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Performing of the acts within criminal proceedings usually takes too long and thus this phenomenon can be regarded as one of the most burning problems which have plagued the criminal justice not only in the Czech Republic but at least all over Europe for the last few decades. This phenomenon, among other things, obviously results from considerable extension of criminal law under which a whole range of illegal acts is settled through criminal sentencing. These acts previously fell within the area of different legal fields. In addition to this, new social phenomena (in economic field as well as phenomena occurring as a result of intensive development of communication technologies, etc.) have also necessitated protection by means of criminal law norms. The significance of this issue

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is closely connected with the fact that unreasonable delays in criminal proceedings represent violation of the right to hearing of the case within a reasonable period of time resulting from the European Convention upon the protection of human rights and fundamental freedoms (compare article 6 clause 1 of the Convention).

This problem obviously has to be dealt with and thus the need to tackle this issue has resulted in the trend which is sometimes called Criminal Justice Rationalization. It means that the state strives to introduce and enforce methods supporting the increase in efficiency of the criminal justice in order to make the criminal proceedings shorter and administrative procedure easier.

The initial stage of the rationalization process was logically focused on dealing with less serious criminal offences which have made the criminal justice system more and more overloaded; offences committed in connection with road traffic could be a typical example with a sharp increase in the volume of car traffic logically bringing about an increase in crimes committed in this area. Both legal study as well as the legislator have come to the conclusion that it is not necessary to carry out all the acts within the criminal proceedings which can often be lengthy and expensive. It is especially possible to solve the case through an out of court settlement and thus refrain from hearing the case before the court. If the prosecuted person agrees with this then the case can be settled before trial hearing before the court. However, this can only be done with the consent given by the person prosecuted.2

This resulted in the introduction of institutes such as e.g. criminal order or so-called diversions of criminal proceedings. The application authorities were keen to accept the newly introduced tools (or at least some of them) as a way to simplify their work as they (e.g. diversions of criminal proceedings) represent certain advantages not only for the criminal justice system but also for the victim of a crime.3

As far as the Czech Republic is concerned the first stage of the rationalization process dates back to the 90’s of the 20th century and the first decade of the 21st century when several amendments into the Czech Criminal Procedure Code were made (Act N. 141/1961 Coll.) In 1993 the possibility to handle a case through criminal order was re-established through the Amendment N. 292/1993 Coll. valid from January 1, 1994. Under this law a case can be handled through criminal order if it is the single judge who is competent to hear and try such a case (this way of trying cases had been abolished through the Amendment N.

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2 In this respect it can be said that this phenomenon to a certain extent challenges the right of general conception of a crime, which is based upon the notion that a criminal act is punishable by the court.

178/1990 Coll.). Through the same amendment the first type of diversion was also enshrined in the Czech Criminal Law – a diversion which is called conditional discontinuance of criminal proceedings. Two years later the first type was followed by the second one (as a result of the adoption of the Criminal Procedure Code Amendment N. 152/1995 Coll.) This type of diversion is called settlement. Within the following ten years other two types of diversion were introduced, namely it was conditional discontinuance of filing a motion to punishment and abandonment of criminal prosecution in proceedings against juvenile offenders.

Elements making the criminal proceedings run faster could also be seen in the so-called great amendment of the criminal procedure code carried out through the Act N. 265/2001 Coll. (valid from January 1st, 2002). This amendment modified the legal regulation of appellate proceedings in favor of the appellate principle with the aim to make the proceedings before the court run faster. However, it was possible to solve less serious cases in a simpler and faster way due to the introduction of the possibility to carry out shortened pre-trial proceedings (§ 179a and subsequently of the criminal procedure code) and subsequent summary proceedings before the court.

If the first stage of the rationalization process is to be characterized as one focused on dealing with less serious crimes, then it is possible to define the year 2012 as the breakthrough in the system of the Czech criminal law as the Czech legislator – following some other states’ example – agreed to the introduction of an institute, the aim of which is also to accelerate criminal proceedings which, however, at the same time does not only apply in cases of less serious crimes. This institute is called the agreement upon the guilt and punishment, which was originally mentioned in connection with the system of criminal law in the countries belonging to the Anglo-Saxon legal order where it is frequently called plea bargaining. This step was not unexpected at all as there had already been two unsuccessful proposals of similar nature submitted for approval to the Chamber of Deputies of the Czech Republic. The introduction of this institute is also touched upon in the intended subject matter of the re-codification of the criminal procedure code.

2 Plea Bargaining and the Continental legal system

Making an agreement between the accused (who is represented by an advocate) and the prosecution (represented in the Czech Republic by the state attorney) can be regarded as the fundamental principle behind the institute of the agreement upon the guilt and punishment. This agreement includes the defendant’s confession to the crime committed and accurate definition of legal consequences drawn as a result of the commission of this crime. These consequences

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4 In the following text the expression agreement upon the guilt and punishment will be used in connection with the Czech and Slovak legal regulation as a literal translation of the term used in the Czech and Slovak legal norms.
especially in the form of a concrete punishment are drawn by the state as a reaction to the crime committed. If this agreement is supposed to have the power and effect of a conviction it must subsequently be approved by the court.

The advantages resulting from the employment of this institute can be easily seen in considerable acceleration of criminal proceedings contributing to the fulfillment of the international and constitutional requirements mentioned above. It also contributes to the simplification of the process of giving evidence, eases the performance of the bodies responsible for criminal proceedings and last but not least solving of cases through the agreement upon the guilt and punishment can also be beneficial from the viewpoint of the efficiency of criminal law bearing in mind that the reaction of the criminal law to the crime committed is all the more effective if it follows immediately after the crime was committed.

On the other hand the institute of plea bargaining under the system of continental criminal law represents a foreign element as it collides with certain fundamental principles upon which the criminal proceedings (falling within the continental legal system) is based. It specifically collides with the principle of legality and the principle of material truth. After all this point is frequently raised by many of those who strongly oppose the idea of the introduction of the institute of the agreement upon the guilt and punishment. The extraneousness of the institute of plea bargaining from the viewpoint of continental system of criminal law results from a different concept of the role of the judge in criminal proceeding. The system of Anglo-Saxon criminal law is based on adversarial model of criminal proceeding in which the prosecutor has a very strong position and a large discretionary power, whereas the judge plays the role of a passive arbitrator with limited powers. By way of contrast the continental system of criminal law is based on inquisitorial court procedure where the roles of the parties mentioned above are to a certain extent reversed, i.e. the court plays much more active role in the criminal proceedings and in the last instance it is responsible for the proper clarifying of the facts of a case.

The number of those countries whose legal order is based on the continental system of law and still adopt the element of plea bargaining as a part of their legal regulation is on the increase. However, the legislators in these jurisdictions are trying to enshrine this institute in their legal systems so that their traditional system of their jurisdictions would not be upset if possible, i.e. they try to minimize

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the intervention into the principles of court procedure applied in the criminal proceedings of the continental legal systems. Thus we can see the rise of a new type of the institute of plea bargaining which in certain features differs from its original model applied in the Anglo-Saxon jurisdictions.

This phenomenon can be clearly seen within the region of Central European jurisdictions and has become frequent in these systems of criminal law in the last decade, which can be demonstrated not only by the new legal regulation valid in the Czech Republic, but also by the legal regulations of Germany or Slovakia respectively. As far as the German legal regulation is concerned, the institute of plea bargaining was implemented into this legal regulation in an unusual way. First agreements (Absprachen) between the prosecution and the defense were made and respected and followed by the courts in practice and it was only later in 2009 when the legal regulation was changed. Thus it was explicitly stated that these steps in the criminal proceedings can be taken and the institute was regulated in a greater detail. As far as the Slovak system of criminal law is concerned the institute of the agreement upon guilt and punishment was adopted as a result of the re-codification of the system of criminal law, which was carried out in 2005 and also resulted in the adoption of a new criminal law statute (Act N. 300/2005 Coll., criminal law) and it also resulted in the adoption of criminal procedure code (Act N. 301/2005 Coll., Criminal Procedure Code); both regulations have been valid form January 1st, 2006.

3 Plea Bargaining and the Principle of Material Truth

As it has been outlined above the existence and implementation of the institute of plea bargaining in the continental law jurisdictions collides with certain fundamental principles upon which the criminal proceeding in these jurisdictions is based. This can be regarded as the main problem. This obviously relates to the systems of Czech, Slovak as well as German criminal law.

The first principle which has to be mentioned in connection with the institute of plea bargaining is the principle of material truth. This principle states that the bodies in criminal proceedings must clarify the facts of the case beyond reasonable doubt to such extent that a decision can be made; the defendant’s confession does not mean that these bodies are freed from the duty to review all the circumstances and facts of the case. This can be regarded as one of the characteristic features of the principle of material truth (compare § 2 clause 5 of the Criminal Law).
The potential collision between the principle of material truth and the institute of plea bargaining is obvious – this institute is directly aimed so that the process of evidence presenting could be completed in a significantly limited scope, which should consequently result in shortening of the criminal proceeding.\(^9\) After all this element can also be found to a certain extent in other institutes, the aim of which is to rationalize the criminal proceeding, no matter whether this is the diversion in criminal proceeding or a special type of decision in the form of criminal order. In comparison with the diversions in criminal proceeding the institute of plea bargaining is not reserved merely for dealing with petty cases. In such cases there is no need to carry out the whole proceedings nor is it necessary to deliver a judgment in the form of a sentence.\(^10\) As far as the application of criminal order is concerned it is explicitly in the competency of the court, whereas the institute of plea bargaining is primarily based upon the agreement between the main parties to the criminal proceedings, i.e. it can be said that the material truth has been agreed upon.

It can be said that the Czech legislator obviously tried to frame the new legal regulation of the institute of the agreement upon the guilt and punishment in such a way that it would not collide with the principle of material truth if possible. The commencement of the agreement upon the guilt and punishment is, under the Czech Criminal Procedure Code, conditioned by the fact that the investigation results sufficiently prove that the act has been committed, the act is a crime and that the defendant did commit the crime (compare § 175a clause 1 of the Criminal Procedure Code). This procedure is conditioned by the investigation results no matter whether the state attorney is supposed to act out of his own initiative or react to the impulse given by the defendant. However, the requirement stipulated in the provision § 175a clause 3 is even more important. Under this provision the state attorney is allowed to make an agreement with the defendant upon the guilt and punishment only in cases when the preliminary proceedings results do not challenge the verity of the defendant’s statement about the commission of the crime prosecuted.

Thus the state attorney, as an authority responsible for the proper performance of the preliminary proceeding, is responsible for the following of the principle of material truth even in those cases when the preliminary proceeding is supposed to result in an agreement upon guilt and punishment. As a matter of fact it can be said that the state attorney should agree to the solution of the case through the agreement upon the guilt and punishment only in cases when the

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\(^10\) As to the characteristic features of diversions in criminal proceedings see Ščerba, F.: *Alternativní tresty a opatření v nové právní úpravě*. Prague: Leges 2011, p. 52-57.
investigation results objectively prove the legitimacy of the prosecution in such a quality which is sufficient for filing an action in standard cases. After all submitting of the agreed agreement upon the guilt and punishment for approval by the court is just another way of bringing the defendant before court.

Also the court has to take into account the material truth when in the process of assessing and approving of the agreement upon the guilt and punishment submitted by the state attorney. This results from the provision § 314r clause 2 of the criminal procedure code, under which the court shall not accept the motion to the agreement upon the guilt and punishment also in such cases when the agreement submitted is not consistent with the ascertained facts of the case. This rule can be interpreted in such a way that even insufficiently ascertained (i.e. not completely ascertained) facts of the case can serve as a reason for not approving of the submitted agreement upon the guilt and punishment by the court. Opposing interpretation would thus mean that the court – as far as the scope of the necessary evidence provided is concerned – is bound by the opinion of the state attorney, which would in fact deny the rule enshrined in the Constitution (article 90 of the Constitution, article 40 clause 1 of the Fundamental Charter), under which it is the court which shall decide upon the guilt and punishment.

Under the new Czech legal regulation both the state attorney as well as the court are under the obligation to find out the facts of the case so that the content of the agreement upon the guilt and punishment made between the prosecutor and the defendant is in harmony with the objective facts, thus they have to thoroughly review the defendant’s confession. Thus the Czech legal regulation does not represent a real breakthrough in the principle of material truth but rather its modification.

The Slovak legal regulation, which definitely served as an inspiration to a certain extent for the Czech legislator as far as the institute of agreement upon the guilt and punishment is concerned, is based upon similar principles and also takes into account the principle of material truth significantly. Even under the Slovak criminal procedure code mere confession of the defendant is not enough to commence the proceedings based on the agreement upon the guilt and punishment, but the prosecutor (i.e. the person representing the prosecution) can commence the proceedings only in such cases when at the same time the investigation results (or the results of the summary proceedings) sufficiently justify the conclusion that the act committed is a crime and that the defendant did it and the evidence is in accordance with the confession made by the defendant (§ 232 clause 1 of the Slovak criminal procedure code).

However, there are some differences between the Slovak and Czech legal regulations as far as the conditions for denying (or not approving) the motion for agreement upon the guilt and punishment is concerned. Under the Slovak legal regulation the court (or the senate chairman) can refuse to accept the motion for
agreement upon the guilt and punishment if it is obviously unreasonable [compare § 331 clause 1 letter b) and the clause 2 of the Slovak criminal procedure code]. Thus the court can refuse to accept the agreement if it is considered to be unfair (compare § 334 clause 2 and 3 of the Slovak criminal procedure code).

As far as the German criminal law is concerned it takes into account the principle of material truth significantly when negotiating about the punishment between the parties to criminal proceedings. This is closely connected with the fact that under the German criminal procedure code (as compared with the Czech and Slovak legal regulation) the institute of plea bargaining is not designed as a special and separate mode of proceedings, but as a specific right of the court to make an agreement with the two parties during the trial (compare § 257c of the German criminal procedure code). Thus the obligation to prove all the relevant factual circumstances of the case which results from the principle of material truth (§ 244 clause 2 of the German criminal procedure code) must be complied with.

The previously announced taking into consideration of the material truth can also be seen in the provision § 257c clause 5 of the German criminal procedure code under which the court is not bound any more by the agreement to settle a case made with the defendant and the prosecutor if within this agreement legal or other important factual circumstances were not taken into consideration or if such new circumstances emerged if the court at the same time arrives at a conclusion that the expected terms of punishment do not fit the gravity of the crime or the level of guilt any more. This means that objective and correct finding of the facts of the case (i.e. material truth) along with legal assessment of the case must have priority even in such cases when all three main legal parties (defendant, state attorney and the court) have explicitly agreed to the agreement.

However, at this stage it must be emphasized that the conditions and interpretation of the legal regulation of the institute of plea bargaining outlined above from the viewpoint of the principle of material truth does not necessarily mean that the state attorneys and judges will respect and apply this institute in practice. After all opinions frequently appear in professional literature according to which the idea of a thorough review of the confession made by the accused is nothing more than just a “pious hope of the legislator”.

However, the fact that the principle of material truth must be respected even in the proceeding involving the agreement upon the guilt and punishment resulting from the legal regulation brings another consequence, i.e. the Central

11 The same holds in cases when the defendant’s behavior in the subsequent proceedings (after the agreement has been made) does not correspond with the circumstances the court took into account when making the agreement. Thus the defendant’s confession in such cases cannot be used in the subsequent proceedings.

European concept of the institute of the plea bargaining is different from the Anglo-American one. If the material truth is still supposed to have priority over the formal (agreed) truth it is not possible to legally qualify the act committed as a part of the negotiation between the state attorney and the defendant.

In the Anglo-Saxon legal jurisdictions negotiating about the legal qualification of the act committed is quite common. However, the situation in Central European Region is different, i.e. if the equal position of both parties is to be kept it is not admissible for the same acts to be assessed in different ways merely for the purpose of making the criminal proceedings run faster. In other words under the Central European continental criminal law system it is not possible for the state attorney or the court to derive knowingly a wrong legal assessment of the act committed on the basis of the facts of the case. In this respect the German legal regulation can be used to demonstrate this problem, namely the provision § 257c clause 2 of the German criminal procedure code, which explicitly rules out the possibility to make an agreement between the two parties in such a way that it would include the statement of guilt (and thus the legal assessment of the act committed).

4 Plea Bargaining and Securing the Right to a Defense

The principle of material truth and its application in the conference procedure adjusting the initial views and opinions is closely connected with other principles of criminal proceedings, i.e. the principle to secure the right to a defense [compare especially article 6 clause 3 letter b) of the European Convention on the human rights protection and the protection of fundamental freedoms]. The legislators within the region of Central Europe are fully aware of this, emphasizing the importance of the right to a defense saying that violation of this right is one of the main reasons why the courts cannot accept the motion for agreement upon the guilt and punishment [compare § 314r clause 2 of the criminal procedure code, § 331 clause 1 letter b) of the Slovak criminal procedure code]. Securing of the right to a defense within the process of plea bargaining is especially connected with the fact that this type of settlement of the case can potentially threaten not only the public interest to properly and fairly sanction the offender who has committed a crime, but it is also connected with the risk posed in such cases when the offender knowingly and intentionally makes a wrong confession, which has been made by the offender for the purpose of getting less severe punishment even if the offender should be wrongly convicted.

Again it is possible to point out that the same problem has been for a long time connected with the application of diversions in the criminal proceedings

13 Compare e.g. Štěpán, J.: Některé rysy trestního řízení ve Spojených státech. Právo a zákonnost 1991, no. 5, p. 298-299.
14 The same in Král, V.: Dohoda o vině a trestu v návrhu novelizace trestního řádu. Právní rozhledy 2008, no. 20, p. II.
(as the application of these diversions is conditioned not only by the confession made by the defendant, but also by the consent of the defendant to such a settlement of the case), but also with the use of criminal order (when such an order has been issued the accused can hesitate whether to accept the punishment imposed by the order or file a protest even when the filing of such a protest is not connected with the prohibition of reformation in peius, which means that even harder punishment could be imposed). This problem becomes all the more serious in connection with the institute of plea bargaining as the application of diversions or the use of criminal orders cannot lead to such hard sanctions as it would be in case of the agreement upon the guilt and punishment within the institute of plea bargaining.\textsuperscript{15}

There is a question to what extent or if it is important at all to take into account the risk of a false confession. This is obviously connected with the scope of paternalism used by the state towards the defendant in the criminal proceedings. The system of continental criminal law has traditionally been much more caring in this respect as compared to the Anglo-Saxon system of criminal law. Thus it is not surprising that in the Central European system of law the legislator has tried to set the conditions for the use of the institute of plea bargaining so that even in these cases the risk of unfair conviction based on false confession of the accused would be minimized.

Thus the basic guarantee is, in this respect, the requirement (outlined above) to objectively find out the facts of the case verified by the confession made by the defendant – i.e. following the principle of material truth analyzed above. However, as it has been said, the fact that this requirement is covered by the legal regulation does not necessarily mean that it will be properly followed by the authorities in the criminal proceedings. In this respect it is rightful to analyze other possibilities of guarantees which could help to eliminate the risks of false confession made knowingly by the accused or generally speaking to strengthen the right of the accused to defense.

The institute of a compulsory defense (i.e. a compulsory representation of the accused by the counsel for defense) can be regarded as one of these types of guarantees. This type of defense could serve as one of the presuppositions for settling a criminal case through plea bargaining. As far as Central European legal regulations and the views upon the utility of the institute of compulsory defense in this special type of criminal proceeding are concerned there are different views upon these issues. Under the Slovak criminal law the agreement upon

\textsuperscript{15} When applying the diversion the formal conviction of the defendant is not realized, and the criminal order cannot be used to impose e.g. unsuspended prison sentence, which is true when talking about the Czech criminal law (compare § 314e clause 2 of the criminal procedure code), and also the German criminal law (compare § 407 clause 2 of the German criminal procedure code); under the Slovak criminal procedure code it is possible to impose the imprisonment sentence, even up to the period of three years (compare § 353 clause 2 of the Slovak criminal procedure code).
the guilt and punishment is not seen as a good reason for the use of compulsory defense institute, however, under the Czech criminal procedure code (provision § 36 clause 1 letter d) of the criminal code, it is said that the accused must have a defender when negotiating the conditions of the agreement upon the guilt and punishment.

Thus the Czech legislator took a careful approach towards the rights of the accused in the proceedings dealing with the agreement upon the guilt and punishment trying to secure an equal position of both the defense and the state attorney when negotiating the conditions in the agreement upon the guilt and punishment. By the way this is the reason why, under the Czech criminal procedure code, the compulsory defense is connected merely with the process of negotiating the conditions of the agreement upon the guilt and punishment itself. After the agreement has been made the accused does not have to be represented by the defender, not even at the stage when the court is in the process of decision-making about the approval of the agreement. It is just during the process of making the agreement with the state attorney when the accused significantly weakens his procedural position by his confession to the act prosecuted. Professional legal assistance provided by the counsel for defense also helps to prevent the state attorney from using undue duress upon the accused.¹⁶ Last but not least it is important to point out that the state attorney (sometimes also called the person representing the prosecution) is a professional whose knowledge and experience can play a bigger role in the process of negotiating about the guilt and punishment of the accused as compared to the trial where this drawback on the part of the accused can be balanced to at least certain extent by the impartial judge who is fully in charge of this stage of criminal proceedings.

5 Plea Bargaining and the Principle of Adequacy of Punishment

Up to now the (in)consistency of the institute of plea bargaining with certain principles governing criminal proceedings has been analyzed, however, now it is important to deal with a collision of this institute colliding with a substantive law principle which belongs to the fundamental principles of sentencing – the principle of adequacy of punishment (§ 38 of criminal code, § 34 clause 4 of the Slovak criminal code, § 46 of German criminal code).

Criteria which must be followed by the court when setting the terms of punishment (the gravity of the act committed, the person and circumstances of the perpetrator, the possibilities of correction of the offender etc.) are purely substantive law criteria. The procedural way of settling a case should have no impact on setting the terms of punishment. Logically the same act and the same perpetrator should result in the same punishment, regardless of the procedural method through which the perpetrator was convicted.

Here it is important to point out that in practice (at least the practice of Czech authorities in criminal proceedings) the procedural way of settling a case has a significant effect on the punishment of the offender. For example the statistical data\textsuperscript{17} reliably speak about the fact that since 2002, when the amendment came into effect, making it impossible to impose through a criminal order an imprisonment sentence, the number of cases settled in this way has lowered and the number of those cases settled through imposing the community service punishment has adequately increased. It was because judges sitting alone often preferred a faster settling of a criminal case (through the issuing of a criminal order) to lengthy and more difficult performance of trial even though instead of imposing an imprisonment sentence, originally imposed in such cases they now imposed they were forced to apply ‘only’ (at that time) the second most severe punishment, i.e. the community service.\textsuperscript{18} A similar phenomenon can be expected in cases when the judges apply the institute of the agreement upon the guilt and punishment. The courts will thus be willing to impose less severe sanctions, compared to those they would have chosen when imposing sanctions through delivering a judgment if this in turn results in making the criminal proceedings faster and lowering the number of pending cases.

It is necessary to say that this is, in fact, the basic principle behind the agreement upon the guilt and punishment from the viewpoint of the accused, i.e. receiving of a less severe sanction as a kind of reward for the confession made, bearing in mind that the accused is primarily motivated to make this agreement by the possibility to bargain a less severe punishment compared to the form of punishment he would probably get if the case was settled through a standard conviction.\textsuperscript{19} However, in spite of this fact, this phenomenon (i.e. less severe punishment of the offender compared to the one the offender would have received in case of standard procedure) represents a very problematic aspect of the institute of plea bargaining. The objection connected with this issue which is quite justifiable cannot be ignored, i.e. if the aim of the criminal proceeding is to realize material criminal law, the procedural criminal legal regulation should not try to appropriate the legitimacy to set a special criterion to set the terms of punishment without setting the conditions for the reward given as a result of the confession made by the accused.\textsuperscript{20}

The obvious danger of unequal approach towards the sanctions imposed upon the offenders is another negative aspect connected with the sanction-

\textsuperscript{17} See Statistical Annals of Crime, available on www.justice.cz
ing through the agreement upon the guilt and punishment made between the defense and the prosecution which is subsequently approved by the court. The negotiating skills of the accused and their defenders especially, workload of the individual state attorneys and judges as well as their willingness (influenced by different factors) to use different types of accelerated forms of criminal proceedings have all always played an important role when choosing the type and setting the terms of punishment even in the current application practice. However, the application of the institute of plea bargaining strengthens these elements even more.

However, certain substantive law acts, which can legitimately be taken into consideration in the sentencing process can be connected with the institute of plea bargaining. Speedy criminal proceedings and at thus accelerated sentencing process reached as a result of this special type of settling of the criminal case boost the efficiency of a punishment and enhances the perception of the legal protection against the crime provided by the state for the public. Thus a more modest sanction which is, however, imposed faster can have a bigger preventive effect both individually and generally compared to a stricter sanction applied after the standard criminal proceedings i.e. a sanction imposed after a longer period of time.\textsuperscript{21} The fact that the accused has accepted the punishment (declared by making the agreement upon the guilt and punishment) can also increase the probability of the fulfillment of the re-socialization aim of the punishment. However, it must be said that in a number of cases the defendant will probably want to make the agreement for tactical reasons, or even self-serving reasons, not because of the fact that he has frankly accepted the punishment as a reasonable and fair one.\textsuperscript{22} The stance of the accused towards the intended form of punishment (on which the possible acceptance of the sanction on the part of the accused is based) can also be collected through different standard means, e.g. using the position of a probation officer.

Thus, bearing in mind the principles of fair and reasonable sanctioning the settling of a case through the institute of plea bargaining seems to bring some drawbacks rather than advantages. These drawbacks must be perceived as the prize that has to be paid for the acceleration of the criminal proceedings, the prize being relatively high. If, however, the legislators intend to pay this prize and incorporate this element into the criminal law system, they should, at the same time, set at least basic framework and rules which would have to be taken into consideration when setting the sanctions within the process of plea bargaining.

The new Czech legal regulation has, in this respect, a large deficit in the area. Under the Czech legislation the courts are under the obligation to refuse to

\textsuperscript{21} Compare Král, V.: Dohoda o vině a trestu v návrhu novelizace trestního řádu. \textit{Právní rozhledy} 2008, no. 20, p. II.

\textsuperscript{22} Compare e.g. Musil, J.: Dohody o vině a trestu jako forma konsenzuálního trestního řízení. \textit{Kriminalistika} 2008, č. 1, s. 19.
approve the motion for agreement upon the guilt and punishment submitted by the state attorney, in case this agreement is wrong or unreasonable as far as the type and terms of punishment, or precautionary measures are concerned (compare § 314r clause 2 of the criminal procedure code). However, the legislator has not set any clues for such legal assessment, i.e. did not create any special rules covering the issues of sanctioning through agreement and punishment.

However, the Slovak criminal law regulation provides an example of such a rule. Under this legislation the performance of negotiation about the agreement upon the guilt and punishment itself can serve as a reason for an extraordinary lowering of a punishment. In such cases the imprisonment punishment can be lowered by one third under the lower limit of the prison term with the exception of most serious crimes fully listed where the punishment cannot be shorter than 20 years of imprisonment [compare according to § 39 clause 2 letter d) and clause 4 of the Slovak criminal law].

However, it must be pointed out that the imposing of a sanction of imprisonment under the lower limit of prison term in accordance with the rule described above is not a matter of course. This step is optional.23 The form and the term of punishment must be agreed upon in accordance with general rules for sentencing so that the punishment agreed fulfilled its purpose. From this perspective it cannot be a punishment imposed under the lower limit of the prison term prescribed by law. Thus it is the prosecutor who should use the knowledge of the courts’ practice when negotiating about the punishment. The prosecutor should also consider what punishment the court would probably impose in the specific case offering the accused a less severe punishment and in justifiable cases also a prison term lowered by one third; However, if the punishment agreed upon by the parties was not consistent with the principles of sentencing, the court would refuse to approve this proposal.24

6 Conclusion

The process of introducing of the institute of plea bargaining into the legal systems of Central European countries which is based on the negotiating about the punishment between the prosecution and the defendant could not have been done without certain collisions with the basic principles upon which the rules of criminal proceedings in these countries are based. Legislators must have been fully aware of this which can be seen especially when analyzing the Czech legal regulation under which it is not allowed to settle a case through the agreement upon the guilt and punishment in cases of prosecuting especially serious crimes,

i.e. intentional acts which carry the penalty of up to ten years imprisonment (§ 14 clause 3 of criminal procedure code). This limitation can be regarded, in fact, as a taking into consideration of certain objections made in connection with this institute. It can also be regarded as a partial breakthrough or modification respectively of certain basic principles of criminal proceedings, namely the principle of material truth above all. In other words the legislation is explicitly based upon the notion that at least with the most serious crimes the agreement upon the guilt and punishment cannot be used as a substitute for the results of evidence presented and obtained during the trial, which means that with this category of offences the principles of criminal proceedings headed by the principle of material truth must be followed unexceptionally.

Thus it is logical that the Central European legal regulations of the institute of plea bargaining have been built in such a way that any possible intervention into the basic principles of the criminal proceedings would be minimized. This can be clearly seen especially in German legal regulation under which the German courts play a very important role in connection with this type of settling a case through the agreement upon the guilt and punishment. Thus the freedom of the two parties in criminal proceedings to make such an agreement is strictly limited.

However, the Czech and Slovak legal regulation of the negotiation about the agreement upon the guilt and punishment is much closer to the Anglo-Saxon model. However, even in these regulations efforts trying to limit any intervention into the basic principles of the criminal proceedings can obviously be seen. The most protected principle is the principle of material truth, at least as far as the letter of the law is concerned (the fact to what extent the authorities in criminal proceedings follow this law is another issue, as outlined above). Moreover, the Czech legislator has decided to support the fairness of the procedure by introducing the compulsory defense of the accused when negotiating about the agreement upon the guilt and punishment. At this stage no specific positive effects of the making of such agreement are mentioned and incorporated into the area of sanctioning (this, however, does not necessarily have to be seen as a positive aspect, as outlined above).

Thus the introduction of the institute of plea bargaining into the criminal law systems of Central European countries does not mean that the basic principles upon which this law is built have been denied and devastated at least in the form as it has been enshrined in the Czech, Slovak and German criminal law. This is also connected with the fact that this institute of settling criminal cases will probably not be used and applied to such extent as it has been applied in the countries where the legal systems are based on the Anglo-Saxon system of law; Thus this institute cannot be expected to solve the situation of excessive overload of the criminal justice system and the lengthy criminal proceedings resulting from this overload. Thus there is no other choice but hope that the legislator
will finally incline to less popular, however, more effective way of solving this problem, i.e. the efforts to more intensive decriminalization and narrowing of the scope of criminal repression.
Abstract: Competition law and Intellectual Property law are remarkably divergent in scope and thus make for uneasy bedfellows. Although they both purport to help the consumer, their effects on the common market can be strikingly different. Recent decisions in the European Union and the United States of America have brought into focus the role of reverse payment patent settlement agreements. These agreements are generally of a commercial nature, and are agreements to settle actual or potential disputes which are related to patents. The questions which are sought by the parties to mutually settle range from infringement of a patent or the validity of a patent. When such a settlement agreement between a patent holder (in this instance the originator company) and a patent challenger (being a generic company) involves a value transfer from the originator to the generic company, coupled with a provision to limit or restrict the generic company’s ability to market its own product on the market, then certain interesting areas of conflict tend to come forward. The question arises whether this is simply a case of a company paying off its competitors to stay out of its market and delay the entry of cheaper, generic medicines, and is thus purely...
anticompetitive and harmful to consumers? Or whether the right to settle a patent dispute within the scope of patent laws is something which is outside the domain of Competition law? The European Commission and the Federal Trade Commission have displayed similar levels of distrust towards such commercial settlement agreements, and now the United States Supreme Court has weighed in with its own opinion. It remains to be seen how this matter will develop further in the courtrooms on both sides of the Atlantic.

**Keywords:** competition, intellectual property, pharmaceutical industry, reverse payment patent, European Union, United States.

## 1 Introduction

An Intellectual Property Right (IPR), be it a trademark, patent, copyright, design, or any other legally protected right, is by its very nature, a monopolistic venture. Hence its grant by the concerned authorities inevitably raises the issue of contravention of Competition laws, since both these streams of law cater to opposing viewpoints. This is essentially due to the inherent nature of an IPR, which grants an artificial protection to companies. This protection, in turn, can potentially furnish the IPR holder with an advantage over its competitors. This advantage can be manifested in different forms, ranging from dominance in a market on the one hand, to even an all-encompassing monopoly at the other extreme end. Conversely, Competition law works on two rather lofty premises, namely the promotion of competition between companies on the market and, as far as possible, the enhancement of such competition to its highest possible form. Notwithstanding the above, the inevitable conclusion which arises from an overview of both these extremes is the fact that both, IPRs and Competition law have surprisingly similar aims – enhancement of consumer welfare being foremost. Allocation of resources in an efficient manner is another key consideration, as is the promotion of competition in an effective manner through innovation and investment in product development.²

Conflict between IPR and Competition laws could be termed as a recurring problem which is as old as the hills. It has been noted that issues relating to IPR and the regulation of competition between commercial entities tend to lead an uncomfortable co-existence.³ However, it is also generally agreed that Competition law should not be used as a bludgeon against IPRs as this can negatively impact incentives for innovation.⁴

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The US District Court, in one instance, had brought on record an old case dealing with a patent-antitrust conflict which was considered by the English Court of King’s Bench in 1602, as the first reported case on the subject (Darcy v. Allein). Since then, it is interesting to note that the issues arising in this field have yet to be resolved in a satisfactory manner or with any touch of lucidity. The US District Court stated further, inter alia, that economic arguments regarding the common goal of the two abovementioned laws notwithstanding, the unfortunate fact still remains that they are judicially divergent.\(^5\)

In the European Union (EU), it has since long been held by the courts that the first holder of an IPR enjoys the right as an owner because the state has granted him such a legal status specifically in relation to his invention. Further, such ownership has nothing to do with the rules relating to Competition law, per se.\(^6\) However, the provisions of Competition law will apply against the exercise of the above mentioned right if the purpose, effect or any agreement related to or of such a right is inherently anticompetitive in nature.\(^7\)

It is not uncommon for most countries to provide special exceptions to IPRs as a means of protecting them from their prohibiting monopolies, in order to create some semblance of balance between the interests of consumers and the state vis a vis the IPR owners and their perceived rights. Further, the IPRs held by their respective owners are construed in a strict sense and are very often strictly limited to the narrow confines of the grant. Any mischievous attempt to breach the boundaries of the grant is deemed to be a misuse thereof and is treated as being downright illegal in nature or void of effect in the eyes of the law, to say the very least.\(^8\)

It is therefore clear to all that although an exclusive right to exploit an IPR may be legally granted by the state, the implication that this would mean that IPRs are in some way or manner immune from intervention by Competition law authorities is incorrect. However the lines can sometimes appear blurred, to say the very least.

Generally, patents are seen as essential for protecting IPRs of inventors so that they can use their innovations to make profits, and hopefully reinvest their profits and continue to work in their field. Many business experts have spoken about the high risks that product innovation can entail, and the high failure rates that businesses have become accustomed to in this field. Hence the need arises

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\(^8\) R. August at 507.
for extraordinary returns to help justify the high investments and commercial risks. Although a patent is granted for up to twenty years from the date of the first application, the effective period available to a patent holder to commence making a profit is much shorter in duration. This is because the processing of the patent application takes time, and once a patent is granted then to operationalise the manufacture, marketing and sale of that product takes more time.

In the case of pharmaceutical products, once the patent expires then generic copies of the product can be freely sold in the market by the competitors of the patent holder. The other alternative for a generic company is to apply for authorisation from the relevant authorities to legally market the drug, with the strong possibility of risk of ensuing litigation from the patent holder.

Many Small and Medium Enterprises (SMEs) are involved in the pharmaceutical sector worldwide. The use of the Intellectual Property system by SMEs in the pharmaceutical industry depends largely on the business strategy of the company. Other relevant factors are size, ability to generate resources, capacity for innovation, general competitiveness and broad experience in this sector. Although most operate in their local markets, often the way forward for them is to link up with larger players and enter into the fields of clinical trials or contract manufacturing of pharmaceutical products and related chemical components. This form of outsourcing by the bigger companies helps the SMEs to achieve commercial viability. If and when a SME acquires marketing approval of generic products (from the concerned authorities) then it can increase its product portfolio and grow bigger. However, most SMEs face difficulties in sustaining their business models, especially since they are vulnerable to attack by the bigger pharmaceutical companies who can afford costly litigation.

It is interesting to note that the European Commission (EC) found in the year 2009 that the effective protection period from the date of launch of the pharmaceutical product to the first generic launch is over 14 years. This is more than what it was in the year 2000, when the figure stood at 10 years.

An interesting area of conflict has been seen recently in the context of patent settlement agreements. These agreements are generally of a commercial nature, and are agreements to settle actual or potential disputes which are related to pat-
ents. The questions which are sought by the parties to mutually settle range from infringement of a patent or the validity of a patent. These settlement agreements are concluded when a dispute is either brewing, or is being contested within the confines of a national patent office in the form of opposition procedures, or litigated in a courtroom. The key consideration to bear in mind is that no final adjudication has been handed down. The common aim of such a settlement is simply to halt the dispute.\textsuperscript{14}

In order to protect their commercial interests, the big pharmaceutical companies who hold patents engage in the practise of “evergreening”, in various forms and formats. These are primarily defensive strategies, which can include, interalia, entering into agreements with generic manufacturers in order to secure the postponement of generic market entry.\textsuperscript{15} Thus, when such a settlement agreement between a patent holder (in this instance the originator company) and a patent challenger (being a generic company) involves a value transfer from the originator to the generic company, coupled with a provision to limit or restrict the generic company’s ability to market its own product on the market, then certain interesting areas of conflict tend to arise.

To put it in a nutshell, Commission Vice-President Joaquin Almunia, in charge of competition policy, said: “It is unacceptable that a company pays off its competitors to stay out of its market and delay the entry of cheaper medicines. Agreements of this type directly harm patients and national health systems, which are already under tight budgetary constraints. The Commission will not tolerate such anticompetitive practices”.\textsuperscript{16}

\section{2 The Lundbeck Case}

The Danish pharmaceutical company Lundbeck held a product patent for the Citalopram molecule, and several related process patents. Citalopram was a blockbuster antidepressant medicine and was the best selling branded product of Lundbeck. After the basic product patent had expired, Lundbeck was left with several related process patents. These however provided a more limited protection from the IPR viewpoint. Thus, legally speaking, producers of cheaper, generic versions of Citalopram now had the opportunity to enter the market and sell their own versions of Citalopram. It is generally acknowledged that competition by generic manufacturers can cause prices of the medicine to reduce in a significant manner (it is estimated by the EC that the entry of generic Citalopram products in the United Kingdom market caused the price of the product


\textsuperscript{15} N. Tuominen at 546.

to nosedive by up to 90 percent), thereby causing a huge drop in the profits of the producer of the branded product.

The EC alleges that instead of competing in a free market, however the opposite took place. Lundbeck and the generic producers are accused of entering into a mutual agreement in 2002, whereby the generic manufacturers refrained from entering the market with their generic versions of Citalopram. In return, it is claimed that Lundbeck offered the generic manufacturers substantial payments and other inducements, to the tune of several million Euros. Not only did Lundbeck pay significant lump sums to the generic manufacturers, but it also purchased the stock of generic version of Citalopram from the manufacturers for the sole purpose of destroying these stocks. Thirdly, Lundbeck offered guaranteed profits to the generic manufacturers by way of dubious distribution agreements. By way of such inducements, Lundbeck was able to keep the generic manufacturers out of the market for the duration of the agreements.

The EC conducted wide ranging monitoring exercises from 2008 onwards. Consequent to this, the EC has alleged that the above agreements were, by their nature, very different from other patent dispute settlements. It was unclear as to why generic companies were paid off, and the assumption arose that this was done purely to keep the generic manufacturers out of the market and to reduce competition with respect to this particular drug. Thus the EC held that the above agreements violated Article 101 of the Treaty on the Functioning of the European Union (TFEU), as these were clearly designed to circumvent the prohibition of anticompetitive agreements under the said article.

Accordingly, the EC announced on 19\textsuperscript{th} June, 2013 that it had imposed fines on Lundbeck to the tune of 93.8 million Euros and on the generic manufacturers (namely Alpharma, Merck KGaA/Generics UK, Arrow and Ranbaxy) fines totaling 52.2 million Euros. It should be noted that this is the first time that the EC has imposed such heavy fines in a case like this. The EC is also investigating anti competitive law practices in the context of two other drugs, namely Perindopril and Fentanyl in 2012 and 2013 respectively.\textsuperscript{17}

The pharmaceutical sector has been facing close scrutiny from the EC since it is important to the health of Europe’s citizens and has a major impact on the finances of governments in the EU.\textsuperscript{18}

Inquiries by the EC held over a period of 7 years from 2000 to 2007 in 17 Member States of the European Union (EU) have shown that citizens had to wait for more than 7 months after the expiry of the patent to be able to access cheaper generic versions of those medicines. This added to almost 20 percent in extra spending. Since competition by generic products brings down prices to a substan-

\textsuperscript{17} Id. at 2.

\textsuperscript{18} Art.168(1) TFEU provides that “A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.”
tial extent (it is estimated by the EC that on an average generic products tend to be 40 percent cheaper just two years after their entry into the market, when compared to the prices of the originator drugs), this is a matter of great relevance to EU consumers in general. It was also unearthed by the EC inquiry that originator companies tend to use a variety of instruments to protect the commercial viability of their pharmaceutical products by barring the entry of generic products into the market for as long a period as is possible. This included dubious settlements between originator and generic companies which caused harm to the interests of consumers. The competitive relationship between originator companies and generic companies lead to delays of entry of generic pharmaceutical products into the market and this in turn denies patients in the EU access to medicines which are of an innovative nature, which are affordable for all and most importantly which ensure safety concerns. The EC was of the view that competition between originator companies and generic companies does not work as well as it should, and it accused originator companies of using several delaying strategies aimed at generic companies such as use of patent clusters (filing thousand plus patent applications for a single medicine), vexatious patent litigation (which can last over three years on an average) or lastly entering into settlement agreements whereby generic entry is restricted and sometimes involve value transfers from the originator to the generic company. Originator companies also tried to delay regulatory approval of generic medicines by the Member States. 19

3 Views of the EC

An important issue that arises from the above is the concern whether the EC’s competition department is competent to address problems relating to patents, and in doing so, does the EC run the risk of supplanting itself in the place of the patent office. The EC stresses on the need for innovation and that if an invention matches the patentability criteria then Competition law shall not “second guess”. 20 The EC, for its part, denies any claims of usurpation of powers, and further asserts that it has worked closely with the European Patent Office in this regard However, the EC is clear about its obligation to apply the antitrust rules at its discretion when the misuse of the patent system or other regulatory processes affects competition in the market place. 21 The EC has also pointed to the various OECD Roundtables on Patents, Innovation and Competition, held in 2006 and 2009 where the issue of the use of patents and their possible negative effects on innovation and competition have been discussed in detail. 22

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21 Commission MEMO/09/321 at 5.
There is no disputing the fact that the EC agrees that parties to a commercial dispute have a legitimate interest in reaching a compromise which would be mutually acceptable. This is desirable since disputes or litigation can be expensive, time consuming and there is always an element of risk when it comes to the aspect of the outcome of the case. Thus settlements are a legitimate route to end a disagreement between private parties. This is also a time saving device for judicial, semi judicial and administrative authorities and has significant positive impacts on the interest of society.23

However, some patent settlements in the field of pharmaceuticals are, in the view of the EC, rather problematic when seen through the prism of Competition law. Any agreement between parties to a dispute, which has the effect of delaying the entry of a potentially cheaper generic drug into the market, in return for a value transfer to the generic company by the original patent holder company is especially fraught with dangerous consequences for the state in general and the consumer in particular. Key areas of concern in such agreements are where:

a. the scope of the patent is extended beyond its geographical limits,
b. the restriction extends beyond the legitimate period of protection of the patent,
c. the restriction extends beyond the claims of the granted patent, or
d. the patent holder knows that his invention does not meet the criteria of patentability and has thus been wrongly obtained, or the granting of the patent by the concerned patent office was due to information which was incorrect, misleading or incomplete, yet strives to maintain the status quo.

The EC is of the opinion that settlement agreements containing such provisions would no longer appear to be directly related to the IPR regime, since they can potentially have a very negative effect on the finances of the consumer who pays the price for the delay of entry into the market of the generic drug, notwithstanding any of the above mentioned benefits to society arising from such an agreement. 24

Accordingly, the EC has sought to categorise patent settlement agreements on the following basis, namely:

a. whether the agreement foresees a limitation on the ability of the generic company to market its own generic version of the medicine, and
b. whether the agreement envisages a value transfer from the originator company to the generic company, in lieu of a settlement. 25

The EC is of the opinion that a limitation on the entry of a generic company in the market can be effected through the use of non-challenge clauses or

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24 Id at para 4.
25 Id at para 7.
non-compete clauses in a settlement agreement. Further, a licence granted by the originator company to the generic company can result in partial control of the former over the latter, and thus be restrictive.\textsuperscript{26} Similarly, if the generic company is forced to accept a distribution agreement whereby it is forced to sell the originator company’s products alone, or is forced to source its supplies of the active ingredient from the originator company, to the exclusion of all other sources, etc are seen by the EC as some of the potential limitations.\textsuperscript{27} Further, a value transfer from the originator company to the generic company could be in the form of a direct monetary transfer (ostensibly as compensation for the legal costs incurred by the generic company or for the purchase of its stock, but in reality having the odious purpose of paying the generic company for agreeing to delay the launch of its generic product in the market). Similarly, a lucrative distribution / licence agreement could be some of the guises in which value transfers are effected between originator companies and generic companies.\textsuperscript{28}

Based on the above categorization criteria, the EC has reached the conclusion that certain types of agreements (namely in the B.II category – which limit the generic entry and foresee a value transfer from the originator to the generic company) are deemed problematic and require closer scrutiny.\textsuperscript{29} However, there is a clear degree of overlap between IPR law and Competition law in the concerns expressed by the EC in the case of even seemingly unproblematic settlements (namely where the settlement which is unrestrictive of the generic entry (deemed A category) nonetheless caused a delay in the generic entry due to unilateral conduct of the originator company,\textsuperscript{30} or a settlement which although limiting the generic entry but not including any value transfer from the originator to the generic company (deemed as B.I category) nonetheless provides for a settlement which is outside the exclusionary zone of the patent or which includes patents for which the patent holder knows that it does not meet the patentability criteria).\textsuperscript{31} In cases such as these, the EC views such agreements as problematic from the Competition law perspective, although the author feels that such issues should rightly be addressed by laws concerning IPR, rather than Article 101/102 of the TFEU.

The author also finds it very worrying when the EC is quick to typecast private business settlement agreements (of the A category) as “concluded on a
walk away-basis” (where litigation is presumed by the EC to be a waste of time and resources of the parties concerned)\textsuperscript{32} or B.I category agreements as those where the parties are deemed to have assessed that the originator company had a “strong case”.\textsuperscript{33} What the author fears is that such typecasting by the EC often overlooks the hard, commercial realities faced by businesses in today’s market. Another indicator of the EC mindset can be seen from the fact that after it had carried out a sector inquiry on the Pharmaceutical Sector in 2009 and had also conducted several monitoring reports of patent settlements, it is now keen to extend enquiries in the context of technology licensing, all in the name of securing the ideals of innovation and competition. Thus the draft Technology Transfer Guidelines look more deeply at the anti-competitive outcomes of “pay–for-delay” or “reverse payment” settlement agreements and no-challenge clauses in the context of such settlement agreements. One question that arises is as to how the EC will judge whether the licensor knew or could reasonably be expected to know that his invention did not justify being conferred intellectual property law protection.\textsuperscript{34}

The first EC patent monitoring exercise covered the period of 1 July 2008 until 31 December, 2009.\textsuperscript{35} The second monitoring exercise covered the period of 1 January, 2010 until 31 December, 2010 (it added a significant number of companies when compared with the first report, and also included information found in the specialised press on the conclusion of settlement agreements).\textsuperscript{36} The third monitoring exercise covered the period from 1 January, 2011 to 31 December, 2011.\textsuperscript{37}

Data collected by the EC in the course of the above exercises shows that although there has been an increase in number of payments connected to B.II settlements, the overall picture shows that the percentage of B.II settlements in general have significantly decreased since the sector inquiry.\textsuperscript{38} So although the implication is that this is due to an increased awareness of companies and their legal advisors to the inquiries conducted by the EC into the legality of such settlements from the point of view of Article 101 of TFEU,\textsuperscript{39} the EC however is quick to use statistics to show that its actions have not hindered companies from concluding patent settlement agreements in general (which have substantially

\textsuperscript{32} Id. at para 27.
\textsuperscript{33} Id at para 31.
\textsuperscript{38} Id at para 45.
risen to 120 in the year 2011 compared to the average of 24 per year between the years 2000 - 2008). This is used by the EC as a counter reply to the doomsayers who suggested that the hard approach adopted by the EC in this regard would force companies to litigate each patent dispute until its bitter end. Further the EC also states that almost 89 percent of patent settlement agreements fall into the A and B.I category which are typically considered by the EC to be “unproblematic” from the viewpoint of Competition law.  

So this is how things stand as of 19th June, 2013 in the EU with regard to Patent Settlements in the Pharmaceutical Sector and Competition Law. It remains to be seen what legal resources will Lundbeck resort to, in order to challenge this order of the EC. By a strange coincidence, two days earlier (on the 17th June, 2013), the United States Supreme Court (SC) dealt with a matter which bore remarkable similarities to the above mentioned Lundbeck case.

4 Parallels with Actavis Case

In Federal Trade Commission vs. Actavis, Inc. and others, the SC dealt with an issue arising under the Hatch-Waxman Act of 1984. Solvay Pharmaceuticals obtained a patent for its branded pharmaceutical product AndroGel. 2 generic manufactures, Actavis and Paddock, filed applications before the US Food and Drug Administration (FDA) under the Hatch-Waxman Act for generic drugs modeled after AndroGel. Further, they certified that Solvay’s patent was invalid and that their generic copies did not infringe Solvay’s patent. Solvay immediately sued Actavis and Paddock for infringement of its patent.

The FDA eventually approved the generic product of Actavis. However, instead of introducing its generic version to the market, Actavis took the unusual step of entering into a reverse payment settlement agreement with Solvay. Under the terms of this agreement, Actavis undertook not to bring its generic product to the market for a specified number of years in exchange for millions of dollars from Solvay. Paddock and another generic manufacturer made similar agreements with Solvay subsequently.

The Federal Trade Commission (FTC) sued the parties, alleging that this was an unlawful agreement to abandon legitimate patent challenges, refraining from launching cheap generic drugs in the Market and actively sharing Solvay’s monopoly profits. The FTC has for long viewed such settlement agreements (where the plaintiff agrees to end the litigation by paying the defendant millions to stay out of its market, even though there is no monetary claim sought by the

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42 570 U.S. [2013], United States Supreme Court.
defendant against the plaintiff) as unusual and having significant adverse effects on competition.43

The District Court dismissed the complaint, in appeal the Eleventh Circuit concluded that as long as the anticompetitive effects of an agreement settlement fell within the scope of the exclusionary potential of a patent, the settlement was immune to Competition law. It further held that settlement of legal disputes was a matter of public policy, and courts could not require parties to litigate merely to avoid liability under antitrust laws.

The FTC appealed to the SC which held that the Eleventh Circuit had erred and remanded the matter back to the District Court. It was held by a majority of 5–3 in the SC that reverse payment patent settlement agreements are not immune from antitrust attack. Further, such settlements are unusual and can have a significant adverse effect on competition. The SC held as follows44:

a. There exists prior case law in the form of precedents which clearly stipulate that the right to exclude granted by a patent is limited by concerns regarding the antitrust legality.
b. There is the potential that such patent settlement agreements have for genuine adverse effects on competition.
c. There might be pro-competitive benefits under such agreements, but that possibility does not justify dismissing the objections of the FTC.
d. The size of the payment to the generic challenger is a strong indicator of potential harm due to exercise of a monopoly, and the likely possibility of higher than usual prices payable by the consumer.
e. An unexplained large reverse payment itself would normally suggest that there are serious doubts in the mind of the patentee regarding its patent, thus enabling a court to determine the outcome without going into detail with regard to the question of validity of the patent.
f. The parties to the dispute can still settle their disagreements without unjustifiably large reverse payments.
g. The reverse payment settlement agreement is not presumptively unlawful (as suggested by the FTC). Rather the “Rule of Reason” should be applied to such agreements in order to study their factual details in a close manner, bearing in mind the size, scale in relation to the payor’s anticipated future litigation costs, payment in lieu of other

43 R.H. Stern, “Antitrust Legality of Reverse Payments from Patentees to Accused Infringers Upheld: In re Ciprofloxacin Hydrochloride Antitrust Litigation” 31(2) European Intellectual Property Review 101-102 (2009), where the case In re Ciprofloxacin Hydrochloride Antitrust Litigation 544 F.3d 1323 (Fed. Cir. 2008) dealing with reverse payment settlement agreements is discussed and the question is raised whether the public interest in clearing the market of spurious patents should override the patentee’s rational self interest in maximising its financial return by prudent settlement?
44 Opinion of the Supreme Court at 14 and onwards.
services and the need to independently verify these, and lack of convincing justification.

5 Points Raised by the Dissenting Judges in the Above Case

Although the dissenting opinion voiced by Chief Justice Roberts, together with Justice Scalia and Justice Thomas raises to the fore issues from the US legal point of view, there are certain aspects of their comments which resonate with all those who specialize in intellectual property laws. The long held position that a patent carves out something of an exception when it relates to the question of applicability of Competition (or antitrust) laws, appears to be under attack. The difficulty arises in showing how a patent strategy can be deemed to be abusive without allowing Competition law rules to interfere with the rationale of the patent law regime itself. Since the scope of the patent forms the zone within which the patent holder has complete freedom to operate without having to face any risk of anti competition liability, it necessarily leads to the converse being true – namely that any action by a patent holder which goes beyond the monopoly powers conferred by his patent will subject him to anti competition scrutiny. The only two exceptions are when the settlement of a sham litigation is entered into between the opposing parties, or when the litigation involves a patent obtained from the patent office in a fraudulent manner. Since the scope of the patent forms the zone within which the patent holder has complete freedom to operate without having to face any risk of anti competition liability, it necessarily leads to the converse being true – namely that any action by a patent holder which goes beyond the monopoly powers conferred by his patent will subject him to anti competition scrutiny. The only two exceptions are when the settlement of a sham litigation is entered into between the opposing parties, or when the litigation involves a patent obtained from the patent office in a fraudulent manner. Since the scope of the patent forms the zone within which the patent holder has complete freedom to operate without having to face any risk of anti competition liability, it necessarily leads to the converse being true – namely that any action by a patent holder which goes beyond the monopoly powers conferred by his patent will subject him to anti competition scrutiny. The only two exceptions are when the settlement of a sham litigation is entered into between the opposing parties, or when the litigation involves a patent obtained from the patent office in a fraudulent manner.

Since a patent grants a limited monopoly, the obvious defense of a patent holder in any anti competition suit is to contend that his patent allows him to engage in conduct of a nature which would be tantamount to violation of the Competition laws. A court cannot simply ignore the lawfully granted patent and engage in an anti competition analysis of the settlement while ignoring the basic question regarding the validity of the patent. The patent holder is merely exercising the rights which were granted to him by the Government through its patent office. The question that should arise is whether the patent is either valid or invalid. It cannot possibly be both at the same time. Then why should the courts interfere and thereby unsettle the established relationship between patent law and Competition law?

Further, when the majority in the SC suggested that a reverse payment agreement is unusual because a generic company with no claim for damages seeks (and obtains) money from the patent holder in return for staying away from the patent holder’s market, the fact which is ignored by the SC is that the generic

45 Dissenting opinion of the Supreme Court at 1.
46 Id at 3.
47 N. Tuominen at 550.
48 Dissenting opinion of the Supreme Court at 5.
49 Id at 13
50 Id at 9
company is suing for the right to use and market the valuable intellectual property of the patent holder.\textsuperscript{51}

The issue whether a patent is valid or not is again something for the patent law to settle, and it cannot be settled by Competition law. This of course is hotly contested by the “fierce advocates of anti trust law” who would rather lead the public to believe IPR has become increasingly monopolistic and that this issue has increased in scale to such an extent that it needs to be curtailed. \textsuperscript{52}

Another key point is that if the parties settle a patent dispute, and then face the prospect of litigating the same issue, namely that of the validity of the patent, as part of a defense against a suit for anti competition malpractices, then the parties would be discouraged to settle the dispute in the first place.\textsuperscript{53} Since litigation costs can be very high in patent disputes (as the dissenting opinion suggests this sum can be in the millions of US Dollars per suit, according to empirical studies on this subject\textsuperscript{54}), the complexity and expensiveness of patent disputes cannot be ignored by a court while considering the legality of the settlement dispute. Only a patent holder should have the right to decide how he wishes to settle his patent dispute, as long as he works within the scope of his patent, bearing in mind his own business needs. It would be very difficult to ascertain why a patent holder actually agreed to enter into a patent settlement, and if the court wished to deduce the patent holder’s opinions about the strength of its own patent, then the court might need to access documents which constitute privileged communication between the patent holder and its patent lawyers.\textsuperscript{55}

Further, such a patent settlement agreement between the patent holder and a bunch of generic companies would not prevent other generic companies to try and enter the market. Notwithstanding the particular US specific issues listed under the Hatch-Waxman Act, there are serious implications of this distinct possibility arising in the EU context. As the dissenting judges have stated, any patent holder who is perceived as amenable to settling a patent dispute by offering large sums of money to his generic rivals, merely because he believes that his patent is weak, would be opening the floodgates to litigation by all and sundry, with other generic manufacturers hoping to cash in and make a fast buck. Thus, such a policy of a patent holder would be self defeating, to say the very least.\textsuperscript{56}

\textsuperscript{51} Id at 10.
\textsuperscript{53} Dissenting opinion of the Supreme Court at 11.
\textsuperscript{55} Dissenting opinion of Supreme Court at 13.
\textsuperscript{56} Id at 16.
Lastly, the dissenting opinion deals with the issue of generic companies and the commercial decisions which encourage them to challenge pharmaceutical patents. Generic companies tend to be shrewd business operators who carefully weigh the pros and cons before entering into expensive patent litigation, and the prospect of removing settlements from the negotiating table, or the limitation thereof would curtail the behavior of a generic company, both within and outside the court room.\textsuperscript{57} This would especially be true in the case of SMEs who have limited legal budgets to begin with.

Hence the worry that such actions by the Competition authorities and courts would cause high uncertainty and have a chilling effect on patent disputes.

6 Conclusion

It remains to be seen as to how the issues studied in this article by the author will unfold in the future. The approaches adopted by the EC and the FTC in their respective jurisdictions so far have been quite similar. However, potential divergence of approach may be noticed soon, considering that in the Lundbeck case the parties have stated their intention to take the EC to court for a judicial scrutiny. Further, the FTC v Actavis decision has been remanded to the lower courts and will eventually come up for appeal. At the same time, similar settlement agreements entered into between other pharmaceutical companies will be reviewed by the respective Competition law authorities and this will no doubt unearth more interesting views on such cases.

Notwithstanding the outcomes of the above listed issues, the following are the main questions that will continue to be-devil parties to a dispute of such a nature:

a. What is the value of the patent claims that have been granted protection by the patent office? Can the patent office be left out of the discussion regarding the validity of the patent granted by it, when this question comes up for appraisal before the EC on the grounds of anti-competitiveness?

b. Should the parties to a dispute be forced to justify a patent settlement agreement when it makes commercial sense and is within the obvious scope of the patent law, and when the negative effects of such an agreement on the consumers are not quantifiable?

c. Should the EC have the power to indulge in a “fishing expedition” and trawl through vast amounts of paperwork (including privileged communication between patent attorneys and their clients) in order to prove that the parties to the dispute knew (or should have known) that their IPR is weak or unsubstantiated. Can such a finding by the EC

\textsuperscript{57} \textit{Id} at 17.
erode the trust of the patent holders in the ability of the state’s patent office.

d. Is it better to fight out a patent dispute to its logical end in the courtrooms (and exhaust all options to appeal), rather than to settle the dispute and face the risk of an inquiry by the EC (an enquiry which would necessarily ask the same question – is the patent valid in the first place, and if the answer is yes then why did the patent holder stoop to settle despite holding a higher ground and potentially a “winning hand”).

Thus one can see that the question of supremacy of one set of contradictory laws over another is far from settled and will continue to baffle the experts for years to come.
THE COMMON AGRICULTURAL POLICY, ITS ROLE IN EUROPEAN INTEGRATION AND INFLUENCE ON THE ENLARGEMENTS OF THE ORGANIZATION (CASE STUDY: GEORGIA)

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Abstract: The article deals with the problematic of the Common Agricultural Policy (CAP) as the crucial political question related with the European Integration. The authors describes and analysis the role of the CAP within the EU policies, its development form the very beginning of the integration its internal structure, rules of organisation, working system and financial aspects. The close concern is given to the question of the long-term sustainability of CAP and the reform for the next financial period (2014-2020). The special part is devoted to the influence of the CAP on the enlargement process with the special impetus to the association of Georgia to the EU.

Keywords: European Union, Common Agricultural Policy, reform, enlargement, association, Georgia

1 Introduction

The Common Agricultural Policy was not included in the first community, European Coal and Steel Community, but already in the second major treaty founding the European Economic Community (ECC), there were already included different provisions for the further development of Common Agricultural Policy (CAP) on European level. The impact of this policy was so important

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that even its development was marked by a huge controversy between the member states, bringing newborn EEC to crisis. But with insistence of de Gaulle and France in particular, the policy was finally developed and since then, being the most influential policy inside the European communities.

The CAP is important because of its big share in the common budget of the European Union (EU), representing almost half of the current budget of the EU. At the beginning, its share in the common budget was bigger, sometimes reaching 80% of it, but year after year the importance of this policy in terms of budget has decreased. Even though, the amount money spend in the policy has not decreased and has even increased, however the common budget of the EU has increased in a faster. Nevertheless, in budgetary terms CAP is still the most important policy of the EU, having a bigger budget share than any other policy of the union.

The CAP is also important in social terms for the population of European rural areas, as there is lack of economic activities besides agriculture in these regions, therefore making local population depending on the agriculture. In open market conditions, most of the European farmers would probably not be able to compete with farmers from other parts of the world and therefore without a real economic alternative in the rural world, most of these people would have found themselves jobless. It would thus lead these people to migrate from to the cities for finding a job. Thus, the CAP plays a very important role for the social peace of the EU, keeping the rural population in the rural environment preventing an important social chaos of huge migration from the countryside to the cities.

Following the previous path, the CAP also plays important role in cultural and environmental terms by keeping the rural areas populated. Culturally most of the European traditions and cultural differences are kept in the rural areas, heaven of various folk traditions. Therefore, the CAP plays a fundamental role in order to keep the cultural inheritance of Europe and its cultural diversity, one of the pillars of European achievements.

The CAP is affecting the development of the external policy of the EU as well, as many of EU’s partners are seeking free access to the European market in order to open their domestic markets to the European industries, mainly in the service sector. Thus, CAP leads to a confrontation between the EU and many of its partners. Finally the CAP plays an important role in the enlargements of the organization, because of its financial cost for the Union and for the economic, social and cultural benefits for the new members of the organization.

2 The Common Agricultural Policy of the European Union

The Common Agricultural Policy is the most important policy of the European Union in terms of budget, because for long periods of time most of the EU
budget was expended in this policy. Currently the CAP receives nearly half of the EU budget. So, the money spent in this policy is huge in European Union terms.²

After the Second World War, there was a lack of almost all the essential primary goods in Europe, and the threat of a great famine was real. The economic situation of Europe was precarious and it needed an important effort in order to restore farm production to supply the European population.³

Shortly after the war, there was another important fact that influenced the production of food: the independence of European colonies all over the world. These countries were mainly agricultural suppliers for the European metropolis because their production was much cheaper than in Europe and it became their main economic activity. Independence meant instability in the supply and growth in prices. The governments of European states handled the situation in different ways, but generally they opted for protecting their farmers with subsidies to have a secure, stable, and independent supply of food for securing the living of their citizens.

Some European countries still had an important national sector related to agriculture in which many citizens were working. Importing food from other states such as Argentina, South Africa, or Australia would have solved the problem of the shortage of food in the short term, but it could have also generated other problems. The European farmers needed more money to produce, so they could not compete in a free market with these producers. Importing cheap food would have meant the end of the European farmers, as they could not compete in a free market, with all its social consequences.

Europe was greatly damaged after the war, and there was a problem with housing in the cities even for the urban population. If people from the countryside had to end their economic activity because they could not stand the competition of the international farming producers, they would have moved to the cities to find a new living. The cities were already handling housing problems even for the urban population, so these farmers would have problems finding adequate living conditions, with the consequent social problems. It basically meant the possibility of having many people in cities without the essential living conditions. At the end of the war, and in the following years, there was a competition between two political systems, communism and capitalism, and some important European states, as France and Italy, had an important communist presence in their national politics. Social unrest provoked by the massive movement of farmers from the countryside to the cities could have meant the rise of communist influence in these countries. To secure the states from any internal communist threat, it was important to protect the national farmers. So, the pro-

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tection of the farmers became a necessity for avoiding revolutionary movements inside the European states.⁴

National cultural traditions and the role of the countryside were also important for retaining national identity. The cities then and even now are more homogenous than the countryside, and normally there is an urban society that looks beyond the cultural traditions for more modern cultural activities. As the rural areas are more traditional, they keep the cultural heritage in a more conservative way, keeping the folklore untouched for a long period of time, keeping the roots of the European nations versus the modernization of the cities. As the national state was the main political vehicle in Europe at that time, it was important to keep the source, the traditions, in order to unify the community of citizens and maintain their loyalty to their national state.

Because of these reasons most of the European States decided to subsidize their farmers, creating close national markets paid for by the taxes of their citizens, and blocked their national markets from external producers. This policy protected the national farmers but had some negative effects in provoking a distortion in prices and production because free competition meant importing cheaper products and hence cheaper prices for consumers, plus production adapted to demand.

This system was widely accepted in continental Europe and was important especially in France, because of the huge amounts of the economic subsidies, the number of small and middle farmers operating in the country, and the economic crisis after the war that made it impossible for the French government to afford these expensive subsidies. The French politicians thought of the European Communities as a way to make viable the protection of the French farmers. Also, as a consequence of national protection, French agricultural production increased while the French national market could not absorb the whole production, creating a difficult to manage costly overproduction.⁵ Creating a European market for agricultural products instead of close national markets could give access to other markets for French farmers to sell the overproduction not absorbed by the French national market. The economic support of the European Communities in the field of subsidies could also solve the financial problem of the French state. The best way to solve the French problems related to its agricultural sector was integrating this policy into the European Communities. Hence, the French politicians, using the predominant role of France at the beginning of the European Communities, lobbied for the inclusion of this policy in the European integra-

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tion, and the CAP was included in the Treaty of Rome, becoming the center of the European Economic Community budget.

At the beginning of the process, the rest of the partners of the European Communities were reluctant to develop the CAP because of its financial cost, but the pressure of the French government led to the conference of Stressa in 1958, and a long process until the CAP started working.\textsuperscript{6}

3 The Stressa Conference

The six members of the EEC met from 3 to 12 July in Italy to discuss the introduction of the CAP with Walter Hallstein, president of the European Commission, and Sicco Mansholt, Commissioner with special responsibility for agriculture, and the real architect of the Common Agricultural Policy. They decided to focus the CAP on two main points: a common market for agricultural production and different market organizations for different products to protect the farming industry.

3.1 Common Market with common borders

The integration of the agricultural markets of the members of the EEC meant the unification of their national markets into a single market on the European level substituting for the previous national markets. In order to achieve a common market it was needed to abolish all the internal barriers to the free movement of goods and all the obstacles to the trade of agricultural products inside the organization.

At the same time, the external borders had to be harmonized to have a common border because once the external products reached any member state, they could move freely in the whole European market without restrictions. The main discussion about the common borders was the level of protection needed to make the European producers competitive. So, a high level of protection was decided on, with high taxes, quantity restrictions, and temporal restrictions.

The taxes were focused on prices, forcing international producers to pay high taxes for accessing the European market. It made its products more expensive than the Europeans', artificially increasing the competitiveness of the European farmers in the European market. Quantity restrictions were important for restricting access of international production to the European market. It decreased the offer of farming products and consequently increased the prices paid by the final consumers, the European citizens. The quantity restrictions were calculated according to European production.

Another important tool was the temporal restrictions. Agricultural production is seasonal, and the readiness to harvest is decisively influenced by weather conditions. Other parts of the world, with different weather conditions, have their harvest ready earlier than in Europe, and it gives them a privileged position in the market because they are the first to reach it, so they have dominance over the market and could saturate the offer before the European farmers could even reach the market. The temporal restrictions wanted to avoid this dominance by forbidding the import of these kinds of products until the European production was completed and already in the market, giving the benefit of reaching the market first to the European farmers.

The creation of common borders and common rules meant the common management of them, the European management of the European market, and the institution to deal with it had to be common and hence European Commission was chosen. This policy gave a lot of power to this European institution, but under the close supervision of the European states. This control explains the traditional composition of the DG of the European Commission in charge of agriculture, where traditionally most of the workers and the Commissar in charge are French.\(^7\)

### 3.2 Market organizations

The complexity of agricultural production made difficult the creation of common rules on the European level because of different weather conditions, different types of production, and different importance of farm products. The solution was the creation of market organizations for different kinds of products. Each market organization included different products with common rules and common protection different from the other market organizations that included different production. In practical matters it meant that the CAP was divided in different independent chapters, with different levels of protection, and it explains why continental production, at that time mainly focused in France, still gets higher benefits than other kinds of productions, such as that of the Mediterranean.

The main protection in the market organizations is the guaranty of a fair price for the production of farmers that can allow them a living in good conditions in the countryside through their agricultural activity.\(^8\)

### 4 Working system of the CAP

The situation of a perfect market that is open to all economic actors, where the economic agents have access to the information of the demand and the offer,


\(^8\) Europedia. The common market organisations of the CAP. Available http://europedia.moussis.eu/books/Book_2/6/21/04/?all=1 (Accessed 10.05.2013)
and is not dominated by a single company or group under monopoly rule, leads us to an equilibrium point where the demand coincides with the offer, and prices and quantities are the consequence of this equilibrium. It means that the economic agents included in the offer will produce a specific quantity for a specific price, and the demand will consume a specific quantity for a specific price. So, if we increase the price, the suppliers will produce a bigger quantity, but at the same time the demand, with higher prices, will consume less. That means a distortion between the demand and the offer. The offer will sell the production that has not been consumed by the demand at lower prices. Once the over production is sold out at this lower price, the offer will reduce the quantity of their production because they will lose money producing so much at a reduced price. Then, with less quantity in the market, the demand will pay more for it, increasing prices. That means that with higher prices the offer will produce more, and again prices will drop. In the conditions of a perfect market this operation will continue until the wishes of the demand and the offer meet and prices and quantities will be stable at an equilibrium point.

**Spider’s web patterns**

The CAP works in altering the natural equilibrium between the offer and the demand, creating an artificial price and interfering in the normal relations between producers and consumers.

As we have seen, the offer and the demand will have a common point where they will meet their wishes in terms of prices. The demand of the consumers
decreases with the quantity at some point because they are not able to consume an unlimited quantity. For example, we can eat 20 strawberries, and if the prices go down, we can eat 25, but if the prices goes down further we will not be able to eat 200 strawberries. Also there is a limit to the quantity produced because of technology and of the capacity of land to produce agricultural goods.

The CAP paid each year a guaranteed price (P1) higher than the equilibrium price (PE) for the produce because at this equilibrium price the farmers could not earn enough money and they would stop their farming activity. It meant that with this price (P1), the consumers bought a certain quantity (Q1), but the farmers produced a higher quantity (Q2). Normally the producers have to decrease the prices in order to sell their overproduction, but as the agricultural market in Europe had an artificial higher price sustained by the European Union, this natural correction did not happen.

The producers sold at the price of (P1), and produced (Q2); the consumers bought at this price the quantity of (Q1), and the difference between the quantity produced (Q2) and the quantity consume (Q1) could not be absorbed by the market, and hence had to be bought by the European Union.

![Diagram of supply and demand](image)

**Working system of the CAP**

This system had the positive effect of keeping artificially high prices for agricultural production, increasing it, and providing a high and constant income for European farmers, solving the problems discussed before, but it also had some negative consequences as:

1. **Budget.** This policy was very expensive; most of the money of the European Union went to the CAP in order to keep the high prices in the market. The protection of European farmers was done at a huge financial cost. It also generated tensions between the institutions about the control of these funds, especially

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between the Council and the Parliament. The main institution controlling these funds was the Council, where the member states are represented, because this policy was very important for their internal situation and they wanted to keep it under their control. On the other hand, the European Parliament argued that this was a Communitarian policy, so it had to be under the control of the institution that represents the common interest of Europeans, the European Parliament.  

2. It generated tensions inside the European institutions, especially inside the European Parliament, where the members of the Parliament often voted according to their nationality instead of their political ideology. The examples are numerous, such as French members of the Parliament, communist, socialist, center, or conservative, voting together against any reform of the CAP because the main beneficiary of these funds is France. The problem here was that the European Parliament represents the interest of the whole community, of all Europeans, but in the case of the CAP, it changed its role becoming a Parliament divided according to the nationality of its members.

3. Consumers had to pay a higher price for agricultural products than in normal conditions. In a free market they will pay \( PE \), but under the European circumstances there were paying \( P1 \). So it meant that consumers were supporting farmers each time they bought any agricultural product.

4. Overproduction: The system generated an overproduction that the market could not absorb, and each time this overproduction was bigger because new technologies made it possible to produce more with a cheaper or even price. As the guaranty price was fixed and the production grew, the expenditure grew equally, increasing the financial cost of the CAP. Another fact that increased the financial cost was the necessity to storage the production bought by the European Union.

5. Distortion of the international market: The EU bought the difference between what was produced and what was consumed in the market, but could not store it for long because agricultural production has a limited period of life for consuming. There is a point at which the production is out of date and cannot be consumed with security, and then has to become waste. Before this point was reached, the European Union needed to sell it, but the European market could not absorb it, and the international market had lower prices. The EU needed to sell the agricultural production under the international price in order to lose less money. As an example, the European Union buys wheat at a price of 8 euros, and needs to keep it at a cost of 1 euro; it means a cost of 9 euros. The international price of wheat is 7 euros, and the EU needs to sell its overproduction at a price of 6 euros, losing 3 euros. If the EU would not sell its wheat, it will lose 9 euros. This

action saved money to Europe but made a distortion in the international market forcing the international producers to reduce their prices with the consequent decrease in their profit. If we add the fact that the USA had a similar system, the international agricultural market had artificially low prices. At the same time that the EU closed its market to international producers, it decreased the price in the international market with the consequent discontent of the countries which produced agricultural goods. The EU tried to reach the markets of these states in financial services and high tech in an open competition, but at the same time closed the European market for the production of these same countries. It created problems because these states wanted to have access to the EU market as a compensation to opening their own markets to EU companies. Currently the system has been reformed, and also there are higher prices in the international market because of the growing demand of China and India, reducing this problem. But in case of a drop in price in the international market, the problem will rise again.

6. Anglo-Saxon model: Some members of the European Union opted for a different model, importing cheap agricultural products instead of protecting their own farmers. The UK, because of historical reasons, imported most of its food from the countries of the British Commonwealth, previous members of the British Empire, as Canada, Australia, or South Africa. It meant that there were fewer farmers in the UK, so less money of the CAP went to this country. At the same time, the UK paid more money to the EU via VAT because its imports were higher, so there was a distortion between the money the UK paid and the money it received from Europe. The problem was partially solved with the British Rebate\textsuperscript{11} where the UK got a reduction in their net contribution to the EU, but is currently creating tensions between the EU and the UK because the situation has changed. The British have developed their own agricultural sector under the umbrella of the CAP, and the distortion between what they pay and what they get is smaller, and at the same time the importance of the CAP in the general budget of the EU is gradually decreasing. It means that the UK gets money from the EU via other policies, decreasing the distortion mentioned above.

7. Another important problem is that the CAP originally was created to protect farmers, but it was very difficult to define what a farmer was. If the EU just took into consideration the production, whoever owned land and produced was a farmer, so big landowners were considered farmers. As an example, one of the main landowners of the UK is the British Monarchy, currently represented by Queen Elizabeth II. The Queen receives substantial quantities of money from the CAP when obviously she is not a farmer. This situation is similar in other countries of Europe, as in Spain, where the house of Alba, a noble family that owns large amounts of land, also gets important funds from the CAP. The problem also

expands to the part time producers of agricultural products. These are people who have another job as their main activity but at the same time own land and produce, and hence get paid by the CAP, as we can see in the case of Denmark. Here the problem is to define the concept of farmer and who can get support from the CAP. The EU wants to implement a modulation in the payments to farmers, where the amount of money paid decreases as the quantity increases, hence protecting mainly small and mid-sized farmers. But it will damage the big agricultural companies that own big extensions of land. So more thoughts about this problem are needed and the current reform is still addressing this problem.

8. Environmental damage: The system encouraged increasing production and had negative consequences on the environment because more land was used even when the productivity of it was low, and the existing land also wanted to have bigger production. It created the necessity of increasing the productivity of the land, aggregating the use of chemicals, and higher necessities for water, resulting in a negative effect on the European environment. It also was a contradiction, because the European Union was funding the protection of the environment and included this target in other policies, but at the same time the CAP encouraged overproduction and damaged the European environment.12

9. Corruption: As the CAP was the main policy of the EU in monetary terms and its size was big, it was difficult to control, and fraud was bigger than in other policies. As a consequence some part of the money spent in the CAP was wasted. There are many examples, such as the fraud committed by some Italian producers with olive production. The market organization of olives is organized in a way that farmers get paid by each olive tree they have, not by the production. As it is very difficult to count these trees, the European Commission took pictures of the fields from airplanes, and later counted these trees from the pictures. They discovered that some Italians had olive trees made of cardboard that from the air looked like real trees. These farmers got payments for these fake trees. But this is just one example, and the corruption here is not a matter of just one country because is possible to find similar examples all over Europe.

5 Solutions

The situation of the CAP is not sustainable in the long term, so it needs to be reformed, and the European Commission is working on that. The main reform is concerned with the guaranty price paid by the EU, or direct payment. If the protection of the EU is not linked to prices, farmers will decrease their production, decreasing the negative effects of the working system of the CAP. But if the EU wants to protect its farmers, it needs to subsidize them in a different way. There many proposals here, some of them already working, as payments linked to rural development, or using agricultural land for forest, with farmers reducing

the amount of land cultivated and getting paid for it. It mainly means that farmers will get paid just for being farmers, no matter how much they produce, how much they work. It is a strange solution, because it pays money for just being a farmer, but on the other hand, farmers are farmers because it’s their job, and they want to work, and produce, not just sit at home and get a payment. So, in the long term, more ideas are needed in order to reform the current system of the CAP to reduce its negative effects and at the same time protect European farmers.

The European Union has introduced some important changes for the CAP that will start working in the period 2014-2020 in order to reform this policy and avoid some of the problems already mentioned:

- There will be a cap to the money received by each agricultural holding of 300,000 euro. To calculate this cap or "capping", the EU executive proposes that wages be deducted from employees reported in the previous year as well as taxes and Social Security contributions. The member state will recover this money and invest it in innovation and research, as the Commissioner for Agriculture, Dacian Ciolos,\textsuperscript{13} has explained. This measure will affect mainly the big landowners in order to focus more intensively on the real target of this policy, the European farmers.

- The reform maintains the two pillars of the CAP, for agriculture and livestock, and rural development. The first is financed by Community funds and includes an important reform linked to the historical rights, abolishing them gradually. The historical standards were included in the CAP to protect the farmers of Western Europe from the negative consequences of the enlargement to Central and Eastern Europe. This reform will be negative for countries like Spain and France, because in 2019 it establishes a uniform payment per hectare across the European Union. As the European Union was growing, and more agricultural states joined the organization, the historical standards were included to maintain the level of incomes of farmers from the older member states. It meant that the farmers of states that are already members of the European Union were getting more money than the farmers of new member states, breaking the principle of solidarity in the European Union. This situation will be finished in 2019, and will be a more fair system to the rest of the member states. Moreover, farmers will be rewarded with an additional payment to those who make environmental efforts, including monetary payments. It is expected to lead to a more sustainable agricultural system because it could act as an extra motivation for European farmers to go ahead with actions as reduction of greenhouse gases or more efficiency.

in the use of energy. The new targets of the CAP are the creation of jobs, food security, and promoting the use of renewable energy.\textsuperscript{14}

- The second pillar, rural development, is co-financed by member states or regions. The reform will almost equalize the scheme, but introduces new priorities related to aid. It will include actions improving competitiveness, promoting and organizing food chain risks, conservation and enhancement of ecosystems, and the promotion of resource efficiency.

- The different market organizations that have different payments for different productions, protecting the continental production more; the distinctiveness of French production will disappear in the next reform of the CAP, providing French farmers a flat payment for most products, thus equalizing them and the other European farmers, without special protection to French farmers or to any kind of production.

The new CAP intends to keep the traditional ratios for most co-payments, but may increase them if the farmers bet on innovation, cooperation, the creation of producer groups, or small grants to young farmers.

Another reform, based on the report of the Agriculture Committee of the Parliament, has also called for spending cuts in bureaucratic and administrative expenditures linked to agricultural policies in member states, because an important amount of money did not reach the final target, the farmers. Now the states should reduce these bureaucratic expenditures to make the system more efficient. The reform includes measures to fight against price volatility in agricultural products; the new reform proposes a global system of notification of agricultural reserves and a special budget item in case of crisis.\textsuperscript{15}

About the new budget, the CAP receives most of its funds from EU coffers, accounting for more than 40% of the EU budget. In 2012 this represented an expenditure of 57 billion euro. It will keep to similar levels in the next years. The budget of the future Common Agricultural Policy (CAP) reserves 3,500 million euro to deal with crises like the one of the summer 2011 of cucumbers affected by the outbreak of E. coli. This is an important new tool of the CAP and will be used in case of a crisis affecting a particular agricultural sector when the trust of consumers is lost with consequent economic harm for producers.\textsuperscript{16}


The EU budget 2011 – The figures (CA: commitment appropriations – PA: payments appropriations):

<table>
<thead>
<tr>
<th>Heading</th>
<th>Billion €</th>
<th>% of total budget</th>
<th>% change from 2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Sustainable Growth</td>
<td>64.5</td>
<td>53.3</td>
<td>+0.4</td>
</tr>
<tr>
<td>1a. Competitiveness for growth and employment</td>
<td>13.5</td>
<td>11.6</td>
<td>-9.0</td>
</tr>
<tr>
<td>1b. Cohesion for growth and employment</td>
<td>51.0</td>
<td>41.7</td>
<td>+3.2</td>
</tr>
<tr>
<td>2. Preservation and management of natural resources</td>
<td>58.7</td>
<td>56.4</td>
<td>-1.4</td>
</tr>
<tr>
<td>of which Direct aids &amp; market related expenditure</td>
<td>42.9</td>
<td>42.8</td>
<td>-2.1</td>
</tr>
<tr>
<td>of which Rural development, environment &amp; fisheries</td>
<td>15.7</td>
<td>13.5</td>
<td>+0.7</td>
</tr>
<tr>
<td>3. Citizenship, freedom, security and justice</td>
<td>1.1</td>
<td>0.8</td>
<td>+13.2</td>
</tr>
<tr>
<td>3a. Freedom, security and justice</td>
<td>0.7</td>
<td>0.6</td>
<td>+3.2</td>
</tr>
<tr>
<td>3b. Citizenship</td>
<td>8.8</td>
<td>7.2</td>
<td>+7.5</td>
</tr>
<tr>
<td>4. EU as a global player</td>
<td>8.2</td>
<td>8.2</td>
<td>+3.4</td>
</tr>
<tr>
<td>5. Administration</td>
<td>3.3</td>
<td>3.3</td>
<td>-8.2</td>
</tr>
<tr>
<td>Total</td>
<td>141.9</td>
<td>126.5</td>
<td>100</td>
</tr>
</tbody>
</table>

In % of EU-27 GNI: 1.13 1.01

Source: European Commission

Professional associations have complained bitterly about the reform because it does not count the productivity of the land for payments, being based only on hectares. The system will not be fair to many farmers according to ASAJA because the only important fact will be having land, not the way it is used, or the benefits for the society in terms of production. The more land you have, even when it is not productive at all, the more money will you get from the CAP, without any link to the operational system, or the quality of farming, or the quality of a good job from a good farmer. It also creates a problem with innovation and investments in the farming sector because there is not real benefit in producing either more or less. The areas that already had invested more money in their development are the ones that will suffer more with this reform, again France and Spain, and the main beneficiaries will be Central and Eastern member states, because of the extension of land there and the lower investment ratio. So, as we see, the reform will be positive for some member states and negative for others. Other complaints are related to milk and livestock because the payments for these products have been abolished, with consequent economic harm for the

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breeders. This is similar to another controversial decision, the end of payments to sugar producers, a clear sign for the international market with many benefits for European consumers also, but with unpredictable consequences for European producers.

6 The influence of the Common Agricultural Policy in the enlargements of the organization

The CAP has been a central point in the negotiations for further enlargements of the European Communities and the European Union. The first enlargement of the Community was United Kingdom, Denmark and Ireland and the CAP was crucial in the negotiations and in the further behavior of these countries inside the Union. First of all the enlargement could not be a reality until the CAP was already approved and was working inside the Community. The reason of the French government, that rejected twice the British application, was the fear of UK influencing the development of the policy during the preliminary discussion, as the British farming sector was very different than the French. Once the policy was working the enlargement was accepted because the British did not have any other option than accepting the whole European policies, including the CAP or withdraw their application for joining the Community. So it can be said without any doubt that the CAP was the main reason for keeping UK out of the European Communities.19

The following enlargement of the European organization was Greece, and the CAP did not play a major role as the Greek farming sector was Mediterranean, and hence its competition with the other member states was small as they most spread agriculture was the continental production. Southern parts of Italy and France had their own Mediterranean production but the Greek production was not so high and hence there was enough market for all their products. But the CAP played a major role in the crisis generated by the Greek leader, Andreas Papandreu. When he took office he complained about the unbalance situation of the Greek economy in the organization because the industrial production mainly came from other European states and the benefits for the Greek agriculture were small as the protection of the Mediterranean production was very reduced comparing with the Continental production. The situation was tense and could just be solved with the creation of a Mediterranean Fund. Then the internal organization of the CAP was a fundamental fact for the creation of the concept of internal cohesion between the member states of the European Union.

The enlargement to Spain and Portugal was much more problematic from the point of view of the CAP, as Spain was a big agricultural producer and its production was not just Mediterranean but also Continental and more competitive than other European states. It meant a problem in terms of market access in

the field of the Mediterranean production, because the Continental production was completely out of the market rules as its production was protected by a minimum price from the Communities. The harvest in Spain was ready because of climate reasons before than the French harvest and hence the Spanish products could access the European market before with more competitive prices and cope the demand, with the subsequent loses for the French producers. At the same time the Spanish government was indirectly subsidizing exports with a reduction of taxes for those products exported to the external market. It meant that the Spanish had more quality, better prices and reached the market before the other Mediterranean producers inside the EU.20

The CAP was the a very important chapter in the package of the negotiations between the European Communities and Spain, and the difficulty for reaching an agreement meant a big delay in the Spanish wish of joining the European organization soon. It took several years and the most complicate Treaty of accession ever to reach an agreement that still did not satisfied all the parts involved.

Soon after the enlargement was approved and the Spanish Mediterranean production was already enjoying the conditions of the European market, the French farmers blocked for several years the border between Spain and France in order to avoid the Spanish production reaching the market before the French production was in conditions to compete. It meant big economical loses for the Spanish farmers as long queues of tracks transporting farm products were stopped in the Pyreneans Mountains and logically the products were out of date.

This situation lasted for some years until the French state was forced to stop the blockade by the Communitarian authorities as it was a clear obstacle for the free movement of goods.

The CAP also influenced the enlargement to Sweden, Finland and Austria, as these countries had developed their own national protection for their farmers and their financial support was higher than the Communitarian. It forced the national authorities of these countries to downgrade their support in a gradual way, trying to avoid any collapse. Also the situation in the north of Sweden and Finland was an important issue in the negotiations for the enlargement, as the cattle production there, mainly focus on reindeer was not included in the CAP. Hence a special fund focus on less populated areas was created in order to protect the way of life of the people living in Lapland.

Finally the enlargement to Central and Eastern Europe was the most problematic for the European Union, as many countries joined the organization and their agricultural sector was important in continental production. As this kind of production gets most of the financial support of the CAP, there was not enough

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money to subsidize all the farmers of Europe in the same level, and hence a reform was needed. There were mainly three options:

1. Downgrade the financial support for all the European farmers and share the money available between all. But it was not acceptable for the farmers of France, Germany and Spain, the main receivers of funds from the CAP.

2. Create different speeds of integration in different areas, keeping the new member states out of the CAP. But the new members did not accept it because it meant a discrimination against their farmers and the collapse of their farming sectors incapable of competing with the other European farmers.

3. Creation of a hybrid system with two different levels of protection for the European farmers. The system proposed was based on historical production, or historical rights, of the previous members of the Union. According to it, they would keep their living standards and the level of protection they enjoyed before the enlargement. The new members would have protection for their levels of production in the previous years before the enlargement.

Finally the third option was adopted, but with controversial issues related to the calculation of the levels of production. The new member states had a higher production during the communist times, and with the collapse of the communist regimes came also a significant drop in the agricultural production. The European Union selected the last period for the calculations against the will of the Central and Eastern Europeans to select the previous period. Nevertheless, the current system of historical rights is under reform and soon will be changed for a full integration of the CAP for all the European farmers, with the same rights and duties and no discrimination because of the nationality. The CAP would probably be an important issue in any further enlargement of the organization as it has been in the past, but its importance will decrease as the CAP is currently under reform in order to reduce its financial cost and open the European market to the world farm producers.

7 Georgia’s agricultural sector

Despite change of the government in October 2013, Georgia has a strong European orientation and the ultimate goal has continuously been identified as joining the European Union. Therefore, if Georgia one day is set to join the EU, its agro-sector will have an important role in the negotiations. As mentioned above Common Agricultural Policy has always been one of the central points

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in the accession negotiation process and certainly expected to be an important discussion topic in Georgia’s possible pre-accession negotiations.

When it comes to Georgia, agriculture has traditionally been very important for the country’s economy and it was central reasons for the country to be one of the richest in the Soviet Union. Georgia produced a main part of several agricultural products in the Soviet Union, providing 98% of citrus fruits consumed by the USSR, 90% of tea, 60% of wine, big part of fruits and vegetables, etc. Country’s economy was typical colonial economy having production directed only to Soviet Union market. That is also one of the reasons why country suffered so much during the last period of the USSR and after the collapse of it, as its GDP per capita dropped by almost 80% during the period of 1988-1994.22

Development of the agro-sector has been a priority of new government, due to its traditional importance for the country’s economy, employment of the big part of the population and keeping this population in the rural areas. And as already mentioned strong agriculture will mean its more important role in EU pre-accession negotiations. In these regards, Georgia has several advantages. First of all, small size of the country, and therefore agricultural production, means less competition for the EU farmers and therefore fewer problems in negotiations. Secondly, as illustrated above, enlargement to Central and Eastern Europe was also problematic due to new members having continental agricultural production. In this regard, Georgia’s similarities with Mediterranean climate and production should be considered as a positive aspect, as country will not compete in continental production, but will do so in Mediterranean one, where there is less pressure and more possibilities. Some of the goods from Mediterranean production are still imported by the EU, which means Georgia could possibly use the demand and export to the EU. Natural conditions will allow Georgia to produce some Mediterranean products fast enough to provide the market. Thirdly, even if the production is small in size, it could still contribute to the stable supply of the goods to the EU, therefore, less dependent on the suppliers from outside the union. Finally, one of the problems after enlargement has been an exodus of the population. Having strong agro-sector would mean keeping big part of Georgia’s population living in rural areas and being employed.

On the other side, the negative aspects could be the fact that in some agricultural sectors, producers are farmers with small farms, which is not the priority for the CAP, as explained above. Therefore it is vital that Georgia has medium or big size farms, which would make investment environment better, innovative system to be implemented easier and faster, production sustainable, etc. Environmental issues could also be a problem, as more needs to be done to have sustainable agricultural system and farmers being able to benefit from the rewards for implementing such systems, as discussed above.

However, still one of the main problems of Georgian agro-sector is the low level of its competitiveness and productivity, as it is far less developed than those of the leading countries on the world and European markets. Being competitive and especially having high productivity is essential for the farmers, as it will allow them to invest in modern technologies, build a sustainable system and further improve the productivity.

Nevertheless, natural resources allow country to develop several productions that could be competitive and productive, one of such productions could be Georgian hazelnut. It is mostly a Mediterranean product and is also being produced by some EU members, as Spain and Italy. The same time several factors support this production:

1. Production of hazelnuts in Georgian has a long tradition and therefore experience
2. Natural conditions in the country allow growing the product on 1500-1800 meters above the sea level, which is very important for broadening the production
3. Georgian hazelnut is ecologically compatible product, as well as with strong immunity and resistance against plant diseases
4. Market possibilities are high within the EU, still importing the product.

Georgian hazelnut production could be one of the strategic, priority areas for the country to try and develop competitive export production in agriculture, which the country has struggled to develop since its independence in 1991. But the production needs to be correctly modernized and managed, in order to develop competitive export production.

One of the main producers of hazelnut for the year 2011 in the world was Turkey, which had biggest (data for the year 2011) area harvested (400000 hectares) in the world, as well as the highest production a year (430000 tones), the following countries are Italy, USA, Azerbaijan, etc. (table 1).

<table>
<thead>
<tr>
<th>Country</th>
<th>Area harvested</th>
<th>Production quantity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Turkey</td>
<td>400000 hectares</td>
<td>430000 tones</td>
</tr>
<tr>
<td>Italy</td>
<td>70492 hectares</td>
<td>128940 tones</td>
</tr>
<tr>
<td>Azerbaijan</td>
<td>23242 hectares</td>
<td>32922 tones</td>
</tr>
</tbody>
</table>

24 ibid
26 FAOSTAT - Food and Agriculture Organization of the United Nations statistical database (2012)
Hazelnut production has developed in Georgia during recent years, as natural environment, required labor and market price makes it better choice over other productions\textsuperscript{27}. Mostly production is concentrated in west Georgia, in 2006 95.6\% of whole Georgian production was from west of the country, especially Samegrelo region, however, during recent years, production has been developing in east of the country as well\textsuperscript{28}. The statistical data from ten-year period of 2011-2002 shows that area harvested is generally increasing, as does the production (table 2).

<table>
<thead>
<tr>
<th>Year</th>
<th>Area harvested</th>
<th>Production quantity</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>15500 hectares</td>
<td>31100 tones</td>
</tr>
<tr>
<td>2010</td>
<td>15000 hectares</td>
<td>28800 tones</td>
</tr>
<tr>
<td>2009</td>
<td>12000 hectares</td>
<td>21800 tones</td>
</tr>
<tr>
<td>2008</td>
<td>10000 hectares</td>
<td>18700 tones</td>
</tr>
<tr>
<td>2007</td>
<td>12000 hectares</td>
<td>21200 tones</td>
</tr>
<tr>
<td>2006</td>
<td>13000 hectares</td>
<td>23500 tones</td>
</tr>
<tr>
<td>2005</td>
<td>10000 hectares</td>
<td>16393 tones</td>
</tr>
<tr>
<td>2004</td>
<td>4600 hectares</td>
<td>8327 tones</td>
</tr>
<tr>
<td>2003</td>
<td>5500 hectares</td>
<td>14820 tones</td>
</tr>
<tr>
<td>2002</td>
<td>4915 hectares</td>
<td>13901 tones</td>
</tr>
</tbody>
</table>

Source: FAOSTAT\textsuperscript{29}

Competiveness for Georgia’s hazelnut production would mean its ability to sell produced goods in competition environment for a long period of time and be profitable. Analyzing Georgian hazelnut production shows there is no rapid growth indicated in competitiveness index of the production, however the data suggest that hazelnut production deserves more attention and should be listed among priority fields of competitive production of Georgia.\textsuperscript{30}

\textsuperscript{27} GHN news agency (2010). Georgia biggest export for 2009 was hazelnut. Available http://www.ghn.ge/news-6544.html (Accessed 08.05.2013)
\textsuperscript{29} FAOSTAT - Food and Agriculture Organization of the United Nations statistical database (2012)
Analyzing of Georgian market’s microenvironment shows that market of the production is developing in three directions:

- Distribution companies
- Factories
- Farmers

For development of hazelnut business, important is to have integrated horizontal and vertical production system, where production of the good, its processing and realization will be united.

Here, important is to underline that currently farmers own 95% of harvested area and mostly these farmers are small size ones.\(^\text{31}\) This is, as already discussed an obstacle, as the priority should be to have medium and big size of farmers. In the regions of Samegrelo and Guria, there are several functioning integrated small-size companies. In Georgia as whole, there are up to 100 medium and small-size hazelnut processing factories. During last years, several 50-100 hectare farms were built, including GEL 6 million investments from company Ferrero, that owns up to 1200 hectare land in the region of Samegrelo as well as increasing activities from local company Dorani, that also owns lands where hazelnut is cultivated in the region of Kakheti, in east Georgia.\(^\text{32}\)

From the three directions mentioned above, distribution/realization is still more developed than other two, but increasing number of investments, farms and factories, suggests the development of those two directions as well. For the development of these two directions it is also essential to have a good system of bank loans and taxation policy in the field, which needs fundamental improvements in the country.

Despite several problems, the production can still be considered profitable and strategic, as for example for the year 2009, export production of hazelnut in Georgia amounted in GEL 83.6 million, while that of wine amounted in GEL 64.8 million and that of mineral waters – GEL 59.3 million.\(^\text{33}\)

Based on the mentioned above, Georgian hazelnut production should be considered as possible competitive export production in the country, as it has necessary natural and economic resources. If the production is prioritized, improved and brought to a necessary standards, by working on improving each chain of the production mentioned above, the country could develop competitive export production.

\(^{31}\) Ibid
8 Conclusions

The enlargement of the EU to the Caucasus region and to Georgia will also mean the enlargement of its most important policy, the Common Agricultural Policy, integrating the Georgian agricultural sector in a wider European perspective. The CAP is certainly going to play an important role in the relations between Georgia and the European Union, as well as in general, further development of Georgia.

As Georgian agricultural production is mainly based on Mediterranean production, because of the climate and other natural conditions in the country, it is not going to create major problems inside the EU, as most of the financial support has been traditionally focusing on continental production. The main benefit for the Georgian agricultural sector will be access without restrictions to the European market, selling its production on European market before other Mediterranean producers outside the EU can do so. The EU will also benefit from the enlargement to Georgia, as the country will increase the Mediterranean production of the union in general, that is still under the real demand. Therefore, it will increase the independence of the EU in the agricultural sector.

As the EU is trying to reform internally in order to reduce the impact on environment from the CAP, its negative effect on international trade or problems of overproduction, the main idea will be eliminating small farmers. The Georgian agricultural sector is widely represented by small farmers, therefore, they will disappear with the enlargement as a consequence of the current structure of the CAP. On the other hand, these measures will have a positive effect on the agricultural sector of Georgia in general, as it will have an access to new funds in order to modernize, increasing its productivity, as well as reducing its negative impact on environment.
MISTAKE AS A GROUND FOR NULLIFICATION OF CONTRACTS
(THEORIES AND APPROACHES ON ITS RELEVANCE)

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Abstract: The paper offers the analysis of the theoretical approaches to the problem of mistake in the law of contracts and its relevance for the nullification of the contracts. Author focuses on the several understandings of mistakes: mistake of delusion, mistake of combination of misbelief and misconception, mistake in social interactions etc. Further he evaluates the legal consequences and the practical application of the abovementioned theoretical concepts. Finally author analysis the draft projects related to the mistakes in the law of contacts and their legislative implementation.

Keywords: civil law, law of contracts, mistake, theories, legislative proposals

I. Civil Law Theories on Mistake as a Ground for Nullification of Contracts

1. Theories on Mistake as a Fact *in interiore hominis*

They are known as theories on error as a psychic fact or as subjective theories. These theories on mistake are well represented in continental legal doctrine’s explanation of that ground for invalidation of contracts. We may distinguish two directions among them:

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1.1. Theory on Mistake as a Simple Delusion

1.1.1. Nature and Characteristics

According to it, mistake is a discrepancy between any subjective state of mind and objective reality. For example, Pothier perceived mistake as subjective misconception as true of something wrong. Later on, other prominent lawyers (Savigny, Pugliatti and Carnelutti) have defined it in a similar way. They describe the mistake as a case in which there is a false impression of reality.

The theory of mistake, as a simple delusion, has many supporters in Bulgaria. Under our old Law of Obligations and Contracts (LOC) mistake has been defined as the erroneous notion that we have on something. At the same time, another author gives such a definition. He understood mistake as a discrepancy between reality and subjective perceptions of it.

This theory is widely spread in modern continental civil law doctrine. Famous French lawyers define mistake as consideration of something false as true and vice versa - as consideration of something correct as a falsehood. The first part of that definition is largely influenced by the above mentioned Pothier's notion of mistake. German civil law theoreticians have defined the same phenomenon as "a false understanding of the actual situation", similarly to considerations of Savigny, Pugliati and Carnelutti.

A large number of contemporary writers in Italian and Bulgarian doctrine also share the theory of mistake as a simple delusion. The reason for putting them together in a group is the similarity of their two features. Firstly, I have found continuity between these contemporary views and the foregoing opinions on mistake. It can be observed in several key points – they both support the idea that delusion represents an essential element of mistake; in addition, contempo-

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2 Delusion designates a particular state of mind in which there is misconception about reality - so Vasilev, L. Graždansko pravo na NRB. Obshta chast. 3 prerab. i dop. izd., S., 2000, p. 320. Further on, I will utilize both terms (delusion and misconception) with equal meaning.


5 Published in Darzhaven vestnik, No 268, 1892, abrogated by our new LOC, Darzhaven vestnik, No 275, 1950. The latter LOC has entered in force at 1 01 1951 (see § 4 of its Transition Rules).

6 See Mevorah, N., Lidzhi, D., Farhi, L. Komentar na ZZD. Chl. chl. 1-333. S. 1924, p. 33. The definition is seriously influenced by the understanding of French scientist René Demogue who defines mistake as a psychological state of mind which is incompatible with the objective truth - cf. Ibid.


8 "L’erreur consiste à croire vrai ce qui est faux, ou faux ce qui est vrai" - see Ghestin, J. Traité de droit civil. La formation du contrat. 3e édition. P. 1993, p. 455.

rary views do not hesitate to borrow from the previously mentioned definitions of mistake. The second feature of similarity consists of introducing of additional remarks on field of misconception by some Bulgarian and Italian authors sharing that theory of mistake. I will briefly describe their views.

A group of Italian authors includes in the perimeter of misconception not only false but also distorted representations of reality\textsuperscript{10}. Compared with the definition of mistake given by Pothier, their argumentation seems to extend the field of mistake as a ground of nullification of contracts. But, on the contrary, we should have in mind that the latter formula is influenced by local case law. It includes a distorted view of reality in the field of misconception not to broaden the mistake's field of application but to show different reasons (spontaneous or induced by others\textsuperscript{11}) causing that ground of nullification of contracts.

As I have already mentioned, many Bulgarian authors also accept the theory of error as a psychic fact\textsuperscript{12}. A view expressed in our doctrine deserves special attention. It highlights two hypotheses of misconception.\textsuperscript{13} The first is the case where there is a difference between specific individual state of mind and reality. I could confirm that first hypothesis harmonizes perfectly with the views of analyzed theoretical direction. According to the second hypothesis, delusion encompasses situations where there are certain subjective representations on something which in reality completely lacks.

It seems to me that the formula I have just described sticks pretty closer to the concept, advocated by both Italian and Bulgarian author\textsuperscript{14}. It also outlines two hypotheses of misconception. The first, quoted above several times, could be called a classical situation of that theory of mistake – in that case the error lies in false representations of the subject revealing his will. Another hypothesis, however, includes in the scope of delusion the ignorance on circumstances that are important for the formation of the inner will of errans\textsuperscript{15}.

\begin{itemize}
\item \textsuperscript{10} These are professors Roppo, Bianca, Galgano and others. – q.v. by Rossello, C. L'errore nel contratto. Il Codice civile commentato. Artt. 1427 – 1433. Milano, 2004, p. 5, 6 and n. 6.
\item \textsuperscript{11} Ibid. Therefrom, we can easily identify main common features between mistake and deceit as grounds for nullification of contracts. The latter is a qualified case of mistake caused by intentional misleading acts (generally belonging) to contract partner of errans. The latter Latin term denominates mistaken contract party.
\item \textsuperscript{13} Tadzher, V. Ibid.
\item \textsuperscript{14} Trabucchi, A. Istituzioni di Diritto civile. 40ma ed. Padova, 2001, p. 158; Pavlova, M. Ibid.
\item \textsuperscript{15} If ignorance can (not) be included as a component of mistake in formation of will is a problem
\end{itemize}
Is there any difference between these two second hypotheses of mistake? When: a) some object is completely missing in reality but the *errans* has formed certain subjective representation on its existence, on the one hand, and: b) the ignorance of *errans*, on the other? I think the answer is yes, because ignorance is tantamount to lack of any conception of reality, while in the other case there were some subjective perceptions formed, even though they differ from the objective reality.

**1.1.2. Meaning of Theory of Mistake as a Simple Delusion**

Analyzing the Pothier’s thesis - the main supportive element of that theory of mistake - French researchers Ripert and Boulanger have stressed out its general character. According to them, that concept of mistake can be applied to any intellectual activities\(^\text{16}\) without distinguishing whether or not they have any legal consequences. Ripert and Boulanger’s opinion should be shared. Moreover, it also fits to more actual definitions of mistake belonging to that theoretical direction. However, its importance should not be overlooked. And it is still widely spread in civilian doctrine. Secondly, the theory of mistake as a simple misconception has given a strong basis for further justification of the nature of that ground for invalidation of contracts.

**1.2. Theory of Mistake as a Combination of Misbelief and Misconception**

**(In Brief: Theory of Mistake as a Combination)**

**1.2.1. Nature and Characteristics**

This theory is a further development of the previous assumption, describing mistake as a psychic fact. Theory of mistake as a combination adds a second component to the requirement of inadequate subjective perceptions on specific object of knowledge. This is the confidence of *errans* that his false beliefs match reality. According to this theory, delusion is not sufficient to justify the invalidation of a specific contract on the ground of mistake. In order to apply that reason for nullification, there must be another component of mistake to exist - the confidence that false misconception reflects reality. The *errans* as its owner should believe in its truth, i.e. he has to be confident that his representations correspond to the referred object.\(^\text{17}\)

I have already mentioned the “confidence” and “belief” in the truth of delusion. They both indicate the same component of mistake - the misbelief of mis-

\(^{16}\) See Rieg, A. Ibid.

guided person. According to that theory of mistake, the combination of these two factors (misbelief and delusion) builds seeming knowledge in the mind of errans. Their simultaneous coexistence causes him entering into a specific agreement under mistake.

The misbelief must be distinguished from another state of mind – the doubt. An individual could have doubt whether specific individual representations match reality. While the first is a positive fact, the same cannot be definitely said for the latter. The state of doubt is equivalent to hesitation that personal impressions differ from reality. This guesswork eliminates the misbelief that ideas and reality match. Therefore, suspicion of a particular person excludes his conviction that individual perceptions correspond to reality. Moreover – that doubt creates a probability that person could later realize he was wrong).

Hereinafter I should analyze some theses belonging to that theoretical direction. They attract my additional interest because of the ambiguity they contain. An opinion describes mistake as a discrepancy between subjective belief and reality. Its author does not point out the delusion as a separate component of that ground for nullification. Another statement sounds somewhat similar to the previous one, as it does not insist on the simultaneous coexistence of misbelief and misconception. However, in contrast with the former opinion, the latter considers interchangeable two elements of mistake and deems their alternative appearance as a sufficient requirement of that ground for invalidation.

If these views would be analyzed from the viewpoint of the theory of mistake as a combination, they should be described as inaccurate. To justify the existence of mistake, the conviction must be connected with certain misconceptions. Research for conviction of errans would make sense, if in this case his delusion could be found as well. In addition, the misbelief that individual perceptions match reality is different from them. I could prove the latter using the fact that confidence (either belief or misbelief) may exist in the state of mind, notwithstanding that individual impression conforms or not to reality. When we observe only conviction of certain subjective perceptions, they cannot be classified as true or false. We need to examine their contents.

19 See Vivien, G. Ibid.
1.2.2. Meaning of the Theory of Mistake as a Combination

If the theory of mistake as a combination could be compared with the theory of mistake as a simple misconception, it would be established that the former applies misbelief as a second component of the psychological concept of mistake. An advantage of the theory of mistake as a combination is that most writers apply it in contractual relations. It is for sure that it makes easier the problem on the legal relevance of mistake for invalidation.

2. Objective Theory of Mistake\(^\text{21}\) (or Theory of Mistake in Terms of Social Interaction)

2.1. Nature and Characteristics

Theories of mistake as a psychic fact have been criticized in Italian literature. In the second half of the twentieth century there has been formulated a different opinion on the nature of mistake as a ground for nullification. In contrast with the subjective theories, that opinion explores mistake not as a fact \textit{in interiore hominis}. It puts that phenomenon in a more different context.

Objective theory investigates mistake as a fact occurring not only in the individual consciousness, but also puts it in lights of interpersonal communication\(^\text{22}\). That theory appeared consistently with the trends in contract law in the twentieth century. One of them is the focus on social and economic functions of agreements\(^\text{23}\).

The study of the error from this point of view rests on the premise that individuals serve with same tools (language, signs and symbols) - either to interact with each other or to perceive reality\(^\text{24}\). Therefore the objective theory of mistake is influenced by language sciences, mainly by semiotics, which studies the problems of relationship between sign and language; of the meaning of signs in human communication\(^\text{25}\).

\(^{21}\) The name is somewhat arbitrary, since its adherents do not escape entirely from mistake’s subjective roots. They also use psychological arguments defining that vice of will. More precisely, this theory would be called “objectified”. Here, however, I prefer the name “objective” for the sake of brevity.


\(^{24}\) See Barcellona, P. Op. cit., p. 89.

\(^{25}\) Legal science also explores language a) as a kind of legal system with its own semantic rules; and b) the importance of the sign as its element - see Tashev, R. Teoria na talkuvaneto. S. 2001, pp. 74, 76, 178-181.
Objective theory sets up as a major problem the way of determination if there is a mistake. Its followers argue for the need of a predetermined criterion for assessment. That criterion is external to subjective consciousness. Some adherents call it “a scale of compliance” (termine di riferimento). Thus the concept of mistake has been “exported” outside the realm of certain individual psychic activity.

The scale of compliance is a product of interaction among people by linguistic means. It consists of common sense of linguistic resources that have been used. Further on, that common sense has been created by social convention. Bulgarian literature calls it the conventional or customary sense of used words and phrases.

Under the objective theory the occurrence of mistake depends on establishment of meaning, introduced by probable errans in linguistic means as a tool for reflection of reality. It has to be checked out if that meaning coincides or differs from the common sense, established for the same linguistic means. The mistake could be detected when the meaning of linguistic means, used by errans, is different from its conventional sense on condition that the same object of reality has to be described. If we do not make such a comparison between personal sense and conventional sense of linguistic means, signs and symbols, we could not establish whether there is a divergence between an individual state of mind and objects of reality. This divergence should be established by taking into account the expressed will of the alleged errans, his behavior, and other facts having material being. All these circumstances have to occur not later than the conclusion of contract. In other words, material facts which have appeared by a certain moment in time, serve as a kind of objective limitation on the means of determination of mistake.

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27 See Barcellona, P. Ibid.
31 Cf. Tashev, R. op. cit., pp. 72, 76, 179, cf. also the provisions of the Art. 9, para. 1 of Bulgarian Law on Normative Acts (LNA) and the Art. 36, para. 1 and Art. 37, para. 1 and 2 of Bulgarian Decree for Application of LNA.
32 See Barcellona, P. op. cit., p. 89, 90; Rossello, C. ibid.
33 So Kozhuharov, Al. Ibid, note 99.
34 See Barcellona, P. op. cit., p. 89, 93.
36 Cf. This can be deduced from the postulate, which in Bulgarian doctrine has been formulated on the problem of interpretation of transactions: If the addressee understands a declaration of will in accordance with the conventional sense of used words and phrases, the author of the same declaration can not refer to another artificial sense, existed only in his mind, of used words and
2.2. Importance of the Objective Theory on Mistake. Relationships with Other Legal Institutions

Proponents of objective theory have cited it as a continuation of the idea of priority of the declaration over the will, both conceived as components of the legal construction on declaration of will (Willenserklärung)\(^{37}\). However, it is not easy to conclude if this is the leading position in Bulgarian legal doctrine\(^{38}\). There are some other opinions known on the issue. One of them gives priority of the will to the declaration, but adds significant objective corrections\(^{39}\). It stays closer to the thesis, which examines the will and its declaration in their entirety\(^{40}\).

Supporters of this theory point out its two manifestations in Italian legislation\(^{41}\). These arguments however, cannot be found in Bulgarian legislation.

All that I have already mentioned creates doubt about the perception of the objective theory of mistake by Bulgarian doctrine and case law. A strong negative answer to that question, however, would be outward. It is worth observing that the problems of common sense have also been discussed by Bulgarian doctrine in a more general level - that of interpretation of legal acts. It turns out that these problems also need to reflect on the legal essays on mistake as a vice of consent.

Finally, I have already highlighted proximity between the objective opinion on mistake and other sciences as semiotics, psychology, etc. The last came to support the following conclusion. Despite the denial of subjective theories on mistake, the objective theory can not entirely avoid the psychological arguments

\(^{39}\) So Tashev, R. op. cit., pp. 104–107.
\(^{41}\) Rossello, C. Ibid. The first manifestation lies in the elimination of the distinction between the effects caused by mistake-vice of consent (errore-vizio) and mistake-obstacle (errore-ostacolo) for consent. Article 1433 of Codice civile italiano (CCI) provides avoidance for both of them, contrary to concepts adopted by French and Italian old literature. These concepts discern mistake-vice of consent from mistake-obstacle. According to their view, the former is a factor leading to nullification; the latter directly causes nullity of agreements. Bulgarian doctrine and case law is not aware of these two types of mistake. The second manifestation of objective theory is suggested by provisions of CCI on basic kinds of relevant mistake. Since they affect the object of the false state of mind, CCI eliminates further researches for subjective components of that state of mind – see Rossello, C. Op. cit., p. 7, 8. In my country, however, LOC is quite frugal from such provisions. (Its key provision is Art. 28, para. 1, which explicitly deals with 2 types of mistake only – mistake to the object and mistake to the person. That paragraph is similar to the art. 1110 of Code civil français, strongly influenced by ideas of Pothier). Naturally, prevailing Bulgarian doctrinal view on the relevant mistake states that the law is not exhaustive on the subject.
to justify the error as a ground for invalidation of agreements. Objective theory does not leave completely out the subjective perspective on mistake but provides greater clarity on the issue of its interpretation.

2.3. On the Suitability of Reviewed Theoretical Directions. Conclusion

Uncertainties or ambiguities on various concepts of mistake can be avoided if we borrow different aspects of represented theoretical directions.

So I would lay the theory of mistake as a combination in the foundation of the legal concept of mistake as a vice of will. That fact will provide continuity with the older notion of mistake as a simple delusion. Further on, the findings of objective theory shall not be ignored. They will be considered as interpretative principles to establish whether there is error-vice. In this way, a twofold effect could be achieved - borrowing foundations of mistake from subjective theories and respecting some conclusions of objective theory on mistake.

Problems that have just been considered are an appropriate starting point for debate on the legal relevance of that ground for annulment.

II. Approaches to Relevant Mistake: Setting of Common Legal Requirements or Specific Types of Relevant Mistake?42

1. Comparative Data

It was already denoted that the determination of common legal requirements of mistake is a very difficult question, although scientific pursuits had been approached to it for centuries43. In national continental legal systems, it is a task mainly performed by the doctrine, based on current (often inadequate) legislation and case law44. To illustrate, I will briefly mention various common legal requirements of mistake.

For example, according to the opinion of the French doctrine any relevant mistake45 has to: a) have caused this agreement; b) be excusable and c) affect quality, which the parties expressly or impliedly agreed for.

In Italian literature one of attempts to draw legal prerequisites recognized the mistake as relevant when it: a) affects one of essential elements of the contract

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42 Both approaches have been caught by Zezekalo, A. Sdelki, sovershennye pod vliyaniem zabluzhdenia, v proekte konceptsi sovershenstvovania obshtih polozheniy Grazhdanskogo kodeksa Rossisskoy federatsii, available from http://www.koteh.ru/journal-yurist/9893.html
43 Initial merit for sketching of legal requirements of (ir-)relevant error belongs to the school of Natural law. Its leaders also refused the casuistic examination of various types of errors - see Zimmermann, R. Op. cit., p 612.
45 See Ghestin, J. Traité ..., p. 518.
(denoted as its objective core) and b) determines the agreement. This attempt was disputed by numerous theoreticians for different reasons. Maybe the most important of them is that this set of facts is far from normative requirements for the relevance of error. Under Art. 1428 of CCI to justify the invalidation of agreement, mistake must be substantial and identifiable by the other contract party.

The legal requirements on operative error elaborated by Spanish case law are closer to those concepts. They comprise of two components. Firstly, mistake must relate to the essential content of a specific contract. Thus it leads to conclusion of the latter. Secondly, the error has to be excusable. As we see, the first component of the Spanish construction comprises of two elements identified by previous attempts to establish common legal requirements on relevant mistake.

According to § 871 of the Austrian Civil Code the error is legally relevant only if it refers to the principal object or an essential attribute of it to which the intention was principally and expressly directed. In addition, the errans has to prove one of three alternatives: a) that the other party caused the mistake or b) the error must have been obvious to the other party in all the circumstances, or c) that mistake was notified to the other party in good time.

Let us look at the soft law sources of law. Article 3.2.1. of Principles of International Commercial Contracts (PICC – version 2010) denotes mistake as erroneous assumption relating to facts or to law existing when the contract was concluded. The following provision of the Principles entitles the mistaken party to avoid the contract only if at the moment when the agreement was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would have not concluded it at all if the true state of affairs had been known, and a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error, or b) the other party has not reasonably acted, in reliance on the contract, at the time of avoidance;

The approach of the Principles of European Contract Law and of the Draft of Common Frame of Reference does not differ to that of PICC. As the latter Principles, their provisions indicate that errors in fact and in law are legally relevant - see Art. 4:103 PECL and Art. II-7: 201 DCFR.

46 See Allara, La teoria generale del contratto, p. 182 – q.v. Rosello, C. op. cit., p. 61; Sacco, R. op. cit., p. 386, and other authors cited therein.
47 See Rosello, C. Ibid; Sacco, R. Ibid.
48 Cf. Mistake, Fraud and ..., p. 125.
50 Under Art. 4:103 PECL, para. 1, a party may avoid a contract for mistake of fact or law existing...
It should be recognized that in the doctrine we could find another approach. It consists of casuistic analyzes of different kinds of error and appreciation whether they are either legally relevant or irrelevant\(^1\). That approach follows tradition of Roman lawyers\(^2\). They refrained from summarizing constituent elements of operative mistake.

2. Approach of Bulgarian Law

Let us now see what the situation in Bulgarian law is. Doctrine prefers the first of the two approaches already outlined. The difficulty comes from the problem that the stated legal requirements for relevant mistake have different scopes. I find it hard to go in details of main author’s views on the problem. However, I could only illustrate my impression with the following example. For decades, the main textbooks in civil law were two. Based on the same legal provision (art. 28 LOC), one of them pointed out two, and the other - three elements, for the relevance of mistake for avoidance of contracts\(^3\).

Having in mind this problem, on the one hand, and the need to summarize legal requirements for relevant mistake under the prevailing views in our theory\(^4\), on the other hand, it can be concluded that the mistake in Bulgarian law is relevant for avoidance of contract if:

a) Its components (delusion and misbelief) relate to constituent elements of contracts and

b) It caused the conclusion of a specific agreement.

when the contract was concluded if: (a) (i) the mistake was caused by information given by the other party; or (ii) the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error; or (iii) the other party made the same mistake, and (b) the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms. The provision of Art. II-7: 201 DCFR has similar content. It differs from Art. 4:103 PECL by adding fourth hypothesis to the established three alternatives of behaviour of the partner of errans - when the mistaken party's partner caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors.

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\(^3\) See respectively Vasilev, L. op. cit., pp. 321-322 and Tadzher, C. op. cit., p. 271. The same is the impression if we look at legal requirements of mistake in foreign literature already outlined.

If we make a brief comparison between these legal requirements and those, outlined by foreign doctrine, of course we will find some differences. Which are the most obvious? Bulgarian law does not involve additional criteria for a relevant error. For instance, it does not require a mistake to be identifiable or excusable.

In the meantime, by striving to summarize the features of the relevant error, our doctrine continues to keep Romanistic tradition of analysis of mistake. Along with the description of its legal requirements, Bulgarian theory explores main kinds of mistake and studies their legal significance\textsuperscript{55}.

In conclusion, it should be recognized that the second approach itself is not enough to appreciate the legal relevance of a certain type of mistake. Therefore, it depends on the achievements of the first approach. If we want to consider the legal relevance of any described type of error, it has to be put through the prism of legal prerequisites for that vice of will.

\textsuperscript{55} See textbooks in our civil law, except for Rachev, F. op. cit., p. 412. The latter follows a completely casuistic approach.
THE ISSUE OF THE DEFINITION OF “SOUND RECORDING” IN THE SLOVAK AND CZECH LEGISLATION

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Abstract: Sound recording a posteriori Slovak as well as Czech legislation represents the unity of the recorded information and the medium in which the information is stored. However, the medium of audio information can take various forms. This diversity is on the one hand determined by the technical development and on the other hand by the fact that the term "sound recording" can be interpreted broadly, which means that under the term "sound recordings" need not be understood only carriers of audio information that are directly reproducible by means of a technical equipment intended for sound reproduction but even such objects which are already technically outdated (e.g. musicboxes or automatic musical instruments) or that are relatively new but specific or rare (e.g. music roads). Therefore in some case unclear or imprecise definition of "sound recording" may lead to doubt whether a particular object ought to be protected as a sound recording or not.

Keywords: Intellectual property, sound recording, legislative definition, Slovak regulation, Czech regulation

1. Sound recording, phonorecord or phonogram?

The collocation “zvukový záznam”\(^2\) is usually translated in English as: “sound recording” or “phonogram”. A slian more complicated form “phonorecord of sound recording” could be also used. Translations of Slovak authorship law, as well as Czech authorship law, are available on the internet site of WIPO. One of the xxx of these translations is that the term “phonogram” is used. It is questionable why the collocation “sound recording” has not been used, as it is a literal translation which render the text from one language to the other “word-for-

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2 There is no difference between this collocation in the Slovak and Czech language.
word”. At the outset of this article I would like to point out the issue of whether the term “phonogram” is an appropriate translation of the collocation “zvukový záznam”. I believe that it was not reasonable to use the word “phonogram” because there were no shades of meaning, which could influence or even change meaning given by the lawmaker in the (Slovak or Czech) original language. On the other hand, use of the word “phonogram” in legal texts does not respect the common usage of legal terms in English, especially usage by legislatives which originated in English. Therefore it might be useful to compare relevant provisions in copyright acts of selected English speaking countries, focused on definitions of the collocation “sound recording” or its synonymic alternatives.

UK Copyright, Designs and Patents Act 1988 defines the collocation “sound recordings” in the section F85A in the following manner:

(1) In this Part “sound recording” means—

(a) a recording of sounds, from which the sounds may be reproduced, or

(b) a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced,

regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced.

(2) Copyright does not subsist in a sound recording which is, or to the extent that it is, a copy taken from a previous sound recording.

The collocation “sound recordings” as legal significance is used also in the Canadian Copyright Act. In section 2 (Interpretations) it is defined as follows: “Sound recording” means a recording, fixed in any material form, consisting of sounds, whether or not of a performance of a work, but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work.

According to the Copyright Act of New Zealand, Section 2 (Interpretations) the collocation “sound recording” means:

a) a recording of sounds, from which the sounds may be reproduced; or

b) a recording of the whole or any part of a literary, dramatic, or musical work, from which sounds reproducing the work or part may be produced, regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced

The collocation “sound recordings” is also used in the Australian Copyright Act 1968. But the term “record” and the collocation “sound recording” are there distinguished. Both are defined under section 10 (1). “Record” means a disc, tape, paper or other device in which sounds are embodied. Interesting is that a record can be also a paper or a device. “Sound recording” means the aggregate of the sounds embodied in a record. The word “record” thus indicates carriers and the collocation “sound recording” denotes recorded information. These definitions in the Australian Copyright Act 1968 are basic but there are also complementary
definitions. For example: “Sound recording” means a sound recording in which copyright subsists (see definitions under section 189) or definition of “sound recording of a live performance” which means a sound recording, made at the time of the live performance, consisting of, or including, the sounds of the performance (this definition is also provided under section 189).

South African Copyright Law is governed by the Copyright Act of 1978 and subsequent amendments. The term “record” as well as the collocation “sound recording” are defined under section 1 (1). The term “record” means any disc, tape, perforated role or other device in or on which sounds, or data or signals representing sounds, are embodied or represented so as to be capable of being automatically reproduced or performed therefrom. “Sound recording” means any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but does not include a sound-track associated with a cinematograph film. The word “record”, therefore, indicates carriers and the collocation “sound recording” means recorded information. According to section 2 (Works eligible for copyright) subsection 1 (e) subject to the provisions which appeared of this Act, the following works, if they are original, shall be eligible for copyright “sound recordings”.

Even though the meaning of the word “record” and the collocation “sound recording” are defined and consequently strictly distinguished under the terms of the copyright acts of Australia and South Africa, the word “record” might have different meanings in different linguistic contests. For instance, according Cambridge Advanced Learner’s Dictionary the word “record” denotes “to keep (information) for the future, by writing it down or storing it on a computer” or “a record is a piece of information or description of an event which is written on paper or stored on a computer”. Contrasting the word “recording” according Cambridge Advanced Learner’s Dictionary denotes “a record, disc or tape on which you can hear speech or music or watch moving pictures” or “the process or business of putting sounds, especially music, onto records or magnetic tapes use electronic equipment”.

The legislation of the United States of America, however also uses the collocation “sound recording” (see, for example, Title 17 of the United States Code ch. 11 (Sound recordings and Music Videos) or section 1101 (Unauthorized fixation and trafficking in sound recordings and music videos). However, the collocation “sound recording” is not used in the text of any provision. Instead of the word “record” the words “fix” or “fixation” are utilized there. For example: Anyone who ... fixes the sound .../... an unauthorized fixation/... regardless of whether the fixation occurred in the United States. Last but not least the term “phonorecord” is employed there.

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3 Definition of “record” substituted by sect. 50 (g) of Act No. 38 of 1997.
4 Definition of “sound recording” substituted by s. 1 (v) of Act No. 125 of 1992 and by s. 50 (h) of Act No. 38 of 1997.
Chapter 17 of the US Code (Copyright) defines a *phonorecord* in section 101: *Phonorecords are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.*

According to other definition: *Phonorecord is a physical object that contains a permanent record of a sound.*

It follows that the distinction between the carrier and the recorded content (or information) in the context of this legislation can be expressed also by the collocation “phonorecords of sound recordings.” However, according to the USC Title 17, Chapter 1, section 102 (a) objects of copyright are “sound recordings” and not “phonorecords.”

According to a statement of the United States Copyright Office in Circular 56 - Copyright registration for Sound Recording (page 1) “Sound recordings are defined in the law as „works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work.”...Copyright in a sound recording protects the particular series of sounds that are “fixed” or embodied in a recording... Generally, copyright protection extends to two elements in a sound recording: (1) the contribution of the performer(s) whose performance is captured and (2) the contribution of the person or persons responsible for capturing and processing the sounds to make the final recording. A sound recording is not the same as a phonorecord. A phonorecord is the physical object in which works of authorship are embodied. Throughout this circular, the word „phonorecord“ includes CDs, casette tapes, LPs, and other vinyl discs, as well as other formats.”

Finally, in U.S. legal terminology the word “phonogram” is also used. For example, it is used under Title I of the Digital Millennium Copyright Act. Interesting is that this Act amended U.S. copyright law to comply with the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, which is mentioned below.

In contrary to English speaking countries where prevails usage of the collocation “sound recording” in their legislations (with the expection of diversity of therms “sound recording”, “sound fixation” and “phonorecord” in the U.S. legislation), international agreements such as TRIPS (Agreement on trade-related aspects of intellectual property rights) or WPPT (WIPO Performances and Phonograms Treaty) use the term “phonogram”. Whereas TRIPS presents the term “phonograms” as a synonym of the collocation “sound recordings” WPPT uses the term “phonograms” exclusively and without any definition. The word

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6 See for instance Article 14: Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations.
“phonograms” is used there in two conjunction: Firstly, with the word “original” (original of phonogram) and secondly with the word “copy” (copies of phonogram). The word “original” is always in singular form, from which it is clear that the original is always just one and conversely copies can be multiple objects. However, only copies are to be considered “phonograms” - see, for example art. 12 para. 1 of WPPT: Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their phonograms. xxx a difference as compared with the strict division of the terms “copies” and “phonorecords” under U.S. Code, where both terms are referred to in the plural and are always separated by the conjunction “or”.

As far as use of of the word “phonogram” is concerned I must also point out that interpretative dictionaries define the term “phonogram” not as a synonym of the collocation “sound recording” in general, but merely like any written symbol standing for a sound or syllable, morpheme, word. Also, on the Internet no sites have (been?) found conjunctions between the word “phonogram” and the collocation “sound recordings” even though a comprehensive explanation of the meaning, involving the history of the origin of the word “phonogram”, has been provided.

The term “phonogram” in the first half of the twentieth century may have been synonymous with the collocation “sound recording”, because phonograms as carriers of sounds, developed to be reproduced by phonographs, were for some the only manner of sound recordings, it means recording of such sounds which existed in the past in a certain time and space. However, because of the evolution of other technical ways of audio recording as well as other kinds of media (carriers of recorded information), the designation “phonogram” has become a narrower concept, which in recent time cannot be accepted unreservedly as a synonym of the collocation “sound recording”. One might argue that the word “phonogram” can be understand in the strict sense as a kind of carrier of information which can be reproduced by a phonograph as well as in a broad

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7 According 17 USC article 101 "copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed. It means "copies" are material objects from which a work can be read or visually perceived either directly or with the aid of a machine or device, such as books, manuscripts, sheet music, film, videotape, or microfilm. “Phonorecords” are material objects embodying fixations of sounds (excluding, by statutory definition, motion picture soundtracks), such as cassette tapes, CDs, or LPs. Thus, for example, a song (the "work") can be fixed in sheet music ("copies") or in phonograph discs ("phonorecords"), or both. (see http://www.loc.gov/copyright/circs/circ01.pdf)

8 See for instance http://www.wisegeek.com/what-is-a-phonogram.htm: The word phonogram literally means sound-write: it is a sound that has its own written symbol. It is a term that was coined in the mid 1800s by Isaac Pitman, a shorthand expert and teacher. The word itself most likely is based on the then-popular word telegram. Since that time, it has become an important tool for teaching and learning to read.
sense as the equivalent of the collocation “sound recording”. Nevertheless, I consider use of the term “phonogram” in the broad sense of sound recording to be an archaism which makes the boundaries of the term’s meaning ambiguous and therefore use of the term “phonogram” should be considered counterproductive in current normative texts. Last but not least, use of the term “phonogram” could lead to a semantic shift because of the different scope of denomination, xxx the ambivalence of the broad and narrow senses of the word.

Sound recordings as a protected objects according to Slovak and Czech legislation

Slovak athorship law (Slovak Copyright Act) defines the collocation “sound recording” under section 5 para 25 as following:

Zvukový záznam je len záznam znímateľný sluchom bez ohľadu na to, akým spôsobom a na akom nosiči sa tieto zvuky zaznamenávajú; záznam zvuku, ktorý je obsiahnutý v zázname audiovizuálneho diela, sa za zvukový záznam nepovažuje.

Phonogram is a fixation of sounds, which are perceivable by hearing, regardless of the manner of recording and the medium at which these sounds are recorded; the phonogram contained in the audiovisual recording shall not be deemed to be a phonogram.

Although this definition is formulated positively as well as negatively, the most important point is that “sound recording” under this definition cannot be considered solely as sounds but rather as a unity of recorded information and the carrier of this information. Perhaps the Slovak lawmaker considered the verbal link “sound recording” self-evident and therefore did not consider xxx it should be more closely circumscribed or specified.

The Czech definition in section 75 para. 1 of the Czech authorship law (Czech Copyright Act) is different in some details:

A phonogram is exclusively by hearing perceivable fixation of the sounds of the performer's performance or of other sounds, or the expression thereof.

Zvukový záznam je výlučně sluchem vnímatelný záznam zvuků výkonu výkoného umělce či jiných zvuků, nebo jejich vyjádření.

It is noticeable that “sound recording” is delimited alternatively, either as:

a) sound record of a performance of a performer)

or

b) a record of other sounds

I have no fundamental objections against this dual determination. However, it is worth of discretion whether it would not be better to edit out the part concerning the sounds of the performer’s performance and in the interest of purer
legislative to define sound recording as a record of any sounds, under which it is possible to subsume:

a) the sounds, which have arisen as a result of natural processes,\(^9\) as well as
b) the sounds of the animals and last but not least
c) also such sounds that have arisen as a result of human activities.

Regarding that what is mentioned above it can be also considered whether for sound recordings in the legal sense should be counted also records of such sounds, whose frequencies are outside the range of sensitivity of human hearing.\(^10\) It is clear that from the physical point of view also these records of sounds are sound recordings because outside the frequencies hearable to human ears there are also ultra-sounds and infra-sounds, which existence is demonstrable by technical means. Moreover, certain spectrum of ultra-sounds or infra-sounds can be perceived by (perceivable for) some animals.\(^11\) On the other hand, it cannot be excluded that the Czech as well as Slovak authorship law operates with certain conditions of quality which are related to the expression of the object of protection. However, the context in which these conditions are referred to is different when we compare the Slovak and the Czech authorship law.

According Slovak copyright law “work is expressed in any objectively perceivable form”.\(^12\) This provision under sect. 15 para. 1) of the Slovak copyright law can be applied, mutatis mutandis, also to the performer and his artistic performance (see section 71 para. 1) of the same law, as well as the producer of the phonogram (see section 71 para. 2 of the same law. Logically, it can be concluded that sensual perception must be interpreted restrictively. It means the legislator had in mind the senses of an ordinary man. Therefore a recorded audio expression in the field of ultra-sound, although it could be a performance of a performer, respectively it is recorded, would not be eligible object of legal protection.

Czech authorship law, in connection with beginning of the protection of copyright work, requires under section 9 para. 1 that work must be “expressed in any objectively perceivable form”\(^13\) In the English translation (available on

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\(^9\) Sounds of seismic activity for instance.

\(^10\) The human ear can respond to minute pressure variations in the air if they are in the audible frequency range, roughly 20 Hz - 20 kHz.

\(^11\) For example highfrequency sounds of dog pipes is not hearable by human ear, however for dogs it is hearable and usually serves as a training signal.

\(^12\) See Slovak authorship law sect. 15 para 1. This provision relates also to performers and their performances (see sect. 71 para 1 of the same law) as well as to makers of sound recordings (see sect. 71 para. 2 of the same law)

\(^13\) Here might be considered what the Czech legislator had in mind under the word link "objectively perceivable": On the one hand this verbal link can be interpreted in conformity with the Slovak regulation, under the word “perception” to understand sensory perception and under the word “objective” from this point of view it should mean potentialities of an ordinary man’s perception. However on the other hand I reckon that other manner of interpretation of the Czech provision which is in question does not exclude that the legal protection can uprise even on the basis of technical documentation of a work’s existence, it means that human perception...
the WIPO web site) it is the same as in the Slovak authorship law but when we compare these in original languages there is a difference.\textsuperscript{14} According Czech authorship law, section 78 producers of phonograms and its phonograms are not involved under section 9 para. 1,\textsuperscript{15} what is different when it is compared with Slovak authorship law. By the way, it seems to be logical in the context of section 75 para. 1 of Czech authorship law where it is stated that a sound recording is just such record which can be perceived exclusively by hearing.\textsuperscript{16} I reckon that also in this case should be applied the restrictive definition of the concept of “hearing” what is boundared by ability of auditory sensation of normal humans and spreading such ability also to hearing of animals must be excluded.

As far as sound records from the range of entertainment industry are concerned, generally, those objects are not touched by theoretical considerations on the protection of the ultra-sonic (as well as infra-sonic) records mentioned above.\textsuperscript{17} However, if sound records are made in the framework of scientific research the presence or absence of sensory perceiving sound recording may be crucial, because according to Slovak legal regulation as well as in the case of restrictive interpretation of Czech legal regulation ultra-sonic or infra-sonic records should not be covered by legal protection on the ground that reproduction of such records is out the range of percievability by human hearing.

\textsuperscript{14} Expressed In Czech it is: “vyjadrenie v akejkoľvek objektívne vnímateľnej forme”, and expressed in Slovak it is “vyjadrenie v zmyslami vnímateľnej forme”.

\textsuperscript{15} All provisions of section 9 are according sect. 74 applicable to performers. But as far as makers of sound recordings are concerned there are applicable only para. 2 and 4 of sect. 9 of Slovak authorship law.

\textsuperscript{16} Expressed in Czech: zvukový záznam je výlučně sluchem vnímatelný záznam...

\textsuperscript{17} The problem could be only so called subliminal information.
As far as the definition of the phonogram according sect. 75 para. 1 of Czech authorship law is concerned there instead of dual signs, which determine phonograms as “recording of sounds of a performance of a performer or other sounds”, can be still found other pair of signs which determine phonograms as:

a) recording of sounds,

or

b) expression of these sounds.

For comparison, I can quote Czech authorship law sect. 75 para. 1 again:

*A phonogram is exclusively by hearing perceivable fixation of the sounds of the performer’s performance or of other sounds, or the expression thereof:*

Zvukový záznam je výlučně sluchem vnímatelný záznam zvuků výkonu výkonného umělce či jiných zvuků, *nebo jejich vyjádření.*

I consider the collocation “expression of these sounds” is redundant and consequently unreasonable for the following reasons:

On the basis of lingual interpretation it is not possible to decide whether the word “expressed” means technically non specified alternative to the word “recorded”, or it should be understood as a reproduction of a record. If the word “expression” is not understand as a synonym of the word “record” therefore the word “expression” must be distinguished from the collocation “sound record” in current meaning as record of sounds which is stored on a media and ready to be reproduced by an appropriate technical device. Therefore following meanings of the collocation “expression of sounds” could be considered:

1) Recording of sound organisation by means of traditional musical notation. It is any system that represents aurally perceived music, through the use of written symbols, but it was different in various countries. Modern music notation originated in European classical music and is now used by musicians of many different genres throughout the world. Now a days use an appropriate computer programme it is possible to transform every musical notation into sound performance, but considering musical notation for sound recording can be in my opinion far off.

2) Graphical notation is the representation of music through the use of visual symbols outside the realm of traditional music notation. Graphic notation evolved in the 1950s, and it is often used in combination with traditional music notation. Composers often rely on graphic notation in experimental music, where standard musical notation can be ineffective. Graphical notation is not

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18 I have on my mind a sound recording stored on some carrier of information which is every time reproducible when appropriate technical device is used.
as standardized as traditional musical notation. Graphical notation is usually only an indicative plan of the sound organization in the time (and sometimes also in the space), therefore automatic transformation into a sound production (which can be perceived by human hearing) would occur only in the case if for each such a graphic notation would exist special computer program able to read and interpret a particular set of used signs. It can not be excluded also alternative approach of the compositor which is based on the exploitation of signs which are already adopted to an existing visual programming language. Exploitation of such programming languages as, for instance, Pure Data (PD) which was developed in the 1990s for creating interactive computer music and multimedia works enables live collaboration across networks or the Internet, allowing musicians connected via local aria networks or even in disparate parts of the globe to create music together in real time. Modular, reusable units of code written natively in PD, called “patches” or “abstractions”, are used as standalone programs and freely shared among the PD user community, and no other programming skill is required to use PD effectively. One of the key innovations in PD over its predecessors has been the introduction of graphical data structures, which can be used in a large variety of ways, from composing musical scores, sequencing events, to creating visuals to accompany PD patches or even extending PD’s graphical user interface.\footnote{In computing, a graphical user interface (GUI, commonly pronounced gooey\cite{1}) is a type of user interface that allows users to interact with electronic devices using images rather than text commands.}

\textbf{The picture shows Pure Data with many patches open}

\textbf{The picture shows Hans-Christoph Steiner’s score for \textit{Solitude}, created by Pure Data’s data structures.}
3) It might be that Czech lawmaker has understood under the word line “another expression of sounds” a mechanical device producing music. As an example can serve a player piano (also known as pianola or autopiano). It is a self-playing piano, containing a pneumatic or electro-mechanical mechanism that operates the piano action via pre-programmed music perforated paper, or in rare instances, metallic rolls. The rise of the player piano grew with the rise of the mass-produced piano for the home in the late 19th and early 20th century. \(^{21}\) Other example of automatic musical instrument could be musical boxes. \(^{22}\) A music box is a 19th/20th century automatic musical instrument that produces sounds by the use of a set of pins placed on a revolving cylinder or disc so as to pluck the tuned teeth (or lamellae) of a steel comb. The cylinders were normally made of metal and powered by a spring. In some of the models, the cylinders could be removed to change melodies. The cylinder is the programming object, a metallic version of a punched card which, instead of having holes to express a program, is studded with tiny pins at the correct spacing to produce music by displacing the teeth of the comb at the correct time. The tines of the comb ‘ring’, or sound, as they slip off the pins. The disc in a disc music box plays this function, with pins perpendicular to the plane surface.” \(^{23}\) I reckon that in the case of automatic musical instruments we can talk about sound record even though the record is not kept on a separate device but it is integrated into the technical equipment used for a reproduction of sounds.

As a special kind of mechanical devices also musical roads should be mentioned. “A musical road is a road (or part of a road) which when driven over causes a tactile vibration and audible rumbling transmitted through the wheels into the car body in the form of a musical tune. Musical roads are known to exist in four countries: Denmark, Japan, South Korea, and the United States of America. The first known musical road, the Asphaltophone, was created in October 1995 in Gylling, Østjylland, Denmark, by Steen Krarup Jensen and Jakob Freud-Magnus, two Danish artists. The Asphaltophone is made from a series of raised pavement markers, similar to Botts’ dots, spaced out at intermittent intervals so that as a vehicle drives over the markers, the vibrations caused by the wheels can be heard inside the car. In Japan, Shizuo Shinoda accidentally scraped some markings into a road with a bulldozer and drove over them, and realised that it was possible to create tunes depending on the depth and spacing of the grooves.” \(^{24}\) In this case it was not created intentionally therefore it is questionable whether in this case is possible to talk about a record of music. \(^{25}\) 2007, the Hokkaido National Industrial Research Institute refined Shinoda’s designs to create the Melody Road. They used the same concept of cutting grooves into the concrete at specific intervals and found that the closer the grooves are, the higher the pitch of the sound; while


\(^{22}\) Musical boxes must be distinguished from jukeboxes.


grooves that are spaced further apart create lower pitched sounds. The Singing Road can be also found close to Anyang, Gyeonggi, South Korea, and was created using grooves cut into the ground, similar to the Japanese Melody Roads. Unlike the Japanese roads, however, which were designed to attract tourists, the Singing Road is intended to help motorists stay alert and awake – 68% of traffic accidents in South Korea are due to inattentive, sleeping or speeding drivers. The tune played is “Mary Had a Little Lamb”. The Civic Musical Road was built on Avenue K in Lancaster, California, United States, on 5 September 2008. Covering a quarter-mile stretch of road between 60th Street West and 70th Street West, the Musical Road used grooves cut into the asphalt to replicate part of the Finale of the William Tell Overture from Rossini. The rhythm is recognizable, but the pitches are so far off that the melody bears only a slight resemblance to the William Tell Overture. The intonation is not affected by the design of the car or the travel speed. It is likely the designers made a systematic miscalculation which affected all the groove spacings.”

4) Under the word line “other expression of sounds” can be also understood a sound realisation. The word “realisation” in this case should denote the transformation of sounds existing in the latent, time-less and space-less form to the form perceivable by human senses in a certain space and time. In other words, with a different expression of sounds can be understood either reproduction of a sound recording or a lively performance. Here it should be noted that the content of the record is something else as a carrier of information. The carrier is tangible, and its functionality is limited to whether intentional or accidental destruction, or destruction of material as a result of aging. It is logical that a sound realisation of a record (whether digital recorded on CD, analog record on the tape or on classical sheet music) can not be regarded as a sound record. For these reasons, the reproduction of a sound record as a form of use of a sound record can not be confused with the existence of a sound recording as the content which is recorded on a carrier of information and hence the collocation “other expression of sounds “can not be interpreted as a transformation of a sound record in the form perceivable by human hearing.

25 There are three permanently paved 250 m stretches of Melody Roads, one in Hokkaido, another in Wakayama where a car can produce the Japanese ballad “Miagete goran yoru no hoshi wo” by Kyu Sakamoto, and a third in Gunma, which consists of 2,559 grooves cut into a 175 m stretch of existing roadway and produces the tune of “Memories of Summer”. The roads work by creating sequences of variable width groove intervals to create specific low and high frequency vibrations. The pavements were designed so that the songs were heard right only when a car drove at a certain speed, encouraging drivers to observe speed limits.

2 Conclusion

From the above it is clear that the space of meaning of the collocation ”sound recording” need not to be so obvious as it seems to be at a first impression based on imagination or experience of ordinary CD’s users. The definition of a sound recording should take into account the different types of “sound recordings” including types technically obsolete as well as forms that may appear in the future. A satisfactory definition can largely eliminate vagueness of defined object. Use of general terms in law is a necessity, because only in this way casuistry can be restrained. Something else, however, is the “uncertainty of a term” which cannot be confused with “generality”. Vague legal concepts might be rooted in a dilatory compromise which is a solution of the extensive diversity of meaning of the denoted content resulting also from the advancement of technical development. “However, uncertain legal terms disrupt the common legal certainty, because from the very text cannot be apparent for an addressee the content and the scope of such a vague term.”

Czech authorship law defines sound recording via two signs: 1) fixation of the sounds or 2) the expression thereof. Use of the word “expression” causes an extensive hypertrophy of uncertainty and consequently the interpretation of a such concept may be very wide what results in the ambiguity in what can be regarded as a sound recording. Last but not least the broad uncertainty of legal terms is contraproductive also in the case of translation because it could redound to the shift of meaning.

28 sect.75 para. 1
SELECTED JUDGMENTS OF CONSTITUTIONAL COURT OF SLOVAK REPUBLIC REGARDING THE PRELIMINARY RULING PROCEDURE

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Abstract: This article deals with the question of the obligation to refer a preliminary reference to the Court of Justice and when the national courts breach its obligation to refer. In case when the national court breach its obligation to refer the issue of violation of the constitutional right of individual arises. The article provides insight in terms of constitutional law on the fundamental right with connection to the violation of the obligation of national court to refer.

Keywords: Preliminary ruling procedure, Court of Justice, national courts, obligatory preliminary question, non-referral to the CJEU, constitutional consequences of non-referral, Slovak practice.

1 Introduction

The general role of the preliminary ruling is to ensure uniform application of the European Union law in all Member States and guarantee that the law of the European Union will be applied in same terms in any Member State.

In a case where the national judge needs assistance in European Law interpretation he or she should file a preliminary reference to the Court of Justice where he or she will seek for answers on questions important for the final judgment. “If the national court does not submit the preliminary ruling in case where it is necessary for establishing a legal framework for the final judgment, acts in contrary with its constitutional duty, that guarantees a right for fair protection of rights and legitimate interests of participants as it is covered by § 1 Slovak Civil Procedure Code…”

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There is a new intriguing frontier for judicial dialogue: the potential beginning of an era of cooperation between the European Court of Justice and some constitutional courts. Recently, the Belgian, Austrian, Lithuanian, and lastly Italian Constitutional Courts accepted to raise the preliminary reference to the ECJ. Constitutional Courts are progressively accepting the cooperative mechanism set up by art. 234 of the European Community Treaty. 3

Constitutional rights related to submitting preliminary references to the Court of justice will be presented through judgments of the Constitutional court of Slovak republic. As the first decision we would like to mention judgment of the Constitution court of Slovak republic that considers the right for judicial protection 4 in accordance with art. 46 (1) of the Constitution of Slovak republic. 5

According to the Constitutional court: „...it is in the content of fundamental right for the judicial protection belongs also the right to decide a case according legal act that is based in the valid legal order of Slovak republic or in such international agreements ratified by Slovak republic and published according to law. At the same time everyone has the right for a constitutional interpretation of legal act applied within his case. This implies that real guarantee of judicial protection is only provided if the facts are considered using constitutionally interpreted valid and effective legal act.”

2 II. ÚS 90/05

The Slovak constitutional court was already confronted in 2005 with the topic of breaching the obligation to refer by general court. 6 The participants filed a complaint claiming the right to judicial protection, according to art. 46 (1) of Constitution of Slovak republic and the right to fair trial by independent and impartial court in accordance with art. 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, that were breached by the Regional court in Bratislava as a first instance court and also by the Supreme Court as an appeal court. These courts did not refer a preliminary reference to the Court of Justice during the procedure, and so did not ask for the interpretation of the European Union law, so according to the opinion of the complainant they did not decide according to a relevant legal act. The Constitutional court refused this complaint because of the lack of jurisdiction, but stated that, breaching the duty to refer should be considered as a reason for an extraordinary appeal

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5 Article 46 (1) of the Constitution of Slovak republic: „Everyone may claim by the established legal procedure his right to an independent and impartial court hearing and, in cases designated by law, to another body of the Slovak Republic.”
6 Resolution of Constitutional Court of Slovak republic No. II. ÚS 90/05 from 30. March 2005, not published
in accordance with the § 237 Slovak Civil Procedure Code. The Constitutional court stated: “In this case the judicial protection according to art. 46 (1) of the Slovak Constitution and art. 6 of the Convention is provided by the general courts using available legal remedies, that at the same time can be considered as effective legal remedies against the alleged violation of their mentioned fundamental right. The Constitutional court found out that the complainant did not file an extraordinary appeal against the appeal court decision. “The subject matter of the case was the violation of the right to judicial protection for the reason, that the court did not apply and interpret the European Union law and did not use the possibility to refer a preliminary ruling to the Court of Justice according to art. 267 TFEU. Although the decision of the Constitutional court stated, that the complainant did not expressly mention the article 48 (1) of the Slovak constitution about the right to a law-assigned judge, argued in the reasoning of the complaint by the fact that the regional court and subsequently the Supreme Court did not use the discretion to submit a preliminary reference the Court of Justice for interpretation under art. 267 TFEU. Constitutional court had in this case the opportunity to give his opinion on the issue, if not referring to the Court of Justice under the terms of art. 267 TFEU and the related case law of the Court of Justice can under certain circumstances give a conclusion about non-lawful judge and also the conclusion about not-properly court deciding. The constitutional court did not answer these questions in this case; he firstly dealt with this issue in his judgment No. IV. ÚS 206/08.

3 IV. ÚS 206/08

The question of discretion or obligation to refer the preliminary reference to the Court of Justice by himself (i.e. Constitutional Court) has settled the Constitutional court in his judgment so that he admitted the obligation to submit a preliminary reference to the Court of Justice as follows:”... may in the exercise of its power get into a situation, where the duty to refer will be applicable also on him.”

In above mentioned judgment, the Constitutional court addressed the question whether in a particular case a party may rely on it’s constitutionally protected right to refer a preliminary reference by national court according to art.267 TFEU. “If such a court, as a last instance court, fails to refer a preliminary reference to the Court of Justice, opens the issue of the constitutionality of the procedure with regard to art. 46 (1) (4) and art. 48 (1) of Slovak Constitution. It should be noted also the duty in accordance to § 1 with connection to § 109 (1) c) Slovak Civil Procedure Code to ensure equitable protection of rights and legitimate interests of the parties.”

7 resolution of Constitutional court No IV. ÚS 206/08 from 10. March 2008, not published
8 art. 48 (1): No one must be removed from the jurisdiction of his law-assigned judge. The jurisdiction of the court is established by law.
Constitutional court at the same time held with regard to the court of last instance in Slovak republic: “Examination has to be done with respect to particular dispute or legal case, whether the court against whose decision there is no allowed judicial remedy, respecting Slovak Civil Procedure Code, its system of judicial remedies and also the jurisprudence of Supreme Court of Slovak republic dealing with the judicial remedies including extraordinary appeal. This implies that according to valid Slovak legal order the court of last instance is the Supreme Court or Constitutional court.” Some authors did not agree with this interpretation of the meaning of last instance court. “On the contrary, the court of last instance that according to the circumstances specified in the art. 234 TEC (now art. 267 TFEU) and relevant case law has an obligation to submit a preliminary reference to the Court of Justice, can be also the district court or regional court according to legal conditions of Slovak republic, in cases when there is no judicial remedy allowed: for example cases of inadmissibility of appeal according to § 202 Civil Procedure Code or cases of inadmissibility of extraordinary appeal according to § 236 to 239 Civil Procedure Code.”

The Constitutional court also raised the issue of extraordinary appeal because of law-assigned judge and inappropriately seated court in the proceeding where the court has the obligation to refer the preliminary reference to the Court of Justice. The Constitutional court while deciding about this issue refers to the jurisprudence of German constitutional court that already recognized the Court of Justice as a law-assigned judge. Consequently the Constitutional court concluded “if the judge of Court of Justice did not contribute in the interpretation of European Union law in the dispute before the national court, although this interpretation was essential to decide the case, than the national court was in this part of proceeding inappropriately seated court. This states also the complainant in the complaint when saying that the judgment was not issued by law-assigned judge. … Beyond the abovementioned the Constitutional court states that to support the conclusions of this decision it is important to have in mind the role of Supreme Court in unification of general courts jurisprudence, which lies in the further guidance where they should ask the Court of Justice to decide about the preliminary reference.”

The indicated above shows opinion of the Constitutional Court on the question of law-assigned judge. “It is important that, in this decision the Constitutional Court remained on that, that in a subsystem of the judiciary is to fulfill the duty (and possibility) to submit the preliminary reference primarily responsible

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the Supreme Court of the Slovak republic, which has such an obligation by law."\textsuperscript{11} The law, from which the obligation arises, is the Statute on Courts, while the obligation should also apply to fulfill the duty to refer the preliminary reference according to art. 267 TFEU.

It should be noted that the amendment of Civil Procedure Code, effective from 15. October 2008 extended the enumeration of resolution, which cannot be appealed (§ 202 (3)). Here belong also the resolution by which was rejected the motion for interruption of the proceeding according to § 109 (2) c). Unlike the legal framework valid in the time of this decision of Constitutional Court, the participant does not have the opportunity to appeal against such a decision. This amendment is fully reflecting the judgment of Court of Justice in the case Cartesio\textsuperscript{12}.

It is necessary to mention to the question of law-assigned judge that in case if there is an obligation to submit a preliminary reference, the law-assigned judge is the Court of Justice. “The fact that the Court of Justice is the law-assigned judge is possible to derive from art. 220, 267 and 292 TEC.\textsuperscript{13} By interpretations of these articles we will reach the conclusion, that the definite and authoritative interpretation of European Union law belongs solely to the Court of Justice.”\textsuperscript{14}

\textbf{4 PL. ÚS 3/09}

In another decision\textsuperscript{15} the Slovak Constitutional Court developed and confirmed the previous idea of the existence of the duty to refer to the Court of Justice by following words: “In principle another situation would arise if the claimant according to art. 130 (1) of Slovak Constitution (other than general court) in proceeding on compliance of legal acts according to art. 125 (1) of the Constitution objected only the non-compliance of national legislation or its part with international treaty according to art. 7 (2) Slovak Constitution, e.g. TFEU. In such a case, which is not under consideration in this proceeding, is obliged to (and this is the difference with proceeding in this case) to examine the claimed inconsistency and decide about it, whether under existing case law of the Court of Justice, respectively according to the principles expressed in the judgment of this court or after referring the preliminary reference to Court of Justice.”

\begin{footnotes}
\item[12] Judgment of the Court of Justice C-210/06 Cartesio Oktató és Szolgáltató bt (2008) ECR I-9641
\item[13] art. 220 was canceled and art. 234 ZES is now art. 267 ZFEU and art. 292 ZES is art. 344 ZFEU.
\end{footnotes}
In its later activity Slovak Constitutional Court dealt with the relation of the constitutional right of a party to judicial protection and not commencing a preliminary ruling procedure. Within its resolution from 2012 the court summarized its recent decisions related to issues of preliminary ruling in the following way: “Not referring a preliminary reference to the Court of Justice, that could be against the European Union Law, in any case does not necessary mean a violation of the fundamental right to judicial protection according to art. 46 (1) of Slovak Constitution (II. ÚS 129/2010). The Constitutional Court is not an additional appeal instance in a matter of referring or not a preliminary reference (see also articles 19 and 20 of the resolution of German Constitutional Court BVerfG 2 BvR 2419/06 from 6th May 2008) and nor in a matter of inappropriate European Union Law application. Also according to the European Court for Human Rights a decision of a general court that adequately reasons not referring to the Court of Justice does not mean a violation of art. 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Judgment Ullens de Schooten v. Belgium from 20th September 2011, complaints No. 3989/07 and No. 38353/07).” With regards to the mentioned only a fundamental and qualified misconduct in deciding on referring a preliminary reference or not that lies in either arbitrary or obviously wrongful omitting a preliminary reference to the Court of Justice in a case where the court itself was doubtful about the interpretation of the European Union Law and did not refer a preliminary reference would mean a violation of the fundamental right to judicial protection or fair trial as in this way the jurisdiction of the Court of Justice would be arbitrary repudiated.

The complainant asked the Supreme Court of Slovak republic as an appeal court in the administrative proceeding for interruption of the proceeding and for referring the preliminary reference to the Court of Justice. The Constitutional court rejected the complaint for the reason of obvious unjustified because, there was no casual link between the alleged procedure of the Supreme court and the alleged violation of fundamental right, The basic argument was based on the judgment of the Court of Justice Ynos in which the Court of Justice held that it had no jurisdiction to give a preliminary ruling and thus to interpret the European Union law, where the fact of the case pending before the national court prior to the accession to the European Union. While in the Hungarian case factual and legal circumstances where completed prior to Hungary’s accession to the

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16 resolution of the Constitutional Court of Slovak republic No.: IV. ÚS 270/2012 from 31. May 2012, not published
European Union, in our case factual and legal circumstances continued also after the accession of the Slovakia to the European Union. It cannot be unambiguously stated, that the Court of Justice would also in this case held that it lacked jurisdiction to give a preliminary ruling. The constitutional court criticized and rejected the case law about the admissibility of extraordinary appeal in administrative proceeding.

7 IV. ÚS 108/2010

This case is connected with the chain of similar cases initiated by Lesoochranárske zoskupenie VLK. It is important to mention that the Supreme court submitted a preliminary reference in one out of more similar cases proceeded in this court. In one case the Supreme Court referred to the Court of Justice and in the other not. The complainant filed four content wise identical complaints which were connected into one proceeding based on argumentation, that the Supreme Court violated its fundamental right according to art. 46 (1) of the Constitution and according to art. 6 (1) of the Convention, based on the different decision-making praxis of Supreme Court on the obligation to refer a preliminary reference to the Court of Justice according to art. 267 TFEU as in other cases. Similarity of the cases held before the Supreme court in administrative procedure was in the issue of legal status of the complainant, whose subject was deciding about exception to the terms of protection of animals, respectively an exception and consent for application of chemicals in protected area.

In the relation the Constitutional court referred to its previous case-law about the usage of the discretion to refer the preliminary reference to the Court of Justice, at the same time pointed to an important circumstance, that differentiated the complaints within this proceeding from the prior proceeding held before the Constitutional court, were the parties itself were demanding to refer to the Court of Justice by the general court, where in this case differentiated approach of Supreme court related to the proceeding of procedure in referring preliminary reference or not in substantially and legally identical cases was objected, where the complaint itself did not demand to refer a preliminary reference. According to the opinion of the Constitutional court this fact did not waived the Supreme court of obligation to refer a preliminary reference to the Court of Justice if other relevant conditions were met like the generally accepted principle iura novit curia.

The Constitutional court also focused on the examining the facts, whether the national court was obliged to submit a preliminary reference to the Court of Justice and if the interpretation of European Union law done by the Court of Justice according to the submitted preliminary reference would be relevant for the decision in the case itself. Whereas it was a decision of the Supreme court within administrative proceeding, where it decides according as an appeal court, examining the decision of the regional court (first instance), that decided about
the action on review the legality of administrative decision. According to the Constitutional court it was a general court against which decision there is no legal remedy allowed, which means this is a general court that has to refer to the Court of Justice. The Constitutional court based this on it’s the settled case-law that there is no extraordinary appeal possible within the administrative proceeding. There would be no obligation for the Supreme court to refer in such a case when the question is irrelevant for establishing the legal basis for the decision in the case or acte clair or acte éclaire would be applied.

The Constitutional court reached a conclusion about violation of fundamental right according to art. 46 (1) Constitution and art. 6 (1) Convention that was breached because of following facts:

- The Supreme court had the obligation to refer to Court of Justice and in the cases covered by the complaints and did not,
- whereas not fulfilling this obligation had significant effect on the decision in the case because by not submitting the preliminary reference to the Court of Justice the Supreme court limited the complainant right to include an interpreted European Union law by the Court of Justice as legal basis for final decision of the cases.

Based on this fact the Constitutional court abolished the previous judgments and returned the case for a new trial to be in accordance with the interpretation of the European Union law provided by the Court of Justice in its decision C 240/09, what is in conformity with the Court of Justice jurisprudence (Blaizot C-24/86 and Kühne a Heitz C-453). According to settled case-law of the Court of Justice is the interpretation binding ex tunc for all national courts of the Member States.

8 II. ÚS 140/2010

The Constitutional court stated that it already examined complaints where the complainant objected violation of the fundamental right for judicial protection guaranteed by art. 46 (1) of the Constitution, respectively the right for lawful judge according to art. 48 (1) of the Constitution, in relation to not refer a preliminary reference to the Court of Justice by general court. The Constitutional court depicted in this case that the complainants as a participant of the hearing where they demanded a preliminary reference. The subject of the complaint in this case before the Constitutional court was differentiated decision-making procedure of the Supreme court related to the procedural proceeding of procedure in refereeing preliminary reference or not in substantially and legally identical cases was objected, where the complaint itself did not demand to refer a preliminary reference.

The Constitutional court noted also that in certain circumstances responsibility of Member state for damages in respect to European Union law may come
into consideration if the national court will not refer to the Court of Justice in a particular case, where it was obliged to do so. According to the case-law of Constitutional court it was necessary that the court concentrates on considering the fact if the national court was obliged to submit a preliminary reference to the Court of Justice and if the interpretation the European Union law done by the Court of Justice according to preliminary reference was necessary for final decision of the case.

The Constitutional court held that the duty to refer to the Court of Justice according to art. 267 TFEU is only valid for a national court that is last instance court in a particular case, this means a court against which decision no judicial remedy is allowed. If such court is a court against which decision there is no judicial remedy allowed does not refer to the Court of Justice, although it had to do so, the issue of constitutionality of its decision in reference to art. 46 (1) (4), art. 48 (1) of the Constitution arises. It is also important to draw attention of national court to act according to § 1 in connection § 109 (1) c) Slovak Civil Procedure Code to secure a fair protection of rights and legitimate interests of the parties.

Respecting its previous case-law about inadmissibility of extraordinary appeal in administrative justice the Constitutional court stated that in the cases that were subject of the complaints where no extraordinary appeals were allowed against the decisions of the Supreme court.

9 II. ÚS 36/02

Appropriate financial satisfaction success in proceedings and the fundamental right not to be deprived of one’s lawful judge.

Substantiation of a claim to appropriate financial satisfaction only by the amount of money applied in a dispute and awarded to the participant does not suffice for acknowledging such a claim by the Constitutional Court of the Slovak Republic. Should a general court reject a participant’s claim in its whole range, this party to proceedings may not successfully claim the infringement of the fundamental right not to be deprived of her/his lawful judge.

10 Conclusion

“The basic message of the Constitutional Court that stays underestimated by the praxis until now is that the competence to examine if the fundamental right guaranteed by the Constitution was violated by not referring a preliminary reference is only there, when all available legal remedies were used and the court considers the extraordinary appeal as one of them.”

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18 Finding of the Constitutional Court of the Slovak Republic Ref. No. II. ÚS 36/02 of 18 September 2002

tutional Court analyzes and partially addresses individual issues and gradually issues opinions on them. We can agree to a statement that a new era begins in perceiving the preliminary ruling procedure in the context of the constitutional law. We all wait until the Constitutional court will refer a preliminary ruling to the Court of Justice.

“The Constitutional court of Slovak republic interprets and applies the condition “in relation to the decision praxis of the court” literally and perhaps blinkered. … Preliminary reference may arise in proceedings without having to have a direct impact on the outcome of the case.”

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20 Drgonec, J.: Ochrana ústavnosti Ústavným súdom Slovenskej republiky, Eurokodex, str. 214
EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION

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Abstract: International commercial arbitration and national commercial arbitration are issues of international private law combined with global and local aspects. The rules of the procedure in international commercial arbitration vary around the world and are combined with the very strong influence of national law and are determinate by the place where the arbitration procedure is being preceded by the arbitrators. Obtaining evidence in commercial arbitration is also dependent on the above-mentioned aspects. The arbitrators have to know, as much as possible, all about the common law system, the civil law system's influence and the powers and initiation possibilities they have during the arbitration procedure. The knowledge of the system and existing procedure rules allow them to produce the most important part of the arbitration, such as a perfect award.

Keywords: International commercial arbitration, obtaining of evidence, practice.

1 International commercial arbitration and the process of evidence

There is no doubt that the evidence is a very important part of international arbitration; regulation of taking evidence and proceeding evidence together with the discovery of evidence are essential parts not only of national arbitration also for international commercial arbitration. Each arbitrator should have knowledge about the law governing the evidence, about rules depending on *lex loci arbitrii* and its background. This is very important on the practical platform, but also for the academic platform, where we have to count with students, teachers and law experts examining and researching the field of international commercial arbitration.

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This article is an introduction into the problems of evidence on international arbitration and was prepared on the occasion of the Pre Moot conference for the Vis Moot of VIAC in Vienna. Thanks to Moot training, we are able not only to focus on practical aspects but also on training law students on the procedure of taking evidence, combined with research, drafting and playing advocacy. This is not only promoting international commercial arbitration, it is also a great practical step for the study of international commercial arbitration. With the help of that practical methodology we are able to prepare future experts of dispute resolution and international commercial arbitration. The concept of the Moot is pretty near to the Praxis of international arbitration. Just like the arbitrators in commercial arbitration, the students too have to research the best arguments for the claimant and for respondent. They have to prepare their arguments in the form of memoranda and combine this with a knowledge of international trade law.

2 International commercial arbitration and evidence

All experts in the field of international commercial arbitration are aware that arbitration has developed as one of the most efficient methods of commercial dispute resolution. The importance of international commercial arbitration is growing, and in the field of commercial law with international aspects, international arbitration comparing national courts is the leading method of dispute resolution. We will put the analysis of the problem concerning alternative dispute resolution and all the methodology used in ADR aside. Neither will the discussion about the relationship between state courts and arbitration be the topic of this study. Evidence in international commercial arbitration has the same history as the arbitration itself. For most experts, it comes as a surprise that international arbitration is more preferred and better known in civil law systems. It is interesting when comparing the origin of ADR.

International commercial arbitration becomes important in the common law system with the United States’ ratification of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Since its ratification in 1970, the number of countries participating coming from the common law system is growing. For the proceeding system of international commercial arbitration this moment was important because of the influence of common law on the rules of international arbitration and evidence in the process. Since the ratification of the United Nations Convention, specific aspects have been enter-

4 http://www.cisg.law.pace.edu/vis.html
5 Goldsmith, J.C., ADR in Business, Kluver law international, 2006, p. 8
ing into international arbitration. For example, pre-hearings and cross examination now have a stronger position in proceedings of international commercial arbitration. The influence of the common law system is also evident in the rules of evidence in arbitration proceedings.  

3 Rules of evidence in arbitration proceedings and at institutional arbitration courts

Rules of evidence are not the same in different countries due to the very nature of their legal systems. The definition of the rules of evidence in international commercial arbitration describes the aggregate of laws that govern the relevance and weight of documentary and oral evidence mentioned by a party, including the preparation and presentation of witnesses, experts, documents and local inspections and results of hearings in order to support a fact in an issue of the legal proceeding.

For international commercial arbitration, it would probably be better to use the term rules. Not only because of the differences in all national law systems, but especially due to the many differences in various international commercial arbitration rules existing in arbitration courts all over the world. And here again arises the problem of the conflict between common law and civil law systems. The problem is combined when the parties come from different legal systems. The arbitrators are obliged to determine the relevance and weight of the evidence. The biggest difference comparing the common law system and the civil law system is in the relevance of written evidence preferred by civil law systems, and oral evidence combined with witness statements in common law systems. This problem is perhaps combined with tradition in civil procedures and proceedings by national courts. Using juries in similar proceedings and counting on the principle of justice in common law systems is bringing these traditional differences from national courts into the arbitration.

The influence of the common law sister on international arbitration is bringing some differences, but there is a strong interest to have balance in the proceeding, especially in international arbitration. So arbitrators are using international rules for international commercial arbitration. We have to differentiate whether the international commercial arbitration ad hoc is in process, or an institutional commercial arbitration preceded by an international arbitration court. In the case of international arbitration

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court, there are rules set up which the arbitrators can follow.\textsuperscript{13} In other cases, so-called ad hoc arbitrators are often using the IBA rules. The International Bar Association rules for taking evidence in commercial arbitration – “IBA rules” – are a good example of internationally prepared rules by a group of experts for international arbitration – especially international commercial arbitration. The rules are prepared to fulfill the expectation of practitioners coming from common law and civil law systems. The rules are related to the rules of evidence and represent a compromise in the practice of evidence. The rules in their construction allow a party to request the opposite party to produce some documents in a restricted number. This is very important in relation to the costs of the case, and also for setting and specifying the category of documents and identification of the document’s importance.\textsuperscript{14}

Following the rules of most international arbitration institutions, we can find a limited number of typical evidence procedures. Typical international arbitration institutions are the International Court of Arbitration of the International Chamber of Commerce – the ICC\textsuperscript{15} – or the rules of the London Court of International Arbitration – LCIA\textsuperscript{16} – and the rules of the American Arbitration Association – AAA\textsuperscript{17}.

Much more detailed than the majority of institutional arbitration rules are the above-mentioned IBA rules. IBA rules describe five basic kinds of evidence in international arbitration. The first position is covered by documentary evidence in Article 3. Article 4 describes witness evidence and Articles 5 and 6 cover expert evidence – appointed by one of the parties or by the arbitrators. Article 8 describes on-site inspection and the five most important parts of evidence following IBA rules, which is the admissibility and assessment of evidence.\textsuperscript{18}

National arbitration and also international arbitration allow the arbitrators not to adopt the rules as such, but to use them as guidelines. Thanks to non-formal aspects of international arbitration, it is possible for the arbitrators to use freedom in the taking of evidence and the flexibility of the proceedings. This aspect, is combined with IBA rules that follow international arbitration practice. They also reflect different legal traditions, the above-mentioned civil law and common law systems. Analyzing evidence in the written and oral phase, the written part is closer to the serial law system and leaves more room for production of documents. The oral part is closer to the common law tradition even if it is divided into parts – in a written part, in the form of written witness statement, followed by an oral examination during the hearing.\textsuperscript{19} This is combined with

\textsuperscript{13} Lowenfeld, A.F., International Litigation and Arbitration, Thomson/West 2005, p. 129
\textsuperscript{14} http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx
\textsuperscript{15} Lowenfeld, A.F., International Litigation and Arbitration, Thomson/West 2005, p. 165
\textsuperscript{16} Lowenfeld, A.F., International Litigation and Arbitration, Thomson/West 2005, p. 189
\textsuperscript{17} Lowenfeld, A.F., International Litigation and Arbitration, Thomson/West 2005, p. 129
\textsuperscript{18} http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx
\textsuperscript{19} Rhoades, R.V., Kolkey, D.M., Chernick, R., Practitioner’s Handbook on International Arbitration
cross examination of the opposite side by the arbitrators. Are there some ques-
tions arising with this procedure? The most important question is how arbitra-
tors assess the probative value of evidence. Simply and practically described, we
have to ask if some evidence has more power or weight than others. Following
both of the above-mentioned systems, civil and common law, there is no perfect
answer to all possible questions. It depends on the budget allotted to each case
and on the quality and style in which the parties have presented the case. It is also
very hard to find the right answer for the question of regulation in the burden of
proof situation. Burden of proof is regulated only in some institutional arbitra-
tion rules and the arbitrators are often taking inspiration from the AAA and the

4 Categories of evidence in international arbitration

4.1 Documentary evidence

Documentary evidence includes the exhibits produced by the parties of the
arbitration combined with their submissions prepared for hearings. Documen-
tary evidence could be in the possession of both parties could be also be ordered
to be produced. Arbitrators in international commercial arbitration are often
ordering production of documents that are in the possession of parties. Follow-
ing the common law system, regarding what each party believes are the relevant
documents, it is an obligation for a party to produce every single relevant docu-
ment in its position to the court. This phase of evidence procedure is executed
after the submissions of the parties, and before the exchange of witness state-
ments and the hearing.

It is clear that documents are the means of evidence in arbitration. In an ideal
case the position of the parties is clearly confirmed by the documents, but few
cases are ideal and the documentary evidence does not always lead to a complete
and final result. In practice, arbitrators have a few relevant documents on which
they can rely. There are often problems with the written form of the documents.
They are sometimes not clear, often in cases when the author of the document
tried to express himself or herself in a foreign language. Not only the knowledge
of foreign languages causes problems. Some documents are irrelevant but pro-
duced in multitudes. From the position of arbitrators, this, combined with the
procedure, add up to the very high cost of international arbitration.

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22 Rhoades, R.V., Kolkey, D.M., Chernick, R., Practitioner's Handbook on International Arbitration
and Mediation, JurisNet, LLC, 2007, p. 165-170
West 2006, p. 316
4.2 Witness testimony

International commercial arbitration understands a witness as any person, including a party representative or employee, whom can be heard. This is a flexible rule and it enables the arbitrators to hear any person with relevant testimony. In the modern procedure of international arbitration, the arbitrators have to take into account the costs of the procedure. So they have established the common practice of asking the parties to submit written witness statements, describing the knowledge of witnesses and their understanding of the relevant circumstances. In the final procedural aspects the subsequent hearing with cross examination and the questions of the arbitrators is very important.

Similar as in the situation of documents evidence, witness testimonies are partly written for efficiency and cost reasons. Often witnesses do not write the witness statements on their own. Papers are prepared by the counsel or by the party. And this may have an impact on the content of the statement. Oral examination is important for the procedure and also for the arbitrators, because it is testing the credibility of the witness’s written testimony.

The arbitrators are very often confronted with orally unconfirmed assessments of written testimony.

4.3 Expert evidence

Expert evidence has an important position in international commercial arbitration. The expert statement is also one of the alternative dispute resolution methods, and the points of view of an expert are often used in international commercial arbitration as a kind of evidence. Expert evidence is related to technical, legal, financial or other expert issues and not only arbitrators have the power to appoint an expert – this possibility also pertains to the parties. It is also possible to appoint not only one expert – two or more experts can be appointed. This possibility is combined with the danger of the high costs of the procedure and arbitrators take care about the relevance of the expert evidence because the arbitrators have to be experts in and of themselves. The situation in the way of appointing experts is complicated because of missing rules in international commercial arbitration, but in the practice the appointment of an expert follows the use of both appointment methods. An agreement between arbitrators of both parties is a good practice because of the will of both parties to appoint their own arbitrator. Also the parties should carefully choose the problems for

which expert evidence is necessary and where it can strength or weaken their statements.\footnote{Varady, T., Barceló, J.J., von Mehren, A.T., International Commercial Arbitration, Thomson/West 2006, p. 504}

Arbitrators are not bound by experts’ conclusions and it is not important whether the expert was appointed by the arbitration tribunal or by the parties. In some cases the experts produce contradictory opinions and the arbitrators have to decide which opinion is more credible. In this situation oral explanations are a help to the arbitrators. Also the position of an expert and his statement in the case could be a problem. Experts are not allowed to act as an adviser or in a position similar to the position of an arbitrator. Experts cannot decide the cases, they only deliver opinions.\footnote{Varady, T., Barceló, J.J., von Mehren, A.T., International Commercial Arbitration, Thomson/West 2006, p.519}

\textbf{4.4 On-site inspection}

International commercial arbitration uses on-site inspection as evidence. This is an inspection of the object of the dispute in the form of an inspection of the works, machinery, and/or relevant documents.\footnote{http://www.wipo.int/amc/en/arbitration/rules/index.html} The arbitrators must carefully analyze whether an inspection of the machinery is necessary and if the machines or components or another object have not changed since the start of the dispute. In cases concerning with some installations it could be useful for the arbitrators to inspect the installation to get a better understanding and more complex view. Both parties of the international commercial arbitration should be present during the inspection, and the arbitrators have to organize the procedure of statements, explanations and documentation in the form of pictures and recordings.\footnote{Varady, T., Barceló, J.J., von Mehren, A.T., International Commercial Arbitration, Thomson/West 2006, p. 568}

\textbf{5 The importance of the evidence}

The arbitrators in the procedure of international commercial arbitration are trying to obtain all possible evidence to find and prove the material facts. The arbitrators play an active role in the exploration of the evidence and testimony and they have to search for the material facts of the case to arrive at an impartial award. Evidence in international arbitration helps to assess each party’s argument and the arbitrators must mind balance and principles of fairness in the process of evidence.

The arbitrators should not only use their power to take and assess the evidence, they should also protect the rights of the parties and proceed carefully for a fair award. Different means of evidence have been mentioned, but it is hard to
decide what kind of evidence is more important. It depends on the case and the variability of the arbitration. Arbitrators have to carefully analyze the different means of evidence which are submitted to them and choose carefully the rules, whether they come from international arbitration courts or institutions or from the International Bar Association.

6 Conclusion

The importance of international commercial arbitration is growing also in Europe, and especially in the field of dispute resolution concerning commercial law with international aspects. International arbitration is, comparing the length of the procedure at national courts, the leading method of dispute resolution. Since the ratification of the United Nations Convention, new specific aspects have been entering into international arbitration. We have to differentiate whether the international commercial arbitration ad hoc is in process, or an institutional commercial arbitration proceeded by an international arbitration court. The International Bar Association rules for taking evidence in commercial arbitration – “IBA rules” – are a good example of internationally prepared rules, however the arbitrators will have the final say in evidentiary procedures, although the new IBA Rules provide a number of helpful clarifications and innovations for the process of taking evidence. There is also a risk combined with such detailed rules as the IBA Rules, using them – flexibility, as the main advantage of arbitration, could be lost in some situations. The underlying importance of gathering of all possible evidence is to find and prove the material fact and we have to keep in mind, that each arbitrator should have knowledge about the law governing the evidence, about rules depending on lex loci arbitrii.
NEW LEGAL REGULATION OF ADMISSIBILITY OF APPELLATIVE REVIEW FROM THE VIEWPOINT OF CERTIORARI INSTITUTE

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Abstract: The article is focused on current legal regulation concerning review of an appeal within the Czech civil procedure law. Changes, adopted by Czech legislator in 2012, brought to this extraordinary remedy new concept and approach. The article compares this approach to a certiorari principle common the US legislation and brings conclusions denying the new Czech and the US legal regulation shall correspond perfectly to each other, even though some experts expressed an opposite opinion.

Keywords: Civil procedure law, Czech Republic, remedies, appeal, a certiorari principle, Czech law, US law.

1 Introduction

At the beginning of this year became effective the amendment to the Code of Civil Procedure (CCP), introduced by Act No. 404/2012 Coll., regarding in particular the legal regulation of appellative review (hereinafter referred to as “appellative amendment”). This legal regulation brings a change in overall concept of this extraordinary remedial means, when after twenty years it abandons...
the admissibility of court decision review by the Supreme Court on the basis of so-called diformity.\textsuperscript{3} The new regulation of access to the highest segment of the system of general courts became a topic for discussion already before the adoption thereof, in particular as regards the impact the Constitutional Court made by its decision, file No. Pl. US 29/11 of February 21, 2012, affecting the provision of § 237 in the wording preceding the appellative amendment. Effective as of December 31, 2012, the Court subrogated the provision § 237 section 1 c)\textsuperscript{4}, which at non-diform decisions conditioned the admissibility of appellative review by \textit{legal issue of substantial importance}, with the reasoning that application of the provision causes infringement of the right to fair trial and leads to discretion, when the Supreme Court would admit appellative review unpredictably and without a uniform approach. Therefore, as we may say with a certain hyperbole\textsuperscript{5}, the Constitutional Court followed from the presumption of objectively ascertainable diformity of the decision as the fundamental and only criterion for admissibility of appellative review, but the appellative amendment cancels diformities, and newly formulates the provision of § 237 Code of Civil Procedure.

It is not the purpose of this paper to evaluate the new legal regulation of appellative review as a whole, but to look at the new formulation of admissibility of appellative review as the only extraordinary remedial measure in the Czech civil procedure\textsuperscript{6}, in comparison with the certiorari institute. The certiorari institute, or certiorari attitude, will be in this article examined not only as an institute to govern admissibility of review by the highest judicial instance in the United States of America, but as a type of remedial measure based on the selection by the reviewing body.\textsuperscript{7}

The reason for the choice of this special institute was the statement by the Constitutional Court, that subjected the cancelled provision of Section 237 (1)

\textit{from being overloaded with by the reviews, often useless, it is necessary to determine which decisions and for what reasons may be decisions be contested by appellate review}. For more information see Explanatory note to act No. 519/1991 Coll., amending and supplementing the Code of Civil Procedure and the Notarial Procedure, source: ASPI.

\textsuperscript{3} The previous legislative regulation distinguished diformity expressly stated in section 237, paragraph (1)a of the Code of Civil Procedure, and hidden diformity - Section § 237 paragraph (1)b of the Code of Civil Procedure.

\textsuperscript{4} In the wording preceding the appellative amendment.

\textsuperscript{5} Said with a certain hyperbole, since the Constitutional Court has not a priori stated that admissibility is possible only by diformities; for its reasons see herein below.

\textsuperscript{6} The Code of Civil Procedure recognises action for nullity of judgement and action for a new trial as extraordinary remedial measures. However, they cannot be considered as remedial measures from the viewpoint of theory of civil procedural law, since they fail to meet all the required criteria. Devolutive effect is missing at action for nullity and as concerns action for a new trial, in addition to the absence of the devolutive effect, we emphasise its very purpose, which is not the review of the contested decision, but a new hearing of the case, in consequence of which a legal regulation of an action for a new trial cannot be grounded on any of the remedial systems.

\textsuperscript{7} See herein below.
2 Certiorari as an institute of the law of the United States of America

Certiorari is concerned where admissibility of remedial measure is based on a selection, or individual decision determining the circumstances of each case. The term comes from the Latin certioro, certionem facio that also means to admit. As concerns legal systems, certiorari is generally considered one of remedial means to correct erroneous judgments in the Anglo-American legal system - common law. Within this system, the Supreme Court is the top judicial body and annually decides only several dozen cases. At its discretion, the Supreme Court selects cases of parties that appeal thereto through an application for certiorari. The Supreme Court chooses out of the cases only those from which it intends to make a precedent, alter a previous precedent, or a case where another important issue is to be decided upon. The opposite to the Anglo-American legal system is the continental system called civil law, in which the Supreme Court primarily holds the position of a corrector of inferior court decisions.

Most typically, certiorari is connected with the access to the Supreme Court of the United States of America and it occupies a very specific place within the judicial system of the federal state. In the U.S.A., the state and federal courts operate in parallel. Individual states have their own judicial systems, which are unique, and two identical ones are impossible to find. Beside state courts, there operate the already mentioned federal courts, whereas citizens fall within jurisdictions of both judicial systems. The choice of the particular court system in which the case is to be heard depends on the merits of the case. It should be noted that most cases are heard by state courts.

Unlike state judicial system, the federal court structure is three-tiered. Judiciary on first level is executed by districts courts, ninety-four in number. Each State therefore seats at least one district court; on the other hand none of the districts covers more than one State. The second level consists of courts of appeals, the number of which amounts to thirteen. By their decisions, the appellate
courts ensure unified application of federal laws within their respective districts. Since appellative courts are not bound by other appellative courts’ decisions, there may occur a situation where two different appellative courts should deal with very similar cases and each of them will interpret the same act differently. The issue of different application of the same act may be resolved by the Supreme Court of the U.S.A., which is the ultimate instance for both judicial systems. However, there is no entitlement for a case to be heard before the Supreme Court. Also, the Supreme Court has the right to interpret the Constitution of the U.S.A. along with the entitlement to declare an Act of Congress void. The Supreme Court is the only federal court established by the Constitution of the U.S.A., while other federal courts are established by the Congress.

Access to the Supreme Court is entirely non-claimable and a possible alteration of a decision by its interference may be considered purely theoretical. Cases may come to the Supreme Court of the U.S.A. from various sources. First, noteworthy is the original jurisdiction, vested in the Court by the Constitution itself in Article III, Section 2. The relevant section reads as follows: “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.” In such cases, the Supreme Court itself shall hear and decide on the merits; in other words, the cases start and finish at the Court.

Most cases are referred to the Supreme Court of the U.S.A. from appellate courts or state courts of last resort. Concerned is the execution of the so-called power of review, where the case has already been decided at appellate proceeding, and therefore all means provided by the state and federal law have been exploited. However, appellative jurisdiction of the Supreme Court may be at the disposal of the Congress of the United States, through which it may be altered or even cancelled. On the other hand, from 1925 the US Supreme Court disposes

13 See herein below.
14 This power was expressed by the Supreme Court’s decision in Marbury vs. Madison case of 1803. For more information about the case see NOWAK, John E., ROTUNDA, R. D. Constitutional law, Saint Paul: West Publ. Co., 1990, p. 2-14.
16 Out of approximately 10 000 petitions for a writ of certiorari, this institute is annually granted by the Supreme Court to 75-80 cases each year. Supreme Court of the United States [online]. [quoted on January 25, 2013]. Available at <http://www.supremecourt.gov/faq.aspx#faqgi9>.
18 In exceptional cases, the Supreme Court may decide the case immediately following the decision by a district court, i.e. prior to ruling by the United States Court of Appeal. So it was in the case United States v. Nixon, 418 U. S. 683 (1974). See JANDA: Výzva demokracie…, p. 300.
19 The power of discretion has been awarded to the Supreme Court by The Judiciary Act of 1925, also known as Certiorari Act. For more information see STERNBERG, Jonathan. Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court. [online]. [quoted on January
with almost exclusive control over its agenda, where it independently chooses (allows) the case that is to be heard. In the vast majority of cases that the Court denied to hear, the decision of the lower court remains valid. However, since the US Supreme Court will not provide any explanation to those rejected cases, the judicial rulings are of almost zero value.\footnote{JANDA: Výzva demokracie..., p. 300.}

The option for the US Supreme Court to choose, i.e. certiorari, has limited the number of cases resolved by the Supreme Court. Admissibility is based on the so-called “rule of four”. The case may be reviewed only on account that four of the nine judges agree that the particular case is worth considering. Before the judges decide, each of them receives a copy of a petition for certiorari, so that after studying it they could decide whether the petition should be allowed or rejected. For that purpose the justices hold a meeting in camera. Chief Justice opens discussion on each case. When each justice has presented his opinion, they vote in reverse order of the length of service. If at least four justices agree that the case is worth full consideration, the petition is affirmatively disposed, which is only then followed by a review and the Supreme court’s decision.\footnote{SHANK: American Politics..., p. 396.}

However, certiorari is not based on judges’ decision without any rules. The criteria for consideration by the Supreme Court are stated by Rules of the US Supreme Court, part III., Rule 10.\footnote{As concerns the actual course of proceedings before the US Supreme Court: The judges’ decision to hear the case (after the provision of certiorari) is followed by presentation of written argumentation of advocates to the parties. Then comes an oral reasoning held before nine judges at open hearing. (See SHANK: American Politics..., p. 396). Each party is provided with thirty minutes for a speech. The judges do not decide on oral argumentation, they adopt their preliminary decision only after they have met at a common meeting. The course hereof is similar to the decision-making on review of applications for certiorari. Voting is conducted again in a reverse order accordingly to seniority. Having finished the voting, the judges in majority write the reasoning of the judgement. When all the judges agree on the court judgement and reasoning, unanimous opinion is concerned. The judgement is considered colliding if all the judges agree to the judgement statement, but differ in reasoning. Also, there may appear circumstances when a judge holds a divergent opinion and does not agree with the court’s decision. Dissenting and colliding opinions may be included in the reasoning of the judgement. See JANDA: Výzva demokracie..., p. 302. After that, the presiding judge or another judge authorised by the presiding judge will produce a draft opinion. If the presiding judge has not voted for the majority-adopted judgement, the writing thereof or authorisation to do so shall belong to a judge who has voted for the majority opinion and who has served the longest tenure at the court. Once the draft opinion has been worked up, each judge will receive a copy to study. Each judge will send his notes and comments to others. Draft opinion may be rewritten repeatedly, also the judges may decide to change the judgement, but only until the statement is officially pronounced. Reaching an unanimous opinion among the judges is therefore rather difficult.}

not a matter if right, but of judicial discretion. It is further stipulated that a petition for a writ of certiorari will be granted only for compelling reasons. The US Supreme Court chooses and followingly resolves only cases where:

a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter or has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, so as to call for an exercise of this Court's supervisory power;

b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari will exceptionally be granted when the alleged error consists of erroneous fact-findings or improper use of duly chosen legal provision. An application for a review of a case where a lower instance court's judgment has not yet been delivered will only be admitted in the event of emerging urgent public interest, so that the Supreme Court could correct the usual appellative practice and request immediate decision by that court. In American law, certiorari may be felt as a real discretion. The Supreme Court USA has certain rules in its Order to admit certiorari, though the rules are not of an exhaustive nature and the decision is fully at the Court’s discretion.

3 Provision of § 237 section 1 letter c) of the Code of Civil Procedure in the wording valid until 31. 12. 2013 from certiorari viewpoint

Provision of § 237 section 1 letter c) of the Code of Civil Procedure in the wording valid till 31. 12. 2012 laid down that *appellative review is permissible against a judgment of a court of appeal and against a resolution by a court of appeal, by which a decision of the first-instance level court has been confirmed, if appellative review is not admissible pursuant to letter b) and the appellate review*...
court arrives to the conclusion that the contested decision is of a substantial legal importance in the case itself. Assessment of the legal issue of significant importance was left up to courts of appellative review\textsuperscript{25}, however, the Code of Civil Procedure in provisions of Section 237(3) specified that a decision is of a substantial legal importance namely if it resolves a legal issue that has not yet been solved within decision-making of a court of appellative review or which has been adjudicated differently, or if the resolved legal issue is to be adjudicated otherwise by the court of appellative review.\textsuperscript{26}

Therefore, the court of appellative review was entitled to select decisions against which it would admit appellative review and against which it would not. The Code of Civil Procedure comprised certain rules, though not an exhaustive list. Similarly to the US system it meant discretion, but more limited and entrusted to only a three-member bench, for a decision of which a plain majority would suffice. In this form the Czech legislation corresponded with certain features of remedial measures of the certiorari type.

The Constitutional Court, during the course of deciding upon repealing the provision § 237 section 1 point c), had to deal with the very existence of a legal regulation similar to certiorari in the Czech legal order. Even though discretionary attracting of cases is not primarily concerned, admissibility of appellative review on the grounds of assessment of an issue of law of substantial importance follows from the approach aiming to create inspiring court decisions or case-law, representing a very important source of interpretation of law, sometimes binding for the courts. The fact, that as concerns non-claimable appellative review, correction of a particular deviation is not the objective of the Supreme Court’s decision, as it is the provision of a relevant opinion from the highest court instance where the legal regulation is unclear or differently interpreted, is

\textsuperscript{25} Admissibility based on discretion of a court of appellative review is not a rule in our neighbouring countries. Both in Austria and Germany there are appellate review courts that assess if the decision delivered thereby is of substantial importance form the legal viewpoint. The rule is set in Section 543 (2) of the German Code of Civil Procedure (Zivilprozessordnung) „Das Revisionsgericht ist an die Zulassung durch das Berufungsgericht gebunden“. In the Austrian Code of Civil Procedure (also Zivilprozessordnung), the rule is laid similarly by Section 500, paragraph 2, points 2 and 3.

\textsuperscript{26} Until the so-called overall amendment of the Code of Civil Procedure introduced by Act No. 7/2009 Coll., the situations where the decision solved an issue at variance with substantive law were considered a legal point of substantial importance. However, this was omitted from the Code of Civil Procedure. Although the explanatory report to the act does not explicitly say so, we may assume that the legal point of substantial importance was in this case omitted in order to enhance appellate review as a measure to unify case-law to the detriment of remedial measures for a specific decision. It is not sufficient for a decision by the court of appellate review if concerned is a decision grounded on erroneous determination of law in the case. Also concerned must be a question that has not yet been resolved or has been solved differently. Individual deviation of a judge who has not respected the current case-law of the Supreme Court cannot as such establish admissibility of appellate review.
apparent already from the above mentioned legal regulation introduced by Act No. 7/2009 Coll.

While concerning legitimacy of the certiorari principle in the system of general courts, the Constitutional Court also addressed the Office of the Government Agent for representation of the Czech Republic before the European Court of Human Rights, with the application for determination of this court's decisions, in which the certiorari construction is assessed positively, and for his opinion as concerns accordance thereof with the European Convention on Human Rights and Fundamental Freedoms. The Office of the Government Agent did not find any breach of Article 6 of the Convention in certiorari\(^{27}\), or in principle did not find any breach thereof in the legal regulation contained in Section 237 of the Code of Civil Proceedings in the wording valid until December 31, 2013.\(^{28}\)

Simultaneously, the Constitutional Court primarily challenged the accordance of admissibility of appellative review pursuant to Section 237 (1)(c) with predictability of adjudication, which must be, e.g. pursuant to Article 1(1) of the Constitution of the Czech Republic, considered a principle of a state respecting the rule of law.\(^{29}\) In its decision-making the Court eventually proceeded in two directions: by assessment of admissibility of non-claimable appellative review as such, or admissibility of an approach similar to certiorari in the Czech legal order at all, following with application of provision of Section 237 (1)(c) in the actual practice of the Supreme Court.

As concerns assessment of admissibility of certiorari, the Constitutional Court in the final version held a very reserved opinion. The Court considered assessment of the second issue in question as the core of its decision, i.e. the application practice of the Supreme Court and predictability thereof; therefore the Court has not expressed a concrete opinion as concerns existence of an institute similar to certiorari in the Czech legal order. The Court expressly stated that

\(^{27}\) The Office referred in particular to decisions in Šroub vs. Czech Republic of May 10, 2005, complaint No. 5424/03 and Holub vs. Czech Republic of December 14, 2010, complaint No. 24880/05. From that case-law the Office reminded the ECHR attitude that regularly states that if internal law enables rejection of a remedial measure for the reason that it does not rise any important issue of law and it does not hold sufficient expectation for success, then it will suffice if the particular court will restrict itself to a reference to a legal provision which enables such a procedure, without presenting detailed arguments. ECHR therefore rejected, as apparently unjustified, the plea of breach of the right to a fair trial, which allegedly happened when the Supreme Court without reasoning dismissed appellate review of a complainant, as was then possible by virtue of the provision of Section 243c(2) of the CCP, which was in the meantime abolished by the Constitutional Court as unconstitutional. See the judgment of the Constitutional Court of February 21, 2012, file No. Pl. ÚS 29/11, point 10.

\(^{28}\) Ibid.

\(^{29}\) In point 31 of the judgement of the Constitutional Court of February 21, 2012, file No. Pl. ÚS 29/11, the Constitutional Court expresses its opinion that the principle of predictability of law belongs to fundamental principles of the rule of law, its comprehensibility and inner non-contradictoriness. [cf. judgement of the Constitutional Court of 15 February 2007, file No. Pl. ÚS 77/06 (30/44 SbNU 349, point 36)].
by its decision it does not give a general opinion on the issue of the option of actual “selection” of cases, i.e. on the institute of certiorari, or on the institute of admissibility of application, since the Court does not see any reason for that under the indicated circumstances.\(^\text{30}\) The Court gave that opinion despite the fact that it had considered the issue of constitutionality of such an institute in its earlier judgement. Eventually, the Constitutional Court only reminded that this institute may hardly be employable in the conditions of the Supreme Court, decisions of which must remain fully reviewable as concerns constitutionality within proceedings on constitutional complaints.\(^\text{31}\) Specifically from that viewpoint, the Constitutional Court blamed the legal regulation of appellative review effective till December 31 for the fact that unlike certiorari in the U.S.A. or e.g. decision-making in Germany upon rejection of appellative review for absence of legal point of substantial importance, a three-member bench decides by mere majority of votes; thus there is no need even of an unanimous decision, or decision of a larger (or more-member) body, respectively.\(^\text{32}\) Therefore, if we compare the position of a participant who seeks appellative review against a confirming decision, with that of a participant who applies for certiorari, the position of the American applicant may look better, since the issue of necessity of review is decided upon by not only all judges of the US Supreme Court, but their minority will suffice (four of nine)\(^\text{33}\), while the Czech appellant may be ”left at the mercy” of two judges out of a three-member bench, regardless the opinion of other judges of the Supreme Court.\(^\text{34}\)

The Constitutional Court found the reason to repeal the provision of Section 237 paragraph 1 point c) of the Code of Civil Proceedings in the second suggested question. The Court analysed particular decisions of the Supreme Court\(^\text{35}\)

\(^{30}\) See the judgment of the Constitutional Court of 21. 2. 2012, file No. Pl. ÚS 29/11, point 71.
\(^{31}\) Ibid.
\(^{32}\) For details see the judgement of the Constitutional Court of February 21, 2. 2012, file No. Pl. ÚS 29/11, point 47.
\(^{33}\) The ”rule of four” see hereinabove.
\(^{34}\) As concerns this comparison, we identify ourselves with the Z. Kühn’s opinion that concerned is comparing of the incomparable, or, respectively, it is necessary to repeat again the above mentioned, i.e. that the US Supreme Court always decide as a unit, not in partial benches, while the Czech Supreme Court never decides as a unit. See KÜHN, Zdeněk. *Nenárokové dovolání je protiústavní.* [online]. Jiné právo, March 1, 2012 [quoted on March 3, 2012]. Available at <http://jinepravo.blogspot.cz/2012/03/nenarokove-dovolani-je-protiustavni.html>.
\(^{35}\) For example, in point 61 of the judgement the Constitutional Court reminded that *in decisions file No. 26 Cdo 689/2009, file No. 26 Cdo 3876/2010 and file No. 22 Cdo 1936/2009*, the Supreme Court stated that the question whether a certain execution of a right is in breach of good morals, according to ascertained facts important for determination of law in the case, cannot be considered an issue of substantial legal importance with a general impact on judicial practice. On the contrary, in its decision file No. 22 Cdo 1185/2009 the Court held that it is qualified to make a consideration on variance of a legal act (a contract) with good morals pursuant to Section 39 Civil Code a subject of the court’s review, however, only in the event of apparent inadequateness of relevant considerations of the court at first instance trial. Referring to this issue, the Constitutional Court in its ruling of June 21, 2011, file No. I. ÚS 548/11 held that if the Supreme Court generally rejects the possibility to consider substantial legal importance at the question whether an objection based
and found its proceeding breaching the right of the participant to fair trial, or an exercise of a constitutionally prohibited discretion. The Court concluded that there actually exists a problem lying in diverse case-law of the Supreme Court, relating to interpretation and application of the contested provision, along with continuous neglect of rectifying opinions by the Constitutional Court, at various legal issues.\(^{36}\)

Thus, we may sum up that the Constitutional Court was dissatisfied “only” with non-uniform decisions by the supreme Court pursuant to § 237 (1c) of the Code of Civil Proceedings and in principle it has not found unconstitutionality in admissibility of access to the supreme judicial instance based on selection, i.e. a certain discretion from the side thereof under the criteria set by law.\(^{37}\) The Court has reserved an opinion that as concerns an institute similar to certiorari, the solution is inappropriate in the Czech legal environment. The conclusions of the Constitutional Court may seem this way at least. However, we incline to the Kühn’s opinion that appeared immediately after publication of the judgement, stating that the judgement by the Constitutional Court in practice disqualifies the arrangement of the legal regulation of admissibility of appellative review on the basis of selection.\(^{38}\)

In fact, the Constitutional Court in the recital of law in the statement reserves for the legislators that it intends to respect the free will of the legislator, which it will incorporate into the new regulation of appellative review, the Court neverthe-
less reminds that the regulation must be predictable to such extent that admissibility of appellative review must be apparent to every possible appellant even before such an appellant makes use of the remedial measure in the form of appellative review. In point 53 the Court infers an imperative by which the rules of access to higher degrees of jurisdiction must be formulated as concrete as possible so that they would be most clearly understandable for individual persons. This is because exactly those rules set the limits and manners by which the injured person may seek its rights. Should everyone, already at the moment when he holds in his hands a judgement by the court of appeal, be sure whether an extraordinary remedial measure is admissible or not, then a non-claimable appellative review could succeed. Finally, it is necessary to remind that non-claimable appellative review, or the option of choice, is not convenient for the Constitutional Court also for the reason that Supreme Court decisions may be subject to revision by the Constitutional Court and the individual selection makes the assessment of admissibility of constitutional complaint rather complicated.39

4 New legal regulation

Thus the Constitutional Court did not make the role of the legislators any easier. Even though it determined that a legal regulation based on selection does not bother in principle, the court simultaneously burdened the legislators with an unenviable task of formulating thereof so that it would prevent unpredictable decisions. From the two ways that emerged after the publication of the judgement Pl. ÚS 29/11, i.e. maintenance of admissibility of appellative review only on the principle of diformities, which undoubtedly meet the requirement of predictability, and an attempt to newly define the admissibility of appellative review on the basis of an effort to unify case-law, the legislators have chosen the latter. We believe that they did right. Leaving admissibility of appellative review only up to variances between judgements of first and second instance courts may be a clearly defined rule on admissibility of a remedial measure, but in our opinion this is not in conformity with the purpose that appellative review should fulfil in the Czech Legal order.

On the contrary, as already mentioned herein above, the new legal regulation of appellative review abolishes admissibility based solely on diformities, and in provision of Section 237 CCP it introduces an entirely new design of admissibility of appellative review. But in fact, the legislators in the explanatory report to the appellative review amendment state that upon formulating thereof they took into account the judgement by the Constitutional Court Pl. ÚS 29/1140 and for that reason they pursue introduction of entirely new defini-

39 Conformingly ibid.
40 Ironically, for the purposes of the appellative review amendment, out of it were produced three
tion for admissibility of appellative review and measures which will introduce a more qualified way of decision-making as concerns admissibility of appellative review.\textsuperscript{41}

Pursuant to Section 237 CCP, as amended by the appellative review amendment, appellative review is newly admissible against all decisions by a court of appeal, by which the appellative proceeding is accomplished, if the contested decision is dependable on the resolution of an issue concerning substantive or procedural law, upon solving of which the court of appeal has departed from settled decision-making practice of courts of appellative review or which has not yet been solved at decision-making of the court of appellative review, or is decided differently by the court of appellative review, if the legal point that has been solved by the court of appellative review should be adjudicated differently. Pursuant to Section 243c(1) CCP, a court of appellative review is newly obliged to decide on admissibility of appellative review within six months from the day that the case has been placed before that court. Furthermore, the new rule also clearly states that rejection of appellative review must be decided upon unanimously by the bench. (Section 243c(2) CCP).

The Appellative review amendment omits the term “legal point of substantial importance” in the legal regulation of the Czech civil procedural law. The term, under influence of the Constitutional Court’s interpretations often considered vague and leading to unpredictable decisions, has been repealed from the Czech legal order and replaced by conditions under which appellative review is admissible. In fact, these have been inspired by what has been considered a legal point of substantial importance. Moreover, the new provision of Section 237 CCP additionally specifies that an issue of substantive and also procedural law must be concerned.\textsuperscript{42}

\textsuperscript{41} See Explanatory note to Act. No. 404/2012 Coll., source: ASPI.
\textsuperscript{42} See Explanatory note to Act. No. 404/2012 Coll., source: ASPI.

The legal issue of procedural law was in the past considered also by the Constitutional Court, when in its decision of 9. 1. 2008, file No. II. ÚS 650/06, the court stated that: “As also follows from provision of Section 237(3) CCP, by which the issue of a substantial legal importance is determined so that concerned is a legal question that has not yet been resolved by a decision of an appellative review court, or which is solved differently by courts of appeal or by appellative review courts, or if the courts solve the issue in contravention of substantive law. As may be deduced from this provision, the question of errors in proceedings may be an issue of substantial importance as concerns law, since the issue of errors in proceedings may be considered a “legal” issue because the
If we look at the new legal regulation from the certiorari viewpoint, or design of a remedial measure based on selection, respectively, then we may doubt if the new regulation still maintains this principle. The appellative review amendment, fully within the intent of the Constitutional Court judgement, pursues certainty of admissibility of appellative review. At the first sight, it may seem that the conditions of admissibility are clear for the appellant and he could in advance assess the chance that his appellative review would be admitted. In contrary to the legal regulation valid until December 31, 2013, the new legal legislation does not permit any discretion for the Supreme Court as concerns what the Court could consider a legal issue of substantial importance, beyond the limits formerly exhaustively defined by Section 237(3) CCP. The conditions set by Section 237 CCP as amended by the appellative review amendment are exhaustive and appellative review cannot be admitted if they have not been met. Compared to the American attitude, the difference is rather significant. The Rules of the Supreme Court as of a recommending nature; the judges may consider an allegedly erroneous application of a legal regulation beyond the Rules if at least four judges (by the rule of four) come to the conclusion that certiorari is necessary to admit. Hence, we may sum up that the current legislation has completely gone astray from the certiorari attitude and the Supreme Court has no choice. Therefore, once claimable appellative review is concerned and the condition of admissibility is given, then the Supreme Court has no choice.

At the same time, we would like to make an observation on the following. It is obvious that the court of appellative review has no option but to justify admissibility of appellative review by one of the cases contained in § 237 CCP. However, the conditions of admissibility are of a different nature than those of so-called diformities. It is not the procedural state of the decision - only a mere change in the decision by a court of appeal was sufficient for diformity. Appellative review as a means to unify case-law should only be chosen where the issue of substantive or procedural law has not yet been resolved in the Czech judicial practice by a supreme judicial instance decision, or where it should be solved differently. It is only the Supreme Court judges who may decide upon the different solution. Their decision therefore depends on their judgement if the given issue is necessary to solve or if it is necessary to solve in a way different from current case-law. It is not given by the mere procedural state of the case, but primarily rather by consideration under substantive law (or by

matter falls within procedural law. Simultaneously, we may undoubtedly find procedural issues that have not yet been resolved by an appellative review court decision, or which have been solved differently by courts of appeal or by appellative review courts. Furthermore, it is appropriate to highlight the phrase "in particular" used in Section 237(3) CCP, meaning that the following list of elements fulfilling the nature of a legal issue of substantial importance is only a demonstrative list (therefore not an exhaustive one).
consideration of importance of the issue as concerns unification of case-law). The decision if an already solved issue will be considered again and differently, is in principle made only by judges of an appellative review court, who have the option within statutory limits. The legal regulation approximates the nature of appellative review to a certiorari remedial measure also by the change in the voting ratio, when newly one vote of three suffices for a review of the appellate court decision on the basis of appellative review.

These are only partial issues, and in general, we should repeat the above mentioned, i.e. that the new legal regulation of appellative review has undoubtedly departed from the certiorari attitude by far. Selection, or a choice of procedure may be talked about only if the current legislature changes; as concerns the issue of deviation of an appellative court or an issue not yet solved, the procedure of courts of appellative review is bound by the rules and requirements for minimum reasoning of the judgement defined so clearly that a real choice is out of question. In the reasoning of an adverse decision, the court of appellate review should always indicate the decision that has already solved the issue and reasons why it is not necessary to reopen it gain, respectively.

Despite the above mentioned conclusions of the Government Agent and conformity of admissibility of a remedial measure based on selection by the highest judicial instance with Article 6 of the Constitution, i.e. by the right to fair trial\textsuperscript{43}, the Czech legal environment, for the time being, has not vested such confidence in its highest segment in the system of general courts. Admissibility of appellative review, which was originally based on assessment of a legal point of substantial importance with an exhaustive list of its content, that was, though

\textsuperscript{43} Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms reads as follows: 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:
   a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   b) to have adequate time and facilities for the preparation of his defence;
   c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.
in only several features, similar to the American certiorari approach, is getting stricter with the aim to determine clear rules, within the limits of which the Supreme court may operate. The option of choice is significantly limited for the Court; moreover, it is always subject to checking as concerns constitutionality. As it may seem from the above stated, the courts of appellative review are not provided with confidence for assessment based on profound analysis of substantive law and determination of importance of the issue, and the Czech legal practice prefers building upon clearly defined rules, of a procedural nature at the best. It is not appropriate to speak about a certiorari approach here, as the option of choice is rather limited, in some cases almost hypothetical.

It is difficult to judge if the limitation of discretion of the Supreme Court is the right way. However, we would like to add a final note. In our opinion, the reason for the alteration of the legal regulation was the question of the judges’ individual approach that would lead to unpredictable and non-uniform decisions, rather than the issue of the legal regulation as such. We assume that the institute of certiorari in its pure form is not immediately doomed to strict rejection. On the contrary – the option to assess the importance of the legal question to be resolved provides space to unify case law and may inspire the legal order. The still remaining distrust towards judiciary (in all its levels and instances) should not always lead to the effort to make legal regulations formally stricter and to introduce only technical rules, as that might hurt sometimes.
THE RE-CODIFICATION OF THE SLOVAK CIVIL PROCEDURE CODE WITH A SPECIAL EMPHASIS ON REMEDIAL MEASURES

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**Abstract:** This analytical paper focuses on the ongoing works on the recodification of the law of civil procedure in Slovakia. The paper introduces and presents the most relevant changes to the Slovak Civil Procedure Code and offers the closer examination of the reform of remedial measures included in the re-codification proposal.

**Keywords:** Civil procedure law, Slovak Republic, re-codification works, remedial measures.

1 Introduction

Civil procedure is most frequently characterized as a procedural activity or the procedure of a court, parties to a case and other subjects and persons participating in the proceedings, the aim of which is providing the protection of subjective rights and interests protected by the law. It is also possible to use a different definition to characterize the civil procedure which defines civil procedure not only as an activity, but also as procedural relationships which are formed when the aims of the basic procedural goals are reached.

In Slovakia the civil procedural law is mainly regulated through the Civil Procedure Code from 1963. Despite the legislator’s attempts to modernize and enhance the Procedure Code it is not possible to consider it as a modern regulation of the 21st century meeting the requirements and criteria for a good quality fundament for reaching an effective court procedure.

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The Civil Procedure Code has been amended almost eighty times, which has caused content as well as logical discontinuity of the individual sections of this Code. It is not possible to cover all the provisions connected with the corresponding procedural institutes or in other words they can only be covered partially. The partial amendments brought many provisions (so called procedural provisions) into the Civil Procedure Code which contributed to its rather inconsistent inner structure thus making the basic civil procedure more chaotic. Many provisions have been cancelled, many others are obsolete and those procedural institutes which would deserve a special attention and which should be covered in a special part if not in a special code have been placed at the end of the specific sections. On the other hand some procedural institutes which in fact do not have to be a part of procedural code, are regulated in a special part of the code (such as e.g. other activities of a court).

The current Civil Procedure Code does not only suffer from the formal deficiencies, such as fragmentation and incoherency of the legal regulation. There are also such provisions which are practically not in use and thus it is not necessary to include these provisions in the Procedural Code. On the contrary the practical experience has proved that there are some institutes which are not reflected in the Slovak legal regulation. However, based on the knowledge of history and the comparison with other legal regulations it is obvious that these institutes should be introduced.

The reasons and causes of the problems connected with the current civil procedure can also be perceived in the complexity and the structural relations with respect to the inadequate size of the staff as well as material necessities of the judicial system. These deficiencies were caused by politically conditioned different ideas about the administration and the management of justice in the Slovak Republic.

It was the reasons mentioned above that led to the idea in the office of the Ministry of Justice of the Slovak Republic to create a new Procedure Code. A re-codification committee was created, made up of experts in all legal professions. These experts after a ten-month period created the legislative intent which should also be introduced to the Czech legal professionals through this contribution. The re-codification committee agreed that it was necessary to create three codes instead of one Civil Procedure Code with one Code regulating the dispute proceedings (Civil Dispute Code), the second should cover the other proceedings than disputes, which has been up to now known as the non disputes proceedings and the next code should be intended exclusively for the needs of the administrative justice (Administrative Procedure Code).
2 What Are the Most Important Changes Going to Be?

At the time when the proposal of the legislative intent of the re-codification of the civil procedural law was being consulted by the experts, we were working on this contribution. The final version of the law will take into account the comments acquired through the consultation and it will be this version which will have to be approved by the Government of the Slovak Republic. However, we can point out several proposed changes as presented in the proposed legislative intent.

The contradictory principle is to be made stricter. This principle is based on the fact that the plaintiff in the civil lawsuit insists on the satisfaction of the claims made and the defendant has the same contradictory goal. Thus in the civil lawsuit there is a social conflict solved through the process of two parties standing against each other. This conflict is controlled by the court and thus the court is supposed to actively participate in the proceedings. The court is not merely a passive observer of the conflict between the two parties but it influences and controls the conflict in order to provide protection to the party that needs the protection under the law. The contradictory principle can also be understood as a battle which motivates the parties to actively use the means of attack and defense.

This principle is to be applied mainly in the process of providing evidence. The proposed legal regulation covering the court procedure and the process of providing evidence will differ significantly from the current regulation. The court will only be allowed to use the evidence suggested by the litigants. Exceptionally the court will also be allowed to use the evidence that was not suggested by the litigants. This will be possible only in those cases where it is important for reaching the verdict, however, only in cases where the law explicitly says so. This is done in order to protect he weaker party such as e.g. the employee or the consumer.

There is an important change to be made as far as the content of the code is concerned. According to the experts proposing the legislative intent this change can contribute to the efficiency and speediness of proceedings. This change consists in the increase of requirements for the procedural activity of litigants and the procedural responsibility for the sanctions imposed in cases of procedural inactivity. In order to illustrate the point it should be said that the litigants themselves frequently lengthen the proceedings, sometimes they do so intentionally. In cases when the litigants avoid the proceedings, obstruct the justice and do not cooperate with the court in the proceedings in order to reach a speedy judgment, it should be made possible to sanction such litigants through a new institute under the new Civil Procedure Code. For example in cases when the litigant does not meet the deadline and does not take the necessary procedural steps he/she would lose the opportunity to take this step later in the proceedings (proce-
dural preclusion). This measure would help to secure greater interest to cooperate with the court on the part of the litigants. As a matter of fact the continuity and speediness of the proceedings does not always depend merely on the will and activity of the court, or even the judge. The Ministry of Justice of the Slovak Republic as the authority responsible for the administration of justice frequently receives complaints about delays in the proceedings which, after a deep analysis of the case, seem to have been caused by the procedural passivity of the litigant who subsequently mistakenly complains about the ‘wrong’ procedure of the court. When talking about the obstruction of justice in proceedings, it has to be said that the court proceedings which are often, from the subjective viewpoint of the litigants characterized as lengthy. However, it is not only this subjective viewpoint, but also certain objective attributes such as e.g. meeting certain non-effective procedural deadlines which often cause the inability of the litigants to apply their rights within a reasonable period of time. As a result of the traditional overload of the courts, the courts cannot even objectively cope with the number of cases to be solved. The aim of the newly proposed legislation is to eliminate such situations.

The professionalization within the civil proceedings is going to be another important change. This means apart from other things that the professional legal representation in the proceedings at the courts of second instance and in the proceedings at the courts of first instance e.g. in accordance with the principle ratio valoris and ratio causae should be made obligatory. The selection of the proceedings, which could only be conducted if the litigants are represented by an advocate (or the compulsory representation by an advocate except for the cases when the litigant himself does not have a legal education or his employee /member/ who is acting on his behalf), could be conditioned by the sum of money on the one hand (the sum of money that is being claimed by the plaintiff) on the other hand it could also be conditioned by the type of matter that is being tried – i.e. the subject of the dispute. With the compulsory legal representation the courts may be freed from certain obligations connected with the filing of complaints which are not complete, clear and do not contain all the required formal elements. The responsibility of the court to exercise some of its duties towards the litigants is also minimized with the obligatory legal representation. At the same time the initiator of the legislative intent takes into account the necessity on the part of the represented litigant to financially participate in the proceedings. The proposed legislation will also contain the adjustment of social aspects of law towards the way to the court.

The new legal regulation will strengthen the existing elements, which were supposed to intensify the court proceedings. According to the proposal of the legislative intent a form of so-called pre-trial hearing will be introduced. The existing legal regulation contained in the § 118 clause 2 of the Civil Procedure Code should be developed into this institute (especially the provisions saying
that after the beginning of the proceedings the litigants will present or complete their proposals and the senate chairman or the judge sitting alone will announce the results of the preparation of the proceedings. Subsequently the chairman of the senate or the judge sitting alone will state, in accordance with the results of the previous proceedings, which are the important facts of the case presented by the litigants which can be regarded as matching, which are the important facts of the case which are contradictory and which of the proposed evidence will be carried out and which will not be carried out by the court even though they have been suggested by the litigants). The court should at this stage determine obligatorily which of the statements made by the litigants should be considered as legally significant with a subsequent challenge addressed to the litigants in order to signify clearly which evidence they suggest in order to prove these facts. The other following statements and suggested evidence will not be taken into account. The existing right of the court under the § 100 clause 1 of the Civil Procedure Code, (in cases when the proceeding has started, the court has to proceed even without any further proposals so that the case is dealt with and closed as soon as possible) will be transformed into the duty of the court to state the legal assessment of the case and focus the process of evidencing solely on the presentation of conflicting facts between the litigants.

Re-codification will also take into account the fact that the current society is modernized and uses electronic means of communication. The new regulation of the court procedure and the litigants must be based on and accept new means of communication. The existing legal regulation only reflects the new means of communication marginally, which leads to an increased expenditure on the court proceedings. Electronic mail, telecommunication, websites and data files have to gain a greater importance, which will make the conducting of proceedings easier and more economical.

In cases of dispute proceedings the legislative activity, from the viewpoint of the content, must be above all focused on the regulation of delivering the writ of summons on the natural persons. The recent legal regulation coped effectively with the problems connected with the delivery on the legal persons and natural persons, businessmen, through a strict delivery fiction. The corresponding delivery fiction on the natural persons who are not businessmen would probably be connected with impossibility to appear before the court on the constitutional law level on the one hand, however, on the other hand it is necessary to transfer the responsibility on the citizens for the impossibility to deliver the writ of summons on the citizens at the place of their official residence in accordance with the specific regulation. The existing legal regulation results in lengthy and financially demanding finding of the whereabouts of the litigants and thus it is practically ineffective and non-uniform. Therefore it is necessary to regulate the way of finding out the whereabouts of the litigant, on whom it was not possible to deliver the writ of summons to the address of the litigant’s registered place of residence.
3 The Remedial Measures after the Re-codification of the Civil Procedural Law

The system of remedial measures is an exceptionally important system of legal institutes used for the securing of review of the court’s decision and proceedings, which preceded the decision. The current Slovak legal regulation distinguishes between standard remedial measures and extraordinary relief depending upon the fact whether the remedial measure is aimed against valid decision or not. One of the standard remedial measures is – according to the Civil Procedure Code – the appeal and one of the extraordinary relieves is appellate review, new trial and extraordinary appellate review.

The revision of the appellate review proceedings based on the combination of reviewing and cassatian system will belong among the most important changes to the new legal regulation of remedial measures. It will also be based upon the fact that the extraordinary appellate review is going to be removed from the system of remedial measures. This step is going to reflect the ruling of the European Court of Human Rights (hereinafter referred to as ECHR) considering the extraordinary appellate review as a redundant element inconsistent with the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as European Convention). This opinion has appeared and is based upon the overall character and nature of the extraordinary appellate review as the application of this institute in the dispute proceedings has raised doubts as a result of the unequal positions of the two parties, violation of the principle of legal certainty and the violation of the principle of res iudicata.

The system of remedial measures will be represented even after the re-codification process by the standard remedial measures and the extraordinary relieves in the same way as it was up to now.

Appeal will still serve as the standard remedial measure whereas the action to compel somebody to act and the appellate review will serve as the extraordinary relieves. In the legislative intent there is also a proposal to introduce a new institute of procedural remedy – remonstrance. Through the remonstrance it will be possible to challenge the judicial resolution on proceedings along with some other procedural resolutions fully listed by the law. After the complex and detailed proposal of the proceedings has been made by the court of first instance, especially the legal regulation of the proceedings, it will be decided whether the remonstrance will be a standard remedial measure or the measure of procedural protection (i.e. not regarded as a remedial measure), such as e.g. protest or objections.

3.1 Appeal

It has been proposed that the appeal should be kept as a standard remedial measure. In connection with the legal regulation dealing with proceedings at the
court of first instance the different types of modifications of decisions against
which it is not possible to appeal could be also considered. It is also necessary
that the responsibility of the litigants in the appellate proceedings should be
strengthened through the concentration in the appellate proceedings. Then it is
also important to think about a new division of competencies between the court
of the first instance and the court of appeal. It is also necessary to consider the
fact that in some cases it should be the judge sitting alone who should be allowed
to decide about the appeal. In dispute proceedings it is necessary that the court
should stick to the principle of incomplete appeal.

3.2 Appellate Review

The appellate review will be used as a remedial measure serving above all as
a measure to remove the deficiencies that could lead to a confusion and wrong-
ful legal assessment of the case. This measure should be used in accordance with
the regulation specifically defining the circumstances that will have to be taken
into account.

Taking into account the fact that it was proposed that the institute of the
extraordinary appellate review should be cancelled the appellate review should
be made more accessible. It is possible that the applicability should be widened so
that it could also apply to the valid decisions made by the court of first instance.
It would also be convenient if the Supreme Court of the Slovak Republic was
allowed to decide about the admissibility of the appellate review for crucial legal
purpose.

There are several possible alternatives for the defining of the admissibility of
appellate review. First it could be regulated based on the type of decision made
by the court (deformity, conformity) as it is now under the current legal regula-
tion, or it could only be conditioned by the essential legal meaning and thus it
will be specifically defined (such as e.g. in Austria or the Czech Republic). The
specific defining of the admissibility will also be based on the new legal regula-
tion dealing with proceedings at the court of first instance.

When defining the admissibility the current constant judicial decisions as
well as the foreign legal regulation will be taken into account. In this context it
will also be inevitable to explicitly regulate by the law the inadmissibility of the
appellate review against verdicts through which it was decided about the divorce
of a marriage, through which the marriage was declared as void or through
annulment of the marriage (in order to rule out the possibility of bigamy). In
other family law matters the appellate review will be admissible for certain rea-
sons such as confusion, however, the inadmissibility of the appellate review will
be kept under the § 238 clause 4 of the current Civil Procedure Code.2

2 The appellate review is not admissible in cases regulated by the Family law and by the amendments
It is suggested that in the appellate review proceedings the cassation-reviewing principle should be kept. The reviewing principle in the legal regulations of the EU member states is frequently praised also by the Council of Europe. It is also another way to conduct the proceedings more effectively, economically and speedily. In cases of the reviewing principle (i.e. the possibility to change the decision) there is an issue arising connected with the necessity to find out the facts of the case and its potential changes – if the appellate court is supposed to decide according to the state at the moment when the court is about to decide about the appellate review. The second variant is to make a decision according to the state of the day of issuing of the challenged decision with possible changes in the facts of the case being eventually solved within the execution of the judgment.

3.3 Action Filed in Order to Renew Proceedings

This type of action will be designed as a remedial measure the primary aim of which is to review the facts of the case on which the original valid judgment was based. At the same time those reasons the are the results of the implementation recommended within the region of the European Region will be the reasons belonging to the category of renewal reasons [current reasons according to the § 228 clause 1 letter d), e), f) of the Civil Procedure Code].

There are not going to be any big changes made during the process of the formation of the new legal regulation in comparison with the existing valid and effective legislation.

As far as the terminology is concerned, when dealing with the newly proposed system it is possible to refer to this institute as to the action filed in order to renew the proceedings, as it is the remedial measure which is addressed to the court which has given the verdict and then subsequently after the admission there is going to be another proceeding at the court of the first instance. This term was used in the Slovak Republic up to the year 1950 and currently it is also used in the Czech legal regulation which has been inspired by the Austrian and German regulations. In the historical and legal context as in the comparative context it is a completely conform solution.

3.4 Extraordinary Appellate Review

As it has been outlined above it was proposed that the extraordinary appellate review should be completely crossed out from the system of extraordinary remedial measures. The reasons for this step are dealt with in the following part of the contribution.

to some laws apart from the judgment upon the limitation or removing of parental rights and duties, or the discontinuance of their execution, upon the acknowledgement of parental rights and duties to the minor parent of a child, upon the establishing paternity, upon the denial of paternity or upon the adoption.
If we compare the regulations of selected European countries it can be said that in the Western European countries (e.g. Austria, Germany, Italy, Denmark, Finland) person other than the litigant or the enjoined party cannot intervene into the procedural autonomy of another litigant. This trend is only typical of the post-communist countries. However, the Czech Republic does not have a specific legal regulation covering this analogical remedial measure either. If we take a look at the ruling of the ECHR it seems that the application of this extraordinary remedial measure can lead to the conclusion that the ECHR will consider the result of the proceedings achieved due to the application of an extraordinary remedial measure as violating the principles of due procedure. The attitude of the ECHR can be easily seen in the decision made in a case Brumarescu v. Romania, Tripon v. Romania (No. 1), Tripon v. Romania (No. 2). Based on the decisions made in these cases it is obvious that according to the ECHR an intervention of the general prosecutor into a private law dispute is an aggravating factor. Although the state authority acts based on an impulse, filing an extraordinary remedial measure is always dependent upon the discretion of the general prosecutor.

In this context it is also important to point out the Recommendation of the Ministries’ Committee of the Council of Europe adopted in 1984 called The Principles of Civil Procedure for Better Functioning of Justice. Under this document the valid legal regulation should aim to make the civil procedure easier and faster. These principles also recommend certain measures in order to prevent the misuse of remedial measures.

However, the extraordinary appellate review is currently well regulated under the Civil Procedure Code of the Slovak Republic (§ 234e – if the general prosecutor, based on the impulse given by the litigant, a person influenced by the decision of a court or a person harmed by the decision of the court, finds out that the valid decision of the court violated the law and if it is required because of the protection of rights and interests of natural persons protected by the law, legal persons or the state and at the same time it is not possible to secure this protection through different legal means, then the general prosecutor shall file an extraordinary appellate review against such a decision of the court). The admissibility of this institute is not so limited as in the case of appellate review, thus there is an enormous space for the review of the court’s decisions. The time limit for the filing of extraordinary appellate review is one year from the validity of the court’s decision, which disturbs the principle of the legal certainty which has long been pushed forward in the rulings of the ECHR. The litigant in the proceeding of extraordinary appellate review also, in comparison with the appellate review, does not have to be represented by the advocate and the proceeding of the extraordinary appellate review is not chargeable. The attributes to be mentioned last can be, for the person giving an impulse to the general prosecution,
a reason for such a procedure if it is taken into account that there is “nothing to lose”.

An area which is very broadly regulated is the possibility to file a motion to an extraordinary appellate review for a person other than the litigant, such as e.g. a person influenced by the decision of the court or a person who has been harmed by the decision of the court. Such a blurred definition does not give any concrete idea how the specific criteria should be interpreted. Under this regulation the institute of the suspension of enforcement of challenged decision has a very privileged position compared to the institute of appellate review. Under the § 243ha if the general prosecutor files an extraordinary appellate review and at the same time files a motion to suspend the enforcement of the challenged decision, the enforcement of the challenged decision is postponed because of the delivery of the extraordinary appellate review to the appellate court.

On the other hand the legal regulation of the extraordinary appellate review is often duplicate with the legal regulation of appellate review. Based on such a definition of a remedial measure it is possible to review a wide range of valid decisions of courts in a period that is unreasonably long without any duty to pay a court fee, and also without the duty of the litigant to be represented by an advocate if the litigant is only a person giving an impulse and in the proceeding there is a general prosecutor. That is why among the legal professionals there has been a debate about the justifiability of the extraordinary appellate review. Last but not least the criticism also uses the fact claiming that the strong procedural position of the general prosecutor is historically based upon the specific situation in the Czechoslovakia in the 1950’s, i.e. in the period when the justice was repressively controlled by the state.

3.4.1 The Extraordinary Appellate Review and the ECHR

ECHR repeatedly came to conclusion that as a result of the cancellation of valid court decision based on the decision about the extraordinary appellate review there as the violation of the article 6 of the European Convention. The decisions about the extraordinary appellate review are characteristic as a matter of fact by the fact that based on the procedural step of a person other than the litigant even in cases when the impulse was given by one of the litigants a valid and legally binding decision of the court is cancelled. The ECHR decided that there was an inconsistency with the ECHR’s rulings in cases of Kutepov and Anikeyenko v. Russia (decision of October 25, 2005), where the execution of the power to ask for an extraordinary review consisted explicitly in the discretion of an official and his own evaluation of the arguments while considering whether or not the case requires an extraordinary review. In cases when a valid and legally binding decision of the court was declared void based upon the filing of a general prosecutor (or another person respectively) who was not the litigant the ECHR

3 The ECHR’s rulings were processed for the purposes of the Re-codification committee.
declared that the whole court proceedings was, in such cases, frustrated. An institute, very similar to the institute of extraordinary appellate review regulated by the Civil Procedure Code was subject to scrutiny by the ECHR in a famous case Tripon v. Romania No. 1 (the ruling of the 23rd September 2008). The ECHR in the ruling declared that in the matter tried the general prosecutor did not act out of his own initiative but acted based on the claim of one of the litigants. This was a private law dispute and in addition both litigants were entitled to the same right to ask the general prosecutor for an initiation of a review proceeding. ECHR pointed out again to its settled rulings saying that the right to a fair trial guaranteed by the article 6 clause 1 of the European Convention must be interpreted in the light of the Preamble of the European Conventions which, among other things, declares the principle of democratic state respecting the rule of law as the common heritage of all the states that signed the European Convention. In the ruling Tripon v. Romania the ECHR stressed that one of the basic aspects of a state respecting the rule of law is the principle of legal certainty requiring apart from other things that in cases where the courts decided in accordance with the law (giving a final verdict) about the subject of a dispute the decision should not be challenged. The ECHR in the case mentioned above did not take into account the fact that both parties could have asked the general prosecutor for an intervention into their private law dispute. The ECHR denoted the intervention of the general prosecutor into such a dispute as an aggravated factor because, even though the state official acted upon the impulse of the litigant, the filing of the extraordinary appellate review was left entirely upon the discretion of the general prosecutor. The ECHR therefore arrived at the conclusion that the cancellation of the challenged valid legally binding decision of the court breached the plaintiff’s right to the fair court proceeding according to the article 6 clause 1 of the European Convention.

The ECHR stated that the violation of the principle of the legal certainty had occurred and as a result of this also the violation of the right to a fair trial under the article 6 clause 1 of the European Convention in cases when the reviewed extraordinary remedial measure was not available to the litigants but was available merely to the general prosecutor and as a result of the filing of this measure the relevant court decided to freeze the whole court proceeding which resulted in a valid legally binding decision which represented res iudicata. In the sense of the decision-making practice of the ECHR, even the time limit for the application of the procedural step did not have any effect upon the conclusion described above. As a result of this time limit the valid decision of the court was cancelled as the time limit is not under the ruling of the ECHR enough to justify the existence of such an institute. It is not even enough to pronounce compatibility of the extraordinary appellate review with the article 6 clause 1 of the European Convention.
In the case of SC Masinexportimport Industrial Group SA v. Romania (verdict of December 1, 2005) the ECHR stated that irrespective of the fact that there was a one-year time limit period introduced as a special measure for the filing of the extraordinary appellate review, this institute still unjustifiably collides with the principle of legal certainty, with two other elements of this remedial measure being preserved. The ECHR pointed out the incompatibility of these elements with the principle of legal certainty when dealing with another case – Brumarescu v. Romania (the extraordinary appellate review 1. was not available to the litigants, but to the general prosecutor only and at the same time the right to file this remedial measure was not subject to any time limit and 2. as a result of the successful application of this measure the Supreme Court frustrated the whole court proceeding which was ended by the court’s decision representing the principle res iudicata).

In the case of Asito v. Moldavia (verdict of November 8th, 2005) the ECHR dealt with a legal institute similar to the extraordinary appellate review regulated by the Slovak Civil Procedure Code, i.e. the motion to cancellation through which the general prosecutor was allowed to challenge any final decision of a court. Thus it was possible, through this procedure, to reach the cancellation of final and enforceable decisions of a court. The ECHR in this respect stated that such a procedure violates the principle of legal certainty.

The relevant ECHR’s rulings show that the system of remedial measures as enshrined in the legal order of the contractual party to the European Conventions must inevitably be in harmony with the requirements listed under the article 6 of the European Convention. In the case of Sitkov v. Russia (verdict of January 18, 2007) the ECHR referred to its previous decision from the ruling in the case of Sovtransavto Holding v. Ukraine, under which the court systems, which are characteristic of objection proceedings, saying it is possible to repeatedly cancel the final decisions of courts, are not compatible with the principle of legal certainty, which is one of the fundamental principles of the state respecting the rule of law under the article 6 clause 1 of the European Convention. Thus the ECHR within its decision-making activity has more than once pronounced the incompatibility of such extraordinary remedial measure with the principle of legal certainty and stated that the article 6 clause 1 of the European Convention have been violated.

The ECHR also pronounced a violation of the article 6 clause 1 of the European Convention in those cases when a new review of a case was ordered because of the fact that there was a different assessment of the case in comparison with the legal assessment of the state courts, which dealt with the case and gave a final meritorious verdict. The ECHR, in relationship to the cancellation of the verdict of the court of lower instance through the reviewing of the case Sitkov v. Russia stated that, taking into account the circumstances of the case submitted, the article 6 clause 1 of the European Convention was breached through the cancellation
of final legal and valid decision of the court. In this case the primary reason for the “re-opening” of the proceeding the need to judge once again the facts of the case. This was done on the basis of the impulse given by an official who was not a litigant. In connection with these cases the ECHR mainly pointed to the legal uncertainty arising as a result of the cancellation of the final court’s decision. For example in the case of Stere and others v. Romania (verdict of February 23, 2006) the ECHR stated that, in case, the litigant challenged the valid decision of the court merely for the purpose of reaching a new analysis, judging and decision in the case the cancellation of legally valid verdicts would lead to creating the environment of legal uncertainty resulting in the citizens’ lack of confidence in the legal system and consequently the lack of confidence in the state respecting the rule of law. In this context the ECHR reminded that the principle of the state respecting the rule of law as one of those principles of democratic society is contained in all the articles of the European Convention. The principle of a democratic state respecting the rule of law is based on the condition of respecting the principle of legal certainty especially as far as court decisions representing the principle res iudicata are concerned. No litigant is entitled to require the court to assess the court’s decision that is legally binding merely for the purpose of getting the chance for new dealing with the case, assessment and verdict. The ECHR also stressed that through the cancellation of a legally valid decision the environment of legal uncertainty would lead to the lack of confidence of the public in the legal system and subsequently lack of confidence in the state as the one respecting the rule of law.

The ECHR in the case of Abdullayev v. Russia (the verdict of February 11, 2010) stressed that for the sake of legal certainty implicitly contained in the article 6 of the European Convention, final decisions should remain, in general, “untouched”. That is why they should only be cancelled for the purposes of relieving crucial faults. However, according to the ECHR, the fact that there are two different views on the subject of the proceeding should not be considered as such a fault. Thus the ECHR came to the conclusion that such a reason cannot be regarded as a good reason for assessing the case for a second time.

In the case of Sutyazhnik v. Russia (verdict of July 23, 2009) the ECHR ruled that the decision of a court representing res iudicata can only be reviewed on condition that there has been a serious fault made and as a result of this the decision should be reviewed.

In the case of Cornif v. Romania (verdict of January 11, 2007) the ECHR stated that it had come to the conclusion while judging the case that this was a typical example of the existence of two different legal opinions on the same subject of proceeding, which in no case allows the court to cancel a valid and legally binding decision of the court. In addition to this in that case which involved a legal dispute between private subjects there was nothing that would represent circumstances of such a crucial and important interest which would entitle the
court to cancel the valid decision of the court in accordance with the principles declared in the case of Ryabykh (Ryabykh, § 52).

In many cases the argumentation from the case of Kot v. Russia has been used. Under this argumentation the litigants in a civil court proceeding inevitably have a different opinion on the application of the substantive law. The disagreement with the assessment of the case by the court of first instance and by the appellate court cannot be regarded as extraordinary circumstances which would entitle the court to cancel a legally binding and enforceable decision and subsequently “re-opening” of the proceeding. That is why the ECHR also stated that the article 6 clause 1 of the European Convention was violated in these cases.

It is possible to sum up by saying that in the sense of the ECHR’s rulings the justifiability of the application of the extraordinary remedial measure for the purpose of cancellation of the court’s decision and the admissibility of the diversion was accepted as non-violating the principle of the legal certainty only in such cases when during the proceedings there were serious procedural mistakes made by the acting courts, i.e. there were some deficiencies in proceedings, however, not in cases of different assessment of the facts of the case and different factual and legal conclusions made by the litigants against the factual and legal assessment pronounced by the court in a due process.

The application of the extraordinary remedial measure is, under the legal order of the Slovak Republic, directly available to the litigants in cases of serious mistakes on the part of the court. It can be applied on the basis of some of the appellate review reasons enshrined in the § 237 of the Civil Procedure Code. The appellate review is, as a matter of fact, admissible against every decision of the appellate court if:

a) the court has made a decision about a thing that does not belong to the competency of the courts;
b) the person who presented himself as a litigant did not have the capacity to be called a litigant;
c) the litigant did not have the procedural capacity and was not properly represented;
d) the same case has already been decided or in the same case the proceeding has already started;
e) if the motion to begin the proceeding has not been filed, although it was necessary under the law to do so;
f) the right to appear before the court was removed from the litigant through the procedural steps taken by the court;
g) the case was decided by an expelled judge, or the court was improperly occupied, the senate decided instead of the judge sitting alone

If there are some of the points or so-called “reasons for confusion” mentioned above connected with the decision-making of the court upon the legal claims
of the litigants, then the litigant himself can apply the extraordinary remedial measure in the form of appellate review. However, if there were no such serious mistakes made by the acting courts, then the application of the extraordinary appellate review is, in the light of the rulings of the ECHR outlined above, incompatible with the article 6 of the European Convention.

For these reasons the initiator of the legislative intent decided to omit completely the institute of the extraordinary appellate review as an extraordinary remedial measure in the proposal of the new legal regulation. However, it is still not clear and final whether such a step will be taken or not. The omission of the extraordinary appellate review as well as some other changes briefly outlined above are conditioned by the legislative intent which must first be approved by the Government of the Slovak Republic. It will only be this version which is supposed to be binding for the framing of the specific provisions in the new form of the law.
THE EFFORT TO ACHIEVE EQUALITY WITH THE HELP OF THE REVERSAL OF THE BURDEN OF PROOF IN ANTI-DISCRIMINATION LITIGATION

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Abstract: Application of non-discrimination has a fundamental problem inherent in the fact that the prosecutor has only a very limited possibility to prove violations of the prohibition of discrimination, and much less the motives of the discriminating person, and thus the reason for discrimination. In addition, discrimination occurs in the relations, which are characterized by considerable inequalities, when more evidence is on the side of potentially discriminating than on the side of those discriminated. The article offers the analysis and comparison of the US and European approach to the procedural aspects of the anti-discrimination litigation with the special attention given to the special procedural mechanism - the reversal of the burden of proof.

Keywords: Anti-discrimination litigation, equality, reversal burden of proof, Unites States, European Union, Czech Republic

“Equality would be heaven if we could attain it.”
Gerard Queen,
professor of Kingston University, Surrey, UK

Application of non-discrimination has a fundamental problem inherent in the fact that the prosecutor has only a very limited possibility to prove violations of the prohibition of discrimination, and much less the motives of the discriminating person, and thus the reason for discrimination. In addition, discrimination occurs in the relations, which are characterized by considerable inequalities, when more evidence is on the side of potentially discriminating than on the side of those discriminated.

For this reason, the U.S. Supreme Court in the 1970s ruled that it is sufficient to prove only “discrimination at first glance – prima facie. In the decisions of the

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U.S. Supreme Court in case Green v. McDonnell Douglas (1973) and in the matter of Texas Dept. of Community Affairs v. Burdine, 1981, it was noted that the onus of proof of discriminatory behavior is transmitted from the plaintiff to the defendant with the minimum evidence of the obvious case. The factual basis of the dispute was that the candidate for a job who was at the same time a member of an ethnic minority in the United States, had qualifications for the work, and yet she has not been accepted for the position, and this place remained vacant until it was occupied by a person who was not a member of an ethnic minority. This rule of the reversal of the burden of proof was based on the following two premises:

1. Employers are acting rationally, and only they know or can explain the reasons for their decisions.

2. The most likely reason why the employer refused a qualified member of a minority on the job vacancy is just his belonging to such a minority.

The new rule about shifting the burden of proof under the US Supreme Court decisions should not be a kind of persuasive burden, but rather an obligation to continue in the proceedings. In proceedings where there is floating burden of proof, the burden of proof spills over from the side of the plaintiff to the defendant, and vice versa, and this until confirmation or a complete refute of the fact, that, for example, the conduct of the employer in the employment dispute has not even contained a motive that could be considered discriminatory. Thus, the court often examines whether the grounds put forward by the defendant are not only covering the actual reasons for inappropriate treatment of applicants for a job, or employees themselves, thus the reasons for discriminatory behavior. Therefore, it is frequently talked about the actual "discriminatory intent." The first allegation of the existence of discrimination, however, is always on the aggrieved or the plaintiff. What is then, the most frequent way used by the employees to prove their discrimination?

Plaintiffs usually rely on a combination of comparative methods (e.g. a black employee was laid off from his job working for a work misconduct, although an employee of the white skin committing the same misconduct was not fired; or a man looking for work was hired although the female candidate with higher qualifications was not; or a younger employee was promoted, though the older one had more experience, etc.)

The grounds for discriminatory conduct in their mutual combination can be usually presented as follows:

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a) By proof of fictitious reason (e.g., the employer alleges that the employee has committed a violation of the working discipline and therefore had to be dismissed)

b) By proof suggesting bias against a certain group of people (e.g. a managing employee used, in public or private, allusions to persons of different race, gender, age, education, ethnicity, skin color, sexual orientation, etc.)

c) By proof of discriminatory treatment of other persons (e.g., the employer dismisses at first persons of another ethnicity, or skin color, in the case of his/her difficult economic situation).

d) By proof of the existence of stereotypes on the part of the employer in assessing applicants for the job or the employee (e.g., the implementer of the status of employees committed insults of women or persons of other ethnicity as people reputed to be less able to carry out certain work)

d) By proof of statistical data (in the context of long-term development of case law in the field of discrimination, statistics is often a common proof when the complaining party submits official or their own statistical data about existing or ongoing discriminatory practice of the defendant).

5 C-54/07: Judgment of the Court (second chamber) of 10 July 2008. Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV – statement by the EU Court of Justice: “1) The fact that the employer has publicly declared that they will not accept employees of a particular ethnic or racial origin constitutes direct discrimination in recruitment to employment within the meaning of article 2, par. 2 of Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, in view of the fact that such declarations can actually dissuade certain aspirants from that to make themselves known, and therefore acts as an obstacle to their access to the labor market. 2) Public statements by which an employer announces that as part of its recruitment policy, the employer will not hire an employee of a certain ethnic or racial origin, is sufficient to create a presumption of the existence of directly discriminatory recruitment policy within the meaning of article 8 (1) of Directive 2000/43. This then is the responsibility of the employer to prove that there has been no breach of the principle of equal treatment. It can do so by proving that the actual recruitment practice of the company does not conform to such declarations. The referring court is to verify that the facts complained of are demonstrated, and determine whether the facts presented to support the statements of the mentioned employer, based on which it did not infringe the principle of equal treatment, are sufficient. 3) Article 15 of Directive 2000/43 requires the system of penalties for infringements of the national provisions adopted in implementation of this directive in the case where there is no specific victim, to be effective, proportionate and dissuasive. “ (see Codexis)

6 The judgment of the European Court of human rights, dated February 7, 2006, in complaint No. 57325/00 D. H. and the other against the Czech Republic, where it was in point 38 of the judgment stated that: “the complainants maintain that if a complainant in the case proves an obvious discrimination (for example, by supporting statistics), or it will be revealed by the latest news of international organizations, as it is in this case, the burden of proof is shifted on the defendant government, which must prove that the difference in treatment is justified. In this respect, the complainants refer to the opinion of the Court, according to which, under certain circumstances “it should actually be considered a must have, that the burden of proof lies on the authorities, which must submit a satisfactory and convincing explanation” (Anguelova against Bulgaria, no. 38361/97, sect. 111, ECHR 2002-IV). As a reasonable and objective explanation may not be in their opinion based on insufficient mastery of the Czech language, on the different socio-economic situation and on the consent of the parents of these children, State authorities failed to give such
Regulation of the European Union is working with the principle according to which the burden of proof moves only with regard to the facts that the plaintiff cannot have reasonable access to, or it cannot have them reasonably at his disposal. Therefore, if the complainant submits a fact suggesting that there has been direct or indirect discrimination, the burden of proof must be moved and the defendant must prove that the breach of the principle of equal treatment did not occur. The difference in treatment as discriminatory behavior is modified also in the meaning of article 14 of the Council of Europe Convention for the protection of human rights and fundamental freedoms, as behavior, which lacks objective and reasonable justification. This means such conduct which does not follow the legitimate purpose and for which there is no reasonable relationship between the means used and objectives pursued.

Council Directive 97/80/EC of 15 December 1997 provides for the burden of proof in cases of discrimination based on sex. This directive was valid until August 14, 2009 and was cancelled by the following EU legislation, which was the European Parliament and Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment for men and women in matters of employment and occupation. However, this directive has created room for wider protection of the rights of persons who feel their rights to be affected by a discriminatory expression, for example, of the employer. This directive is consistent with the Council Directive No. 75/117/EEC, Council Directive No. 76/207/EEC, insofar as discrimination based on gender is concerned, and Directive No. 92/85/EEC and 96/34/EC, which affect the proceedings in the public or private sector. Article 4 (1) of the repealed by Directive No. 97/80 provides for reversed burden of proof. Although the defendant is required to prove the legitimacy and legality of the procedure against the person complaining, the complaining, aggrieved, party, shall present their evidence as well. The directive states that: “persons who feel harmed by the fact the principle of equal treatment has not been applied to them, shall present in a court or other competent authority, facts from which it can be inferred that there has been direct or indirect discrimination.”

an explanation. Even assuming that the inclusion of the complainants to a special school was led by a legitimate aim, but with which they fundamentally disagree, this measure cannot in any way be regarded as proportionate. “ (see Codexis) or the EU Court of Justice judgment in case C-415/2010 Meister, (see Codexis)


9 Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

10 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in the cases of
Rules for application of so called reverse the burden of proof are also laid down in Council Directives 2000/43/EC and 2000/78/EC. In the article 8 of the Council Directive 2000/43/EC, it is stated: “Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment 11

This way of the proving shall not apply to criminal proceedings, as well as for the proceedings, where inquisitorial principle applies for the courts or for the decisive authorities. States are obliged to comply with the minimum standards for the protection of weaker parties, they may, however, in their legislation, offer even more protection.12 A part of this enhanced defense of weaker parties to a dispute is also ensuring access to associations, organizations and other legal entities in judicial proceedings. These bodies, as soon as they prove their legitimate interest on compliance with anti-discrimination law, are accepted into the proceedings (or they even initiate the proceedings themselves) and they usually support the complaining party or they provide it with the necessary legal means (legal advice, funds for the process, etc.) to defend their rights against the employer. It is interesting that on the side of the employers are often big companies, concerns, and/or entities that are in the case of reimbursement for so called non-material damage – financial satisfaction, also able to meet the cost of these auxiliary bodies.13

In Czech law, the shifting of the burden of proof is embedded in the provisions of the section 133(a) of the Act No. 99/1963 Coll., Code of Civic Proce-

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12 The EU Court of Justice judgment in case C- 303/206 Coleman
13 For Example, the European Roma Rights Centre (ERRC) is an organization based in Budapest, which deals with the problems of the Roma and Sinti people in Europe. Its main activities include lobbying and training in the field of human rights. ERRC was founded in 1996 and is managed by the International Commission-http://www.errc.org/
dure, as amended by later regulations (hereinafter referred to as CCP). This regulation implements a significant part of the anti-discrimination legislation.

The Constitutional Court of the Czech Republic in the application for revocation of provisions of section 133 of CCP for its alleged unconstitutionality decided that:

“By the interpretation of the provisions of section 133a (2) of the CPR it cannot be inferred that the person purchasing the services who felt to be racially discriminated against, it is simply sufficient to claim that there was a discriminatory act. This person in court proceedings must not only maintain, but also prove that he/she has not been dealt with in the usual manner, i.e. in the manner which would be to their disadvantage. If this person does not prove the claim, he/she cannot succeed in the proceedings. Furthermore, the person must claim that the disadvantageous treatment was motivated by discrimination on grounds of racial or ethnic origin. He/she, however, does not need to prove this motivation, as it is in the case of a proof of a different treatment assumed, however, it is rebuttable, when it is proven otherwise in the evidence. Indeed, the requirement that the plaintiff had to prove that he/she was discriminated against precisely and exclusively for their racial origin (ethnic) and not due to another reason, is obviously impossible, because to prove motivation (incentive) of the defendant is inherently impossible.

Thus, the appellant’s opinion that, in proceedings referred to in the contested provisions of the code of civil procedure “the complaining party has an advantage, since it does not have to prove what should have happened, and why it is a subject of a law suit, while the defendant party has disadvantage because it should demonstrate what did not happen,” does not hold. In fact, the burden of proof does not lie solely and exclusively on the side of the defendant. Even the complaining party

14 Provision of section 133 (a) of the CPR: “If the claimant shall state the facts before the court, from which it can be inferred that he/she has been subjected to direct or indirect discrimination from the defendant a) based on sex, racial or ethnic origin, religion, faith, belief, disability, age or sexual orientation in the workplace or other dependent activities including access to them, occupation, business or other self-employed activities, including access to membership in an organization of workers or employers, and membership and activities in professional chambers, b) on the basis of racial or ethnic origin in the provision of health and social care, in access to education and training, access to public procurement, access to housing, memberships in associations and interest in the sale of goods in a shop, or the provision of services, or (c)) on the basis of sex in the access to goods and services, the defendant is obliged to prove that there was no breach of the principle of equal treatment.”

shall bear its burden of evidence and claims. If the complaining party can bear the
burden, which must be assessed in each individual case by the court, the defend-
ant is to subsequently prove their claims that the discrimination of racial (ethnic)
grounds did not happen. For these reasons, the Constitutional Court came to the
conclusion that the provisions of the section 133a (2) is a means proportionate to
the achievement of the objective pursued and that, – if applied by the above men-
tioned constitutionally conforming manner – there shall be fair balance maintained
between the requirements of the public interest and the requirements of the protec-
tion of individuals fundamental rights. “ 16

Thus, according to the opinion of Constitutional Court of the Czech Repub-
lic, the shifting of the burden of proof does not mean a definitive “condemnation”
of the defendant to lose, but a requirement that the defendant in reasonable and
convincing arguments explained the non-discriminatory nature of its decision.
“The requirement that the complaining party had to prove that the complainant
was discriminated against precisely and exclusively for their racial origin (ethnic)
and not due to another, is obviously impossible, because to prove motivation (inci-
tive) of the defendant is inherently impossible from very the nature of things.” 17 It is
not, therefore, a presumption of guilt. Both the Czech and European legislation
work with shared, (also known as shifting or floating burden of proof) burden of
proof, because the true transfer of the burden of proof would be inequitable in
its result. It would subsequently lead non-proportional effects on the subject the
accused of discrimination. In the dispute over discrimination, therefore, a differ-
ent principle of evidence than in other private-law disputes applies.

The Constitutional Court of the Czech Republic also expressed its opinion on
a situation where the ordinary courts had not sufficiently considered the alleged
discriminatory act, and stated that Constitutional Court cannot pronounce
generally valid conclusion what behavior is discriminatory, because it always
depends on the circumstances of the particular case. However, it is necessary
general courts properly addressed the alleged objection of a discriminatory act
and did not infringe the constitutionally guaranteed right to a fair trial. If the
complainant alleges a discriminatory act and this is be documented in a manner
from which the discrimination results prima facie, the application of section 133
(a) of the CPR and thus the reversing of the burden of proof, applies. 18

However, the scope of things, in which the burden of proof passes to the
defendant, does not overlap in the whole range with the arrangements con-
tained in the Act. No. 198/2009 Coll., on equal treatment and the legal means
of protection against discrimination and on amendments to certain acts (the

16 Points 73, 75 of the justification of the finding of the Constitutional Court of the CR Pl. ÚS 37/04
in the matter of the motion for revocation of the law
17 Point 71 of the justification of the finding of the Constitutional Court of the CR Pl. ÚS 37/04 in
the matter of the motion for revocation of the law
18 Finding of the Constitutional Court of the CR II. ÚS 1609/08
Anti-discrimination act). The Anti-discrimination act prohibits discrimination on grounds of race, ethnic origin, nationality, gender, sexual orientation, age, disability, religion, faith and belief in all the areas defined in section 1 (1) of the Anti-discriminatory act. According to the provisions of section 132 (a) however, the burden of proof may be shifted from these reasons (with the exception of nationality) only in the workplace or other dependent activity, profession, business or other self-employed activity, membership in the organizations of employees or employers and professional membership and the activities in the professional chambers, and furthermore, on the basis of ethnic origin, the burden of proof is also transferred in the provision of health and social care, in access to education and training, access to public procurement, access to housing, memberships in interest associations and in the sale of the goods in the shop or the provision of services; and on the basis of sex, the burden of proof is transferred in the field of access to goods and services.

Rules of the administrative procedure with regard to proof of discrimination, are listed in the provisions of section 64 of Act No. 150/2002 Coll., Code of Administrative Justice, as amended (hereinafter referred to as "CAJ") and the provisions of the Code of Civil Procedure apply to them mutatis mutandis, that means also provisions of section 133 (a). The Act No. 500/2004, the Administrative Procedure Code as amended, however, does not directly contain provisions relating to the transfer of the burden of proof. If the administrative procedure is controlled by the inquisitorial principle, which, as a rule it is, it is the decision of the administrative body which method of investigation it uses. Administration bodies, when investigating the matter, should therefore use the procedure, which is effectively the same as a institute of shared burden of proof and which will lead to ascertainment of the factual situation of the matter. However, with knowledge of the facts, it could be doubted that the administrative authorities will follow the above mentioned procedure.

On the American continent, where the idea of shifting the burden of proof emerged, some very critical views have been occurring more and more frequently. These opinions are based on skepticism about whether a person of judges themselves, who decide on merit, are involved in so called subconscious discrimination. The so-called cognitive bias that explains discrimination as a natural part of the human psyche, and in which there are stereotypes that have influence on decision-making without any intention, can negatively affect the

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19 Letters (h) to (j) of the provisions of section 1 (1) of the Anti-discriminatory act complemented by membership in special interest associations, access to public procurement and the area of social welfare, which represents a slice of the area under the letter (f)

20 Letter (j) of the provisions of section 1 (1) of the Anti-discriminatory act


decision-making process. I believe that, for example, in the matter of D. H. and others v. the Czech Republic, in which the Grand Chamber of the Strasbourg Court finally decided on the existing discriminatory motive in the Czech legislation using the statistics as a decisive argument, such a stereotype about the persistent discrimination against Roma people in the Czech Republic may be considered. This conclusion follows also, inter alia, of all the reports of the Commission at the time when the Czech Republic negotiated its accession to the EU.

Overall, it can be concluded that the fight against discrimination in the form of shifting the burden of proof is now an integral part of the legal systems of countries in Europe, but despite this, the very psychology of discrimination is not completely dealt with.
Introduction

Taxation of employment income (income from dependent activity) is within tax systems quite separate field and the corresponding tax liability is usually higher than of income from other activities. A key role in this context play con-...
tributions on obligatory insurance. Therefore, it is important to clearly state what the income from employment is.

The relevant Czech legislation specifies the income from dependent activity clearly. Due to this definition, there is a consensus on the types of the taxable employment income; it includes both regular and irregular income paid out in cash or in a non-monetary form including also all kinds of discounts and non-cash benefits. This broad definition of taxable income is also accepted for the purposes of contributions to obligatory insurance.

However, there is not so wide consensus on the specification of payers of the employment income in the Czech legislation. Income related to employment will be subject to the personal income tax from dependent activity regardless who the payer of the income is. The specifics of insurance compared to income tax complicate the application of the same approach for calculation of the contributions to obligatory insurance. This inconsistency can be used for tax optimization to minimize the cost of employment benefits.

Typical situations – when the employment income is paid by someone else than the legal employer (a third party) – are stock option plans, or different kinds of employment benefits, such as provision of wellness or sport activities to employees. Often the payment of employment income is a part of a special employment structure, e.g. hire out of labour.

Based on real practical examples we define a general remuneration structure. We analyze in detail this structure according to the Czech legislation and discuss possible approaches to the tax consequences of the structure. This discussion brings us to question principal issues such as what is an employment-related income, who should bear the social security expenses, how far should we go with the assimilation of facts in social security coordination etc.

There is not much literature on the concrete examples/analyses of the situation when the income related to employment is paid directly by a third party. The technicalities for the purposes of the personal income tax were analyzed within the Coordinating Committee of The Chamber of Tax Advisers and the Ministry of Finance in 2007\(^3\) (discussed further). The Chamber of Tax Advisers also provoked a discussion on this issue with the Ministry of Health Insurance which leaded to an official statement issued in 2008.\(^4\) Brief information on this issue presents Červinka in practical information about changes in definition of employee and employer in 2008.\(^5\)

\(^3\) See the conclusions of the negotiations of the Coordinating Committee of the Ministry of Finance and the Chamber of Tax Advisers No. 730/08.10.03


As for the discussion on broader consequences of the case, the theoretical literature is more developed. In further discussion we use mainly literature related to assimilation of facts.\(^6\)

The paper is structured as follows. First we provide a detailed analysis of taxation of employment-related income in the Czech Republic with the specification of the problematic questions. Further we present the tax treatment of the employment-related income paid by a third party in selected countries, followed by the discussion of the related basic principles. We close the paper with a short summary pointing out the main conclusions.

### 2 Analysis for the Czech Republic

A starting point for determination of treatment of an individual's income in the area of personal income tax, social security\(^7\) and health insurance contributions is specification of basic terms: an employment income, an employee and an employer. These definitions differ for each of these areas, as specified by the respective legislation.

Generally, employment income is the income which is paid to an employee by an employer, in relation to an employment activity. For certain implications, it is important for who is the employment activity performed: for the payer of the income, or for another entity. Other important criteria might be the existence of a formal relationship between the individual and the payer of the income.

For the income tax, social security and health insurance implications of the employment-related income provided by a third party, it is important whether the related costs are re-invoiced by the payer (a third party) to the legal employer, as discussed in detail below.

#### 2.1 Personal Income Tax

The Act No. 586/1992 Coll., on Income Taxes (hereinafter “Income Taxes Act”), derives the specification of an employee and an employer from the definition of employment income. *An employee* is a receiver of an employment income; *an employer* is a payer of such income.

This definition of the employment income is very wide. It includes all income from the current, previous or future employment or similar relationship, in which the individual is subject to orders and instructions of the payer of the income. In addition, certain types of income are deemed to be employment income.

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\(^7\) For the purposes of the Section 2 of the paper, we use the term social security as used by the Czech legislation, i.e. covering the pension, sickness and unemployment insurance.
income even if there is no dependent relationship between the individual and the payer of the income, e.g. income for the activity of members of cooperatives, members of statutory boards, executives etc.\textsuperscript{8}

For the personal income tax purposes, it is irrelevant whether the income is paid by an entity for which the individual performs a dependent activity, or from any other payer (a third party), if such income relates to a dependent activity performed for someone else.

Practical application of this definition means that employment income is anything which relates to a dependent activity (employment) and the payer of this income is considered an employer for the personal income tax purposes. Neither a legal relationship, nor a performance of activity for the payer is required.

The Income Taxes Act binds the obligation to pay the personal income tax on the moment when the income is actually paid out to an employee (to a bank account, in cash, as a non-monetary benefit etc.) or when it is accounted to an employee. Each income, to which an employee is entitled based on his employment activity (performed for the payer of the income, or for another entity) is considered an accounted income. The tax obligation for the personal income tax purposes then arises either when the income is paid to an employee, or when it is accounted to him, whichever comes first.

If the employer (i.e. the entity which pays out or accounts the employment income to the employee) is a registered payer of the personal income tax, he has to process the employment income through the payroll, i.e. withhold the Czech personal income tax from dependent activity from this income and transfer it to the Czech tax authority. The definition of a registered payer covers the following subjects: \textsuperscript{9}

- an entity seated in the Czech Republic, which pays out or accounts the income,
- a Czech permanent establishment of an entity seated abroad, except for a permanent establishment created due to provision of services at the Czech territory and foreign embassies.

A special definition of an employer is stipulated for the situation of international hiring out of labour.\textsuperscript{10} In this case, the employer for the Czech payroll tax is deemed to be the Czech entity, at which the employees work (under its orders and instructions), even if they are legally employed by a foreign entity, which also pays them their remuneration. The Czech entity, the employer de facto (or economic employer), is then required to pay the Czech payroll tax from the individual’s remuneration, even if it does not pay this remuneration directly to them but it is being invoiced by the foreign entity.

The international hiring out of labour is a typical case when employment income is paid by an entity for which the individual does not perform any activity. Since the personal income tax treatment is specifically stipulated by the law in this case, there are no doubts who should pay the personal income tax. However, there might also be situations in which the related obligations are not clearly specified, e.g., when the individual works for one entity but receive the employment income from another entity, which does not have any relationship with the individual's employer (a third party). In such situation special tax treatment for international hire out of labour does not apply.

In case the costs of the employment income remain to be borne by the third party, no further steps need to be taken. On the other hand, if it decides to re-invoice these costs to the individual’s employer (or the entity for which the individual performs his work),\textsuperscript{11} it might be questioned whether the obligation to process the income through the payroll lies only with the third party (the payer of the income), or with the individual’s employer, or both. These doubts should be clarified by a recent standpoint of the General Financial Directorate, expressed in the Coordinating Committee with the Chamber of Tax Advisers.\textsuperscript{12}

In situations when the payer of the employment income does not fulfill the conditions for a registered payer of the personal income tax (e.g., because it is an entity seated abroad), the individual has to include the income as the employment income (according to the Section 6 of the Income Taxes Act) in his annual Czech personal income tax return and pay the tax from it himself.

\textbf{2.2 Social security}

In the area of social security (i.e. pension insurance, sickness insurance and unemployment insurance), an income (as specified above for the personal income tax purposes, i.e. both monetary and non-monetary) related to an employment activity is subject to the social security contributions on condition that it is paid by an employer to an employee. However, definitions of these terms differ from the definitions used in the personal income tax area.

Currently, an employee for the social security purposes is defined by enlisting the respective categories of individuals.\textsuperscript{13} Anyone who is not specifically mentioned in this list is not considered an employee. They might participate at the Czech social security system as another category (e.g. a self-employed individual or a voluntary participant), or not participate at all.

\textsuperscript{11} E.g., based on the transfer pricing rules, requiring each related entity to bear the costs of an activity from which it benefits.

\textsuperscript{12} See the conclusions of the negotiations of the Coordinating Committee No. 393/20.02.13.

\textsuperscript{13} See Section 5 of the Act No. 187/2006 Coll., Act on Sickness Insurance, as amended.
An employer is an entity which has the legal relationship with the employee. It might be seated in the Czech Republic, or in a country with which the Czech Republic has concluded an international social security agreement.\(^{14}\)

Practically, the definition of an employee includes most of individuals who are considered employees for the personal income tax purposes. However, there is a significant difference with respect to income paid by a third party. In case there is no legal relationship between the individual and the payer of the income, they are not considered an employee and an employer for the social security purposes, even if the individual actually works for the payer. Consequently, the income paid to the individual by this entity is not considered an employment income for the social security purposes and there are no Czech social security contributions due from this income, regardless of treatment of this income from the personal income tax point of view.

According to the current rules, if an employee receives income related to his employment activity from an entity with which he does not have any legal relationship (a third party), such income is not subject to the Czech social security contributions. This applies even if the individual performs an employment activity for the payer of the income. The relationship between the two entities (e.g., a parent company and a subsidiary) is not relevant.

However, unlike in the personal income tax area, the social security treatment of such income differs if it is re-invoiced by the payer to the employer. The reason is that the assessment base for the Czech social security contributions equals to the accounted income, which according to the social security legislation includes all income which is provided to an employee by an employer in a monetary or non-monetary form, as a benefit or in any other way.\(^{15}\) This term in its official interpretation includes any income which an employer has in its accounting books accounted in the name of the employee, generally on a payroll sheet. Should the payer of the income, with which the employee does not have any legal relationship, recharge the costs of the income to the legal employer of the employee, the employer has to include this income to the payroll for the social security purposes.

Effective as of January 2014, the definitions for the social security purposes should be amended.\(^{16}\) The new definitions should be practically same as for the health insurance purposes as specified below. Although the draft amendment

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\(^{15}\) See Section 5 para 1 of the Act No. 589/1992 Coll., on the Social Security Contributions and the Contribution to the State Unemployment Policy, as amended.

\(^{16}\) Proposal of the Act on the Amendment of Tax Legislation related to the Recodification of the Private Law and the Amendment of Other Legislation, No. 1004
of the legislation still includes an enlisting overview of the employee’s category, there should be a generalizing point covering all other individuals who perform dependent activity for which they receive income. There will still be a difference compared to the personal income tax treatment, since performance of an activity for the payer of the income will be required. Therefore, a third person paying income related to an employment activity performed by an individual for another entity will not be considered an employer for the Czech social security purposes and there will be no Czech social security contributions due from such income. This treatment stems from the purpose of the social security system, which is to compensate a drop out of income when an individual cannot perform the gainful activity (because of sickness, old-age etc.). When there is no activity done by the individual, he might continue receiving the income during his incapacity to work; there is thus nothing to be compensated for.

According to the proposed regulations, an income paid to an employee in relation to his employment activity by a third party, should thus still be exempt from the Czech social security contributions; the Czech social security contributions should only be extended to income from an entity with which the individual does not have a legal relationship, but for which he actually works. Different treatment of employment income re-invoiced to the employer of the individual, which applies currently, should be applicable as well, same as the irrelevance of the relationship between the entity which pays out the income and for which the employee works.

The only situation when the legal relationship is not required for the purposes of payment of the Czech social security contributions is the assignment structure of international hiring out of labour from a country with which the Czech Republic has not concluded any treaty on the social security. The legal employer, seated in such country, is called “a foreign employer”. The Czech entity, at which the individuals perform their activity, is called “a contractual employer” and the individuals “contractual employees”. The contractual employee’s position differs slightly from a standard employee’s position, since he participates at the Czech social security as of the first date of his activity in the Czech Republic only if he is not covered by a pension insurance in the country where his legal employer is seated. Otherwise, he participates only after 270 days of his activity in the Czech Republic, calculated in two consecutive years. Similar to the treatment of the international hiring out of labour in the area of the personal income tax, the contractual employer has the same obligations as a standard employer in the social security area. The income paid by the contractual employer to the contractual employee, both paid directly and through the foreign employer

17 This might be amended in the future, in relation to creation of the Single Collection Point, unifying the collection of the personal income tax, social security and health insurance contributions.
18 See Section 3 letter o) of the Act No. 187/2006 Coll., Sickness Insurance Act, as amended; this treatment does not apply to countries covered by the European social security coordination.
(invoiced to the contractual employer), is considered employment income which is subject to the Czech social security contributions.

2.3 Health insurance

The treatment of an income related to an employment activity in the health insurance area is similar to the social security area in the way that it has to be paid by an employer to an employee. Also this area defines these terms differently.

The definition of *an employee* for the health insurance purposes is closely related to its definition for the personal income tax purposes, i.e. as someone who receives income from employment. There are a few exemptions stipulated in the law, e.g. individuals working based on an agreement on work activity or an agreement on work performance with income lower than the specified thresholds. The existence of any formal legal relationship is not relevant. An employer is then someone who pays the employment income, when it is seated in the Czech Republic (or another state, if the participation in the Czech health insurance is derived from any international regulations).

When the current rules were introduced in 2008, large discussions had occurred, questioning the relationship between the definition of an employee and an employer for the health insurance purposes and for the personal income tax purposes, especially in case of the international hiring out of labour and employment income received from a third party.

For the international hiring out of labour structure, the official interpretation of the Ministry of Health declared the Czech entity, at which employees of a foreign company work, as an employer for the Czech health insurance purposes. As a result, any income paid or accounted by this entity was subject to the Czech health insurance contributions. On the other hand, experts declared that the definition of the “payer” for the personal income tax purposes must be interpreted only as the entity which actually pays out the income. This matter has not been challenged in front of a court so far and thus, the Ministry of Health keeps its interpretation.

In case of employment income received from a third party for which the employee does not perform any activity, the Ministry of Health declared that such income is not subject to the Czech health insurance contributions due to the missing activity, although many experts claim that the law does not include this limitation and thus, the health insurance contributions should be due also

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19 See Section 5 letter a) of the Act No. 48/1997 Coll., Act on Public Health Insurance, as amended.
20 Until 2007, the definition of an employee was more related to the definition used for the social security purposes; the existence of a formal legal relationship was relevant by then.
from income paid by a third party. This matter has also not been challenged in front of a court yet.

Based on the above, income received by an employee in relation to his employment activity by another entity, for which he does not perform any activity, is not subject to the Czech health insurance contributions. Potential legal relationship between the entity which pays out the income and for which the individual works (e.g., a parent company and a subsidiary) is not relevant; the obligation to pay the health insurance contributions depends on whether the individual performs any activity for the payer of the income.

Same as in the social security area, potential recharge of the costs of the income results in a necessity for the employer to process the income in the payroll for the health insurance purposes and pay the Czech health insurance contributions.

3 Comparison with selected states

Since the analyzed situation is quite specific, usually without a unique arrangement in the legislation, only professionals with detail knowledge of the system are able to assess it correctly. That is why we prepared a specialized questionnaire and asked professionals in a few other countries for their expert comments.22

The payment of the income by a third party can apply in different situations; in our analysis, we compared one specific situation, which is as follows:

An individual is employed by Company A, based on a standard employment contract. Company B, which is a parent company of Company A, provides the individual with a bonus for his employment activity performed for Company A. There is no employment relationship or any similar contract between Company B and the individual. The individual works only for Company A.

We received reliable answers from the following countries: Belgium, Germany, the United Kingdom, Ireland, Hungary, the Netherlands and Russia. After the analysis described in section 2, we included also the Czech Republic.

All included countries consider income paid by Company B (the third party) as taxable income. With the exemption of Hungary, all countries also consider this income as income from dependent activity (employment income). In Russia, there is no special distinction of dependent income from the other income.

Personal income tax is paid by the employee in Germany, Hungary and Belgium. However, for Belgium it was stated that some other circumstances might be important in this particular issue. Company A is required to pay the personal

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income tax in the United Kingdom, the Netherlands and Ireland. In Ireland the Company B is obliged to pay the personal income tax, if Company A did not do so. In Russia, Company B is responsible for paying the personal income tax, if it is a Russian entity; if not, the employee is obliged to do it himself. Generally, the same would apply for the Czech Republic. If Company B is seated in the Czech Republic, it should be considered a payer of the employment income, with the obligations of the tax payer. However, if Company B is seated outside the Czech Republic, it would in general not be considered a payer of the income and therefore, the employee would be required to declare the income in his personal income tax return and pay the tax himself.

Social security contributions (in their broader meaning including also health insurance contributions) from this income must be paid in the United Kingdom, the Netherlands and Ireland. These contributions have to be paid by Company A. In Belgium, Germany and the Czech Republic the social security contributions must be paid only if the costs of this remuneration are re-invoiced to Company A, which then pays these contributions. In Hungary a specific treatment is used for the health insurance purposes: the employee must pay the contributions himself, since there is no “employer” for this purpose.

Only in the Netherlands and the United Kingdom, the treatment of the situation would differ if the companies were unrelated. In all other countries, the relation between companies is not important.

The fact that the costs were re-invoiced by Company B to Company A is important in Belgium, the Netherlands, Hungary, Germany and the Czech Republic. If the costs of the income are re-invoiced, the social security contributions have to be paid in these countries. For the Netherlands the re-invoicing is only declaratory, since the social security contributions should be paid even if the re-invoicing does not take place (it is sufficient that Company A is aware of the fact that such income was provided to the employee by Company B, regardless of whether the costs were re-invoiced or not). On the other hand, re-invoicing of the income is not relevant in Ireland, Russia and the United Kingdom. However, for the United Kingdom the potential re-invoicing might be important if Company A does not have a presence in the United Kingdom.

4 Principles behind

The described situation – when a third party is a payer of the income from dependent activity – questions some basic principles of taxation and social security. Generally speaking, the basic principles usually work well in standard situations (in our example meaning standard relationships between an employee

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23 This treatment is based on the fact that the companies A and B are related. The answer might differ if the companies were unrelated.

24 Even in this case, the employee is obliged to file a personal income tax return due to the fact that he has two employers simultaneously.
and an employer such as a direct labour contract), however, in a bit special cases,
the basic principles might fail to provide a solution which would be possible to
administer in practice.

When determining the tax consequences to the specified situation, we should
ask the following questions:

• What is taxable employment income?
• Should we treat tax and social security contributions differently or the
same?
• How to work with the principle of assimilation of facts within EU coor-
dination of social security?

Some of the above mentioned questions were already discussed in previous
parts of the paper. Further, we point out the most important conclusions which
might be further discussed. In each part we start with a brief general overview
and then follow with the specific treatment in the Czech Republic.

4.1 Taxable employment income

Income related to employment paid by the third party is in all analyzed states
taxed as employment income (income from dependent activity). Probable rea-
son for this is that another treatment of this income would cause distortions in
employment taxation and could promote tax optimization. Tax treatment of the
income should depend on its source (meaning for what the income is paid) and
not the way of payment which is only a technical matter.

The Czech income tax legislation considers income related to employment as
income from dependent activity regardless who pays it.

However, in some situations a strict application of this rule is impractical or
even absurd (e.g. little presents to employees on a cultural event organized by a
third party, a tip to a waiter who is an employee of a restaurant). It is not reason-
able to require payment of tax in such situations, meaning the organizer of the
party or the guest of the restaurant should be considered an employer for tax
purposes. The tax liability would in such cases be very low and incomparable to
the related administration.

A limitation to the basic rule was suggested by the Ministry of Finance in the
past, when it was confirmed by the Coordinating Committee with the Cham-
ber of Tax Advisers that employment taxation procedure does not apply when
the income is provided to the employee as a part of marketing campaign; even
though the Ministry of Finance in its conclusion urges to exercise caution in tax
treatment of marketing actions.25

25 See the conclusions of the negotiations of the Coordinating Committee of the Ministry of
Finance and the Chamber of Tax Advisers No. 730/08.10.03.
This forces tax professionals to seek the line between cases when the basic rule should and should not apply, without any guideline in the relevant legislation.

In the Czech Republic, also the determination of the so-called accounted income is important; as discussed in section 2.1 and deeply in the standpoint of the General Financial Directorate, expressed in the Coordinating Committee with the Chamber of Tax Advisers.\textsuperscript{26}

4.2 Tax versus social security contributions

The obligatory contributions are very often put on par with the income tax. It is logical, as both are compulsory payments from work income. However, there are still some differences between these payments that should not be neglected.\textsuperscript{27}

As discussed above, the income related to employment should be taxed as employment income, which implies that the income should be also included in the assessment base for calculation of social security contributions. However, practical realization of this straightforward idea is very problematic. Generally, for tax treatment it is only important that it is properly paid. For social security contributions, it is not only important that they are properly paid, but the payment must also be carefully ascribed to the insured person so that proper benefits can be calculated in future. To make this link between the contributions and the insured person, we must seek for the insured relationship to which the contributions can be connected.

The current Czech legislation on social security does not allow paying the contributions from the employment related income when it is paid by a third party and is not re-invoiced to the legal employer (where the connection to the insured relationship would be obvious).

With preparation of the Single Collection Point in the Czech Republic, it become more actual whether the obligatory contributions should (or could) be treated as tax. It would be most convenient for harmonization and administration to treat them in the same way, however, the specifics of the systems must be respected.

\textsuperscript{26} See the conclusions of the negotiations of the Coordinating Committee No. 393/20.02.13.
With the common administration system for income tax and social security, it would be possible to levy the contributions in the cases when the third party is also a registered tax payer. It is true for the situations when the third party is a Czech entity. However, when the third party is not a registered tax payer, the question whether to pay the contributions is more difficult.

If the third party is not a registered tax payer and the income is not re-invoiced, the tax is paid by the employee after the end of the year in his personal income tax return. The question is: Could the social security contributions be treated the same way? Technically yes, because the employee could calculate and declare the contributions in the same form in which he declares and calculates the tax. The main complication in this case is determination of the amount of these contributions payable by the employee. The contributions are divided to a part paid by the employee and a part paid by the employer. This concept assumes that the payer of the income (the employer) would withhold the employee’s part and pay his own part. However, in the mentioned case there is no “employer” which would fulfill this obligation. From a practical point of view, the registration of the third party as an employer for social security purposes would be an excessive administrative demand since the income paid in such way is often one-time or random. Also being an “employer” for social security purposes is related with significant administrative obligations linked to benefits from the social security system. The enforceability of such obligation would be difficult.

Other possibility is to let the employee pay all contributions himself. However, if only the employees’ part of the contributions would be paid from such income, it would cause an undesirable distortion in costs between the income paid by a legal employer and the one paid by a third party. Further, the social security benefits would be calculated in their full amount, even if only a part of the contributions would be paid because the employers’ part would be missing. This approach would lead to a conclusion that both parts of the contributions must be paid. In case the employee is required to pay both parts of the contributions from the income paid by a third party which is not a registered tax payer, it might be considered discriminatory compared to employees receiving income from their employer.

The Ministry of Finance in the above mentioned statement from the Coordinating Committee suggests a process which is not covered by any legislation. From the administration point of view, it would be preferred to include the income paid by a third party into the payroll of the legal employer, even if it is not re-invoiced to the employer. This conclusion has significant consequences for the social security payments. As stated above, the social security contributions should not be paid from the income paid by a third party as long as it is not re-invoiced to the legal employer. The inclusion of the income into the payroll of the

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28 See the conclusions of the negotiations of the Coordinating Committee of the Ministry of Finance and the Chamber of Tax Advisers No. 730/08.10.03.
legal employer implies that the income is accounted by the legal employer and therefore, the social security contributions should be paid. It is not appropriate to build the obligation to pay the contributions on a process which is not specifically required by any legislation. Moreover, this process assumes that the legal employer knows about the income paid by a third party; for related companies, this knowledge is highly likely, but it does not have to be the case.

4.3 Assimilation of facts

The assimilation of facts is an important part of basic principles of the European social security coordination and substantially influences the discussion of possible social security treatment in the situations when the employment-related income is paid by a third party.

The assimilation of facts is defined by the European Regulation on coordination of social security and is subject to many discussions, because the definition is not clear and its practical application is questionable. A strict application of the principle of the assimilation of facts implies that all situations would be considered as if no internal borders within the states which apply the European social security coordination regulations would exist.

According to this interpretation, a third party which pays employment related income - when the third party is an entity with the seat within the states covered by the European social security coordination regulations – would have to be considered the employer for the social security purposes, since the registered seat in another state must be considered as it were in the Czech Republic. Therefore, the third party would have the obligation to register for the social security purposes in the Czech Republic and withdraw and pay the social security contributions as it were a Czech entity.

Since the assimilation of facts is not relevant for tax purposes, the tax treatment would differ from the social security treatment in the sense that the third party from the state covered by the European social security regulations would not be considered a tax payer for the purposes of income tax, but would be considered the employer for the social security purposes.

31 This assumes that Czech social security system is applicable.
5 Conclusion

There is not clear tax treatment of employment-related income in the Czech legislation. It might lead to complications for certain specific situations in the tax area; however, it has more significant implications in the social security area.

With the preparation of the Single Collection Point in the Czech Republic, the discussion of possible unified treatment of such situations for both tax and social security has intensified.

Currently, in the situations when the employment-related income is paid by a third party and is not re-invoiced to the legal employer, the income tax is paid, but the social security contributions (including the health insurance contributions) are not required. With the unification of the systems, the question arises whether the contributions from such income should be required as well.

Possible solutions to the unified treatment result in difficulties caused by basic differences of the systems. The unified treatment is complicated due to several reasons. Firstly, different international treaties with different basic rules apply (double tax treaties for taxation, the European Regulations and bilateral agreements for the social security). Secondly, the social security contributions must be properly linked to the insured person, so that future benefits can be calculated correctly.\(^{32}\)

Currently, the most discussed possible treatment is that the employee would pay the social security contributions himself, when the payer of the income (a third party) would not be obliged to register as a payer for the personal income tax purposes. In such case the question of discrimination of the employee, who would bear full cost of the contributions by himself (both the employers’ and the employees’ part) must be argued, as well as possible impact of the principle of assimilation of facts.

These alternatives are discussed mainly in relation to the preparation of the new legislation for Single Collection Point in the Czech Republic, which should be effective from January 2015.\(^{33}\) Should a constructive discussion on this topic occur, its outcome might be reflected in the proposed legislation.

\(^{32}\) In the Czech Republic it is mainly true for pension and sickness insurance. The health insurance in the Czech Republic is closer from the economic point of view to the income tax in this context.

\(^{33}\) The political changes might influence the officially declared date of January 2015.
LETTER OF RIGHTS FOR PERSONS ARRESTED ON THE BASIS OF A EUROPEAN ARREST WARRANT: A NOVELTY UNDER THE DIRECTIVE 2012/13/EU

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Abstract: The paper deals with a Letter of rights for persons arrested on the basis of a European arrest warrant, a novelty introduced by the Directive 2012/13/EU on the right to information in criminal proceedings. The Directive stipulates that Member States of the EU shall ensure that persons who are arrested for the purpose of the execution of an European arrest warrant are provided promptly with appropriate Letter of rights containing information on their rights according to the law implementing the Framework Decision 2002/584/JHA on the European arrest warrant in the executing Member State. The paper is divided into three sections. First section presents fundamental knowledge on starting points of the letter of rights. Further, second section analyses its legal basis, i.e. Directive 2012/13/EU. The last third section introduces an indicative model of letter of rights.

Keywords: Letter of rights, European arrest warrant, surrender proceedings, strengthening procedural rights, right to information

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1 Introduction

In May 2012 was adopted the Directive 2012/13/EU on the right to information in criminal proceedings (hereinafter ‘Directive’), which has impact on the European arrest warrant (hereinafter ‘EAW’). It introduces two novelties – first – a Letter of rights on arrest, which shall apply to criminal proceedings in general, and – second – a Letter of rights for persons arrested on the basis of an EAW, which shall apply to surrender proceedings under the Framework Decision 2002/584/JHA on the EAW and the surrender procedures between Member States.

As far as the surrender proceedings are concerned, the Directive stipulates that Member States of the EU shall ensure that persons who are arrested for the purpose of the execution of an EAW are provided promptly with appropriate Letter of rights containing information on their rights according to the law implementing the Framework Decision 2002/584/JHA on the EAW in the executing Member State. Member States of the EU shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 2 June 2014.

As is obvious, the article deals with the Letter of rights for persons arrested on the basis of an EAW, a novelty introduced by the aforementioned Directive. It is divided into three sections. Section 1 presents fundamental knowledge on starting points of the letter of rights. Further, section 2 analyses its legal basis, i.e. Directive 2012/13/EU on the right to information in criminal proceedings. The last section 3 presents an indicative model of letter of rights.

2 Starting Points of the Letter of Rights

Letter of rights for persons arrested on the basis of the EAW is a result of the development of political and legal documents introduced and presented by the top EU institutions.

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The European Council held a special meeting on 15 and 16 October 1999 in Tampere on the creation of an Area of freedom, security and justice in the EU. It sent a strong political message to reaffirm the importance of this objective and agreed on a number of policy orientations and priorities which would speedily make this area a reality. The 1999 Tampere European Council concluded that enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights.

Furthermore, in Hague Programme of 2004, the European Council argued that further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards of procedural rights in criminal proceedings.

On 30th November 2009 – the last day of the III Pillar of the EU – the Council of the EU adopted a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (hereafter 'Roadmap'). Under the Roadmap, action should be taken at the level of the EU in order to strengthen the rights of suspected or accused persons in criminal proceedings. The Commission was invited to submit proposals regarding the measures set out in the Roadmap, namely: translation and interpretation (measure A); information on rights and information about the charges (measure B); legal advice and legal aid (measure C); communication with relatives, employers and consular authorities (measure D); special safeguards for suspected or accused persons who are vulnerable (measure E); and to consider presenting a Green Paper on pre-trial detention (measure F). It is worth mentioning that the scope of these measures is not focused exclusively on criminal proceedings, but some of them are related also to the EAW, i.e. the surrender proceeding.

Two legislative measures have been adopted so far, namely a Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, introducing the A measure, and a Directive 2012/13/EU on the right to
information in criminal proceedings, introducing the B measure. Moreover, the European Commission has introduced a Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest\textsuperscript{13}, in connection to the C measure. Furthermore, it introduced also a Green Paper on the application of EU criminal justice legislation in the field of detention\textsuperscript{14}, in connection to the F measure.\textsuperscript{15} As far as the D and E measures are concerned, no proposals have been introduced.

3 Legal Basis: Directive 2012/13/EU on the Right to Information in Criminal Proceedings

Broadly speaking, the right to information has been recognised as a fundamental human right.\textsuperscript{16} In the Criminal law area, the right to information is considered to be a crucial aspect of the overall right to defend oneself.\textsuperscript{17} The European Council argues that a person that is suspected or accused of a crime should get information on his/her basic rights orally or, where appropriate, in writing, e.g. by way of a Letter of Rights. Furthermore, that person should also receive information promptly about the nature and cause of the accusation against him or her. A person who has been charged should be entitled, at the appropriate time, to the information necessary for the preparation of his or her defence, it being understood that this should not prejudice the due course of the criminal proceedings.\textsuperscript{18}

As a result of aforementioned steps, in May 2012 was adopted the Directive 2012/13/EU on the right to information in criminal proceedings. It is addressed to the Member States of the EU, excluding Denmark.\textsuperscript{19} They shall bring into force

\textsuperscript{14} Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention. KOM(2011) 327 final.
\textsuperscript{19} Denmark is not taking part in the adoption of the Directive and is not bound by it or subject to
the laws, regulations and administrative provisions necessary to comply with the Directive by 2 June 2014.

The Directive is based on the Treaty on the Functioning of the EU, which stipulates that minimum rules concerning the rights of individuals in criminal proceedings may be adopted by means of directives to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial co-operation in criminal matters having a cross-border dimension.\(^\text{20}\)

It should be explained why the EU is better placed to take action than its Member States. The EU is establishing its own, unique system of judicial co-operation based on the principle of mutual recognition throughout the EU.\(^\text{21}\) Such a novel system calls for a guarantee of uniformly high standards of fundamental procedural rights protection in the EU. Considering that there is wide variation between Member States on the content, means and timing of information on rights and on the charge provided to suspects and accused persons, it is unlikely that Member States acting individually would be able to establish a sufficiently consistent standard of provision of information. There are no indications that Member States would provide for raising and approximation of standards of informing accused persons of the charge against them. Whilst a majority of Member States of the EU already use largely identical means of informing accused persons of the charge, there is still significant variance in the precise way and timing of the provision of this information which leads to a divergence of standards in relation to this information across the EU.\(^\text{22}\)

The Directive lays down, first, rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them, and second, rules concerning the right to information of persons subject to a European arrest warrant relating to their rights.\(^\text{23}\) Thus, the Directive deals with the EAW proceedings, i.e. surrender proceedings, which in 2002 replaced extradition\(^\text{24}\) (as far as EU is concerned).

The Directive promotes the application of the Charter of Fundamental Rights of the EU and the European Convention on Human Rights and Fundamental
 Freedoms as interpreted by the European Court of Human Rights. However, as shown, it lays down minimum rules with respect to the information on rights of suspects or accused persons. Member States may extend the rights set out in the Directive in order to provide a higher level of protection also in situations not explicitly dealt with in the Directive. The level of protection should never fall below the standards provided by the European Convention on Human Rights as interpreted in the case-law of the European Court of Human Rights. On the one hand, this is without prejudice to information to be given on other procedural rights arising out of the Charter of Fundamental Rights of the EU26, the European Convention on Human Rights, national law and applicable EU law as interpreted by the relevant courts and tribunals. On the other hand, once the information about a particular right has been provided, the competent authorities should not be required to reiterate it, unless the specific circumstances of the case or the specific rules laid down in national law so require.

As far as the scope of the Directive is concerned, it applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings. Thus, it applies until the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, the Directive shall apply only to the proceedings before that court, following such an appeal.27

The Directive stipulates rules on certain rights, namely: right to information about rights; right to letter of rights on arrest; right to letter of rights in EAW proceedings; right to information about the accusation; right of access to the materials of the case; and right to verification and remedies.28

4 Indicative Model of Letter of rights in EAW proceedings

As shown, Member States of the EU shall ensure that persons who are arrested for the purpose of the execution of an EAW are provided promptly with appropriate Letter of rights containing information on their rights according to the law implementing the Framework Decision 2002/584/JHA on the EAW in the executing Member State.29

25 European Treaty Series No. 005 [1950].
26 OJ, C 83/389 of 30.3.2010.
27 Article 2 of the Directive.
28 Articles 3-8 of the Directive.
29 Article 5(1) of the Directive.
The Letter of rights shall be drafted in simple and accessible language. An indicative model Letter of rights is set out in Annex II to the Directive. The sole purpose of the model is to assist national authorities in drawing up their Letter of rights at national level. Member States are not bound to use the model. When preparing their Letter of Rights, Member States may amend this model in order to align it with their national rules and add further useful information. Under the indicative model, Letter of rights should include information about the EAW, assistance of a lawyer, interpretation and translation, possibility to consent, and hearing.

However, the provisions on Letter of rights in EAW proceedings do not include standards regarding language. Analogically, taking into account provisions on the Letter of rights on arrest, which shall apply to criminal proceedings in general, persons arrested on the basis of the EAW should receive the Letter of rights written in a language that they understand. Where a Letter of rights is not available in the appropriate language, they should be informed of their rights orally in a language that they understand. A Letter of rights in a language that they understand should then be given to them without undue delay. Thus, the Directive does not require maternal language (one’s native language). It is sufficient a language that a person understand. In comparison, in case of the European Convention on Human Rights and Fundamental Freedoms, everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

5 Conclusion

As far the European arrest warrant is concerned, the Directive 2012/13/EU on the right to information in criminal proceedings introduces a novelty – a Letter of rights for persons arrested on the basis of an European arrest warrant, which shall apply to surrender proceedings under the Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States.

Letter of rights for persons arrested on the basis of the European arrest warrant is a result of the development of political and legal documents introduced and presented by the top EU institutions. The Council of the EU adopted a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. Under the Roadmap, action should be taken at the level of the EU in order to strengthen the rights of suspected or accused persons in criminal proceedings. As a consequence, in May 2012 was adopted aforementioned directive.

31 Article 5(2) of the European Convention on Human Rights and Fundamental Freedoms.
The Directive, *inter alia*, lays down rules concerning the right to information of persons subject to a European arrest warrant relating to their rights. Member States of the EU shall ensure that persons who are arrested for the purpose of the execution of an EAW are provided promptly with appropriate Letter of rights containing information on their rights according to the law implementing the Framework Decision 2002/584/JHA on the EAW in the executing Member State. They shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 2 June 2014.
Le droit français et le couple

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Abstract: French family law has just undergone tremendous changes. The May 17 Act which allows same sex marriage means the acknowledgement of a right for couples either homosexual or heterosexual. These couples can be married or not. Beyond the diversity, we can however feel the emergence of a right for the couple, that is to say common rules for all couples. The couple, from every angle, became an essential and inescapable element of family law which has its proper rules.

Keywords: Couple, Homosexual, Heterosexual, Marriage, PACS, Cohabitation, Filiation

Le couple est aujourd’hui sous les feux de l’actualité en droit français ! Au terme de débats houleux, la loi du 17 mai 2013 ouvrant le mariage aux couples de même sexe², validée par le Conseil constitutionnel³ invite en effet à s’interroger sur la notion même de couple et sur la façon dont le droit français appréhende cette notion.

S’il est acquis que pour former un couple il faut être deux, le mot couple étant issu du latin « copula » qui signifie « tout ce qui sert à attacher, lien, chaîne »⁴, le couple n’est pourtant pas le mode exclusif de la vie à deux : la vie à deux peut être conçue déchargée de son aspect charnel. La jurisprudence récente de la Cour européenne des droits de l’homme s’est d’ailleurs clairement engagée dans cette voie⁵.

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3 Cons. Const., déc, n° 2013-669 17 mai 2013 DC.
4 Dictionnaire latin-français Félix Gaffiot : Hachette
5 Arrêt Burden/ Royaume Uni, CEDH, 29 avril 2008 : www.rtdh.eu/pdf/burden-c-royaume-
Il apparaît en tous cas que ce sont les sociologues plus que les juristes qui ont souligné d’abord l’importance du concept. Ce dernier ne fait en effet l’objet d’aucune définition légale6. En droit, il semble d’ailleurs que le terme soit d’abord entré dans le langage juridique par la porte du droit fiscal afin de faire supporter une imposition globale par les couples mariés puis par la porte du droit social, celui-ci ne distinguant pas selon la nature du couple, marié ou vivant en concubinage. En droit civil, la notion de couple est apparue plus tardivement avec les lois dites de bioéthique du 29 juillet 1994 qui y font référence en particulier pour préciser les conditions de l’assistance médicale à la procréation et envisagent à ce titre le couple comme formé d’un homme et d’une femme. La Loi du 15 novembre 1999 relative au PACS a par la suite utilisé le terme pour définir le concubinage, et faire de la « vie en couple » une condition d’application de cette notion.

A l’heure actuelle, en sociologie comme en droit, un couple semble devoir être compris comme un ensemble de deux personnes, liées par une volonté de former une communauté matérielle et affective et se traduisant par des relations charnelles. « Vivre en couple, c’est, pour reprendre une expression de Victor Hugo, être deux et n’être qu’un » !

L’appréhension du couple par le droit français concerne essentiellement le droit civil7 et plus particulièrement le droit de la famille. Le couple apparaît en effet comme une composante majeure du droit de la famille, le concept de famille étant toutefois une notion qui ne fait elle-même l’objet d’aucune définition légale. Conçue comme « l’élément naturel et fondamental de la société » par la Déclaration universelle des droits de l’homme de 1948, elle recouvre à l’heure actuelle des réalités très variées. Si la famille contemporaine est formée du couple de parents et des enfants se démarquant de la famille primitive plus large fondée sur le lignage8, elle est susceptible d’englober aussi les familles monoparentales qui se développent d’ailleurs avec l’accroissement à la fois des divorces sans remariage et des maternités sans mariage. Elle est alors réduite à l’extrême : un seul parent, et souvent un seul enfant. Les conceptions de la famille ont ainsi évolué selon les temps, les époques et les sociétés et il apparaît que notre société occidentale contemporaine se caractérise par le pluralisme.

6 La plupart des dictionnaires juridiques ignorent d’ailleurs cette notion. V. cependant G. CORNU, Vocabulaire juridique : Ass. Henri Capitant, PUF 2011, qui donne la définition suivante « Union que forme un homme et une femme entre lesquels existent des relations charnelles et en général une communauté de vie, soit en mariage, soit hors mariage ; se dit parfois de deux individus de même sexe qui vivent ensemble ».
7 V. J.-J LEMOULAND, Le couple en droit civil : Dr. famille 2003, chron. 22.
8 L’histoire de la famille en Occident illustre une évolution que DURKHEIM appelait la « loi du rétrécissement continu de la famille ».
En dépit de cette hétérogénéité des modèles familiaux, la famille souche fondée sur le couple semble être prévalente. Le lien familial créé par le couple est certainement un facteur d’équilibre au sein de notre société qu’il s’agisse du couple conjugal ou du couple parental.

Etudiée ainsi dans le cadre du droit français de la famille, force est de constater que le couple est, paradoxalement, sans faire l’objet d’une définition légale précise, utilisé par la plupart des ouvrages contemporains de droit de la famille comme critère de subdivision. On peut dès lors s’interroger sur les raisons de cet engouement. Une première explication paraît être d’ordre historique. En droit canonique en effet, la corpula carnalis est un élément indispensable à la perfection du mariage. Le terme est ainsi resté familier et passé dans le langage courant. Une autre justification peut être trouvée dans la volonté d’une bonne partie de la doctrine juridique contemporaine de tenter de reconstruire le droit de la famille sérieusement mis à mal par la multitude des réformes récentes autour de cette notion de couple, une reconstruction ne pouvant se faire sans fondation et le couple étant alors considéré comme un élément fondateur de la famille.

Le sujet présente de nombreux intérêts qui méritent d’être évoqués.

Il revêt d’abord un intérêt indéniable d’actualité lié à la loi nouvellement votée dans un climat agité et aux répercussions de cette loi largement discutées. Mettant en œuvre l’engagement de campagne 31 de l’actuel Président de la République française François Hollande, ce texte a été annoncé par son premier ministre Jean-Marc Ayrault comme « une évolution majeure de notre Code civil, une décision de justice et d’égalité qui prend acte de l’évolution de notre société ». A vrai dire, ce texte nouveau constitue comme ont pu le constater certains auteurs une véritable révolution et non une simple évolution, car il concerne non seulement le mariage mais également la filiation, ouvrant la possibilité d’adoption d’un enfant par des couples mariés de même sexe, ce qui marque une véritable rupture sociale. En consacrant une nouvelle conception du mariage et donc du couple marié, le texte bouleverse inévitablement l’ensemble du droit de la famille français.


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9 V. nouveau C. dr. canonique, canon 1061 : c’est le rapport charnel qui consomme le mariage et le rend indissoluble.
10 H. FULCHIRON, La reconnaissance de la famille homosexuelle : étude d’impact : D. 2013, p. 100.
une convergence intéressante du droit français avec les droits en cause invitant à s’interroger sur le sens d’une telle évolution\textsuperscript{11}.

On soulignera en dernier lieu l’intérêt pratique du sujet au-delà de son aspect théorique. La façon dont le droit français appréhende aujourd’hui le couple n’est pas en effet sans provoquer un certain nombre de conséquences pratiques qui ne manquent pas d’intéresser les praticiens tels que les notaires par exemple, conseillers des familles par excellence\textsuperscript{12}. L’ouverture du mariage et de l’adoption aux couples de même sexe suppose en effet une adaptation du droit des régimes matrimoniaux, du droit des successions\textsuperscript{13} et du droit du nom notamment\textsuperscript{14}.

L’étude du droit français et du couple a vocation à analyser l’évolution de la notion de couple et des règles qui le concerne, l’objectif étant de mesurer l’impact de ce concept dans le droit de la famille français actuel. Il ne s’agit pas de procéder à une analyse descriptive qui serait purement technique mais à une étude démonstrative amenant à dégager un certain nombre de fils conducteurs.

Si l’évolution du droit français traduit ainsi la reconnaissance d’un droit des couples (I), la notion de couple se déclinant en plusieurs variantes, on peut y percevoir aussi l’émergence d’un droit du couple (II), c’est-à-dire d’un socle commun protégeant l’ensemble des couples dans leur diversité, dans l’intérêt des familles.

1. LA RECONNAISSANCE D’UN DROIT DES COUPLES

L’évolution contemporaine du droit de la famille amène à distinguer deux façons d’appréhender le couple, chacune de ces façons revêtant elle-même plusieurs formes. Le terme de couple sert en effet à désigner l’union de deux personnes, mais il est parfois employé aussi pour qualifier la relation qui existe entre les parents vis-à-vis de leurs enfants.

Dans le premier cas, c’est le couple conjugal (A) qui est en cause, tandis que dans le second il s’agit du couple parental (B).

\begin{itemize}
\item \textsuperscript{11} S. PARICARD, Mariage homosexuel et filiation. Quelques éléments de droit comparé : Dr. famille, janvier 2013, dossier 8; C. BEAUDOUIN, La loi française peut-elle contribuer au renversement du consensus européen ?: AJ Famille 2013, p. 366.
\item \textsuperscript{12} J. HAUSER, Le mariage des couples de même sexe et le notaire : une réforme par prétention et procrastination : Dr. famille 2013, dossier 7.
\item \textsuperscript{13} C. PERES, Le droit des successions dans le projet de loi ouvrant le mariage aux couples de personne de même sexe : Dr. famille 2013, dossier 6.
\end{itemize}
A. La conjugalité

Le couple conjugal est aujourd’hui pluriel dans son mode d’expression. Le mariage n’est plus qu’une forme de couple parmi d’autres et la conjugalité déborde le cadre du mariage.

A cet égard, l’évolution a été remarquable car pendant fort longtemps, le seul couple envisagé par la loi était le couple marié. Le mariage était la seule forme d’union reconnue et organisée non seulement par le droit canon qui régissait seul les relations familiales sous l’Ancien Régime, mais aussi par le Code civil qui laissait délibérément hors de son champ le concubinage. La formule restée célèbre de Bonaparte à cet égard était « Les concubins se passent de la loi, la loi se désintéresse d’eux ». Le couple marié constituait le socle de l’édifice familial : pas de famille sans couple et pas de couple sans mariage. Cette famille issue du mariage était dotée d’un chef, le mari, la femme initialement incapable étant soumise à son autorité.

C’est en fait dans la seconde partie du XXe siècle qu’un mouvement de libéralisation s’est amorcé et a fait céder cette exclusivité. Il s’agit des années 60 à 90 que l’on peut appeler les années Carbonnier du nom de l’initiateur de la plupart des réformes de l’époque. Un vent de liberté et d’individualisme souffle alors sur le droit de la famille !

Le couple n’a plus de chef : les époux sont égaux et le mariage voit son caractère institutionnel décroître, la liberté du divorce devenant le corollaire de la liberté du mariage. Le mariage n’est plus le seul moyen de fonder une famille.

Les couples hétérosexuels non mariés ont d’abord été pris en compte par le droit de manière parcellaire. L’ignorance juridique du concubinage a fait place peu à peu à des textes particuliers attachant certains droits à des situations de concubinage (en matière de bail, de responsabilité, de sécurité sociale…). Et le législateur a fini par donner lui-même une définition légale du concubinage faisant sortir de la sorte les concubins du non-droit (article 515-8 du Code civil). Puis, la loi du 15 novembre 1999 a offert un cadre juridique à ceux qui souhaitent organiser leur union sans vouloir ou pouvoir s’inscrire dans le moule strict du mariage. C’est l’introduction du PACS en droit français (pacte civil de solidarité), l’article 515-1 du Code civil définissant le PACS comme « un contrat conclu par deux personnes physiques majeures, de sexe différent ou de même sexe, pour organiser leur vie commune ».

Les couples homosexuels par la suite se sont vus avec le PACS faire l’objet d’une reconnaissance légale. Même s’il ne leur est pas finalement dédié, le PACS est né à la suite des revendications matrimoniales des couples homosexuels. Le PACS connait un succès grandissant car c’est un contrat dont la formation et la résiliation paraissent fort souples (on compte aujourd’hui 2 PACS pour 3 mariages). Les couples de partenaires ne forment plus une communauté marginale et sont pour la plupart hétérosexuels. Et, la conclusion d’un PACS corres-
pond assez souvent aujourd’hui à un préliminaire du mariage (ce que l’on appelait autrefois les fiançailles).

La loi du 17 mai 2013 ouvrant le mariage aux couples de même sexe amène en dernier lieu à offrir le cadre légal bien connu du mariage aux couples d’homosexuels. Le mariage homosexuel est célébré dans les mairies de France depuis le 29 mai. L’exposé des motifs présenté par Madame Christine Taubira, Garde des sceaux, Ministre de la Justice révèle la volonté de franchir une nouvelle étape après l’adoption de la loi relative au pacte civil de solidarité, afin de répondre à la demande des couples de même sexe qui souhaitent pouvoir se marier et à leur demande d’accès à l’adoption.

Ouvrir le mariage aux couples homosexuels conduit inévitablement à repenser aujourd’hui la conjugalité. En ouvrant le mariage aux personnes de même sexe, on modifie en effet la définition du mariage. Le mariage homosexuel fait voler en éclats le mythe du mariage - berceau de la famille fondée sur les liens du sang. Le mariage ne constitue plus une union sexuée creuset de la procréation ; il apparaît être un statut du couple parmi d’autres. L’article 143 nouveau du Code civil est ainsi rédigé de la façon suivante « Le mariage est contracté par deux personnes de sexe différent ou de même sexe ». L’article 144 quant à lui ne contient plus de référence sexuée à l’homme et la femme mais se contente de déterminer l’âge nuptial « Le mariage ne peut être contracté avant dix huit ans révolus ». Le texte ne modifie pas le régime juridique du mariage. Certaines dispositions traditionnelles sont apparues toutefois inadaptées, comme celles relatives au nom de famille, le nom du père ne pouvant plus être imposé. Par ailleurs, de nombreuses dispositions de coordination ont à cet égard été prévues, les mots de « père » et « mère » étant remplacés par ceux de parents, et les mots de « mari » et « femme » par ceux d’époux.

On aboutit ainsi aujourd’hui à une trilogie des couples.

Il y a d’abord le mariage, contrat et de moins en moins institution dont la nature originale est la marque de la durée. Union durable, elle est organisée par la loi à travers un statut complet, fait de droits mais aussi d’obligations. Le mariage est affaire de personnes et de biens : il fait l’objet d’un statut patrimonial contenu dans le droit des régimes matrimoniaux. On peut simplement se demander comment le droit du mariage construit à la base pour des couples composés s’un homme et d’une femme pourra s’adapter à des couples composés de deux hommes ou de deux femmes. Le refus de la discrimination impose de traiter à égalité de droits des situations identiques. Or, comment considérer comme identiques des situations qui à la base ne le sont pas ? Certains critiquent cette évolution estimant que le terme de mariage est par là même dénaturé15. Il est vrai que le mariage perd sa dimension institutionnelle destinée à offrir à l'en-

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15 Un auteur s’interroge sur l’avenir de l’institution, se demandant si elle reste une institution ou si elle n’est pas devenue une auberge espagnole où chacun entre et sort au nom de ses droits subjectifs.; V. J. CASEY, Quel avenir pour le mariage : Gaz. Pal 2012, p. 9, n° 259.
fant sa double ascendance maternelle et paternelle pour se réduire à un contrat d’union civile régissant la vie à deux, dont les règles impératives relèvent d’un ordre public social et non plus familial, simplement déclenché par la cohabitation. Le nouveau texte devra en tous cas amener à informer particulièrement les couples de même sexe des effets qui s’appliqueront au choix de la structure mariage, c’est-à-dire le régime matrimonial qui en découle, le droit du divorce qui pourrait s’appliquer avec notamment le risque d’une prestation compensatoire et les conséquences particulièrement importantes des réformes récentes sur la condition du conjoint survivant.

Outre le mariage, il y a aussi le PACS qui correspond également à un couple contractuel mais selon une organisation légale plus libertaire. Il n’a pas la même solennité que l’acte de mariage passé devant un officier d’état civil. Différemment, il fait en effet l’objet d’un acte sous seing privé ou d’un acte notarié16 et d’une déclaration puis d’un enregistrement soit par le greffier du tribunal d’instance si l’acte est sous seing privé soit par devant notaire si l’acte est notarié, ceux-ci faisant alors procéder aux formalités de publicité17. Aucun passage n’est prévu par devant l’officier d’état civil.

Le pacs est doté d’un statut plus tenu que le mariage, les partenaires étant essentiellement soumis à des règles d’ordre patrimonial sans qu’existe pour autant entre eux à l’instar du mariage un quelconque régime matrimonial. Par ailleurs, le pacs peut se rompre plus facilement que le mariage, les modes de dissolution du pacs étant plus nombreux et plus rapides que ceux du mariage et les conséquences d’une telle dissolution étant beaucoup moins protectrices qu’en matière de mariage (en particulier, absence de droit à prestation compensatoire ou de vocation successorale).

Enfin, le principe du pluralisme du couple conjugal se traduit par l’existence du concubinage, situation de fait non organisée par la loi et qui doit le rester pour ceux qui veulent s’aimer dans l’instant : c’est ce que l’on appelle aussi volontiers l’union libre ! Bien que faisant l’objet d’une définition légale depuis la loi relative au PACS, la notion s’appliquant aussi bien aux couples d’hétérosexuels que d’hétérosexuels, il n’entraîne l’application d’aucun statut général mais se voit appliquer de façon ponctuelle quelques effets juridiques : en matière de protection sociale par exemple ou encore par l’application de contrats de concubinage.

Il est ainsi impossible aujourd’hui de nier l’existence en droit français d’une trilogie des couples : mariage, pacs, concubinage, le couple étant une notion plurielle !

Si le droit français connaît ainsi plusieurs formes de conjugalité, il connaît aussi plusieurs formes de parenté.

16 J.-F SAGAUT, Notaires, à vos actes, prêts, pacsez !: Drefénois 2011, p. 1106.
B. La parentalité

La parentalité correspond à la fonction d'être parent. La façon dont le droit français appréhende le couple parental a elle aussi beaucoup évolué au cours de ces dernières années et fait l'objet d'une véritable révolution juridique avec les textes récents. La consécration d'une double parentalité mono sexuée amène en effet à modifier totalement le droit de la filiation charnelle et de l'adoption.

 Traditionnellement, la parenté est liée à la filiation par le sang, à la filiation biologique : elle assure le rattachement de l'enfant à un homme et une femme qui l'ont engendré. La présomption de paternité selon laquelle « l'enfant conçu ou né pendant le mariage a pour père le mari de la mère » traduit d'ailleurs cette finalité procréative assignée initialement au mariage en facilitant de la sorte la preuve de la paternité du mari. Si la parenté a subi au départ l'attraction du mariage, force a été de constater le développement du nombre de naissances hors mariage pour modifier le droit de la filiation en prenant en compte ce phénomène : les enfants naturels se sont vus ainsi octroyés des droits équivalents à ceux des enfants légitimes et les couples de parents mariés et non mariés se sont vus attribués des droits équivalents dans leurs rapports avec leurs enfants.

Il est acquis toutefois que la parenté ne s'en tient pas à cette seule conception purement biologique. Elle peut aller au-delà et traduire des liens affectifs. Ainsi, depuis des temps déjà anciens, la filiation adoptive, créatrice d'une filiation purement élective répond à cet autre aspect de la notion de filiation. Elle permet de donner des parents à des enfants qui n'en ont pas. Il est par ailleurs admis depuis longtemps que le lien sociologique créé par une filiation non immédiatement contestée pouvait prévaloir en particulier pour la paternité sur la vérité biologique, ceci par un jeu de présomptions et de brefs délais venant consolider juridiquement un lien biologiquement incertain (rôle fondamental à cet égard de la possession d'état).

Parenté dans le mariage, parenté hors mariage, parenté liée à des relations charnelles ou même en dehors de toute relation charnelle, tels sont les différents visages des couples parentaux. Il est à remarquer à ce dernier titre que l'évolution des techniques médicales ayant donné naissance aux lois bioéthique du 29 juillet 1994 modifiées en dernier lieu par la loi du 7 juillet 2011 a renforcé cette dissociation de la parenté et de toute relation charnelle en réglementant divers modes de procréation telle l'insémination artificielle ou la fécondation in vitro susceptibles de prévoir le recours à un ou plusieurs tiers donneurs.

Ces profondes mutations liées à la maîtrise de la procréation ont certes ébranlé la vision traditionnelle de la parenté. Cependant, toutes les règles existant jusque là ont été élaborées sur la base d’une parenté hétérosexuelle, l'enfant devant être placé dans un système de parenté le rattachant à un père et à une mère, à un seul père et à une seule mère.
En consacrant une double parenté mono sexuée (l’homoparentalité), le droit contemporain fait vaciller les fondements du droit de la famille. La loi du 17 mai 2013 accorde en effet aux couples de même sexe l’accès à la parenté via le mécanisme de l’adoption. Le Conseil constitutionnel qui a eu à examiner le contenu de la loi au regard des principes fondamentaux de la république a à cet égard jugé que si le texte est conforme à la Constitution, il ne peut pas ouvrir un droit à l’adoption à tous, toute adoption reposant sur la recherche de l’intérêt de l’enfant, principe ayant valeur constitutionnelle. La réforme n’a pas ainsi pour but de consacrer un droit à l’enfant en toutes circonstances 18.

Pratiquement d’ailleurs, si l’adoption classique d’un enfant abandonné est visée, sa mise en œuvre ne sera pas évidente. L’adoption conjointe en matière d’adoption internationale apparaît en effet délicate non seulement en raison du faible nombre d’enfants adoptables, mais aussi en raison du refus de nombreux pays de faire adopter leurs ressortissants par des couples homosexuels. C’est en fait l’adoption de l’enfant du conjoint qui est prioritairement revendiquée et qui sera vraisemblablement essentiellement pratiquée 19. Or, ce type d’adoption obéit à une procédure simplifiée puisque la différence d’âge entre adopté et adoptant est réduite, que l’enfant de moins de deux ans n’a pas à être remis préalablement au service d’aide sociale à l’enfance, et que le conjoint n’a pas besoin d’agrément. Dans les différents cas envisageables, une fois l’adoption prononcée, les deux parents détiendront l’autorité parentale. La réalité de l’adoption qui apparaît ainsi en pratique assez limitée reste toutefois quant à son avenir étroitement liée au choix que le législateur fera demain en matière de PMA. A l’heure actuelle fermée aux couples de même sexe, elle n’empêche pas certaines femmes d’y recourir en marge de la loi. La question des PMA et de son corollaire, la gestation pour autrui a été renvoyée à un examen ultérieur 20.

C’est donc au nom d’une égalité très contestée que le législateur français multiplie les formes de couples parentaux, allant jusqu’à faire abstraction du sexe des êtres humains 21. La parenté dans sa signification traditionnelle amenant à faire référence à un père et une mère apparaît aujourd’hui remise en cause.

Si l’on constate la reconnaissance progressive d’un droit pour les couples, le couple étant manifestement compris comme une notion plurielle susceptible de revêtir des formes diverses, il apparaît aussi paradoxalement qu’émerge au sein


de cette diversité un droit des couples, une sorte de droit commun pour tous les couples.

2. L’EMERGENCE D’UN DROIT DES COUPLES

L’émergence d’un socle commun de règles pour tous les couples a vocation à protéger l’ensemble des couples dans l’intérêt des familles.

L’avènement d’un droit commun du couple peut à vrai dire être constaté tant en ce qui concerne le couple dans ses rapports internes, c’est-à-dire le couple conjugal (A) qu’en ce qui concerne le couple dans ses rapports avec les enfants, c’est-à-dire le couple parental (B).

A. Un droit pour le couple conjugal

Bien que la conjugalité se décline aujourd’hui sous plusieurs formes, on peut déceler en droit français un droit de la formation du couple, certaines conditions de fond et de forme étant exigées à titre commun pour l’ensemble des couples.

L’interdit de l’inceste, le respect du principe monogamique et l’exigence d’un âge légal semblent ainsi constituer des conditions nécessaires à l’édification d’un couple. Par ailleurs, le mariage et le PACS supposent de façon commune au titre des conditions de forme la conclusion d’une convention et un passage devant l’autorité compétente (maire pour le mariage, greffier du tribunal d’instance ou notaire si le PACS revêt la forme d’un acte authentique depuis la loi du 28 mars 2011 de modernisation des professions judiciaires ou juridiques et certaines professions réglementées) qui doit enregistrer l’opération puis la transcrire sur le registre d’état civil. Et, si les candidats au mariage ou au PACS n’ont pas respecté les conditions de fond ou de forme requises par la loi pour la validité de l’acte, l’opération pourra être déclarée nulle par le tribunal.

On peut constater par ailleurs un droit des effets du couple, la vie en couple supposant le respect d’un certain nombre d’obligations. Il s’agit non seulement de devoirs personnels comme l’obligation de vie commune ou d’assistance, mais aussi de devoirs matériels comme l’obligation de contribuer aux charges de la vie commune (le JAF étant d’ailleurs compétent depuis la loi du 12 mai 2009 pour trancher les questions relatives à la contribution aux charges du mariage et du pacte). Pour le concubinage, la loi de 2009 permet aux concubins de saisir le juge aux fins de résoudre les difficultés liées au fonctionnement de l’indivision. D’ailleurs, rien n’interdit aux concubins de s’engager l’un envers l’autre à une telle contribution. En outre, face aux créanciers, les personnes qui vivent en couple doivent se montrer solidaires au moins pour les dettes de la vie courante (C. civ, art. 220 applicable traditionnellement aux époux et 515-4 pour les pacsés modifié par la loi du 1er juillet 2010 relative au crédit à la consommation).
La vie en couple suppose également le respect par chaque membre du couple de l'autre, ce qui exclut toute forme de violence. On peut signaler à cet égard l'existence de solutions communes à toutes les formes de conjugalité qui concernent aussi bien la matière pénale que civile. Les violences conjugales constituent sans doute en effet le fléau contemporain du droit commun de la famille. Une loi du 9 juillet 2010 relative aux violences faites spécifiquement aux femmes, aux violences au sein des couples et aux incidences de ces dernières sur les enfants octroie en ce sens au juge aux affaires familiales (JAF) des prérogatives civiles et pénales pour mettre à l'abri les victimes de violences au sein du couple qu'il soit marié ou non. Il est à remarquer que par ce texte, le JAF apparaît une fois de plus comme le juge du couple sous toutes ses formes. L'article 515-9 du Code civil permet notamment au juge aux affaires familiales de délivrer en urgence une ordonnance de protection qui peut porter notamment sur la résidence séparée des époux, pacsés ou concubins ou sur les modalités d'exercice de l'autorité parentale. Jusque là, le JAF n'était compétent que pour régler les crises du couple marié en application de l'article 220-1 du Code civil. Cela voulait dire que la concubine battue n'avait d'autre choix que de partir en ne pouvant en tout et pour tout qu'espérer une priorité pour l'attribution d'un logement social ; elle ne pouvait pas compter sur le juge civil. La loi nouvelle a mis fin à ces inégalités, le JAF pouvant désormais prendre, dans le cadre de l'ordonnance de protection toute une série d'interdictions pour mettre fin aux violences dans le couple et il peut statuer sur l'attribution du logement, la notion de logement familial concernant désormais tous les couples.

Il apparaît enfin que s'est mis en place progressivement un droit de la rupture du couple. On peut ainsi distinguer en la matière la rupture conventionnelle supposant un commun accord des membres du couple et des modes de rupture non conventionnelles incluant la dissolution par volonté unilatérale et la résiliation pour faute.

Lorsque la dissolution du couple résulte différemment du décès d'un des membres du couple, on trouve également dans la législation récente la volonté de protéger le survivant quelle que soit la forme de conjugalité. La loi du 3 décembre 2001 est venue à ce titre améliorer nettement la vocation successoriale du conjoint survivant et consacrer l'existence d'un droit au logement ; par ailleurs, la loi TEPA du 21 août 2007 exonère le conjoint survivant de tout droit de succession. De façon comparable, le partenaire pacsé survivant se voit reconnaître des droits sur le logement (droit temporaire au logement et attribution préférentielle possible du logement) et exonérer de droits de succession.

Comme il apparaît qu'émerge depuis quelques années un droit commun du couple conjugal, les mutations contemporaines du droit de la famille traduisent de façon comparable l'émergence d'un droit commun du couple parental.

B. Un droit pour le couple parental

L'émergence d'un droit commun du couple parental amène à constater une homogénéité entre les différentes sortes de couples (mariés ou non mariés) dans les rapports avec leurs enfants.

La loi du 4 juin 1970 relative à l'autorité parentale est d'abord venue substituer à la notion de chef de famille celle d'autorité parentale qui induit une égalité entre les parents dans les rapports avec leurs enfants. Dans les conventions internationales, on parle plutôt de responsabilité parentale. Or, cette responsabilité, c'est à travers la notion d'autorité parentale que le législateur l'a introduite en droit français en 1970 d'abord pour les couples mariés puis par la suite pour les couples non mariés.

Certaines lois postérieures à la loi de 1970 sont en effet venues ensuite consacrer le principe d'autorité parentale conjointe que les couples soient unis par les liens du mariage ou pas. Ce principe, contenu en dernier lieu dans la loi du 4 mars 2002 suppose l'exercice en commun de l'autorité parentale par les deux membres du couple. Le terme de coparentalité sert d'ailleurs souvent à désigner le couple parental et à exprimer ce principe d'exercice en commun de l'autorité parentale.

Appliqué tout naturellement aux couples qui vivent ensemble, la règle de coparentalité est également appliquée aux couples séparés. Toute une partie de la loi du 4 mars 2002 est en effet relative à « l'exercice de l'autorité parentale par les parents séparés ». La règle est que « la séparation des parents est sans incidence sur les règles de dévolution de l'autorité parentale ». Elle vaut tant pour les couples divorcés que pour les couples séparés qui n'étaient pas mariés. Le législateur précise les deux obligations qui en découlent : d'une part l'obligation pour chaque parent de maintenir des relations avec l'enfant, d'autre part l'obligation pour chaque parent de respecter les liens de l'enfant avec l'autre parent. Et, pour assurer le maintien effectif du couple parental au-delà de la séparation, différentes mesures concrètes ont été imaginées par le législateur en sollicitant l'accord des parents pour favoriser un exercice consensuel de l'autorité parentale, en instaurant la possibilité d'une résidence alternée, en imposant aux parents une obligation d'information en cas de changement de résidence notamment.

Les lois bioéthiques du 29 juillet 1994 modifiées en dernier lieu par la loi du 7 juillet 2011 traduisent également l'émergence d'un droit commun pour le couple parental en admettant de façon semblable le recours aux méthodes de procréation médicalement assistée que le couple soit marié ou vive en concu-
binage sans exiger désormais la condition antérieure d’une durée de vie commune de deux ans. A l’heure actuelle cependant, ces méthodes sont réservées aux couples composés d’un homme et d’une femme qui expriment une demande parentale. En revanche, même si certaines voix se font entendre en ce sens, la PMA n’est pas ouverte aux couples homosexuels.

L’évolution du droit français révèle en conséquence à quel point le couple ne lui est pas indifférent. Il l’intéresse en effet à un point tel qu’il tend à constituer un des piliers du droit de la famille contemporain lui-même en plein bouleversement. Il est devenu une unité à par entière car il remplit des fonctions utiles pour la société permettant notamment de lutter contre l’isolement, un des fléaux de notre époque !

Comme a pu l’écrire Alphonse de Lamartine, poète et romancier français du XIXe siècle, « Toute saison, tout ciel sont bons quand on est deux ! ». Et Alain, Philosophe français bien connu du XXe siècle a rajouté « Aimer, c’est trouver sa richesse hors de soi ».

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