as early as 1994–97. It was characterized by the effort to make the regulation of private law as broad as possible, and included the regulation of business relations (though it intended to provide a special regulation for business companies), fundamental provisions about employment contracts and employment in general, private rights and rights to non–tangible estate, securities, insurance agreement and the protection of the weaker contracting party. It clearly demonstrated the effort to overcome the fragmentation of private law, so characteristic for the previous regulation.

As regards the structure of this proposal, it was based on the pandect system and the division of law into absolute and relative.

[4] More details in GERLOCH, A.: Několik poznámek k rekodifikaci soukromého práva [Some notes on the recodification of private law]. Acta Universitatis Carolinae – Iuridica 1–2, Praha 2003, p. 28, cf. also Pelikánová, I. Kodifikace českého soukromého práva, zejména vzhedem k úpravě obchodních vztahů [Codification of Czech private law, mainly with respect of the regulation of business relations], Bulletin advokacie, 3/2003, p. 41.

[5] For a similar opinion, cf. Gerloch,: ibid, 28.

[6] Cf. ZOULÍK, F: Úvaha o systému soukromoprávního kodexu, Pocta Martě Knappové k 80. narozeninám, [A reflection on the system of the code of private law, Tribute to Marta Knappová on the occasion of her 80th birthday] p. 446.

[7] The concept of civil law was defined as a set of legal norms arising between citizens themselves, between citizens and organizations or citizens and the state, and the areas of satisfying citizens' personal needs in relations based on the exchange of money and goods, cf. FIALA, J.: Poznámka ke kodifikaci občanského práva [A note on the codification of civil law], in: Východiska a trendy vývoje českého práva po vstupu České republiky do Evropské unie, Masarykova Univerzita 2005, Brno, p 131.

[8] Nowadays, the key legal regulations in the field of private law include, above all, the Civil Code, the Labour Code, the Commercial Code and the Family Act, but the legal regulation is scattered in many other legal regulations governing relations in private law.

[9] For a similar opinion see ZOULÍK. F.: ZOULÍK, F.: Pocta Martě Knappové k 80. narozeninám [Tribute to Marta Knappová on the occasion of her 80th birthday], Praha: Aspi, 2005, p. 449.

Part I: General part

Absolute rights: Part II: Personal rights and rights to non-tangible estate, Part III: Property rights

Relative rights: Part IV: Obligations *ex contractu*, Part V: Securities, Part VI: Obligations *ex delictu*, Mixed absolute and relative: Part VII Family law, Part VIII Inheritance law

The virtue of this proposal consisted in its attempt at unification and systemic continuity, which was connected with the desire to overcome the said fragmentation of the existing legal regulation.

Critics of this conception, including professor K. Eliáš – the originator of the current (i.e. second) proposal of the new civil code, objected mainly to the "encyclopaedic" character of the proposal, which was manifested in the fact that all private law institutes were meant to be included in a single code.

After 2000, the re-codification attempts have found their tangible outcome in the legislative intent of the civil code, as accepted by the decision of the Government of the Czech Republic on the approval of the legislative intent of the civil code (codification of private law) No. 345/2001 of 18 April 2001.

Professor Karel Eliáš, professor at the Faculty of Law at the University of West Bohemia in Pilsen, was appointed as the main drafter of the new bill of the civil code.

The first draft version of the general part of the civil code, divided into individual sections, came in 2002, soon after followed by the special part of the proposed new code. Subsequently, this version was submitted for discussion to the re-codification committee of the Ministry of Justice of the Czech Republic[10], which resulted in further modifications of both the general and the special parts. It was already at this early stage that the main drafter made it possible, by publishing the general part in professional journals and on the Internet, for other legal professionals to get involved in the formulation of this key legal norm by means of submitting their comments.

In spring 2005, the draft version of the new civil code was published in the form accepted by the Ministry's re-codification committee and submitted to legal professionals for a wider discussion. At present, this version of the new civil code is the focus of numerous professional conferences held not only in the academic environment of individual Czech faculties of law and the Academy of Sciences of the Czech Republic, but also in many other institutions; the main drafter – professor Eliáš – is welcoming to discussions about individual contested points.

The aim of the codification – a publicly declared one – is to establish discontinuity, i.e. to cancel the existing Civil Code No. 40/1964 Sb., as subsequently amended, and replace it with a new code meant to serve as a unifying feature for the entire area of private law.

The purpose of the civil code as the fundamental code of private law is to embrace the complete regulation of general civil law and provide general principles applicable for private law. The application of the codification of private law will be extended mainly into the sphere of family law, business law and, to a limited extent, also employment law.

The proposed version is based on the structure of the 1937 Czechoslovak civil code, while taking into account modern trends perceptible in the codifications of private law abroad (e.g. in the Netherlands and Quebec). Its conception departs from the monistic approach of a commercialised civil code, which was determining for the first proposal of the civil code in 1996.

Together with the coming into effect of the new Civil Code, a new Act on Commerce was supposed to come into effect too, replacing the existing Act No. 513/1991 Sb. (the Commercial Code), as subsequently amended. This new law should, from now on, include mainly the legal regulation of business companies and associations, as well as some other issues. The majority of provisions regulating business obligations should be cancelled. As a result, the duality of the law of obligations, treated both in civil law and business law, should be removed.

The regulation of employment relations should be preserved in a separate regulation, but it should be subsumed under the system of private law as a special legal regulation, as opposed to the general regulation provided for in the proposed version of the new civil code (i.e. the relation of *lex specialis – lex generalis*). In this way, the current faulty situation should be removed, namely the existence of the Labour Code as an entirely independent legal norm without any systematic connection to other branches of private law, which is a unique conception without any parallel among European legal systems[11].

The Act on the International Private and Procedural Law should be unaffected by the re-codification, although the original proposal also included the regulation of conflict of laws.

The Family Act No. 94/1963 Sb. should be abolished in its entirely. The regulation of family law should, under the proposed legal regulation, be subsumed in the code.

[10] This commission consists of professionals from the field of civil law, appointed from among university teachers and the individual legal professions – judges, attorneys-at-law, notaries public, etc.

[11] Some months ago, the governing Social Democratic Party, supported by deputies from the Communist Party, succeeded, despite the resistance of other parliamentary parties, in passing a "new" Labour Code. This, however, is hardly compatible with the conception proposed in the draft version of the new civil code.

As stated above, the conception anticipates the existence of independent business and employment acts and a whole range of other special laws, e.g. on copyright law, law of cheques and bills of exchange, etc.

As regards the structural arrangement, the draft version is divided into the following sections:

Part I. General part, Chapter I. The subject matter of regulation, principles, Chapter II. Persons, Chapter III. Representation, Chapter IV. Subject of legal relations, Chapter V. Legal facts, Chapter VI. Limitation of actions.

Part II. Family law; Chapter I. Matrimony, Chapter II. Family and kinship relationship, Chapter III. Guardianship and other forms of care for minors, Chapter IV. Registered partnership

Part III. Absolute property rights; Chapter I. Property rights, Chapter II. Inheritance law

Part IV. Relative property rights; Chapter I. General provisions on obligations, Chapter II. Obligations ex contractu, Chapter III. Obligations ex delictu, IV. Obligations arising due to other legal reasons

Part V. Common, transitional and final provisions

The merits of the proposal include its connectedness to constitutional instruments (mainly the Charter on fundamental rights and freedoms) and international documents. Positive acceptance has also met the explicit formulation of principles of private law, the refinement and development of the legal regulation on the protection of personal rights[12], and the emphasis which is placed on the imperativeness of this fundamental code.

The discussion of this proposal has also seen many critical opinions concerning both the conceptual and the structural conception, as well as its content.

The proposal has been attacked as having an insufficient internal structure, namely that its arrangement is not easy to explain in terms of a common differentiating criterion. Opponents have also raised the objection that the system is being justified by a certain value scheme expressing the principles of private law, which some authors consider to be a dated conception[13]. Other criticism has been directed to the fact that the proposed version does not codify everything that falls within the scope of private law. The critics have also claimed that the systematic placement of the protection of personal rights into the general part of the civil code is questionable[14].

There is another controversial issue – namely the new terminology introduced by the draft version of the new civil code and aimed to establish discontinuity with the legal regulations from 1950 and 1964. However, there are some voices, getting stronger recently, which caution that the current legal terminology should be kept – in the event that such terminology is customary, unless it can be reliably and factually proved that the use of certain expressions is in conflict with the conception of the draft proposal and private law as such.[15]

Other critical comments are directed to the fact that the proposal does not yet deal with the connection between the new civil code and other legal regulations.[16]

As regards the content, I am not going to dwell on it in detail due to the limited scope of this contribution. However, I would like to mention at least some of the novelties introduced by the draft proposal of the new civil code, e.g.:

- extension of the protection of personal and personality rights,
- extension of the general regulation of legal persons (the current regulation has 7 provisions), inclusion of legal regulation of corporations and foundations in the civil code,
- unification of the concept of a 'thing' in the legal sense
- return to the principle of "superficies solo cedit",
- unification of the legal regulation on the limitation of acts (in currently valid law, there is

[12] The personal rights of natural persons (and similarly those of legal persons) are thus becoming – next to traditional property rights – another pillar of private law. This modern trend is respected by the proposed draft of the new civil code. More information is provided in Švestka, J., Zoulík, F., Knappová, M., Mikeš, J.: Nad vývojem i současným stavem rekodifikace českého soukromého práva [On the development and the current situation concerning the re-codification of Czech private law], Acta Universitatis Carolinae – Iuridica 1–2, Praha, 2003, p. 69.

[13] Cf. Zoulík, F.: Pocta Martě Knappové k 80. narozeninám, Praha: Aspi, 2005, p. 451.
Note: According to Eliáš, the draft proposal should clearly express "the fundamental principles on which private law is built. The provisions of the proposal follow the protection of an individual human being, its personal rights and position, family and property, including the regulation of what is to happen to its property after death, also with an emphasis on the binding nature of a promise...". I.e. there is the triad family – property – contract, cf. Eliáš, K.: Principy a východiska nového kodexu soukromého práva [Principles and Points of Departure for the new codification of private law], Praha: Linde, 2001, p. 74.

[14] E.g. rights to intangible property are left in a special regulation without a clear connection to the code, cf. Zoulík, F.: op. cit., p. 452.

[15] Cf. Gerloch, A.: Několik poznámek k rekodifikaci soukromého práva. Acta Universitatis Carolinae – Iuridica 1–2, Praha 2003, p. 30.

[16] Cf. Švestka, J., Zoulík, F., Knappová, M., Mikeš, J.: Nad vývojem i současným stavem rekodifikace českého soukromého práva, Acta Universitatis Carolinae – Iuridica 1–2, Praha, 2003, p. 71.

a separate regulation of this concept in Civil Code, Commercial Code and Labour Code,
- contains a new regulation of joint ownership,
- renews the building right etc..

The proposal further aims to unify the institutes of the law of obligations, mainly its rationalization and the removal of duplicities.

III. SOME NOTES ON THE PROPOSED REGULATION OF LEGAL PERSONS

Under the approved legislative intent, the first part of the draft proposal of the new civil code should also contain the general regulation of the position of legal persons, including the positive specification of the legal regime of associations and foundations as special legal forms of subjects of private law.

The Dutch regulation is conceived of in a similar manner and, in this connection, it appears to be very inspiring as it provides a good base for a well functioning civil society in the Netherlands. In my opinion, the Dutch civil code is currently one of the most modern and most thoroughly formulated codes of civil law in the world.

The draft proposal of the new civil code contains a relatively extensive general part, which is common for all legal persons; with 'legal person' defined in Section 22, subsection 1 as follows: "A legal person is any person identified as such by the law." The proposal thus aligns itself with the theory of legal fiction and considers the legal person to be a purposeful creation of law.

The 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 types of legal persons, include the legal forms of associations, foundations, endowment funds and institutions (ústav). The current Act No. 227/1997 Sb. on Foundations and Endowement Funds should be cancelled as well, and the legal regulation of foundations should serve as *lex generalis* for legal persons of the foundation type. There is also the intention that the Act No. 83/1990 Sb. on Citizens' Associations 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 also anticipates the cancellation of the Act No. 248/1996 Sb. on Public benefit institutions. However, public benefit institutions founded previously will be able to continue their existence and will be regulated by the existing legal regime, while newly founded beneficiary societies will have the legal form of "institutions".

The 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. The new code defines a foundation [nadace] as a legal person established under private law by a purposeful unification of property which should, by its fruits, serve permanently to a useful goal. The permanent character is what distinguishes foundations from endowment funds. The main difference between foundations and endowment funds on the one hand and institutions on the other consists mainly in the purpose for which they are established. Foundations and endowment funds are characterized by the accumulation of financial means which are then, by means of foundation contributions, provided to third parties for the performance of services beneficial to the public. Institutions, by contrast, are characterized by a purposeful unification of property which may be subsequently used for the direct performance of services (activities) beneficial to the public. In the Netherlands, the legal form of a foundation is used in all of these cases; so this is a specifically Czech situation, although "institutions" – "Anstalten" in German – occur in the legal systems of some other European countries, too.

As regards corporations, the proposal takes over some aspects from the currently valid legal regulation of associations (Act No. 83/1990 Sb.). Others features are "borrowed" from the legal regulation of cooperations and other business companies, which is, in my opinion, not a good thing. However, 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.

A novelty which was successfully included in the proposal is, among other, the definition of the establishment of an association as a legal person. The current legal regulation, which is based on the registration principle for the establishment of associations[17] is replaced by the principle of the freedom of establishment. It is not uninteresting to note that the draft proposal has found inspiration for this conception in the Dutch regulation.

The proposal also anticipates the definition of what a 'public benefit' is understood to be – there should be a separate law dealing with issues related to the 'public benefit' status, its acknowledgment, etc. But this issue has not been entirely clarified yet. Neither the current Civil Code nor any other legal regulation contains an explanation of what 'public benefit' is. This is, therefore, an entirely new term which needs to be delimited. This, however, is quite difficult.[18]

You may be surprised to find out that from the point of view of taxes, the Czech legal system *does*

[17] In the case of trade union organizations and employer organizations, this principle is modified, due to the fact that the Czech Republic is bound by international agreements of the International Labour Organization, by the evidence principle.

not distinguish between a public and a private company, thereby providing public advantages also to private activities or, to put it another way, legal persons which exert solely private activities. Tax advantages are conditioned by the *legal form*, not the purpose of establishment – or activity – really performed by a given legal person. At the same time, individual tax laws are not uniform and sometimes are even chaotic in setting up the group of subjects which enjoy tax advantages. Another paradox is that a certain type of activities, more specifically "sport" (even professional sport, i.e. performed on a commercial basis) is declared by a special law[19] to fall within the scope of 'public benefit' even without there being a systematic or any other reason with view to other types of activities which are, in their character, in the scope of 'public benefit' without any dispute.

A problem encountered in the current legal practice is the absence of a unified subsidy policy on the part of the state for subsidies provided from public resources.

It clearly follows from what has been said so far that there is an indisputable need for a certain correction in this area. The question remains, however, in what manner is should be carried out, whether this should be done on the general level or, similarly to the regulation here in the Netherlands, merely on the level of fiscal law.

The discussions on the meaning of the term 'public benefit', the establishment of the status of 'public benefit' in the Czech legal system and other related issues have been going on various levels for some time and will certainly continue in the future.

V. CONCLUSION

There is a general agreement that a new code should provide a unification of the entire area of private law. It should formulate the fundamental principles and be sufficiently general in order to resist pressures at being amended. Most important and decisive, however, is the quality of the proposed code and its applicability in practice. Its conception, structure and content, as well as everything else, should be simply a means of achieving such a quality. In spite of that, the final shape of the new code of private law is presently still being discussed among professionals, legislators and politicians. We will still have to wait for some time before the final version is ready.

[18] For a similar opinion, see CHOLENSKÝ, R,: Když se řekne veřejná prospěšnost právnické osoby [What 'public benefit' of a legal person is]. Právní fórum, *2*, 2005, č. 5, příl. Via iuris, č. II/2005, pp. 25–29.

[19] Cf. Act No. 115/2001 Sb., on the Support of Sport, as amended by Act No. 219/2005 Sb.

Czech family law after the Czech Republic has acceded to the European Union

Zdeňka Králíčková*

1. INTRODUCTION

After the Czech Republic has acceded to the European Union, the Czech family law has not changed much. There are more reasons for this. Especially, since May 1st, 2004 until today, a relatively short period of time has elapsed. It is also necessary to mention that major changes in the Czech legal order had already occurred and had to occur immediately after 1989.

The main reason, however, is the temporary non–acceptance of the *Treaty establishing a Constitution for Europe*, which would have included, among other things, also the clause on *respecting family life* (Article II–67), *the rights of children* (Article II–84), and *family life* (Article II–93), and which would definitely have had, together with the judiciary, direct and indirect influence on the development of domestic legal environments, including the Czech one.

An important cause is also played by the fact that in contemporary European Union, family law plays only a minor, although not negligible, role through the human rights and freedoms, which until now on the organisational level belongs under the institutions of the

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Council of Europe. For the development in the Czech family law until now, the legal and political activities of the Council of Europe is therefore much more significant.[1] This, however, might change exactly by the accepting the proposed *Treaty establishing a Constitution for Europe* that should include – in contrast to the community law up to the present moment – also a human rights catalogue. A different issue lies in the unifying tendencies that are beginning to take shape in the *principles of the European family law*, which could play their role at the beginning, at least when opting for the law with obligations with a foreign element,[2] just as it is with the principles of the European law on conventions, or with the principles of international trade conventions UNIDROIT.

Until now, the acceptance of the Czech Constitution and of the originally Czech–Slovak Charter of Fundamental Rights and Freedoms and especially of a fair number of human rights conventions was of key importance for the Czech family law. The growing respect towards human rights, international conventions, and to harmonisation and unification tendencies in the sphere of the traditional institutes of the European continental family law have in a positive way influenced and still influence Czech family law and leads to the legally and politically optimistic views as regards the perspectives of its future development.[3]

When speaking about the individual international conventions significant for Czech family law, which the Czech Republic has acceded recently, we have to name especially the universal *Convention on the Rights of the Child*, the European *Convention for the Protection of Human Rights and Fundamental Freedoms, European convention on the Exercise of Children's Rights, European Convention on the Legal Status of Children Born out of Wedlock, European Convention on Adoption of Children*, the Hague *Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, the Hague *Convention on the Civil Aspects of International Child Abduction*, and the Hague *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, and the European *Convention on Contact Concerning Children.*

In connection with this, it is therefore also necessary to draw attention to Article 10 of the Constitution of the Czech Republic, which states that the announced international convention, to whose ratification the Parliament had consented and by which the Czech Republic is bound, form a part of the legal order; if the international convention states something different from the law, the international convention is to be used.

The acceptance of the above-mentioned international conventions led to and leads to, among other things, also to the new perception of the Czech family law, its more cultural interpretation and application, and last, but not least, to the growing interest of the Constitutional Court in the conformity of the Czech family law with European human rights standards.[4]

Last, but not least, it is necessary to mention the precedence law of the European Court of Human Rights in Strasbourg, especially in the case of Article 8 of the *Convention on the Protection of Human Rights and Freedoms* (right on respecting private and family life).[5]

The aim of this contribution is neither the criticism of the contemporary state of the Czech family law – nor of the law on family in its original wording of 1963,[6] nor its non-conceptual, direct or in-

[1] Cf. HADERKA, J. F.: The impact of the Council of Europe norms on the modern family law [in Czech]. Právní praxe, 1994, No. 9, p. 507, REQUENA, M.: Activities of the Council of Europe in the area of family law [in Czech]. Právní praxe 1999, No. 2/3, p. 132 ff.

[2] Cf. BOELE-WOELKI, K.: The way to European family law [in Czech]. Právní praxe, 1999, No. 2/3, p. 125–126 and further references ibid. in remark 39.

[3] To the general issues of the evolution of the Czech family law, cf. KRÁLÍČKOVÁ, Z.: Czech family law: the development, current state, and perspectives [in Czech]. Právny obzor, 2003, No. 5, p. 487–508.

[4] Compare judgement of the Constitutional Court No. 72/1994 Coll., in the case of the abolition of § 46 of the Act No. 94/1963 Coll., on family, in its original wording.

Further, compare the judgement of the Constitutional Court No. 476/2004 Coll., in the case of the abolition of § 5 par. 1, last clause, § 8 par. 4, and § 41 par. 2 of the Act No. 109/2002 Coll. on the exercise of special treatment in an institution or protective education in school institution and on preventative educational care in school institutions and on the changes of other laws. These clauses enabled the court to put a child not only into an institution, but also to a "contractual family", without further specifying the conditions and the definition of the contractual family.

[5] For general information see BERGER, V: The judiciary of the European Court of Human Rights [in Czech]. Praha: IFEC 2003, p. 357. On the concrete influence of Strasbourg judiciary on Czech family law, cf. HADERKA, J.: The case Keegan versus Ireland [in Czech]. Právní rozhledy, 1995, No. 8, pp. 311–313.

[6] On the questions of the development and the basis of the communist law, including Czechoslovak law, see the work of RODOLFO SACCÒ: On some issues of the basis of the civil law of the communist countries [in Czech]. Právník, 1969, pp. 801 and following, Czech translation by OTTO KUNZ. The author states here that of all the civil law legislation valid in the communist countries, it is the Czechoslovak and the Soviet Union ones that reflect the most conscious deviation from the Roman law patterns. It might be added that it is exactly this fact that significantly inhibits the process of the transformation of the civil law in the Czech republic nowadays.

On this issue further compare the conclusions of JÁN LAZÁR, who states that the Czechoslovak civil law was a markedly totally anomalous and even for the situation before 1989 an inadequate and unsuitable system of the overall arrangement of the property

direct, amendments.[7] Many words have already been said with respect to this.[8]

It is generally only possible to agree with the opinion that the undesirable state of the frequent legislative changes, especially the changes affecting marriage and family, weakens the stability and certainty of the legal order and in its consequences, it influences the level of law awareness.[9] The result of the development after 1989 is a bleak provisional situation, which has been named, in the Czech literature in connection with the necessity of re–codification of the Civil Code, "an open–air museum of the Soviet understanding of the law."[10]

The aim of the following lines are, after the brief summary of the legislative development in the 1990s or rather the attempts at a major changes within the re–codification of the civil law, especially thoughts *de lege ferenda* on the Czech family law in European context.

2. THE INEVITABILITY OF THE RE–CODIFICATION OF THE CZECH FAMILY LAW WITHIN THE CIVIL CODE

The attempts at re–codification of the Czech family law can be counted with fingers of one hand:[11]

In the first half of the 1990s, the abolition of the Family Act and the implementation of the norms concerning family law into the existing Civil Code as its last part were suggested.[12] In connection with this, it has among others been stated in the literature dealing with the re–codification of the private law family relationships that the implantation of the family law into the existing Civil Code would only increase its inconsistency reached by the so–called large amendment of 1991 (compare Act No. 509/1991 Coll.).[13] As a starting point from the bleak state of the art, the reform of the private law family regulation in two detached phases was recommended: first, the absolutely necessary changes in the existing family law regulation were to be made in the form of an amendment to the Family Act, and later on the coherent modern family law regulation was to be created, which would then be systematically integrated into the new basic private law regulation, i.e. the Civil Code.[14]

The first attempt at the re–codification of family law, or its inclusion into the new Civil Code, was more or less rejected by the specialists.[15] Family law was to be included in the seventh part of the Civil Code under preparation.[16]

Basic inconsistencies of the Family Act thus began to be removed only in 1998 in connection with the acceptance of the controversial so–called large amendment of this regulation (Act No. 91/1998 Coll.).[17] This amendment significantly affected the regulation of divorce, newly regulated parental responsibility, se-

and personal relationships in the society into five independent codices. See the essay The topical contemplations on the optimal conception of the private law code [in Slovak]. In: OSTRÁ, L. (ED.): A Homage to A. Kanda on his 75thbirthday [in Czech]. Plzeň: A. Čeněk 2005, pp. 45–56.

[7] The so–called large amendment to the Family Act exercised by the Act No. 91/1998 Coll. was preceded by an amendment exercised by the Act No. 234/1992 Coll., which is very limited with respect to its size, but is of key importance from the point of view of content: the possibility to enter a marriage in a church was reinstated into the legal order of the federation (§ 4a–4b of the Family Act), including the relatively problematic retroactivity (cf. § 4c of the Family Act). Further compare the most recent indirect amendment exercised by the Act No. 383/2005 Coll.

As far as the Civil Code amendments significant for the family law are concerned, it is necessary to mention the so–called large amendment exercised by the Act No. 509/1991 Coll., which significantly touched upon the issue of community property of spouses by enabling the so–called modification contracts and by adjusting the common use of a flat by a married couple, when substituting it by the traditional notion of "tenancy". By this, however, the amendment did not fully free the rigidity of the property rights either of a married couple in general, or of the dwelling of the spouses in particular.

[8] On the problems of the development in the post–communist countries, see materials from the conference held in Prague in 1998, organised by the *International society of family law,* especially the introductory contribution; see HADERKA, J. F.: Basic features of the legal regulation of the family law in the post–totalitarian states of Central and Eastern Europe [in Czech]. Právní praxe, 1999, No. 2/3, pp. 71–93. For the general view on the communist family law, compare MLADENOVIČ, M., JANIJIĆ–KOMAR, M, JESSEL–HOLST, C.: The family in Post–Socialist Countries. In: International Encyclopaedia of Comparative Law. Vol. IV, Chap. 10. Tübingen 1998, pp. 3–151.

For the Czech reality, see HADERKA, J. F.: The Czech Republic – New Problems and Old Worries. In: International Survey of family Law 1994. The Hague – Boston – London: Martinus Nijhoff Publ., 1996, pp. 181–197. A Half–Hearted Family Law Reform of 1998. In: International Survey of Family Law. Bristol: Jordan Publ., 2000, pp. 119–130.

[9] See ŠVESTKA, J. KOPÁČ, L. KNAPPOVÁ, M., KNAPP, V:. To the topical issue of codification of private family law relations [in Czech]. Právní rozhledy, 2005, No. 9, p. 348.

[10] Compare ELIÁŠ, K.: The concept of the new Civil Code [in Czech]. Právní rádce, 2001, No. 8, p. 12.

[11] I am leaving aside here the activities during the era of Czechoslovakia under the leadership of professors V. KNAPP and K. PLANK.

[12] For details see the critical words by M. HRUŠÁKOVÁ: Several notes on the "family law" amendment of the Civil Code [in Czech]. Právní praxe, 1995, No. 6, p. 338 ff., and On the draft of the family law amendment of the Civil Code [in Czech]. Právní rozhledy, 1996, No. 2, p. 45 ff.

[13] It can be fully agreed that the Civil Code of the year 1964 is a creation of legislature that from its very beginning shows low legal standards from the point of view of conception, content, and systematism and that by the amendment exercised by Act No. 509/1991 Coll. it became an inconsistent legal hybrid of two qualitatively different political and economic periods. See ŠVESTKA, J., KOPÁČ, L., KNAPPOVÁ, M., KNAPP, V.: To the topical issue of codification of private family law relations [in Czech]. op. cit. p. 345–346.

cured the protection of ownership interests of the child, again anchored the institute of a guardian, modernised the institute of adoption, improved the regulation of the relationships of alimony, and anchored a new institute of marital property law, which is the community of property of the spouses. The acceptance of the large amendment of the Family Act was shortly afterwards followed by the acceptance of the Social-Legal Protection Act (Act No. 359/1999 Coll.), which, however, has already been amended.[18] By this Act, the institute of foster care was, among others, included into the Family Act and the special Act on Foster care was abolished (Act No. 50/1973 Coll.).

It is possible to say that the above stated partial changes of Czech family law prepared the grounds for a fundamental step – the re-incorporation of family law institutes into the Civil Code as the basic source of private law. The time enabling the realisation of the second detached phase could start – the phase of the private law family regulation reform recommended in specialists' studies for general discussion on the Czech family law *de lege ferenda* in such a way that it was closer to the current legal regulations of European countries.[19]

In the spirit of the European tendencies, the work on the re-codification of the Civil Code as the basis of the private law is currently going on in the Czech Republic. The work should result in a unified, coherent, systematic, clear, complete, and at the same time necessarily open code.[20] This direction of development of the Czech family law, defined by the subject matter of the Ministry of Justice (ref. No. 2623/00-L of January 29^{th} 2001), can be characterised as an effort to create European continental civil concept of family law. Family law norms were incorporated into the second part of the paragraphed working version of the re-codified private law code, which, apart from the matters now codified by the Family Act, also includes marital property law, based on the principle of full private autonomy between the spouses, further the rights of marital and family dwelling and other connected property issues,[21] including the private-law norms against domestic violence.[22] The new norm will regulate among others also the registered partnership of the same sex couples.[23]

This concept had, has and will certainly have many adherents, but also opponents, both in the issue of returning the family law in the Civil Code at all,[24] and in the issue of its inclusion into the system of Civil Code,[25] and last, but not least, the content of the individual institutes.[26]

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[14] Op. cit., item V. The suggested concrete solution [in Czech]], p. 347.

[15] On the criticism of the concept compare ELIÁŠ, K.: On some basic aspects of the recodification of Czech private law [in Czech]. Právník, 1997, No. 2, pp. 105 and following and his other works cited here.

[16] Compare the material on the conception of the new Civil Code, Právní rádce, 1996, No. 5–6, p. 353nn.

[17] On Act No. 91/1998 Coll. see ZUKLÍNOVÁ, M.: What is new in the Family Act [in Czech]. Právní praxe, 1998, No. 5, p. 258, and HADERKA, J.: On the origin and basic problems of the Family Act amendment of 1998. ibid., p. 269.

[18] In connection with this, we should also draw attention to the Act No. 218/2003 Coll., on the responsibility of youths for acts violating the law and on the judiciary of the youth. For this compare ŠÁMAL, P., VÁLKOVÁ, H., SOTOLÁŘ, A., HRUŠÁKOVÁ, M.: The law on the judiciary of the youth [in Czech]. Praha: C.H. Beck 2004.

[19] See ŠVESTKA, J. KOPÁČ, L. KNAPPOVÁ, M., KNAPP, V.: To the topical issue of codification of private family law relations [in Czech]. op. cit., pp. 345–346.

[20] Compare ŠVESTKA, J., ZOULÍK, F., KNAPPOVÁ, M., MIKEŠ, J: On the development and the contemporary state of re-codification of the Czech civil law [in Czech]. In: The issues of re-codification of private law [in Czech]. Acta Universitatis Carolinae, Iuridica, 2003, No. 2/3, p. 39.

[21] On the subject matter of the law compare ELIÁŠ, K., ZUKLÍNOVÁ, M.: Principles and starting points of the new private law code [in Czech]. Praha: Linde 2001. On the significance of the work compare the review by I. TELEC in the journal Právník, 2002, No. 8, pp. 906 and following. For German review see Rabels Zeitschrift, 2004, No. 4, pp. 191–221.

[22] On the necessity to anchor not only the penal norms against the domestic violence, but also the civil law regulations see KRÁLÍČKOVÁ, Z.: Civil law aspects of domestic violence DE LEGE FERENDA [in Czech]. Bulletin advokacie, 2003, No. 8, pp. 84 and following.

[23] On this issue see ZUKLÍNOVÁ, M.: Question marks on other (i.e. non-marital) co-habitation from the point of view of family law [in Czech]. Právní rozhledy, 1999, No. 6.

[24] When rejecting the solitary different opinions, resulting mainly from force of habit, we could agree with the words that *"wilful adherents of the de-codification of private law can bring to life the already dead idea of an independent code of marital and family law"* and that *"the disintegration of the legislature and the disorientation of the public, including the specialists"* can, according to these adherents, be prevented by creating *"a series of codes, with the Civil Code leading, and build a dike to the legislative tornado, stabilise the legal order, bring legal certainty and renew the trust in the law and in the institutions of legal protection, beginning with courts of justice."* See GERLOCH, A: Several notes to the re-codification of private law [in Czech]. In: The issues of re-codification of private law [in Czech]. Acta Universitatis Carolinae, Iuridica, 2003, No. 1/2, p. 29.

[25] To the reservations on the systematic inclusion of the regulation of the private (both personal and propriety) family legal relationships into the Civil Code see the study ŠVESTA, J., ZOULÍK, F., KNAPPOVÁ, M., MIKEŠ, J.: On the development and the current state of re-codification ... [in Czech]. Op. cit., p. 61.
On the defence of the overall concept compare the work of ZUKLÍNOVÁ, M.: The future Civil Code and the family law (several contemplations *de lege ferenda*) [in Czech]. In: The issues of re-codification of private law. Acta Universitatis Carolinae, Iuridica, 2003, No. 1/2, p. 141–154.

We can only add one aspect to the issue: conceptual inclusion (returning) of the family law norms into the Civil Code is correct. It namely draws upon the status rights of people, or persons in the legal sense of the word in general. This is not changed even by the fact that in family law, a significant role is played by mandatory legal norms, as this is a phenomenon characteristic for status rights, without leaving anyone in a reasonable doubt about a private character of such rights. Also the high level of mandatory nature does not make this part of private law public.

An indubitable positive aspect of the big codes is exactly their stability.[27] In democratic conditions it is not easy to change them *ad hoc*, according to the topical particular interests.

In connection with the supposed system and quality changes of the family law within the framework of re–codification of the Civil Code it is necessary to mention the legislative initiative that rippled the still waters of Czech family law.

On June 6^{th}2004, that is after the Czech Republic acceded to the European Union, the controversial act on the so–called secret childbirths was accepted on the basis of the proposal of a group of members of Parliament (compare Act No. 422/2004 Coll., by which the following acts are changed: Act No. 20/1966 Coll. on the care of the health of people with its more recent amendments; Act No. 301/2000 Coll. on the registers, names and surname and on the change of some related acts with their amendments, and Act No. 48/1997 Coll. on public health insurance with its amendments, further only the cited Act).[28]

As was already said, the new Act is a work of the members of Parliament, and therefore it was not discussed by specialists.[29] From the explanatory note to the cited Act, the effort to create conditions for diminishing the number of abortions, preventing the murders of the newborn babies by their mothers, and lowering the number of cases when the mothers abandon their children is apparent.[30] In this issue, we encounter two opposing interest. The interest of the mother often lies in keeping the pregnancy, childbirth, and identity secret. The interest of the child is, however, the right to live, know his or her descent and live in the care of his or her mother and father. Saving human life is certainly a priority issue, but we cannot forget that apart from the right to live, there are also other fundamental human rights that need to be respected.[31] The given issue cannot be trivialized and legislatively fast, briefly, and simply regulated by an institute of an "artificial foundling". We can fully agree with the opinion that the results of an effort to find an original solution at all costs can even be worse than unprofessional approach.[32]

It is alarming that such a serious interference into the status rights that have their basis in the private law was done by amendments of the norms of public law, without consequent analysis of legal consequences of such a change and also without the amendment of the Family Act. The cited Act namely did not change the Family Act that regulates the establishing of motherhood in the following diction: *The mother of the child is the woman who gave birth to it* (compare the clause § 50a of the Family Act). The regulation is mandatory and quite explicit: *motherhood is based on the objective legal fact – the childbirth.*[33]

A significant consequence of the new legal regulation on the possibility of childbirth with keeping

[26] To the partial problems of marital propriety law *de lege ferenda* see KRÁLÍČKOVÁ, Z.: Contemplation on the re–codification of the Czech family law [in Czech]. In: Proceedings Homage to M. Knappová. Praha: ASPI, 2005, pp. 225–243.

[27] Compare ZIMMERMANN, R.: Re–codification of private law in the Czech Republic [in Czech]. Evropské a mezinárodní právo, 1996, No. 5, p. 3: *"From the codification we expect that it will last"*, p. 7: *"... the codification can stand against the storms, if its clauses are sufficiently abstract and flexible and enable the judges and authors of legal texts influence the necessary adjustments"*..

[28] On the fierce critical comments see HRUŠÁKOVÁ, M., KRÁLÍČKOVÁ, Z.: Anonymous and secret motherhood in the Czech Republic – a utopia, or reality? [in Czech]. Právní rozhledy, 2005, No. 2, p. 53nn. S. RADVANOVÁ and M. ZUKLÍNOVÁ from the Faculty of Law of the Charles University have expressed strong agreement with the conclusions presented in the contribution.

[29] On the problems connected with proposals prepared by the members of Parliament as on of the causes of the contemporary state of the Czech legislature, see the study of ZOULÍK, F.: Essay on our contemporary legislature [in Czech]. In: In the service of the law. Collection of contribution to the 10^{th}anniversary of the foundation of the C. H. Beck branch in Prague [in Czech]. Praha: C. H. Beck, 2003, p. 1ff.

[30] On this issue see SEVEROVÁ, I.: Mothers that give up their children [in Czech]. Náhradní rodinná péče, 2000, No. 1, pp. 38–41.

[31] See HERMANOVÁ, M.: Legal aspects of the problems with abandoning a child anonymously [in Czech]. Justiční praxe, 2002, No. 6, p. 391.

[32] See ZOULÍK, F.: Essay on our contemporary legislature [in Czech]. Op. cit., p. 14.

[33] On this issue, see HRUŠÁKOVÁ, M. ET AL.: The Family Act. A Commentary [in Czech]. 3^{rd}revised edition. Praha: C. H. Beck, 2005, pp. 181 and the following.

From the sources devoted to motherhood see further e.g. MELICHAROVÁ, D.: Determination and denial of motherhood, the issue of surrogate motherhood [in Czech]. Zdravotnictví a právo, 2000, No. 7–8, pp. 24 and following, from older works see FIALA, J., STEINER, V.: Theoretical aspects of the determination of motherhood according to the Czechoslovak law [in Czech]. Právník, 1970, No. 1, p. 33, and HADERKA, J.: On some issues of determination (and denial) of motherhood [in Czech]. Bulletin advokacie, 1979, July–September, pp. 14 and foll.

On the issue of motherhood, or more generally parenthood, compare the essential work by RADVANOVÁ, S.: Who the parents of a child are – only seemingly simple question [in Czech]. Zdravotnictví a právo, 1998, No. 5, No. 6, No. 7–8, further HADERKA, J.: The issue of motherhood and fatherhood since Act No. 91/1998 Coll. became effective [in Czech]. Právní praxe, 1998, No. 9, pp. 530 and following.

the identity of the mother secret in the administrative regulations is the interference with the concept of status rights in the Czech Republic, a concept based on natural legal basis of the Austrian general Civil Code (ABGB, 1811). Some foreign legal regulations following the French Code Civil (CC, 1804) rely on the concept that motherhood is based not only on the fact of giving birth, but also on the recognition of motherhood by the woman who has given birth to the child (still France, Italy). In such a way, childbirth without stating the identity of the mother in the child's document is possible. However, these regulations were accepted in social and economic conditions diametrically different from the situation in the contemporary Czech Republic.[34] Many countries are nowadays trying to amend the laws accepted in turbulent times.[35]

The cited Act stimulates many questions and throws the legal order of the Czech Republic back by many years – not to the years of building communism, but much further.[36] This partial problem of Czech legislature documents the state of the Czech society, which is able to tolerate the suppression of the rights of children and is closing the eyes before the advocating of particular interests at all costs.[37] In this issue, we can only rely on the Constitutional Court and its so–called negative creation of the norms as a safety catch of the constitutionality.[38]

3. SEARCHING FOR THE EUROPEAN STANDARDS – ON THE MARGIN OF THE HARMONISATION AND UNIFICATION OF THE EUROPEAN FAMILY LAW

In the explanatory note to the Proposal of the Civil Code it is stated several times that the Czech family law is a result of the overall Sovietisation and that one of the major programme objectives of the proposed code is the discontinuity with the communist Civil Codes of 1950 and 1964 and that it is necessary to give the Czech Civil Code a function of a "systematically integrating focus" of the legal order, as it is common in standard legal orders of the continental Europe type. We may fully agree with this. We can also fully agree with the general statement saying, "Czech private law must come closer to European standards".[39] However, what are the European standards, when family law is concerned? There is no simple answer to this very simple question.

It is commonly known that family law in each country is based on the tradition, culture, religion and that it reflects the society of that country. In Europe, there exist different kinds of family law: family law influenced by the French *Code Civil*, family law of the German speaking countries, very similar family law of the Nordic countries, family law of the countries pre-

[34] On the arguments in favour of and against the anonymous and secret childbirths see FLÍDROVÁ, A: An anonymous childbirth? [in Czech]. Jurisprudence, 2004, No. 4, p. 10ff. The author further states that in Germany, the law regulating anonymous childbirths was rejected in May 2002.

[35] On the situation in other European countries see HUBÁLKOVÁ, E.: Anonymous childbirths from the point of view of Article 8 of the European convention on human rights [in Czech]. In: Proceedings from a conference Family and the law of personal status (status law) [in Czech]. Správní právo, 2003, No. 5–6, p. 283. The author among other things states that the Spanish Supreme Court has recently decided, because of the discrepancy with the constitution, on the abolishment of Article 47 of the Register Act that made the entry "mother unknown" in the register possible.

[36] On the history, the contemporary state and unfortunately also the future of the boxes for abandoned children see ZUKLÍNOVÁ, M.: Several notes on the legal questions on the so–called baby–boxes [in Czech]. Právní rozhledy, 2005, No. 7, pp. 250 and following. Compare further especially the conclusion, not very complimenting to the Czech Republic and its legislative practice.

[37] The gravity of the problem is underlined a.o. by the significant initiative of the Health Ministry in the form of the Methodical directive No. 9487/05/OZP/3 in the gazette of the Health Ministry No. 6/2005, effective from June 1st2005, which emphasises that the law imposes on the health facilities the obligation to inform the bodies of social and legal protection of children about the fact that the mother abandoned her child after the birth and that substitute family care is mediated by the state and its bodies (Article 5). Compare also the activities of the Ministry of Work and Social Affairs. Further see KRÁLÍČKOVÁ, Z.: The case of the so–called legally free child [in Czech]. Právní rozhledy, 2004, No. 2, pp. 52 and following.

[38] See Footnote 4.

[39] See the explanatory note, I. general part, pp. 1 and following, and the partial explanatory notes to the individual clauses of the Second Part – Family law, pp. 92 and following of the Draft for the Civil Code. Part One to Four. Draft of the working committee. Praha: Ministry of Justice, without reference, without year (spring 2005) [in Czech]. [Main compilers: K. ELIÁŠ and M. ZUKLÍNOVÁ] (in further footnotes referred to only as the "Draft").

[40] Compare JEMOLO, A. C.: La Famiglia e il Diritto. Annali della Facoltà Juridica della Università di Catania II, 1948.

viously under Soviet influence, etc. In Italian sources, the quotation of the important Italian family law specialist is often paraphrased, that "family is a rocky island which the family law can only wash with its waves".[40] Also the renowned Czech family law author *Jiří Haderka* developed some thoughts on the limits of the family law.[41] It is certain that anywhere in the world, family law cannot be changed, so to speak, over night and at all costs, and even less so by experimental institutes.

However, for the legislature in many European countries, the essential changes in the relationships of the family and the society, especially after the 2^{nd} World War and mainly in the 1970s and 1980s, signified the necessity to look for common paths. The emphasis on the protection of human rights, on the advocating of full equality of men and women in the society, marriage, and family, equal rights for children born out of wedlock with the so–called legitimate children, globalisation, migration, new problems in life, assertion of the principle of private autonomy, as well as its limits, were and are discussed for a long time especially in connection with the need to transform family law[42] and following the ideas on the need of harmonisation and unification of the law of the EU members and the ideas of European family law.[43]

The first step towards European family law is considered to be the activity of the academics and the comparative analysis, which should lead to the understanding of the differences and similarities contained in the legislature of the member states and towards the comparative synthesis.[44] The results of jurisprudence should be formulated into the *Principles of European family law* and should serve as inspiration for the domestics and international legislators or as an alternative or supporting law. First areas of research are the propriety law aspects of marriage and divorce, propriety law aspects of co–habitation outside marriage, the rights of the minors, and the protection of minors.[45] For this purpose, the *Commission on European Family Law (CEFL)* was created, whose aim is to reach the truly European identity.[46]

The Czech Republic does not stand aside the harmonisation and unification tendencies of the family law. The Czech society and Czech family have also changed and are still changing.[47] As was already said above, Czech legal order undergoes radical changes. As far as Czech family law is concerned, many positive steps were taken especially thanks to the above–cited conventions, especially the Council of Europe ones. However, the Czech law is still awaiting the essential steps.[48]

It is not only the fact that *lex scripta*, the law is paying tribute to the time in which it has originated and that it is marked by non–conceptual and often chaotic amendments, but especially the interpretation and application that should have already been performed within the framework of the principles on which the Civil Code is to be built.[49] Family law as a whole is to be regarded as a value that must be protected and developed. The proposal of the new Civil Code gives the family law a dignified place – the second part. As far as the content is concerned, we may at a glance see that the creators aimed at a comprehensive and syste-

[41] See HADERKA, J.: LIMITS OF THE POSSIBILITIES OF THE LAW IN REGULATING FAMILY RELATIONSHIPS [in Czech]. Speech before the Lower House of the Czech Parliament. Právní praxe, 1995, No. 6, pp. 330 and following.

[42] The opinion that full transformation of family law was not reached anywhere in the world thanks to the *"strength of traditional institutions"* and with the scepticism as regards the European family law can be found in CHLOROS, A. G.: The reform of family law in Europe. Deventer – Holland, Boston – London – Frankfurt: Kluwer 1978; especially in the Foreword, p. vii.

[43] From the rich foreign sources, compare MARTINY, D: Europäisches Familienrecht – Utopie oder Notwendigkeit? Rabels Zeitschrift, 1995, No. 3–4, pp. 419 and following, MARTINY, D.: Is Unification of Family Law Feasible or Even Desirable? In: HARTKAMP, A. ET AL. (EDS.): Towards a European Civil Code. 2^{nd} edition. The Hague, London, Boston: Kluwer Law Int. 1998, pp. 151 and following, ANTOKOLSKAIA, M.: The Harmonisation of Family Law: Old and New Dilemmas. European Review of Private Law, 2003, No. 1, pp. 28 and following, JEPPESEN, CH., SUMMER, I.: Perspectives for the Unification and Harmonisation of Family Law in Europe. European Review of Private Law, 2003, No. 2, pp. 269 and following, PINTENS, W.: Grungedanken und Perspektiven einer Europäisierung des Familien- und Erbrechts. Zeitschrift für das Gesamte Familienrecht. 2003, Teil 1: pp. 331 and following, Teil 2: pp. 417 and following, Teil 3: pp. 499 and following.

In Czech see the study BOELE–WOELKI, K.: The path to European family law [in Czech]. Op. cit., pp. 119 and foll.

[44] See the study BOELE–WOELKI, K.: The path to European family law [in Czech]. Op. cit., pp. 120–123 with reference to the relatively extensive list of sources cited there.

[45] Ibid, p. 126.

[46] For details see http://www.law.uu.nl/priv/cefl of September 12th 2005.

[47] On this issue see RADVANOVÁ, S.: The state of the Czech family and the family law in contemporary era [in Czech]. Právní praxe, 1999, No. 2–3, pp. 94–102, Portrait of a family (on the background of the legal order) [in Czech]. Zdravotnictví a právo, 2004, No. 2, pp. 15–22 and other publications by the same author.

[48] On this compare KRÁLÍČKOVÁ, Z.: Harmonisation and unification of European family law [in Czech]. Právo a rodina, 2003, No. 3, pp. 1 and following, Czech family law on the way to the traditional institutes (on the margin of the harmonisation and unification) [in Czech]. In: BLAHO, P., ŠVIDROŇ, J. (EDS.): Kodifikácia, europeizácia a harmonizácia súkromého práva. Proceedings of a conference VIII. Lubyho dni. Braitslava: Iura Edition 2005, pp. 415 and following.

[49] The necessity to anticipate the interpretation was mentioned also by Prof. TYMEN J. VAN DER PLOEG in his contribution in connection with the re–codification process of the Dutch civil law. See his contribution Pro's and Contra's of the New Civil Code. In: HURDÍK, J., FIALA, J.(EDS.): Východiska a trendy vývoje českého práva po vstupu České republiky do Evropské unie. Proceedings of a conference held in Brno on Ocotber 5^{th} 2005. Brno: Acta Universitas Brunensis, Iuridica, No. 294, Masarykova universita 2005.

mic attitude. There can be reservations to individual parts, the whole, however, fully respects and develops the values stated below.

It is not the aim of this contribution – and with regard to the limited space, it cannot be – to provide a detailed analysis of the special institutes of the Czech family law included in the prepared Civil Code.

However, in general it can be said that the European standards, to which we should hold while performing the reform, undoubtedly include the following principles:

a) indivisible and general values of human dignity, freedom, equality, and solidarity,[50]

b) respect to the family life of a person, regardless of which form they opt for,[51] including the so–called single–style,

c) autonomy of will of an individual and its free application in all matters where there is no reason to limit it, either in the form of *ius* cogens or *legal* institutes in the case of status laws,[52] or other limitations caused by the natural assertion of the principle of solidarity in marriage and family and the unhurried assertion of the principle of the protection of the weaker one[53] – the so–called economically weaker of the partners,[54]

d) separation of any kind of co–habitation by consent as a comprehensive and final solution of personal and propriety matters between the partners,[55] with suitably drafted "hardship" clause,[56]

e) the best interest of the child, including the right to know the parents and live with them *(joint custody)* and other relatives in a common dwelling in joint custody, the right to the regular contact with both parents, the right to substitute care secured by the state – however always as a subsidiary to the care provided by the family and looked upon as the service to the child,[57]

f) participation rights of the child,[58]

g) propriety interests of the child, the right to the same standard of living as the parents,[59]

h) solidarity in the propriety law of the spouses,[60] in the law of marital and family dwelling,[61] and in the case of alimony between the spouses as well as divorced spouses,[62]

i) effective civil–law protection against domestic violence,[63]

j) alternate forms of solution to the marital and family conflicts or arguments (mediation).[64]

[50] See the *Treaty establishing a Constitution for Europe*, part II Charter of Basic Rights of the Union. Preamble. From Italian sources devoted to the Treaty establishing a Constitution for Europe, human rights, and family law compare RESCIGNO, P.: Convenzione Europea dei diritti dell'uomo e diritto privato (famiglia, proprietà, lavoro). Rivista di diritto civile, 2002, pp. 325 and following, VETTORI, G.: Carta Europea e diritti dei privati (diritti e doveri nel nuovo sistema delle fonti). Ibid., p. 669, ZENO–ZENCOVICH, V. Le basi constituzionali di un diritto privato europeo. Europa e Diritto Privato, 2003, pp. 19 and following., VACCA, L: Cultura giuridica e armonizzazione del diritto europeo. Europa e Diritto Privato, 2004, pp. 53 and following.

[51] Compare the regulation of the marital status in clause in § 528 and following of the draft and the institute *Registered partnership* anchored in § 836–854 of the draft.

[52] For details see KRÁLÍČKOVÁ, Z.: Autonomy of will in the family law in Czech–Italian comparison [in Czech]. Brno: Masarykova univerzita, 2003.

[53] On this see ZOULÍK, F.: Private–law protection of the weaker party of a contract [in Czech]. Právní rozhledy, 2002, No. 3, pp. 109 and following.

[54] Compare e.g. the limits of the autonomy of will to the advantage of the ability of the husband to provide for the family anchored in § 586 par. 1 of the draft.

[55] Compare the right of the spouses to file a common motion on divorce and arrange the proprietary matters, dwelling, alimony for the time of the divorce, if applicable, by a contract, anchored in § 624 of the draft.

[56] See the clause of § 622 par. 2 of the draft, regulating the cases when the marriage cannot be divorced.

[57] Compare the legal regulation of motherhood and fatherhood in the clauses of § 643 to 663 of the draft. Further compare the new concept of the adoption of a minor child anchored in the clauses of § 664 to 719 of the draft, especially the thorough regulation of the consent of the parents in § 680 and following of the draft.

[58] See especially § 746 par 1 of the draft and § 100 par. 3 of the civil procedure code.
For published sources, see HRUŠÁKOVÁ, M.: The child, the family, and the state. Essays on the legal position of a child [in Czech]. Brno: Masarykova univerzita, 1993.

[59] Compare the relatively extensive institute *Care of the child's property* anchored in § 766 and following of the draft and *Alimony obligations* regulated in § 871 and following of the draft.

[60] See the institute of *Usual equipment of the common dwelling* regulated in § 571 of the draft and the rules for dealing with exclusive property in the regime of separated property of the spouses in § 592 of the same draft. Compare the limits of the autonomy of will to the advantage of the ability of the husband to provide for the family anchored in § 586 par. 1 of the draft.

[61] See *Some clauses on the dwelling of spouses* anchored in § 609 and following of the draft, namely the institute of the *right to dwelling* and a number of limitations of the rights of the exclusive owner, or the tenant of the dwelling, e.g. 613 and following of the draft.

[62] See the institute of *Alimony of the divorced spouses* in § 627 and following of the draft.

[63] See the relatively comprehensive protection in the form of *Special clauses against domestic violence* anchored in § 617–619 of the draft.

4. CONCLUSION

In spite of the above-mentioned problems with searching for European standards, the Czech family law *de lege ferenda* moves towards the traditional family law institutes included in the Civil Code as the basis of the private law. The new regulation of the family relationship will namely be very similar in its concept to the large codices of private law, i.e. also the Austrian general Civil Code (ABGB), which is the basis of civil jurisprudence[65] and whose institutes are still in the minds of wide public of both specialists and laymen. We can agree with the opinion that the new private law code should include, as a principle, all the private law matters, i.e. also family law in such a way that is usual in countries with comparable legal environment, with the reference to the necessity of unity of private law.[66]

As was already said with reference to the explanatory note on the Proposal of Civil Code, the creators' effort aiming at discontinuity with the communist law and the aim to create a code comparable with European cultural convention is perceivable at first glance. As far as the future Czech family law incorporated into the Civil Code is concerned, it must in essence be a spiral-like return into the civilized bosom of the propriety law. Family law must be comprehensive – from the legal regulation of status matters in marriage and family, including the registered partnership, it must also regulate propriety relationships including the marital and family dwelling, and must contain clauses against domestic violence. The individual traditional institutes must be enriched with such elements that will contribute to the development of a person and the cohesiveness and solidarity in the family. The proposal of the Civil Code, on which the general discussion has been going on now, is a work that fully accepts these essential values.

[64] Compare especially the new concept of the institute of *Decision taking on the family affairs* anchored in § 565 of the draft and the explanatory note to it, in which it says: "The court should ... lead the spouses to agreement, if necessary, even by using a mediator (intermediary in family matters)" and the institute of *Exercise of the parental duties and rights after divorce* in § 778 of the draft, which says: "When deciding on entrusting child to care, the court will always recommend the parents the help of an intermediary in family matters", including the explanatory note to it.

[65] Compare ELIÁŠ, K: Nobility of the civil law tradition and the post–modern approaches to civil law [in Czech]. Právní rozhledy, 2003, No. 8, p. 413, and ELIÁŠ, K.: The Civil Code and the Czech legal culture [in Czech]. In: GERLOCH, A., MARŠÁLEK, P. (EDS.): The Act in the Continental law [in Czech]. Proceedings of an international conference "The place and the role of law in the continental culture: tradition, present, and developing tendencies." Praha: Eurolex Bohemia, 2005, pp. 213 and following, and ELIÁŠ, K.: Theoretical questions of the reform of the private law (and its practical problems) [in Czech]. In: ELIÁŠ, K.(ED.): Soukromé právo v pohybu. Plzeň: A. Čeněk, 2005, pp. 54 and following.

[66] For the theoretic questions and legal theory starting points compare the study ZUKLÍNOVÁ, M.: The future Civil Code and the family law. In: The issues of re–codification of private law [in Czech]. Acta Universitatis Carolinae, Iuridica, 2003, No. 1/2, pp. 141 and following.

Is there a conflict of goals between law and economics in the European competition law?

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1. INTRODUCTION

Rather cynical opinion (which might therefore be quite close to the truth) on the inertia of old theories was expressed by J. M. Keynes in his book on the general theory of employment, interest, and money in 1963. He said that the ideas of the economists and political philosophers are stronger than is usually supposed. Practitioners who are usually considered to be immune towards any intellectual influence are in fact often slaves of dead economists. Powerful men that "hear voices" in fact, according to Keynes, distil the lunacy uttered a few years ago by some academic scribblers. He also waspishly remarked that in the area

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of economic and political philosophy it is not probable that there are many people older than twenty–five or thirty that would follow new theories, so that the thoughts of officers, politicians, or even propagandists applied in topical situations are probably not much newer. However, he did not consider the interests to be the most dangerous factor, but the permeation of ideas,[1] so he (remark by JB) did not rely much on the psychologically and sociologically conditioned inertia of interest. Without the elegance of Keynes, it may even be suggested that the ideas cannot be genetically separated from the interests.

The background of interests is also apparent in the change of the access to the European competition law in the last few years. The debate goes around the emphasis of the economic viewpoints (*more economic approach*)[2] and on the suppression of the normative approach. This trend of economisation is also in the background of the so–called modernisation package of European competition law. Its motives, however, were more complex, although it is necessary to admit that they were probably not complex enough, that they were not sufficiently theoretically substantiated, and that their main motive was the pragmatic one.[3] On the other hand, we can convincingly argue even then that no theory of economic competition has ever been more convincing than the legal norms coming out of it and based on it. Irrefutable scientific proofs of economic theories do not exist (in general as well as in the case of competition theories), and therefore (as always in the area of competition law) the starting point was the massive political support of the new approach, based on the acceptable theoretic arguments, but especially enforced by the competition–politicy reality and its feedback, which signalised malfunction of the current system.

European competition law has for many years been, in fact since its origin, exposed to the conflict of two principal approaches: the so–called "economic approach" on one hand, and the so–called "systemically theoretic one" on the other.[4] The economic approach emphasises the influence of economic competition on the production, allocation, and dynamic efficiency; it is based on the hypothesis that there is a causal relationship between the structure of the market, market behaviour, and the results reached on the market, and poses the question whether the real competition is workable (essential, effective, intensive). The market situation is measured against some kind of propagated ideal norm and it is studied whether in practice there are deviations from this norm. In the practice of competition policy, this approach is manifest through the study of the market results, setting the norms of acceptable competition behaviour, and interference with the market structure.

The system–theoretic approach, on the other hand, considers the main (if not the only) function of the competition to secure freedom. It does not see the causal relationships among the structure of the market, the behaviour on it, and the results reached, but it claims that good economic results are directly dependent only on the freedom of competition. It does not ask the questions concerning efficiency, intensity, or essential character of the competition, but is only interested in the fact whether the free market exists and whether the desired freedom of competition is not being limited. From the point of view of competition policy, this becomes manifest in the prohibition norms on the behaviour in the market.

In both cases, however, the approach is normative from the practical point of view, even though in the case of economic approach, there were more norms and in the system–theoretic framework less (while relying on the auto–regulation of the free markets).

The emphasis on the economic viewpoints while judging the situation in the market and for the application of competition law does therefore not mean some abandonment of normative points of view and their substitution with some purely "economically opportune" approach "case by case".

[1] Quoted freely according to Vickers, J.: Competition Economics and Policy, E.C.L.R. 3/2003, pp. 95, 102.

[2] On this compare e.g. VICKERS, J.: Op. cit., p. 95 and following; HUTCHINGS, M: The Competition between Law and Economic, E.C.L.R 9/2004, pp. 531–533; NITSCHE, R. – THIELERT, J.: Die ökonomische Analyse auf dem Vormarsch – Europäische Reform und deutsche Wettbewerbspolitik, WuW 3 / 2004, pp. 250 and following; BÖGE, U: Der more economic approach und die deutsche Wettbewerbspolitik, WuW 7–8/2004, pp. 726 and following; HILDEBRAND, D.: Der more economic approach in der Wettbewerbspolitik, WuW 5/2005, pp. 513 and following; MAAHS, CH.: Wettbewerbschutz und Verbrauchinteressen im Lichte neuerer ökonomischer Methoden, WuW 1/2005, pp. 49 and following.

[3] Compare e.g. the very reserved, or even critical and rejecting reactions to the planned modernisation of the European competition law after the so–called "White Book" was issued in 1999, especially from the part of the representatives of the German ordoliberal school of competition law. These views are summarised e.g. by L. TICHÝ in his article "The change of the paradigm of the European competition law and its significance for the Czech Republic", Právní rozhledy 2/2004, pp. 61 [in Czech] and following. From the informative publications on this topic in Czech we should mention especially MUNKOVÁ, J.: The reform of the European competition law and its influence on the competition rules and the decision–taking by the Authority and courts of justice in the Czech Republic [in Czech], Právní rozhledy 7/2003, pp. 18–21, by the same author: Directives on the monitoring of the merges of companies No. 139/2004 EC [in Czech], Právní rozhledy 12/2004, p. 458–463; FIALA, T: Competition law of the European communities [in Czech], Právní rádce 4/2004, Appendix "A practical manual"; NERUDA, R.: Modernisation of the European competition law and its impact on the Czech competitors [in Czech], Právní fórum 7/2004 (pp. 263–272) and 1/2005 (pp. 19–25); BEJČEK, J.: Decentralised application and modernisation of the European competition law [in Czech], Proceedings of the XVth Karlovarské právnické dny Linde, Praha, 2005, pp. 32–51.

[4] Compare HERDZINA, K.: Wettbewerbspolitik, 4.A, G. Fischer Verlag, Stuttgart 1995, pp. 114 ff.

2. *"AUTOMATIC" VERSUS "REASONABLE" PROHIBITION IS NOT EQUAL TO "NORMATIVE" VERSUS "ECONOMIC APPROACH"*

Basically, it is possible to distinguish between two approaches from the normative point of view:

- the prohibition of anti–competition process without any further remarks, *"automatically"*, prohibition "as such"
- the so–called *conditional* prohibition on the basis of judging concrete circumstances of the individual case and especially the relation between the advantages gained and the level of threat to the economic competition

The terms that are being used for these methods in English and internationally are the *per–se rule* and the *rule of reason.*

Distinguishing between the per–se rule and the rule of reason is based on the American Common Law that considered some of the limitations of market competition unacceptable and prohibited, unless they were, with regard to the concrete circumstances, necessary as a marginal agreement to the main subject of the contract (so–called *ancillary restrictions*).[5]

The advantage of the *per–se* method lies especially in greater legal certainty, easier situation for evidence (it is only necessary to file evidence of the existence or accomplishment of the elements of the *per–se* prohibited procedure) and the elimination of the arbitrary decision making of cartel offices.

The disadvantage, on the other hand, lies in the certain schematic and rigid character of decision making, because it is not the matter of fact that is judged, but that things are only "filed" and deviations in specific cases, which are exceptionally desirable from the point of view competition policy, are not allowed. These advantages and disadvantages must be balanced.

If the approaches of the competitors may be ambivalent (both beneficial and harmful) from the point of view of competition policy, but from the statistical point of view the harmful effects prevail, preventive control is justified. On the other hand, if in the marginal cases the conformist effects with the aims of competition policy prevail, the subsequent control is more effective.

Advantages and disadvantages of the *rule of reason* method are an opposite mirror reflection of those of the *per–se* method. The rule of reason method is functionally equivalent to the per–se method of prohibition, connected with the possibility of exceptions and can be used in ambivalent cases from the point of view of competition policy, where the compatibility of behaviour with the aims of competition policy usually prevails. It provides greater space for administrative bodies to judge individually, but this diminishes the legal certainty and predictability of the parameters necessary for the businessmen.

With this method, also both the preventive and subsequent control is possible, and the burden of proof may be carried both by the cartel office and the businessman. There is no reason for using only one of the methods, either the per–se or the rule of reason method, for a certain kinds of anticompetitive behaviour. The possibility of exceptions, preventative or subsequent character, and possible transfers of the burden of proof give these instruments a large extent of flexibility. Legal orders, bans, or permissions are not as far away from each other as it may seem at first glance.

The rule of illegality asserted by the per–se method is suitable only in the cases when it only concerns behaviour that would *evidently and under all circumstances* be (or that almost always is) anticompetitive. The rule of reason method analysis is used in the cases when the competitive behaviour cannot be filed in the so–called per–se category. Then the danger of such behaviour for competition must be examined in the individual, quite individualised and concrete, case. This is an utterly value–concerned analysis that helps us to find a way out and a solution of conflicts of interest.[6]

The per–se method covers the area that we might call the *"hard–core" cartels*, as price fixing agreements and agreements on the division of the market. For cooperation agreements endangering competition and for vertical contracts limiting the competition, the rule of reason analysis is used more often. Certain groups of such per–se prohibited behaviour are formulated and are usually accompanied by a list of ex-

[5] For more on this, compare BEJČEK, J.: Existenční ochrana soutěže. MU BRNO 1996, pp. 114 and following.

[6] In 1972, B. Sangmeister still wrote (Die rule of reason und das per–se Konzept in der Rechtsprechung des Supreme Court der USA zu § 1 Sherman Act, Carl Heymans Verlag KG, Köln 1975, p. 29) that the price agreements, agreements on the division of customers and area, agreements on production limits, profit and loss pools (dividing the risk) and group boycotts belong to the category of per–se prohibitions – all these as horizontal agreement, and as vertical agreement to a certain extent also the limitations of the customers and areas. Already in 1990, this was no longer true and the sphere narrowed down to horizontal price agreement, tied transactions were already assessed also according to the rule of reason, decisions on group boycott were also taken on the basis of rule of reason, and the same kind of assessment won in vertical price agreement (compare Toepke, U.P.: Per–se Verbot und die Rule of reason: Der Wandel vom Automatismus des Kartellverbots in Section I Sherman Act zur "Per–se perhaps" Regel des United States Supreme Court, WuW 7–8/1990, pp. 578–592). It is also stated (ibid., p. 588) that the "golden age of anti–trust law with its automatism when applying the 'per–se' principle does not exist any more" And further shift towards the loosening of the strict per–se rules in the decision making practice of the Commission and the European courts in the following years up to now is evident.

[7] For example, horizontal price agreements were traditionally considered to be a crystal clear and typical example of cartel, where

ceptions from the prohibition (both conditional and unconditional).[7]

With market structures endangering the competition, the situation is more complex – according to the traditional opinions, they should not even be allowed to originate, and therefore the per–se method of prohibition was recommended.[8] However, it is hard to identify whether the merger of companies will really bring with it a threat to the competition (and to what extent), or a comparable compensatory or even prevailing advantage. This issue is much more complex than the judging of cartels.

Neither the general prohibition of mergers, nor the overall effort to make them more difficult may be recommended, but the same holds for the general resigning over the level of concentration in industries. Therefore the rule of reason method is much more suitable with the reservation that mergers from a certain dangerous borderline market power of the participant (the so–called "elephant marriages") can be subordinated to the per–se prohibition with the possibility to examine the declared specificity in the procedure on granting the exception with the burden of proof on the part of the business people.

Preventing practices can be, according to the degree of seriousness, classified as belonging to the group adequate for the per–se prohibition (boycott, discrimination) and/or into the sphere of competence of the rule of reason (abuse of market power by refusing a contract) with the ex–post check up.

It has already been stated[9] that the controversy around the per–se method and the rule of reason is not solvable by an "either–or" answer, but rather "it depends" kind of answer (*es kommt darauf*), depending on considering all the positive and negative effects of competition.

The rule of reason method helps to overcome the dilemma of draconic (not economically rational) thinking. The per–se approach with the absolutist attitude, impossibility of exceptions, and wide application could also be called the *"per–se unreasonableness"*. It is exactly the per–se method that is (should be) only another (shorter, generalised, operational) expression of the economic and social rationality and it should not eliminate, but complement its other expression (namely the rule of reason principle).

The analysis from the point of view of rule of reason and the approach according to the per–se method are in its essence nothing else but two different methods of determining whether the limitation imposed on the competition is *"unreasonable"*, i.e. whether its anti–competition effects will be balanced with the pro–competition ones, or not.

The automatism during the application of the per–se method steps back into the background more and more often to the assessment of a concrete case and its impact on the competition. It is often even stated[10] that nowadays, there are only a few areas where it would be uniquely and without any further examination by the relevant court of justice necessary to follow the suit of the per–se rule.

I think that this development may be caused by the increasing complexity of economic life, to which the shortened and simplified form of rationality modelled by the per–se method does not suffice, but that it requires more detailed examination of all the circumstances and connections. After all, even Sherman Act in Article 1 contained only one prohibition and had only one purpose, to whose fulfilment the courts gradually began to use a different method (rule of reason). The controversy on the method of regulation of cartel law may thus be reduced to the controversy on the *literal* explanation of the law, or a *teleological* one.

In a state that respects the rule of the law, however, this is not a question to be trivialised. Preference for the purpose–based explanation of the law (or even thinking of it) is a dangerous and pernicious process for legal certainty and in this area also for the basic legal guarantees of economic prosperity. Reducing a norm in the teleological way is easier for an American judge than for the continental one, not even speaking of a continental officer at the respective antitrust authority.

The problem of the choice of the method against the anticompetitive conduct, and strategies was originally created as a result of a too general clause of Section 1 of Sherman act, to which a practically usable content had to be given. The problem of approach according to the rule of reason has at least one other important social dimension. If an independent court is deciding about the application of the antitrust regulations, the rule of reason method is better protected against abuse from the part of lobby groups, than

there is no space for exceptions, and where the per–se prohibition could be used, even ex ante. However, the tendencies to implement the rule of reason also into the areas where nobody thought of it in the past (even in the horizontal price agreements, group boycotts, and tied transactions), are apparent.

[8] See Möschel, W.: Der Oligopolmißbrauch im Recht des Wettbewerbsbeschränkungen, J.C. B. Mohr (Paul Siebeck), Tübingen 1974, p. 23. However, it must be emphasised that the complication lies in the solution to the end conflict, to which the absolute per–se method does not provide many possibilities. The "Vivat comcurrentia, pereat mundus" cannot hold. The most recent development of European law heads also in this area quite unmistakably to the assessment on the basis of the "rule of reason" (compare the implementation of new substantive test with merger with European impact commented upon below, i.e. the so–called test of substantial impedimet to effective competition SIEC).

[9] Compare Ulmer, P.: Rule of Reason im Rahmen von Artikel 85 EWGV, Recht der internationalen Wirtschaft 7/1985, p. 524.

[10] See Toepke, op. cit., p. 592.

when these issues were dealt with by an administrative body within the framework of administrative consideration. This circumstance is an indirect argument for keeping the per–se method in the countries with such system of decision making. The per–se method, on one hand, is more rigid, but on the other hand, it provides more exact limits to the so–called administrative consideration and to a certain extent it probably prevents the change of the rule of reason into the *"rule of lobbyism"*.

This dilemma of the two seemingly incompatible methods is rather artificially presented as critical, as if the rule of reason and per–se methods were quite different, whereas they are only two different manifestations of the pro–competition rationality. As if rational competition policy could only be secured by the application of the per–se rules, and as if the per–se rule did not make a space for administrative consideration and rational (*reasonable*) competition policy.

If the rule of reason is applied, the expert bodies should be involved in the assessment of the economic competition rationality, as not even the court is the best equipped body for the assessment of the complex economic competition connections. The question of the choice of the so–called method cannot be artificially exaggerated. Even the requirement of the adherents to the free market that (if the *laissez–fair* situation itself is not installed) the competition rules should have the per–se form is ill–conceived. If the purpose lies in the prevention of decisions within the framework of discretion consideration of the relevant administrative body, another consideration (albeit prejudicial and dogmatic) is already contained generally in the legal per–se rule, which might be harmful for competition. It is, on one hand, true that the fiction of a rational legislator holds and that in the legislative process, group interests are asserted worse than in the ad hoc decision taking, but such cases exist. Then, paradoxically, the adherents of the per–se method as the lesser evil would in fact be in favour of competition interference with a normative incorrect measure of the state with the weak consolation that the result is at least known in advance.

3. THE PHASE OF THE "MORE ECONOMIC APPROACH" IN THE EUROPEAN COMPETITION LAW

The preceding more general approach may serve as a support for keeping the methodically sceptical view to the most recent development in the area of European competition law that – at the legislative level as well as in the decision making practice – significantly emphasises the economic evaluation of the impact of the competitors' behaviour at the market, than the formerly so frequent more formal assessment of the accord or disaccord with unconditionally prohibitive norms.

In a rather simplified way, it can be said that the lawyers identified competition law with the application of the principles given by the law and did not seek the answer to the question as to which solution is economically correct, but which one is in accord with the explanation of the given rules. Economists think differently and for them, it is not the legal principle that is the essence, but the market situation and the practice with which they are confronted.[11]

At the same time, economic methods in the competition policy cannot be identified with the quantification of the competition problems; they provide especially the possibility to find factually well researched and objective decisions on the basis of a number of modern analytical methods, including the economic simulation modelling, to which the "formal juristic optics" often presented an obstacle[12]. This is of course no breakpoint, because, after all, even the "per–se" rules were determined on the basis of economic analysis standing in the background of the regulation of competition delimited by the law; when, however, it was considered to be only a tool for "statistical justice", the economic approach allows for better assessment and evaluation of the *concrete* situation of the *concrete* competitors at a certain time and their impact on the competition environment. We could probably even speak of a "more casuistic method".

This economising approach was not introduced "out of nowhere", but is rather a name of the greater significance of the economic substantiation of the decision of the Commission, which was gradually required by the European Court of Justice, or by the Court of First Instance[13]. The Commission, as a result of this development, also began to put more weight to the prudent economic analysis, which should have led to greater legal certainty.[14] Economisation of the decision making on the basis of "ad hoc" economic analyses will, however, probably not lead to greater legal certainty; higher transparency of decision making could also be questioned, because what is valid for one case under concrete conditions need not be relevant in another case. Moreover, the compilation of various econo-

[11] Compare HUTCHINGS, op. cit., p. 531.

[12] Compare HILDEBRAND, op. cit., p. 513.

[13] The triple cancellation of the decision of the Commission is typical (in the controversies regarding mergers: the case of Airtours, the case of Schneider Electric, and the case of Tetra Laval) by a first–instance court in 2002 exactly for the reasons of insufficient economic reasoning in favour of the decision.

[14] Compare MONTI, M.: EU Competition policy after May 2005, Speech 03/489, Fordham Annual Conference on International Antitrust Law and Policy, New York, October 24th 2003. In: CHRISTIANSEN, A.: Die Ökonomisierung der EU–Fusionskontrolle: Mehr Kosten als Nutzen?, WuW 3/2005, p. 285.

mic analyses will probably lead to greater costs for the participants of the proceedings as well as for the Commission.[15] There are even warnings against the "battle of assessments"[16]. More justice in the individual case will mean greater costs in the individual case; a question, which can hardly be solved economically ex ante, remains whether the sum of the costs will not charge the overall balance to such an extent that the "more economic approach" will in the end not be economically efficient. There is also another factor, the factor of time (higher time demand for economically more sophisticated decision making), which especially with the assessment of the mergers can lead to the fear of the parties to join at all; rather than to undergo a lengthy decision making process with an uncertain verdict; the parties might prefer another investment alternative.

The uncertainty connected with decision making in the individual case will never be removed completely, not even with wider use of economic methods, models, simulations, and calculations. The theoretic base of the competition policy will even so have to provide hypothetic instructions.

In the end, the declared approach requires only a *more* economic approach, not an *only* economic approach. We are thus dealing only with the shift on an imagined scale between the per–se method and the *rule of reason* towards the latter pole and to the accent on the concrete circumstances of the individual case.[17]

4. WHAT IS "ECONOMIC"?

The situation is by far not such that we would move from the vague, unclear, uncertain, not transparent criteria of the legal assessment of competition behaviour to clearly defined, transparent, and predictable economic criteria. It is well known, almost notoriously well known, that the aims of legal regulation are not only complementary, but also competing ones.[18] Similarly, however, even the economic approach is not free of inner differentiation and internal contradictions of the economically seen objectives, so that even the economic objectives are subordinated to hierarchy and optimization balance.[19] The unclear definition of the notion of efficiency itself corresponds to this, for the definition of efficiency is necessarily connected with some theoretic notion (i.e. also a value standpoint). The notion of efficiency in itself is considered questionable in the works of eminent authorities.[20] Even in the question of economic dimension or efficiency of a certain solution (it is irrelevant whether it is casuistic in the single example, or normative), time is the ultimate judge. Value and conventionalist criteria are not only a privilege of the legal regulations, but are inherent to any concept of economic efficiency. Efficiency as such has hardly any value in itself, if it is not based on the agreement of the people involved.[21] Even within the framework of the so–called "more economic approach", it is necessary to find balance between various aspects of economic phenomena and their assessment.

[15] Compare CHRISTIANSEN, op. cit., p. 292.

[16] Compare the cited report Maahs, Ch., p. 53.

[17] No ody would probably question that even the economic methods are not self–saving and that they are liable to fashion and unpopularity. An illustrative example may be found in the decision taken by the British anti–monopoly office (stated in the cited article by M. Hutchings, p. 532), in which it said in 1979 that the production exclusivity of freezing boxes is in accord with the public interest (the producers were allowed to ask the purchasers to fill the boxes supplied with their ice–cream only – the ice–cream supplied by the producer). In 1994, exactly the same decision was issued. However, in 1998, the opinion changed and it was concluded that such exclusivity limits the economic competition. The conditions had changed within those 4 years, but not significantly (the market share of the main supplier of freezing boxes sore from 66 per cent in 1994 to 70 per cent in 1998, so the dominance could not have been the main criterion in decision taking). From the point of view of transparency and legal certainty, a clear normative solution would have been more adequate (an overall prohibition of exclusivity). No sufficient explanation as to why the decision had changed or why the previous decision had been wrong was given (insufficiency of the institutional memory). A similar case of different assessment was described by FIALA, T. (The advantages and risks resulting for businessmen from the new system of asserting the competition rules within EU [in Czech], VOX, Praha 2004, p. 8): In 2003, the Czech Office for the Protection of Competition prohibited the agreements on the exclusive right to buy beer on the basis of the threat to competition; Plzensky Prazdroj exceeded the market share of 30 per cent. In 2002, the Dutch Competition Bureau, on the other hand, consented to the agreement for exclusive purchase of beer for the Heineken Company, although the market share of Heineken exceeded 50 per cent. For the Dutch Authority, it was sufficient that around 40 per cent of the pubs were not bound by these exclusive contracts, which was enough for preserving the competition. The dominant position in the market in itself thus does not automatically have to signify an interference with the competition and the decision is rather dependent on the fact whether the procedure is more or less formalist or on the basis of an overall economic context of the agreement.

[18] Compare e.g. the objectives of equality and protection of the weaker party, objectives of the protection of competition and competitors' protection, the aim of supporting innovation, support of fair and equal competition, and so on.

[19] Compare e.g. the criterion of short–term and long–term efficiency, micro– and macroeconomic efficiency, etc.

[20] E e.g. ROTHBARD, M.N. (Comment: The Myth of Efficiency, p. 90, cited acc. to ŠÍMA, J.: Ekonomie a právo [Economy and the Law], VŠE Praha 2004, p. 77) states that "... as nobody can ever have perfect information on the future, nobody's action can be called effective. We live in the world of uncertainty. Therefore, efficiency is only a chimera.".

[21] Paraphrasing the quotation of J. BUCHANAN, cited acc. to ŠÍMA, J., op. cit., p. 80.

Following relationship that cannot be quantified and probably also modelled is joined with this: relationship of economic and extra–economic objectives, such as society welfare, sustainable harmonious development, quality of life, but also (in the European law the first objective) of economic convergence, which inevitably requires the accepting of sub–optimum ("not economic") topical decisions in the interest of further optimum development or state.

If the objective of European competition law is (apart form the support to the creation of the unified market) to support and protect business competition and through it the economic efficiency, it is necessary to start from certain *theoretic* differences between the various forms or aspects of efficiency – its legal definition is not at the disposal.

Generally, three kinds of efficiencies are recognised[22]:

- *allocative* efficiency, which corresponds to the situation in which the services and goods are allocated to the consumers (in the wide sense of the world, i.e. not only the end consumers, but also the so–called production consumers) according to the prices which they are willing to pay; these prices will not be higher than the marginal costs of the production. This effeciency will become true in the situation of perfect competition, where the producer cannot influence the market price by limiting the production, and therefore is not interested in doing so.[23] Situations are called ineffective with regard to allocation, when the strong subjects in the market have the ability to influence the price by limiting the production and the price will be higher than marginal costs[24]. Agreements or mergers that are directed towards strengthening the market force may stimulate the tendencies towards allocative inefficiency.[25]
- *productive* efficiency, which stands for the production of goods and providing services with the lowest possible costs. Market output is maximized through the best combination of inputs, which means that the least possible volume of sources (common richness) is used for the production of the given goods or providing the given services.[26]
- *dynamic* efficieny is reached when the producers constantly innovate and develop new products as a part of the fight for market shares by gaining new customers.

In an ideal case, competition should support economic efficiency in its allocative form and also in its productive form and at the same time, it should support innovations. The problem lies in the fact that the three components of effeciency mentioned need not necessarily be consistent and during an assessment of an agreement between competitors or their behaviour, tensions might arise.[27]

For example, mergers can contribute to savings due to extent and range of goods (*economies of scale and scope*) and thus fulfil the productive efficiency. On the other hand, the merged subject might reach higher market power, and thus also the ability to reach "over–competitive" prices, which interferes with allocative efficiency. Market power may further lead the strong subject to the neglecting of innovations (as e.g. high barriers to entry the market discourage possible interested persons). Then it is necessary to consider whether the advantage of productive efficiency (the costs saved by the merger) will be passed on to the consumer (which would be a compensation of the disadvantageous consequences of a higher market concentration), or whether they remain in the hands of the merged subject in the form of higher profit.

Similarly controversial is also the doctrine – created by the European case law – on the access to the so–called *essential facilities*, owned or operated by a monopoly or a dominant subject. On one hand, such enforced access strengthens the competition in subsequent (subordinate) markets (e.g. access to the distribution electrical network strengthens the competition in the market of electricity distribution), but on the other hand, it might hinder the motivation of the dominant operator of the network to innovation, which might weaken the dynamic efficiency.

Innovation motives might, however, be arguments for those who struggle to have access to the essential facilities, as well as for those who own these facilities and thanks to the savings due to the size reach higher productive efficiency and can thus invest part of the higher profit into innovations and the development of new technologies.

[22] Compare e.g. ARREDA, P./KAPLOW, L.: Antitrust Analysis, Aspen Law & Business, 5th ed., New York 1997, pp. 5 and following.

[23] Compare BISHOP, S. – WALKER, D.: The Economics of EC Competition – Concepts, Application and Measurement, 2nd ed., Sweet & Maxwell, 2002, pp. 20–21.

[24] Marginal costs are the increase of the costs necessary for the production of another supplementary unit on the output (or by lowering the overall costs as a result of diminishing the output b one unit). Compare Samuelson – Nordhaus, Ekonomie, Svoboda, Praha 1991, p. 974.

[25] GERADIN, D.: Efficiency claims in EC competition law a sector–specific regulation, draft paper, Workshop on Comparative Competition Law (The Evolution of European Competition Law – Whose Regulation, Which Regulation?). Firenze November 12^{th} to 13^{th} 2004, p. 3.

[26] Compare WHISH, R.: Competition Law, Butterworths, 4^{th} ed., 2001, p. 3.

[27] As illustriously shown by Gerardin, op. cit., pp. 3–4, whose examples I am taking over.

An inevitable and very uneasy task of the antitrust authorities thus lies in performing a comprehensive test that would consider all possible effects and their consequences. *"Consumer welfare"*, which is used as the first aggregate criterion of the European competition law[28], seems to suggest rather that it is the allocative efficiency that is looked upon in the first place (so that the consumers get a significant part of the efficiency growth)[29] – the profit of the producer in itself is not sufficient as a consequence of higher efficiency.

On top of that – apart form the notion of consumer welfare, indefinite already by its qualitative essence – there is also a problem of the transfer of real and alleged welfare and guaranties and instruments of securing the declared transfers of substantial part of the profit for the consumers in the future. At the same time we have to be careful in not preferring the short-term transfers of the savings to the consumer (short-term consumer welfare); the successful subjects have to be granted sufficient resources for investment and future innovations[30].

Although the main objective of the European Union is considered[31] to be the creation of an unified internal market without any barriers to the free movement of goods, people, services, and capital between the member states, the value of competition is not competing with this objective, although the objective of the internal market integration may sometimes lead the Commission to such a decision that would prohibit even such restriction of economic competition that would bring economic advantages.[32] The unified internal market in itself is namely a tool of economic efficiency – removing the barriers of free movement on one hand stimulates competition between producers and thus contributes to allocative efficiency; the size of the integrated market makes it possible to profit from the advantages of the economies of scale and thus contribute to productive efficiency; further, the size of the integrated market is stimulating for the spread of innovations in member states, by which it contributes also to the dynamic effeciency.[33]

5. A "MORE ECONOMIC APPROACH" IN ASSESSING ANTICOMPETITIVE AGREEMENTS

The combination of the prohibition principle of Article 81, par. 1 CEC[34] with the exceptions under Article 81, par. 3 CEC[35] is an example of using the *"rule of reason"* approach when assessing the agreements restricting competition. The prohibition of anti-competitive elements stated in par. 1 are considered in confrontation with the pro-competitive elements contained in par. 3. Although the text of Article 81 CEC did not change, it was possible to put greater emphasis on the economic justification of the agreements restricting competition not only through the judiciary and the so-called exclusions *en bloc* from the prohibitions of agreements restricting competition[36], but also with the help of Guidelines[37]. In a more general way than in the exclusions from the prohibition of cartel agreements *en bloc*, the economically reasonable exclusions from the prohibitions of such agreements are regulated in Art. 81 par. 3; by supplementing with the exclusions *en bloc* and with interpretation principle in the Guidelines, the "reasonable" solutions become normative, whether it be as "hard law" or "soft law" The guidelines contain a lot of standpoints and recommendations and

[28] Compare BISHOP – WALKER, op. cit., p. 24.

[29] See GERADIN, op. cit., p. 3.

[30] Compare BISHOP – WALKER, op. cit., p. 26.

[31] See Article 3 par. 1, letter c) of the European Convention.

[32] Similarly GERADIN, op. cit., p. 4.

[33] Ibid.

[34] Article 81, par. 1 CEC (Convention on European Communities) prohibits all agreements between undertakings, decisions by their associations and concerted practices, which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

[35] Article 81 par. 3 CEC excludes the following agreements from the prohibition according to Article 81, par. 1:

- agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit
- agreements that do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives
- agreements that do not afford such undertakings the possibility of eliminating competition in respect of substantial part of the products in question.

These conditions hold *cumulatively* and their list is *exhaustive*. Exemptions from the prohibition according to Article 81 (3) apply only in the above-mentioned cases; i.e. they do not apply e.g. for an agreement that would increase the employment rate in one of the countries of European Union, which is not a competitive aim.

[36] Compare the Commission Regulation 2658/2000, 2659/2000, 2790/, 772/2004.

[37] Guidelines on the application of Art 81 (3) of the Treaty, O.J. C 101 of April 27th 2004.

present a kind of "soft norms", derived from the case law[38] and their aim is among others "keeping the balance between the prohibitive rule and the rule for the exemption from prohibition"[39].

Exemptions of certain categories of agreements from the prohibition *en* bloc as well as the Commission Guidelines offer, after closer inspection[40], a well–founded conclusion that the economisation of the approach to the agreements restricting competition is a long–term and intentional trend by which the European law is governed. It is said[41] that even the economic approach to Art. 81 does not mean that the compensation of interference of competition with extra–competitive objectives was made possible beyond the framework of the exemptions in Art. 81 par. 3[42]. Pro–competitive and anti–competitive effects of the agreements are judged separately for each case, but they should essentially be balanced on the basis of the same geographically relevant markets[43]. The sign of the economic approach that cannot only emphasise the topical effects without their relations to future development is the requirement[44] that the agreement of the competitors and its effects were judged in *context*, i.e. not exclusively according to the *moment* in which it was reached. Exclusive judgement according to the ex ante state would not be justified and also the factors arising after reaching the agreement must be taken into account.

Bearing in mind that the judgement of economic contributions and advantages is not an exact science, but that it is necessarily *to a certain extent* always connected with arbitrariness, at least general rules for the assessment of economic advantages and efficiencies[45] can be defined, which are contained in Art. 81 CEC, in a few *en bloc* exemptions and in the Commission Guidelines, which set the borders for the arbitrariness of economic analysis; in connection with the decision making practice of the Commission and of the European courts, they are gradually softened.

These rules may serve also as a general guideline for the people in practice who are moving on "thin ice" of the economically "interesting" agreements restricting competition topically or potentially. For most competitors, it is beyond their powers to dig out independently the rules of correct action (by combining primary legislature, *en bloc* exemptions, Commission Guidelines, all this while bearing in mind the significant level of casuistic mode and range of these regulations, which are on top of it modified by the decision taking practice of the Commission and the European courts).

- The advantages must be *justified*. Vague references to future contribution that appear as effects of the restriction of competition are not taken into account.
- The advantages must be *objective*, i.e. based on trustworthy economic data, and not on the subjective assessment of the parties of the contract.
- Limiting the competition must be *inevitable* in order to reach the proclaimed advantages; i.e. that the advantage is not reachable by an agreement that would restrict competition less (a less restrictive alternative does not exist)
- The declared advantages must *overweight* (not just "balance") the restriction of competition brought on by the judged agreement. The overall net impact must be economically positive.
- The consumers (in the wider, not just "consumerist" sense of the word) must receive *a significant part of the profit* resulting from the re-

[38] Thus e.g. in Art. 18, the Guidelines anchor two tests by which it is examined that the agreement restricts actual or potential competition, which would otherwise exist without that agreement or without a concrete contractual limitation contained in the tested agreement.

[39] KJOLBYE, L.: The New Commission Guidelines on the Application of Article 81 (3): An Economic Approach to Article 81, E.C.L.R. 9/2004, p. 570.

[40] Which was done in specialised literature especially by the cited authors Kjolbye and Geradin and with whose partial analyses I do not burden the reader, but refer only about the overall conclusions.

[41] KJOLBYE, op. cit., pp. 570 and following.

[42] In connection with this it is adequate to note that the notion of *effective* competition does not mean the protection of economic liberty as a "value in itself". Effective competition is characterised by its effect on the consumers' welfare, it cannot be led by the motto "fiat competio, pereat mundus". It seems that it is this relation between the protection of economic liberty as an indirect tool for securing long–term economic welfare of the consumers which is left aside in the thoughtful essay by Kindl, J.: The notion of interference of business competition – general standpoints and concrete applications [in Czech]. Právní rozhledy 10/2005, p. 343 and following. No theoretician, and even less so the anti–monopoly authority, would seriously assert the freedom of competition as a formally aesthetic per se purpose ("the competition must be free, because it falls well within the speculative normative concept and it looks nice?"); the freedom of competition is a tool corresponding to the economic rationality and welfare. The shift in the standpoints of the Commission as well as in European legislature towards the *"more economic approach"* in recent years means especially less reliance on these long–term effects of free competition and the willingness to judge ex ante the positive contributions of the limitations of free competition to that basic objective of competition, which is evidently not the formally in a fundamentalist and paranoid way judged "purity of the tool" (i.e. *free* competition), but reaching the objective – the economic welfare (of consumers in the wide sense of the word).

[43] Compare Art. 43 of the Guidleines on the application of Art. 81 par. 3.

[44] Art. 44 and 45 of the Guidelines.

[45] I take over and paraphrase the list by D. Geradin in op. cit., pp. 19–20.

levant restriction. It thus does not have to be a transfer of each single advantage on the consumer, it is enough if its significant part is transferred. Consumer may, as a result of the restrictive agreement, suffer also a disadvantage (e.g. higher price), which will, however, be compensated by another advantage (e.g. higher quality of the product). The transfer of advantages to the consumer will be directly proportional to the elasticity of the demand (a significant decrease in the price as a result of a restrictive agreement might, with elastic demand, lead to the transfer of the advantage resulting from it on a higher number of consumers).

- There must be a *direct proportion* between the intensity of restricting competition on one hand and the size of advantages for the consumers resulting from it on the other. The more damage is done to the competition by the agreement, the higher advantage must be passed on to the consumer.[46]
- There are no such advantages that would justify *complete* exclusion of competition. The Commission recognises that the rivalry between competitors is a basic prerequisite and a stimulator of efficiency. The elimination of competition at a certain commodity market might, on one hand, bring some visible short–term contributions that would, on the other hand, be outweighed by long–term losses. In contrast to the previous approach of the Commission, which put an equality sign between the exclusion of competition and getting dominant position, this formal test has been abandoned within the framework of economic assessment of the agreements limiting the competition. From the Guidelines it follows that Art. 81 (3) CEC may be used also for the agreements of competitors with dominant position.[47] It is not an a priori question of threshold values of the share of the relevant market. The Guidelines thus consciously do not provide a "safe haven" for the acceptability of a restrictive agreement and thus emphasize the necessity of a more detailed analysis of the concrete circumstances.
- The advantages and contributions resulting from the restrictive agreement must be market specific, i.e. they have to relate to the *same market* and their anticompetitive impact is assessed also at the same market. Negative effects on the consumer on one market cannot be outweighed (overweighed) by consumer benefits on another market, unless the markets were interconnected (then, of course, the markets would not be separate and would belong to the same group of consumers).
- Assessment according to Art. 81 par. 3 depends on the eventual *changes* of the decisive facts; it is not done once for ever, but only for the period of time in which all required conditions are fulfilled cumulatively.
- The proclaimed advantages *cannot* follow from carrying out market power. Thus e.g. the savings of costs caused by a restrictive agreement cannot be a result of the use of market power (then that agreement would be not necessary from the point of view of higher efficiency, as the costs savings would be reached by a subject strong in the market anyway and at the same time, the competition would not have to be restricted – it would even violate the above–mentioned principle of inevitability).

6. ABUSE OF A DOMINANT POSITION

Not even this sector of European competition law could have been left aside of the trend of stronger position of the economic methods of assessment. The situation is even more complicated, as in this case – in contrast to the agreements restricting competition – no exemption from the prohibition of the abuse of a dominant position exists. The problem of abandoning the rigid and formalist approach in favour of the "more economic approach" is thus reflected in the quest for the answer to the question as to what exactly the abuse (albeit in the form of exploitation or elimination) is, and this is to be done through economic analysis. The *per–se* prohibition, however, does not go down well with the assessment of *concrete* circumstances of an individual case, which is necessary for the economic analysis.[48]

The criteria for the judgement of what an abuse is can be created normatively only with difficulties (at most as examples), and so they usually originate continuously as results of the procedures of the Commission and of the European courts; they gain the "normative power of the factual approach" (Jhering) by its convincing nature and as a result of the assertion of the requirement of predictability and taking similar (the same) decisions in similar (the same) cases.

The dominant competitors, in contrast to the merged subjects, have earned their market position by a better market output and were thus successful wi-

[46] We speak of *sliding scale* here.

[47] The same opinion is expressed by KJOLBYE, op. cit., p. 576.

[48] Similarly GERADIN, op. cit., p. 25. Some commentators even deny the dominance of the "automatic" prohibition rules (e.g. LÖWE, B.: "We have to tackle each abuse in its specific context, and we have to also look at the particular motivation and context of abuse", Fordham Antitrust Conference, Washington 2003, cited according to Hildebrand, op. cit., p. 517).

thin the framework of the competition process. Therefore (because it is their own economic success that leads to market dominance) their behaviour should be assessed with a great care, so that the successful subjects are not regulated in the cases when it is not necessary. Distinguishing between "normal" conduct (in the conditions where dominance or monopoly are normal) and "abusive" conduct, where the behaviour of the dominant subject should be "taxed afterwards", is impossible with the use of the *fixed* (per–se) rules.

Thus, casuistic is the main method. Recently, the tendency towards economic analysis appeared in the European competition law e.g. when judging discounts provided by the dominant subject. Such discounts are per–se thought to be a kind of prohibited and abusive behaviour, unless economic compensation is associated with them.[49] The principle that while fidelity and aim discounts present an essentially anti–competitive abuses of the dominance, quantity discounts are not, developed as a per–se rule of the judicatory kind.[50] The Commission is preparing methodical Guidelines also for the area of discounts.

The problem with introducing so–called predator prices is still open especially because it is not easy to find evidence of the fact that the dominant subject supplying the goods for a price below the variable costs will in future (be able to or want to or both) compensate the losses from the period of "combat prices". In this direction, both the Commission and the ECJ have up to now held the position (in fact close to the per–se rule) that the supplies for prices below variable costs almost always indicate the intention of the dominant subject to push the competition out of the market.

The use of comparable markets (*benchmarking*) or the monitoring of the costs might be an objectivising economic method. It is not out of the question that the use of such methods might lead to the confirmation, softening, cancellation of the per–se methods (although respected only on the basis of habit according to the case law), or even to the creation of new, more sophisticated per–se rules[51]. The case law of European courts provides only a very general "per–se" rule for the assessment of the abuse of dominant market position, which says that the prohibition of such behaviour relates also to the activity that is not "objectively justifiable".[52] There is probably no better tool than an in–depth economic argumentation that would present the objective view of the action and that would be capable of convincing about its justification.

Just as it is not possible to conclude that the dominance was abused in the prohibited way solely on the basis of higher prices, it is not possible to do so with the tied transactions. Tied selling of products and services is effective in a number of cases and on the contrary, selling the items separately would lead to the decrease in quality and consumer comfort.

7. *MERGER CONTROL*

It is generally accepted that if the merger control has any influence or contribution to the public interest at all, it lies exactly in the preserving of procompetiti conditions.[53] From this point of view, merger control presents a very important part of the EU competition policy. The motivation of the change that has found its expression in the Regulation No. 139/2004 was among others the effort to strengthen competitiveness of European companies, to diminish the demands of the process on administration (with the prospects of massive EU–enlargement), and to decentralise the decision making process. The idea of creating "national champions" that would succeed better in the international world competition is not (in spite of some apparent concessions in the Commission's decision making practice) accepted as a part of European competition policy[54].

The Regulation brought with it some changes in the substantive law that are also an expression of strengthening of economic approach. It especially introduced a new definition of basic criterion for expressing the prohibition of a merger – instead of the former prohibition to allow the merging on the basis of the

[49] Compare e.g. the cases of Virgin/British Airways (2003), PO–Michelin (2003).

[50] Explicitly acknowledged e.g. in German competition law – compare Maahs, op. cit., p. 51.

[51] For example, the a priori negative statement of the Commission to price discrimination is judged as not substantiated, as that discrimination has an internal structure. For more details compare Bishop/Walker, op. cit. p. 195.

[52] Compare e.g. the examples of IMS Healths (2004) and Oscar Bronner (1998), mentioned in the cited work of Geradin, p. 27.

[53] Compare VICKERS, J.: op. cit., p. 98.

[54] Compare the presentation of the European commissioner Neelie Kroes on February 7th 2005 (accessible at http://europe.eu.int/rapidpressReleasesAction.do) in which she openly supports the idea that the companies that are exposed to strong competition environment in their country stand a chance in succeeding on the global scale and that the temptations of the politicians attempting to sell the dream of guaranteed international success in the times of hardships as a result of the creation of national and branch champions (p.3) have to be faced energetically. The existing system of monitoring of concentration (after accepting Directive No. 139/2004) is judged (p. 5) as mature, based on healthy economy and by the same standards as "most global jurisdictions", and incorporating the principles of proportionality and subsidiary through adequate decentralisation of the decision taking of the national competition bureaus.

fact that the dominant position would be created or strengthened by it (the dominance test), there is now an unclear criterion of an important (significant) obstacle of the competition (the SIEC test – *significant impediment to effective competition*).[55]

The former dominance test was built upon the criterion of the origination or strengthening the dominance position – a merger that was not leading to this supposed consequence was allowed regardless of the fact that it could nevertheless influence the competition negatively on the basis of one–sided or co–ordination effects[56]. The dominance test is criticised for being based on the hardly applicable assumption that the dominance and sub–dominance can be clearly separated, while the test of significant lowering of competition enables us to predict whether the competition on the relevant market would decrease as a result of the merger to such an extent that the prices would go up or the output down. The significant lowering of or interference with competition detects rather the changes in the competition, while the dominance test is rather attempting to measure how much competition is still remaining in the market.[57] At other times, on the other hand, it is concluded that the significant lowering of the competition test (SLC test) provides the information on how much competition has been lost from the market, while the significant impediment to effective competition test (SIEC test) is concerned about how much competition will remain on the market after the merger[58], i.e. with what was according to the previous opinion identified by the dominance test. However, the answer to the question as to how the merger will influence the competition, and not whether its realisation will surpass the limits of dominance, will be decisive.

Two conclusions follow from this for the practice:

- With the help of the SLC (or SIEC) test, it is possible to prohibit also such a merger that sill not lead to the creation or strengthening of the dominant position. This, however, can even with dominance test be functionally substituted with the European construct of the so–called collective dominance.
- Second, it is possible, with the SLC test, not to prohibit a merger even when the dominant position is created or strengthened, a.o. when specific *efficiencies* that otherwise could not have been reached would result from the merger.

The admissibility of the so–called specific efficiencies of the mergers is now predicted also by European law[59], in contrast to the American law, where balancing the advantages and disadvantages of mergers, or *"trade–offs"* of lowering the competition with specific contributions were common a long time ago, while

[55] Only practical experience will show whether the optimistic conclusion that the European merger control is neither softer, nor harder, but clearer, is true.

[56] *Not coordinated* (or also one–sided) *effects* of the mergers lie in the removal of the competitors from the market as a result of a merger, which will diminish the competitive pressure on those that remain on the market. Increasing the price by the connected subject will e.g. lead the customers to the subject standing outside of the merger, who might also increase the price to a certain level.

Coordinated effects of the mergers are explained as a consequence of the lower number of competitors on the relevant market, which might lead to collective dominance. The probability of the remaining competitors to behave without unnecessarily to resort to the prohibited conduct according to Art. 81 CEC is higher. Such coordination is probable especially on condition that the situation on the market is clear and the competitors can easily find out whether the other competitors are observing the conditions; that there is a trustworthy mechanism for discouraging from breaching that understanding between oligopolies; that the expected results of the coordination cannot be threatened from the outside, namely by the existing or future competitors who do not take part in the coordination of behaviour. Compare Guidelines on the assessment of horizontal merges under the Council Regulation on the control of concentrations between undertakings, OJ 2004/C 31/03, especially items 24, 39–41.

[57] Compare BURGSTALLER, M.: Marktbeherrschung oder "Substantial Lessening of Competition"?, WuW 7–8/2003, p. 732.

[58] Compare the perceptive remark by J.T. LANG in op. cit. VICKERS, J.: Merger Policy in Europe. Retrospect and Prospect, E.C.L.R. 7/2004, p. 460.

[59] Guidelines on the assessment of horizontal merges under the Council Regulation on the control of concentrations between undertakings, OJ 2004/C 31/03, items 76–78, explicitly state that the contributions of the merger might balance its (unfavourable) effects on the competition, especially its potential harmful effect on the competitors. In the overall competition assessment of the merger, also all the justified contributions of the merger are weighed, especially – *if they mean benefit for the consumer* – whether they are exactly only the *consequence* of the merger (whether they are merger–specific), and – if they are *verifiable*. These conditions must be fulfilled *cumulatively*. The assessment of the merger that results in the conclusion on significant interference or non–interference with the effective business competition at the common market or its substantial part is according to the Art. 2 of Directive 139/2004 based on several criteria. Even in those criteria, the technical and economic *development to the benefit of the consumers*, if it does not *prevent* business competition, is contained.

The role of these circumstances taken into account during the assessment is apparently different from the criteria stated in Art. 81 par. 3 CEC, which might "defeat" the prohibition stated in Art. 81 par. 1 CEC regardless of the economic judgements. The assessment of the criteria according to Art. 2 par. 1 of Directive 139/2004 is subordinated to the covering economic criterion that no obstacles to competition shall be created. The technical development itself cannot overweigh in the case of mergers above the requirement of no interference with competition. Art. 81 par. 3 CEC is slightly asymmetric – it makes it possible for an extra–economic requirement of technological advance to overweigh the competition viewpoints (worsening the conditions for competition is possible, because the prohibition according to Art. 81 par. 3 concerns only the *elimination* of competition with a significant part of the goods in question). Long–term untenability of this differing attitude is subject to criticism – compare Whish, R., op. cit., p. 156.

in European law, the opinion was based on the strict conception that structural damage to competition cannot be compensated with partial and mainly temporary specific advantages. European competition law has thus set free of the strictly normative structural approach and accepts a more pragmatic outlook also on other than just structural indicators.[60]

The difference between these approaches to the basic test for allowing the merger is therefore not, as far as the result is concerned, of essential importance and in both cases it contains the economic assessment; sometimes it is even argued that it is a question of semantics.[61] The sole fact of reaching dominance need not be a reliable reason for not allowing the merger and at the same time, there are examples when the merger was not approved, although no dominant position originated (and this was still in the time when the dominance test was valid).[62] The arguments that removing the dominance test would diminish the legal certainty of the applicants as a result of the very wide space for considerations of the Commission, which then could exercise a policy with too many interventions[63], however, cannot be trifled with[64].

It is said that the significant impediment to effective competition (this, however, is, or can be, exactly the same as significant barrier to effective competition) provides the most useful viewpoint, as in many cases, there will be a dominant subject on the market anyway and for many mergers, the relevant question would be whether the competition will grow or diminish through such a merger in the process of determining the dominant company.[65] The test of significant lessening of competition is considered to be more flexible and less rigid exactly when compared with the dominance test, as it is closer to the spirit of economically founded analysis of the merger[66] as a "harder" test for the applicant for the merger.[67]

It is obvious that flexible application and reasonable decision making is possible also in the case when the concept of the dominance test is basically valid. Reaching or strengthening the dominant position through a merger is nowadays one of the possible ways that can significantly impede to effective competition. Further cases of such "significant impediment" without the origin or strengthening of the dominance can also be identified, but (with the restrictive interpretation of the notion expected) only in the cases of such anti–competitive consequences of the merger that follow from uncoordinated actions (one–sided effects) of the participating undertakings.[68]

From the new more flexible test (from the point of view of the result, however, also less predictable) for assessment the compatibility of mergers with the common market, which makes it possible not to allow even such mergers that do not lead towards the creating or strengthening of the dominance at the market,

[60] This is evidently the influence of the tendency dominant in the U.S.A. towards the strengthening of economic viewpoints in the competition law ("more economic approach"). Compare also BISHOP, S. – RIDYARD, D.: Prometheus Unbound: Increasing the Scope for Intervention in EC Merger Control, E.C.L.R. 8/2003, pp. 357 and following. Compare also THOMPSON, R.: Goodbye to "the Dominance Test"? Substantive Appraisal under the New UK and EC Merger Regimens, Competition Law Journal, vol. 2, 4/2003–4, pp. 332 and following. From Czech authors see KINCL, J.: The Control of Concentration after the Accession of the Czech Republic to the EU [in Czech], Právní rozhledy 22/2004, pp. 816 and following.

[61] Compare After, M.: Untersagungskriterien in der Fusionskontrolle (SLC – Test versus Marktbeherrschende Stellung – eine Frage der Semantik?) WuW 1/2003, pp. 20 and following. The German Bundeskartellamt stated already in October 2001 (Diskussionspapier: Das Untersagungskriterium in der Fusionskontrolle – Marktbeherrschende Stellung versus Substantial Lessening of Competition, pp. 35–37, accessible on the www.bundeskartellamt.de/w.Deutsch/publikationen) that the insufficiencies of the dominance test have not been confirmed and that no convincing reasons speak in favour of the transition from it towards the significant lowering of competition test. It might have been also for this reason that the compromise formulation of the substantial impediment to effective competition eventually won, especially as a result of the creation of the strengthening the dominant position (SIEC). The imaginary gap between the SLC test and the dominance test closed at least form the formulation point of view in Directive 139/2004. The decision taking practice of the Commission and of the national competition offices will of course be more important.

[62] Compare the case Schneider electric SA versus Commission T–310/01, October 2001. A different situation is described by After, op. cit., p. 24: FTC USA (Federal Trade Commission of the USA) judged the proposal for a merger of two producers of baby food Heinz and Beech–Nut, which held the second and the third position on the relevant market (common share 35 per cent), on which the homogenous products producers Gerber dominated with the share of 65 per cent. Although both producers had their regional "strongholds", in which they had superiority (Gerber belonged to the two most often sold marks regularly), there was a lively competition going on between the second and the third producer in the market for the second place. It was exactly this reason, namely that the competition pressure between the two closest competitors of the dominant company would vanish, that eventually led (after an examination before the court) to the prohibition of the merger in 2001.

[63] Compare DRAUZ, G.: Vorstellungen der EU – Kimmission zur Reform der europäischen Fusionskontrolle, in Schwarze, J.: Instrumente zur Durchsetzung des europäischen Wettbewerbsrechts, Nomos Verlagsgesellschaft, Baden–Baden 2002, p. 51.

[64] BISHOP, S. and RIDYARD, D. in op. cit. on page 363 claim (maybe a bit prematurely) that the economic framework of the concentration control is strengthened, but that the announcement on the assessment of horizontal mergers (today Guidelines 2004/C 31/03) have begun the path to a greater level of interventions of the Commission. It would probably be more important than the hypothetic possibilities how the Commission will judge the mergers in practice.

[65] LIND, R. C. – MUYSERT, P.: Innovation and Competition Policy: Challenges for the New Millenium, E.C.L.R. 2/2003, p. 92.

[66] Green Paper on the Review of Council Regulation (EEC) No. 4046/89, December 2001, p. 40.

[67] Compare GODDARD, G. – CURRY, E.: New Zealand's New Merger test..., E.C.L.R. 7/2003, p. 300.

[68] Compare "recital" No. 25 from the Preamble to Directive No. 139/2004.

certain tendency towards economic criteria of assessment is apparent. In contrast to the fixed principles of legal analysis, the economic assessment relies above all on the concrete situation on the market and to a great extent also on its hypothetic development in the future[69].

Neither mathematical methods, nor the use of the curves and other technological means of the symbolic "grasp" of the reality will of course eliminate the uncertainty of future development. It is hardly possible, in spite of using all these tools, to give a reliable answer to the question whether the single economic savings that are an unquestionable consequence of many mergers, will not be balanced in the middle and long–term perspective by not reached costs savings, which will not happen at all as a result of the absence or lessening of competitive pressure (I. Schmidt), and whether the more adequate way is not to secure the structural prerequisites for a stabile existence of such pressure in order to reach the general (not just undertaking's) economic optimum. The general a priori assumption that mergers lead to the increase of effeciency is not justified[70]. It is further necessary to take into account also no small transaction costs connected with the assessment of the mergers, which might even discourage from the merging.[71]

It is out of the question that such a test will capture also such cases of uncoordinated or one–sided effects of the merger (certain control of the prices and other competition parameters) that the previous dominance criterion was not able to separate, unless of course the concept of "collective dominance" was not used. The criterion of strengthening or creating of the dominant position (which is rather a legal term) is nowadays subordinated to the rather economically approached criterion (test) of significant impediment to effective competition (SIEC).

It is of course again the concrete interpretation and application that will be of decisive importance, not the semantic exercises by academics.

8. CONCLUSION

The law supposes a prejudice in exchange for legal certainty. This regulatory prejudice is often insufficiently justified and not verified in practice, or the conditions since the time it had been introduced sometimes change to such an extent that the law does not respond to the practice.

Resigning to the prejudice means increasing legal uncertainty *generally*, but (maybe) increasing the hope in just decision in a *single* case, i.e. such that will take into account all important circumstances.

The second way is the creation of a topical normative prejudice with the risk of repeating the same development. The more flexible way of an adaptation not in leaps (by the change of the norms), but step by step (which persistently reminds us of the advantages of the system of *common law*) need not necessarily lead to the lessening of the legal certainty of the addressees of the norms.

The economic tools not rarely create only an illusion of exactness; the ability to quantify hardly quantifiable data may be useful when seeking answer to exactly formulated narrow questions, but it may be misleading when seeking answers to more complex questions.

The principle of competition should not be substituted by a principle of purely economic calculation that is an end in itself. The competitive pressure is a tool of rationalisation and of the economic behaviour of competitors in the right sense of the word that cannot be substituted. A single decrease in costs as a result of one merger might then be devaluated by multiple non–decreasing of costs, which was possible exactly because, as a consequence of the concentration of undertakings, the competition pressure has fallen down.[72] European emphasis on the structure of the market (higher than in the USA) is not economically (and by no means empirically) unjustified. European scepticism towards spontaneous auto–corrections

[69] As M. Hutchings (The Competition Between Law and Economics) stated (maybe too unambiguously and optimistically in favour of the economists), the lawyers, in contrast to the economists, are not good in speculating, and especially not in the issues of mergers, where the important thing is the estimate of the future market effects of the allowed merger on the basis of application of economic models.

[70] For more detailed treatment of the topic see Luescher, Ch.: Efficiency Considerations in European Merger Control – Just Another Battle Ground for the European Commission, Economists and Competition Lawyers? E.C.L.R. 2/2004, p. 72 and following.

[71] It is e.g. pointed out that the predictability of the decision and the length of the proceeding to allow the merger can influence the intention itself. Within the *"more economic" approach*, it is recommended to take in account also the *"truly economic"* approach, i.e. not only to approve of economic models, but also the fact that some procedures (e.g. the dominance test) require less sources then other, less economic procedures, and that it is further necessary to approve the general scarcity of the sources – for more details see Voigt, S. – Schmidt, A: Switching to Substantial Impediments of Competition (SIC) can have Substantial Costs – SIC!, E.C.L.R. 9/2004, p. 587.

[72] The idea of I. Schmidt in one of the commentaries in WuW, (2004 or 2005), which I could not identify further.

of the market (especially towards the possibility of new competitors entering the concentrated markets) has its good reasons – "a bird in the hand" in the form of today's sufficient competitive pressure is preferred to "two birds in the bush" in the form of possible advantages and contributions.[73]

The economic advantages are not even in the case of cartel agreements a result for exempting them out of the ban (although they might be substantial, permanent, and would bring benefits to the consumers), if they do not comply with the last cumulative criterion, which is, that agreements will probably not exclude the competition on a substantial part of the market.

I think that the conflict of aims between law and economics can hardly be spoken about, if we accept the standpoint (and possibly also a long–standing experience) that the competition increases efficiency. Legal regulation of competition is from this point of view a tool that secures the functionality of another tool (functioning of the competition) working to the benefit of economic efficiency. In some cases the legal (normative) approach, which (because of the lower complexity of the problem) can incorporate the economic contemplations into legal norms, is more suitable; in other cases (especially with mergers), economic casuistic assessment should be preferred to the clumsy effort of precise normative formulation of complex economic viewpoint.[74]

The main problem lies in the delimitation of the space for the consideration of decisive anti–trust authorities (the Commission and the courts, as well as national anti–trust bodies) to such questions that by their nature do not fall into the categories of economic objectivity and normalisation in the form of legal tests. The economic approach even here puts impediments of the type "transfer of substantial part of the advantages on the consumer", "prevailing reached or declared advantages over disadvantages following form the limitation of the competition", etc., to the arbitrary decision making. The economic efficiencies in themselves are often not much, if at all, more quantifiable (and thus also "measurable") than the similarly uncertain legal notions[75] – they also depend (time–wise, value–wise, interest–wise, and in other ways) on the interpretations.

The effort to keep the economic (and thus also political) plurality, which was in the background of the so–called ordo-liberal approach, does not make the economic contributions absolute (which is the tendency in the USA). The more pragmatically (and probably also more short–term) oriented modernised European competition policy presents probably a certain amount of "competitive Darwinism".[76] European Commission and the courts will hopefully keep this development within the limits after whose crossing there would be no return and the economy would be governed by oligopolies and monopolies under the nice motto of economic contributions to the welfare of the consumer.[77]

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[73] Paraphrasing the outstanding study on the role of *"efficiencies"* when assessing mergers in the USA and EU – GHIDINI, G.: A Tale of Two Cultures? Some Comments on the Role of "Efficiencies" on the Two Sides of the Atlantic, IIC, Vol. 35/2004, p. 538.

[74] Similarly HUTCHINGS, op. cit., p. 532.

[75] Compare e.g. the contributions in the form of the approach to the new "know–how", improvement of the selling conditions, abilities to increase the innovation activities, etc.

[76] GHIDINI, op. cit., p. 542.

[77] In the last work cited, the author warns against the transition from the "winner takes more" principle to the "winner takes all" principle. He is afraid of the monopolisation spread under the motto of reaching "efficiencies" He does not believe even the substitution of the method for keeping the competitive structure of the market by the method of supervision of the "good behaviour" of the monopolists.

Unfair Competition Law in the EU and in the Czech Republic

(Paradoxes of the current state and the new trends)

Petr Hajn*

I. INTRODUCTION

1. In science, it is considers good manners to start by delimiting concepts that are to be used in one's analysis. However, good habits may turn into bad ones whenever the delimitation of key concepts becomes so thorough and detailed that little time and space is left for a serious discussion of other issues. Let me therefore leave aside any considerations of what constitutes law in general and law on unfair competition in particular, while only briefly discussing the notions of 'current state and 'trends in development'. The expression 'European' is used in the sense of referring to the situation in the member countries of the EU.

2. A 'state' may be understood as any position (even a very turbulent one) in which the object of one's scholarly investigation is currently to be found. However, as the expression itself indicates, a 'state' more often tends to refer to a situation under which the phenomenon studied remains in a relatively stable situation and its development proceeds only gradually, i.e. not by means of changes which are sudden, significant and still 'unsettled'. This understanding of the term becomes even clearer if it is substituted with the notion of 'a point of departure'. This is used to describe a fixed point from which one either sets out on certain pursuits or at least considers the available options.

3. The expression 'trends' indicates, also by virtue of its plural form, that the pursuits may be variable, that a definite selection between them has not been made, and that the direction of any of the pursuits has not yet been precisely set. We will reach the same conclusions if the fashionable word 'trends' is substituted with the traditional expression 'tendencies'.

II. UNFAIR COMPETITION LAW AND ITS CURRENT STATE WITHIN THE EU

1. European law against unfair competition is presently at a paradoxical stage of its development: it has become difficult to distinguish between its state (in the sense of a stabilized situation) and its various developmental trends. The long and gradual process of its maturation, which has led to a certain convergence in European countries (groups of countries) with different legal cultures and often very different structures of regulating unfair competition, seems to have come to an end.[1]

2. The current state of European law against unfair competition (resembling quick–sand rather than a firm point of departure) was the topic of two symposia held in 2005. The first was organized by the Munich–based Max Planck Institute for Intellectual Property, Competition and Tax Law in Budapest, Hungary from 16 to 18 une 2005 under the title „Das Recht gegen den unlauteren Wettbewerb in den neuen Mitglidstaaten: Impulse für Europa" („Law Against Unfair Competition in the New Member States: Incentives for Europe"). As some conclusions from this conference will be referred to in the text below, let me just briefly note here that the current ambivalent nature of European law against unfair competition was rightly underlined by the interrogative form of the title of the final session: Das Recht der Beitrittsländer als „Züglein an der Waage"? (The Law of the New Member States as „the Element that May Tip the Scales"?). The implication was that the positions of the new member states could have some weight in the disputes between the founding members of the EC; namely that **there is, within the EU, some kind of a competition for the positions held by the new member states.**

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[1] HARTE–BAVENDAMM/HENNING–BODEWIG: UWG (Gesetz gegen den unlauteren Wettbewerb, Kommentar, Verlag C. H. Beck, 2004, chapter Ausländisches Recht (Länderberichte), pp 180–346.

2. The second symposium was organized in Vienna by the local Faculty of Law in cooperation with several governmental and industrial institutions. Its title (identical with the conference proceedings[2]) was even more characteristic of the current situation in this field than the title of the former symposium, namely „Lauterkeitsrecht im Umbruch", indicating that law against unfair competition has presently reached a certain turning point. Although some of the conference contributions will be mentioned below, it may be generalized that some (though not all) speakers proposed, to varying degrees, that unfair competition law has to get rid of many traditional approaches and seek new theoretical foundations (paradigms) and new legislative solutions. The German word „Umbruch" (i.e. 'break-up') in the title of the conference may, as I will show later on, have been meant to indicate that unfair competition law, up to now conceived of in a uniform way, might 'break up' into two parts: first, provisions applicable in mutual relations between entrepreneurs themselves and second, provisions applicable in relations between entrepreneurs and consumers.

3. The current state of European law against unfair competition (understood as its more stabilized situation) does, however, deserve a less sceptical approach. There is some firm ground provided by the provisions of **Article 28 (formerly Article 30), Article 29 (formerly Article 34) and Article 30 (formerly Article 36) of the Treaty Establishing the European Community** (hereinafter referred to as „the Founding Treaty"), as amended by subsequent treaties and published in the Official Journal. These articles **prohibit any quantitative limitations on export and import between member states, as well as any other measures with an identical effect. At the same time, however, there is no exclusion of prohibitions or limitations of export, import or transit, if they are substantiated by an appeal to public decency, public order, public security, protection of health and life of people and animals, protection of plants, protection of national cultural heritage with artistic, historical or archaeological value, or protection of industrial and commercial ownership. Such prohibitions or limitations may not, however, serve as means of arbitrary discrimination or veiled limitation of trade between member states.**

4. The above-mentioned provisions of the Founding Treaty are complemented with the representative decision-making practice of the European Court of Justice („ECJ"). Its decisions may be considered as relatively consistent, although the court has to cope with numerous vague legal terms contained in the provisions of the Founding Treaty. It mostly appears from ECJ's decisions that the **measures with an identical effect such as quantitative limitations on export and import are those measures which follow (or might follow) from unfair competition law and its national regulations (restrictions on advertising, ways of identifying goods, requirements on the composition of goods constituting a competitive advantage or disadvantage, etc).**[3] Such measures do not immediately concern export and import as such, but they may, in their consequences, make the free movement of goods and services between EU member states more difficult or expensive. **The acceptability of such measures has been assessed, according to the decision-making practice on the part of ECJ, on the basis of the „principle of the country of origin", unless the circumstances stated in Article 30 of the Founding Treaty exceptionally justify some other solution.** This has led to the unification of restrictions on advertising and other issues, as well as the review of their necessity and reasonability, eventually resulting in some deregulation measures[4] primarily in those EU member states which had placed particularly strong demands on the standards of competitive behaviour.

5. **The decision-making practice of the ECJ has also arrived at a new conception of the ultimate recipients of various forms of marketing communication, who might be misinformed when making consumer decisions: it has been applying „the normative model of the European consumer" as a person who is reasonably mature, careful, judicious and able to differentiate when sufficient information is provided to him/her.**[5]

6. It should be hardly surprising to find out that a stronger role (a point of departure) in European unfair competition law is played primarily by the decision-making practice of the ECJ. Unfair competition law (regardless of whether relying on extensive normative regulation or not) is always, to a significant degree, a kind of judge-made law and this can-

[2] Krejci, Kessler, Augenhofer (editors): Lauterkeitsrecht im Umbruch, Manzsche Verlags-und Universitätsbuchhandlung, Vienna 2005.

[3] Kroker, E.R.: Irreführende Werbung (Die Rechtsprechung des EuGH, , Verlag Orac, Vídeň, 1998; Einzinger, M.: Die gemeinschaftsrechtlichen Vorgaben für das österreichische Lauterkeitsrecht, in Proceedings cited in Note 2, p. 3 and following.

[4] Schricker, G.: Deregulierung im Recht des unlauteren Wettbewerbs, GRUR International 7/1994, p. 586 and following.

[5] Cf. Fezer, K.H.: Das wettbewerbsrechtliche Irreführubgsverbot als ein normatives Modell des verständigen Verbrauchers im Europäischen Unionsrecht, WRP 9/95. p. 671 and following; Luckner, F.G.: Are the different Concepts of the Consumer in Legislation and Jurisprudence satisfactory, Revue Internationale de la Concurrence, 1/1996. p. 5 and following; Traub, F.: Sind die verschiedenen Verbraucherleitbildern in Gesetz und Rechtsprechung angemessen, Revue Internationale de la Concurrence 3/1996, p. 14 and following.

not be otherwise even in European law against unfair competition. This follows from the character of human creativity as well as the forms that this creativity assumes in business activities (even perverse ones), which cannot be all anticipated in any detailed list of undesirable competitive activities. This is supported by the assumption that various European nations are likely to enrich (as well as debase) European competitive culture by means of highly peculiar forms of competitive behaviour.

7. As regards the normative measures in European law against unfair competition, **Council Directive of 84/450/EEC of 10 September 1984 on misleading advertising** has been in effect for some time. Its transposition into the national legal systems and its application in the original form did not encounter any serious difficulties. This was probably also because **it captured the then existing state of the normative regulation and judicature in European countries rather than introducing anything entirely new.** In many cases, the explicit implementation of the directive into the national legal systems was replaced by a finding that the existing normative regulation and judicature already satisfy the requirements of the directive.

8. **The Directive on misleading advertising was amended and complemented with the Directive of the European Parliament and of the Council 97/55/EC on comparative advertising.** The adoption of the directive itself was a long–term and controversial process because there existed significant differences of opinion concerning comparative advertising. These differences were overcome by a compromise solution, under which comparative advertising is allowed as long as it meets many demanding and cumulative conditions. It is paradoxical that such a „permission" does not really encourage the development of comparative advertising and **rather exists as an example of deregulation which, when implemented by means of too tight a regulation, has a rather insignificant effect.**[6]

9. Unfair competition is the subject matter of **the recently adopted Directive of the European Parliament and of the Council No. 2005/29/EC of 11 May 2005 concerning unfair business–to–consumer commercial practices** (referred to as Directive 2005/29/EC) , **whose time limit for the transposition into national legislatures has not passed yet (the deadline is 12 June 2007).** Due to the existence of doubts about the suitable ways of such a transposition and the highly controversial opinions on this Directive (as well as its certain internal inconsistence), it will be the focus of the following discussion on the current trends in European unfair competition law.

III. CURRENT TRENDS IN EUROPEAN UNFAIR COMPETITION LAW

1. **Unfair competition law was**, in its original shape (and on the basis of the original „philosophy"), **meant to ensure fair conditions in a competition between competitors**, thus protecting the individual competitors as well as the competition itself and its common interests. The protection of consumers was only a side product of this final goal. **However, within the hierarchy of values protected by this field of law, the protection of consumers and the protection of the public interest in distorted competition gradually came to acquire an identically important (and recently perhaps even a more important) position.**

Such a triad of protected values (interests) also found its expression in theoretical considerations, as well as the normative measures and the legislative practice inspired by such theory. This was originally the goal proclaimed in Directive 84/450/ECC. **One of the strong current tendencies within European unfair competition law is the attempt to safeguard the unity of this law, which protects all of the three above–stated interests (values) at the same time.**[7]

2. **A different trend is indicated by the fact that Directive 2005/29/EC concerns only unfair commercial practices with respect to consumers;** in the „Brussels" terminology, this is labelled as B2C (business–to–consumers), not B2B (business–to–business) – so it does not concern the relations between entrepreneurs (competitors) themselves. At the same time, the intended purpose of Directive 84/450/ECC has been changed: from now on, it should serve only for the protection of entrepreneurs.[8] This tends to be criticized mainly in countries with a thorough and unified regulation of the area of unfair competition law (Germany and Austria), **with strong objections to the trend, already initiated, towards the break–up of the unified law against unfair competition and its metamorphosis into a certain kind of „consumer law" which protects compe-**

[6] SHERER, I.: Partielle Verschlechterung der Verbrauchersituation durch die Rechtsvereinheitlichung bei vergleichender Werbung. WRP, 2/2001, p. 95.

[7] Cf. the express provision in Section 1 of the new German act on unfair competition of 3 July 2004 and the commentary on this act in the work cited in Note 1, p. 471 and following.

[8] Cf. Article 14, paragraph 1 of Directive 2005/29/EC, under which Article 1 of Directive 84/450/EC is modified as follows: „The purpose of this Directive is to protect **traders** [emphasis added] against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted".

titors only indirectly.[9] It is being pointed out that such a disunity weakens the protection of consumers, too, since even consumers may be harmed e.g. by belittling competitors, an issue not regulated in Directive 2005/29/EC. Such fears are, to a certain extent, addressed in section 8 of the preliminary provisions of the preamble of the Directive, stating that the Directive indirectly protects „legitimate businesses from their competitors who do not play by the rules in this Directive". The European Commission has also declared its intention to investigate whether even the B2B area needs such a unified regulation of unfair commercial practices as adopted for regulating the relation between businesses and consumers.

3. **Traditional regulations of unfair competition often consist of a „general clause" (i.e. a general provision delimiting and prohibiting unfair competition, which may also serve independently for specifying the elements constituting unfair competition) and a variable number of special elements constituting unfair competition.** The development has gradually led to **an increase in specially regulated instances of unfair competition.** This was done by various means – the stabilization of judicature reaching out towards the general clause and thus creating so–called „judge–made" and „professorial" elements constituting unfair competition (mainly in the German and Austrian models of development of unfair competition law), the creation of highly extensive, semi–official catalogues of „sins" in competition (a model used in France by means of the self–regulating institutions in the field of advertising – Bureau pour la Vérification de la Publicité), and the transfer of judicial elements constituting unfair competition into legal regulations (the Polish model which was rumoured at scholarly conferences to codify German judicature). **Another current trend in European law against unfair competition may be characterized by means of a rising importance (and an increasing number) of general provisions (general clauses) regulating unfair competition and, at the same time, a rising significance (and also an increasing number) of specifically regulated instances of unfair competition.** The first trend is perceptible in Directive 2005/29/EC with its general clause delimiting and prohibiting unfair commercial practices (the extent of this delimitation is discussed below) and its general delimitation of misleading actions (with a particular provision for misleading omissions) and aggressive actions. The second trend is apparent (though not exclusively) from Annex I to Directive 2005/29/EC. This Annex (referred to as „a black list") includes 31 instances of misleading and aggressive actions which are to be, under any circumstances, considered as unfair. **The parallel increase of the importance (and number) of both general and special provisions need not be understood only as two competitive but also compatible ways of legal regulation.** Both can be well applied for standard and less common instances of unfair competition, one or the other may serve well to lawyers of different types. However, let it also be noted that **the over–abundance of special provisions and „supplementary parts" of normative texts (numerous definitions, extensive reasonings, desiderata in European directives) may actually obstruct the decision–making process concerning contentious cases because any experienced lawyer will be able to find and choose, out of the spate of words and ideas, something to support the position of his or her client.** The danger we face as a result of too extensive casuistic regulations was aptly identified by the poet and artist Jiří Kolář in the following verse: „While the world is drowning in commands, it is not within its power to carry out any of the ten main commandments."[10]

4. **The growth of specialized prohibitions of unfair competitive practices in Directive 2005/29/EC and some more recent legal regulations (for the German regulation, see below) may easily lead to the conviction that the current trend in European unfair competition law, which could be expresses by means of the idea of „unification by means of deregulation", is turning.**[11] **Such an impression, however, may be misleading.** Discussions over Directive 2005/29/ES indicate that behaviour which is prohibited 'per se' might be permissible, if it does not meet the prohibiting conditions in the general clause and if a decision–making body resorts to the 'golden rule' of unfair competition law (i.e. „the circumstances of particular cases are decisive")[12] Objections against the 'black list' have been, in the discussions going on at the two above–mentioned conferences, made less serious by the fact that almost all kinds of actions in the list have already been included in German and Austrian „judge–made elements constituting unfair competition". At the same time, some instances of unfair competition that have long been identified and typified in judicature are not included in the 'black list'. This leads to the consideration whether the list is taxative or demonstrative and whether actions not included

[9] Ummenberger–Zierler, E.: Aufgabe und Wirken der UWG–Reform – Kommission, Proceedings cited in Note 2, pp. 1–2.

[10] Kolář. J.: Psáno na pohlednice I., Mladá fronta, Praha 1999, p. 93.

[11] Schricker, cited in Note 4.

[12] Enzinger, cited in Note 3, p. 11.

in the 'black list' are henceforth allowed 'per se'.[13] (In my opinion, the list is taxative in its form, which, however, does not prevent the new general clause to apply to acts prohibited in pre–existing national general clauses, even though such actions are not included in the 'black list'). **The tendency towards a more lenient or strict regulation of unfair competition will, after all, be decided by the degree to which decision–making practice is developed, stabilized and exacting and to what extent it applies general provisions on unfair competition, which enable certain shifts in the stringency of the regulation to occur even without amending the legal regulations or which might even be contrary to such changes. Moreover, as indicated above, Directive 2005/29/EC contains not only the 'black list' but also numerous general provisions and other parts which allow for a relatively significant flexibility in its transposition into the national legal systems** (cf. the „triviality clause" in the new German regulation under which marginal („trivial") harm should not be sanctioned) **as well as in 'EC–oriented' application of unfair competition law.** (An example of such a Janus–faced character is to be found in paragraph 6 of the preliminary provisions of the Directive, which, among other, states „In line with the principle of proportionality, this Directive protects consumers from the consequences of such unfair commercial practices where they are material but recognises that in some cases the impact on consumers may be negligible.")

5. The general clauses of some traditional regulations of unfair competition law contained, and some still contain, expressions which might be ascribed a general ethical content (cf. „honest business customs" in the Paris Agreement, and „good manners" in the Austrian and the original German regulations). **The dominant trend in legal theory (and decision–making practice) stems from the belief that unfair competition law should, above all, ensure a functionality of the competition** and that the resulting requirements and the requirements of general morality merely intersect. This tendency is not denied but rather strengthened by more current regulations in European law against unfair competition. **Thus Directive 2005/29/EC and the most general of its general provisions formulates the criterion of unfair competition in a new way. This concerns the conflict between a particular commercial practice and the requirements of professional care if such a lack of professional care may be capable – to put it in a more condensed way – of affecting economic decisions of those at whom such a practice is aimed.** Such a solution, combining a sufficient degree of generality and a more specific guideline for deciding particular cases, seems to be rational. Moreover, no serious objections have been raised against it, but it will be true in this respect as well that decisive for the content of some very general formulations (vague legal terms) will be the manner in which they will be construed in stabilized decision–making practice.

6. The problematic nature of **Directive 2005/29/EC consists of the fact that it has, in a way, brought into question two of the existing decision–making procedures of the ECJ,** as **mentioned above. This is the principle** (applied, among other, in Directive 2003/31/EC on electronic commerce), **under which the permissibility of marketing and competitive measures was assessed according to the „law of the country of origin", unless specific circumstances gave ground for using a more traditional solution, namely the law of the state within whose territory such marketing measures operate and where the competitive clash occurs.**[14] The „clash" between such solutions (and, in a way, tendencies) has not, by far, come to an end, as attested by the debates over Directive 2005/29/EC. Its proposed version did use the concept of „law of the country of origin", but the opposition to such a clear–cut solution was so strong that the incompatibility of opinions was overcome „in a diplomatic way" – the final version of the text of the directive omitted the „principle of the law of origin" as a fundamental criterion when assessing the permissibility of marketing measures. As a result, the assessment of this issue has been left out to be decided in particular instances. **The conflict between the above–mentioned tendencies thus continues and is likely to continue as long as there are differences in the national legal regulations of unfair competition and differences in interpretation of formally identical regulations, arising from, among other, the various economic development and different legal and cultural traditions of individual EU member states. Any unifying role thus most likely will have to be played by the decision–making practice of the ECJ again.**

7. **Directive 2005/29/EC has also somewhat weakened the above–mentioned normative model of the European consumer, applied up to now by the decision–making practice of ECJ, since it places such requirements on consumers and their properties that are not entirely unequivocal.** On the one hand, it operates (in paragraph 18 of its preliminary provisions) with the notion of the 'average consumer' as understood by the

[13] GAMERITH, H.: Richtlinie über unlautere Geschäftsprasktiken: bisherige rechtspolitische Überlegungen zu einer Nezbestaltung des österreichischen UWGm sborník, cited in Note 3, p. 151 and following.

[14] LINDACHER, Z.: Zum internationale Privatrecht des unlautere Wettbewerbs, WRP 10/96. p. 990 and following.

ECJ, i.e. a consumer who has sufficient information and is reasonably observant and circumspect. At the same time, however, the purpose of this directive is to prevent the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. **The character traits worthy of special attention include, among other, the credulity of consumers which makes them particularly susceptible to a commercial practice** (cf. paragraph 19 of the preliminary provisions)[15] The possibility of a divided interpretation is further indicated by the final text of paragraph 18: „The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case–law of the Court of Justice, to determine the typical reaction of the average consumer in a given case."

IV. THE CURRENT STATE OF THE CZECH LEGAL REGULATION OF UNFAIR COMPETITION

1. The Czech legal regulation of unfair competition contained in Section 41 and subsequent sections of the Commercial Code appears to be stable. After 1989, a brief legal regulation containing a general clause and several elements constituting unfair competition was included in the then Economical Code, approximately corresponding to the level of detail contained in the Paris Agreement. The Commercial Code then basically took over the private law provisions from the pre–war Act against Unfair Competition No. 111/1927 Sb., with some more or less fortunate modifications. The more fortunate ones include the provision in Section 41 of the Commercial Code where, above all, the concept of the 'competitor' is defined (stressing mainly that this need not be an entrepreneur). This section further provides that competitive activity (for the purpose of achieving economic benefit) should be cultivated in a free manner. This may be understood in such a way that it is essentially permitted to use as wide a range of competitive methods as possible and innovate the competitive practices. Certain limitations of competitive activities are relegated in Section 41 of the Commercial Code only to a secondary position. This may be understood as an expression of a belief that a limitation of entrepreneurial activities has a subsidiary importance and should be interpreted in a restrictive rather than extensive manner. The hierarchical arrangement of Section 41 of the Commercial Code and its wording provide a certain guideline for deciding when the requirement of free cultivation of competitive activities comes into conflict with some or other limitations of competitive activities. This provision anticipates some current conceptual opinions which apply the general principles of private law even in relation to unfair competition law.[16]

2. The Czech legal regulation satisfied more up–to–date tendencies from the beginning also by using the expression „good manners of business competition" in its general clause, thus enabling to distinguish (with certain implications for the decision–making activity) this concept from the general institute of „good manners" used in the Civil Code, and the public–law conception of „good manners" as used in the Act on the Regulation of Advertising and in the Act on Trademarks.

3. The later development was anticipated by the regulation of unfair competition in the Commercial Code also by failing to take over some special provisions from the pre–war regulation which had been inspired by German and Austrian laws and which were, during the subsequent process of deregulation, abandoned in these countries (e.g. prohibitions on providing free gifts with sold products).

4. The regulation of sanctions against unfair competition is contentious mainly because it makes use of a generally little successful regulation of damages for infractions in the Commercial Code. The provision is Section 54(2) is „too fervently European" (and excessively protectionist in relation to the consumer), as it specifies that in unfair competition disputes, the burden proof is reversed whenever the consumer acts as the plaintiff. There will be frequent situations when the consumer will be able to bear his or her burden of proof without serious problems; there will thus be no reasons for reversing the burden of proof. On the other hand, sometimes (e.g. in cases of superlative advertising), there will be reasons for reversing the burden of proof even if the plaintiff is a competing entrepreneur.[17]

5. The take–over of substantial parts from the pre–war regulation of unfair competition made it possible to apply many high–quality pre–war judicial findings. Consequently, quite an extensive current judicature of a relatively good quality came into existence.[18] Although the Czech pre–war regulation had been – as mentioned above – inspired by the German and Austrian regulations, scholarly literature and judicature from these countries continue to influence Czech scholarly literature on unfair competition, and affect, in a mediated way, the decision–making practice.

[15] This problem was pointed out at the Budapest conference by Professor Jochen Glöckner and dealt with by Markéta Selucká in a workshop at the Faculty of Law, Masaryk University.

[16] Constitutional principles were relied on by Professor R.M. Hilty during his interpretation of private–law rules of competitive behaviour at the Budapest conference.

[17] See Eliáš, Bejček, Hajn, Ježek: Kurs obchodního práva, Obecná část, Soutěžní právo, 4. vydání, p. 389.

[18] Macek, J.: Rozhodnutí ve věcech obchodního jména a nekalé soutěže. C. H. Beck, Praha 2000.

6. Directive 84/450/ECC was not taken over in its original „long" form into the Commercial Code. This was (as in Germany and Austria) probably based on the conviction that the current regulation – shorter and more abstract, as contained in Sections 45 and 46 of the Commercial Code, combined with the decision–making practice of courts with respect of this regulation – is sufficient to achieve the purpose of this directive. The additions and amendments of this directive, arising from Directive 97/55/EC on comparative advertising, were taken over into the Commercial Code on the basis of its „harmonizing" and „technical" amendments. This was done together with certain deviations in formulation, which have been subject to criticism by scholars.[19]

V. CURRENT TRENDS IN CZECH LAW AGAINST UNFAIR COMPETITION

1. **The fundamental trend in the current and anticipated development of Czech unfair competition law (both as regards its theory, decision–making practice and intended legislation) is a minimum number of new significant tendencies as well as a minimum number of conceptual considerations about the further orientation of this field of legal regulation.**

2. I attempted to formulate some less traditional approaches in one of my monographs a few years ago.[20] In this book, I emphasised the importance and the biological conditioning of human competitive behaviour, pleading for an understanding of a certain degree of aggression, allurement and simulation in business competition, and, in some respects, of a more lenient assessment of some manifestations of business competition. I also recommended that some traditional categories of unfair competition law – namely 'competitive relation' and 'competitive intention' should be replaced with terms of a more objective character: 'competitive situation' and 'competitive orientation of behaviour'.

3. **The available decision–making practice seems to indicate the existence of a relatively insignificant trend towards alleviating the relatively strict previous assessment of unfair competition.** However, there still persists **a strong tendency to bring actions** (and, consequently, to adjudicate, mainly by first instance courts) **in cases concerning competitive behaviour according to the special elements constituting unfair competition rather than the general clause against unfair competition. It cannot be claimed that the current Czech decision–making practice has already led to the formation of more stable „judge–made elements constituting unfair competition".**

4. As regards legislative intents, there is a very **conservative** (some might even say 'conserving') **trend in the intended legal regulation of unfair competition. A novelty should be the transfer of the current regulation of unfair competition from the Commercial Code to the Civil Code.**[21] While some minor changes actually worsen the current regulation (e.g. the absence of the existing text of Section 41 of the Commercial Code, which delimits, to a certain extent, competitors and is related to the way the right to business competition is conceived of in constitutional law; Section 2471 of the proposed Civil Code merely lists restrictions), some improve it (such as the regulation of comparative advertising conforming to the EU directive, and the generally more suitable regulation of damages), some preserve the current legal state criticized in scholarly literature (the reversal of the burden of proof in unfair competition disputes only for the benefit of consumers), and still others preserve the existing statutory formulations (good manners of competition), they cannot be identified as mistaken, but **they do not reflect the new trends in European unfair competition law and in the national legal systems of individual member states.**

VI. CONCLUSIONS FOR THE FURTHER DEVELOPMENT OF CZECH UNFAIR COMPETITION LAW

1. **Czech law against unfair competition cannot, in the short term, remain in the same normative state as at present. This is obvious from the fact that, under Section 19 of Directive 2005/29/EC, the member states have to adopt and publish, by 12 June 2007, legal and administrative regulations necessary for complying with this Directive.** For this reason, the section on unfair competition in the draft proposal of the new Civil Code would have to be changed, if this code was to be passed prior to the above–stated date. This, however, is not planned and is improbable also for other reasons.

2. **As regards the transposition of Directive 2005/29/EC into the Czech legal system, inspiration could be sought primarily in those models which have been inspired by the pro-**

[19] VEČERKOVÁ, E: Aktivní legitimace ve sporech z nekalé soutěže po novele obchodního zákoníku. Obchodní právo č. 3/2001, p. 2 and following. Includes a comprehensive overview of literature concerning this issue.

[20] HAJN, P.: Soutěžní chování a právo proti nekalé soutěži, Masarykova univerzita, Brno 2000.

[21] The proposal of the Civil Code (parts one to four), Draft proposal by the working group, main drafters: Eliáš, K., ZUKLÍNOVÁ, M.: Ministry of Interior of the Czech Republic, no date.

posed and implemented regulation in countries with a similar legal culture and legal history (both generally and in the area of unfair competition law in particular), i.e. in **Germany and Austria.**

3. **Germany has adopted a new Act on Unfair Competition of 3 July 2004 (Gesetz gegen den unlauteren Wettbewerb – referred to below „the new German AUC"), which has also been heralded as the transposition of Directive 2005/29/ES into the national legal system.** This unified normative regulation is not, by any means, a mere transcription of the said directive or its 'black list'; it only takes over some basic thoughts, concepts and structural features (e.g. 'definitions'), trying to overcome some of its contested issues and expressing certain modernising trends in unfair competition law. Since a detailed analysis of this regulation is beyond the scope of this study and will be subject to a special article, let me just briefly use this space to outline some of the concepts of the new German AUC, which:

a) should serve for the protection of „competitors and consumers, as well as other participants in the market, from unfair competition. At the same time, it protects public interest in undistorted competition";
b) abandons the traditional concept of 'good manners' in connection with business competition and makes do with the prohibition of 'unfair competition';
c) delimits the concept of unfair competition in such a way that unfair competitive practices are impermissible only if they may affect competition to the detriment of competitors, consumers and other participants in the market in a significant manner (the German original refers to a 'not insignificant manner'). This is a general clause of a dual character. The second part tends to be referred to as a „triviality clause", introducing the principle of „de minimis" into unfair competition law, too;
d) contains a list of 11 examples in the general clause (previously partly contained only in judicature);
e) regulates, in a particularly detailed manner, deceptive advertising, comparative advertising and persistent and unwanted solicitation (unzumutbare Balaestigung);
f) contains traditional legal means against unfair competition (action to compel a duty to refrain from and remove a faulty state) and their detailed regulation;
g) conditions the claim for damages by an action based on fault;
h) regulates the channelling of profits (for the benefit of the state budget) obtained through unfair competition towards a large number of individual consumers;
i) takes into account collective actions;
j) contains a special provision on short terms of statutory bar with respect of unfair competition;
k) contains some criminal law provisions concerning unfair competition.[22]

4. One of the solutions proposed by Helmut Gamerith in Austria[23] recommends that Directive 2005/29/EC should be transposed into the national legal system by means of the current Austrian AUC. Changes should be made only in the wording delimiting business competition and in the general clause. These changes in wording are most likely to have been inspired by the German regulation (mainly its „triviality clause") and the classification of unfair practices in Directive 2005/29/EC into misleading (including omissive) and aggressive actions. Such a brief regulation is being justified by reference to the fact that the existing Austrian regulation of unfair competition (and the extensive judicature forming a part of such regulation) conforms to the requirements of Directive 2005/29/EC.

5. Other solutions, proposed by Guido Kucsko in Austria,[24] recommend that Directive 2005/29/EC and its 'black list' should be transposed into the national legal system in as detailed and literal manner as possible. The reasoning behind these proposals makes it clear that this should primarily simplify the task of attorneys–at–law and the choice of marketing measures to be applied not only in Austria but also in other EU countries.

5. Each of the above–mentioned proposals (and many other possible ones) has its pros and cons. Discussions over these issues should also be started in this country, going hand in hand with the overall consideration of the future development of Czech law against unfair competition. The solution which I personally find as the most suitable one is the exclusion of the regulation of unfair competition from the Commercial Code and – prior to the deadline for the transposition of Directive 2005/29/EC into the Czech legal system – its inclusion in an independent legal regulation on unfair competition. This would also satisfy the idea from the reasoning on the draft proposal of the Civil Code requiring that business competition be

[22] See ALEXANDER, CH.: Die strafbare Werbung in der UWG–Reform, WRP, 4/2004, p. 407 and following.

[23] GAMERITH, H.: work cited in Note 13, p. 168.

[24] KUCSKO, G.: Wünsche an die österreichische UWG–Reform aus der Sicht der Praxis – ein Plädoyer, Proceedings cited in Note 3., p. 169.

removed from the Commercial Code mainly because it is not limited to entrepreneurs only and includes other competitors, private rights and duties of other persons (e.g. so–called „auxiliary persons"). Such a regulation could provide a way of transposing Directive 2005/29/EC into the Czech legal system by means of one of the ways (or their combination) realized or proposed abroad (e.g. a brief basic regulation according to the above–mentioned model by Gamerith supplemented by an annex with a 'black list' in harmony with the text of the said Directive). At the same time, some legislative improvements brought by the draft proposal of the new Civil Code could be used and others, not contained in the proposal, could be added.

Business groups –European development and trends of their legal regulation

Jarmila Pokorná*

1. *THE CHARACTERISTICS OF BUSINESS GROUPS AND THEIR LEGAL REGULATIONS*

Business groups are bodies that can be found in all economically developed countries, not only in Europe. They bring their participants significant economic advantages, enable the assertion of economic goals unified with all the members of the group, allow them to focus on certain areas considered to be of key importance from the point of view of the whole, and strengthen the sources enabling the assertion of these unified interests. Moreover they provide an opportunity for the localisation and compensation of losses, as they allow the concentration of unfavourable consequences of business only with some participants of the group. For legal regulation, however, their existence brings quite new problems, because these groups can only with difficulties be described by legal categories that we commonly use when dealing with the subjects of legal relationships.

The groups are usually formed by individual legal entities that, as such, are formally independent and participate in the given whole on the basis of facts that can be classified as facts on which the internal relationships in business organisations are based. It is most frequently gaining shares in other companies or signing contracts on the common exercise of the voting rights. The consequence of these is the violation of the equal position of the subjects, creating the relationships of dependence and control within the given group and limitations to the autonomy of will of the controlled subjects. This leads to the emergence of structures that as a whole are not legal entities and their individual elements do not lose the character of independent subjects of the law, but at the same time they are linked through relationships that bring inequalities and dependency of the controlled subjects on the controlling ones. Such structure brings tension caused by the conflict of partial interests of the individual participants of the group and at the same time on the necessity to respect the unified interest of the whole group.

The contemporary doctrine of commercial law comes out of the basic signs of the group during the efforts to define it. It emphasises that business groups bring up significant problems in all branches of the law, as the legal regulation is always directed not at one subject, but at a union that may be described as poly–corporate.[1] Business groups are then described as a manifestation of economic concentration, for which it is characteristic to connect in the area of legal regulation the individual legally independent subjects into an economic union following its own business interests, while this whole is not perceived as a legal entity.[2]

For the given groups, in the legal terminology, especially in Germany, Austria, and the countries influenced by their law, the expression "holding" has become widely accepted where the legal regulation of

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[1] Synoptic report on the activities of the professional committee Forum Europaneum Konzernrecht published in the journal Zeitschrift für Unternehmens– und Gesellschaftsrecht, 4/1998, the notion is stated on p. 689.

[2] ČERNÁ, S.: Koncernové právo v Německu, Evropské unii a České republice [Law of groups of companies in Germany, European Union, and the Czech Republic]. C. H. Beck, Praha 1999, p. 4.

business groups is concerned; we speak of the holding law as a part of the law of business companies, and this law concerns the specific legal problems resulting from the existence and activity of these groups.

Legislative theory as well as the theory of the law should deal with the issue of the legal regulation of holdings: whether such structures should be subject to legal regulation at all, how far this regulation should go, and whether it should create a unified system or limit itself only to those individual actions at when instances it becomes necessary.

If the functioning of such a group is based on the control and assertion of a unified interest of the whole group and the autonomy of will of the controlled members of the group is deformed, legal regulation should state the limit of the influence of such control at such instances where inequality could have negative influence on the legal standing of the subjects within or outside the group. Legal regulation of the group thus primarily has a protective function, with regard to the controlled entities, to the members, whose will is not significant for the creation of the group (members that are standing aside), as well as towards third parties standing outside the group, especially the creditors.[3]

Apart from this, a further area of key importance arises in the questions whether the legal regulation should not also interact with the structure itself and thus provide the necessary level of legal certainty for it.[4] The group is looked upon as an organisational unit in which the managerial function is performed by the controlling subject who, however, not only takes decisions on the improvement of its share in the controlled entities, but also significantly influences their activity. From the point of view of legal regulation this means that it will be necessary to deal especially with the questions of duties and responsibilities of the controlling entities and the entities that form their managerial and controlling bodies.[5]

2. *THE EFFORTS TO HARMONISE THE HOLDING LAW WITHIN THE EUROPEAN COMMUNITIES*

Within the European communities, business groups are of significant importance, as they are directly connected with the implementation of the freedom of business. If the way to the concentration of business through improving shares that base the controlling should be open, the connection between the law of business companies and the legal orders of the individual member states would have to be overcome and a certain minimum level of their mutual harmony in this area would have to be reached.

In parallel to the other directives concerning business societies, the directive on holdings was under preparation since the mid–1970s. Its first preliminary version was presented for discussion to the governments of the member states in 1974 and 1975. On the basis of serious comments, the Committee then re–wrote the proposal and the proposal for the 9^{th} directive originated; its text was finalised during 1984 and presented to the Council to accept. However, because of the insufficient majority, this proposal could not be accepted, and the text therefore does not have the formal requirements of a directive and it was not even published as such.[6]

The proposal expressed views on the grouping of joint stock companies only and was based on the regulation by the German joint stock company law, especially on its division of the holding groups into contractual and actual holdings. It was exactly the close connection to the German law that had caused the denial of the proposal, because e.g. France, Great Britain, Italy, or Spain did not have common principles and accepting the directive for them would actually mean to "import German law".[7] For this reason, no further work was done on this proposal of a directive and the proposal to this day exists in its preliminary form.

Protective elements to the advantage of the creditors and minor partners of the controlled group also appeared in the proposals for directives on the European joint stock company that originated in the 1970s, but even here, no further use was found for them and they were left out of the text of the directive.

Although legal regulations of capital business companies are nowadays very similar in the member states, significant differences remain in the area of holding law. Two basic approaches have basically established themselves:

a) German legal regulation, in which one of the basic functions of the holding law is the protective one. It is mainly the entities standing aside the decision process in the controlled companies, i.e. minor partners and creditors of the controlled companies that are viewed as endangered. Their legal position regulated in the common law of business companies does not provide sufficient protection against the uncertain-

[3] SCHMIDT, K.: Gesellschaftsrecht, 3. Auflage, Carl Heymans Verlag KG, 1997, p. 494.

[4] The report also points at the protective and organisational function of the regulation of holding structures; report quoted in footnote 1, pp. 677 and 678.

[5] SCHMIDT, K.: op. cit. in note 3, pp. 497 – 498.

[6] On the development, see LUTTER, M.: Europäisches Unternehmensrecht, 4^{th} edition, Zeitschrift für Unternehmens- und Gesellschaftsrecht, Sonderheft 1, Walter de Gruyter, Berlin, New York, 1996, pp. 239 – 240.

[7] Ibid., p. 240.

ty coming up from the interconnection of the controlling and controlled entity. According to the degree of being endangered, the German law distinguishes among simple control, simple and qualified actual holding, contractual holding, and a holding based on incorporation. The holding law is adjusted within the framework of the joint stock company law, but through the judiciary of the Federal Court of Justice it is transmitted to other forms of business companies as well, especially to the limited liability companies.[8] A similar regulation exists also in Portugal, the German model was also inspiring for the Slovenian and Czech regulations,

b) in contrast with this elaborate and relatively very detailed legal regulation, other states proceed differently and use general principles of private law, law of the business companies, and insolvency law to reach factually relevant, effective, and sufficiently flexible regulations that would encompass also the specific features of business groups.[9] Special rules for the business groups are thus being formed rather by an explanation and application practice.

In this state of development, the holding law came also into the 21st century and it was one of the areas of business companies' law with which the preparatory Committees has not had any success so far. Further development in this area is connected with the reformist efforts of the committee that began in the beginning of the new millennium and continue until now.

The proposals for further development of European law of business companies were to be prepared by the working group "High Level Group of Company Law Experts", established by the Committee in September 2001.[10] In the first phase, this committee was to present a new proposal for a directive on the proposals to overtake, in the second phase it was supposed to deal with the law of business companies as such and to present the essential basis of its further development.[11]

The result of the work of the committee mentioned is summarised in the Announcement of the Committee to the Council and the European Parliament of May 21st 2003[12], which delineates the basic political goals of the reform and states the plan for work in the individual areas of the law of business companies for three time periods: short–term (2003 – 2005), mid–term (2006 – 2008) and long–term (since 2009).

As far as the holding law is concerned[13], the conclusions of the expert committee state that the business groups present a legitimate form of business, but that they are connected with many risks for the creditors and stock holders. Legal regulation that should react to these risks will no longer be drafted as a synoptic directive. Therefore the attempts at accepting the 9th directive will not continue, but the individual problems will be solved separately with the help of partial measures. The conclusions also determined three basic areas, into which these measures should aim:

1) sufficient extent of publicly accessible information on the structures in which the group is active, relationships within these structures, economic results of the group in a summary,
2) determination of the holding's policy – legal regulation should ensure that the management of both controlling and controlled institutions determined the essence of the unified approach of the group, so that it was possible to divide the advantages and disadvantages following from the assertion of group interests among the shareholders of the individual companies in a just way,
3) the regulation of holding chains and pyramids – legal regulation should aim at making the relationships within such groups clearer and should not allow for the speculative pyramids created usually by shares in the estate of one mother company in a whole number of other companies ordered into one interconnected chain. Such legal regulation should, at the same time, not hinder business people in their choice of an adequate form of organisation for their activity.

For further approach in the harmonisation of the legal regulations of the member states in the area of holding law, the conclusion of the Committee is important especially with regard to the decline from the efforts to provide a comprehensive regulation of the holdings in one single directive and that it will further proceed by partial steps, by which the clauses important for business groups will be incorporated into the directives whose subject matter lies in other issues. It thus cannot be said that the Committee has given up on the harmonisation efforts in the area of holding law. It is only the process of assertion of these regulations which should reach a certain standard in the individual member states that is changing.

The above–stated procedure does not present anything new for the point of view of holding law harmo-

[8] See op. cit. in footnote 1, p.678.

[9] Ibid., p. 680.

[10] After its head Jaap Winter, it is also called "Winter committee".

[11] Baldamus, E.–A.: Reform der Kapitalrichtlinie, Carl Heymanns Verlag KG, Köln–Berlin–Bonn–München, 2002, pp. 44 – 45.

[12] KOM(2003) 284.

[13] See the Announcement of the Committee, chapter 3.3.

nisation. Apart from the proposal for Directive 9, the partial questions connected to holding structures have been regulated since the 1980s also in other directives. At present, we could state especially the following:

- Directive 7 on the consolidated balance sheet report is of crucial importance here[14] – on the basis of this directive, member states have to oblige the companies belonging to the business group with presenting a balance sheet report, in which all the property and financial matters within the group and the profit of the companies belonging to the group will become apparent. This report must be accessible also to the partners and creditors of the companies of the group. The obligation is binding both for the holdings based on the majority voting status of the participating entities as well as for the ones based on contracts. It should also include the cases when a minority of votes suffices for controlling, and also the groups of equal–status companies standing on the same level. At present, it is becoming apparent from the conclusions of the group of experts for the area of holding law (Forum Europaneum Konzernrecht) that for the time being, no further proposal of a new directive shall be created, as the entire system shall, on the level of the Community as well as in the individual states, undergo significant changes,[15]
- Directive 2 on the protective measures prescribed to the advantage of the partners and third parties for the foundation of joint stock companies, the preservation and changes of their stock capital[16] – this directive was amended with Article 24a in 1992[17], which regulates the basic standards for those cases when a certain business company subscribes for shares, gains or owns the shares of a joint stock company. The regulation is based on the fact that these shares are considered to be proper shares belonging to the property of the company. Member states are asked to define the cases in which it will be taken for granted that the joint stock company may exercise controlling influence on another business company or that the joint stock company has the votes at disposal only as a mediator, or may exercise its controlling influence. Further, the member states should state precisely the circumstances under which it will be taken for granted that the joint stock company has at its disposal voting rights of another company. Voting rights connected with the shares in question are to be suspended in such cases.
- Directive No. 2001/34/EC of May 28th 2001 (Official Journal L 217 of August 11th 2001) on the admission of securities to official Stock Exchange listing and information to be published on those securities – this is a regulation of announcement obligation, which allows those who are interested in participatory securities traded on the regulated markets to look at the structure of the owners of these securities in the individual companies. This information may also be used for finding out about the participants of the business groups and of their influence on the individual participants of the group: The announcement obligation was a general institute that encompassed all the physical persons and legal entities that have gained more than 10 per cent of the subscribed basic capital of the business company and was adjusted already in the proposal for Directive 9 as an institute that enables us to learn more about the structure of the partners of a business group. In the contemporary directive, this is an obligation only for the companies whose shares in securities are traded on regulated markets. The reach of the announcement obligation is thus narrower and serves especially for the protection of the capital market investment. Nevertheless, it cannot be said that it did not serve also to the better protection of the partners and creditors grouped in holdings,[18]
- Directive No. 94/45/EC of September 22nd 1994 (Official Journal L 254 of September 30th 1994) on company councils – although the directive is matter–of–factly directed at the information protection of the employees, it is based on the reality of business entities' grouping and it sets the standards and the employees' information protection procedures especially for the cases of business groups that are crossing the borders of the member states. If the economic activities of the interconnected companies should evolve harmoniously, the groups active in different states must inform on their business decisions

[14] 83/349/EEC published in the Official Journal L 193 on July 18th 1983.

[15] See report cited in footnote 1), p. 703.

[16] 77/91/EEC published in the Official Journal L 26 on January 31st 1977.

[17] The change of Directive 92/101/EEC of November 23rd 1992, published in the official bulletin Official Journal L 347 on November 28th 1992.

[18] Such announcement obligation is sometimes looked upon as a tool whose functions are different than the protection of the partners and creditors in the holdings. – see ČERNÁ, S.: p. cit. in footnote. 2, p. 61. We think that such an opinion is too polarised and that it is necessary to admit certain holding functions also to the adjustment of the announcement obligation determined only for the companies with shares traded on the regulated markets.

also the representatives of the employees that may be affected by the decisions. For the holding law, it is interesting that defines Article 3 of this directive the notion of a "controlled entity", which in the sense of the given directive includes any entrepreneur that on the basis of property, financial participation or special agreements may control another entrepreneur. Article 3 contains also the negative definition and states that the quantitative limits of the controlling relationship will be determined by the law of the state to which the given entrepreneur belongs.

- Directive 13 No. 2004/25/EC April 21^{st} 2004 (Official Journal L 142 of April 30^{th} 2004) on takeover bids – this directive is important especially for the creation of business people networking, as it regulates the basic principles of the shares offer with the purpose of gaining controlling influence on another business company. It unites the conditions for the creation of a group and the protection of the partners standing aside. Apart from this, it also anchors the basic principles for the squeeze–out procedures, i.e. for the possibility of forced redemption of shares from minority shareholder, which is used for simplifying the structure of shareholders' company and increasing the efficiency while exercising the rights and obligations of the shareholders in the internal relationships of the society.

Further partial steps may be expected on the basis of the initiatives of a group of experts (Forum Europaeum Konzernrecht) and its suggestions. Although they concentrate only on those aspects of holding law that are connected with the law of the companies, their aim is to unify the way business groups are managed, the protection of investors, minority shareholders as well as the creditors of the subsidiaries and thus contribute to better regulation of those areas that have been found to be necessary for the creation of the EU internal market.

3. *REFLECTION OF THE EUROPEAN REGULATIONS IN THE CZECH LAW*

The elements of holding law have been infiltrating the Commercial Code gradually and over many years. At first, its elements appeared in § 161 of the Commercial Code in connection with the regulation of gaining shares. The third paragraph of the cited clause prohibits the subsidiary of a joint stock company to gain shares of that company.[19]

The amendment by the Act No. 142/1996 Sb. defined, among the general regulation of business companies, the notion of a controlling entity, according to which the controlling was bound with a greater amount of voting rights. The clause regulated the increase and decrease in the number of voting rights according to the fact whether the controlling was direct or indirect, and according to who held the shares in question. This regulation, which was mainly of definition character, was followed by further clauses on the legal regulation of joint stock companies: Clause § 161a par. 1 letter b), according to which, when gaining proper shares, the shares of the controlled company owned directly or through, Clause § 190a that rendered the making of agreements on the transfer of profit between the controlling and controlled entity possible, Clause § 183d par. 3 and 4 regulating the announcement obligation, Clause § 196 par. 1 letter d) which enabled personal interconnection between the controlled and controlling entity, and Clause § 196a that stated some softening of the rules preventing the abuse of the company property for the interconnected entities. Although in comparison with the previous regulation, the changes of the Commercial Code text seem to be rather significant, this amendment also presented only some partial steps, which could not have been enough to ensure the effective fulfilment of the protective functions of the holding law neither for minority shareholders, nor for the company's creditors.[20]

The basis of the current legal regulation, implemented from the Act No. 370/2000 Sb., is again the amended § 66a of the Commercial Code. In its second paragraph, it defines the relation of controlling through the definition of the legal standing of the controlling and controlled entity. The controlling entity is any entity that factually or legally exercises directly or indirectly the decisive influence on the management or operation of a company of a different entity. For easier assessment of the controlling relationship, the law contains the irrefutable presumptions, by which the following entities are always considered controlling ones:

1) the entity who is a majority partner in the sense of § 66a par. 1 of the Commercial Code (majority partner is the one having the majority of votes on the basis of participation in the company),
2) entity that has majority of the voting rights on the basis of an agreement with another partner/other partners,

[19] For a more detailed commentary on this clause see PELIKÁNOVÁ, I.: Komentář k obchodnímu zákoníku [Commentary on the Commercial Code.] 2^{nd} volume, Linde, Praha 1995, pp. 425 and following.

[20] For commentary on the amendment mentioned see PELIKÁNOVÁ, I.: Komentář k obchodnímu zákoníku [Commentary on the Commercial Code], 3^{rd} volume, Linde, Praha 1996, pp. 36 and following and the text of the commentary to the clauses to which it refers on p. 40.

3) entity that can assert the election or nomination or dismissal of the majority of people that are not a statutory body or its member, or majority of people that are members of the supervisory board of a legal entity, of which it is a partner,
4) entities acting in accord (see § 66b of the Commercial Code), who together have majority of voting rights on a certain entity.

According to the irrefutable presumption in § 66a par. 5 of the Commercial Code, the controlling entity is such an entity that has at least 40 per cent of the voting rights on a certain entity, unless it is proved that another entity does not have the same or higher amount of voting rights.

The second important part of the business group is contained in the Czech Commercial Code, § 66a par. 7, which defines a holding. According to this regulation, a holding originates when one or two entities (managed entities) are subordinated to a common management by another entity (the managing entity). The companies of the managed companies form a holding together with the managing entity. The connection to the controlling relationship is formed by a refutable hypothesis according to which the controlling entity and the controlled entities form a holding, unless the opposite is proved.

The quoted clause regulates also the formation of a holding by stating that the entities can be subordinated to a single management also by a contract. This contract may be signed also between the controlling entity and the controlled ones.

In overview, we can then reach the following alternatives of business groups[21]

a) a group in which the relationship of controlling and at the same time, a holding is created. If this group is based on the factual controlling relationship, a factual holding originates, if there exists a contract between the controlling entity and the controlled ones, a contract holding originates,
b) there is no factual controlling relationship between the entities of the group, but their holding relationship is based on a controlling contract. This is a contract holding of two companies with equal rights,
c) there is a controlling relationship between the entities of the group, but not a holding relationship, because the single management element is missing.

The valid regulation contains, apart from the definition clauses, also all the principles on which the legal regulation of a holding is constructed, whether it be written regulation as in Germany, or mostly judiciary regulations. With the factual groups, commands of the controlling entity that might be harmful for the controlled entity are not allowed. If the controlling entity has to issue such a command, it is obliged to cover for the harm following the observance of the command. Thus, the controlled entity, whose interests are primary and with whose management the controlling entity must not interfere, is preferred. Whether this command of the law is fulfilled, should be found out by the partners and creditors from the report which the statutory bodies of the controlled entities are obliged to compile and in which they have to state what contracts between the connected entities have been signed in the previous accounting period, what other legal actions were taken to the advantage of these entities, and what other measures were taken to the advantage or on the basis of an impulse of those entities. In the report, it is necessary to specify the payments provided by a controlled entity, possible consideration on the part of the controlling entity, advantages or disadvantages of the steps and measures and methods of compensation for the harm done to another entity, or whether an agreement on the compensation of the harm has been made. This report is filed in the collection of certificates with the registry court and the partners have the same access to it as to the balance sheet report.

As regards the contractual groups, the controlling entity may give commands to the statutory body of the controlled entity, and even such commands that might be disadvantageous for the controlled entity, if these commands serve to the advantage of the controlling entity or another entity with which it forms a holding. The legal regulation here prefers the common interest of the whole group, but to the controlling entity, the obligation to cover for the loss stated in the annual balance sheet report of the controlled entity arises, if the controlled entity cannot cover for this harm from the reserve fund or other sources it has at its disposal. When signing the controlling contract, all the partners of the group must be given the relevant information, the contract is approved by the general meeting of the company and the contract is effective after the announcement that it has been filed in the collection of certificates of the registry court. Minority partners (the law calls them the apart-standing partners) have the right to ask the company to sign a contract on the valued transfer of their shares to the company for a price adequate for the value of the shares.

Although the valid legal regulation respects all the principles mentioned in the text of the proposal of Directive 9 and appear also in the proposals of the group

[21] In the discussion among the professionals, the classification is stated by Burešová, J. in the article Závislost ve franchisingovém vztahu z pohledu práva podnikatelských seskupení [Dependency in the franchising relationship from the point of view of business groups], Právo a podnikání 2002, No. 7 – 8, p. 24. However, no single classification criterion has been selected for this classification.

of professionals,[22] this did not prevent some problems regarding the explanation. I consider the following to be the most important ones:

a) is the regulation really applied only in those cases when the people or entities owning the company join, or also in the cases where e.g. one partner holds a majority position in the trading company, but does not own any company and does not even participate in the business of another person/entity,

b) what facts is the controlling relationship based on – is it only the special fact regulated by the law of business companies, or also any contract, or other legal fact, in which there are only partial elements of controlling,

c) what will the process be when a factual holding is formed, i.e. the state when the controlling contract has not been signed, but the interconnection of the entities in the group is so intensive and close that it influences all the activities of the controlled entity. The report on interconnected entities loses its sense in this situation, as it is based on the existence of the individual separated and identifiable measures directed from the controlling entity to the controlled one

The solution to these problems must be sought in the explanations to the Czech legal regulation and in the decision taking of the courts of higher instances. Inspiring impulses for the explanation may be found also in the German regulation, which served as a model for the currently valid Czech law. Partial steps on the basis of the individual EC directives dealing with business companies do not have an immediate impact on Czech holding law. They appear in the relevant special laws (consolidated balance sheet report is regulated in § 22, 23 and 23 and in the Act No. 563/1991 Sb. on bookkeeping; take over bids form a part of the legal regulation of the joint stock companies in the Commercial Code; the announcement obligation is looked upon as one of the protective elements of the capital market and, as such, it is regulated in the Act No. 256/2004 Sb. on business on the capital market – § 122), whose purpose they help to fulfil, while their importance for the business groups is only secondary.

The proposals that have been compiled for further development of the European holding law by the expert group Forum Europeanum Konzernrecht contain a number of very practical thoughts. However, they originated from the comparison of regulations and theoretical conclusions reached in different states and in many ways deviate from the German model, which was to a great extent taken over into the Czech law. Their immediate significance for the explanation and application of the valid Czech regulation will therefore consist rather in the area of principles applied in the holding law. It is, however, not possible to leave it aside while creating a new legal regulation of business groups, which should form a part of the new commercial code currently under preparation.

[22] See report cited in footnote 1).

Comparison of European trends with the State of Czech Law development for awarding public works contracts

Karel Marek*

TO EUROPEAN TRENDS

It is well known that the EC law in the area of awarding public works contracts has gone through many changes recently.

Within the EU, the need to simplify the legal regulation with the use of new electronic possibilities was intensely felt.

When compiling the relevant directives, it was at the same time stated that the general principles for awarding would be kept, i.e. securing the transparency and equal treatment. Assigning public orders should secure that the order is obtained by the subject that offers the best quality while keeping the lowest possible cost on the part of the awarder.

The new European regulation should at the same

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time also determine the so–called competition dialogue of the awarder and the tenderer, which would consist in the determination of contract conditions.

Within the EU, the following main directions for formulating the new regulations were outlined:

- determination of competition dialogue (competition dialogue should have been determined for especially complicated contracts)
- introducing electronic awarding (which would also make it possible to shorten the whole process of awarding)
- making it possible for the awarders not to have only a realisation contract, but also so–called "framework contracts", on whose basis the realisation contracts would be signed
- simplifying the clauses on technological specifications
- determination of the values of contracts for simpler application.

For the realisation of the outlined directions, the new EC guidelines were issued, which led to the issue of new legal regulation in the Czech Republic, i.e. to the issue of Act No. 137/2006 Coll., effective from July 1st2006.

European awarding directives regulate in detail the procedures for awarding the public works contracts exceeding the limit; with the public works contracts below the limit, however, they limit themselves to the anchoring of the principle of transparency and no discrimination in the awarding procedure. Our legal regulation up to now as well as the new one elaborates in detail the procedures for awarding the contracts below the limit and tries to keep the balance between the transparency and proportionality principles. With the contracts below the limit, a special simplified kind of procedure is stated in the new law.

PRINCIPLES OF THE NEW LAW

- efforts to simplify and clarify the law as a whole,
- efforts to remove the problems up to now and to take into account practical experience when applying Act No. 40/2004 Coll.,
- clarification of basic notions,
- more detailed specification of the individual awarding procedures,
- introducing the subjects providing postal services among the sector awarders,
- introducing the possibility to award with the help of common purchasing subjects,
- determining the possibility of signing framework contracts also for public awarders (not just for the sector ones),
- determined competition dialogue – proceedings determined for especially complex contracts, making it possible for the awarder to obtain an innovative solution to the given project in the situation when he himself is for objective reasons not able to specify exactly the mode of realisation of the public works,
- enabling electronic process of awarding.

We think that the issuing of the new act on the awarding of public works contract may be welcome. However, the fact that this happens only shortly after the issuing of the previous Act will have negative effects. We namely think that the practice needs around three years to "intake" a new legal regulation.

Simultaneously with the new regulation of public works contracts, the new act on the public–private partnership is issued (the concession act). This law contains a really large number of references to the act on public works contracts. Therefore there was also the possibility to consider the issuing of both amendments in a single regulation, but this was not done.

SUBDIVISION OF THE ACT

The Act incorporates the relevant regulations of the European Communities[1] **and regulates**

- **procedures for the award of public works contracts,**
- **competition on the design,**
- **supervision regarding the compliance with this act**
- **conditions of keeping and the function of the list of qualified suppliers and of the system of certified suppliers.**

The Act is subdivided into eight parts and has three appendices.

The first part – general clauses – is devoted to the Regulated Subject, the Awarder of the public works contract, the Central awarder, the Relevant activity, Concurrence of the activities, Principles of the procedure for the awarder, Public works contract (and public works contract for supplies, construction work, and services and the public works contract according to its estimated value), Definition of the notions; it

[1] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Directive 2005/75/EC of the European Parliament and of the Council of 16 November 2005 correcting the Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

also deals with exceptions and business competition connected with the output in the relevant activity.

The second part regulates the Awarding procedure, its kinds and conditions for the use of some procedures, including the competition dialogue and the simplified procedures for the contracts below the limit.

The third part regulates special procedures in the awarding process.

The fourth part regulates the competition on design.

The regulation on the protection against incorrect procedures of the awarder is contained in the fifth part.

The sixth and seventh parts contain clauses on the list of qualified suppliers, the system of certified suppliers, list of foreign suppliers, and common clauses (especially on the publication of the communication between the awarder and supplier).

The act ends with transitional and concluding clauses in the eighth part.

Appendices 1 and 2 contain the lists of services liable to publication in the Official Journal of the European Communities (Appendix 1) and the list of services not liable to this publication (Appendix 2). Appendix 3 bears the title Construction works according to § 9 par. 1 letter a) of the Act (to be understood of this Act). The clause of § 9 par. 1 letter a) cited at the same time states that if the construction works fall within the categories stated in Appendix 3, then this is also a public works contract for construction work.

Applicability of the act is determined by the given group of people.

AWARDERS

The awarder of the public works contract for the purposes of this law is a public, subsidized, or sector awarder.

The public awarders are

a) **The Czech Republic**[2]

b) **institution receiving contributions from the State Budget,**

c) **territorial self–governing unit or an institution receiving contributions from the State Budget,** where the territorial self–governing unit acts as a promoter

d) **another legal entity**, if

1. it was founded or promoted with the purpose of fulfilling the needs of public interest that are not of industrial or commercial nature, and
2. it is financed mostly by the state or another public awarder, or it is owned or controlled by the state or another public awarder, or the state or another public awarder appoints more than half of the members in it statutory, administrative, supervision, or control organ.

The subsidized awarder is a legal entity or a natural person that awards a public works contract of which more than 50 per cent is paid with the money provided by a public awarder, which is done through another person in the following cases

a) public works contract for construction works whose estimated value is over the limit,, i.e. corresponds with the minimum financial limit stated in § 12 par. 4 and the object of this public order

1. is the realisation of construction work related to one of the activities stated in Appendix 3, or it
2. is the realisation of construction works according to § 9 concerning healthcare facilities, sports facilities, facilities for leisure time and relaxation, schools, administrative buildings, or

b) public works contract for the services related to the public works contract for construction work according to the letter a), whose estimated value is also over the limit and corresponds at least to the financial limit stated in § 12 par. 3 letter b).

For the purposes of signing a contract with a subcontractor, such supplier that had not been awarded a public works contract by a public awarder is not considered to be a subsidised contractor.

When awarding a public works contract, the subsidised contractor proceeds according to the clauses of this act valid for a public awarder even in the cases when the awarder simultaneously fulfils the prerequisites for being classified into another category of awarder according to par. 2 or par. 6 (§ 2 of the act).

A sector awarder is a person performing one of the **relevant activities** according to § 4 (in § 4, some concrete relevant activities in the individual branches are given, i.e. in the gas manufacture, heating plants, power engineering, water supply industry, activities related to the water supply industry, activities related to the operation of transportation networks, activities related to providing reserved postal services, other services and activities listed performed while using a geographically delimited territory), if

a) this relevant activity is performed on the basis of a special or exclusive right, or

b) the awarder can directly or indirectly exercise

[2] Act No. 219/2000 Coll. on the property of the Czech Republic and its representation in legal relationships as amended.

the dominant influence; the awarder applies the dominant influence in the following cases

1. he has the majority of his votes at disposal himself[3] or on the basis of an agreement with another person, or
2. he nominates or votes for more than a half of the members of the statutory, administrative, supervisory, or controlling body.

If the public awarder exercises one or more relevant activities according to § 4, the clauses of the act relating to the sector awarder apply for him as well under the assumption that the public works order must be awarded in connection with a relevant activity of one public awarder (§ 2 par. 7).

Even several awarders are considered to be a single awarder for the purposes of this law (stated under § 2 par. 2, 3 or 6), **if they associate or in other way join in order to coordinate the procedure directed towards the awarding of a public works contract** (further only as "association of awarders"). In such a case, the awarders are obliged to sign a written contract before the commencing of the awarding procedure, in which they arrange their mutual rights and obligations related to the awarding procedure and determine the manner of negotiation in the name of the participants of the association of awarders. If a public or subsidised awarder is participating in the association of awarders, the clauses of the act valid for a public awarder apply for this association of awarders; this does not interfere with the clause in par. 7 (§ 2 par. 8).

Also any other association or other joint activity of the awarder with a natural person or a legal entity that is not an awarder with the purpose of awarding a public works contract is considered as awarder (according to § 2 par. 2, 3 or 6). Clause in § 2 par. 8 third sentence is to be used in a similar way.

A central awarder is the public awarder who performs the centralised awarding, consisting in

a) for the other awarders, he purchases supplies or services that are objects of public works contracts, which he further sells to other awarders for a price that is not higher than the purchasing price of the supplies and services, or
b) sells the awarding procedure and awards a public works contract for supplies, services or construction work to the account of other awarders.

Before the start of the centralised awarding, the awarders and the central awarder are obliged to sign a written contract in which they arrange their mutual rights and obligations related to the centralised awarding procedure (§ 3 par. 1).

The central awarder performs the centralised awarding according to § 3 par. 1 according to the clauses of this act valid for the public awarder. If, however, he performs the centralised awarding exclusively for sector awarders or on their account, he proceeds according to the clauses of this act that are valid for sector awarders.

If during the procedure according to § 3 par. 1, this act is breached, it is the central awarder who is responsible for breaching the law, unless such breaching of the law was a result of an activity of negligence of the awarder on whose account the centralised awarding was performed.

If the public works contract was awarded in compliance with this act by the central awarder, it holds that the public works contract was awarded in compliance with this act also with respect to the awarder for whom the centralised awarding was performed.

According to the legal regulation stated in Act No. 40/2004 Coll., as amended, it was a problem if there was a concurrence and the relevant person complied with the conditions for both the public awarders and the sector awarders, or the contract in question was for a different contract than for the sector one with the sector awarder. At the same time, there were various explanations of this. This is improved in the new regulation (§ 5 of the Act).

By concurrence of activities, it is meant that the object of the awarded public works contract is related to the execution of a different activity as well as to the execution of a different activity of the awarder (§ 5 par. 1).

The existing problem of concurrence is solved in the new act to the benefit of the awarder and opts for a more favourable solution for the awarder.

In the case of concurrent activities:

a) the public awarder proceeds according to the clauses of this law valid for a sector awarder only in the cases when the object of the public works contract is related especially with the relevant activity performed by a public awarder, in other cases or when it cannot be objectively determined whether the object of the public order is connected especially with the execution of the relevant activity, the public awarder proceeds according to the clauses of this act valid for the public awarder,
b) the sector awarder does not proceed according to this act, if the object of the public works contract is related especially to its different activi-

[3] E.g. § 12 par. 1 of Act No. 77/2002 Coll. on the joint stock company České dráhy (Czech Railways), the state organisation Správa železniční dopravní cesty (Railway Infrastructure Administration) and on the change of Act No. 266/1994 Coll. on railways as amended, and Act No. 77/1997 Coll., on the state company as amended.

ty than the execution of the relevant activity; in the opposite case or when it cannot be determined objectively whether the object of public works contract is related especially with the execution of a different activity, the sector awarder proceeds according to the clauses of this act valid for the sector awarder.

SMALL–SIZE CONTRACTS, CONTRACTS BELOW AND ABOVE THE LIMIT

By a **small–size public works contract** we mean such public works contract whose estimated value will not reach in the case of a public works order on supplies or public works order on services CZK 2 000 000 without value added tax or, in the case of public works contract for construction work, CZK 6 000 000 without value added tax.

The small–size contracts are not regulated in detail by the legal norm. The rule of transparency and non–discrimination, however, holds for them as well.

The table expresses the orientation values as to when the public works contract is above the limit, it states the given limits

AWARDERS	SUPPLIES AND SERVICES	CONSTRUCTION WORK
The Czech Republic, state organisations receiving contributions from the state budget, for the Czech Republic – Ministry of Defence, this limit holds only on the goods according to the statutory instrument	**4 290 000,- Kč** with services with the exception according to the law	**165 288 000,- Kč**
Territorial self–governing unit or an organisation receiving contributions form the state budget whose promoter is the territorial self–governing unit and the so–called other legal entity, for the Czech republic – Ministry of Defence for the goods that is not determined by the legal statutory instrument	**6 607 000,- Kč** with services, the more detailed definition is contained in the act	**165 288 000,- Kč**
Sector awarder	13 215 000,- Kč	165 288 000,- Kč

By a **public works contract below the limit** we mean such a public works contract whose estimated value in the case of public works contract for the supplies or a public works contract for the services is at least CZK 2 000 000 without value added tax or in the case of public works contract for construction work at least CZK 6 000 000 without value added tax and does not reach the set financial limit. With these contracts, the awarder asks 5 suppliers to participate.

By a **public works contract above the limit** we mean a contract above the stated limits (see the table).

SUPPLIER, INTERESTED PERSON, APPLICANT

Act No. 137/2006 Coll. in § 17 called Definition of some other notions defines, for the purposes of the act, the notions of **supplier, interested person, and applicant** and uses these notions further in its clauses (similarly to the previous regulation).

Supplier is a natural person or a legal entity that

a) supplies goods,
b) provides services, or
c) executes construction work if its residence, place of business, or permanent residence is in the Czech Republic, or
d) a foreign supplier.

Applicant is a supplier, who filed in an application in the awarding procedure.

Interested person is a supplier, who, in the stated period of time, filed in an application to

a) participate in the short-listed procedure,
b) participate in the action procedure with publication or
c) participate in the competition dialogue,
d) or a supplier that was asked to take part in the action procedure without publication by the awarder,
e) submit the preliminary offer in a dynamic purchasing system,
f) submit the offer in a simplified proceedings for contracts below the limit,

g) submit the offer for the proceedings on the basis of a framework contract, or

h) verify the interest in participating in the case of awarding procedure started by the publication of a regular preliminary announcement.

SUPPLIES, SERVICES, CONSTRUCTION WORK

The contracts are classified in compliance with the preceding legal regulation into

- **supplies,**
- **services,**
- **construction work.**

Public works contract is a contract executed on the basis of the contract between the awarder and one or more suppliers, whose subject is the provision of paid–for supplies or services or the paid–for execution of construction work. The public order that must be awarded by the awarder according to this act has to be executed on the basis of a written contract. Thus what we said in the part dealing with the regulation according to Act No. 40/2004 Col. holds also here.

Public works contract for supplies is the public works contract whose subject is the obtaining of an item (further only "goods"), and especially purchasing the goods, purchasing the goods in instalments, renting the goods or leasing the goods with the right of subsequent purchase – see § 8 par. 1.

Public works contract for supplies is also the public work contract whose object is, apart from obtaining goods according to § 8 par. 1 also providing the service consisting in placing, assembly, or putting such goods into operation, unless these activities are not the essential purpose of the public works contract, but are necessary for the fulfilment of the public works contract (§ 8 of the Act).

Public works contract for construction work (§ 9) is the public works contract whose object is

a) execution of construction work pertaining to one of the activities stated in Appendix 3,

b) execution of construction work according to letter a) and the project or engineering activities related to it, or

c) execution of a building that is a result of the construction or assembly work, or also the related project or engineering activities and that is as a whole able to fulfil an independent economic or technological function.

Public works contract for construction work is also the public works contract whose object is, apart from fulfilment according to paragraph 1, also providing the supplies or services necessary for the execution of the public works contract by the supplier.

Public works contract for construction work is considered to be also the construction works obtained with the use of mediating or similar services that will be provided to the awarder by another person.

Public works contract for services (§ 10) is a public works contract that is neither a public works contract for the supplies nor a public works contract for construction works.

Public works contract for services is also the public works contract whose object is apart from providing services also

a) providing the supply according to § 8, if the estimated value of the services provided is not higher than the estimated value of the supply provided, or

b) execution of construction work according to § 9, unless these works are an essential purpose of the public works contract, but their execution is necessary for the fulfilment of the public works contract for services.

Services are divided into categories determined in Appendices No. 1 and 2.

If the object of the public works contract is the provision of the services stated in Appendix 1 as well as in Appendix 2, the estimated value of the services stated in the relevant Appendix is of decisive importance when determining whether the public works contract is according to Appendix 1 or 2.

AWARDING AND AGENDA PROCEDURES

The law regulates the following kinds of awarding procedures

a) **open procedure (§ 27),**

b) **short-list procedure (§ 28),**

c) **agenda procedure with publication (§ 29),**

d) **agenda procedure without publication (§ 34),**

e) **competition dialogue (§ 35),**

f) **simplified procedure for contracts below the limit (§ 38).**

The kinds of awarding procedure according to e) and f) may be used by a public awarder.

The use of agenda proceedings is easier for the awarder. The new legal regulation makes their use wider in a certain way.

The overview of the agenda procedures is given in the form of a table (the text of the law is shortened).

Use of the agenda procedures with publication

acc. to § 22 par. 4	in the case of sector awarders
acc. to § 22 par. 1	in the previous open procedure, short-list procedure, or a competition dialogue, only insufficient or unacceptable offers were filed in. Note: the law at the same time states examples when the awarder is not obliged to publish the agenda procedures with publication.
acc. to § 22 par. 3	in exceptional cases, if it can be, with regard to the nature of the supplies, services, or construction work or the risks connected with them, justifiably expected that the offer prices of the applicants will not be comparable, in the case of public works contracts for services, especially insurance, banking, investment, or project services or auditing, interpreting, legal or other similar services, if the nature of the service does not enable a sufficiently exact determination of the subject of public works contract in advance so that it was possible to state the procedures determined by this act for an open or short-list procedure, especially with regard to the establishment of evaluation criteria, or in the case of public works contracts for construction work, if the construction work performed exclusively with the purpose of research and development, and not with the purpose of profit or paying for the expenses related to research and development
acc. to § 22 par. 5	public awarder may award a public works contract in agenda procedure with publication also without fulfilling the conditions stated in par. 1 to 3, if it concerns public works order for services stated in Appendix No. 2.

Use of the agenda procedures without publication

acc. to § 23 par. 1 a)	in the previous open procedure, short-list procedure, or agenda procedure with publication, no offers were filed.
acc. to § 23 par. 1 b)	in the previous open procedure, short-list procedure, or agenda procedure with publication, only unsuitable offers were filed according to § 22 par. 1 letter a)
acc. to § 23 par. 1 c)	no applications were filed for the participation in short-list procedure or agenda procedure with publication
acc. to § 23 par. 4 a)	public works contract may be fulfilled for technological or artistic reasons, for the reasons of protection of exclusive rights or for the reasons following from the special legal regulation only by certain supplier
acc. to § 23 par. 4 b)	it is necessary to award a public works contract in an extremely demanding case that was not caused by the awarder and his actions and which he could not foresee and for time reasons it is impossible to award the public works contract in another sort of the awarding procedure
acc. to § 23 par. 5 a)	the goods supplied is made only for the purposes of research and development, with the exceptions of the cases when the goods is produced in greater quantities in order to gain profit for the awarder or with the purpose of covering the costs of the awarder related with research and development
acc. to § 23 par. 5 b)	this concerns additional supplies of the same supplier, with whom the contract has been signed where they are determined as a partial substitution of the previous supply or as an enlargement of the contemporary extent of the supply, with the assumption that the change of a supplier would force the awarder to purchase goods of other technical parameters, which would result in incompability with the original supply or would mean inadequate technical problems during the operation and maintenance of the original supply, and this with the conditions given
acc. to § 23 par. 5 c)	these are supplies offered and purchased on the commodity markets
acc. to § 23 par. 5 d)	these are supplies purchase for exceptionally advantageous conditions from a supplier that is in liquidation, or from the bankruptcy trustee, counterbalancing trustee, or the trustee in the case of a supplier, on whose property bankruptcy was adjudicated or towards which settlement is possible or the forced settlement is confirmed or which is under official trusteeship
acc. to § 23 par. 5 e)	these are goods that have been purchase for a price much lower than the usual market price and significantly lower price is offered by the supplier only for a very short time; the public awarder is authorised to award the public works contract in agenda procedure without publication according to this letter only in the relationship towards the public works contract below the limit
acc. to § 23 par. 6	in the agenda procedure without publication, the awarder may award a public works contract for the services also in the case when it is awarded in connection with the competition for design

acc. to § 23 par. 7 a)	additional construction work or additional services that have not been contained in the original conditions of awarding; the need for them originated as a result of objectively unpredictable circumstances and these additional construction works or additional services are necessary for the execution of the original construction work or for providing the original services with the stated assumptions
acc. to § 23 par. 7 b)	New construction work and in the case of public awarder also new services consisting in the construction works or services of the same or similar kind as in the original public works contract, and this on the basis of stated assumptions
acc. to § 23 par. 8 a)	Sector awarder is authorised for the awarding of a public works contract over the limit in the case were the contract is awarded for the purposes of research and development m but not with the aim of gaining profit with the purpose if reaching the profit by the awarder or payment of the costs of the awarder connected with the development, all this with a given pre–requisite
acc. to § 23 par. 8 b)	Sector awarder is authorised for the awarding of a public works contract over the limit in the case when it is a public works contract awarded on the basis of a framework.

Note: If a framework contract is signed by a public awarder, he proceeds according to § 92 and signs contract, or awards the public works contract according to the conditions of this clause.

The law newly constitutes the competition dialogue and the conditions for its use. **Public awarder may use the competition dialogue for awarding a public works contract with a very complicated fulfilment**, if the use of open procedure or shortlist procedure is not possible with regard to the nature of the object of the fulfilment of the public works contract.

Public works contract with an especially complex object of fulfilment is considered to be such public works contract with which the public awarder is objectively not able to define exactly

a) technological conditions according to the determined clause (§ 46 par. 4 and 5), or
b) legal or financial requirements on the fulfilment of the public works contract

In the announcement of a competition dialogue, the public awarder announces the intention to award a public works contract to an unlimited number of suppliers in this awarding procedure; the announcement of competition dialogue presents a call for filing in the application for the participation in the competition dialogue and for proving the fulfilment of qualification.

Apart from the announcement, the public awarder is authorised to specify the needs, requirements, and other facts also in the documentation of the competition dialogue

The applicants file a written application for participation and prove the fulfilment of qualification until the stated deadline. For judging the qualification of the interested people, the public awarder asks the interested people who have shown the fulfilment of qualification to take part in the competition dialogue. If the public awarder limited the number of interested people in the announcement of competition dialogue, he will ask to participate in the competition dialogue only those interested people that have been chosen in compliance with § 61. Public awarder may also state the maximum number of interested people to take part in the competition dialogue.

The public awarder is obliged to ask to participate in competition dialogue at least 3 interested people. If the public awarder received less than 3 applications for participation or less applications for participation than was stated in the announcement of the competition dialogue, the public awarder may ask to participate in the competition dialogue all the interested people who have filed the application for participation and proved the fulfilment of qualification to a full extent. This holds also in the case when the fulfilment of qualification was shown by less than 3 interested people.

The law newly also regulates the **simplified procedure for contracts below the limit** and the conditions of its use.

Public awarder may use the simplified procedure for contracts below the limit

a) for awarding a public works contract for supplies below the limit or a public works contract for services below the limit
b) or for public works contract for construction work below the limit, whose estimated value will not exceed CZK 20 000 000 without the value added tax.

The law also regulates the introduction of a dynamic purchasing system. **For the purposes of awarding public works contracts, whose object is the obtaining common, generally accessible goods, services, or construction work, the awarder may introduce the dynamic purchasing system in the open proceedings.**

When introducing the dynamic purchase system and filing the suppliers into the dynamic purchasing system, the awarder proceeds in compliance with the rules of open procedure until the moment of awarding

the public works contracts in the dynamic purchasing system.

The prerequisite of the introduction of the dynamic purchasing system is the announcement of this fact in the announcement of the open procedure. The announcement of the open proceedings on the introduction of the dynamic purchasing system is a call for the preliminary offers. In the announcement of open proceedings about the introduction of the dynamic purchase system, the awarder will state also the Internet address, on which the awarding documentation is at disposal.

Dynamic purchasing system cannot be introduced for the purposes of signing framework contracts.

Dynamic purchasing system cannot last longer than 4 years, with the exceptions in cases adequately justified by the awarder. The awarder will provide the suppliers with unlimited, complete, and direct remote access to the awarding documentation from the announcement of the open procedure on the introduction of a dynamic purchasing system until the end of functioning of the dynamic purchasing system.

In the announcement of the open proceedings about the introduction of a dynamic purchasing system and in the awarding documentation, the awarder specifies at least the kind and object of the public works contracts that shall be awarded in the dynamic purchasing system, the conditions for entering the dynamic purchasing system, which must contain also the requirements for the qualification of the supplier; this holds for the sector awarder only when he asks for the proof of the fulfilment of qualification, evaluation criteria for awarding public works contracts in the dynamic purchasing system, if this is suitable with regard to the time difference of the awarding of public works contracts in the dynamic purchasing system, the information related to the dynamic purchasing system and the use of electronic equipment and the information on the filing of preliminary orders.

When introducing the dynamic purchasing system and awarding public works contracts in a dynamic purchasing system, both awarder and supplier use solely electronic means (according to § 149 of the Act).

The Act also regulates the **Electronic auctions**, namely the conditions and the scale of use and their running. This kind of auctions, however, will not be applied immediately, but gradually.[4]

CONCLUDING REMARK

If we are to attempt the comparison of the trends of the EC legal regulation with the new Czech legal regulation, i.e. with Act No. 137/2006 Coll., we may say that the main directions formulated by the EC legal regulation correspond with the principles stated for the new Act No. 137/2006 Coll.

The new act, however, is about a third greater in size than the previous legal regulation. For the common addressee, it will at the same time be difficult to find "bridges", i.e. the relations between the individual clauses that are related to each other, as they are scattered throughout the Act. The users may thus find professional publications, e.g. explanations and the text of the law with commentary, useful.[5]

To foreign people, we may then recommend also publications in the journal Public Procurement Law Review.[6]

SUMMARY

Within EU, the main directions for the formulation of the new regulation were outlined:

- determination of the competition dialogue (competition dialogue was to be determined for especially complex contracts)
- introduction of electronic awarding (which would also make it possible to shorten the whole awarding process)
- enabling the awarders not the sign only realisation contracts, but also the so–called "framework contracts", on whose basis the contracts concerning realisation would be signed
- simplification of the clauses on technological specifications
- determination of the value of the contracts for simplified proceedings.

If we are to attempt the comparison of the trends of the EC legal regulation with the new Czech legal regulation, i.e. with Act No. 137/2006 Coll., we may say that the main directions formulated by the EC legal regulation correspond with the principles stated for the new Act No. 137/2006 Coll.

[4] On the electronic procedure for public orders, see the editorial interview with R. MARTÍNEK: Public works contracts elektronicky (Public Orders Electronically), Konkursní noviny No. 11/2006,. p. 1.

[5] See e.g. KRČ, R., MAREK, K., PETR, M.: Act on public orders with explanatory notes., Linde Praha, in print.

[6] See e.g. KRČ, R.: The Czech Republic – Draft Legislation on Public Contracts, Public Procurement Law Review, No. 4/2006, pp. NA 123–NA 126.

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EU social policy – its development and perspectives

Zdeňka Gregorová*

1. THE NOTION AND SIGNIFICANCE OF SOCIAL POLICY IN THE EUROPEAN COMMUNITIES

From the point of view of historical development, human society functioned and functions as a structurally and functionally complex rational auto–regulating or regulated open system that is composed of people and institutions. The surroundings of the social system are always formed by the system of nature, which provides the material sources for it. In such form and symbiosis with nature the human society exists and develops, from the auto–regulating systems to the systems regulated by the state.

The state and the society are not identical institutions. Society may be defined as a complex, open socially–economically–culturally managed system that is composed of individuals and institutions connected by on–going activity and relationships that happen in accord with the ethical, technical, religious, and legal norms. The state, from the point of view of the historical development as well as from the point of view of the relations to the nature and society, can be defined as an open system of sovereign political–power–managing bodies and institutions that manage the society through legal norms secured by the threat of enforcement. This is a system that is composed of people–bureaucrats and bodies–institutions and which governs the society through law.[1]

Since the prehistoric times, human beings cherish the need for social security, which is a natural, both conscious and subconscious, constant in human behaviour. To begin with, a human being seeks protection and the securing of the physical essence, but as the time changes, this need is enlarged to the security against possible risks of the economic life and gradually, the requirement of a certain standard of living and basic conditions for the development of the personality begin to materialise. In this process, it is not only the quantitative and qualitative change in the satisfaction of social needs, but at the same time the change in the participation of the state in this process. The impact of the state in the area of securing social needs of a human being is changing from the situation when the state does not interfere with the social and economic sphere, to the situation when the state is significantly socially engaged, and when it supports and regulates social development.

In modern history of the development of the society we meet the notion of a social state or a welfare state as a kind of a strong social state. Many definitions hold concerning the essence, character, and extent of the welfare state. For the purposes of this contribution we will start only from the basic definition. While a state respecting the rule of the law considers the greatest value to be freedom, social state obliges the individual to take part in the common coping with life. At the same time, social state has as one of its objectives the creation of a certain social system in the name of the implementation of social justice. It is the role of social state to look after the securing of a dignified life of a human being (existential minimum) for everybody. This state is obliged to keep social equality and justice and to improve the general welfare. The notion "social" obliges the state to take care of its citizens with regard to basic risks of the life, i.e. illness, job injury, unemployment, disability, and old age. Social state does not only secure basic rights, but is also obliged to act positively, develop "social activity" and create a social system directed at the implementation of social justice. It must work against the economic hardship of all the groups of citizens and must contri-

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[1] For more details see PRUSÁK J.: Vybrané kapitoly z modernej teórie štátu a práva [Selected chapters from the modern theory of the state and the law], UK, Bratislava 1992, p. 8 and following.

bute to the just compensation between the economically and socially weaker and stronger members of the society.[2] Some countries, as e.g. the Federal Republic of Germany and France, have the fact that they are a social state respecting the rule of the law anchored in the constitution.[3]

At present, all the advanced economies count on the participation of the state in the economic and social development. The state enters the economic and social developments and regulates them. In this sense, the state in all the advanced economies is also a social state. The question at present thus is not put whether there should or should not be a social state, but what kind of social state it should be, how "social security" oriented it should be, to what extent these features are to be fulfilled. The policy of each state that wants to be a social one must look into the future and must change the economic and social conditions by appeal and guarantee social security and freedom in this way. Each state creates its own concept of social policy and the tools for its implementation are determined by its historical and geographical factors and also by social, political, and economic conditions.

The relation of the European Union to social policy may be characterised as a gradually developing one. In the first phases of the existence of European Communities, social issues did not play an important role. Originally, the opinion that economic integration will automatically improve social conditions and therefore the social issues need not be regulated was prevalent. The activity in the economic area was a priority and the almost exceptional clauses in the employment law and social security were the ones on the free movement of employees. Only during the development of the European Communities it has become apparent that the conflict–free development and functioning of the common market cannot be expected without at the same time paying attention to social issues, which are on the other hand deepened as a result of the common market. The idea of renewing the social dialogue as an important prerequisite of economic growth began to be asserted.

2. *DEVELOPMENT OF SOCIAL POLICY OF THE EUROPEAN COMMUNITIES*

The development of social policy in the European Communities can be divided into three phases:

- the first phase (1957 to 1974) was characteristic by its very cautious approach to the solution of the social issues;
- the second phase (1974 to 1990) was, to begin with, the so–called "golden period" for the social security policy, which was true until 1980, when the conditions changed radically;
- the third phase (since 1990) is the period of the Charter of Basic Social Rights of Employees, whose content has influenced all the subsequent important documents of the Community, and further it is a period of intensive fight against unemployment.

The first phase of the development of social policy in the European communities is typical for its exclusively economic co–operation. The founding countries did not assign to this community any authority in the social security area. This belonged almost exclusively to the individual member states. The European Community was created on the basis of the idea that the process of economic integration will proceed in accord with the free market philosophy. Social security measures were considered to be only tools through which the correct functioning of a common market may be reached, or a logical consequence of the openness of the market. The original clause of Article 117 of the Convention on the Forming of EC which says that the improvement of the living standards and working conditions of the employees that will make their "gradual equalisation" possible can only happen as a result of the common market functioning and the steps foreseen by the Convention. With regard to the absence of any regulation in this area, co–operation was to be reached through consulting, study groups, and only tentative ideas. Due to the fact that the Convention on the Forming of EC eliminated normative interferences in the social security sphere from the sphere of the direct activity of the Committee and anchored unanimous voting of the member states, the creation of rules obligatory for all the member states became very problematic. The main reason for accepting legal regulations related to employment and social security on the level of the Community was especially the effort to secure free movement of people and the protection of the economic competition conditions, later already the efforts to preserve the generally high standards of living and social protection of the EC citizens. Towards the end of the first phase, however, the viewpoint on the social issues changed significantly, which was expressed in the common declaration of the heads of states and governments in Paris in 1972. In this declaration, social policy was put at the same level as the implementation of the economic and monetary union.

The second phase may be divided even further into two parts, the first part from 1974 till 1980, which is

[2] For more details see MATLÁK J.: Právo sociálneho zabezpečenia v historickom, súčasnom a európskom kontexte [Law of social security in the historical, contemporary, and European context], Vydavatelské oddelenie PrF UK, Bratislava 1996, p. 10.

[3] Article 20 par. 1 and Article 28 par. 1 of the Essential Law of the Federal Republic of Germany, Article 2 of the Constitution of the French Republic.

often called the "golden period of harmonisation", and second part from 1980 till 1989, when the neo-liberal approach won in social policy and a new movement in favour of deregulation and higher flexibility of work relationship developed. The first part began by the acceptance of the Social action programme, which focused on the implementation of the following priorities:

- to reach full and quality employment rate in the Community,
- to improve life and work conditions, so that their harmonisation was made possible while preserving the improvements,
- to increase the involvement of the management and the labour force (the representatives of workers) in the economic and social decisions of the Community and the participation of the workers in the life of the companies

In the second part of this phase – as has already been said – the neo-liberal approach, emphasizing deregulation and higher level of flexibility in social policy, won, because according to the neo-liberalists' opinion, the high regulation of the previous period led to unemployment and created drawbacks for employees. In this phase, however, social sphere underwent a significant change by the acceptance of the Unified European Act in 1986, effective since July 1st1987. The Unified European Act is a reflection of a certain change in European thinking. The tendency to leave the neo-liberalist thinking is apparent from it. It was a manifestation of the change in approaches to the understanding of the market as something "all–solving" and a manifestation of the effort to begin work on social integration of Europe as the necessary prerequisite for reaching adequate level of competition, without which the market that shows significant internationalisation of economy, cannot function smoothly. In other words, the member states reached the conclusion that in the conditions of economic integration, social integration cannot be omitted, since the social conditions of people significantly influence successful economic development and competitiveness of the companies. Thus the necessity to solve the social and economic problems as parallel ones appeared. As a result of gradual enlargement of the European Community with further members, a completely new problem arose – noticeable differences in the economic level of the individual member states, as some new members were economically much weaker, and these differences could not have been ignored, but needed to be counted with when building the economic relations and economic co–operation within the Community. When implementing social policy, the emphasis after the acceptance of the document mentioned is moved from the harmonisation to the definition of minimum requirement on the European level or at least to the assessment of the essential problems regarding employees.[4]

The third phase – since 1990 until the present – may be characterised as a phase of still stronger tendencies to the support of social solidarity not only in the individual member states, but also between them. The beginnings of these efforts may be seen already in the report of the Committee of September 1998, in which the basic theses, which should have served as a basis for future initiatives, are put more concretely. These were mainly the introduction of entirely free movement of people, removing the still existing obstacles of social harmony in various areas (women, the disabled, and so on), measures to improve the protection of health and safety of employees, renewal of social dialogue, and the Charter of social rights, which would delimit basic social rights of employees in the Community.

In this phase, the most important steps towards the development and improvement of co–operation of the member states in the social area were made, and in a number of documents, quite concrete aims of social politics of the Community were outlined. The common effort at approchement and harmonisation of the processes in social sphere, especially in the employment policy, is apparent from them, as in this phase, the number of the unemployed rose significantly in the member states of the Union, and therefore especially the last years are marked by intense co–operation of the member states in the fight against unemployment. The third phase may also be called the phase of the Charter of basic social rights of the employees, which was signed in December 1989 in Strassbourg. The Charter regulates basic social rights in connection with employment and holds only for the member states of the European Communities. The document is a declaration of the representatives of the member states of the Communities without direct legal consequences.

The acceptance of the Convention on European Union in 1992, containing the Protocol on Social Policy as its part, marked a significant shift for the development of social policy. The importance assigned to social policy is apparent already in the preamble of the Maastricht Treaty, where it is one of the basic objectives. The Union is formulated as a support of balanced and sustainable economic and social progress, among other things also by supporting social solidarity. The basic trends defined in Maastricht were the following:

- emphasizing the importance of collective negotiation and the dialogue of the social partners,

[4] On the issue of employment law rapprochement see TRÖSTER, P., Sbližování českého pracovního práva s právem Evropské unie [Rapprochement of Czech employment law with the law of the European Union], Právo a zaměstnání No. 11/1997, pp. 8 and following; also FUCHS, M., Sbližování pracovního práva [Rapprochement of employment law](1), Sociální politika No. 1/1998, p. 3.

- adjustment of parental leave,
- protection of part–time work and on the basis of fixed–term contracts.

A problem connected with Maastricht Treaty and especially with the Protocol on Social Policy was the creation of "dual–speed social Europe". The discussions related to the accepting of this treaty were governed by the fight about the programme for the European Union in the social area. As a result of this, Great Britain decided not to participate in this programme, which was expressed only in the fact that only the remaining 11 member state at that time agreed on the Agreement on Social Policy, and thus founded the new European social dimension. Eleven member states committed themselves to support employment, improve living and employment standards, provide adequate social protection, support dialogue between the management of the companies and employees, development of human resources with regard to high employment rate, and fight against the elimination from the society. The Maastricht Protocol on Social Policy and the subsequent Agreement on Social Policy contain the enlargement of the rights of the eleven member states in social area as well as the enlarged voting by a qualified majority and the possibility of collective contracts on the community level, which under certain conditions might be binding for all the member states. For all these 11 member states, economic and social policy in Europe presented two sides of the same coin; both were to be developed harmoniously and together, under the same conditions. On the other hand, for Great Britain, the developing social policy signified increased rigidity of the labour market, and therefore also the decrease of the necessary flexibility and the growth of unemployment.

Double–track development of social policy only ended after five years by the acceptance of the Amsterdam Treaty in 1997, in whose framework the chapters on employment[5] and social policy[6] were included into the Convention on the foundation of the European Communities. The Amsterdam treaty further strengthened social policy of European Union and at the same time ended the exceptional status of Great Britain, as Great Britain, on the occasion of Amsterdam Treaty negotiations, joined Protocol No. 14 on social policy. In accord with the clauses of the Amsterdam Treaty, social policy in European Union focused mainly on the following four spheres:

- employment,
- fight against the discrimination of employees,
- equal opportunities for men and women,
- role of social partners – social dialogue.

Amsterdam Treaty is undoubtedly another important milestone in the development of European social policy. It unquestionably contributed to the modernisation of European employment law, which forms a necessary basis of the economic prosperity and the growth of the employment rate in the Union. At the same time, this treaty as the last phase of the development of social policy of European Communities stimulates thoughts on the limits of social policy and on the possibilities to overcome the difficulties that hinder EC social policy to keep up with the other areas of the Community policy. The changes that the treaty has brought in the social security area show that on one hand, Europe realises the essential importance of solving social problems, especially unemployment and poverty and elimination from the labour market resulting from it, but on the other hand the member state unify the methods of dealing with social issues only with difficulties. Therefore it is often stated that the result of the Amsterdam Treaty did not fulfil the expectations (not only in the social security area, but also with regard to the institutions reform) and that it rather presents a "reasonable" or "successful" compromise. Although on one hand, it is assessed positively that Amsterdam Treaty followed the direction of social policy outlined in Maastricht Treaty, especially by standing up for the basic social rights, by devoting a special chapter to the solution of employment issues, and in the area of social policy, extending the possibility to accept decision by a qualified majority, on the other hand it is necessary to realise that the problems of solving employment costs and related issues as the social security costs, remained fully in the sphere of national competence. The same holds also for the employment policy, although the new Chapter on employment in the Treaty of EC requires co–ordination of national policies when securing employment.

One of the main objectives outlined in the Amsterdam Treaty was the employment policy. A special meeting of the heads of the states and governments of the European Union in Luxembourg in 1997 was devoted to its compilation; on this meeting, the so–called Luxembourg process was started, i.e. the way to more effective and more objective–oriented European employment strategy, within whose framework it was supposed that the open method of co–ordination was to be used. The focus on the creation of new jobs and decreasing unemployment rate was stated as the main objective of European Union employment policy. During the Luxembourg process, a catalogue of concrete objectives, stating the main directions of the employment policy in European Union was agreed upon. Each member state has to accept and implement its own programme of activities, which will be based on the

[5] Compare Chapter VIII. – Employment.

[6] Compare Chapter XI. – Social policy, general and vocational education and the youth.

economic situation in the country and on the structure and specific qualities of its labour market; on the level of the Community, then, common strategy will be compiled, which should secure reaching higher employment rate. The check–up on observing the accepted measures and the assessment of the situation on the labour market is performed annually in the member states.[7]

The Luxembourg process was further developed on the meeting of European Council in Lisabon in March 2000 – the so–called Lisabon strategy – a ten–year programme whose aim is to "become the most competitive economy of the world, based on knowledge, which is capable of sustainable development and offers more and better jobs and more extensive social solidarity". In this programme, the problem of Europe's lagging behind in the context of globalisation and the onset of new economy was open vehemently. Within the framework of the social pillar of the programme, attention was focused on increasing the employment rate and modernisation of the European social model as well as the fight against social elimination and more intensive co–operation in the area of social protection.[8] One of the most important objectives within the new strategy is the so–called social solidarity, which is looked upon as preventing any form of elimination or discrimination and is one of the essential values of the European social model.

The basic development of the work on social policy of the European Union was then accepted at the meeting of the European Council in Nice in December 2000. At this meeting, the document called European social agenda was accepted. It focuses on the following issues:

- the inevitability of improving qualification and improving the access to lifetime education including vocational training,
- creating more and better jobs,
- predicting the changes in work environment and its use by creating balance between flexibility and security,
- fight against poverty and all the forms of elimination from the society with the aim to support social integration,
- modernisation of social protection,
- support of the equality of sexes,
- supporting social and political aspects of enlargement and exterior relations of the European Union.

The European social agenda should be an important step towards strengthening and modernisation of the European social model, which is typical by its indivisible connection of economic efficiency and social progress. The agenda emphasizes the interconnection of the economic, social, and employer policy.

The last development (meeting of the European Council in March 2005 in Brussels) shows that the aims of the Lisbon strategy have been set too high and their fulfilling rate is slow. However, the interconnection of the economic growth and softening their social impact is considered to be a necessary prerequisite for securing social solidarity and sustainable growth.[9]

3. SOCIAL POLICY AND EMPLOYMENT LAW IN THE EUROPEAN COMMUNITIES

The clauses on social policy in the document of the European Union already nowadays form only a basis for two separate legal branches – employment law and the law of social security. European Communities are rather consequently avoiding the notions of "employment law" or "social security" in the general sense. The theory of European law, however, works with the notions employment law and social security[10] on a quite regular basis. Defining employment law within the European Communities is very difficult. With regard to the social and economic influences on the employment law, it does not form a systematic unit within the European Communities; quite on the contrary, it is limited to certain connections and institutions and is always bound with economic agenda.

Employment law is considered to be a law of a special kind, as it is destined to protect the employees. If assessed from the point of view of the purpose of the European Communities as it is defined in Article 14 of the Convention on the EC, employment law is a significant tool corresponding to the creation of common market. Employment law must with its clauses correspond to smooth and effective production of good and providing services with regard to the competitiveness in all the relevant areas and to the securing of sufficient economic growth. On the other hand, on the European level, it is unanimously accepted that employment law interferes also with the private–law sphere, i.e. the relationship between the employers and employees, and this is because of the protection of the employees. Employment law should, not only by its

[7] See KOLDINSKÁ, K., Otevřená metoda koordinace – nová cesta evropské sociální politiky [Open method of co–ordination – a new way of European social policy]., Právo a zaměstnání No. 7–8/2002, p. 35.

[8] Compare European social agenda – COM (2000)379, chapter 1.

[9] Similarly also KOTÝNKOVÁ, M., Sociální souvislosti vstupu České republiky do Evropské unie [Social consequences of the Czech Republic's joining the European Union], Právo a zaměstnání No. 6/2005, p. 18.

[10] If we started from the exact translation of the term used in the theory, we would have to speak about "social law". In this article, however, we will further use the term "social security", which is closer to our legal terminology.

clauses, create a space for free movement of labour force, but it should also anchor the minimum labour and living standards of employees, which would be respected by all the employers. If the obligations related to employment law have an evenly distributed impact on all the employers, the impact of employment law on competition would be neutralised. From the economic point of view as well as on European level, it is justified to see employment law functioning as a cartel with the purpose to soften the competitive pressures between employers.[11]

The importance that is now put on the regulation of the labour and living conditions is reflected in the clauses of the Charter of basic rights of the European Union declared in 2000 in Nice. In Chapter II Freedoms, Article 12 anchors the freedom of assembly from which the freedom of assembly in trade unions with the purpose to protect social and economic interests derives, and Article 15 anchors the right to work and to be active in a freely chosen or accepted environment, which is applicable within all the EU countries. In Chapter III – Equality, Article 23 anchors a very important principle that influences the implementation of legal relationships related to employment and is reflected in all the regulations, namely the equality of men and women regarding employment, jobs, and pays, including the possibility to implement special steps that would balance inequalities eventually occurring in some areas. For the development of labour law and the social security system and for the explanations of all the regulations accepted so far, Chapter IV – Solidarity is very important, in which Articles 27 to 35 express the essential principles on which the approach to the status of employees in EU is built. Articles 27 and 28 form the basis for the development of social dialogue as an important tool for status of employees, Articles 29 to 33 delimit the basic approaches to the protection of an individual in the labour process – from entering the labour process up to its end: the right to the free mediation of job (Art. 29), the right to the protection in the case of unjust dismissal (Art. 30), the right to safe and just conditions for labour (Art. 31), the prohibition of child labour and protection of the young in labour (Art. 32), protection during motherhood and childcare (Art. 33). Finally, Articles 34 and 35 anchor the right to social security and healthcare.

Regardless of the above–stated, the notion of community labour law is not quite stable. When using the legal–dogmatic point of view, community labour law may be looked upon as a supra–national regulation of the individual institutes of the employment relationship, resulting from the need for the functioning of the common market in such a way that the objectives of the European Communities were fulfilled. Community labour law in the first place aims at the harmonisation of national regulations. Community regulation does not mean the suppression of national regulations, but getting them closer on the basis of respecting certain minimum standards on which the European Communities' member states have agreed.

It is of course not possible to expect that the community labour law shall regulate all the institutes in a complex way. At present, we may divide community labour law into the individual labour law and collective labour law. The individual labour law devotes attention especially to:

- legal regulation of the free movement of the labour force,
- some issues of the origin and ending of a job relationship change,
- equality before the law for men and women in legal relationships related to employment,
- legal regulation of working time,
- health and safety regulations during work,
- legal regulation of special labour conditions for women and the young,
- social protection of employees when changing an employer and in case of the insolvency of the employer.[12]

Collective labour law deals more closely with the regulation of social dialogue and with the participation of employees on the employer's decision taking.

4. CONCLUSION

As was already stated above, social policy, for which labour law presents one of the basic tools for implementation, belongs to a very important area, to which extraordinary attention is devoted from the part of the European Union. At the same time, however, opinions questioning whether the wide regulation, especially of labour conditions, is not an overly limiting factor for the economic development appear. The stated double view on the given issue is, however, nothing new. The whole modern society is continually encountered with the question of the measure of labour force protection and the intensity of interferences with the labour process. The economic policy and social policy are – in my opinion – inseparably connected areas. It is quite impossible to develop economy without in an adequate way developing also the social area; the only question – with no final solution,

[11] For more detail see e.g. FUCHS M., Základy evropského pracovního práva [The elements of European employment law], Právo a zaměstnání No. 3/1998, p. 2.

[12] See also SCHRONK, R., Pracovné právo Európskej Únie [Employment law of the European Union], PrF UK, Bratislava 1998, p. 70.

however – is the intensity and extent of the interference in the social security area (i.e. also in the area of the regulation of the participation in labour process) in such a way that the social security of the employees is kept and the economic development is not limited or hindered by it. The task to be solved in the following period is the examination of the community labour law and of the Czech labour law especially in those parts and institutes that deal with employment. Further research will be directed mainly at the changes of labour relationship both from the point of view of the community law and from the point of view of Czech labour law, but also on the possible development of the legal regulation of the legal relationships related to employment with regard to the changes happening in the organisation of labour itself.

PUBLIC LAW SECTION

A Treaty[1] of the Constitution for Europe and the starting points for the "European criminal law"

Implications for the Czech penal law European /CPLE/ valid currently and in the future and for the European penal law /EPL/

Vladimír Kratochvíl*

CHAPTER I: INTRODUCTION

The following conveyance is based on an extensive worked out pilot study "A dimension of the questions of the criminal justice of the Treaty of the Constitution for Europe and its importance for European criminal law (Europeanization of the Czech penal law de lege lata, de lege ferenda, i.e. the starting points and trends of the Czech penal law European /CPLE/; the foundations of the European penal law based on the treaty of the constitution /EPL/; Austrian experience)". It is therefore limited to some chosen problems of otherwise extensively conceived text, which are thus offered to discussion.

PART I. – THE BASIC STARTING POINTS OF METHODOLOGY AND TERMINOLOGY

The structure of the *theoretical conception* of the material penal law and the procedural penal law, represents the core of the wider term of the theory of penal law both material and procedural, involves as its elements the "functions" of both the penal law sectors, their "essential principles", and even the "penal-law institutes", especially the key or main ones.[2]

The identical, i.e. a systemic, methodological approach may be chosen even in the relation to the *"European criminal law"*, I presume, or even to the Treaty of the Constitution for Europe (further also "TCE") and its penal law aspects. If the "European criminal law" is in Footnote.8 marked as a term superior to the terms "penal law of Europe" and "European penal law", it is not just a verbal gymnastics.

I grasp **European Criminal Law (ECL)** as *a complex of norms of different legal quality*[3] *(primary, secondary) accepted by the member states and institutions of the European union (further also "EU",*

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[1] The nowadays too early "refused" Treaty of the Constitution for Europe is in certain danger. SICHA J. in his text: A ridiculed beauty the Treaty of the Constitution for Europe expresses the fact literally very fittingly, LN, XVI, 2005, p. 7.

[2] Compare in detail KRATOCHVÍL, V. Cesty individualizace trestní odpovědnosti, či konstatování trestní odpovědnosti: hmotně–právní nebo procesně právní problém? Právny obzor, LXXXVIII, 2005, 1. p. 13 and following.

[3] JESCHEK, H.–H. To the bill of the general part of the new penal code of the Czech Republic. Trestní právo, VIII, 2003, 11, p. 15; the author lectures here about "... the validity of the norms of the European criminal law of various legal nature." And further on about the ways of the creation of the community European law regulations, that state the sanctions without having defined "the European criminal law" in greater details.

"Union") with the legislative authority that are concerned with the intrastate (national) penal law systems of the member states of the EU or that gradually create the penal–law system of the EU itself of a supranational nature.

From the draft definition just mentioned we may derive two *fundamental forms* of European criminal law, namely *national (Czech) penal law European (CPLE)* and *European penal law (EPL).*

The first mentioned, the **CPLE,** is a *national (intrastate)* category and thus the outcome of the process of Europeanization (not "europeanization") of the national penal laws of the member states of the EU, the result of their vertical harmonization to the communitary law of the EC and a horizontal harmonization to the EU law, including the mutual harmonization of the penal laws of the member states.[4]

The second one, on the other hand, i.e. the **EPL,** should be (could be) an independent *supranational* category, as a result of the law creating of the institutions of the union.[5]

The theoretical conception of the European criminal law should involve as its components also the *functions,* its *essential principles* that it is based on, as well as appropriate *penal law institutes.* As an element of the broader sense of the term of the theory of penal law the *institutions* are added.[6]

When projected into the mentioned forms of the ***European Criminal Law,*** it will be about functions, principles, institutes and institutions of the ***Czech penal law European,*** and about the same elements of the ***European penal law.***

From the point of view of the PLE it may be important to compare what Czech penal law (both material and procedural) offers, with regard to its functions, principles and institutes, as well as institutions with what in this respect the TCE involves. From the point of view of the EPL it will be appropriate to perform an analysis of the fact, whether and if so, then in what form, the TCE contains the penal law functions, principles, and /or institutes and institutions, even if they are in a rudimentary form.

From one or other aspect the TCE gets into the role of the starting point of the European criminal law, the starting point, which at the same time suggests its developing tendencies (Art. I – 1 par. 1 the process of the communitarization of European law)

PART II. – EXCURSUS: INTRASTATE PENAL LAW AND EUROPEAN INTEGRATION THROUGH THE LENS OF THE TCE

Both penal law sectors as an obvious manifestation and an especially sensitive and severe implement of an assertion of mainly the inner autonomy of the member states of the EU have for a relatively long period of time enjoyed certain preserve from the part of the European integration processes. The practice has basically been holding on and at least till the admission of the TCE will be, due to the nowdays *communi-*

[4] The term of *harmonization* includes according to my opinion in the first place the relation of the national law of the member states of the Union and the *laws of EC (i.e. community one, I. Pillar)* that rests in the "approximation", "adaptation" of the first one towards the second one, that passes along the vertical, because the national penal law and the level of the law of the EC (and after the admission of the constitutional treaty all the law of the EU?) is /should be a *vertical,* that is lead through the way of orders / European laws and of the regulations along the line of the supranational European law and national law. On the other hand in the relation of the national law of the member states of the Union a the *law* of the EU (i.e. a Union one, II. and III rd Pillar intergovernmental), it may be only a *horizontal,* thus a "harmonization" in the technical, narrower sense; (see even the art. 10 of the Constitution of the CR, that anchors between the intrastate law and the international treaty only an application hierarchy, not concerning the relations). Therefore in the context of the national law on the one hand and the lawful acts of the EC/EU on the other hand may be and also is the term "harmonization" used both in its broader sense, i.e. including not only a vertical (approximation, adaptation), and even the horizontal, thus harmonization in the *narrower* sense (i.e. the harmonization of the intrastate judicial codes of the member states, that mean, or rather emphasize the process of harmonization of the national rights of the member states of the EC/EU mutually, as a part of the process of implementation of the frame decisions/ European frame laws). See also TIEDEMANN, K. Gegenwart und Zukunft des Europäischen Strafrechts. Zst W, 116, 2004, 4, p. 949 or 955. Further on SATZGER, H. Auf dem Weg zu einem Europäischen Strafrecht, 2001,15, p. 553.

[5] But not utterly independent of the influence of the penal–law traditions, principles etc. of the member states of the Union. SATZGER, H. Internationales und europaisches Strafrecht. Baden–Baden: Nomos Verlagsgessellschaft, 2005, p. 24 f., talks here about the European criminal law in the narrower (EPL) and broader (PLE) sense. The same SATZGER, H. mentions here the supranational, immediately effective penal law of the EC as the "community penal law" (Gemeinschaftsstrafrecht), that he of course considers the (strongest) form of Europeanization of the penal law, that the member states apply; he gives the term "Europeanization" a broader sense, than is the one in this paper, where it is connected only with the PLE, which is considered more accurate. The thing is that the EPL is not a result of the process of Europeanization, but a result of the legislation activity of the Union, which is relatively independent of the interference of the national legislator. See the quoted author of the Die Europaisierung des Strafrechts. Koln etc.: Carl Heymans Verlag, 200, Sieber, U. (Hrsg), p. 57 f.

[6] Besides above mentioned and used structure elements of the "theoretical conception of the penal law" it has been shown as necessary to embody into the structure of the broader sense of the "theory of the penal law" even the *institutional* element. It means such that includes the penal–law *institutions,* which in the contrary to the penal–law "institutes", put into practice the penal law (material and procedural) in its dimensions theoretical and practical. In this respect the "institutional" element would of course belong rather into the structureof the theory of the penal law procedural (?). Further to the source cited in the note No 2 should the institutional element be added into the there mentioned structure of the system of the theory of the penal law (A, B, C) as "D". In this text we rank it also as the fourth, therefore under D, see the chap. II, part II.

tarian point of view, which is interconnected to the delegation of the competences of the member state on originally EC, nowadays on EU.[7]

The phenomenon of the PLE[8] was not understood so urgently, as it had been since the very beginning of functioning of the EC/EU in the cases of the extra–penal law sectors.[9] The reality though has been distinctly shifted:[10] the penal law has been getting mixed up with the processes mentioned more and more explicitly, and that without any regard to the three–pillar architecture of the EU that has been used up to now, where there is the space for the penal law problems in the broadest sense reserved explicitly in the Third Pillar, the intergovernmental one, unlike the communitarian First Pillar, nevertheless the protection of these values may be subjected to the protection through the means of penal law, according to the principle of the same, thus even the penal–law protection of the member states interests and the interests of the EC/EU, implied in the Art. 10 of the Treaty of the foundation of the European Community;[11] see also the Art. 280 par. 2 of the treaty quoted about the same combating frauds that damage the financial interests of EC as well as the financial interests of the member states. For example *Bacigalupo* writes in this connection: "A good reason exists for the hypothesis that the communitarizated economy needs also a communitarizated economic penal law". At the same time he adds:"EU wants to be something more than just an economic community. Therefore a good reason exists for the implementation of also other European criminal deeds..."[12]

The European integration processes do not avoid even the objective tendency that is represented, in my view, by the EPL just being formed. But just with regard to the mentioned nature of the intrastate penal law will the process of the forming of the EPL be a very careful, slow, and because of that a long–term one.[13]

Into this reality enters now the treaty document marked in the title.[14] Through its multiplicity of layers it covers up in a broad take a number of aspects of the European integration among which the dimension of penal law (i.e. both PLE and EPL) is in an important position, though not, as I think, in a key position. Apparently in the spirit of a usually grasped penal law as an *ultima ratio* is in the penal–law dimension in the text of TCE reserved only a relatively narrow space. But it cannot mean a change of *corroboration* of the penal law in the sense of ultima ratio through its mere *inferiority*. Besides the mentioned facts, the role of both penal–law sectors will change, because the present three–pillar construction of EU should be in the TCE substituted by the *"monolithic"* construction, thus sweeping away the up–to–now existing difference between communitarian law and the union one.[15] What definitely would not lead to subduing of the importance of the PLE, because the intensity of the Europeanization of national penal law will obviously not be weakened. Therefore it will not be allowed to refuse again and again the repeated and more and more urgent "invitations to the dance", which are being obtained from Brussels. Among undoubtedly most serious in this sense belongs also the TCE. This legal

[7] ARNOLD, R. Suverenita a evropská integrace. Evropské právo, II, 1998, 9, p. 12, or Satzger, H. Die Euripäisierung ... rep. quot. Sub 5, p. 699.

[8] Analogically to the terms of the "penal law international" and "international penal law" it is possible and necessary to construct new terms for the fast communication; on the one hand *"the penal law European";* as the intrastate penal law, national, modified through the process of its Europeanization (i.e. europeanized) on the other hand *"the European penal law"* as independently long–termed formed penal law of the supranational nature (i.e. in the form of e.g., European model Penal Code /RE/ or the Corpus Juris /EC/EU). Genus proximus of both terms mentioned represents the term of the *"European criminal law"*. On all the mentioned levels the basic classification of the forms of the penal law is projected: "the penal law *material*" and "the penal law *procedural*".

[9] TOMÁŠEK, M. Evropská ústavní smlouva a suverenita v trestních věcech. Časopis pro právní vědu a praxi, No 3/2004, p. 254. TOMÁŠEK. M. Existuje „evropské trestní právo"? No 5/2004, p. 143. German authors pay a long termed and profound attention to the problems of the European penal law: cf. JUNG, H. Europäisches Strafrecht (Part I) Literaturbericht. Zst W 112 (2000), p. 866 or JUNG, H. (Part II) Zst W 116 (2004), p. 475.

[10] RENDELING, H. – W., MIDDEKE, A.. GELLERMAN, M. (HRSG) Handbuch des Rechtsschutzes in der Europäichen Union. München: Verlag C. H. Beck, 2003, p. 766–767; JUNG, H. Europäishes Strafrecht (Teil II). ZStW, 116, 2004, 2, p. 475: "Eorparecht kann nicht mehr ohne Strafrecht betreiben werden ..." and others (SATZGER, H. re. Cit. sub 5, Die Europäisierung ..., p. 152, 185; *the same author*, the same quotation Internationales ..., p. 90). See also Action plan of the Counsel and Commission, through which the *Haag program* about the strengthening of freedom, security and law in the EU, that strengthens the comunitarization of the third pillar of the EU is being executed. (Central gazette of the EU from the 12. 8. 2005;2005/C198/01; Law bulletin, 6. 2005, 9.

[11] http://europa.eu.int/eur–lex/lex/cs/treaties/dat/12002E/htm/C_200 2325EN.003301.html.

[12] BACIGALUPO, E. Bemerkungen zu strafrechtlichen Fragen des Verfassungsentwurfs. ZStW, 116, 2004, 2, p. 327, 328.

[13] JESHECK, H. – H. rep. cit. sub 3 if I grasped it well, apparently the same thing had the author quote in his mind, when said: "From the long–termed point of view it will be necessary to create *our own European norms (italics V.K.)* that belong to the general part of the penal law, because the application of *the European facts of the cases of the criminal deeds (italics V.K.),* even if they came into being isolatedly, would not be possible without a general consent about the basic terms, as sympathy, attempt, intention, negligence, factual and legal mistake etc." See also SATZGER, H. Internationales ..., op. cit. sub 5, p. 77 f., p. 92., the principle of the protection of the national penal laws.

[14] The treaty about the Constitution for Europe, Central gazette of the European union, C 310/1, 16.12. 2004.

[15] Rep. cit szb 9, TOMASEK, M. Evropská ústavní smlouva... p. 255.

act in itself defines, as I think, also the frame and the starting points of forming of the EPL, which in itself also represents the penal–law dimension of the TCE.

A sweeping refusal of the "invitation" would not be correct, to put it mildly. A sweeping acceptance of everything what it supposes and offers would on the other hand be objectively very naive, and thus also unacceptable. There is no other way than to set off into the analyses and search, first of all, for factual theoretical solutions.

Not even the fact that the present ratification process of TCE slowed down a little[16] should not according to my mind hinder the professional discussions about important theoretical, and thus also penal–law theoretical aspects of this document. I think it is necessary to approach it at least in the same way as any other not yet accepted and therefore invalid norm complex as Corpus Juris for the Protection of the Financial Interests of EU (further also "Corpus Juris"), which was and will be subdued to many analyses.[17]

Time and energy spent in this direction are surely not to be considered as misused. Just to the contrary, a factual conversation in spite of the real course of the ratification process of TCE, which through its delay paradoxically created for these discussions greater time period, may be rather of use than damage to the matter.

CHAPTER II: PENAL–LAW ASPECTS OF THE TREATY OF THE CONSTITUTION FOR EUROPE – ESSENCE, SURVEY, AND ANALYSIS

PART I. – ESSENCE OF PENAL–LAW ASPECTS OF TCE

From the point of view of the intrastate penal law material[18] and procedural[19] of the Czech Republic all the aspects of TCE in this text are considered as penal–law ones, without any regard to their position in the structure of the system of TCE, that *represent the reaction on of criminality on the national, international (i.e. in EU), or even supranational (i.e. from the level of the EU towards the member states) levels, and thus the means of the nature of penal law and penal–procedural law.* Otherwise expressed, it is about *instrumentarium of the penal–law nature (material and process one) anchored in the TCE explicitly or only implicitly (further also "constitutional penal–law instrumentarium").*

The description and analysis in individual parts of the TCE codified penal law instrumentatium may be so far only restrictedly based on the commentator's literature,[20] in contrast with the TEC and the Treaty of the European Union (TEU)[21].

PART II: – A SURVEY (STRUCTURE) OF THE PENAL–LAW ASPECTS OF TCE

We may find constitutional penal–law instrumentarium in the structure of the TCE itself quite sporadically up to somewhat confused. This instrumentarium may be of course arranged also differently if not only a possible research worker but also its consignee should be able to orientate themselves in it quickly and well. As a base of this "other" structure may be used as I think, elements of the above mentioned structure

[16] The actual state may be found on www http://europa.eu.int/costitution/ratification_en.ht.

[17] KRATOCHVIL, V. Tschechische Strafgesetzgebung unf Corpus Juris 2000 mit brsonderer Berücksichtigung des Wirtschaftsstrafrechts und der Strafbarkeit juristischer Personen. In: KRATOCHVIL, V. LÖFF, M. Wirtschafssrafrechts und die Srtafbarkeit juristischer Personen. Brno: AUBI No 272, 2003p. 49 f. There is not without interest that the program of the 4^{th} *Modern course of the international penal law – summer school of the European penal law,* that took place by ISISC a other academic establishments in Syrakusy on 2. – 13. 10. 2005; the program is dedicated to the European Constitution and the penal law (it is about the problems and perspectives of the European Constitution / a new constitutional frame, the principles of penal law and the European Constitution, the perspectives of the actual text and possible alternatives of the Constitution, The Document of the basic rights and the penal law/); also the mentioned Corpus Juris is on the program of this school, the renowned specialist will take part from the renowned European Universities and research institutions.

[18] KRATICHVÍL, V. A KOL. Trestní právo hmotné. Obecná část. 3. přepracované a doplněné vydání. Brno: MU v Brně, 2002, p. 10, 13.

[19] MUSIL, J., KRATOCHVÍL, V., ŠÁMAL, P. A KOL. Kurs trestního práva. Trestní právo procesní. 2. přepracované vydání. Praha: C. H. Beck, 2003, p. 6.

[20] A brief commentary is offered in this direction the articles from ARNOLD, R. Evropská ústava - první komentář, 1. část, Evropské právo, č. 10/2003, p. 13 and f. The same one: 2. část, Evropské právo, č. 11/2003, p. 11 and f., KRÁL, D., PÍTROVÁ, L., ŠLOSARČÍK. I. Smlouva zakládající Ústavu pro Evropu – Komentář. Praha: Europeum, 2004. SYLLOVÁ, J., PÍTROVÁ, L., SVOBODOVÁ, M. A KOL Ústava pro Evropu. Komentář. 1. vyd. Praha: C. H. Beck, 2005.

[21] BARDENHEWER–RATING. A., GRILL, G., JAKOB, T., WOLKER, U. Kommentar zum Vertrag über die Europäische Union und zum Grundung der Europaischen Gemeinschaft. 6. Ed. Baden–Baden: Nomos Verlagsgesellschaft, 2003. Smlouva o Evropské unii. MS ČR, odbor EU, Praha, červen, 2004.

of the *theory and theoretical concept* of penal law. The structure thus conceived is created, as it was stated, by functions, basic principles, institutes and institutions, of a penal–law nature, of course.[22]

In this sense we may talk about:

A) penal–law **functions**[23] of TCE
B) penal–law **principles**[24] of TCE
C) penal–law **institutes**[25] of TCE
D) penal–law **institutions** of TCE

PART III. - ANALYSIS OF SOME PENAL-LAW ASPECTS OF TCE

A defined extent of this conveyance requires a limitation of the analysis for only some[26] aspects of *functions and principles.* It will be about *material law and procedural law* instrumentarium, where on each of these basic law levels even an aspect of *penal–law of Europe (national) and European penal law (supranational)* is being followed if possible.

A) the penal–law functions of TCE

These result first of all from the stipulations about the aims of the Union, **Art. I–3 par. 1, 2** that imply their protection. In **Art. III–257 par. 1** the TCE closer specifies this *corroborative protective function* and in par. 3 it supplements it with a *securing* function, that is followed by the principles described here through which the functions mentioned are being realized (in details see ad B).

According to the **Art. I–3 par. 2** in relation to the **support** of peace, and the values and well being of the inhabitants of the Union (**Art. I–3 par. 1**), the Union provides its citizens a *space of freedom, safety and justice without any inner frontiers.* According to the Art. 2 TEU thus ... the connection of the (former) first and third pillar to the common communitarian base is being expressed[27], apparently even in the connection with the paragraph 3. Other authors see the substance of the stipulation of the Art. I-3 par.. 2 differently: e.g. according to Arnold *"These aims correspond in principle to the contents of the Third Pillar o the European Union."*[28] *Weigendd,* e.g. who at the same time expresses possible doubts of the standing by this promise to the citizens of the Union, is of the same opinion.[29] His analysis of the paper quoted is concluded with these words: "... it is necessary to translate the aims thus established as: a lot of (European) law, little of (law) security and even less freedom."[30] As the constitutional frame for the forming of EPL (material) as the TCE has defined is concerned, this should not be further extended.[31]

From the quotations mentioned a certain amount of scepticism and reasonable reserve to the "European criminal–law material", whether Europeanized (PLE) or Europe alike supranationalized (EPL).

The idea of the European integration is since the times of the king George of Poděbrady remarkable and undoubtedly necessary. Nevertheless, from the point of view of its gradual and long–termed implementation, especially in the last century and nowadays, apparently not everything is or need be that "remarkable" and "necessary". It is doubly true for the penal–law dimension of the TCE. Here, as I think, it will be reasonable

[22] The listed elements of the structure and the theory and theoretical conception of the penal law create an *inner* structure, that is connected wih the term "segmentation". A different nature is ascribed to the structure not only of the theoretical conception of penal law, but of any random term, that is marked as *outer,* for it works with the terminology of the type of "division", "classification", "categorization". The individual kinds, forms of a term, that is the subject of such operation, i.e. e.g. classification, nevertheless show the features of the structure of the system as well, because they are in mutual relations, that makes just this structure out of them; cf. e.g. the system of the kinds of deeds judicially punishable in the form of the tripartition (crime, misdemeanour, offence). The logics (and dialectics) of the "inner" and "outer" structure of a random term does not exclude, *without simply identifying both,* the use of the elements of the inner structure in the role of the criterion of the outer structure, i.e. that it does not exclude the possibility to arrange certain material, term etc on their basis, that is to categorize or classify it. This particular methodological approach has been used at the presentation of the penal–law material contained in the TCE.In more details to the essence of the inner and outer structure of the criminal act cf. KRATOCHVÍL, V. Trestný čin v československé a české trestněprávní vědě a trestním zákonodárství. Brno: MU in Brno, 1995, p. 7 and f.

[23] Cf. op cit.sub 18, p. 16 and f., op. cit. sub 19, p. 11 and f.

[24] Cf. op. cit sub 18, p. 21 and f., op. cit. sub 19, p. 99 and f.

[25] Cf. op. cit. sub 18 and 19, of the relevant passage about the individual penal–law institutes.

[26] In the full range is this analysis offered in the introductory study, elaborated during the first year of the research intention: "European context of the development of the Czech law after 2004 (the influence of the admission of the CR into the EU of the Czech Judicial Code").

[27] SYLLOVÁ and others, op. cit. sub 20, p. 11. In details see ARNOLD, R. Evropský prostor svobody, bezpečnosti a práva – k vrcholné schůzce Evropské rady v Tampere 15. – 16. října 1999. Evropské právo, IV, 2000, 1, p. 9 f. To the term of the "European space for freedom, security nd law itself in the sense of the Treaty from Amsterdam cf. PIKNA, B. Evropská unie – vnitřní a vnější bezpečnost a ochrana základních práv (na pozadí boje proti mezinárodnímu terorizmu) Praha: Linde, 2002, p. 22 f."

[28] Op. cit. sub 20, ARNOLD 2^{nd} part, p. 14.

[29] WEIGEND, T. Der Entwurf einer Europaischen Verfassung und das Strafrecht. ZStW, 116, 2004, 2, p. 275, 276, 277.

[30] Ibidem, p. 302. Further cf. HASSEMER, W. Strafrecht in einem europäischen Verfassungsvertrag. ZStW, 116, 2004, 2, p. 307.

[31] WASMEIER, *p. 455, in: Kre3/* , C. Das Strafrecht auf der Schwelle zum europäischen Verfassungsvertrag ZStW, 116, 2004, 2.

"to be on the alert" for the tendency of the "Brussels institutions" to expand in creating the secondary legal acts of the Union that are concerned both with PLE and EPL, and at their assertion. *Hassemer* aptly talks about the fact, that"... "The criminal law from above' ...'claims the criminal law from below' to be criticized and corrected".[32]

What will be especially demanding is the finding of an optimal balance between the interests of the EU on an effective recourse of criminality, that concerns the Union itself and also the member states (e.g. Art. III–415, fighting trickery) on the one hand, and the view of the so-called *"structurally justified lack of confidence for the national penal judiciary"*[33] on the other hand. This problem is alike the one, that is, so far unsuccessfully, being solved by the international penal law in relation to the will of the individual states to pursue criminally the particular criminality.[34]

The chief orientation at searching for the answers to this question should be provided apparently by the main principles that the definition and execution of the authorities[35] of the EU are based upon, i.e. the principle of the *entrusting of the authorities,*[36] the principle of *subsidiaries* and the principle of *proportionality.*

The TCE entrusts the sector of space, freedom, safety and justice to the *shared* authority of the EU and the member states (Art. I–12/2, Art. I–14/2 ltr j.)). The extent to which the member states can or do execute the authorities depends on the extent to which the EU did not execute them or decided not to execute them. It seems that in the formulation of Art. I–12/2, the last sentence, there is one more principle having been encoded, namely the principle of briskness, or one may say a quasi-principle *"who is about to win".* If, that is to say, the EU decided to execute its authority in the objective sector in the extent that eliminates the execution of the authority of the member states, and would really do so (as the faster one), such authority would become not a shared one, but de facto an exclusive one. To avoid this it has been accepted that the executions of the authority in this sector are regulated through the mentioned principles of *subsidiaries* and *proportionality* ones (Art. I–11/1. 3. 4. See also *The protocol on using of the principles of subsidiaries and proportionality).* The principle of subsidiaries "... is the only barrier against the expansion of the activities of the Union".[37]

The principle mentioned should be able to hinder the structurally explained lack of confidence of the EU to the national judiciary (i.e. they should not be pushing forward with the execution of the authorities immediately there where it is first of all necessary to grant confidence and space to the national criminal justice) and if the execution of the authority of the EU should be applied, i.e. strictly in the limits of subsidiaries, then at the same time only proportionally. Through this the interest of both the EU and the member states should be guarantied in the effective recourse of the specified kinds of criminality.

In the connection with the principle of subsidiaries the one who critically opposes the construction of the shared authority is *Hassemer.* He in fact confirms my certain worry mentioned above about the existence of the implication of the TCE expressed quasi–principle "who is about to win", when he says: "We may expect only little good for the penal law material and penal law procedural in the European practice from such a construction (Art.I–12 par. 2, Art. I–14 par. 2 ltr j) of the TCE. Such division of authorities is rather hindering for the applied subsidiaries... *The Union may occupy the space of (freedom, security, and justice), practically any time they may want to /italics V.K.).* It will not be possible to fulfil the promise of the order of subsidiaries, when it is not possible to ward off the danger of indefinite division of authorities to be shifted."[38]

The reality of such risks may be unfortunately only

[32] Op. cit. sub 30 HASSEMER, p. 319.

[33] SCHÜNEMANN, FUCHS, p. 452, in: *Kre3/, C.* Das Strafrecht auf der Schwelle zum europäischen Verfassungvertrag. ZStW, 116, 2004, 2.

[34] Ibidem, p. 452–453.

[35] SYLLOVÁ ET AL., op. cit. sub 20, p. 9.

[36] The Czech translation of the Proposal of the Treaty of the foundation of the Constitution for Europe (European Convent, 13. 6. – 10. 7. 2003, presented to the chairman of the European Counsel in Rome 18. 7. 2003 works in the contrary to the text of the TCE with the term "competence" In regard to the context in which the different terms are being used in the text of the Proposal and even in the TCE, I think that the matter–of–factly correct will be the category of "authority" and not "competence" (Proposal). If the EU should derived its functioning from the member states in the sense of the TCE (art. 1/1, of the Proposal, art. I–1. TCE), then we nay talk only about its authorities to found, change or cancel the rights a obligations of the members of the EU and their citizens by using the proper measures (art. I–3, para %), which authority for the individual sectors of such functioning will be committed to the Union by the original subject, i.e. the member states. See also SYLLOVÁ, J. and others op. cit. sub 20, p. 31.

[37] See also ARNOLD, R. Evropská ústva: základní dokument pro budoucnost. Pravni rozhledy, XII, 2004, 9, p. 319. ARNOLD, R. Evropská ústava – první komentář, 2. část, op. cit. sub 20, p. 15; in the context with the share authorities he differentiates between the *cumulative system* of the authorities and their *alternative pursuit;* the advantage of the law of the Union is manifested here, according to his opinion, as the advantage of *application (dispensation V.K.)* of the law of the Union, not as an advantage of its *creation.* This differentiation, that is derivable from the, art. 1.–6 and art. I–12 para 2. of the TCE through the explanation only with difficulties, should not be too overvalued, namely in the connection of the dispensation of the shared authority and a quasi–principle of "who wins".

[38] Op cit. sub 30, HASSEMER, p. 315–316.

confirmed, which is documented by the existing normative production of the "Brussels institutions" in the sector of secondary law not only in the frame of the Third Pillar.[39] I think these risks have quite clear contours rather in the penal law procedural, less in the penal law material, even if even there it will be good to be watchful. It is so not only through the execution of the shared authorities in themselves, which means through the "who is about to win" from the point of view of the application, but also through the nature of the legal acts created and accepted by the Union to imply the shared authority in the space of freedom security a law, namely in the sector judicial cooperation in penal matters (part III., heading III., chapter IV., par. 4). Those are just the *European laws*, eventually also *European frame laws,* through which the Union may define the regulations essentially of only penal procedural nature (Art. III–270 par. 1). Unlike this, the Union may step into the sector of penal law material only through the *European frame laws* (Art. III–271 par. 1, 2,) that represent the instrument of a "lower rank" than the European laws are. But even the European frame law here applied may have straight effects, "...if the criteria of its straight effect are fulfilled".[40]

In this there is reflected on the one hand the aspect of the EPL, that is formed in the sector of the penal law procedural through the European laws, on the other hand it is the view of the PLE, that originates for both of the penal–law sectors from European frame laws. The potential superiority of the supranational European penal law *procedural* in relation to the law material, that is given through the legislative exclusiveness of the first towards the second one, that follows from the nature of secondary resources, that create this law, will probably bring objective pressure on the gradual, even if slow, formation of the European penal law *material.* The state when the penal procedure might be supranational in the far future of the European region, where the penal law material will be essentially only national, even if Europeanized, would obviously not be sustained in the long term. Though at the same time it does not mean that this procedural–material parallel should be pushed through on the level of all (thinkable) kinds of criminality, as it is counted with in the special parts of the penal laws of the member states of the EU. The idea of limited possibilities of harmonization in the sectors that come under the part III., heading III., chapter IV has here its inalienable position.

Through the words of the stipulation **Art III–257 par. 1** the Union creates the space for freedom, security, and law *at respecting the essential rights and different law systems and traditions of the member states;* according to the quoted commentary to the TCE, it is on the one hand the future limited possibility of harmonization of the whole sector covered by the chapter IV that is emphasized in this way, on the other hand it newly points to the observation of the essential rights.[41] I agree with such interpretation explicitly emphasizing the limitation mentioned. The observation of the essential rights, obviously in the sense of part II of the TCE, is to be grasped here not only as a partial aim followed by the Union, but also as a necessary corrective at the forming of the legislation regulations aimed against such forms of criminality that through their nature demand such instruments to which the essential rights are especially sensitive.

In the general and special parts of the penal law material it will therefore be possible to harmonize reasonably, and if we have a vertical on mind, to form the supranational penal law only in the limits of the consensus that follows from the *points of the intersections of different law systems and traditions of the member states.* The overstepping of these imaginary limits might be dangerous, if not self–destroying, for the EU.

With the stipulation **par. 3 Art. III–257** there is connected, as has been said, the function *securing,* i.e. the function that guaranties the fulfilling of the essential function of protection (Art. I–3 par. 2). A high level of security should be guaranteed first of all, as follows from the diction of par. 3., where principles here named should secure it, e.g. the principle of the mutual recognition of judicial decisions in penal matters).

Further on we may rank the contents of the **Art. I–9 par. 1, 2** among the functions. In **par. 1** the Union states the its obligation to recognize the rights, freedom and principles contained in its part II (Charter of Basic Rights of the Union, further on "CBRU"). The stipulation of the **par. 2.** declares the obligation to access to the European agreement of human rights and basic freedoms protection (further only "EAHRBF"). Both may be grasped as a *human rights* function. The mentioned documents essentially define the subject of the penal–law protection, which is where the EU is *aimed to* as well, and what the TCE thus adopts, and should *act* for.

Some questions are arisen by the fact that the CBRU and EAHRBF through their contents in the text

[39] Even the word of a playwright (KURAS, B. Jako psa ke kandelábru. Praha: Baronet, 2005, p. 100–101) expresses this fact very appropriately even if with some exaggeration. It would not be fair not to add that one of the tasks of the TCE is to make this up to now complicated code a little more transparent. It is a question though whether a up to what measure we will be successful in the end.

[40] SYLLOVÁ, J. and others op. cit. sub 20, p. 401. To the direct effectiveness of the regulations cf. ESD 1970, 825, 837–Rs. 9/70, "Laberpfennig", (cit. according to *Satzger, H.* Internationales..., op. cit. Sub 5, p. 83). This judicial practice is nevertheless disputable, writs *Cromme, F.* Verfassungsvertrag der EU. 2. Auflg. Baden–Baden: Nomos Verlagsgesellschaft, 2003, p. 131.

[41] SYLLOVÁ, J. and others op. cit. 20, p. 378–379.

of the TCE itself duplicate approach to the "human rights material", especially in the case when the EU fulfils their program obligation mentioned in the paragraph 2.[42]

Not always the "duplicate holds on". The stubborn duplicity may even work in a counterproductive ways because it may make one the "duplicate" ones unwillingly redundant. At the same time it is necessary to acknowledge that the planned access of the EU to the EAHRBF is to guarantee an individual the right for the individual complaint to the European Human Rights Court against the acts of the organs of the Union.[43]

In spite of the doubts mentioned the TCE profiles, its character and importance in the area of the penal law European as well as European penal law, because the problems of the basic human rights and freedoms is traditionally closely connected to the aspects of penal law, especially the procedural ones, whether on the national, international or (future) supranational levels.

Pars II of the TCE – Charter of the basic rights of the Union[44] – suggests the functional aspects in general in the *preamble*.

It does so in the first place through declaring the *common values,* which mean *human dignity, freedom, equality, and solidarity* its fundament; *it is based on the principles of democracy and the law respecting state* as on its fundament. Hand in hand with this declaration goes the attribution of the Union to the *keeping and developing* of these common values. It is possible without any doubts to grasp as its aimed heading, which means functioning in the direction mentioned; the so–called *functional anthropocentrism.*

The penal–law character of thus defined functional approach of the CBRU shows its preamble at least through the fact that it places the individual (the citizen of the Union) for whom it creates the mentioned space for freedom, security and justice into the centre of its activity. To reach this *aim* it considers it necessary to *strengthen the protection* of the basic rights, which obviously means also the means of the penal–law nature.[45]

In the literature in this connection we may read: "Anthropocentric character of the Charter is manifested in the fact that *all (italics V.K.)* protection stemming out of the basic human rights must be effective in relation to the individual."[46] According to others"... embodying of the Charter into the judicial system of the EC/EU will mean creating of the '*European space for human rights*' *(italics V.K.),* that is functioning as the basic element for the building and functioning of the European space for freedom, security, and justice"[47]

In the connection of the basic human rights the quoted *Arnold*[48] talks also about the so called *positive protection function,* that should consist in the activity of the EU, or the member state, that is directed to the real assertion of such rights[49]; the passive abstention from the interference into the rights of the individual would not be enough. The author quoted alerts us to the problems that could emerge at the moment when the anchoring of the basic human rights into the Charter (now into the CBRU) would be grasped just in the sense of the positive protective function mentioned. The risk of these problems he apparently sees in the possible overstepping of the authorities of the EC/EU, which happen just at the assertion of this function of the Charter. (CBRU).

B) penal–law principles of the TCE

Part I of the TCE mentions in **the Art. I–5 par. 2** the principle of the *loyal cooperation* of the Union and the member states, which "... *is quite new.*"[50] Loy-

[42] The worries of this type were voiced already during the Convent and the negotiations about the TCE; cf. SYLLOVÁ, J. and others op. cit. sub 20, p. 24.

[43] In more details see e.g. *Bo/3e, M.* Der Beitritt der EG zur EMRK aus der Sicht des Strafrechts. ZRP, 2001, 9, p. 402 sqq.

[44] The predecessor of the Charter, i.e. the Charter of the Basic Rights of the EU (2000), is considered to be "...a pre–constitutional document with a great influence upon the supranational, as well as national judicial codes.. The Chaerter represents the expression of the tendency towards respecting the law and its superiority over the political decision making ..." (ARNOLD, R. European Charter of the basic rights and freedoms (in Czech). Evropské právo. V, 2001, p. 7, 10); others see it as "...the seed of the future integral system of the protection of human rights on the level of the Union." (SISKOVA, N. Human rights in the intentions of acquis communautaire (in Czech). Evropské právo, VI, 2002, 6, p. 5; SISKOVA, N. Dimensions of the protection of human rights in the EU (in Czech). Praha: Aspi, 2003, p. 56 sqq).

[45] PIKNA, B. The system of the protection of the basic rights in the European Union a its genesis (in Czech). Pravnik, CXLI, 2002, 11p. 1197.

[46] ARNOLD, op. cit. sub 44, p. 10.

[47] PIKNA, B. The Charter of the basic rights of the European Union and its judicial and factual dimension (in Czech). Právník, CXLII, 2003, 1, p. 37.

[48] ARNOLD, R. The Charter of the basic human rights of the EU (in Czech). Evropské právo. V, 2001, 4, p. 7–8.

[49] SCHNITZ, TH. Die EU – Grundrechtscharta aus grundrechtsdogmatischer und grundrechtstheoretischer Sicht. Juristen Zeitung, LVI, 2001, 17, p. 842–843. "The Charter of the basic rights of the EU focuses on the authorities of the Union and on the member states at the assertion of the law of the Union.". The same at PIKNA, op. cit. sub 45, p. 38–39, who adds that the member states are not bound by the Charter, if the matter concerns purely national matters.

[50] SYLLOVÁ, J. and others op. cit. 20, p. 17. It is not that new, see the art. 10 SES.

alty at the cooperation the quoted commentary sees through interpretation in two levels: both among the member states and even between them and the Union, which is to be welcome.[51]

The mutual respect and the mutual help of the member states in the penal problems are necessary, if the steps in this direction should ever be of use. Here the demand of loyalty, that should be mutual without any doubts, is in effect, as is defined in the TCE.

A little bit differently, this is shown on the level of the relation: member states contra Union. The stipulation quoted talks about both the mutual respect and mutual help between the Union and the member states. At the same time through the commitments to fulfil all the suitable general and special measures to the fulfilment of the obligations, implied in the TCE, or that result from the activities of the Union, or facilitates the Union to fulfil their commitments, burdens the members states one–sidedly. I would see as a more fitting designation of the principle discussed, at least in this extent, as *"a principle of the loyalty of the member states towards the Union"*.

A partial settlement of this one–sidedness, according to my opinion, is offered only by the mutual respect that is besides the mutual help a part of the principle given. The stipulation of the paragraph **1 Art. I–5**, the second sentence that describes the obligation of the Union to respect the basic functions of the member states might be such a corrective of the one–sidedness mentioned.

The commentary to the TCE quoted ousts the one–sidedness of the loyalty mentioned so, that the indicated *two*–sidedness of the cooperative loyalty is shifted in the way of interpretation, also with the reference to the particular judicature of the European Law Court /ELC/, to the level of *multi*– sidedness.[52] The compound lexeme *The member states (italics by V.K.) makes all suitable both general and particular measures to the fulfilment of the obligations that are implies* ...according to the source quoted"...also rests on the obligation of the organs of the EU to provide the member states with all possible help, so that they could fulfil the task of securing of the application and effectiveness of the EU justice."[53] These interpretations of the principle of loyal cooperation in the sense of Art. I–par. 2 unnecessarily complicated and could have been avoided with help of a more straightforward formulation of the text of the TCE itself, respecting even a judicature of the ELC.[54]

The principle of the loyal cooperation falls on both material and procedural laws, what is confirmed by the stipulations of the TCE, documenting the particular forms of cooperation. The penal process shows traditionally a slight prevalence. An obvious importance of the described principle both for the PLE and the EPL results from them.

An indolent fulfilment of this principle among the member states at the implementation of the European frame laws (PLE, Art. III–270 par. 2) could complicate e.g. an assertion of mutual admissibility of evidence at the factual police and judicial cooperation in criminal matters on the international grounds. The consequences of such slowing of the criminal proceedings are obvious, especially if it concerned some kinds of criminal activity that may escalate easily; see Art. III–271 par. 1. On the other hand an exaggerated activism of particular legislative organs of the Union at creating the penal law (EPL) and its assertion in the frame of shared authorities might weaken the supervision of the European penal law "from below" and through this e.g. weaken the effective influence of the EPL, because of having been created without the necessary cooperation of the member states.

The TCE then counts on the *general principles of law* of the Union, that are created by the basic rules *guaranteed* by the EAHRBF, and of the rights that *result* of the constitutional traditions that are shared by the member states of the EU, **Art. I–9 par. 3.** Thus a number of traditional basic rights (human and civil ones) find their ways into the TCE, through their existence they legitimised the basic principles of law, thus even those of the *"penal law nature"*,[55] through which we get "the treaty–constitutional–European" confirmation in the form of the "general principles of law" in the Union. We have to differentiate between the principles just mentioned and the "general principles of law", that are shared with the judicial orders of the member states, which belong among the sources of European law,[56] but the principles mentioned in the Art. I–9 par. 3represent the fundament out of which this law arises (Art. 6 par. 2 of TEU). Notwithstanding such differentiation we have to take into account the fact that both the "principles" are one way or the other connected to the basic elements

[51] SYLLOVÁ, J. and others, op. cit. 20, p. 15–16.

[52] Ibid, p. 18.

[53] Ibid, p. 18–19.

[54] This is not the only example of a wrongly written text of the TCE; e.g. the complicated and may be surprising explanation of the art. I–6, ensuring the assertion of the advantage of the law of the EU for the law national only from the point of view of the application, dispensation, not from the point of view of its creating could have been avoided through a simple change: the word they "should" could have been shifted behind the word "Union". See ARNOLD, R. European Constitution – the first commentary, 2^{nd} part, (in Czech), Evropské právo No 11/2003, p. 15.

[55] Cf. reference No. 24.

[56] TICHY, L. ARNOLD, R., SVOBODA, O., ZEMÁNEK, J., KRÁL, R. Evropské právo. 2^{nd} ed. Praha: C.H. Beck, 2004, p. 230.

of a man and a citizen coming from national milieu, i.e. from the constitutional traditions that are shared with the member states, as well as from the judicial codes of the member states. As a result of this they meet in such extent.[57]

The "treaty–constitutional European" confirmation of the traditional penal law principles via and in the form of the general principles of law of the Union is without any doubt important both from the point of view of the PLE and the EPL. In the first place the solid and profound base is *confirmed,* out of which the penal rights of the member states of the EU arise anyway, which is logically true even for the PLE of the states mentioned. It is so obviously because the existing members of the EU are the signatories of the EAHRBF at the same time. In the second case this confirmation should *guarantee* the corresponding and optimal base, the starting point of the EPL. The thing is that just the agreement of the general principles of the Union mentioned should represent that minimal point of intersection of the initial values as one of the *conditio sine qua non* of the formation of the EPL.

From the point of view of the PLE the TCE does not bring anything new. From the point of view of the EPL to the contrary the TCE means not an insignificant starting point for its forming. The important methodological demand of the creating of law is being fulfilled: the inner harmony of the individual parts of the rule of law, i.e. the simple law with the constitutional law. The same should be in effect even on the level of European treaty "constitutional law", as well as the supranational EPL formed on its base.

The principles, according to which the authorities of the Union are being *defined* and by which their *execution* is being controlled, are gathered in the stipulation **Art. I–11 par. 1**: the *principles of the commitment of authorities, subsidiarity and proportionality,* that play the key role from the point of view of the penal law.; cf. ad A) of the part, to which it refers.

The importance of these principles for the ECL is surprisingly not too sharply differentiated, if we look upon them through the optics of the PLE and EPL. From the point of view of the PLE the principle of the commitment will be in play in such extent, to which the member state and the Union will share the authorities in the room of freedom, security and law (Art. I–14 par. 2 ltr j)). And when the authority has been "divided" this way, then the execution of such shared authority in this room cannot avoid the principles of subsidiarity and proportionality. Only in their boundaries the activities that the Union carries out, esp. the legislative ones (i.e. through the *European frame law*), follow then on the intrastate penal law and Europeanize it. But of course only in the measure that follows the aim of the Union on the level and in the process of harmonization of the intrastate penal laws that are respected at the same time. Thus not in the form of some "Europeanization" at any price. From the point of view of the EPL the only thing that is changed is that the legislation act of the Union will work in the milieu of shared authorities in the sense of Art. I–14 par. 2 ltr j) *European law* (e.g. Art. III–270 par. 1 ltr a), Art. III–273 par. 1 et al.) and limited again as for its acceptance and passing through the principles of subsidiarity and proportionality.

Many articles of the part II of the TCE (CBRU), especially the stipulation of the heading VI concerned with "Judicature", take the nature of principles in the context of penal law and penal procedure material.

Note: Even here we realize the prevalence of the principles of penal–procedural nature.[58] It is given through the traditionally close connection between the constitutional and penal laws procedural already at he intrastate level; personally I see this connection as a penal proceedings in the form of "litmus paper" of the degree of the constitutionality (in use).[59] Similarly it may be probably applied even for the TCE as an internationally –law constitutional document on the one hand, and the penal laws of the member states (PLE) as well as even for the "embryonic" EPL on the other.

The principle of the *equality before the law* – **Art. II.80,** exceeding the boundaries of both penal law *procedural* and *material* are of an introductory nature.

In the *procedural* sense it may be grasped as an equality of the participants of penal proceedings, what the Czech penal law guarantees through the equal rights and duties of e.g. the accused ones, and the other subject of the penal process. It has been being done in the harmony with the Art. 37 par. 3 of the Charter of the Basic Rights and Freedoms (further: "CBRF"). The so called "favor defensionis" that help the legislator to balance the really existing unequal positions of some subjects of the penal proceedings are not in any contrast with what has been said above, e.g. in the unequal relation of the public prosecutor contra the accused person the law of the "last word" of the accused one, that only he/she has, fulfils the function of "favourization".

From the point of view of the *material* law it will be first of all about an equal position of the perpetrators of the crimes before the penal code at the level of

[57] Ibid, p. 231–232.

[58] ŠTURMA, P. The Charter of the basic rights of the European Union. AUCI, 2004,1–2. p. 101. ŠIŠKOVÁ, N. The first completed catalogue of the basic rights of the European Union – the Charter. (in Czech) Právník, CXL, 2001, 6, p. 598.

[59] Further see e.g. PLATZGUMMER, W. Grundzüge des osterreichischen Strafverfahrens. 8. Aufl. Wien, New York: Springer, 1997, p. 3 (penal process as an applicated constitutional law); ROXIN, C. Strafverfahrensrecht. 22. Aufl. München: C. H. Beck, 1991, p. 9 (the penal law procedural as "a seismograph of the constitution of the state"); SCHROEDER, F.–CH. Strafprozessrecht. Aufl. München: C. H. Beck, 1997, p. 28 (criminal code as a "procedural law" of the constitution).

their guilt (the signs of the body of the crime are the same for everybody). In the level of punishment it is to the contrary about how to create lawfully the same space for all the perpetrators, of course such that in its frame it would be possible to individualize maximally the meted out sanction. The constitutional buttress of equality in the sense of the material law is offered in Art. 4 par. 3 of CBRF.

Only thus understood equality before the penal code may guarantee justice reliably from the point of view of *guilt* and *punishment.*

The penal procedural principles are offered in **Art. II–107**, about an *effective law protection before the court,* i.e. even the penal one, as well as about a just lawsuit (i.e. even the penal one).

Note. The text of the TCE mentions here the right for an effective protection ... etc., and not explicit principles; we can find identical terminology e.g. in Art. 36 par. 1, 2 CBRF. On the other hand it is not unusual to read a collocation: "a principle of the right for (e defence) ..." that is used especially in textbooks.[60] The thing is that a number of procedural principles, as e.g. the principle of a regular lawsuit is from the point of view of CBRF in the position of the basic human right (Art. 8 para2.). It is not any different according the CBRU. This is why the term "principle" of the right is being used in this text, e.g. for the court protection etc.[61]

For the penal dimension of the principle of "the right to an effective law protection before the court" the genesis of the art II–107 par. 1 CBRU (i.e. Art. 13 EAHRBF) is important.[62] Its penal–law connotation demanded that it was applied from ECourtHR as linked to the Art. 6 par. 1 EAHRBF, that anchors the demand of an objective trial, where the legitimacy of a penal accusation should have been decided. An independent application of the Art.13 quoted did not encounter the question of the violation of the rights of the penal law nature.[63] In the TCE should this penal "shade" be manifested in the link of the paragraphs 1 and 2 of the Art. II–107, for in the last mentioned one we may find also the principle of the right for a fair trial, thus including the trial that is conducted by an independent court. The genesis of the principle discussed that we have mentioned implies the right for the court protection as it is dealt with in the Art. 36 par. 1 CBRF and is implemented through its stipulations (§ 2 par. 1, 8 through 11) by the Czech penal process–code (further on "p.p.c.").

The principle of "the right for a process–fair trial" (par. 2 Art. II–107), includes without any doubt even the criminal procedure, at least because in is derived from the Art. 6 par. 1 EAHRBF. In the extent of the first sentence this principle corresponds to its traditional formulations in other documents: Art. 6 par. 1 EAHRBF, Art. 38 par. 2 CBRF. The penal process–code comprises the actual warranties of this principle in the form of procedural principles in § 2 par. 4, 5 and others.

While the right for the fair trial has been endowed by a single and quite brief paragraph, the creators of the TCE were much more thorough at the regularization of the law for a regular administration in the Art. II–101.In its par. 2 the constituent parts of this law are given, that would be decent to repeat even in the case of the right for the fair *penal* trial. In this respect the CBRU is unbalanced out of the reasons that are quite obscure.

The standard procedural principles of the *presumption of innocence* and the *right for a defence* are presented in **Art. II–108.**

In the paragraph 1 the stipulation mentioned the defined principle of the "presumption of innocence" is derived from Art. 6 par. 2 EAHRBF, which as well as the International Pact of the Human and Political Rights (further on "IPHPR") in Art. 14 par. 2 defines this key procedural principle in a *positive* way; similarly it does Art. 40 par. 2 CBRF. The stipulation of § 2 par. 2 p.p.c. to the contrary "...does not comprise any positive expression of the presumption of innocence, but a *ban of presumption of guilt* (italics V.K.)"[64] This is considered to be a weaker warranty than the presumption of innocence.

The principle of "the right for a defence" – para2 Art. II– 108 – also "copies" EAHRBF, namely its Art. 6 par. 3. To this principle in intrastate matters corresponds to Art. 40 par. 3. While the TCE, EAHRBF, and CBRF construct this principle in the first place from the point of view of the *contents,* i.e. they point out what specific rights the defendant has, the penal process–code goes through the construction of *warrants.* It does not say through what is the accused one equipped from the point of view of his/her defence, but it states the warrants in the form of obligation of instruction an obligation of the authorities active in the criminal proceedings to enable the accused one the assertion of the rights for defence (§ 2 par. 13 p.c.). The real defence rights are named afterwards in fur-

[60] See e.g. op. cit. sub 19, p. 117.

[61] Similarly also Šišková, N. op. cit. sub 58, on p. 599 considers the procedural judicially state warrants contained in the chapter VI of the Charter the core of the human rights, where each of the warrants of the human rights is a principle in itself.

[62] Pikna, B. European Union – the inner and outer security and the protection of the basic rights (on the background of the international terrorism) , (in Czech). Praha: Linde, 2002 p. 162; to the relation of the art. 6 paral and the art. 13 EAHRBF see p. 163. Syllová, J. and others op. cit. 20, p. 152.

[63] Gomien, D. Short guide to the European Covention on Human rights. Strasbourg: Council of Europe, 1991, Czech translation, Malenovsky, J. A brief handbook of the European arrangement on the human rights. p. 37.

[64] Repík, B. European arrangement on the human rights and the penal law. (in Czech) Praha: Orac, 2002, p. 175.

ther stipulations, that do not have the nature of the procedural principles (cf. § 33 of the p.c.) The rights for defence do not change substantially in all the mentioned sources as for their contents is concerned.

Art. II–109 is "essential" from the point of view of the material law, as it comprises the principles *nullum crimen, nulla poena sine lege praevia,* including exceptions from them as well as the principle of *adequacy of the size of the punishment to the criminal deed.*

The classical principle of the "legality of the criminal act and the punishment", that is completed with the principle of "the ban of retroactivity of the penal code in malam partem", or the order of retroactivity of the penal code *in bonam partem,* in the case of meting out the punishments, again draws from the EAHRBF, the Art. 7. In these consequences it is not quite clear, why the TCE pinpointed the order mentioned only in the relation to the punishments and not in relation to the base of the penal responsibility itself, i.e. to the criminal act. For even for this the order of retroactivity "in favour" is being applied. This is absolutely clearly stated in the Art. 39 and even Art.40 par. 6 CBRF, as well as in the penal code (further on "p.c.") in the § 3 par. 1 and in the § 16 par. 1 behind the semicolon.. The fact that as the TCE does also even the IPHPR in the Art. 15 is not an argument.[65] Where the exception from the ban of retroactivity to the burden is concerned (para2), which means the retroactivity admissible in this sense (not ordered), nothing is allowed in this respect neither from the CBRF nor from the Criminal Code.[66]

The principle of *adequacy of the criminal acts and punishments, "is anchored in the common constitutional traditions of the member states and in the judicature of the Judicial Court of the Community*[67]. In this respect the TCE follows the EAHRBF, even if the EAHRBF does not explicitly express the principle of the adequacy of the punishment. "Nevertheless it is about the principle that runs through the whole Treaty. The judicature of the Court (ECourtHR), eventually the Commission, has brought it to the light."[68]

Art. II–110 illustrates the principle *ne bis in idem*[69] or the right not to be accused or criminally pursued twice for the same criminal deed/act. Even if this principle is traditionally linked to the criminal, eventually to other trial, its dimension of the material law cannot be entirely ignored.

From the point of view of the *trial* it guarantees the legal security in that sense, that the same person will not be after the authorized final verdict in his/her criminal matter, that states the obstacle to the matter finally decided (exceptio rei iudicatae), whenever again criminally prosecuted, unless the meritorious decision mentioned in the set procedure (i.e. the extraordinary correction measure) has been cancelled.

From the point of view of the *material* law carries out the function of a warrant of the legal security in the way that the same person will not be after the authorized final verdict in his/her criminal matters as for the guilt and the punishment are concerned *punished* again[70] , unless the meritorious decision mentioned in the set proceedings (i.e. extraordinary corrective) has been cancelled. The penal–law nature of the principle ne bis de idem may show itself as the principle of "the ban of double evaluation and scoring" of one and the same fact of a certain nature, i.e. as a ban of its double scoring as from the point of view of the guilt of the perpetrator and his/her punishment (§ 31 par. 3 p. l.)[71] This article has its independent material law importance only from the point of view of the guilt (so called apparent concurrence of the criminal deeds)[72] and from the point of view of the punishment (the principle of incompatibility of punishments)[73].

The extent of the ban of the double recourse for the same thing depends on whether the ban is based on the double recourse of the act (deed), as it is in the CR (§ 11 par. 1 ltr f), g) and h) of the p.p.c.,[74] or the criminal act, out of which apparently stems the judicature of the ECourtHR[75] T; see the explanation of

[65] SYLLOVÁ, J. and others op. cit. 20, p. 154.

[66] This question is in the Czech practice a little more complicated, for against the ban of the retroactivity in malam partem is the opinion, according to which the retroactivity to the burden of the culprit is possible, see e.g. op. cit. sub 18, p.85.

[67] SYLLOVÁ, J. and others op. cit. sub 20, p. 154.

[68] REPÍK, B. op. cit. sub 64, p. 65.

[69] PIPEK, J. The principle ne bis in idem in the competition with the jurisdiction. (in Czech). Trestněprávní revue, III. 2004, 4, p. 98. SATZGER, H. op. cit. sub 5, Die Europaisierung ..., p. 685.

[70] Ibid p. 102–103: "The double punishment is in fact directed to the material law and defines this obstacle that hinders the meting out of the next punishment. The double prosecuting is directed to the penal proceeding and there already into the penal pursuing itself and thus even in its reason ... and is an obstacle of the penal proceeding itself.".

[71] KRATOCHVÍL, V. et al., op. cit sub 18, p. 34–35.

[72] Ibid p. 45.

[73] Ibid. P. 55.

[74] MUSIL, J., KRATOCHVÍL, V., ŠÁMAL, P. and others op. cit. sub 19, p. 7.

[75] RŮŽIČKA, M., POLÁK, P. Over one of the decisions of the Supreme Court, that refers to topic of the "ne bis de idem" from the point of view of its international and home aspects. Public prosecutor office, III, (in Czech) 2005, 6, p. 9. This conclusion is not plain, because at least the matter of Gradinger v. Austria the ECourtHR was based not on the identity of the judicial qualification, but the identity of the deed. (see KMEC, J. op. cit. sub 76, , p. 23, No 2, p. 21.).

the Art. 4 of the Supplementary Protocol No 7 to the EAHRBF (further on "Supplementary Protocol")[76] in the causal report, that concerns he criminal act[77] , as well as to the TCE.

In the first case is decisive the deed de iure, i.e. a summary of factual circumstances that are relevant from the point of view of the penal law (the factual state of affairs – § 2 par. 5 of the p.p.c.), that was the subject of the first criminal prosecution, namely without any respect to its penal-law qualification. In the second case on the other hand the legal qualification of the deed de iure as a criminal act is important. The connection of the principle of the ban of a double recourse to the *deed* leads to *narrowing* of its range, because the preceding authorized decision about the deed, without any regard to its legal qualification, bans under the mentioned procedural conditions the new deciding about the deed, namely under a different legal qualification. The protection before the double recourse is thus relatively strong and from the point of view of the accused one relatively wide. Thus created space for the rehearing in the same matter is therefore relatively narrow, for it makes the prosecution of the same deed, qualified as a different criminal deed, impossible.

If the principles mentioned are made dependent only on the legal qualification of the act (deed), thus a criminal act, it creates a broader space for repeated decision making, because it thus enables to recourse the same deed, if it shows the characteristic features of the fact of the case of some other criminal act than the one in the previous proceedings. The protection before the double recourse is here to the contrary relatively weak and from the point of view of the accused one relatively narrow. The mentioned aspect of the principle of ne bis id idem belongs among the most disputable ones.[78]

In the Czech legal milieu this principle is offered in the first place in the Art. 40 par. 5 CBRF. Its diction, to the contrary of the diction of the Art.II–110, does not explicitly point out the ban of double punishment; it is restricted to the ban of double criminal prosecution only. This article therefore, when explained in the way recommended in literature,[79] covers even the mentioned punishment.

With the reference to the stip. § 11 par. 1 ltr j) of the p.p.c. and to the Art. 10 of the Constitution, it is possible to apply this principle directly even based on the Supplementary Protocol. It will be the case when about a offence (of the penal-law nature, § 50 Bill No 200/1990 of the code, of offences) had meritoriously decided the administration authority in the first place, when about the same deed that has been afterwards qualified as a criminal act, decided consequently even the Court.[80]

The catalogue of the principles concentrated in the CBRU from the point of view of the penal law carries on an obvious stamp of the EAHRBF. In spite of this it falls behind its standard in some respect. It has been recommended to the Charter of the Basic Rights of the EU already earlier, to accept into its contents especially "the right for the substitution of the damage in case of an illegal sentence", as well as "the ban of imprisonment for debts."[81] It is necessary to insist on such recommendations. Above their frame I would state at least one recommendation: "the right for justification of the court decisions in the penal matters". Even if this law has not been explicitly stated by the EAHRBF, because it has been derived from the principle of the right for the fair trial,[82] it should be part

[76] To the Protocol itself cf. e.g. REPIK, B. op. cit. sub 64, p. 247 ff. further KMEC, J. To some aspects of the principle of ne bis in idem in the light of the judicature of the European Human Rights Court. (in Czech) Trestní právo, 3, 2004, 1, p. 21 f., 2, p. 20 f., § p. 16 f., otherwise see PIKNA, B. op. cit. sub 62, p. 167, SYLLOVÁ, J. and others op. cit. sub 75 p. 4–11.

[77] RŮŽIČKA, M., POLÁK, P. op. cit. sub 75, p. 7.

[78] PIPEK, J. op. cit. sub 69, p. 100 f.

[79] PIPEK, J. op. cit. sub 69, p. 103: "... it is correct to use the term double 'pursuit '" This term comprises in itself the whole complex of unfavourable consequences, that it should hinder, namely both the pursuing itself and the result, (the punishment V.K.), from the point of view of ne bis in idem.

[80] RŮŽIČKA, M., POLÁK, P. op. cit. sub 75, p. 10; REPÍK, B. OP. CIT. sub 64, p. 248; as well as the verdict of the SC from 22. 7. 2004, sp. zn. 11Tto 738/2003, which legal sentence says: *"It is a violation of the principle ne bis in idem in the sense of the art. 4 of the Protocol No 7 to the Arrangement and protection of human rights and basic freedoms, if the accused one was prosecuted and convicted for the same deed, that was as an act of penal-law nature earlier dealt with by a relevant administration authority in the proceedings of an offence, that ended in a final verdict, through which was this act of the accused one judged as an offence, if it did not came to the cancelling of this decision of the administration authority. In such case the stipulation of the § 11 para 1ltr. j) p.p.c. together with the stipulation of the art. No 4 of the Protocol No 7 to the Arrangement of the protection of the human rights and basic freedoms makes the prosecution inadmissible. If, in spite of this, the accused was prosecuted for the same deed, for which he/she had been already punished (or acquitted) in an administration proceeding, and if such prosecution ended in a final verdict in the matter itself in the sense of § 265a para 2 p.p.c., the reason for an appeal is through this accomplished according to § 265b para 1ltr e) p.p.c."* to hinder the violation of the principle ne bis in idem and with regard to only the facultative authority to stop in the cases mentioned the prosecution in the sense of § 172 para 2 ltr. B) p.p.c., the authorities active in the criminal proceeding are obliged to stop such prosecution that is based on the Supplementary protocol in the reference to the § 11 para 1 ltr. J) p.p.c. The thing is that in the § 172 para 2 ltr. B) p.p.c. something else is stipulated than in the Supplementary protocol, therefore the proceeding according to the Constitution (Art. 10) will be asserted.

[81] ŠIŠKOVÁ, N. op. cit. sub 58, p. 599.

[82] REPÍK, B. op. cit. sub 64, p. 152.

of the CBRU all the more, as the Art. II–101 par. 2 ltr c) counts on its explicit induction.

The importance of the discussed principles of the CBRU for the PLE and EPL is obvious. In the first place the classical penal–law principles of the laws are being confirmed as treaty–constitutional, so the process of their Europeanization should not create any problems. In the second place the mentioned principles men a reliable starting point for the forming of the EPL.

The TCE offers a number of penal–law principles even in the part III, head. III, chap. IV (The Space for the freedom, security, and law). It is possible to name selectively just e.g. **the Art. III–270 par. 1**, that comprises a new principle of the *mutual recognition of verdicts and court decisions* as a base for the *judicial* cooperation in the penal matters[83] , and the principle of *approchement of the legal regulations of the member states* in the sectors mentioned in the par. 2 and in the Art. III–271.[84] It is about a minimal horizontal harmonization of the penal law regulations, that enable the acceptance of the intrastate corrections, that conserve or introduce a higher degree of protection of the persons; **the Art. III–27o par. 2 ltr a)** states *a mutual admissibility of the evidence among the member states.*

CHAPTER III: CONCLUSION

A necessary fragmentary description and analysis of the selected *functions* and *principles* of the TCE of the penal law nature do not justify any essential conclusions. Therefore we may only partially conclude that the selected functions and principles of the TCE in the relation to the PLE may and in an effect should act first of all as *limits* of the process of Europeanization of the penal law in the CR, i.e. its harmonization (see reference No 4), namely with reservations or recommendations to some of the principles (loyal cooperation, subsidiary).[85] To what extent the Czech penal law correction corresponds in its level with the requirements of the TCE, in that extent it enables the harmonization.

The TCE that is looked upon as a "placenta" of the possible future EPL proves to be not only a mere idea, a wishful thinking, not to be put in effect in the future. The fact is that the "delivery" apparently would not pass without difficulties. The question is where the process of the European integration may come to in the law in general and in the penal law especially, namely the supranational one.[86]

[83] SYLLOVÁ, J. and others op. cit. sub 20, p. 401, where there is further stated: "The conclusions of the council of the EC in Tampere in October 1999 explicitly stated, that the principle of the mutual recognition of the verdicts must be the pillars of the judicial cooperation in the frame of the Union."

[84] The text of the art. III–27o para 1, as I think, is not precise. It comprises the judicial cooperation in the penal matters of approchement of the legal regulations of the member states, even if such harmonization is the supposition of the cooperation and not tha part of it.

[85] SCHÜNEMANN, B. Grundzüge eines alternastiv–Entwurfs zur europaischen Strafverfolgung. ZStW, 116, 2004, 2, p. 391.

[86] TIEDEMANN, K. Gegenwart und Zukunft des europäischen Strafrechts. ZStW, 116, 2004, 4. p. 954, 957. VOGEL, J. Licht und Schatten im Alternativ–Entwurf zur europäischen Strafverfolgung. ZStW, 116, 2004, 2, p. 423.

Environmental issues in the legal order of the Czech Republic

Ivana Průchová*

I. INTRODUCTION

Methodologically, it is impossible to find a way of describing and eventually assessing, in the most objective manner, how the Czech legal order reacts to the requirement of *„integration" of the protection of the environment*[1].

Any consideration of the issue needs to start from the fact that the *protection of the environment is a worldwide task.* Its *realisation* is accompanied by a *number of problems* of both objective and subjective nature.

The realisation means are of various kinds, while the *law* is undoubtedly *one* of the most important

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[1] Cf. e.g. KRUŽÍKOVÁ, E. et al.: Právo životního prostředí Evropských společenství [The European Communities environmental law], LINDE PRAHA, a.s., 2003, especially p. 38 and following.

ones. This is true for both *international* law as well as the law of the EC *(community law)* and the law of the individual states (*national law).*

The first step, when dealing with trends in environmental issues in the legal order of the Czech Republic in the current European context, is to turn attention to basic issues concerning the legal regulation of social relationships in the area of environmental protection, as well as other notions closely connected with it.

It is not the aim of this study to examine in detail whether environmental law at the above-stated levels (international, community, national) can, in the objective sense of the word, be considered an independent branch of the law. This issue, however, cannot be completely dismissed. Opinions on this issue are, in the case of the Czech Republic, divided[2]. At this point, however, I think it important to draw the readers' attention to the opinion expressed by V. Knapp[3], who, as early as a decade ago, included the field of environmental law among the so-called mixed or complex branches of law. Their characteristic feature is the inclusion of elements of various branches of law and also the fact that they may be created ad hoc. The mixed quality is apparent in the use of both public law and private law methods of regulation. In the case of environmental law in the contemporary period of development of social relationships, the public law methods of regulations are significantly predominant. The „ad hoc" feature may, with respect of the environment or its protection, be perceived in two ways. First, there is the „ad hoc" principle up to the time when the independent regulation of the object of protection (the social relationships originating in the protection of the environment) loses its justification. In this sense, „ad hoc" undoubtedly represents the „for eternity" horizon, i.e. lasting for the whole period of the existence of the Earth and any life on it. Second, „ad hoc" may be seen from the point of view of the legal system, i.e. lasting for the time of the „need" to objectively (despite the elements of the mixed character of the method of legal regulation and the possible fragmentary and cross-sectional nature of the legal regulation) respect environmental law as an independent branch of law. *Personally, I think that environmental law represents an independent branch of the Czech legal system.* The definition of the area of the social relationship forming it, however, still presents a major problem, also with regard to the way in which *environmental* law is conceived of in EC law *in the objective sense of the word.*

II. THE SYSTEM OF EC ENVIRONMENTAL LAW AND ITS RELATION TO CZECH ENVIRONMENTAL LAW

The current EC environmental law[4] is divided into two areas. The first, so-called „horizontal", area is represented, above all, by regulations concerning general and common institutes of environmental law (this area primarily includes the assessment of the influence on the environment (SEA, EIA), integrated prevention, reduction of the pollution of the environment (IPPC), marking of products, free access to information on the environment, the system of environmental management and audit (EMAS), the relations to town and country planning, and as a specific area also the problems of standardisation and rationalisation of reports on the implementation of directives related to the environment). The second area, which might be called as „component-source", is represented by the legal regulation of the protection of the individual components of the environment or the sources and agents that threaten either the individual components, several such components, or the environment as a whole (specifically, this concerns the legal regulation on the protection of the air, water, nature, as well as the legal regulation of the protection against the negative influence of waste materials, industrial waste, and the risks which industrial pollution, chemical agents, genetically modified organisms, and noise may pose for the environment or its components). As regards legal regulation, the area of the „rationalisation of the report on the implementation of directives related to the environment" does not, in my opinion, present merely „the area of legal regulation of environmental law", but a general trend with regard to all directives (i.e. other directives in addition to those concerned with the environment) whose content has to be implemented, both at present and in the future, by the member states in their legal systems. This implies that it would certainly be possible to include other specific areas in the field of EC environmental law (such as forest protection, consumer and health protection, public health protection, protection against negative effects in agriculture, ionisation radiation, cultural heritage protection, and internal environment protection). In this respect, one could also look for inspiration at the national level of the individual member states, including the Czech conception of environmental law, and possibly formulate certain conclusions that might influence the community vie-

[2] Cf. e.g. the individual contributions in Právo životního prostředí [The environmental law], Conference proceedings, MU, Brno, 1995

[3] KNAPP, V.: Teorie práva [Theory of the law], 1st edition, Praha, C.H.Beck 1995, p. 69

[4] See KRUŽÍKOVÁ, E., op. cit. in footnote 1, ibid.

wpoint on the subject of EC environmental law. The fact that the areas enumerated above are not explicitly included in the field of EC environmental law does not, however, mean that the community law has not dealt with them – quite on the contrary. Without wishing to diminish the significance of the legal regulation of the respective areas, this, however, occurs „outside" the framework of EC environmental law, e.g. within the framework of consumer protection, public health, agriculture, culture, etc.

With regard to the principle of integration – one of the basic principles of EC environmental law, it needs to be acknowledged that the field of community law is (and will be) marked by a „foray" of environmental aspects into other legal branches of EU law. The same trend may be expected to exist in the legal systems of individual member states.

From the above–stated, at least four viewpoints follow, under which the so–called environmental issues of the Czech legal order in the European context should be dealt with:

1) from the point of view of the object and quality of environmental law of the Czech Republic (environmental issues in the narrow sense of the word),
2) from the point of view of integration, i.e. the intersection of environmental elements into all branches of the Czech legal order,
3) from the point of view of the relationship of the Czech environmental law to other branches of the Czech legal order, and
4) from the point of view of the relations of Czech environmental law and environmental elements of other branches of the Czech legal order towards EC environmental law and environmental elements in other branches of EC law.

III. THE NOTION OF „THE ENVIRONMENT" AND ITS APPLICATION IN THE CZECH LEGAL ORDER

The „general"[5] legal definition of the notion of the „environment" is contained in the Czech legal order under Section 2 of the Act No.17/1992 Coll. on the protection of the environment, as subsequently amended. According to this provision, *„the environment is everything that creates the natural conditions of existence of organisms, including human beings, and is a prerequisite of their further development. It consists, above all, of the air, water, rocks, soil, ecosystems, and energy".*

This definition has been analysed by numerous authors in the past few years, especially from the theoretical point of view[6]. It can certainly be stated that the definition is rather broad with regard to its interpretation, and thus (when attempting to „grasp" it), it may be conveniently used in the process of application of those legal provisions containing the notion of „the environment" but not originally drafted as specifically environmental law regulations. That is the case, for example, with certain articles of the Charter of Fundamental Rights and Freedoms, such as Article 11, Section 3 in connection with the limitation of the ownership right mainly in order to avoid harming the environment, Article 35 Section 1 in connection with the subjective public right to an unharmed environment, Article 34 Section 2 in connection with the right to timely and complete information on the state of the environment, and Article 35 Section 3 prohibiting anyone to endanger and damage the environment.

Additional examples may be found in connection with legal liability and the prevention of damage in Section 45 of the Act No. 200/1990 Coll. on administrative infractions, as subsequently amended, which regulates administrative infractions in the area of environment protection. Still other examples occur, for instance, in Sections 181(a) and 181(b) of the Act No.140/1961 Coll. – the Criminal Code, as subsequently amended, which deal with the „general" elements of the crimes of endangering and damaging the environment (i.e. intent and negligence), and in Section 415 of the Act No. 40/1964 Coll. – the Civil Code, urging people to act without causing any harm to the environment.

Other areas of law contain similar references to the environment. Thus, in connection with „unfair competition", Sections 44(2) and 52 of the Act No. 513/1991 Coll. – the Commercial Code, as subsequently amended, are exceptionally included (i.e. in relation to the private law aspects of environment protection), providing that endangering the environment constitutes behaviour classifiable as unfair competition. There are also regulations concerning the Real Estate Registry as a state–operated information system on real estate which, in Section 1(3) of the Act No. 344/1992 Coll. on Real Estate Registry, as subsequently amended, provide that the registry is a source of information which may also serve the purpose of „the protection of the environment". Another important regard for the environment can be perceived in the current wording of the Act No. 5/1976 Coll. on Town Planning and Construction Guidelines. When defining the aims and tasks of town planning, it specifically states that town planning forms the prerequisite for ensuring a lasting

[5] See e.g. KINDL, M., DAVID, O.: Úvod do práva životního prostředí – soukromoprávní aspekty ochrany životního prostředí [Introduction into the environmental law – private law aspects of environmental protection], vydavatelství a nakladatelství Aleš Čeněk, s.r.o., Plzeň, 2005, p. 1

[6] E.g. textbook-like publications of the individual Czech faculties of law

harmony between the natural, cultural, and civilisation values in a given area, especially with regard to care for the environment. To give one last example – the new Construction Act No. 183/2006 Coll., effective from July 1st 2007, expressly uses the term „environment" and refers to environmental regards in an even more intense way, both from the quantitative and qualitative points of view.

Numerous other sections of various acts might be provided here, but it is apparent from the above-mentioned examples that the Czech legal system has recently been paying an increasing attention to environmental issues. However, the question remains to what extent the principle of integration is being observed.

IV. A NOTE ON THE RELATIONSHIP OF THE OBJECT OF ENVIRONMENTAL LAW AND THE PROBLEMS OF ENVIRONMENTAL ISSUES IN THE CZECH LEGAL SYSTEM

The concept of „the environment", as defined in Section 2 of the amended Act No. 17/1992 Coll. on the environment, makes it possible, in my opinion, to approach the issue of the legal regulation of environmental law in various ways, both as regards the „objects and areas" of the protection of the environment and its actual means. To be more specific, there are certain differences between the „Prague" approach and the „Brno" approach to the subject (and thus also the system) of environmental law, namely the reliance of the „Brno school" on a broader conception. We could also draw attention to the contribution of the „Pilsen school", which has practically been the first one in the Czech Republic to systematically deal with the private-law aspects of the protection of the environment, namely with the emphasis on civil law institutes. Its complex approach should, in my opinion, be complemented with other private-law aspects, namely those from the area of commercial law. In any case, none of the differing approaches corresponds fully with the definition of environmental law within the EC. As regards the complexity of dealing with the legal regulation of social relations relating to the protection of the environment, the „Brno school" is really the most advanced one. If the rationalisation and system measures with respect to the protection of the environment were taken for the entire Czech legal system in such a way that the provisions of both purely environmental and other legal regulations containing provisions or legal norms with an impact on the environment were not doubled and contradictory, then one could, in my opinion, confirm the existence of a trend to approach environmental law in the broadest or most complex way possible. In other words – this is the trend (though not without its faults) asserted by the „Brno school". In principle, it would be optimal to regard Czech environmental law as an area of social relation regulated by law, regardless of whether the particular legal norms are to be found among those considered as sources of the „traditional" branches of public and private law, or whether they are to be found only in those legal norms which have been generally considered as sources of environmental law.

V. ESSENTIAL PREREQUISITES FOR THE RATIONAL INCLUSION OF ENVIRONMENTAL ISSUES IN THE CZECH LEGAL ORDER WITHIN THE EUROPEAN CONTEXT

The answer to what forms the basic prerequisites for the rational inclusion of environmental issues into the legal order within the European context may seem to be quite simple: namely to formulate the national, i.e. Czech, legal norms according to the requirements of European environmental policy. However, bearing in mind that one of the essential principles in the area of the protection of the environment (i.e. also EC environmental law as well as other areas of community law) is the *principle of subsidiarity,* it is necessary to approach the determination of the scope available for possible national (i.e. Czech) specifics of the legal regulation of social relations related to the environment protection in a more general way.

From the factual point of view, this means to decide on the „structure and nature" of the fundamental national sources of environmental law. In other words, to see whether or not the quality and mutual relationship of environmental legal norms are, after the rather hectic period of development in the area of environmental law (from the accession of the Czech Republic to the EU until the present), such that it is no longer necessary to change anything about the legislative steps taken so far. A part of this problem is undoubtedly contained in the answer to the question as to whether it is suitable, or needed, given the conditions of the Czech Republic, to continue the elaboration of the factual draft of the proposed Act on the Environment as a general „code" that would regulate general institutes and tools for the protection of the environment. I consider it important to emphasize that those institutes and tools which, by their nature, clearly belong to other „code" regulations (especially the Civil Code, the Penal Commercial Code, the area of general norms of administratively legal punishment etc.) would have to be excluded from such a code. The ambition of the adherents of the „environmental code" in the Czech Republic is not (and, as far as I know, it has never been) to create a legal regulation that would disregard the function of other „traditional" legal norms as the sources of environmental law.

It is also necessary to emphasize that the Czech Republic (as well as other member states) is not obli-

ged to adopt a legal regulation in the form of a code in order to comply with the aims in the area of environmental protection. However, the existence of environmental acts (with different levels of complexity) can be encountered in foreign legislature.

Personally, I think that in the situation when the Environment Act (Act No. 17/1992 Coll., on the environment, as subsequently amended) has been a part of the Czech legal order for almost 15 years, it is not a pertinent question to ask whether to have an independent „general environmental law" or not, but rather „what" should be included in the object of its legal regulation and „when" it would be best to accept it.

The basis for the drafting of the possible new environmental act should be the submitted proposal of the intended environmental act[7], especially its general part, which should be elaborated not only in coordination with the legislative work on other environmental norms (which the Czech Republic is obliged to adopt in connection with the implementation of the current wording of EC directives or as a consequence of the results of the decision-making activity of the European Court of Justice), but also with legislative work on other legal norms from other branches of the law.

In my opinion, the situation has ripened to the point when it does not seem suitable to include the „new" institutes and tools of an environmental character in the legal system of the Czech Republic by „enlargement", i.e. by amending the Act No. 17/1992 Coll. on the environment. I express this opinion in spite of the fact that I was in favour of this procedure only two years ago, especially in connection with the need for legal regulation of the liability for damage to the environment in the Czech legal order by amending the then provisions on the liability for harm to the environment[8]. With regard to the fact that the Environment Act has not been directly amended in the „positive" sense of the word, it seems that a better way of dealing with the new „general" environmental problems may be by issuing independent legal norms. However, I think that the focus of attention should lie in the general part, namely that the act (code) on the environment should regulate social relationships connected with general notions, principles, implications, and institutes in the area of environmental protection. The special regimes of the protection of the elements and sources, as well as regimes of protection from adverse effects of substances, phenomena, and specific activities, should, in my opinion, remain within the legal regulation of special legal norms, which, however, should in the „general" principles fully correspond to the general environmental act (code). At this point (or in the first phase of the preparation of the draft of the environment act), I see as the least suitable alternative the situation where some areas of the so-called special part are regulated „within the framework" of the general environment act (code) while others stay „outside" the scope of legal regulation. I think the solution offered above is sufficiently pragmatic because it takes into consideration the necessity of more frequent amendments in the areas regulated in the special part. And if the environment act (code) was to become a part of the legal order of the Czech Republic, it should be the first relatively stable and unchangeable legal norm.

With regard to the existing situation regarding the quantity and quality of the legal norms regulating the social relationship in the area of the environment, I think that a compromise solution serving as a possible prerequisite for the effective inclusion of environmental issues into the Czech legal order should respect the following:

a) where the sources of EC environmental law impose the obligation of implementation, this should be done without any undue delay, while respecting the linguistic and other specificities of the creation of legal norms in the Czech Republic, by means of

   aa) amendments of the already existing norms for the protection of the environment;

   ab) creation of new environment protection norms while bearing in mind that they might eventually become a part of the „environment code";

b) as a consequence to the application activity of the domestic courts, or of the European Court of Justice, any unsuitable domestic norms for the protection of the environment should be amended,

c) when creating legal norms in which the object of the legal regulation is primarily the regulation of other than environmental social relationships, the tools for the protection of the environment should be included in a suitable way, while the explanatory notes to these acts should specify

   ca) whether it is the final solution (or inclusion), or

   cb) whether it is assumed that the content should (might) eventually become an object

[7] Kodex životního prostředí – zdroj polemik a nadějí aneb návrh věcného záměru zákona o životním prostředí s polemickým komentářem Evy Kružíkové a Petra Petržílka [The environmetal code – the source of polemics and hopes, or the proposal of an intended act with a polemic commentary by Eva Kružíková and Petr Petržílek], MŽP 2005.

[8] Průchová, I.: Environmentalizace českého právního řádu – vývoj, současnost a perspektivy [Environmental Issues in the Czech legal order – development, contemporary state, and perspectives], in Sborník Aktuální otázky práva životního prostředí, Brno, MU, 2005, p. 9 and following.

of legal regulation of the „general environmental code"

d) to continue the work on the environmental act (code) with the emphasis on the legal regulation of general notions, means, and institutes of the protection of the environment.

In my opinion, the above–stated steps respect the principle of integration emphasised in the introduction in the sense that it is necessary that the legal regulation of the social relations in the area of environment protection should not be isolated; on the contrary, they should also be incorporated, where suitable and possible, into the legal norms primarily regulating other social relations. In this sense, I consider it important to emphasize that with this requirement in mind, it would not be wise to include environmental issues in these legal norms by means of „special" legal norms adopted at all costs.

Even in connection with the protection of the environment it holds that it can, in practice, be secured also by the application and interpretation of „generally" sounding formulations. This statement may be demonstrated e.g. in the wording of Section 420(a), subsection 2(b) of the Civil Code, which regulates the objective liability for harm done by the operational activity with „physical, chemical, or biological effects of the operation on the surroundings". In the diction of the law, the notion of „the environment" is not used at all. However, nobody would probably hesitate to subsume „the environment" under the meaning of the notion „surroundings" (cf. the notes on the legal definition mentioned in Section III above).

CONCLUSION

From the above stated, it follows that the process of inclusion of environmental issues into the Czech legal system is already being gradually realised. However, the first period of the membership of the Czech Republic in EU is mostly marked by the mechanical overtaking of the content of the sources of EC environmental law. The above stated conclusions present an individual and partial view on the possible access to the legislative steps with the aim to create effective environmental legislature. The scope and demand of the task of *complex* elaboration of the environmental trends of the Czech legal order in the European context, however, requires the participation of representatives from the area of the environmental law and from all branches of the Czech legal system, as well as representatives of European and international public law.

European basis and relations of the basic principles of the activities of administrative bodies

With the emphasis on the area of discretionary powers

Soňa Skulová*

INTRODUCTION

The research into the influences of the accession of the Czech Republic to the European Union in the area of administrative law presents a very wide spectrum of questions of legal nature as well as necessarily of those of non–legal nature. This is caused by the fact that administrative law presents in its essence basically a legal order[1], or a regulatory framework of the real system of public administration (in the conditions of the continental Europe especially, and in this country also to a rather large extent), which, apart from the legal dimensions, has also other dimensions that cannot be neglected, from which we should mention the political and economic dimension, and which by many of its aspects touch the life of the society as well as its individual parts and individual people. Sometimes in an essential way.

From the above–described wide framework of administrative law, the object for closer observation was

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[1] PRŮCHA, P.: Správní právo, obecná část [Administrative law, general part], Masarykova univerzita, Brno, 2003, p. 15.

chosen to be area of problems connected with **discretionary authority**, applied in the sphere of decision taking of the administrative bodies.

1. TO THE PROBLEMS OF DISCRETIONARY AUTHORITIES OF ADMINISTRATIVE BODIES

From the point of view of the content, the notion of ***discretionary powers*** is based on the word *"discretion"*[2]. Some German sources use the name *"Das (freie) Ermessen"*.

In current Czech literature, the term *administrative discretion* (sometimes also *free consideration of the administrative body*) or the term discretionary powers established, usually without any difference in the meanings.

The notion "discretionary powers" evokes the impression of its meaning as a manifestation of authority of somebody who decides and bears the relevant sector of public power (either state or self–governing), i.e. who governs the relevant decision taking space created by legal norms.

If we try to characterise briefly discretionary powers, we will in the first place speak about the space, founded by the law for administrative bodies[3], for the option for one of more possible solutions of the concrete decision–taking situation.

We would be looking for the legal definition of administrative discretion in the positive law in vain. Administrative discretion as a legislative solution of the transfer, or the foundation of a discretionary authority, is on one hand included in many legal regulations, but on the other hand, the legislator does not provide them with any explicit sign in the text of legal regulation and it is necessary to reach its identification through interpretation, which is not always a simple matter.

The theory finds consent on the general characteristics or maybe on the *definition* of the administrative discretion (discretionary powers), which is represented by the situation (or the fulfilment of the legislatively–technological means), when the origin or existence of certain conditions (facts of the issue) do not relate to the relevant clause of the legal regulation to the necessity of a single possible legal consequence to follow, but on the other hand leave some (smaller or larger) space for the choice of a certain solution, or decision, to the subject executing the public administration. This sometimes means to apply or not apply the competence of the office (the so–called considering the action), in other cases the administrative discretion means the possibility to choose from a wider spectrum of behaviour alternatives (the so–called considering the choice).[4]

Discretionary authority thus represents one of the sides or areas of the execution of the public administration, or more concretely of its addressees. This area is rather complicated. The essential problem lies not only in the name of administrative discretion, which, however, is in fact an obligatory or not absolute consideration[5], but also directly in the nature of the issue and the foundations and requirements of the state respecting the rule of the law.

In the conditions of a state respecting the rule of the law, we cannot speak of the claim to use of the executive power without the natural awareness of the relationship of this component of public power to the legislative power, or to the acts of legislative power and also to the judicial power, or to its function towards the executive power. These relationships can be in a simplified way characterised as the interconnections of the public administration by the laws, or by the law in the first case and by the control of legality or the judiciary in the second case. We have to see the administrative discretion and its application in this way.

The essential issue is how to secure, under the conditions of a state respecting the rule of the law, the accord of elastic borders of the execution of public administration formed by the legislator in the form of administrative discretion on one hand with the area of subjective rights of the individuals – the addressees of the execution of the discretionary authorities, and in this area especially the intensively (constitutionally) protected sphere of the fundamental rights and freedoms, in which the interference on the basis of consideration should happen, on the other.

At the same time, the solution should exist at the general level as well as for any single execution of the discretionary authority.

The above–mentioned facts suggest that the admi-

[2] Tento výraz může evokovat související významy, jakými jsou např. ohleduplnost, šetrnost, rozvážnost, vlastní úsudek. Jak nám později naznačí zásady, které by měly provázet uplatnění discretionary pravomoci, mělo by se správní uvážení vskutku obdobnými vlastnostmi vyznačovat.

[3] The subject that within the framework of the execution of public administration decides on the basis of free consideration confined to him by the law, might be on one hand a body of state administration, self–governing territory or its body, further a subject authorised by the law or accredited on the basis of the law to execute public administration.

[4] Hoetzel states in a lapidary way: The question is, whether the administrative body has to conclude a certain legal conclusion from the legal factual assumption. HOETZEL, J.: Československé správní právo, část všeobecná [Czechoslovak Administrative Law, General Part], , Melantrich Praha, 1937, p. 346.

[5] Z. Bažil draws attention to these terminological and content problems in his monograph "Neurčité právní pojmy a uvážení při aplikaci norem správního práva, se zřetelem na judikaturu bývalého čsl. nejvyššího správního soudu" [Indefinite legal notions and consideration when applying the administrative law norms with regard to the judicature of the former Czechoslovak Supreme Administrative Court], Praha, Univerzita Karlova, 1993, p. 57.

nistrative discretion is a phenomenon and also a problem with three essential levels, of which the first creates the basis for the claim to use this authority (the legislative level), the second presents the domain of the public administration itself in this area (the legal–application level), and the third one includes the system (especially the judicial one) of the monitoring of the previous two levels of discretion.

To put it differently, the problems connected with discretionary authorities of the administrative bodies include ***three large areas for research:***

- the foundation of the discretionary powers of the public administration in legal regulations, including the way of determining the criteria for the regular execution of discretionary authorities (and the issue of their interconnections),
- the activity of the administrative bodies themselves when applying the norms containing the administrative discretion, including the issue of respecting the determined criteria,
- the system of monitoring (especially judicial) of the execution of the discretionary authorities of the public administration, including the respect to binding criteria for the execution of the discretionary authorities.

2. *THE PRINCIPLES OF GOOD ADMINISTRATION AND THE DISCRETIONARY POWERS*

The effort to stand up to all the different kinds of standards that make the fulfilment of the requirement of the state respecting the rule of the law, of the protection of the individual's rights and freedoms, and also the effectiveness of the public administration execution are significant features of the modern systems of public administration. Such efforts are natural not only to the individual states and their legal systems, but they are also asserted (or in the mutual interconnections of these efforts) at the European Union level. The wider "European" environment is then represented by the space of the Council of Europe member states, which implies significant historical and content connections for the issues we study, which we will further mention. In these, either purely "Union"[6], or sometimes, on the other hand, wider European connections, the term ***"European administrative space"*** is used.

Within the European Union, but also on the wider basis of this European space, four cornerstones of values have been formulated and recognised in the last decades – principles that attribute or enlarge and complement the "traditional" requirements and principles of the state respecting the rule of the law and the protection of human rights and freedoms

They are the following requirements – principles:

- reliability and predictability,
- openness and transparency,
- accountability,
- efficiency and effectiveness.[7]

On the basis of this, certain principles that should control the execution of public administration in Europe were or are created. At the most general level, the name ***"principles of good administration"*** has been coined for them.

In some legal systems, the principles of good administration serve as the criteria of legal proceedings of the administrative bodies in the wider sense of the word. E.g. according to the Belgian sources, they serve the courts of justice for the monitoring whether the public administration has taken action in accord with the law. They are also used directly by the administrative bodies as the measures of correctness within the framework of the decision taking processes.[8]

Our interest is directed at the principles that control the administrative discretion, that is, they are legally binding. In the outlined context, we could speak of the *principles of good administration in a narrower* sense, or rather of the ***legal principles of Good Administration (Governance).***

In the prism of the influence of the Czech administrative law by the integration process, the question *whether the (legal) principles of Good Administration are legally binding* is of key importance for the theme of discretionary powers. When dealing with this question, it is also necessary to take into account that the general legal principles of European law that are applied by the European Court of Justice also belong among the sources of European law.[9]

The importance of the judiciary for the profile and assertion of some general legal principles in the area

[6] Compare e.g. POMAHAČ, R.: Správní právo, obecná část [Administrative law, general part], 5th edition, C.H.Beck, Praha 2004, pp. 731–733. This author defines the notion elsewhere as a set of principles, rules, and measures that are applied in a unified way in the administrative activity of EU member states, or the same author: Zásady správního řízení a evropské právo (K návrhu nového českého zákona o řízení před správními úřady) [Principles of administrative procedure and European law (To the draft of the new Czech act on the procedure before the administrative bodies], Evropské a mezinárodní právo, 2001, No. 3, p. 41.

[7] Compare e.g. Pomahač, R., op. cit., p. 733, or POMAHAČ, R., VIDLÁKOVÁ, O.: Veřejná správa [Public Administration], C.H. Beck, Praha, 2002, p. 47.

[8] MAST, A.., DUJARDIN, J., VAN DAMME, M., LANOTTE, J.V., Overziclet van het Belgish Administratief Recht, Kluwer Rechtswetenschappen, antwerpen, 1999, pp. 45–46.

[9] They exist on the primary law level. They do not have any form and they are based on the legal orders of the EU member states. They are based on the basic values common to all the member states, while their main part concerns fundamental rights in the

of administrative law, or in the area of the principles of Good Administration, is crucial. It is a process that has been developing in the European context for a long period of time already, and its outputs and direction are highly significant for the conditions of the public administration in the Czech Republic, especially with regard to the incorporation into the European administrative space governed by the above–mentioned principles.[10] While in the "old" member states, the development was more or less natural, gradual, and continuous, while in the Czech Republic, we may observe a rather chaotic as well as delayed process in this area.

It is necessary to realise that the European system of justice, based especially on the common constitutional traditions of the member states, interferes also with the legal systems of the member states, whose judicial systems and legal orders it has significantly influenced. It thus has impact on the development of the European Communities as a legal community, in the sense of asserting the principles of the state respecting the rule of the law.[11]

Since the mid–1960s, the European Court of Justice protects the legal standard in the sense of the constitutional traditions common for the member states, as well as of international conventions, especially then the European Convention on Protection of Human Rights and Fundamental Freedoms. A further significant act was the accepting of the Declaration of Fundamental rights and freedoms (European Parliament – 1989).

As a member state of the EU, the Czech Republic also has to come to terms with the fact that the principle of equality before the law holds without exceptions together with the *principle of proportionality when applying the discretionary authorities* and that any restrictive interpretation of basic rights and freedoms is prohibited.[12]

Further development in this area then brought the Charter of Fundamental rights of the European Union (European Council – 2000), which is (up to now) a political document but it is however expected that it will become a part of the primary law.

Article 41 of the Charter, named "The right to good administration", is of special importance for our purposes, and towards the administrative discretion, it bases the principle of objectivity.[13]

In the activities of the European Court of Justice, the effort to formulate rules distinguishing *the good execution of administrative activities* form the bad one is apparent. The main principles of the stated ones have become a direct part of the primary community law; others are rather of a substitution or auxiliary character.

With regard to the influence of the French and German law on the recent European law, the most frequented principles are the principles of equality, the principle of bondage of the administration by acts, or by the law, the principle of limited freedom in administrative decision taking, or discretionary authorities, the principle of responsibility of the administration, the principle of proportionality, and the principle of legitimate expectations.[14]

Looking at the set of principles presented above, it is obvious that not all of them are on the same level of generality, as some may under certain circumstances include others. There are also intersections with regard to the content of the individual principles. For the purposes of the "correct" administrative discretion, this is the case with the principle of equality and the principle of bondage by the law, which belong to the basic features of the state respecting the rule of the law, or legal community, further with the principle of limited discretion, which, however, is a consequence of the previous two for the area of free thoughts on public power, or it limits it in the way outlined.

For the correct execution of the discretionary authorities, we may consider especially the principle of proportionality and the principle of legitimate expectations to be decisive.

Good Governance was not left unattended even by the Treaty on the Constitution for Europe, where the *"right to regular administration"* is based in Article II–101. It contains the right of any person for having their matters dealt with before the bodies of the Union

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form of material law and process guarantees. For more details see TICHÝ, L., ARNOLD, R., SVOBODA, P., ZEMÁNEK, J., KRÁL, R.: Evropské právo [European law], 2nd edition, C.H.Beck, Praha, 2005, pp. 230–231.

[10] In relation to the principles of good administration, as well as to the phenomenon that is new in our conditions, J. Grygar suggests to seek for the real line of development in those cases where the stated principle has a longer history, while he finds the judicature of the EU member states and of the European Court of Justice suitable. For more detail see GRYGAR, J.: Právo na dobrou správu [The right to good administrtion], Justiční praxe, 2002, No. 7, pp. 488–495.

[11] TICHÝ, L., ARNOLD, R., SVOBODA, P., ZEMÁNEK, J., KRÁL, R.: Evropské právo [European law], C.H.Beck, Praha, 1999, p.233. Further the authors stated say: *"The unified use and keeping to the law (emphasis by the author) is a powerful integration tool. ... In its judicature, the European Court of Justice a.o. applies the generalisation of some tendencies and features, it formulates some principles as specific rules of European law" and influences the creation of the norms.* Ibid, p. 234.

[12] PÍTROVÁ, L., POMAHAČ, R.: Evropské správní soudnictví [European Administrative Judicature], C.H.Beck, Praha, 1998, pp. 254–255.

[13] For more details and the content of the Charter of Fundamental Rights of the EU see e.g. Sander, G.G.: Poznámky k Chartě základních práv Evropské unie [Notes on the Charter of Fundamental Rights of the EU], Evropské a mezinárodní právo, No. 7–8/2001, pp. 9–13. For the text of the Czech translation of the Charter see http://.euroskop.cz.

[14] PÍTROVÁ, L., POMAHAČ, R., op. cit., pp. 257–258.

impartially, justly, and *within a reasonable time span,* which includes especially the right to be heard, the right to access the files, the right to the justification of the decision. This right further includes the right to reimbursement of the damage caused by the bodies of the Union and the right to pose questions to the bodies of the Union and the right to an answer in one of the languages of the Constitution. Although further fate of the Treaty is not yet certain, there is no doubt as to the entitlement to good administration.

Even the Czech Constitutional Court in its decision taking practice does, nevertheless, not waive community law, or the general principles applied in it.[15] The Constitutional Court emphasizes the "radiating" function of the community law, which especially in the form of general legal principles shines to a great extent onto the actual decision-taking practise of the Constitutional Court. Further, the Constitutional Court has stated that it has repeatedly applied the general legal principles that are not contained in the legal regulations explicitly, but that are applied in the European legal culture without exceptions (e.g. the principle of proportionality).[16]

The existence, binding, and ways of formulating and assertion of the principles of good administration are sufficiently apparent from the above stated.

The courts have played and quite certainly will play an important role in the formulation and application of the stated general principles. Their role is especially important in those cases when the concrete legal regulation of the proceedings of the administrative bodies is not at disposal, which are typically those cases where the discretionary authority of administrative bodies is applied. Courts, especially the courts in the administrative judiciary, must provide protection to subjective rights and their decisions also have to be based on certain viewpoints, which should be applied on the basis of equality, and therefore should be generally valid.

After the renewal of the monitoring of the public administration by the judiciary (1992) and especially after accepting the new regulation of the administrative judiciary in the Czech Republic in 2002 (effective from January 1st2003) we are witnessing the assertion of (some) immediately above emphasized legal principles of good administration that concern the discretionary authorities of the public administration. This is a rather interesting process with elements of continuity as well as turns and twists – changes of the up-to-then judiciary.[17]

We have met the notion of *principles of Good Governance (administration)* in our legal regulation in two cases so far.

First, the use of the good administration principles as the criterion for judging the activities of public administration is entrusted to the public defender of rights ("ombudsman"), within the framework of his work in the "protection of people against the actions of the authorities and other institutions". Further criteria for the compliance of ombudsman's activities are the compliance with the law and the principles of a democratic state respecting the rule of the law. The stated activity of the ombudsman should, as a whole, contribute to the protection of fundamental rights and freedoms.[18]

Further, second in a row became the new administrative order, i.e. the new legal regulation of the proceedings of the administrative bodies anchored in Act No. 500/2004 Coll., which became effective on January 1st2006. The acceptance of this legal regulation in 2006 established further reasons for proper examination of the problems of good administration and their bondages and relations.

This is caused by the fact that the new administrative order, Act No. 500/2004 Coll. introduced explicitly into legal order of the Czech Republic its index of the "basic principles of the activity" (§ 2–8) and made them the universally valid principles for all the execution of public administration (compare the diction of § 177 par. 1 of the cited act.[19]).

The administrative order also fully, in the establishment of review authority of the appellate body (§ 89 par. 2), puts next to the traditional requirement of legality or lawfulness (with the spectrum of sources growing larger through history) of the decision also the requirement of ***"correctness"*** of the decision, and also requirements with regard to the quality of the previous proceedings (the notion ***"faults of the proceedings"***, some of which can and others of which cannot render the decision unlawful or incorrect).

The ***criterion of "correctness" of the decision*** is the one that needs to be dealt with. It will also be necessary to further sufficiently explain its connection with the notion of "abuse of administrative discretion"[20] (i.e. incorrect use of the authority of the admi-

[15] Pl. ÚS 5/01, No. 149, Coll. n. ÚS, vol. 24, C.H.Beck, Praha, 2002, p. 79.

[16] Thus presented in the finding of the Constitutional Court, Pl. ÚS 33/97, Coll.n. ÚS, vol. 9. p 407.

[17] Compare e.g. the development of the opinions on the existence or acceptability of the so-called absolute administrative discretion, when the development necessarily reached the statement of unacceptability of such a way of deciding of the administrative bodies (the resolution of the enlarged senate of the Supreme Administrative Court, No. 6 A 25/2002–42 of March 23rd2005).

[18] Compare § 1 par. 1 of Act No. 349/1999 Coll., on the public defender of rights.

[19] *"Basic principles of the activity of administrative bodies stated in § 2–8 are to be used for the execution of public administration also in the cases when a special law determines that the Rules of Administrative Procedures should not be applied but it does not contain a regulation corresponding with these principles".*

[20] *"The court abolishes the contested decision even in the case when it finds out that the administrative body* **has crossed the limits**

nistrative body), which is one of the most important ones for our research of the discretionary authorities.

The *"correctness"* of the decision certainly bears in itself (apart from the requirement on the sufficient fact–finding and its correct evaluation) also the criteria of justice of the decision, i.e. suitability, adequateness, justified expectations ("predictability"), consideration of the rights obtained in good will, and further respect to the public interest (as it is brought in the concentrated and binding form in § 2 par. 2–4 of the Rules of Administrative Procedure, while most of the "items" mentioned present directly the constitutional principles of a state respecting the rule of the law).

Correctness of the decision is apparently a part of *good* administration. "Good administration" should always be also the "correctly deciding administration", or the just public administration (?).

3. *NEW RULES OF ADMINISTRATIVE PROCEDURE AND ITS BASIC PRINCIPLES OF ACTIVITY*

The basic principles of the activity of the administrative bodies are stated in § 2 – § 8 of the Act No. 500/2004 Coll. The act, however, contains in it manifestations of the principles that are not stated in the given clauses separately, but from the point of view of the requirements on the quality of the activity of administrative bodies, they are important. I will focus on those principles that are related to the area of discretionary authorities.

The new law namely brings and sets more demanding qualitative requirements on the procedure aspect of the decision taking processes of the public administration, but it also explicitly sets much more demanding requirements, in contrast to the literal adjustment of the "old" Rules of Administrative Procedure, for the content of the accepted decisions in the most general sense of the word, i.e. whether they have the form of classical administrative decisions of the meritorious or process standpoint, the form of the so–called certificate, the form of the so–called public law contracts (agreements), the form of a measure of general nature, as they are explicitly regulated in the individual parts of the new Rules of Administrative Procedure, or any other form.[21]

If there is, to use the words of a classic, any "emission of the authority of an administrative body", and if there is a space defined by the law for the so–called free consideration of the administrative body, it will be necessary to respect the requirements indicated.

However, it is not pertinent to use the future tense. The requirements mentioned have already been stated and the new Rules of Administrative Procedure are "only" introducing them into the society of common legal regulations, i.e. to the level of legal directives with which our public administration is used to work.

As the title of the relevant section in Part One of the Act states, these are really the *principles of the activities of the administrative bodies.* The wording and content, which with most principles exceeds the traditional framework of purely process principles, of the principles really hints at the wider application of the mentioned principles.

Apart from the direct *legal bondage,* the basic principles also have another traditional role, namely to serve as an *interpretation rule* for the explanation and application of the individual clauses of the law, or the clauses regulating the procedures of the administrative bodies in the individual special laws that are in the relation of specialty with respect to the regulations contained in the Rules of Administrative Procedure.

The basic principles have inevitably become a logical guideline for the legislators who project their requirements in many cases into the concrete clauses of the Rules of Administrative Procedure solving various process situations and regulating the individual (not just the classical process ones, because they are also related to other kinds of administrative bodies procedure) notions and institutes. The interconnection of especially some clauses of the law in connection with the essential principles of activity is evidently even more apparent than it was in the previous regulation.

The new Rules of Administrative Procedure was to a certain extent influenced by the previous regulation from 1967 in the sense that it preserves, albeit with some necessary changes, a certain range of traditional principles of classical process nature. However, it became a breakthrough regulation by bringing the reflection of the principles of good administration in its first part, or to put it more precisely, states at the legal level some concrete requirements concerning the *quality of the accepted decisions* and on the *way of executing public administration* in the relationship officer – the addressee of the officer's activity.

In the observed first part of the Rules of Administrative Procedure, the principles of activity are stated in the following order:

- **the principle of legality (lawfulness)**

is the basis for any execution of public power nature and also for the execution of public administration towards relevant people.

set for administrative discretion by the law or has abused them" (author's emphasis) – § 78 par. 1 of Act No. 150/2002 Coll., Rules of Administrative Procedures, as amended.

[21] The reader is referred here to § 177 par. 1 of the new Rules of Administrative Procedure.

The Rules of Administrative Procedure imposes the administrative bodies to proceed in accord with the *acts* and *other legal regulations,* as well as with *international conventions* that form a part of the legal order. For these binding sources, the legislative abbreviation "legal directives" is used in the text of the act.

The principle of lawfulness may be considered to be the most important one, as for the public administration executed in the conditions of a state respecting the rule of the law, it determines the conditions, limits, and way of execution of its authorities especially towards the administered persons. It is, however, also a basis for the application of further principles, as its content, way of application, and bondage is determined by the law.

The principle of legality is a concrete manifestation for the condition of public administration and at the same time a constitutional guarantee of legality in the sphere of public administration, anchored in the Constitution of the Czech Republic and in the Charter of fundamental rights and freedoms.[22]

The principle of legality presents one of the guarantees of legality in the area of public administration. None of the procedures by which the subjects perform public administration and interfere with legal relationships of the addresses or influence them should remain outside the sphere of its application. It is also for this reason that the principle of legality, and with it also other basic principles of the activity of administrative bodies, is set as a universal principle, controlling the execution of the public administration.

The principle of legality (lawfulness) thus explicitly receives the necessary scope from the point of view of constitutional regulations and also from the point of view of bindings resulting from relevant international conventions. By such explicit formulation, the legal state based by the "Europeisation" amendment of the Constitution has thus been reached.[23]

- **the principle of adequateness (proportionality) and its components**

belongs to the principles influencing in a fundamental way the content of the accepted decisions and the execution of the discretionary authorities. It consists of several partial principles that can also stand independently, which is why they should be dealt with in greater detail:

1. THE PROHIBITION TO ABUSE ADMINISTRATIVE DISCRETION[24]

The administrative body only applies its authority for those purposes to which it has been confined in him by the law or on the basis of the law, and in the *scope* in which it was confined to it.

The principle helps to *materialise correctly* the principle of legality, while it emphasizes its content side (purpose of the authority determined by the law) and at the same time follows up on the requirement to act always (or take a decision that will be) in accord with the public interest.

2. THE PRINCIPLE OF ACCORD WITH PUBLIC INTEREST

can also stand independently.

The notion "public interest", as an indefinite notion, may be fulfilled or determined exactly with the help of the purposes that the legislator has determined in relevant laws for the execution of authorities of the administrative bodies in the individual sections of the administration.[25]

The principle of the prohibition of the abuse of authority is followed by and the principle of proportionality is organically complemented with:

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[22] Art. 2 par. 2 of the Charter: *"State power may be applied only in the cases and within boundaries stated in the law and in the way stated in the law"* and further Art. 4 par. 1: *"Obligations may be set only on the basis of the law and within its limits and only while preserving basic rights and freedoms."*

[23] Compare Art. 10 of the Constitution of the Czech republic: *"Announced international conventions to whose ratification the Parliament has given its consent and by which the Czech Republic is bound form a part of the legal order: if the international convention stated something else than the law, the international convention is to be used."*

[25] In the decision taking in the public administration, we always find an element of law and an element of purpose. Purpose is in the most general level represented by public interest.

According to V. Vopálka, the category of purpose prevents the abuse of authority (in Hendrych, D. et al.: Správní právo, obecná část [Administrative law, general part], 5th edition, C.H.Beck, Praha 2004, p. 85).

"The purpose of the law" serves as an important interpretation rule that helps the correct fulfilment of the space founded for administrative discretion.

The "public interest" explicitly or implicitly included in the legal regulations is then the main criterion determining the content–wise direction of the public administration. From the legal order, we may extract a whole structure of public interests that are not always in accord, and when deciding, it is necessary to balance them or to put them into accord (*the principle of the cooperation of administrative bodies* – § 8 par. 2 of Act No. 500/2004 Coll.), and at the same time monitor the accord with the legitimate private interests (for these, see § 2 par. 3 of Act No. 500/2004 Coll., or the *principle of subsidiary,* i.e. minimisation of interference) or to prevent the influence of the illegitimate private interests.

For the details on the issues of purpose and the public interest see e.g. SKULOVÁ, S.: Správní uvážení, základní charakteristika a souvislosti pojmu [Administrative Disretion], Masaryk University, Brno, 2003, pp. 91–100.

3. THE PRINCIPLE OF PROTECTING THE GOOD FAITH AND JUSTIFIED INTERESTS

The state body takes care of the *rights obtained in good faith* as well as the *justified interests* of the people who are affected by the activity of the administrative body in the individual case (further only "affected people") and may ***interfere*** with these rights ***only under the conditions determined by the law and in the necessary range.***

The requirement emphasised at the end of the previous sentence is sometimes called

4. THE PRINCIPLE OF SUBSIDIARY;

and this goes together with the requirement that the

- **accepted solution corresponded with the circumstances of the given case.**

5. THE PRINCIPLE OF THE PREFERENCE FOR REMOVING CONFLICTS BY RECONCILIATION

when discussing and deciding on the issue matter-of-factly follows from the stated requirements.

The principles mentioned also complement the *content of the adequacy principle* in the sense that the means of public power were applied only to the extent necessary, justified by the purpose of the execution of this authority, and only in the cases where the reconciliation is not reached within the procedure of the administrative bodies and their decisions. The accepted solution then should be, with regard to the above-stated viewpoints, adequate to the solved case or situation.

- **The principle of predictability (legitimate expectations)**

is the second major principle for the execution of the discretionary authorities.

In the Rules of Administrative Procedure, it is introduced by the requirement to pay attention that *while deciding on the matter-of-factly identical or similar cases, no unjustified differences originated.*

It is the projection of the equality principle and also the legal certainty on the conditions of public administration.

It presents the guarantee of the constitutional principle of equality in the rights and dignity, the equality before the law (and also the prohibition of discrimination).[26]

The principle of legitimate expectations does not mean an absolutely constant decision taking. As follows from the concurrently established principle of adequacy, there is always also the requirement to look for a suitable, adequate solution, and this on the level of looking for even more adequate solutions (more perfect balancing of the interests) or a justified change of the practice.

In relation to the issued administrative acts, the requirement of **justification** of the processes and decisions, which concern the rights and obligations of the individuals, is thus introduced, especially if the use of administrative discretion is concerned, for the situations of changes in the stabilised practice or towards the legitimate expectation.[27]

From the other principles included in the first part of the new Rules of Administrative Procedure that have in concrete cases a narrow or loose relationship to the area of administrative discretion, I will further mention also the *principle of material truth, the principle of procedural equality and impartiality of the procedures of administrative bodies, the principle of public administration as service, the principle of rapid and economic procedures* (procedural effectiveness).

CONCLUSION

The principles of the activity of the administrative bodies, as they are incorporated into the new Rules of Administrative Procedures, present a real change in the system in the explicitly and obligatory formulated requirements on the decision-taking activity of the public administration with all the features that the systemic change has. The stated principles affect the area of discretionary authorities of the administrative bodies quite severely. The demands have increased significantly.

The influence of this significant change of the legal regulation will unavoidably and constantly spread in all the necessary directions that have been hinted in the introduction, and it will affect the public administration, the judicial review activities towards public administration, and undoubtedly also the certain feedback to the legislators.

With regard to the current situation in the monitored areas, it is evidently not to be expected that the influence will be swift and intensive, but rather continuous and gradually spreading circles on the surface. Their running and the (hopefully) positive erosive effects towards the sometimes maybe even too steep or rigid banks of bureaucracy and its foundations will deserve to be studied in detail.

[26] Compare especially Art. 1, Art. 3, Art. 5 of the Charter of Fundamental Rights and freedoms.

[27] As contained in the Recommendation of the ministers of the Council of Europe, as cited in Note No. 24.

For the purposes of the research plan, the concrete suitable task in this field will consist in the attempt at categorisation – the classification of the principles of good administration into an adequate scheme and the specification and structural description of the components of the individual principles of activity of the administrative bodies. That is the creation of a certain scheme of "principles", whose application to a concrete case may enable us to assess in a more concrete way the possible faults of the authority and the classification of these faults, which might present a contribution to the application of the principles of good administration in the practice of administrative and review activity of the courts.

The load–bearing lines of the stated schemes could be e.g. the criteria for the assessment of the regular procedure of the administrative body, further the criteria of just and correct decision, and further the criteria of adequate behaviour and approach of the authorities and the officers towards the addressees of the administration. Across through these viewpoints or aspects of activity and the approach of the authorities and officers, the line of the intensity of legal binding character (the legal strength of the principles, or the rules, where there is no real principle involved) or "just" the ethical dimension would meander.

The starting point must be exactly the necessary European context of the stated principles, with its legislative, legal–application, and judicial aspects. These, however, are principles, and thus this would also contain the aspect of values, which is actually referred to by the essential documents and judicial decisions.

If the stated scheme is compiled, then it will be possible, where the concrete basis for this exists, to connect it with the relevant clauses of the Rules of Administrative Procedure and other legal regulations, especially those that regulate the review regimes and responsibility regimes. At this point, some interesting connections can appear, and maybe also discord. The use of the stated scheme for some significant or specific areas of administrative discretion, as e.g. the area of administrative punishment, may also be interesting.

It may be assumed, and the signal cases are already at disposal, that there will be cases of unsuitably founded discretionary authority.

The examination of the structure and way and the extent of the overlapping of the requirements of a democratic state respecting the rule of the law and also the protection against silence of administrative authority will be a rather extensive, but not unjustified, task.

The outlined questions and consequences, however, have the starting point at the formulation level, and especially the nature and legal obligation of the individual principles of good administration. It will be necessary to deal with this requirement in a concrete and dignified way.

As a partial motivation to this activity, I shall conclude with a quotation:

"The state should behave not only legally, but also justly, as law is only a means to reach justice. ... The principle of justice is not a mere criterion for moral acceptability or unacceptability of a legal norm, judgement, finding, or a decision taken by a administrative body, but becomes a criterion for its legal acceptability and as a part of the state respecting the rule of the law it poses limits that cannot be crossed by the positive law."[28]

[28] KLOKOČKA, V.: Ústavní zřízení České republiky [Constitutional establishment of the Czech Republic], Vyšehrad, Praha, 1997, p. 11.