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Abstract: The article approaches issues concerning the representation of Romania in the European Council, question that has received significant attention in recent years. Several decisions handed down by the Constitutional Court of Romania were meant to clear up to a certain degree the division of roles between the President of Romania and the Prime Minister in representation in the European Council meetings, while other matters are still waiting for a clearer answer. These developments occurred with parliamentary debates on what is today the Act no 373 of 18 December 2013 on cooperation between the Parliament and the Government in the field of European affairs. The article aims to assess this case-law of the Constitutional Court in the broader framework of EU affairs.

Keywords: EU affairs; Constitution of Romania; Constitutional Court of Romania; Act on cooperation in European affairs; European Council; President of Romania; Prime Minister; Parliament

Preliminary remarks

After almost two years of parliamentary debates and two challenges of constitutionality, on 18 December 2013, the bill on cooperation between the Parliament and the Government in the field of European affairs was finally enacted.
and became law. The Romanian Act no 373/2013 ("the Act on cooperation") aims to govern the framework of cooperation “in the decision-making process within the European Union and also [in what concerns] monitoring the harmonisation of national legislation with European legislation” (Article 1).

This act establishes as a rule an autonomous participation of each Chamber of the Parliament (the Senate and the Chamber of Deputies) in EU affairs, but certain provisions meant to reach a consistent position of these two are also included. The act regulates, inter alia, in matters concerning duties of the Government to provide information to the Chambers concerning EU legislative proposals and documents (but also related to other issues – like reports on participation in the European Council and in the EU Council, reports on transposition acts of the European Union law in the national legislation, information concerning persons appointed or named by the Government to hold offices in EU institutions), the working procedure between the Chambers and the Government, the parliamentary scrutiny over EU legislative proposals and the parliamentary scrutiny reserve, the procedure for monitoring the subsidiarity principle and the subsidiarity action before the Court of Justice of the European Union and so forth.

In parallel with parliamentary debates concerning the bill on cooperation, the most heated (political) issue was the question of representation of Romania in the European Council: who has the constitutional power to participate in these meetings – the President of Romania or the Prime Minister? Therefore, the Constitutional Court of Romania was called four times to state over the matter: two challenges had their basis on the request to solve a legal conflict of constitutional nature occurred within the executive branch of government (between the President of Romania and the Prime Minister), and two other challenges were lodged in connection to successive versions of provisions of the bill on cooperation. Most recently, on 24 June 2014, a new request to solve a legal conflict of constitutional nature within the executive was lodged by the Prime Minister. The latter application was rejected, but the decision reached on 9 July 2014 is not yet published at the time of writing (August 2014). After exposing the main arguments of the parties and of the Constitutional Court, a discussion is made concerning the broader issue of scrutiny in European affairs from the Romanian perspective. Even if the Act on cooperation does not provide for as such in what concerns rules for participation in the European Council meetings, it has some clauses that bear certain relevance for the issue of democratic accountability in EU affairs.

Another very important topic related to the Act on cooperation, touched upon by this case law of the Constitutional Court (so it became a “collateral victim”), concerned the types of act the Parliament or of its Chambers were able to adopt in the course of participation in European affairs. This issue has unfortunately received little attention in the public sphere. It was puzzling that the
Constitutional Court held that the Parliament or one of its two Chambers should adopt (only) resolutions (i.e. legal acts), even if the Parliament intended at some point to legislate the possibility of issuing political acts (namely “opinions”) in European affairs. Therefore, the Parliament was under a constitutional duty to adjust the law to the decision of the Constitutional Court. By that, the decision-making process seems to be wholly shifted from the Committee on European Affairs of each of the Chambers to the plenary sitting, thus leading to inflexibility. Such resolutions are to be adopted not only in what concerns the parliamentary control over the Government in EU affairs, but also regarding the (direct) relationship with EU institutions, for example regarding the subsidiarity control mechanism (under Protocol no 2 on the application of the principles of subsidiarity and proportionality).³

The paper is divided as follows: section I briefly sets the scene in which the constitutional litigation concerning the representation of Romania in the European Council took place, while sections II-V describe the decisions rendered by the Constitutional Court in what may be called a constitutional epic; section VI sums-up and critically discusses the main arguments of these decisions. The final section (VII) examines the issue of constitutional responsibility for European integration: the main question concerns who holds this responsibility?

I. Setting the scene

Prior to year 2012, as a rule, the President of Romania participated in the European Council meetings, having also the power to approve the mandate for these meetings, approval understood as the final stage in establishing the mandate of Romania. In other instances, the President and the Prime Minister participated in the European Council meetings. Prior to this constitutional epic we are going to present and discuss, Frederic Eggermont noticed in his doctoral dissertation on the European Council⁴ that a potential blockage might occur when the President and the Prime Minister are not “in the same boat”:

“In most cases the President chooses to participate, in which case, he headed the delegation. In fact, the participation of the Romanian delegation at European Council meetings was affected par ricochet by the failures of the Romanian Constitution which were not fixed by the revision in 2003. In the Constitution, the delimitation of competences between the President and the Prime Minister is not clearly stated, including in the field of foreign policy. The system works when the President and the Prime Minister are in the same boat (and row in the same direction). When they are at odds, the constitutional mechanism is

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³ The topic of acts of the Parliament of Romania in EU affairs will be discussed in detail somewhere else.
blocked. Until now [i.e. 1 September 2011, date at which the book was completed], Romania has spoken with a single voice in the European Council, although the Romanian delegation was in reality fractured.\footnote{Ibid., 39.}

Then, following changes in parliamentary majority and the appointment of a new Government, that took place in May 2012, the new Prime Minister expressed the will to participate in the European Council meetings. Concurrently, the Parliament (in joint session of the Chambers) passed the Declaration no 1 of 12 June 2012 concerning the current issues on the agenda of the European Union and the corresponding obligations incumbent upon Romania\footnote{Published in Monitorul Oficial no 392 of 12 June 2012.} – political act which supported a division of respective roles for the Government (i.e. the Prime Minister) and the President in representing Romania in the European Council meetings, depending on the issues on the agenda.

Three major points were made in that Declaration. Firstly, the Parliament asked to be informed prior to and after any European Council meeting and claimed also the power to establish in principle the mandate concerning the positions expressed by the representative of Romania. Secondly, it supported a division of the roles of the President and of the Prime Minister in participating in the European Council meetings: the President should gain precedence in matters of European defence and security policy and in European Union common foreign policy, while the Prime Minister should play the main role in policies like those economic, social, budgetary, European funds, Schengen and on any other executive issues. Thirdly, referring to the agenda of the European Council meeting of 28 June 2012, the declaration emphasised that the Prime Minister should have taken part in that meetings, taking into account that the agenda concerned issues like the economic situation in the European Union, adoption of economic and social measures and continuing negotiations for the Multiannual Financial Framework 2014–2020.

That is broadly the context in which the first act in this constitutional epic arose. It is not of course the aim of this paper to explain political reasons, so it looks exclusively at legal arguments of this epic.

II. Act one: a conflict of constitutional nature within the executive branch of government (in foreign relations) – the Decision no 683 of 27 June 2012

On 22 June 2012, the Constitutional Court of Romania was called to hear a complaint lodged by the President of Romania concerning a legal conflict with constitutional nature between the Government, represented by the Prime Minister, on the one hand, and the President of Romania, on the other. By its Decision no 683 of 27 June 2012,\footnote{Published in Monitorul Oficial no 479 of 12 July 2012.} the Constitutional Court established that constitutional
conflict, which was caused by the action taken by the Government and its Prime Minister in order to exclude the President of Romania from the delegation that was to participate in the European Council of 28-29 June 2012; the operative part of that decision stated that “[i]n carrying out his constitutional powers, the President of Romania shall take part in the European Council meetings in his capacity as Head of State. That power may be expressly delegated by the President of Romania to the Prime Minister.”

The President relied in his complaint on Articles 102 and 80(1) of the Constitution of Romania. According to Article 102 of the Constitution, “[t]he Government shall be responsible for carrying out (i.e. implementing) the home and foreign policy of the country”. Article 80(1) reads as follows: “The President of Romania shall represent the Romanian State and is the safeguard of the national independence, unity and territorial integrity of the country”. Therefore, the Government would lack the capacity to represent the state in the European Council, power which was incumbent to the President. Also, concerning the Declaration no 1/2012 of the Parliament, the complaint stated that it had only political nature and was not legally binding. On the other hand, relying on Article 80(1) of the Constitution and on Article 10(2)(2) of the Treaty on European Union (“TEU”) and by taking into account that States are represented in the European Council, the President asserted the power to represent Romania in the latter, while the Prime Minister and the government had the authority participate in the EU Council.

The Government stated that, according to Article 15(2) TEU, the Treaty does not provide for a certain level of representation the Member States in the European Council, but it leaves that issue to each Member State, which may appoint a representative, be it the Head of State or of Government. It is the Member State that has the power to decide on that matter, taking into account the national constitutional system and the division of powers at national level. Bearing in mind that at various EU Council configurations only ministers take part, yet by denying the ability of the Prime Minister to participate in the European Council meetings, the latter would be deprived of his ability to take part in decision-making process at European level.

Conflicting grounds were put forward by each party in proceedings in what concerns the subjects on agenda of the European Council meeting of 28-29 June 2012, in order to substantiate an own right to participate in this EU institution: the President emphasised the foreign policy issues on the agenda, while the Prime Minister stated that economic topics and others alike were prevalent.

The Government mentioned also types of form of government of the Member States of the European Union, in order to show that out of the 20 Member States (at that time) with a President of Republic, and 11 of them having a directly elected President, only 3 presidents (of Cyprus, France and Lithuania) take part
in the European Council meetings. Another reason put forward by the Govern-
ment was drafted as follows: “[t]he reason to establish for the Prime Minister or
the President the option to participate [in the European Council meetings] was
that the holder of the executive branch in Member States should participate in
this European body, because the majority of European legislation enjoys direct
applicability, and the Executive is responsible for its implementation. Therefore,
depending of the form of government of each State, in regimes having a bicepha-
lous Executive, that one that has the primary responsibility in carrying out the
Executive shall be entitled to participate [in the European Council].”

On the substance of the case, the reasoning of the Constitutional Court was
of great extent and rich in references to legal literature. The perspective followed
by the Court was twofold: European and national.

At the outset, the Court mentioned the principle of conferral and catego-
ries of competence, according to the Treaty of Lisbon, and then powers and role
of the European Council were pointed out (according to Article 15 TEU). Two
statements are especially significant in that regard. Then again, the Court noted
that “[t]he operation of the Union is not possible without a high level institu-
tion like the European Council, institution that played and still plays a funda-
mental role in European integration”. On the other hand, the Court supported
the unitary nature of the mandate to represent the State, because “according
to its practices, there is no formal and strict division within the agenda of the
European Council concerning certain topics, so that during a European Council
meeting topics related to various fields may be discussed and the participation
in the same European Council meeting of more representatives of a Member
State is impossible and not usual”. The consequence of this latter statement is
that “the representatives of the State are not able to succeed each other during
the same European Council meeting depending on topics included on agenda,
as the mandate to represent the State has a permanent nature, and is not divided
between two public authorities”.

Thirdly, mentioning Articles 10(2)(2) and 15(2) TEU, the Court held that it
is the Member State which is responsible to determine its representation in the
European Council – by the Head of State or Government, and in case of a Mem-
ber State having a bicephalous Executive, in order to establish that representa-
tive, a purposive reading of those two articles should be employed. The objective
that should be taken into account is that of the need to ensure the representation
of the Member State at its highest political level.

Fourthly, the Constitutional Court reminded the fact that three States have
the President as representative in the European Council: France, Lithuania and
Cyprus, while for the rest of States the Prime Minister is responsible: “The rea-
son for that is either the constitutional provisions concerning the form of gov-
ernment in those States (France, Cyprus), or an agreement between political

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actors (Lithuania)”. Next, quoting from the French Professor Maurice Duverger,⁸ the three elements that are able to establish a form of government as being a semi-presidential one were listed: the President is elected by universal suffrage; the President possesses considerable powers; the President has opposite him a Prime Minister and Ministers who possess executive and governmental power and can stay in office only if the Parliament does not show its opposition to them. The Court established that the first condition and the third one were fulfilled, and mentioned that the second condition was the one “problematic”, as it requires establishing the fact that the President holds considerable powers; in that regard, an extremely important element is his role in the State’s foreign policy. The Court listed powers enjoyed by the President, as provided for in the Constitution, and concluded that the form of government in Romania amounts to a semi-presidential regime. Moreover, several previous decisions of the Court were referred in order to show the considerable nature of Presidential powers in various fields. The Constitutional Court relied on reasoning by analogy from Article 5 of the French Constitution,⁹ provision that was source of inspiration at the time when the Constitution of Romania was drafted and that establishes a semi-presidential form of government. Yet, by its wording, Article 80(2) of the Constitution of Romania establishes a fortiori that the President of Romania represents the Romanian State and guarantees the national independence, and the unity and territorial integrity of the country. The President of Romania shall also ensure the compliance with the Constitution and the well-functioning of public authorities.

Fifthly, the Court established the capacity of the President as “Head of State”. Apparently, that need was felt as the Constitution of Romania does not provide expressly for this concept. The Court mentioned its previous decisions, in which the President of Romania was described implicitly and then explicitly as Head of State. That capacity was derived from Article 80(1) read in conjunction with Articles 91 and 148(4) of the Constitution¹⁰ and also from Article 102(1) of the Constitution. Worthy of note here is the opposition clearly defined by the Court between the respective powers in foreign relations of President of Romania and Prime Minister, according to the Constitution:

“Under Article 80(1) of the Constitution, the President of Romania shall represent the Romanian State, so that in foreign policy he runs and commits the State. That constitutional provision allows him to draft future guidelines that the


⁹ “The President of the Republic shall ensure due respect for the Constitution. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State. He shall be the guarantor of national independence, territorial integrity and due respect for Treaties”. (The translation is taken from the website of the French Conseil constitutionnel: http://www.conseil-constitutionnel.fr/).

¹⁰ For a discussion on this provision, see sections VI–VII below.
State will follow in its foreign policy, meaning that he is able to establish its track in foreign relations, obviously by taking into account the national interest. Such concept is legitimated by the representative nature of his office, as the President of Romania is elected by citizens by universal, equal, direct, secret and free suffrage.

In the field of foreign policy, the Prime Minister has the constitutional power to ensure that the country’s foreign policy is carried out [Article 102(1) of the Constitution], meaning that, depending on the track established by the State’s representative in the foreign relations, that is the President of the State, the Government, by its representative, shall duly implement the measures to which the State commits itself. Accordingly, the Court finds that the role of Government in foreign policy is one rather technical, as it is obliged to follow and put into practice the duties to which Romania committed at the State level. Therefore, the role played by the Government is rather one derived, and not primary, unlike that of the President of Romania; that being so, as it is not a delegated power, but one inherent to the President of Romania, he may delegate the representation of State by an express act of will, when he deems appropriate”.

Apparently, this *locus* is the central place in the reasoning of the Court: as the President has the primary (or original) power to represent the State in foreign relations, he may delegate that power to Prime Minister by an express act of will. Nevertheless, this statement is unclear from several points of view. Is the President of Romania completely free to draft and present a position in Romania’s name? Are there any requirements that the President have to fulfil in drafting and presenting his mandate? Is there any (functional) division between defining and presenting such mandate? Is there any role that government (*lato sensu*) may be called to play in that regard? Is there any role also for the Parliament? At some of these questions the Court answered in following decisions of this epic.

Sixthly, the Constitutional Court discussed the Declaration of Parliament no 1/2012. It was noted that division of powers between the President and the Prime Minister made according to the topics on the agenda of the European Council was one “horizontal”, and not “vertical”, issue that is contrary to the Constitution, as the guidelines of the foreign policy of the State are established and defined by its representative, the President, while their precise implementation and carrying out is a matter for the Government. Yet, an act (be it legal or political in nature) may not add to the Constitution and alter powers as provided for in the Constitution: “The political will is subordinated to constitutional principles, values and requirements, independent of the relationship between public authorities, even if they are in a state of tension”.

Concerning also the above-mentioned Declaration, the Court drew a functional argument from the composite nature of agendas of the European Council: “[t]he division envisaged in the declaration is impossible in practice, taking
into account that any European Council meeting does not exclusively approach issues of economic, social, budgetary policy in the way mentioned by that declaration. Moreover, even supposing such topics are under discussion, taking into account that these entail conclusion of treaties on behalf of Romania, the participation of the Head of State, which has the power to conclude treaties in this field, is needed”.

Yet the final part of this latter statement of the Court is thought-provoking, as it raises certain important questions to address. Does the European Council “table” treaties or (international) acts that the representatives of Member States conclude or sign them? Are acts adopted by the European Council “international treaties”? And also, even supposing that on the occasion of a European Council meeting a treaty is signed by the States’ representatives, as a certain practice shows indeed, that act is not an act of the European Council (and even not of the Union itself). Significant examples are international agreements concluded by eurozone members. On the other hand, acts adopted by the European Council under simplified revision procedures (Article 48 TEU) are by no means (classic) international acts. These issues will be discussed in section VI.2 below.

The general conclusion of the decision was that “[…] in the European Council, the Member States are represented at their highest level, meaning by the institution which is able to commit the State in foreign relations, and not by the institution which ensure that goals already established are carried out”. Consequently, “the President of Romania does not only have the right, but he is also under an obligation taken on by the Accession Act to participate in the European Council meetings; otherwise, commitments already taken by Romania would be disregarded”. By placing great emphasis on the site of foreign relations, this argument raises another question: what is “domestic” and what is “foreign” in workings of the European Council?

The final words in the decision emphasized the constitutional duty of cooperation between state bodies, in pursuing their powers, in order to ensure a well-functioning rule of law.

The decision was reached by majority of votes; out of the nine members of the Court, four voted against. Two dissent opinions (one supported by three judges of the Constitutional Court, and the other drafted by one judge) and a concurring opinion (originating from another judge) were also written.

In sum, the first act in this constitutional litigation may be summarized as follows: from a national perspective, under the Romanian form of government (which is a semi-presidential regime), the President has the primary (original) power to participate in the European Council meetings, power that he may delegate, by an express act of will, to the Prime Minister. The President has also (exclusive) power to establish his mandate. The second decision rendered by the Constitutional Court refined these arguments. From a European perspective, the
European Council is deemed by the Constitutional Court as rather similar to a classic international law body. Whether the latter perspective is grounded shall be briefly discussed in section VI.

III. Act two: the Decision no 784 of 26 September 2012 – who empowers whom?

A second Decision – no 784 of 26 September 2012¹¹ – soon followed; it originated from a constitutional challenge against certain provisions of the Act on cooperation between the Parliament and the Government in the field of European affairs, in their wording at that time; the action was brought by a political group in the Senate. The concerned provisions were Articles 2(e),¹² 3,¹³ 18 and 19 of the Act. The reasoning concerning the last two of them is exposed and discussed here.

Ten grounds were put forward in the action, and their common feature concerns the original (or primary) nature of the mandate held by the President, in his capacity as “Head of State”, to represent Romania in the European Council; neither the Parliament nor the Government would have the power to establish or (even) influence such mandate.

Several pleas concerned Article 18 of the bill.

On the one hand, it was alleged that Article 18(2) and (3) was contrary to Article 80(1) of the Constitution and Article 15 TEU because Article 18 stated that, when an agreement between the Government and the President of Romania concerning the head of delegation of Romania to the European Council was not reached at least in 20 working days prior to the date of meeting, the Parliament, in joint session, should appoint the head of delegation. On the other hand, concerning Article 18(1), according to which the head of delegation of Romania to the European Council could be either the President or the Prime Minister,

¹¹ Published in Monitorul Oficial no 701 of 12 October 2012.
¹² This provision concerned the concept of mandate, defined there as “negotiation position of Romania for the issues on the Council’s agenda, including draft legislative acts of the European Union”. In its decision, the Constitutional Court briefly noted that the issue of mandate concerned the Council of the EU, not the European Council, so the plea of unconstitutionality was rejected. It should also be mentioned that the definition retained this wording in the version of the Act in force.
¹³ Article 3 concerned acts (opinions) of the Parliament or of one of its Chambers; the Court held: “Apart from the pleas of unconstitutionality put forward, the Court notes that provisions of Article 3 of the law breach provisions of Articles 1(5) and 67 first sentence of the Fundamental Law [i.e. the Constitution]. That is so because the Parliament, in pursuing its powers provided for by the Act on cooperation between the Parliament and the Government, shall adopt “opinions”. Yet, according to provisions of Article 67 first sentence of the Fundamental Law, “the Chamber of Deputies and the Senate shall adopt laws, resolutions and motions […]”. Therefore, the bill has to be amended, in order to replace “opinion” with “resolution”.

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the applicants stated that, even if that provision would be consistent with Article 15(2) TEU, in that the Member States were represented by their Heads of State or Government, the controversial issue was which one of those could represent Romania in the European Council. The applicants claimed also that neither the Parliament, nor the Government may delegate the function to represent, because that belonged to the Head of State.

Other grounds were directed against Article 19 of the bill.

It was claimed that article 19(1) and (2) was contrary to the Constitution, because it provided for in what concerns the consequences for approval by the Parliament of the head of delegation of Romania to the European Council; the applicants supported the view that prior to the European Council meeting the mandate of the Romanian delegation should be approved by the President of Romania, and not by the Parliament (as it was provided for in Article 19(2)). On the other hand, it was also maintained that Article 19(3) of the bill was not in compliance with the Constitution because the Government might not have a position different from that included in a mandate approved by the President of Romania.

In what concerns Article 18 of the bill, the Constitutional Court referred extensively to its previous Decision no 683 of 27 June 2012. A first reference concerned the fundamental statement that the President participate in the European Council meetings in his capacity as Head of State, and that power may be delegated to the Prime Minister by an express act of will. Then the Court referred to arguments pertaining the features of the Romanian form of government a semi-presidential regime, so that the President of Romania represent the Romanian State and commits the State (according to Article 80(1) of the Constitution), while the Prime Minister has the constitutional power to ensure the foreign policy is carried out (Article 102(1) of the Constitution) and the role played by the Government in the field of foreign policy is one rather technical, executive in nature, and consequently it is a derived (not primary) role. Taking into account the general nature of Article 80(1) of the Constitution, this article has to receive an extensive reading in conjunction with Articles 91 and 148(4) of the Constitution, and the conclusion is that the President is under a constitutional duty to represent the State. The contrary reading would deprive Article 148(4) of its substance.

The Constitutional Court held that also Article 19 of the bill was not in compliance with the Constitution: it was judged as contrary to Articles 1(5) and 80(1), the latter read in conjunction with Articles 91 and 148(4) of the Constitution, because Article 19 did not provide for in what concerns the powers that the President should carry out when drafting and adopting the mandate. In the words of the Court, that state of affairs – i.e. a legislative lacuna – did have constitutional relevance.
The decision was issued with a majority, and four members of the Court joined a dissenting opinion.

Certain conclusions may be drawn from the decision of the Court: the President of Romania has always the right to head the delegation to the European Council and the Parliament does not have any power in that regard, as the latter cannot “pick” one of the heads of the executive branch to participate in the European Council meetings; then, the President of Romania – in his capacity as Head of State – should have the main role in establishing and approving the mandate to the European Council meeting, while the role of the Government is only a derived (secondary) one. The duties under Article 148(4) of the Constitution were also highlighted. At least two fundamental questions can be raised here. One question concerns conditions in which the President may delegate the Prime Minister. In other words, are there any requirements that the former has to fulfil? The next decision of the Court offers a partial answer to this question. The other question is one of democratic accountability: taking into account that the President of Romania is the only authority able to draft and approve the mandate to the European Council, what is the role of the Parliament then? Yet, who bears the constitutional duty to direct the course of the European integration of Romania? Certain clarifications in that direction were also brought by the next decision of the Constitutional Court.

IV. Act three: the Decision no 449 of 6 November 2013 – should the winner take it all?

As a result of this second decision, the Parliament was required to rephrase the provisions of Articles 18 and 19 of the bill. And it did so: the former provision was removed from the bill, while the latter article (which became Article 18 – in the current version of the Law) was altered. Then the bill was sent to the President for promulgation, yet he asked the Parliament to consider anew the disputed provisions of the bill.

The Parliament declined to alter the new version of Article 18 as requested by the President. This article reads as follows:

“(1) Within a time-limit of 10 working days prior to the European Council meeting, the Government shall deliver to the two Chambers of Parliament the proposal for mandate which the delegation of Romania aims to put forward.
(2) Prior to European Council meeting, the Parliament may adopt proposals concerning the mandate.
(3) The proposals adopted according to paragraph (2) shall be taken into account in the mandate drafted by the Government.
(4) The President of Romania may address the Parliament in order to present his mandate”.
As a result, on 9 October 2013, the President of Romania decided to address to the Constitutional Court, holding that the Parliament did not rephrase those provisions of the bill in order to comply with the previous decision of the Constitutional Court (no 784 of 26 September 2012) and that these provisions ran also against the first decision of the Court (no 683 of 27 June 2012).

This new action to the Constitutional Court contained a distinctive feature: it raised the issue that the President of Romania should have the ability to determine the mandate both for the European Council and the Council of the EU, for reasons derived from the need for unity of representation in foreign affairs.

At the outset, the action reprised the ground concerning the legislative lacuna on the role of the President in drafting and approval of the mandate to the European Council. Then, it was claimed that Article 18(4) of the bill was liable to lead to two unrelated mandates, one of the Government, which was subject to Parliamentary supervision and the other of the President, mandate which was “entrusted to the Government”. Such a state of affairs was liable to create confusion and lead to another constitutional stalemate. Therefore, the action supported the indivisibility of the two mandates, as Romania had to express a common position within those two institutions. The participation of the Executive branch in the European decision-making procedures might be not separated. Another ground concerned the fact that the activity carried out by Government in the EU Council would be executive and secondary in nature, yet not one original, like that of the President in the European Council.

More specifically, the action claimed that the definitions in Article 2(e) and (f) of the bill breached Article 80(1) read in conjunction with Articles 91 and 148(4) of the Constitution because those failed to mention the powers of the President in what concerns drafting and approval of the mandates for the European Council and the EU Council and also because an arbitrary division between those two institutions was made from the point of view of mandating, and that was liable to encroach on the powers of the President.

As a preliminary point, the Constitutional Court established that the action concerned Articles 2, 3 and 18 of the bill on cooperation. The wording of those provisions is the same as in the Act in force.

The constitutional provisions relied on in the action were Articles 1(5) concerning the compliance with the Constitution, Article 80(1) concerning the role of the President, Article 91 on powers of the President in the field of foreign policy, Article 147(2) and (4) on effects of decisions of the Constitutional Court and Article 148(4) on the duties derived from Romania membership to the European Union.
The Constitutional Court rendered its Decision (no 449) of 6 November 2013. It reminded its previous two decisions and then it went to establish that Article 18 of the bill provides for in what concerns the procedure that should be followed in case the President delegates the power to participate in the European Council. That was the first issue made clear in decision.

To put it differently, what was at stake in the action was not as such the right to participate, but its (potential) exercise, and by implication (procedural) consequences on the part of the Parliament.

The Court mentioned the Opinion no 685 of 17 December 2012 delivered by the European Commission for Democracy through Law (the Venice Commission) on the compatibility with constitutional principles and of the rule of law of actions taken by the Government and the Parliament in respect of other institutions of the State during 2012, opinion which emphasised that, with a view to revision of the Constitution, a clearer division of powers between the President and the Prime Minister, especially in the field of foreign policy and relationship with the European Union, is required.

The Court reminded its previous statement that the representation of the State may be expressly delegated by the President when he deems as necessary, and it emphasised “that such discretion of the President of Romania is not unfettered or arbitrary, but the appraisal in concreto has to take into account certain objective criteria, like: (1) the public authority which is the best placed in relation with the subjects discussed in the European Council; (2) the position of the President of Romania or of the Prime Minister concerning those subjects should be legitimized by a congruent point of view of the Parliament or (3) the difficulties generated by the task of implementing the position reached within the European Council. The political decision of delegating the power to participate in the European Council meetings has to take into account the above-mentioned criteria, in order to reach a consensus between the public authorities involved: the President of Romania and the Prime Minister respectively, and the decision reached should take into account also the constitutional principle of loyal cooperation”.

Obviously, this statement of the Court brings out an important innovation in the constitutional epic; these three (apparently) illustrative examples aim to rationalize the procedural division of powers within the Romanian executive in what concerns the representation in the European Council (this discussion is extended in the next point of this section). They also aim to a greater flexibility in “foreign” representation in the European Council.

14 Published in Monitorul Oficial no 784 of 13 December 2013.
The second issue concerned drafting, establishing and finalising the mandate for representation to the European Council. The Court mentioned Article 10(2)(2) TEU and reminded that it is the Member State which has to establish, according to its constitutional provisions, the representation in the European Council and to establish, “as the case may be, a national legislative framework on relationship between national authorities meant to ensure a democratic and in the same time effective representation”. This latter point was fulfilled by adopting the Act on cooperation, the Court acknowledged. After quoting Article 1 of it, which lays out the scope of the law, the Court made an interesting reference to the Act no 24/2000 on legislative drafting rules,16 whose rules provide the need for correspondence between the title of a law and its contents, so that to infer that the Act on cooperation concern only rules aimed to regulate relationship between the Government and the Parliament (in the procedure to establish the mandate to participate in the European Council meetings), and it does not comprise regulations concerning relationship between these two authorities and the President of Romania. In other words, the procedural issues concerning the way the mandate of the President is drafted and established, yet not the issue of political accountability, are left out by this Law.

The Court established that Article 18(1)-(3) of the Law concerns the case when powers of the President to participate in the European Council meetings would be delegated to the Prime Minister, case in which the parliamentary scrutiny is carried out only in what concerns the mandate, while Article 18(4) of the Law relates to the faculty of the President to inform the Parliament regarding the content of the mandate which was established by the President, when it decides not to delegate the powers to participate in the European Council meetings. Therefore, the Court found two different cases:

“(a) when the President of Romania decides to take part himself in the European Council meetings, he has the faculty to present the mandate to the Parliament, the content of the mandate being established exclusively by the President of Romania;

(b) when he delegates the power to participate in the European Council meetings, the President of Romania is not able to devise/establish the content of the mandate, and the Prime Minister is under a duty to address the Parliament with a “proposal of mandate”, so that the latter can approve it.

Therefore, the parliamentary scrutiny over Romania’s representation in the European Council meetings takes form in the first case of information, while in the second case the Parliament gains a decision-making power in establishing the content of the mandate, as a consequence of the specific relationship it has with the Government (Article 111 of the Constitution).

16 Republished in Monitorul Oficial no 260 of 21 April 2010.
The parliamentary scrutiny over the representation of Romania in the European Council meetings takes form of debates, information and co-workings between Government, Prime Minister and President. For that matter, the existence of the parliamentary control, irrespective of its form, over establishing content of mandate for the head of delegation to European Council meetings is already an element provided for in all Member States of the European Union. The absence of any information on the part of Parliament by the President would make Romania the only European State in which the mandate to represent [the state] in the European Council is established by a single institution”.

Yet, this statement seems to be the fundamental argument in this decision. Nonetheless, certain doubts remain. The only means to avoid a constitutional stalemate concerning representation in the European Council seems to be the constitutional duty of cooperation. To put it differently: notwithstanding the three conditions to delegate his mandate, the President is largely left out of the checks and balances system. This state of affairs has a certain correspondence in the relationship between the President and the Parliament, according to the Constitution of Romania. These issues will be discussed in section V below.

Subsequently, the Court relied on comparative law, quoting extensively from a study drawn in 2013 under the aegis of the European Parliament by a team led by Wolfgang Wessels and Olivier Rozenberg – “Democratic control in the Member States of the European Council and the Euro zone summits”. The Court lists several types of parliamentary control over the representation in the European Council, and then concludes: “Consequently, the Court finds that the Romanian semi-presidential regime may not exclude the parliamentary control over the representation of Romania in the European Council meetings, that being carried out in form mentioned [above], provided that the political decision to delegate the powers to participate in the European Council meetings takes into account the mentioned criteria”.

Therefore, the claim of infringing the above-mentioned Constitutional provisions by Article 18 of the Act on cooperation was rejected.

17 And not by the European Commission, as the Court mentioned in its decision; the study is available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474392/IPOL-AFCO_ET%282013%29474392_EN.pdf.
18 i.e. when the President decides to take part himself in the meetings of the European Council, or when the President delegates the Prime Minister to participate in those meetings.
19 The three criteria listed in the same decision, i.e. “(1) the public authority which is the best placed in relation with the subjects discussed in the European Council; (2) the position of the President of Romania or of the Prime Minister concerning those subjects should be legitimized by a harmonious point of view of the Parliament or (3) the difficulties generated by the task of implementing the position reached within the European Council”. 

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The Court went to assess the claim of non-severability of the two mandates (in the European Council and the Council of the EU), and that ground was also dismissed.

Reference was made to Article 16(2) and (6) TEU in what concerns the Council of the EU, in order to emphasise that the power to take part in Council meetings belongs to ministerial representatives of each Member State. Then, the Court quoted Article 3(2) and (5) of the Act on cooperation, holding that it is the Government who has the final word in what concerns the content of mandate or of general mandate for the EU Council, power that has to be carried out during a Government meeting, in which the President of Romania is able to take part in. “That being so, the President of Romania has the faculty to participate in these Government meetings, and that would lead to participation, consultation and cooperation among the peaks of the executive branch of government.

The Court finds also that by its configurations, the Council of the European Union puts into practice the issues established by the European Council; all these establish of course the need for a close link between workings of the European Council and the European Union Council, without that to amount to a duty of the President of Romania to take part in finalising the mandate or the general mandate, as the case may be, to the Council of the European Union, according to Article (e) and (f) of the Act”.

In the end, the Court reminded the duty of loyal cooperation which is incumbent to the concerned public authorities.

The Court rejected the action as unfounded, and it established that Articles 2, 3 and 18 of the Law are constitutional. This decision also was reached by majority of votes; out of the nine members of the Court, three judges joined a dissenting opinion.

V. A sequel? The need for consistency in representation and clear division of powers according to the decision of the Constitutional Court on the revision of the Constitution

More recently, in the framework of debates concerning the revision of the Constitution of Romania carried out during 2013, two amendments concerning the issue of participation in the European Council meetings were adopted.

One aimed to add a new paragraph - (1') - to Article 91 (after paragraph (1)), which provides for: “The President shall represent Romania to European Union meetings with an agenda concerning foreign relations, common security policy

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20 In that regard, the debates have been carried out in a joint committee – the Joint Committee for drawing up the legislative proposal for revision of the Constitution of Romania – set up by the Resolution of Parliament no 17 of 13 February 2013, published in Monitorul Oficial no 95 of 15 February 2013. Details are available at: http://senat.ro/Comisie.aspx?Zi&ComisieID=bb175b74-8e6b-4603-8589-d27a014a2dc0.

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23
of the European Union, amending or supplementing the founding Treaties of the European Union”.

The other provision was meant to add a new paragraph to Article 102 (3) (after paragraph (3)): “The Government shall ensure the representation of Romania to meetings of the European Union institutions, with the exception of those provided for in Article 91(1)”.

The Constitutional Court has a constitutional duty to assess ex officio the compatibility of any proposal for a revision of the Constitution, so it rendered the Decision no 80 of 16 February 2014 – in which it asked unanimously that Articles 91(1) and 102(3) should be rephrased.

Concerning Article 91(1) of the proposal, the Court referred to Articles 10(2) and 15(2) TEU, stating that the rule concerning composition of the European Council is a general one, and it does not require that the Member States with a bicephalous Executive to ensure a representation both by the Head of State and the Head of Government, but rather, by employing a purposive reading of the Treaty, it can be established that it aims to ensure the representation of the Member State at its highest political level. This is of course a memento of a pronouncement from the first decision of the Court in this epic (Decision no 683 of 27 June 2012), yet the Court did not quote it explicitly.

Then the Court went to hold that the wording of the new paragraph “amounts to a great degree of generality, likely to cause confusion concerning the powers of the presidential institutions in this field”. Therefore, the Court recommended rephrasing the provision in order to delimit the duty to represent Romania by the Head of State in the European Council meetings.

The Court did not elaborate on final part of the proposed text – that related to the revision of Treaties. In fact, this possibility is included at any rate in the realm of the European Council (according to Article 48 TEU).

Regarding the proposed new paragraph in Article 102, the Court held that it was liable to affect the smooth functioning of the state institutions. While the proposed Article 91(1) concerned “European Union meetings”, the new Article 102(3) mentioned “meetings of the European Union institutions”. Regarding also the powers of the Government to take part in meetings of the European Council and the EU Council, the reasoning followed the previous case law of the Constitutional Court (mainly the first Decision – no 683 of 27 June 2012). Reminding that the agenda of the European Council is likely to include various

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21 According to Article 146(a) of the Constitution: “The Constitutional Court shall have the following powers: (a) it shall give a ruling […] ex officio on any initiative to review the Constitution”.
22 Published in Monitorul Oficial, no 246 of 7 April 2014.
23 See paras 294-297 of the decision.
24 Ibid., paras 302-312.
issues and fields (ranging from domestic policy to foreign policy of the European Union) and that in the meetings of other European institutions (EU Council), independent of the issues under discussion (foreign relations, security), only the Government representatives take part, the Court emphasised the need for unitary representation:

“Accepting the rationale of the proposed provisions, with the ability of both the Prime Minister and the President of Romania to take part in its meetings, would lead to a parallel and divided representation of Romania in the European Council. Moreover, if a specific meeting concerns issues which, according to the initiative to review the Constitution, belong to the powers of the President of Romania and of the Prime Minister, that situation will lead to a fragmented representation of Romania, as in some issue would participate the President, while in others it would take part the Prime Minister. Such an approach on powers of the two institutions runs against the provisions of the Treaty on European Union, which states that a representative of each Member State will participate in a meeting”.

The Court emphasised also that the Government representatives have the power to participate in the various EU Council configurations, and then it observed:

“[…] the Court holds that Romania’s representation in the European Council has to be unitary, on the one hand, and that the Government cannot be denied its full power to ensure the Romania’s representation in the Council of the European Union, irrespective of issues on the agenda of its configurations, on the other”.

The proposed Article 102(3) should be put in conformity with the requirements set in Article 10 TEU in order to ensure the said unitary representation in the European Council, so that the Court sent to its prior Decision no 449 of 6 November 2013; in addition to that, the Court seems to place an obligation on the President to mandate the Prime Minister to take part in the meetings of the European Council when “certain objective conditions are met” – meaning those three conditions mentioned in the Decision no 449 of 6 November 2013.

From the point of view of the Court, the proposed paragraph has a limited scope, liable to lead to deadlocks concerning respective constitutional powers of the two authorities involved, and also to an infringement of the Treaty on European Union (!).

In sum, even if nowadays the revision of the Constitution was (temporarily) put on hold, the conclusions emphasised by the Constitutional Court in its Decision of February 2014 are significant, as they show once again the importance of the division of respective roles within the Executive. They show also a certain

25 The Constitutional Court was not clear on this point whether it referred to “domestic policy” of the Member States or of the European Union.
degree of constitutional acceptance concerning the division of these roles. Therefore, the question likely to be risen here is whether the Prime Minister could assume a certain degree of representation in the European Council meetings? And if so, what might be the consequences for the checks and balances Romanian system?

*The present epic continues with another act.* On 24 June 2014 the Prime Minister addressed the Constitutional Court with a request to solve (another) legal conflict of constitutional nature having as subject-matter the issue of representation in the European Council. The Prime Minister supported the view that the President claimed powers that belong to the Government under the Constitution. Interestingly, besides the fact that the President of Romania did not delegate the power to represent Romania to Prime Minister, choosing instead to take part in the European Council meeting of 26 June 2014, the main arguments were the following: the agenda of that meeting of the European Council dealt with issues that fell within the realm of the Government; the President of Romania did not ask the government to provide him with elements of a mandate; neither the Government nor the Parliament was informed or consulted in what concerns the position that was to be presented to that meeting; the conduct breached the constitutional duty of cooperation between authorities, and the three authorities (the President of Romania, the Prime Minister and the Parliament), acting together, carry out the sovereignty of the people. As previously stated, by decision of 9 July 2014, the Constitutional Court rejected the action. The decision is not yet published (in Monitourul Oficial) at the time of writing.

It is time to discuss briefly certain conclusions drawn from all these decisions of the Court in the broader European context.

VI. In praise of cooperation: A broader perspective on the case-law of the Constitutional Court of Romania in the relevant field

1. Preliminary issues – some directions

The issue of establishing the responsible institution of the Executive branch of government to participate in the European Council meetings is not specific only to Romania, but similar constitutional developments took place in other Member States. Among others, the case of Poland, but also that of Croatia,

28 For an in-depth discussion, see F Eggermont, above n 4, 34–40.
29 In Poland, a dispute between the President and the Prime Minister arouse concerning the participation in the European Council meetings; the Prime Minister lodged an application to the Constitutional Tribunal of 17 October 2008, and the latter court delivered its decision on 20 May 2009 (Ref. no Kpt 2/08), available at: http://trybunal.gov.pl/fileadmin/content/omowienia/Kpt_02_08_EN.pdf.
as the most recent country to join the European Union,\(^{30}\) should be reminded here.

In Romanian legal literature, the issue of representation to the European Council meetings is discussed by Professor Ion M. Anghel,\(^{31}\) but for the most part in a context of international relations, emphasizing various issues belonging to (classic) public international law. The European Union is described as “international organisation”\(^{32}\) or “supranational organisation”.\(^{33}\) Professor Anghel discusses extensively various instruments of international law and then the Romanian constitutional and legislative framework in order to establish the capacity to represent the State in international relations: the scope of State’s representation on international scene depends on the legislation of each State.\(^{34}\) He supports a systematic and combined reading of provisions both of Romanian legislation and those of the European Union. The conclusion from reading the Romanian framework is that the role of the President in concluding treaties is all but minor,\(^{35}\) and in that regard reference is made to Act no 590 of 22 December 2003 on treaties.\(^{36}\) According to Article 19(1) of this law, the vast majority of international treaties are concluded by the government. The issue of concluding treaties in the framework of the European Council is approached in the next section. An important conclusion of this article is that it is the Parliament, not the President, which determines the foreign policy of Romania, when approves the government programme; the main actor in foreign policy is the Government (having full jurisdiction), while the President holds certain powers in that regard, so that the concept of representation has to get a narrow reading.\(^{37}\) In what concerns the European Council, Professor Anghel concedes that this EU institution adopts very important decisions that are “definitive and binding acts, because it is not provided for [in the Treaties] their approval at national level”.\(^{38}\) It is not clear the reason why he supports the view that the decisions of the European Council have the nature of a “multilateral treaty” (or agreement).\(^{39}\) Instead, the division he made between acts (or workings) of the European Council in order to establish the representative is meaningful: “[…] we should also take into account the topic

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\(^{30}\) Article 144(5) of the Constitution of the Republic of Croatia establishes that: “The Republic of Croatia shall be represented in the Council and the European Council by the Government and the President of the Republic of Croatia in accordance with their respective constitutional powers”.

\(^{31}\) Ion M. Anghel, Reprezentarea României în viaţa internaţională (o problemă cu aspecte controversate) [The representation of Romania in international arena (a disputed issue)], in Studii şi cercetări juridice [Legal studies and research], 1(57), Issue 4/2012, 561–586.

\(^{32}\) Ibid., 576.

\(^{33}\) Ibid., 583.

\(^{34}\) Ibid., 579.

\(^{35}\) Ibid., 578.

\(^{36}\) Published in Monitorul Oficial, no 23 of 12 January 2004.

\(^{37}\) I M Anghel, above n 31, 581.

\(^{38}\) Ibid., 584.

\(^{39}\) Ibid. See also: The work within the European Council “[i]t is […] about negotiating in a multilateral framework – a meeting of States – and it is about concluding, according to specific procedure of the EU, of an international treaty”. (Ibid, 585).
under discussion [in the European Council]. When general issues are under discussion, within guidelines of the EU – like goals [of the Union], directions and so forth,\textsuperscript{40} that lack binding commitments, then the President will participate; when specific issues are under examination, which implies taking certain measures (legislative,\textsuperscript{41} organisational and so on), then the State organ who has competence on that, meaning the Government, shall take part”.\textsuperscript{42} Such a division, which seems to be well founded, is worth discussing in more detail. Moreover, “[w]hen decisions taken in the Council involves amending or supplementing the process of governance in Romania, a preliminary mandate from the part of the Parliament is needed; the President is not able to participate in the European Council without such mandate”.\textsuperscript{43} This conclusion seems also well founded.

The following part of this section will approach possible meaning of a division of business inside the European Council for the representation of Romania. Even if the division has certain relevance in this regard, it should not be overlooked the other finding of the first decision of the Constitutional Court: Romania needs to be represented in the European Council meetings at its highest (political) level, according to Article 80(1) of the Constitution. Yet, this statement diminishes the weight of this division of business.

2. What is “foreign” and what is “domestic” in the working of the European Council?

In the same direction that emphasises the international law dimension of workings of the European Council, as is apparent from article authored by Professor Anghel, the first decision of the Constitutional Court (Decision no 683 of 27 June 2012) also stresses the foreign relations dimension of this EU institution. Among the decisions rendered by the Constitutional Court in this epic, it is this former decision that emphasised the foreign affairs dimension of European Council meetings.

It must not be overlooked one of the main innovations brought by the Treaty of Lisbon: the European Council is expressly listed as institution of the European Union (Article 13(1)(2) TEU), and that means it has to act within the EU checks and balances system: “Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation” (Article 13(2) TEU). Therefore, irrespective of the recurrent

\textsuperscript{40} i.e. future directions in developing the Union.

\textsuperscript{41} Yet, compare this legislative nature with the proviso of Article 15(1) final phrase TEU. Professor Anghel mentions later the same provision of Article 15 TEU (\textit{ibid}, 585). Perhaps, the reference made to legislation should be read as meaning to future legislative works of the EU legislator according to a program adopted by the European Council (an example is the EU legislation adopted under a 5-year plan for Justice and Home Affairs, the latter being adopted by European Council under Article 68 TFEU).

\textsuperscript{42} \textit{Ibid.}, 584.

\textsuperscript{43} \textit{Ibid.}, 585.
tendency of the European Council to rely on means outside the Treaties in order to attain goals related to the aims of the EU, the reference made in Article 10(2) (2) TEU to the fact that “Member States are represented in the European Council” does not bear a significance able to lead to the conclusion that the latter institution is an “international organisation” or that its meetings belong to “external affairs”. That provision stresses the intergovernmental nature of this institution of the European Union. Article 10 TEU is included in Title II of the TFEU – “Provisions on democratic principles” applicable to the European Union. Two fundamental statements concerning the EU legal order should be reminded here. Is the EU a (classic) international organisation, taking into account that “the [Union] constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals”? Also, what about the founding Treaty (CEE) and the subsequent Treaties? “By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply”. Along the Member States, the Union resorts also on “its” citizens, on governments of the Member States, but also on national Parliaments, and on political parties at European level (Article 10 TEU).

Coming to the issue of a division in representation in the European Council according to issues on the agenda, reference should be made to Article 15 TEU: “The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof”. It should be “domestic” any issue that is included in the (institutional and procedural) system of Treaties. It has to be “foreign” any issue decided outside the EU system, but also any amendment of the Treaties that has to be ratified by Member States. According to this division, the simplified revision procedures of EU Treaties – under Article 48(6) TEU – should be included in the “domestic” issues, while (to a certain degree) ordinary revision procedure and international agreements concluded by representatives of Member States outside the context of the EU institutional framework should be treated as “foreign”.

Firstly, regarding the simplified revision procedures provided for in Article 48(6) TEU, the decisions adopted by the European Council are subject to the institutional system of the European Union, so that Treaty amendments con-

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47 This is the case with the European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (OJ 2011 L 91, p.
tained in such decisions are not subject to (unanimous) ratification by Member States in order to come into force. Secondly, the ordinary revision procedure (Article 48(2)-(5) TEU) exposes the dual nature of the EU Treaties: while the Member States are “masters of the Treaties”, and “[t]he amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements”, the European Council plays a very important role both in initiating the procedure, and also in overcoming any deadlock in reaching unanimity in ratification. Therefore, the conclusion of a new EU Treaty has to comply with the Romanian legislation concerning negotiation and conclusion of international treaties. Thirdly, international agreements concluded by representatives of Member States outside the context of the EU institutional framework should be treated as classic type of international treaties. Among these, are listed the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (“TSCG”, also called the “Fiscal Compact”) of 2 March 2012, and the Treaty establishing the European Stability Mechanism (the “ESM Treaty”) of 2 February 2012. As Professor Deirdre Curtin writes, these treaties are concluded “extramurally”, en marge of a European Council meeting. This latter class of treaties comes under the “foreign relations” heading and they should be treated according to relevant constitutional provisions and Romanian legislation concerning negotiation and conclusion of international treaties the Act no 590 of 22 December 2003 on treaties.

Therefore, when an international treaty in concluded en marge of European Council meetings, then Article 91 of the Constitution is applicable, and its conclusion on the part of Romania should be performed by the President. This should be perhaps the meaning of the Constitutional Court statement in Decision no 683 of 27 June 2012.

In addition, in what concerns the problem of democratic accountability related to such international acts, comparative insights are useful in this regard. From example, the Act on cooperation between the Federal Government and the German Bundestag in matters concerning the European Union was supplemented in 2013 in order to cover any international agreements and intergovernmental arrangements if they supplement, or are otherwise closely related to the law of

1), whose validity was challenged by means of a reference for a preliminary ruling at the European Court of Justice; the latter gave (in Full Court) its judgment on 27 November 2012 in case C-370/12, Pringle v Government of Ireland and Others, EU:C:2012:2493.

48 For a discussion, see R Schütze, European Constitutional Law, above n 44, 61–2.
49 R Schütze (European Constitutional Law, above n 44, 4, note 26) emphasises the view that EU Treaties is not “primary EU law”.
51 The English version is available at: http://www.bundestag.de/htdocs_e/bundestag/committees/a21/legalbasis/euzbbg/248870.
the European Union. These acts are now subject to ordinary rules of participa-
tion of the Bundestag in EU affairs.

3. The representation in the European Council meetings between the President and the Prime Minister – some practical conclusions

The second decision of the Constitutional Court (no 784 of 26 September 2012) clearly excludes a Romanian legislative provision that would place the President and the Prime Minister on an equal footing in what concerns reaching an agreement for representation in the European Council. That conclusion stems from the emphasis put in decision on the primary nature of the mandate held by the President. From that decision it may be inferred also that the Parliament does not play a role in arbitrating such a potential conflict within the Executive branch.

On the other hand, this second decision of the Court stresses that the President himself has to draft and adopt the mandate, in case he decides to take part in a European Council meeting; moreover, by reading together the second and the third decision concerning what is today Article 18 of the Act on cooperation, it seems clear that the Government may submit only its mandate to the Parliament, yet not that of the President. As it will be discussed in the next point of the present section, this is a consequence of the relationship between the President and the Parliament according to the Constitution.

As mentioned already, the third decision of the Court (Decision no 449 of 6 November 2013) holds that the power of representation in the European Council enjoyed by the President is not discretionary, but it has limits. It is it not clear where the source of those three criteria is. Also, by pointing out that the Act on cooperation should limit itself to regulate the relationship between the Government and the Parliament, the potential consequences on drafting and adopting the mandate by the President are left out from legislation. The only provision in this regard is that of Article 18(4) of the Act on cooperation, which will be discussed later on. Nonetheless, the analysis carried out by the Court on the correspondence between the title of the Act and its content should not be construed as meaning that a future law would not regulate the relationship within the Executive branch in what concerns the representation in the European Council.

All these decisions of the Court discussed here do not elaborate any division between drafting and approving (adopting) a mandate for a European Council meeting: the first decision of the Court was even more assertive in holding that only the President has the power to draft and approve the mandate. That conclusion is at variance with the practice of negotiating and concluding international treaties. These procedures are mentioned in Article 91(1) of the Constitution

52 i.e.: the particular position of the authority in relation with the agenda of the European Council; the need to legitimate the Executive position to the European Council by the Parliament; practical issues in enforcing the “decisions” taken by the European Council.
and regulated in detail by Act no 590 of 22 December 2003 on treaties. Under the former provision, “[t]he President shall, in the name of Romania, conclude international treaties negotiated by the Government, and then submit them to the Parliament for ratification [...]” (emphasis added). According to the division in the Act no 590 of 22 December 2003, it is of interest here the class of treaties concluded at State level (on behalf of Romania). The procedures for negotiating and conclusion of such treaties involve the Ministry of Foreign Affairs, the Government and the President of Romania. Yet, a fortiori, taking into account that acts adopted at the European Union level do not need to be ratified by Member States in order to produce legal effects, the procedure concerning a mandate in the European Council should involve not only the President, but also the government (lato sensu) and the Parliament.

In this series of decisions, the only place regarding the cooperation between the heads of the Executive branch in establishing a mandate is that concerning the mandate in EU Council: in its third decision (no 449 of 6 November 2013), the Court supported a certain degree of prevalence of the President over the Government in establishing such a mandate. Even if the Court did not expressly refer to it, it is obvious that the pronouncement finds its basis in Article 87 of the Constitution that gives the President the right to “participate in the meetings of the Government debating upon matters of national interest with regard to foreign policy, the defence of the country, upholding public order, and, at the Prime Minister’s request, in other instances as well”, and in that regard “[t]he President of Romania shall preside over the Government meetings he participates in”. Unfortunately, in that decision, the Court did not elaborate on a potential “participation, consultation and cooperation among the peaks of the executive branch of government” in what concerns the mandate for European Council meetings.

The Treaties themselves establish certain principles on working of the European Council, relevant for this division of roles. Under Article 16(6)(2) TEU, the General Affairs Council is responsible to prepare and to ensure the follow-up to meetings of the European Council. This rule also supposes that the heads of the Executive branch of the Romanian government have to cooperate in drafting and approving the mandate.

4. The Parliament and the mandate for the European Council – certain paradoxes

Article 18 of the Act on cooperation reveals a paradoxical logic: depending on the will of the President, the degree of parliamentary involvement in draft-
ing (establishing) the mandate to a European Council meeting may vary. If the President decides to take part in a meeting, he has the faculty of addressing the Parliament, while the latter does not have any power to influence that mandate. It is true that this limit flows from the constitutional provisions, according to which the Parliament does not have a power to control the President, unlike the relationship provided for between the Parliament and the Government (according to Article 111 of the Constitution). In other words, under the current provisions of the Constitution, it is the President who decides to “address Parliament by messages on the main political issues of the nation” (according to Article 88 of the Constitution). Contrary, if the President decides to mandate the Prime Minister to participate in a meeting, then the Parliament would be able to perform a scrutiny over the proposal for mandate. The Parliament may adopt proposals concerning that mandate, and these shall be taken into account in the mandate drafted by the Government. Yet, when the Prime Minister takes part in a European Council meeting, the Government has the final word on drafting the said mandate. Unlike the previous version of Article 18 of the Act (former Article 19 of the bill), the current text does not foresee any power of the Parliament to establish the mandate, and it also does not provide for a duty on the part of representative to explain reasons the position in the meeting of the European Council was at variance with the initial mandate. That Article which was judged as being contrary to the Constitution would have given the Parliament the main role in arbitrating the Romanian representation to the European Council and also on the version agreed of the position expressed in that meeting.

On the other hand, it is not clear the scope of Article 8 of the Act on cooperation. Under this article, “[t]he Government shall regularly deliver to the two Chambers of Parliament the following documents: (a) reports concerning the results of participation to the European Council […].” A narrow reading of this provision (meaning that these reports concern only the case when the Prime Minister participates in a European Council meeting) would mean that the Parliament is deprived of its right to information. A systematic interpretation of Article 8 of the law implies that the Parliament should be informed about the entire policy cycle of the decision-making process in the European Union, from the general political directions and priorities established by the European Council to the fulfilling by Romania of the transposition duties of the European Union law in the national legislation. That cycle should not be broken according to the institution involved in a certain point and the cooperation should prevail.

In its third decision (no 449 of 6 November 2013) in this epic, the Constitutional Court seized the paradox of Romania being the only State of the European Union in which the mandate to European Council originates from a single authority – in this case, the President. Yet, would the future revision of the Constitution improve the division of powers within the Executive in that matter?
In that regard, perhaps it would be needed also to remedy the paradox of the President’s discretion in involving the Parliament.

**VII. Concluding remarks: Who bears the constitutional responsibility for European integration? Is the Romanian case (so) different?**

The first question mentioned in the title of this section is not unusual, but it is widespread within Member States of the European Union. Perhaps, in that regard, the most emblematic place is the decision rendered by the German Federal Constitutional Court on 30 June 2009 concerning the Treaty of Lisbon:54

“The integration programme of the European Union must be sufficiently precise. In so far as the people itself are not directly called upon to decide, democratic legitimation can only be achieved by means of parliamentary responsibility […]. A blanket empowerment for the exercise of public authority, in particular one which has a direct binding effect on the national legal system, may not be granted by the German constitutional bodies […]. In so far as the Member States elaborate treaty law in such a way as to allow treaty amendment without a ratification procedure solely or mainly by the institutions of the Union, albeit under the requirement of unanimity, whilst preserving the principle of conferral, a special responsibility is incumbent on the legislative bodies, in addition to the Federal Government, within the context of participation which in Germany, has to comply internally with the requirements under Article 23.1 of the Basic Law (responsibility for integration) and which may be invoked in any proceedings before the Federal Constitutional Court”.55

Hitherto, the Constitutional Court of Romania did not approach explicitly this question. For example, in its decision rendered on the occasion of the last revision of the Constitution (2003), which included a new Article 1451 (now Article 148 of the Constitution) – the Decision no 148 of 16 April 200356 – while the Constitutional Court discussed the transfer of powers to the European Union and emphasised the fact that the institutions of the latter do not have a competence of their own, the Court also noted that the “accession through a law is meant to make known to the supreme representative body of the nation not only the significance of accession to the European Union, but also the responsibility which is incumbent on the Romanian state, as consequence of acquiring the membership of the European Union”. While that statement emphasised the role played by the Parliament (under Article 61 of the Constitution), the decision did not elaborate on paragraph (4) of that Article. That provision reads as follows:

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55 Ibid., para. 236.
56 Published in *Monitorul Oficial* no 317 of 12 May 2003.
“The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) [i.e. founding treaties of the European Union and binding secondary law] are observed”.

The Court noted that “Article 145(4) establishes the competence of the President of Romania, of the Parliament and of the Government to guarantee fulfilment of obligations resulted by the Act of accession and of the putting into practice of the founding provisions of the European Union and binding regulations [i.e. secondary legislation] derived from these”.

The Court judged Article 145(5) (now Article 148(5) of the Constitution – according to which: “The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval”) as a “correct and necessary provision taking into account that the national Parliament is a partner of the decision-making bodies of the European Union, in that manner the role held by the national legislative authority being enhanced”. At that time, that was the place assigned to the Parliament in EU affairs.57 58

Nonetheless, decisions discussed in this article shed some light on the matter. On a careful reading of these decisions, it came out that Article 148 of the Constitution concerns not only the ex post side of Romania’s membership to the European Union. The Romanian legal literature has already emphasised this conclusion: by reference to provisions used in the Constitutions of the newer Member States of the European Union, it was noted that these Constitutions do not only provide for in what concerns limits places on the national sovereignty, but they also include institutional guarantees placed on all three branches of government; these guarantees concern effective participation in a ever growing and irreversible European integration, active participation in the institutional and legal European building-up process, and also concerning the obligations resulted from the European legal order.59

57 Not to mention that this provision was meanwhile rendered nugatory by the so-called “Barroso initiative”, under which proposal of EU acts are send directly by the European Commission to national Parliaments.

58 For the sake of completeness it should be pointed out that the duties of the Parliament under Article 148 of the Constitution concern also the ex post participation in European affairs, more precisely the case of (not) transposing (or the case when the Parliament failed adequately to transpose) EU directives into national law. See recently the Decision no 390 of 2 July 2014 of the Constitutional Court of Romania, published in Monitorul Oficial no 532 of 17 July 2014.

From the point of view of the Constitutional Court, expressed mainly in the first two decisions in this constitutional epic, Article 148(4) of the Constitution was seen as imposing a duty on the President of Romania to represent the Romanian State in the European Council. Similar duties under that constitutional provision should have the other institutions listed in that provision: The Parliament and the Government. Would be disregarded the commitments already taken by Romania as a member of the European Union depending on which of the heads of the Executive branch of the government is participating in the European Council meetings? In other words (also words of the Court), would a divided representation in those meetings (depending on issues on the agenda) break the Treaty on European Union? More important in what concerns establishing the course of European integration is the fact that the Parliament is understood as the “supreme representative body of the nation” (Article 61 of the Constitution), that meaning the Parliament approves the government programme (Article 102(1) of the Constitution) and more generally controls over the government (*lato sensu*). The fact that the Parliament lacks the power to control over the President should not preclude the pursuing a scrutiny over the integration programme of the European Union. The Executive and the Legislative should cooperate on that, and that seems to be the main lesson of this constitutional epic. A future constitutional revision would have to make clear the respective roles of these branches of government in respect of EU affairs.

Interestingly, the Romanian legal literature expresses the view that the place in the list of Article 148(4) of the Constitution (“The Parliament, the President of Romania, the Government”) is given according to the degree in representativeness, as the Parliament is called to enact legislation, while the President and the Government have to put into practice that legislation: Ștefan Deaconu, *Articolul 80*, in: Ioan Muraru and Elena Simina Tănăsescu (eds.), *Constituția României. Comentariu pe articol*, above n 59, 758–9.
The algorithm of the margin of appreciation doctrine in light of the Protocol no. 15 amending the European Convention on Human Rights

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Abstract: European Court of Human Rights applies the margin of appreciation doctrine in order to determine the level of its self-restraint and the latitude of free discretion of states when implementing their Convention obligations. The rationale behind this doctrine is that in certain cases, domestic bodies are in a better position than international judges to provide adequate protection to human rights. In this regard, they should be afforded a margin of appreciation. The Court subsequently only reviews, if the interferences contested by an individual fall within this margin or not. This doctrine was a subject of overwhelming critique because the European Court of Human Rights did not apply it transparently and consistently. Therefore the main goal of this article is to normatively construe an algorithm which could be taken into account by the European Court of Human Rights when applying the doctrine in order to prevent the mentioned critique.

Keywords: Margin of appreciation, European Convention on Human Rights, European Court of Human Rights, Subsidiarity, Proportionality

1. Introduction

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “the Convention”) is on the verge of a significant change. In June 2013, Protocol no. 15 amending the Convention left the port of Council of Europe in Strasbourg and started to sail towards the ports of signatures and ratifications by the individual member states. If it comes into force because of

1 Department of Constitutional Law, Faculty of Law, Palacky University Olomouc, Czech Republic. This article is one of the outcomes of my doctoral research conducted at Palacky University. The usual disclaimer applies, meaning that the author alone is responsible for any errors that may remain and for the views expressed in the article.

2 As of 9 August 2014, it has been signed and ratified by 9 countries: Azerbaijan, Estonia, Ireland, Liechtenstein, Monaco, Montenegro, Norway, San Marino and Slovakia. It has not even been signed by 8 countries so far: Bosnia and Herzegovina, Croatia, Greece, Hungary, Latvia, Malta, Russia and Switzerland. The remaining 30 countries have signed the Proto-
its successful sailing trip between all 47 states, it will significantly impact the Convention. It will newly bring a reference to the principle of subsidiarity and the doctrine of the margin of appreciation to the Preamble of the Convention. Specifically, under Article 1 of the Protocol no. 15, a new recital shall be added to the Preamble, which shall read: “Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention”.

I will argue that this amendment of the Convention will require the European Court of Human Rights (hereinafter “the Court”) to enhance its work with the doctrine of the margin of appreciation. Namely, the article will invite the Court to develop a clear algorithm which may be used in upholding the new spirit of the Convention’s Preamble. Firstly, I will define what the margin of appreciation is and I will mention the mostly raised points of critique towards the doctrine. Secondly, I will briefly identify the concepts of the margin of appreciation which appear in the Court’s case-law. Thirdly, I will identify certain factors which impact the decision on use of a specific concept of the margin of appreciation. And finally, the relationship between identified concepts and factors will allow me to construe a general algorithm of the margin of appreciation doctrine applicable in the decision-making of the Court.

2. The margin of appreciation doctrine and its critics

Over the years, many scholars and even the Court itself provided their definitions of what they thought the margin of appreciation was. The most-commonly referred to judgment in this regard is undoubtedly the Handyside case. In the classic paragraphs no. 48 and 49 of this judgment, the Court noted: “By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [of morals] as well as on the “necessity” of a “restriction” or “penalty” intended to meet them. (…) Nevertheless, Article 10 para. 2 (…) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States’ engagements (Article 19) (…), is empowered to give the final ruling on whether a “restriction” or “penalty” is reconcilable with freedom of expression as protected by Article 10 (…). The domestic margin of appreciation thus goes hand in hand with a European supervision.” This judgment represents the core of the whole doctrine because it emphasizes the knowledge of Strasbourg judges that they are in a worse position to decide on certain cases than

3 Handyside v. the United Kingdom, No. 5493/72, 7 December 1976.
domestic authorities. This position requires them to apply self-restraint, namely in deciding on what they consider to be necessary in democratic society, as the limitation clauses of Articles 8-11 of the Convention stipulate.

As far as academic definitions are concerned, I favor the words of the two last presidents of the Court. The current president Dean Spielmann wrote that: “In applying this essentially judge-made doctrine, the Court imposes self-restraint on its power of review, accepting that domestic authorities are best placed to settle a dispute. Various reasons for this have been put forward in legal writings, for example: the subsidiarity of the Strasbourg Court’s review, respect for pluralism and State sovereignty, a lack of resources preventing the Court from extending its examination of cases beyond a certain level, the Court’s inability to carry out difficult socio-economic balancing exercises, or the idea that the European Court of Human Rights is too distant to settle particularly sensitive cases.”

This definition of Dean Spielmann aptly describes the merits of the whole doctrine and substantive reasons for its application.

The previous president of the Court, Sir Nicolas Bratza, said in his speech at the European conference of presidents of parliaments: “In many types of cases, the Court’s approach is first to determine the appropriate margin of appreciation. There is no general formula for this – whether the margin is broad or narrow depends on a number of variables. The second stage is to establish whether or not the national authorities remained within that margin.”

In contrast to Dean Spielmann’s definition, Nicolas Bratza disclosed how the Court formally applies it.

But one more thing needs to be pointed out and that is the relationship to the principle of proportionality. It was Yutaka Arai-Takahashi who wrote for the first time that: “It is possible to consider the application of the principle of proportionality as the other side of the margin of appreciation.”

In other words, stricter standard of proportionality leads to narrower margin of appreciation for the state. And vice versa, less strict standard of proportionality widens the margin of appreciation the states enjoy.

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My understanding of the margin of appreciation doctrine is a little different. I consider it important to incorporate the concepts of the margin of appreciation and external factors of the Court’s decision-making which I will address in detail below. For that reason, I would define the margin of appreciation as an *ex post* self-restraint of the Court, justified by one of the external factors of the Court’s decision-making, leading to deference of the Court to the state’s judgment made within the framework of the afforded free discretion, especially in the application of the Convention to particular facts of the case.

The doctrine of margin of appreciation has faced a very powerful criticism. Lord Lester of Herne Hill even famously noted that “the concept of the “margin of appreciation” has become as slippery and elusive as an eel”. If we were to summarize the main objections against the use of the margin of appreciation, we may categorize them into several areas:

a. Vagueness of the doctrine;

b. Inconsistency in the use of the doctrine by the Court - especially referring to the doctrine, although it is not actually applied in the case;

c. Risk of manipulation of the identified factors and parameters – the margin of appreciation doctrine sometimes serves as an “excuse” or an “escape route” for the Court in the controversial cases;

d. Lack of legal certainty – we may ask at the end of the day whether or not the doctrine amounts to a deprivation of justice?

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10 See SPIELMANN, supra note 4, p. 28.


e. Inability to create a uniform concept of human rights and a threat to the role of the Court in determination of an appropriate standard of human rights protection;\textsuperscript{13}

f. Eventual threat to the universality of human rights and creation of matrix for moral relativism - the doctrine allows for double standards which may undermine the credibility of the Court.\textsuperscript{14}

I share some of the critical points but I am predominantly a proponent of the margin of appreciation. The critical opinions towards the whole doctrine are usually based on the conception of international human rights protection as an opposite to a level of free discretion of states in this area. But I agree with John Merrils who points out that they are actually complementary.\textsuperscript{15} In other words, where the discretion of states ends, there the international protection begins and \textit{vice versa}.\textsuperscript{16} Margin of appreciation may thus be regarded as a very useful instrument of vertical separation of powers between the Court and domestic authorities in the area of human rights protection.

Nonetheless, the calls for abolishing this doctrine became obsolete because of adoption of Protocol no. 15. However, the Court will now face a new challenge at the same time. It will have to reflect on the valid points of critique and attempt to improve the way it works with the margin of appreciation which will most probably become a part of the Convention text.

3. Concepts of the margin of appreciation doctrine

\textit{a. Norm application and norm definition concepts of the margin of appreciation}

There are generally five different concepts of the margin of appreciation in the Court’s case-law, depending on the perspective. The first pair of concepts consists of norm application concept and norm interpretation concept. Margin of appreciation afforded to the states in \textit{norm application} means that the Court will apply self-restraint in respect of the domestic authorities’ judgment on application of the Convention to a concrete set of facts of the case. In other words, the Court exercises deference to national authorities in evaluating whether concrete factual circumstances fitted the definition of the Convention right or freedom.\textsuperscript{17}


\textsuperscript{15} MERRILLS, John G. \textit{The Development of International Law by the European Court of Human Rights}. 2\textsuperscript{nd} ed. Manchester: Manchester University Press, 1993. p. 174–175.


It may be even regarded as a structural concept, as defined by George Letsas,\(^\text{18}\) because it is related to the fact that the Court is an international court. As such, it does not find a violation of the Convention if the state does not overstep the boundaries of its free discretion. Therefore domestic decisions are not subject to a full and detailed review. The Court refrains from making an unqualified judgment and sticks with the separation of powers outlined above. The norm application concept must be distinguished, however, from finding no violation simply because the merits of the case indicate that there was no breach of the Convention.\(^\text{19}\)

A good example of the norm application concept may be found in the Vagrancy case.\(^\text{20}\) Here the Court deferred to the proportionality assessment of domestic courts regarding the interference with the applicant's correspondence under Article 8 of the Convention. The Court namely observed: “...that the competent Belgian authorities did not transgress in the present cases the limits of the power of appreciation which Article 8 (2) of the Convention leaves to the Contracting States: even in cases of persons detained for vagrancy, those authorities had sufficient reason to believe that it was “necessary” to impose restrictions for the purpose of the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others.”\(^\text{21}\)

On the other hand, margin of appreciation afforded to the states in norm definition means that the states have a room for maneuver in the very defining of a particular Convention right or freedom. Yuval Shany explains that the norm definition concept is related to international norms which are open-ended or unsettled.\(^\text{22}\) He specifies that they are commonly standard-type norms, discretionary norms or result-oriented norms. An example of the first group may be the requirement of necessity in limitation clauses of Articles 8-11 of the Convention. The second rule of Article 1 of Protocol no. 1 to the Convention providing that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law is a good example of a discretionary norm. And a typical result-oriented norm is the Article 6 of the Convention safeguarding the right to a fair trial. It does not specify how exactly are the states supposed to construe fair judicial systems, it only matters, in the end, if they really are fair as a whole in practice.

It is not easy to draw a line between these two concepts which may have been witnessed e.g. in the Schalk and Kopf case concerning the marriages of homo-


\(^{19}\) LETSAS, supra note 18, p. 707.


\(^{21}\) Ibid., § 93.

\(^{22}\) SHANY, supra note 17, p. 910.

sexual couples. The majority used the norm definition concept of margin of appreciation and came to the conclusion that Austria did not have an obligation to adopt the relevant regulation of homosexual marriages before 2010. But the dissenting judges noted that Austria relied on its margin of appreciation while failing to provide any argument justifying the difference in treatment of homosexual couples. In the opinion of the judges Rozakís, Spielmann and Jebens, Austria should not have been afforded any latitude of discretion in the absence of such a justification. They thought that the margin of appreciation could be afforded only if the state provided reasons for the interference with the applicants’ rights under the Convention. It is thus clear that these judges would prefer the norm application concept of the margin of appreciation.

I am of the opinion, that the relationship between these two concepts requires clarification. The most efficient way of doing so would be to abandon the definition concept. I fully agree with the academic critique of this concept. It leads to the Court losing control over defining the exact contours of the rights in the Convention to an extent not justified by the principle of subsidiarity. George Letsas accurately describes the definition concept as related to the issue of limitability of Convention right. However, it does not provide an answer to a question if a particular interference is admissible or not. He therefore describes this concept as either "superfluous or question begging".

It has to be stressed that the margin of appreciation is directly inter-connected with the principle of proportionality and it should be applied with regard to this inter-connection. But definition concept goes one step backwards to the very definition of Convention obligations where proportionality has no effect. In addition, it was mentioned in the Handyside judgment that: "The domestic margin of appreciation thus goes hand in hand with a European supervision". Definition concept of the margin of appreciation doctrine runs against these principles and for that reason, it should be abolished. Some of the critical opinions mentioned above would accordingly lack substance, if the Court used the norm application concept only.

b. Wide, certain and narrow margin of appreciation

If we focus on the breadth of the margin of appreciation afforded to the states when implementing their Convention obligations, there are three main concepts that the Court uses – wide, narrow and a “certain” margin of appreciation.

The wide margin of appreciation means that the Court applies self-restraint to the highest possible extent. Accordingly, the proportionality standard is low.

25 KRATOCHVIL, supra note 8, p. 333.
26 Ibid., p. 332.
27 LETSAS, supra note 18, p. 714.
28 Handyside, supra note 3, § 49.
In such a case, the Court does not act as yet another instance above domestic courts and it sticks to the principle of subsidiarity. The role of the Court is only one of a safety measure against the domestic authorities exceeding the “spectrum of legitimate differences”. The Court affords wide margin of appreciation mainly in cases where there is no consensus among the member states of Council of Europe on certain issues, especially if it is a sensitive one. Other typical areas where the Court uses the wide margin of appreciation are:

- national security;
- public emergency;
- protection of morals;
- social and economic areas of law;
- searching for a fair balance between conflicting Convention rights or public interests.

If the margin of appreciation afforded to the state is wide, then it is up to the applicant to submit arguments that the state nonetheless exceeded it. The most commonly used standard that the applicant’s argumentation would have to reach is that the contested interference is “manifestly without reasonable foundation”. If the applicant succeeds in proving that the actions of state clearly lack reasonable grounds the Court will find a violation of the Convention. In such a case, the state would overstep its margin of appreciation despite its wideness.

On the other hand, narrow margin of appreciation leads to a high standard of proportionality that the interference with Convention rights has to meet. The Court is deferent to domestic authorities’ decision to the lowest possible extent. The states are practically deprived of their right to a certain degree of legitimate differences and the Court now adopts its role of a unifier.

There are several areas where the narrow margin of appreciation typically appears:

30 See e.g. Vo v. France [GC], No. 53924/00, 8 July 2004 where the Court declined to decide on the beginning point of life (§ 82).
31 Klass v. Germany, No. 5029/71, 6 September 1978, § 49.
33 Handyside. supra note 3, §§ 48-49.
35 Odièvre v. France [GC], No. 42326/98, 13 February 2003, § 46. Here the domestic authorities attempted to balance right of the applicant to know her origin and right of her mother to keep the circumstances of the applicant's birth and her own identity in secret.
36 See e.g. James and others v. the United Kingdom, No. 8793/79, 21 February 1986, § 46, A. and others v. the United Kingdom, No. 3455/05, 21 February 2009, § 174, Immobiliare Saffi v. Italy, No. 22774/93, 28 July 1999, § 49; See also KRATOCHVIL, supra note 8, pp. 348-350.
37 BARINKA, supra note 29, pp. 1086–1087.
cases concerning an identity or the very existence of an individual,38 protection of authority of judiciary,39 positive obligations arising out of absolute rights, such as right to life or right not to be subject to torture or inhuman and degrading treatment,40 racial or ethnic discrimination,41 intimate aspects of private life.42

If the margin of appreciation afforded to the state is narrow, then the burden of proof shifts from the applicant to the state.43 It will be usually up to the Government Agent to show that the contested interference was justified by “very weighty reasons” or “convincing and compelling reasons”.44

The concepts of wide and narrow margin of appreciation are thus extremely important from the methodological point of view because they distribute the burden of proof between the parties to the proceedings before the Court and they set standards which the parties have to meet to make their case efficiently.

The last concept that I would like to analyze in this part is that of a “certain” margin of appreciation. As far as the intensity of review is concerned, “certain” margin of appreciation is supposed to stand in the middle between the wide and narrow one. However, this concept does not allow us to find out what the actual breadth of the margin of appreciation is. The standard of proportionality can also be no other than “certain”. In addition, this concept is the most often used one – the statistics in HUDOC disclose that the Court uses “certain” margin of appreciation in almost a half of all cases where the margin of appreciation is invoked.45

38 S. and Marper v. the United Kingdom [GC], No. 30562/04 a 30566/04, 4 December 2008, § 125.
39 Sunday Times v. the United Kingdom, No. 6538/74, 26 April 1979, § 67
40 See e.g. Pretty v. the United Kingdom, No. 2346/02, 29 April 2002.
42 Dudgeon v. the United Kingdom, No. 7525/76, 22 October 1981, § 52.
43 See KRATOCHVIL, supra note 8, s. 350.
45 In 2010, the Court used the margin of appreciation 134 times. The concept of a “certain” margin of appreciation was used in 66 of them (in 49, 3% cases). In 2011, the Court used the margin of appreciation 140 times. The concept of a “certain” margin of appreciation was used in 74 of them (in 52, 9% cases). In 2012, the Court used the margin of appreciation 166 times. The concept of a “certain” margin of appreciation was used in 77 of them (in 46, 4% cases). And in 2013, the Court used the margin of appreciation 181 times. The concept of a “certain” margin of appreciation was used in 73 of them (in 40, 3% cases). In average, the Court used the concept of a “certain” margin of appreciation in 47, 2% of all cases where it used the margin of appreciation doctrine in the last four years.
I have the same position towards the concept of a “certain” margin of appreciation as to the definition concept mentioned above. It is fundamentally flawed and I believe that it is also a source of many of the critical opinions which point out the vagueness, ambiguousness and legal uncertainty that it creates. It does not allow for the distribution of burden of proof as the other two concepts do and blurs the choice of standards which ought to be met to make one’s case, be it an applicant or the Government. Jan Kratochvíl made a fitting analogy as he compared the margin of appreciation to a high jump.\footnote{KRATOCHVÍL, supra note 8, s. 330.} If the margin of appreciation is wide, the bar for the state to jump over is pretty low. Narrow margin of appreciation means that the bar is much higher and makes it hard for the state to overcome it. But with the “certain” margin of appreciation, no one knows how high the bar is. Therefore the state as a high jumper cannot even adapt the way it runs towards the bar. For these reasons, I would suggest that the Court ceases to use the concept of “certain” margin of appreciation.

To summarize, the Court should only work with the norm application concept of the margin of appreciation which leads to deference of the Court to the application of the Convention to a concrete factual background. Such margin of appreciation may be either wide or narrow which is vital for setting the relevant proportionality standard and distribution of the burden of proof between the applicant and the Court. These conclusions will be methodologically crucial for the construction of the margin of appreciation algorithm below.

4. Factors impacting the decision on which concept of the margin of appreciation ought to be used

Having established the applicable concepts of the margin of appreciation, one certainly comes to a question: How do I find out which of these concepts to use? Andrew Legg provides an in-depth analysis of the so-called second order reasons which impact the decision on which concept of the margin of appreciation should be used.\footnote{LEGG, supra note 13, p. 17.} These second order reasons may be described as external factors of the Court’s decision-making. They are external because they don’t necessarily deal directly with the very merits of the case, i.e. whether facts of the case indicate that a certain human right was violated or not. These external factors rather provide systemic reasons for the Court’s decision which lie outside the core of the merits of the case, and in particular, they influence the strictness of the Court’s scrutiny.\footnote{Ibid., pp. 18–23.}

In academic articles and the case-law of the Court, one may identify a high number of these factors. For reasons of economy, I will abstract them and catego-
rize them all in the table below.\textsuperscript{49} Importance of the limited right to an individual, nature of the Convention obligation or existence of a common ground between European countries appear the most often.\textsuperscript{50} But in the past decades, all the academics did not attempt to systemize these factors and analyze the relationships between them. I have come across the first attempt to do so in the Czech commentary on the Convention where these factors are divided into general and special ones.\textsuperscript{51} That is the first starting point for us. The second starting point is the distinction that Andrew Legg made, because he identifies three general second order factors leading to the application of the margin of appreciation doctrine. And within these three general factors, he identifies those that widen the margin of appreciation and those which narrow it.\textsuperscript{52}

To effectively summarize various factors impacting the decision on which concept of the margin of appreciation ought to be used, which were identified by academic authors and the Court, we may put them all in the following table:

<table>
<thead>
<tr>
<th>Democratic Legitimacy and Participation</th>
<th>Current state practice and other international law influences</th>
<th>Expertise and competence</th>
<th>Unclassifiable factors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Widening factors</td>
<td>1. the choice of legislature between two conflicting rights of individuals or between a private and a public interest; 2. nature of the pursued aim</td>
<td>1. lacking legal consensus; 2. consensus in favor of the state; 3. deference to decisions of other international bodies and institutions</td>
<td>1. national security; 2. protection of children; 3. health care; 4. educational needs; 5. organization of police and public administration; 6. area of economy; 7. morals and ethics</td>
</tr>
</tbody>
</table>

Table continues on the next page


\textsuperscript{50} As far as the Court’s case-law is concerned, see notably \textit{A, B and C v. Ireland [GC]}, No. 25579/05, 16 December 2010. § 174–185; or \textit{S. and Marper}, supra note 38, §§ 87–93 etc.

\textsuperscript{51} KRATOCHVÍL, supra note 7, s. 91.

\textsuperscript{52} LEGG, supra note 13, pp. 69–174.
| Narrowing factors | 1. democratic right (e.g. right to stand in election); 2. issue of minorities and vulnerable groups; 3. insufficient debate on the issue in the Parliament and the society generally; 4. application of too general and ill-conceived provisions of domestic law unrelated to an intended purpose; 5. other issues of the rule of law; 6. importance of the limited right to an individual; 7. importance of the limited right to a society: basic values of democratic society | 1. consensus in favor of the applicant |
| Widening/ narrowing factors depending on the case | 1. nature of the state’s obligation | 1. text of the Convention; 2. seriousness of the interference; 3. circumstances of the case (emergency vs. ordinary situation) |

These are, by and large, the factors that may be found in doctrinal works and the case-law of the Court. They are categorized into three general factors:

a) democratic legitimacy and participation,
b) current state practice and other international law influences, and
c) expertise and competence of domestic bodies.

In these three areas, the Court should generally apply the norm application concept of the margin of appreciation. Its breadth is then specified by either widening or narrowing special factors. But this generates one more “million-dollar” question. How do we actually establish the breadth of the margin of appreciation afforded to the state in a particular case?
In many cases, the narrowing and widening factors obviously conflict. For example, in the Odièvre case mentioned above, one may identify the widening factor of the choice of legislature between two conflicting rights and a narrowing factor of importance of the limited right to an individual. In the seminal case of A, B and C, the Court also faced a conflict of several special factors. In arguing for the use of the narrow margin of appreciation, the applicants relied on the importance of the limited right, seriousness of the interference and the practice of European states in their favor. The third applicant added a factor of the rule of law because of an insufficient legal regulation of access to abortion.

In their attempt to persuade the Court to use the wide margin of appreciation, the Irish Government relied on the moral and ethical nature of the problem, the “Irish context” of the case and a lacking consensus on the issue of the beginning of life for the purposes of protection under Article 2 of the Convention.

Resolving such conflicts is not an easy issue and the Court has never laid down any rules on how to do so. Jan Kratochvíl even believes that there are no such rules and that the conflicts have to be resolved on the basis of the particular factual background of a concrete case.

But for the sake of transparency, non-arbitrariness and persuasiveness, I am of the opinion that such rules may be set. It must be borne in mind that the breadth of the margin of appreciation is inter-connected with the standard of proportionality. It is the other side of the same coin. Therefore the conflict of several factors may be resolved with the same methodology that we use to to find the appropriate standard of proportionality – balancing.

After all, Aharon Barak wrote that: “Balancing is central to life and law. It is central to the relationship between human rights and the public interest, or amongst human rights. Balancing reflects the multi-faceted nature of the human being, of society generally, and of democracy in particular.” Balancing exercise between the factors impacting the decision on which concept of the margin of appreciation should be used therefore seems to be perfectly fit.

53 A, B and C, supra note 50.
54 Ibid., § 174.
55 Ibid., § 174–175.
56 Ibid., § 177–179.
57 Ibid., § 185.
58 KRATOCHVÍL, supra note 7, s. 91–92.
In practice, what one needs to conduct proper balancing, is a balancing formula.\textsuperscript{60} Robert Alexy\textsuperscript{61} probably came up with the most transparent one which may lead us to reviewable and persuasive conclusions. His balancing formula has three stages:

1. Establishing the degree of non-satisfaction of, or detriment to, a first principle (a factor in our case) – the interference may be “light”, “moderate” or “serious”.
2. Establishing the importance of satisfying the competing principle (a factor in conflict in our case) – likewise it may be “low”, “medium” or “high”.
3. Establishing whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former. More specifically, if the interference is light and the importance of competing principle is high, then the competing principle outweighs the first principle. And even more specifically with respect to the topic of this part of the article, if a narrowing factor is limited seriously and importance of satisfying the widening factor is low, then the narrowing factor outweighs the widening factor.

There are certainly other options how to resolve the conflict between special factors (e.g. the so-called \textit{ex ante} argument; quantitative solution where more factors of one kind outweigh the factors of another group; balancing formulas \textit{in dubio pro libertate} or \textit{in dubio pro iustitia}). But the Alexy’s balancing formula is the most fitting one because it may allow the Court to clearly explain why a certain concept of the margin of appreciation was chosen or not.

To sum up, we identified several factors impacting the choice of the margin of appreciation concept. We categorized them into general ones and special ones. The special ones may have either a widening or narrowing nature. The conflicts between these two groups of factors may be resolved by using the balancing method. Namely, the Alexy’s balancing formula may be used in order to find out which concept of the margin of appreciation should be applied.

5. \textbf{Construction of the algorithm}

In the previous parts of the article we defined what the margin of appreciation was. We identified its applicable concepts. And we came to the conclusion on how to choose a particular concept on the basis of relevant factors. But now, let us build on these conclusions and construe the margin of appreciation algorithm which could be applied by the Court in practice.


The algorithm might consist of the following four stages which I will describe in detail below:

1. Is there a reason to apply one of the three general factors of the margin of appreciation doctrine?
2. What special factors of the margin of appreciation doctrine are involved?
3. Do the identified special factors lead to the use of wide margin of appreciation or narrow margin of appreciation?
4. Did the state exceed its margin of appreciation?

All the four steps of the margin of appreciation algorithm certainly require a brief commentary.

In the first step, the Court should be asking generally whether there are reasons to apply the margin of appreciation doctrine whatsoever. The doctrine should not be mentioned at all, if the Court is not really about to apply it. Therefore the Court firstly has to establish that it is, in a particular case, in worse position than a domestic judge to decide on the issue as described in the Handyside case. An indication of this may be one the general factors of the margin of appreciation doctrine. In other words, the margin of appreciation should be afforded if domestic bodies are in a better position to decide on the case for reasons of democratic legitimacy and participation, current state practice and other international law influences or their expertise and competence.

In practice, the general factors may be even identified by a clear presence of some of the special factors. But the main purpose of the first step is to make sure that the margin of appreciation will not be used as a mere phrase in the beginning of the Court’s reasoning. If the Court does not plan to apply the doctrine with all its components, it should refrain from mentioning the margin of appreciation at all. That may be the case where the Court will decide the case solely applying the “classic” five-stage test, not deferring to the state’s decisions in the analysis of necessity in democratic society.62

Once the Court decides to follow the path of the margin of appreciation, it ought to identify what special factors are at stake in a given case. The Court should “brainstorm” what special factors appear and what is their nature, i.e. if they are widening or narrowing and whether there is a conflict between them.

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62 The individual phases are: (i) the identification of the right, including positive aspects of the right; (ii) the identification of the interference; (iii) consideration of whether the interference is prescribed by law, including both the internal and external (Convention) understanding of ‘law’; (iv) determining what objectives are sought to be protected by the interference; and (v) deciding whether the interference is ‘necessary in a democratic society’, i.e. whether the state gives, and gives evidence for, relevant and sufficient reasons for the interference and those reasons are proportionate to the limitation of the applicant’s enjoyment of his right. See HARRIS, D. J., O’BOYLE, Michael, WARBRICK, Colin et al. Law of the European Convention on Human Rights. 3rd ed. New York: Oxford University Press, 2014. p. 521.
Only full identification of the relevant special factors will allow the Court to conduct proper balancing in the third stage of the whole algorithm.

The third phase is central to the outcome of applying the algorithm. This is where proportionality comes in as the other side of the margin of appreciation. It is the Court’s task to carry out the balancing exercise. As I outlined above, the best instrument to balance the conflicting factors is the Alexy’s balancing formula. The result of its application may be either the use of wide margin of appreciation or its narrow counterpart. The Court has to set out the reasons for its choice of the margin of appreciation concept clearly in order for the compliance with it to be tested later. The burden of proof will also be distributed depending on the conclusion of the Court in this stage of the test.

In the final fourth step of the algorithm, the Court has to analyze if the breadth of the margin of appreciation afforded to the state has or has not been exceeded by the state’s interference. As I wrote earlier, if the margin of appreciation is wide, it will be up to the applicant’s argumentation to prove that it is “manifestly without reasonable foundation”. If, on the other hand, it is narrow, then the Government’s justification will have to satisfy the Court that its breadth was not overstepped by providing very weighty reasons for the interference. If either of them fails, the Court will rule against them. Namely, if the margin is wide and the applicant fails to prove that the contested interference lacks reasonable foundation, the limits of the state’s discretion will be complied with and there will be no violation of the Convention found by the Court. Contrarily, if the margin is narrow and the Government fails to prove that it complied with its boundaries by submitting very weighty reasons for the interference, the Court will have to find that the margin of appreciation was exceeded and the applicant’s right violated.

That is what the general structure of the margin of appreciation algorithm may look like. It takes into account and gives appropriate emphasis to the various factors influencing the eventual breadth of the margin of appreciation which may be clearly, transparently and persuasively determined.

6. Conclusions

In conclusion, I would just like to provide a reader with a bigger picture and think outside the margin of appreciation algorithm box for a second. The margin of appreciation doctrine is still used the most in connection with Articles 8–11 of the Convention and their second paragraphs containing the limitation conditions. The Court usually uses a five stage test mentioned above to find if these provisions were violated by the state or not. One must ask - how do the margin of appreciation algorithm and the five-stage test come together?

Once again we may refer to the relation of the margin of appreciation and proportionality. That comes into consideration in the final stage of the five-stage
test where the Court has to deal with necessity of the interference in the democratic society, provided that the case falls within the scope of one of the Convention articles, and there was an interference made in accordance with law pursuing a legitimate aim. If the Court gets to the final fifth stage, then that is where it should be asking the first question of the margin of appreciation algorithm. If it does not find reasons to defer to the state on the basis of one of the general factors, it may proceed with an analysis of proportionality not affording any margin of appreciation to the state. It would be assessed whether the interference corresponds to a pressing social need and whether it is proportionate to the legitimate aim pursued.63

But if the Court finds reasons to afford the state with a degree of free discretion, it should follow the algorithm and take into account all the relevant factors which will point to the direction of wide or narrow margin of appreciation. Compliance with the breadth of the margin of appreciation may be subsequently verified using the relevant standards.

Before the adoption of the Protocol no. 15, the Court faced a dilemma. It either had to acknowledge the critical voices and abolish the whole doctrine or it could enhance the way it is applied.64 But now, abolishing the doctrine is no longer an option. The Court will now have to constructively address the criticism bearing in mind that consistency in decision making based on transparent rules is fundamental to any legal system.65 The general margin of appreciation algorithm that I construed above may serve as a handy instrument for the Court to do so.

The application of the algorithm requires further study and research, indeed. For example, how may it be applied with regard to the positive obligations? And what about special areas of protection such as prohibition of discrimination, right to personal liberty, right to a fair trial or even the environmental rights? It is conceivable that these areas may require modifications to the general margin of appreciation algorithm.

Nevertheless, I believe that its form presented in this article may serve as a good starting point for such a research and mainly, for the Court to use the complex doctrine of margin of appreciation effectively, transparently and consistently. That would be the best answer to the strong criticism which the whole doctrine has faced in the recent years.

63 See e.g. Olsson v. Sweden (no. 1), No. 10465/83, 24 March 1988, § 67.
64 KRATOCHVÍL, supra note 8, s. 354.
United States financial institution resolution system as a possible inspiration for the European Union

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Abstract: In the current time there are many initiatives that are aimed to protect financial institution clients in the European Union. Current economic and financial crisis has shown that there is a need for common approach in this area. Some proposals have been passed. But there are still some in the bill stage and the deposit guarantee schema is one of them. The aim of the article is therefore to describe briefly and assess the proposed European model. The article also contains comparison with the operating United States model due to the inspiration possibility.

Keywords: Deposit Guarantee Schema, European Union, Federal Deposit Insurance Corporation

1. Introduction

It has been more than five years since the fall of Lehman Brothers, i.e. five years since the financial crisis has broken not only in the United States. Governments particularly in Western countries responded with full guarantee of deposits and with the financial injections into institutions that were in their opinion „too big to fail“, because their collapse could threaten the whole financial system stability. Herewith the banks defaults were warded off but the measures have significantly increased the government deficits. Therefore in order not to let the countries go “bankrupt”, European Central Bank (hereafter „ECB“) and American Fed had to start buying in bulk the problem countries’ government bonds.

1 Department of Financial Law and Finances, Faculty of Law, Charles University in Prague, Czech Republic.
2 Lehman Brothers was a global financial services firm known for the largest financial bankruptcy in the United States history. Firm declared bankruptcy on the September 15, 2008 due to the huge subprime mortgage market exposures after regulators refusal to liquidate it.
3 In my opinion Greece has already defaulted, de facto. De iure did not, only because of huge bailout, which furthermore relies on an economy growth that would be hard to carry out.
4 Federal Reserved system or United States Central Bank.
bonds. Although on the issue in question there has been written a lot, the real question is whether the appropriate measures, which could prevent similar crisis in the future, has been implemented. Due to the financial world globalization and „spillover effect“ of problems among economic sectors and countries we wouldn’t probably find a sector where the term crisis is not inflected. Despite it at present there are opinions that the financial crisis has been warded off and now it is necessary to ward off the debt one. Although the premise on the debt crisis existence can be accepted, in my opinion, not even the financial crisis has been warded off. In this respect we have to mention in particular the process in the European Union and the United States. Provided we would want to accept the premise on the financial crisis warding off, perhaps it could be so done only in the United States, but even there with reservations. In my opinion it cannot be said on Europe even with reservations. Although I have stated that the whole world experiences the financial and economic crises, it cannot be utterly generalized.

Among individual countries or more precisely mainly among regions there we can see theoretical and practical differences in approach. As I have already mentioned my comparison will be dealing with the United States and the European Union. The reason is the cultural and economic similarity. Also in socio-political establishment there can be found similarities despite the fact that the United States are the federation while Europe is created with the unitary states. That is to say that Europe is walking by leaps and bounds to quasi federative system or system of confederacy, if it already did not. Thus the United States can be certainly used as the suitable inspiration for the newly formed federative Europe.

2. The European Union proposal

Since the beginning of crisis the European Union has prepared many initiatives in an effort to solve related problems. However the initiatives have appeared before the arisen crisis, nevertheless with respect to very significant economic boom many of them were not accepted.\footnote{But some legal texts were adopted, see for instance: Directive 2005/60/ES of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, Directive 2006/48/ES of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit the business of credit institutions (recast), Directive 2006/49/ES of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast).}

As the first measure responding to the economic crisis we can mark the establishment of European System of Financial Supervisors (hereinafter „ESFS“\footnote{ESFS („European System of Financial Supervisors“) consists of „European Systemic Risk Board“ and „European supervisory Authorities“. Among the European supervisory authorities there belong „European Banking Authority“, „European Securities and Markets Authority“ and „European Insurance and Occupational Pensions Authority“}) in January 2011. Although there has been created a broad institutional framework
but without needed tools, which would ensure its practical implementation and enforcement. Top officials of European Union, however, were aware of, and thus the former governor of the Central Bank of Finland\textsuperscript{7}, Erkki Liikanen, along with the others was entrusted to prepare an expert vision that should suppress negative impacts of crisis. The outcome of this group is so called Liikanen’s Report, where detailed root cause analysis of problems in which the European Union is can be found including proposals for their solutions.\textsuperscript{8}

Liikanen’s Report was confirmed in June 2012 by the report of chairmen of the European Council, European Commission, so called Eurogroup\textsuperscript{9} and the President of the ECB.

In this Report there is stated that a stable and prosperous European Monetary Union (hereafter „EMU“) has to be based on four principles, which are:

1. Integrated financial system
2. Unified budget system
3. Integrated economic policy
4. Democratic legitimacy and accountability

These conclusions were also supported by the representatives from the Eurozone countries\textsuperscript{10} and they called upon the European Commission to prepare a legislative proposal. The proposal was announced in the Communication EP from September 12\textsuperscript{th} 2012, which is known as „A Roadmap towards a Banking Union“\textsuperscript{11}.

Newly created banking union ought to be based on four pillars, as follows:

1. Common regulatory rules\textsuperscript{12}

\textsuperscript{7} „Suomen Pankki"
\textsuperscript{8} „Report of the European Commission’s High-level Expert Group on Bank Structural Reform“ Basic recommendations are: 1) Separation of particularly risky activities from the current deposit 2) Strengthening of the supervisor´s powers 3) Greater protection for savers during the institution 4) Increased capital requirements for the risky activities.
\textsuperscript{9} This is regular meeting of eurozone finance ministers. The main goal is the care for Euro and the assets of the European Monetary Union.
\textsuperscript{10} „The Commission will shortly submit proposals of the single supervisory mechanism based on article 127, par 6. Due to the urgency we ask the Commission to judge the proposal until the end of the year 2012. As soon as the effective single supervisory mechanism involving ECB will be established, under proper decision ESM could have the chance to recapitalize the banks in eurozone directly“. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131359.pdf
\textsuperscript{12} Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institution and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives
2. Common European system of deposits insurance
3. Common European system for the banking sector restructuring
4. Single European banking supervision

The difference in adjustment of deposits insurance systems as well as absence of a unified resolution framework according to the explanatory memorandum represents the obstacle for creation or functioning of the single internal market. Adding the economic crisis in progress and the general weakening of the trust not only into the credit institutions, it seems to be for the European Union more than necessary to take the steps for saving or rather even recovering the credibility of the whole financial system.

Concerning these issues the countries often proceed according to their own meaning and hurriedly implemented various measures to prevent a panic and therewith connected runs on the credit institutions. So far the directive from the year 2009 is the latest effective initiative.

Although the system is harmonized, the unification concept in all countries of the European Union is constantly more and more discussed and instead of harmonization there can be seen an effort to come to a direct regulation. In the explanatory memorandum of the proposed regulation there is stated that the existence of more than forty various deposit insurance systems (hereafter „systems“) on the European Union’s territory is the predominant problem and further also their underfunding. To solve these particular problems in the text there are stated the following measures:

1. Simplification of the existing adjustment
2. Shortening of the maturity period and improvement of reporting obligations
3. Increase of the financial systems capacity
4. Borrowing facilities, i.e. the possibility to transfer the funds between the systems of individual countries

The proposal stems from article 47, paragraph 2 of the Treaty on the Functioning of the European Union (hereafter „TFEU“), which is the legal basis for the adoption of measures the purpose of which is to create the internal market within the financial services.

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More clear specification of the deposits definition is a positive aspect of the proposal. According to this proposal only instruments payable in entire extent can be considered as the deposits, i.e. not structured products, certificates or credit bonds. This prevents the systems from unnecessary investment risks. In addition all systems have to be subjected to continuous supervision and have to conduct regularly the exercise tests of all systems. The member states are also expressly authorized for the mergers of the Deposit Guarantee Schemes.

From the insurance there are obligatorily excluded deposits predominantly of the public authorities and financial institutes of any type, which has been modified as the facultative possibility so far.

On the contrary at present the deposits of non-financial companies and deposits in other currencies that are currencies of the member states are considered as the obligatory insured.

Although the maximum amount of insurance is not changing in the proposal there is explicitly stated the possibility to agree higher limit but only in specific cases and for a limited time.\textsuperscript{15} There is also significant reduction in time for deposit withdrawals. Currently the Directive requires the member states to ensure deposit withdrawals within 20 days from the moment when the system is notified on the institution bankruptcy. The proposed adjustment envisages with gradual period shortening up to final 7 days, but right up until the year 2024.

In the regulation there is also set out quite new way of the systems funding, consisting of four phases, whereas not all are obligatory, only their order is.

Firstly after the transitional period of ten years the systems have to dispose with the sum in amount of 1, 5\% of eligible deposits. Only if it appears in connection with the institution bankruptcy that these funds are insufficient, the second phase is going to turn up.

This one insists in ex post obligation of all institutions of the state in question to settle extraordinary contributions, namely up to the amount of 0, 5\% of eligible deposits.\textsuperscript{16} The proposed conception drafted here is the compromise result of theoretical considerations if it is better to finance the systems ex post or ex ante,\textsuperscript{17} thus the funds in the proposed model settled ex ante amount to $\frac{3}{4}$ of the fund volume, while those settled ex post amount to $\frac{1}{4}$.

Thirdly the borrowing facility enables the system, which lacks the funds, to secure a loan from all other systems of the deposits insurance in the EU. Those

\textsuperscript{15} For instance deposits coming from real estate transactions but for a maximum of 12 months.

\textsuperscript{16} However there is the possibility for the supervisory authorities to release the institution from this obligation namely in case that the payment could threaten it.

ones are even obliged to provide the funds in case of necessity namely even without delay up to the amount of 0, 5 % of their eligible deposits. The systems of individual countries will subscribe to the contribution relatively according to the amount of their eligible deposits. For the purpose to ensure repayment, these systems are entitled to enter into the depositors’ claims on behalf of the institution being in bankruptcy. The last chance how to save deposits of the troubled institutions is the alternative financing in case there is a lack of the funds from the previous steps. However the funding through the ECB is expressly prohibited. But this mechanism will start its implementation after ten years, i.e. when the systems will be filled with the needed liquidity. Primarily the system´s funds should be used for the depositors´ redemption. But this does not protect to use them for the problem solution in accordance with the subvention rules. In order to avoid the funds depletion on account of the bank´s uninsured creditors, this way of the funds utilization has to be limited.

In this respect the interconnection with the fund for the banks´ problem solution will be important, i.e. with the so called third pillar. In my opinion the separation of these pillars itself is problematic, because they both are significantly interconnected. This fact strengthens even the reality that in comparison with the original proposal the European Deposit Insurance Fund has been excluded from the proposal and replaced with the above mentioned system of borrowing facilities. This leads to a very close conjunction with the fund which ought to be established in the framework of the Single Resolution Mechanism (hereafter „SRM“). The essence is that if a credit institution despite the Single Supervision Mechanism (hereafter “SSM”) being newly under control of ECB finds itself in serious problems, there will be a single and in advance specified procedure, which will prevent the uncontrolled defaults. The ECB notice will be the releasing mechanism that the bank has serious financial difficulties. The regulation also counts with the possibility that the troubled institutions will “sign up” themselves. The specific solution ought to be prepared by the Committee, but the formal decision making has to be under control of the European Commission. There has to be the support of primary law to establish a body with the decision-making power. With respect to the consentaneity principle to be applied for the primary law changes, it is very unlikely to find political will for such a change in particular in Germany and Nordic countries, because their deficits are, at least in comparison with the south of Europe, relatively low. Because the SRM regulation is the secondary legal act, it cannot create new power beyond the framework of the founding treaties.

18 The Regulation determines five year maturity period under assumption that the system will obtain the funds for its payment through the selection of new contributions.
19 See Article 123 TFEU.
20 The committee should be composed of representatives of the European Commission, central banks, where the problematic banks have its residence, branch offices and subsidiaries.
This is the reason why as the legal basis has been marked article 114, par 1\textsuperscript{21} of the TFEU, relating to the internal market. The foundation of the fund, which ought to be funded by contributions of the banking sector, is a part of this mechanism\textsuperscript{22}. The amount would be based on the bank’s risk profile, whereas the riskiness would be judged by the European Union. But the question is, if this construction does not contradict with the article 114, par 2 of TFEU. In this article there is stated that article 114, par 1\textsuperscript{23} cannot be used for the provisions relating to taxes, nevertheless „contribution of banking sector“, in my opinion, can be subsumed under the term tax. This would mean that the regulation in question cannot be the execution of the article 114 of TFEU and thus it has no reliance in the primary law.

In addition to the fund adjustment I see the fund’s volume as very problematic. The funds will be, in my opinion, also insufficient for the banks’ capitalization leaving alone the settlement of claims for the insured deposits. With regard to the ratio of the bank’s balance sheets to the countries’ GDP, 55 billion is the very conservative estimate. Some estimates indicate that the European banks will need 50 billion for „cleaning“, but others even 900 billion Euros.\textsuperscript{24} I think that currently nobody can state this with certainty mainly with respect to distrust concerning the bank balance sheets of the European institutions.\textsuperscript{25} Therefore ECB has been empowered to perform so called „Comprehensive assessment Analysis“\textsuperscript{26}, i.e. stress tests. These should be completed in November 2014 i.e. at the time when ECB will take over the tasks in the field of single supervision. The tests themselves should assess all of the bank assets, i.e. even so called non-performing loans\textsuperscript{27}, restructured loans but also exposures towards foreign countries.

\textsuperscript{21} Wording of Article 114 par 1 TFEU: „Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."

\textsuperscript{22} It is considered 1 % of covered deposits of the banks of all participating countries. Anticipated 55 billion Euros would be obtained after ten years.

\textsuperscript{23} See above

\textsuperscript{24} See e.g.:”True” euro zone stress test could show $1 trillion hole in banks - study. [online]. [cit. 2014-01-29]. Available at: http://www.reuters.com/article/2014/01/16/eurozone-stresstests-estimate-dUSL5N0KQ2BR20140116

\textsuperscript{25} It’s more than obvious if you looked at the market and book values of 10 biggest euro-area banks. Their market to book value ratio is 54.9 % in comparison with 97.5 % in the top 10 United States banks.

\textsuperscript{26} Empowerment contains article 33, par 4 COUNCIL REGULATION, through which the central bank is entrusted with special tasks concerning policies relating to the prudential supervision of the credit institutions COM (2012) 511

\textsuperscript{27} That means loans approaching to default, e.g. according to IMF they are loans 90 and more days overdue. But this criterion is problematic because the term „non-performing loan“ is not defined in the European legislation.
Probably the biggest problem, which ECB will have to cope with, is the rating of the government bonds especially of the southern wing of Europe\(^28\). The actual ECB testing has, in my opinion, one basic deficit.

Tests, which ECB has started in the last year, stem from the actual capital definitions especially in this respect important definition of indicator Tier 1. However given the effectiveness of so called „CRD IV Package“\(^29\), this capital will be defined more strictly since January 2015\(^30\), and therefore the banks will not be able to include some of the current items into it. Thus the evaluation results will be distorted. In addition in the course of testing it is necessary to hold Tier 1 capital on at least 6 %\(^31\) threshold, although from the next year the percentage ratio will increase, and the banks will have to hold it at 8 %. Therefore the question is how the data, now collected and assessed by ECB, will be relevant. Moreover it is interesting to note that even in October of the last year ECB declared that the threshold 8 % is needed, because its observance reveals all possible types of risks that may arise in the future.\(^32\)

In doing so the experience with the stress tests of EBA over Belgian Dexia\(^33\) in the year 2011 may, in my opinion, serve as an example of what ECB should avoid, if it doesn’t want to be discredited immediately in the very beginning of its new role.

Finally in the transitional provisions of the proposal there is the Commission instrument for preparation report on the whole system functioning. This one should be submitted by the end of the year 2015 together with prospective legislative text of the only system creation within the whole union. Once again

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30 So what can and what cannot be considered as so called CET1 – „Common Equity Tier 1“, which is the basic one for calculation of the capital adequacy of the institution.
33 During stress tests EBA has been specified, that even at the worst scenario that may arise, the capital value of tier 1 doesn’t drop under 12 %, which makes Dexia the most safety bank in Europe. Dexia then, based on the report of EBA, has received rating as high as possible, i.e. AAA. But at about two months later due to the huge losses on Greek bonds the bank has been saved from default only with „government injection „, in amount of 4 billion Euros.
there is to be considered what has already been proposed, i.e. creation of one union fund for all institutions and depositors within the whole territory of the European Union.

At theoretical level I suppose that the interconnectivity will be very important or if you like clarification of relationships among the systems and SRM. Namely in the situation when the European Deposit Guarantee Scheme will be mandatory within the all of “twenty eight”, while SRM will be mandatory only in the countries the currency of which is Euro, or in the countries that will join the banking union voluntarily. I am also sceptical towards ex post financing, although only the relative one. Namely it may be presumed the doubts of willingness to fund the faults of the others so the simplest solution for the institutions in question will be to pass on the costs on depositors through an increase in service charges. Despite the fact that these „loans“ will have to be repaid within five years, I can imagine more profitable investments, which the institutions could do with free funds.

Already once proposed the single system for the whole European Union is, in my opinion, also the way in wrong direction. Although I think that the concept of the deposits insurance is very useful institute, the proposed system may have negative consequences. Generally I also do not share the Commission view that the legal forms diversity deforms the market. More likely reversely, for the subjects at the market there is nothing better than free competition in the provision of services of a large number of subjects. In my opinion, two situations can occur.

In one scenario the European fund can have sufficient capital to help the problematic institutions. Despite this positive aspect, the concept could interfere with the market environment and lead to the laxity of the market operators. One of the key attributes to be evaluated by the potential bank client should be the ability of the institution to meet its obligations. In the proposed system he will have his money „sure“, and so he need not to put emphasize on obtaining information on the institution and its financial situation. In addition thereby the banks lose the element of external supervision. From the viewpoint of banks this increases the risk of moral hazard, because they can suppose that they contribute ex ante on ex post capitalization.

The opposite scenario, and in my opinion more likely, will be that the European fund will not have sufficient capital. Due to the size of the banking sector in Europe, as I have stated earlier, it can be hardly imagined how high the charges should the bank contribute to the fund in order to cover defaults of the so called „too big to fail“ bank. The ultimate consequence should be probably capitalization from the side of countries or their taxpayers. With respect to the fact that in the explanatory memorandums of almost all European initiatives in response to the actual crisis there is stated as the basic goal to pass on the burden of capitalization from taxpayers to the institutions, this model cannot be considered as too
effective one. Moreover in general I suppose that even it is necessary to protect depositors in a certain measure, the regulation should not replace the vigilance of the market subjects namely in context of the already very significant legislative hypertrophy.

3. The Federal Deposit Insurance Corporation

The federal deposit instance corporation was founded in 1933 by the „Banking Act”\(^\text{34}\), so it’s the oldest deposit insurance scheme in the world. It is headed by the quinary Board of governors\(^\text{35}\) and has a special position as an independent government agency that protects depositor’s funds. The aim of this early creation was to prevent bank from failures because of the Great Depression. The main difference between the European Union and the United States approach is that the FDIC is responsible for both deposit guarantee and resolution schemes. The primary purposes of FDIC are to insure and protect the deposits of insured banks and to resolve failed banks. Deposits are divided into categories\(^\text{36}\) within each of them depositors are insured up to 250 000 USD. In this regard there’s a huge loophole in the amounts between mentioned regions. While in the EU there’s a 100 000 EUR limit, in the United States it could be millions, if you are able to diversify your assets shrewdly.

FDIC or in particular its fund\(^\text{37}\) is funded entirely by fees from member banks, savings associations and interest earnings on its investment portfolio of United States Treasury securities. No federal or state tax revenues are involved, although it is guaranteed indirectly by the taxpayers. As it is mentioned on the official web: „FDIC deposit insurance is backed by the full faith and credit of the United States government”\(^\text{38}\). This would be very interesting to see what would happen if such a situation occurred. Although it is written on an official government website, there is no legal document that would make this promise binding. On the other hand there is an explicit legal provision that allows the United States Department of the Treasury (hereafter “Treasury”) to provide a line of

\(^{34}\) The statute is called as a banking act on the ground that its content is aimed at banking reforms in general. The legislation is also referred to as the „Glass-Steagall Act” after its proposers. In addition to the FDIC establishment, the main outcome of this Act was to ban commercial banks from an affiliation with security firms and security activities.

\(^{35}\) The three of them are appointed by the United States president after the Senate approval. Two ex officio members are the Comptroller of the Currency and the director of the Consumer Financial Protection Bureau.

\(^{36}\) There are: 1) Single ownership accounts, 2) Certain retirement accounts, 3) Joint accounts, 4) Revocable trust accounts, 5) Irrevocable trust accounts, 6) Employee Benefit Plan accounts, 7) Corporation/Partnership/Unincorporated Association accounts, 8) Government accounts

\(^{37}\) Till 2006, there were two separate FDIC funds – the Bank Insurance Fund and the Savings Association Insurance Fund.

credit up to 500 billion USD to the FDIC, which it has to repay over time. The last legislation\textsuperscript{39} set the target ratio that has to be reached to 1, 35 \% of the insured deposits\textsuperscript{40} by the September of 2020. In accordance with the FDIC statement\textsuperscript{41}, the aim should have to be reached even in 2018.

As in the EU the FDIC insures deposits only. It does not insure investments in stocks, bonds, mutual funds, life insurance policies, annuities, or municipal securities, even if a customer purchases them from an FDIC-insured bank or savings association. Treasury securities purchased by an insured depository institution on a client’s behalf are not insured either.

The EU proposal is inspired in the United States law in the institute also known as “Living will”. The law requires systemic nonbank financial companies and large bank holding companies\textsuperscript{42} to submit\textsuperscript{43} a plan for their resolution in the event of financial distress or default.

I have mentioned above and contrary to the EU proposals in the United States there are newly\textsuperscript{44} regulated and insured systematically important financial institutions\textsuperscript{45} as well. This means, apart from Credit Unions\textsuperscript{46} which are not covered by the insurance, that the FDIC scope is much wider than in the EU. The decision to deem a failing financial firm “systemic” will be made by the FDIC and Federal Reserve Board in conjunction with the Treasury. After this co-decision it’s up to FDIC solely, what will be done. In the event of a bank failure, the FDIC has two possible capacities.

Firstly, it has to pay insurance to the depositors up to the insurance limit. In the second phase, FDIC role can be described as the “receiver” of defaulted banks. It has to choose among options that were given to it by the law. The first step is called as conservatorship and it means that Board of governors will replace the management. This is referred to as “prompt corrective action”. Than the Board can give binding instructions as follows:

- Restructuring the bank as a “bad bank” and a “good bank”.
- Selling off pieces of the bank or the whole bank

\textsuperscript{39} Dodd-Frank Wall Street Reform and Consumer Protection Act adopted in 2010
\textsuperscript{40} The worst reserve ratio was at 0.17 percent at the end of 2011.
\textsuperscript{42} Those with at least 50 billion USD in assets
\textsuperscript{43} The Plan has to be submitted to the FDIC, Federal Reserve, and Financial Stability Oversight Council
\textsuperscript{44} Since the Dodd-Frank Wall Street Reform and Consumer Protection Act adoption in 2010
\textsuperscript{45} It means institutions whose failure may trigger a financial crisis and it includes large hedge funds and traders, large insurance companies, and various types of systemically important financial market utilities.
\textsuperscript{46} As listed above this term come under the credit institution definition, so it’s covered by the insurance. The Czech equivalent would be “družstevní záložna”.

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- Providing or arranging funding for the bank from official bodies or the private sector
- Forcing creditors to do a debt to equity conversion
- Determining the division of losses among stakeholders

This powers are typically given to the authorities which supervise the bankruptcies. Furthermore FDIC is empowered to make a very quick decisions and most important, without the consent of the stakeholders. It’s very often that bank shuts down on Friday and opens on Monday, after takeover. In general this is very important because the Board can intervene while the institution is undercapitalized but still solvent. In my opinion, this is one of the biggest differences in the approach in comparison with the EU. This decision in the EU has to make European Comission comprising of 28 different state representatives. This will make the resolution process too slow and the decision will be politically affected. I think this is the biggest EU loophole at all decision-making processes. The outcome from that is very clear in figures.

FDIC numbers demonstrates that since 2008, 13 banks received FDIC support, while in the euro area and the rest of the EU, there are 50 cases of state aid support for euro-area banks, and 38 for the rest of the EU.\(^ {47}\) Since 2010, the FDIC has not started a new support Programme for any bank. The FDIC reports that 494 banks failed in the US from 2008 to 2013.\(^ {48}\) In Europe, there is no official data source but unofficial estimates hovers in figures of 49 in the euro area and 64 in the rest of the EU.\(^ {49}\) This figure clearly shows how reluctant the EU and its bodies are.

The other big problem is the low equity\(^ {50}\) level in EU. Problem is that there is a very low interconnectivity within EU member states. Balance sheets of banks are huge compared to the GDP of states compared to the United States, but only on an individual level. EU states have to liquidate banks through the European Stability Mechanism (hereafter as “ESM”)\(^ {51}\) or cross-border consolidation. Only after that we can break the vicious circle between sovereigns and banks. Personally, I would prefer mergers. In my opinion it’s the only way to liquidate bank without the state aid even though this would create even more “too big to fail” banks. Other ways are either insufficient, as in the case of Resolution fond, or inappropriate, as in the ESM case. By in-appropriation it is meant that this way

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\(^{49}\) For details see: Data downloaded on February 2nd 2014 from http://openeconomics.net/failed-bank-tracker/.

\(^{50}\) Also the return on equity has been much lower at the end of 2012. For the data of ten largest banks in the EU was at 1.7 % in comparison with 8.9 % in the United States.

\(^{51}\) ESM is an international organization that was created to provide instant access of financial assistance for its member states.
of capitalizing in fact will rely on taxpayers. Nevertheless this system, build up on cross-border merges, is conceivable only with a strict single supervision and resolution mechanism in the whole European Union.

4. Conclusion

The European financial system will have to pass very significant changes if it wants to move out of the place. It is evident that Europe has only two possibilities how to continue. At first the Europe will return one step or a few steps back. By this I mean abandonment of the single currency and return of some power back to the national authorities. The second possibility of the European Union is to integrate more. Now it is perhaps obvious even to the supreme representatives of EU, that the banking union and monetary union are not possible without the fiscal one. Therefore firstly it is crucial to find political consensus on the future of the Europe. Perhaps the most pressing problem of Europe, maybe with exception for the state deficits, is banking sector and it’s under-capitalization. At present nobody knows how much exactly the banks will need. It should be changed, currently ECB runs tests. After evaluation it will be necessary to find consensus in the sphere of the single resolution mechanism. But such a model should be found, which could be implemented across the whole EU, therefore to carry out in practice the merger of the so called second and third pillar of the Bank union. In this regard inspiration can be found in the United States. Their system is functional and operational. 52 It will be crucial, as it is in the United States, to find operational authority or institution which will not be subjected to political pressure. It must be the authority that will be adequately empowered, but particularly it will be able to make decisions quickly, if possible, without the necessity of the creditors’ consent. I suppose that in the initial stage it will be better to let some bank fail. Although these steps will not be certainly politically popular, they are required for “market cleaning”. What the United States already have gone through, the Europe is still expecting. The problem of Europe still insists in disability to act in a coordinated manner. Instead of that the debts of institutions and countries are “socialized” among the others. However the only result of such acting is putting off the problem until the future. This is the very expensively bought time, which moreover the Europe wasted to a large extent. I think that today it is already obvious that great part of this “loans” will never be repaid. What happens next it is difficult to estimate since the taxpayers’ money also run out once.

52 A good example of it can be IndyMac bank in comparison with the Bank of Cyprus. IndyMac was bank in California with 32 billion USD in assets. It had serious problems in 2008. The FDIC took over this bank and sold it in 2009. I think that most of Europeans didn’t even realize what was going on. The Bank of Cyprus had 37 billion EUR in assets and I think I don’t have to describe what happened in this case, because almost everyone has heard about it.
Analysis of Taxation and Economic Growth – Insights, Background and Findings

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Abstract: The article considers the question of the influence of taxes on economic growth. It presents the basic theoretical findings needed to comprehend the complexity of the question such as various economic theories on what helps to drive economic growth as well as various economic tax policies approaching the question. The methods of measuring the tax burden are then clarified in order to fully understand the last part of the article which is the presentation of findings of various selected literature reviews and research papers. That is what provides the general understanding of the influence of taxes and types of taxes on economic growth.

Keywords: Taxes, economic growth, tax burden, tax quota

Introduction

Economic growth is a very much desired occurrence in the economy for various reasons. What are the factors that influence economic growth though? And more specifically, what about the system of taxation as a whole and the individual various taxes? Is there any connection between the taxes and economic growth? If so, what is the connection? Do taxes always have a negative influence on economic growth? Can they have also a positive influence on the economy? Can the influence be even determined and if so how, using what measurements?

The goal of this article is to present answers to all the above mentioned questions.

The question of how the taxes influence economic growth is one of the most frequently discussed and the need to provide an answer is demanded especially in the times of economic crises. When talking about the issue one can see that it is rather a complex problem that overlaps many fields of expertise. It is not only a question for the economists, because the application of the theory into practice is left to the politicians so in reality it then very much depends on what and how
influences the policy makers of the countries. And to make it even more complex, economic theory is not united to start with. Looking at the economic growth itself as the goal that is to be reached, we can already find competing theories about what drives economic growth. On one side you can find the Keynesian belief that the economic growth is driven by the demand-side factors and on the other hand the Neo-classical belief that economic growth is driven by the supply-side factors. And yet others believe that it is the mixture of the two. This is rather a fundamental question that all the above mentioned theories claim to have found the answer to. What is also important to bear in mind is the fact that the economic theories are theories. In order to answer questions concerning a real economic issue, it is necessary to create a model that has to be as similar with the reality as possible and hence provide the answers. The model itself though copying the reality as much as possible is but a model that does not and cannot consist of all the variables. The reality is far too complex and in order to study with the aim of determining and changing the application of theories on various models is essential.

Looking at the issue there can be found those that would argue that tax cuts or reductions in tax rates will lead to economic growth and prosperity, in other words they believe that the relationship between taxes and economic growth is negative. If the tax rates are lower, then the companies can spend more money on the development and investment and are more likely to keep or improve their position in the market. Others on the other hand would argue that the opposite is true meaning that the more taxes and the higher the tax rates would reduce the deficit of public finance and lead to more economic growth that can be controlled and gained via the redistribution process.

Income tax rates are at the centre of many recent debates over taxes. Some policymakers argue that raising tax rates, especially on higher income taxpayers, to increase tax revenue is part of the solution for long-term debt reduction. Advocates of lower tax rates argue that reduced rates would increase saving and investment, and boost productivity. Sceptics of this view argue that higher tax revenues are necessary for debt reduction that tax rates on high-income taxpayers are too low and that higher tax rates on high-income taxpayers would moderate increasing income inequality. Some economists and policymakers argue that reducing the top statutory marginal tax rates would spur economic growth. This effect could work through several mechanisms. First, lower tax rates could give people more after-tax income that could be used to purchase additional goods and services. This is a demand-side argument and is often invoked to support temporary tax reductions as an expansionary tax stimulus. Second, reduced tax rates could boost savings and investment, which would affect the supply side of the economy by increasing the productive capacity of the economy. Furthermore, some argue that reduced tax rates increase labour supply by increasing
the after-tax wage rate. Taxes can affect investment not only through the income and substitution effects related to savings, but also through a risk-taking effect. Yet again this very much depends on which of the above mentioned economic theories you support and also what you believe what the role of the government in the economy is. Going back to the above mentioned economic theories for examples the Keynesians would believe that the role of the government is to stir the economy by mainly influencing the aggregate demand and fully use the fiscal policy. And that’s how we can get closer to the question of taxes as the tax policies are not quite united either. In connection with the role of the government in the economy Yakushev\(^3\) recognises the following types of tax policies represented by the in brackets mentioned economists:

1. Classical (A. Smith, D. Ricardo) and neoclassical policy of taxation (A. Marshall, A. Pigou, L. Valras, V. Pareto)
2. Keynesian concept of state regulation in economics including tax component (J.M. Keynes)
3. Neoliberal tax policy (F.A. Hayek, M. Friedman)
4. Concept of neoclassical synthesis (P. Samuelson)

For example the ideology of minimal taxation would then follow the neoliberal tax policy of the neoclassical tax policy.

**Economic growth**

If one is to learn more about economic growth and factors that influence economic growth it is essential to get acquainted with the work of Robert J. Barro\(^4\) published at the beginning of the 1990’s. While in the previous growth models (Solow – Swan growth models) the public expenditures and taxes did influence the capital accumulation and investments but did not influence the economic growth the endogenous models (Barro) believe that economic growth is determined by factors inside the model, the level of growth depends on governmental legal regulations, government spending, and the government has a large potential to influence economic growth in the long run. Barro being a liberal economist though states that the influence of the government does not have to be only positive.

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Izák\(^5\) summarizes the concepts of economic growth as the following:

1. In the neoclassical growth models (Solow-Swan type growth models or the exogenous growth models) the economic growth is determined by exogenous factors such as population growth and technological progress while the fiscal policy can influence only a short time periods between the equilibriums. Neoclassical growth models attempt to explain long run economic growth by looking at productivity, capital accumulation, population growth, and technological progress.

2. In the endogenous growth models (Barro) the existence of a mechanism is establish through which the fiscal policy can determine the level of output as well as the level of growth.

In modern society, the existence of the redistribution processes is a necessity. The level of taxation, being the reflection of the redistribution process, is very much different in individual countries that being in the absolute numbers as well as mainly in the actual structure of taxation. The level of taxation and the government expenditures then is rather often incorporated into the economic growth theories. Economic growth significantly influences the key economic characteristic of a country that is the standard of living.\(^6\)

Considering the economic growth theories Kotlán\(^7\) states that the centre of the current economic knowledge is in the neoclassic economic growth theory (Solow – Swan growth model). Should we look closer at the most known theories further supporting this model it is necessary to mention Robert Lucas and Paul Romer. The neoclassical economic growth models in which the economic growth is determined by the technological progress did not allow the fiscal policy (and the level of taxation) to determine the long term economic growth. Considering the influence of taxes on economic growth it was the work of for example Barro and Sala-i-Martin who combined the elements of the endogenous growth model with the neoclassical growth model and above others they took into consideration the role of taxation. Though the economic growth in neoclassical models is given by exogenous factors, in the endogenous models the tax policy provides a mechanism by which the government can influence both the outcome as well as the economic growth. Hence the endogenous growth models proved that taxation can influence long term economic growth.

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Kneller\textsuperscript{8} suggests that the endogenous models can be generally divided based on whether they use distortionary forms of taxation or non-distortionary forms of taxation. The conclusions of his work suggest the following:

1. The government budget constraint implies that the estimated coefficient of each fiscal element within a growth regression will depend on how it is financed.

2. Expenditures classified as non-productive and tax revenues classified as non-distortionary have equal coefficients, and consequently the hypothesis that these variables have a zero impact on growth cannot be rejected.

3. When financed by some combination of non-distortionary taxation and non-productive expenditure, an increase in productive expenditures significantly enhances growth and an increase in distortionary taxation significantly reduces growth.

4. The magnitudes of the estimated impacts of productive expenditures and distortionary taxation are sensitive to the process of 5-year averaging of the data. This suggests that considerable caution should be exercised in predicting the precise growth effects of fiscal changes.

5. Our lowest estimates suggest that increasing productive expenditure or reducing distortionary taxes by 1% of GDP can modestly increase the growth rate by between 0.1 and 0.2% per year

**Tax burden and its measuring**

Szarowska\textsuperscript{9} considers the following approaches to measuring tax burden:

1. *Implicit tax rate*

An appropriate standard for comparison of effective taxation seems to be implicit rates, which are tax rates that consider not only size of statutory tax rates but also other aspects of tax systems determining total amount of effectively paid taxes. Implicit tax rates are calculated in order to provide better information on the tax burden on an economic activity.

\[ \text{Implicit tax rate (ITR)} = \frac{T}{Y} \times 100\% \]

Where T is tax duty and Y is gross income from which tax is counted.


Eurostat has used implicit tax rates for evaluation of structure of a tax system since 1995. In this way, we may express the impact of taxes on economic activities according to their functions (work, capital, consumption).

2. Tax quota

An International comparison of actual taxes does not say much with regard to the different construction of taxes in individual countries. The Level of tax rate is only one of the variables. Resulting values substantially affect differently constructed tax bases, from which the tax is calculated, as well as systems of exceptions and deductible items that vary in every country. For international comparison of tax burden we may use a tax quota. This is a macroeconomic indicator that is calculated as “proportion of tax and duty revenue and to GDP” in current prices.

\[
\text{Tax quota} = \frac{\text{tax revenues}}{\text{GDP}} \times 100 \, \%\]

Simple tax quota includes only those incomes of public budgets that are really labelled as taxes. With regard to the fact that tax revenues (quasi taxes) are in fact also incomes from the obligatory payments of social welfare, contributions to state unemployment policy and obligatory payments to health insurance systems, the relevant indicator for international comparison is the compound tax quota that also includes these incomes.

Compound tax quota (CTQ) is calculated as “proportion of revenue from tax, duty and payments to health insurance and social welfare systems to GDP” in current prices.

\[
\text{Compound tax quota} = \frac{\text{tax revenues} + \text{quasi taxes}}{\text{GDP}} \times 100 \, \%
\]

As it results from the formula, basic factors affecting the value of tax quota is the amount of gross domestic product and volume of taxes collected. Total effective burden is regularly monitored by Eurostat and published in the form of tax quota.

The conclusions of selected studies

In his review of literature, that consisted of 26 studies dealing with the effects of taxation on economic growth since 1983 McBride\(^{10}\) has found out the following:

1. While there are a variety of methods and data sources, the results consistently point to significant negative effects of taxes on economic growth even after controlling for various other factors such as government spending, business cycle conditions and monetary policy.

2. Of those studies that distinguish between types of taxes, corporate income taxes are found to be most harmful, followed by personal income taxes, consumption taxes and property taxes.

3. These results support the Neo-classical view that income and wealth must first be produced and then consumed, meaning that taxes on factors of production, that is capital and labour, are particularly disruptive of wealth creation.

4. The lesson from the studies conducted is that long-term economic growth is to a significant degree a function of tax policy.

5. It was found out that a one per cent spending cut has no significant effect on growth whereas a one per cent tax increase reduces GDP by 1.3 per cent after two years.

6. It was discovered that a one percentage point cut in the average corporate income tax rate raises real GDP per capita by 0.4 per cent in the first quarter and by 0.6 per cent after one year.

7. The most harmful taxes for economic growth were ranked. It was established that corporate taxes are the most harmful followed by income taxes, consumption taxes and finally property taxes. It was also found out that a one per cent shift of tax revenues from income taxes (both personal and corporate) to consumption and property taxes would increase GDP per capita by between 0.25 per cent and one per cent in the long run. They also found out that progressivity of personal income taxes reduces economic growth.

8. It was found that a cut in the average marginal tax rate of one percentage point raises next year’s per capita GDP by around 0.5 per cent.

Kotlán and his team have come up with the following findings:

1. In the whole sample of OECD countries a statistically and econometrically significant negative influence of taxation measured by the tax quota on the economic growth was established.

2. It is also necessary to state that the influence of VAT type taxes was not clear. Though even the positive influence of higher VAT tax rate on the economic growth was established, it was quantitatively and statistically insignificant and when a slight change of the model took place the results had a tendency to a large change as well as the merit of the influence.

3. The results suggest the following recommendations for the OECD economies:
   a. Lower the tax burden measured by the tax quota
   b. Concentrate on lowering the consumption taxes whose influence is quantitatively large
   c. Lower the national health and social care contributions

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4. In the EU 15 countries the total tax quota has much larger negative influence on the economic growth than in the OECD. That can be interpreted that in these countries the lowering of the tax quota has a larger effect. The negative effect of national health and social care contributions is also remarkable.

5. In the EU 5 countries the total tax quota has the highest negative influence on economic growth. The negative effect of corporation taxes has also been proven in this group.

Acosta-Ormaechea and Yoo\textsuperscript{12} investigated the relationship between changes in tax composition and long-run economic growth using a new dataset covering a broad cross-section of countries with different income levels. The findings were the following:

1. Increasing income taxes while reducing consumption and property taxes are associated with slower growth over the long run.
2. Among income taxes, social security contributions and personal income taxes have a stronger negative association with growth than corporate income taxes.
3. A shift from income taxes to property taxes has a strong positive association with growth;
4. A reduction in income taxes while increasing value added and sales taxes is also associated with faster growth.

Conclusions

The question of the influence of taxes generally and individually on economic growth has proven to be not only quite a crucial one but also rather a complex one with indirect answers. The complexity of the problem lies in the heart of economics as a science in itself where everything is in one way or another connected. It is often impossible to copy this complexity into an appropriate model while sometimes even the appropriate model itself might be a problem as there may and often is more than one and the results then differ significantly. On the other hand most of the presented findings are consistent with the general theory and economic reality.

To highlight the most important findings in order to be able to possibly incorporate them into a fiscal policy it needs to be stated that the relationship between the level of taxation and economic growth is mainly a negative one. It also very much depends which of the taxes are taken into consideration. Should the government consider raising the income taxes (both individual as well as corporate) in order to generate more money, the impact on the GDP and conse-

quently on economic growth would be rather negative and harmful. That much has been established in all the above mentioned studies and further studies that are not part of this article.

On the impact scale of negative influence on economic growth the corporate income tax is at the top followed by individual income tax, consumption taxes and then property taxes. It would seem to be the case that increasing property taxes would not affect economic growth in such a bad way as for example corporate tax would. The question is whether the money gained from this step would be sufficient to cover the government spending though. Bearing that in mind a debate led by Milton Friedman concerning corporate taxes needs to be mentioned in which he claims and in my opinion quite clearly wins the argument that corporate tax is an indirect form of an individual income tax.

Another rather important finding, bearing in mind the various models of economic growth is the fact that long-term economic growth is to a significant degree a function of tax policy. Kotlán’s findings concerning consumption taxes are also worth pointing out. The suggestion of lowering them is quite a challenging one especially under the current political climate. An interesting and perhaps not so surprising finding is the role of so called social and health contributions which is another type of tax. The lowering of these would no doubt lead to a positive change in economic growth but it would need a drastic change in the whole social welfare state system that has been established and that might lead to major social insecurity which is certainly not a politically desired step.
The majority of relevant notions and institutions present in Polish administrative law system need to be approached in a new way, for the current approach is to certain extent out-of-date and may raise doubts. The same holds for the notion of public administration entity. Such a state of affairs may be caused by the structural transformations of the state which continually expands the range of tasks to perform. It may also be a result of the formation of new organizational forms. The Polish theory lacks an unambiguous definition of public administration entity. In the literature on the subject one can find numerous approaches to “public administration entity”. According to W. Dawidowicz, public administration entity is an entity formed (created) and equipped by a legislative act with a number of competences for performance of administrative tasks, being at the same time a starting point for the establishment of proper organizational structure necessary to perform those tasks. M. Stahl points out that numerous representatives of the theory consider the state the elementary public adminis-
tration entity.\textsuperscript{3} It stems from the legal personality of the state and the fact that it is represented by its own organs exercising state power. That power is always of state nature. The state can devolve some power to public administration entities as well as to non-public entities which are legally bound to perform public tasks. Nevertheless, it is organs of those entities that exercise power on behalf of the state and other entities. When it comes to public administration, its organs exercise administrative power pursuant to administrative law provisions.\textsuperscript{4} It is therefore an inherent feature of public administration entities and activities performed by the organs of those entities.\textsuperscript{5}

However, in the 19\textsuperscript{th} and 20\textsuperscript{th} centuries the scope of the notion of public administration entity was expanded to include not only public administration organs but also entities equipped with legal personality and performing public administration tasks. According to M. Stahl, “the employment of the notion of public administration entity stemmed from legal reality and the search for forms of decentralization of public tasks while with the increase of the number of state tasks and activities the deconcentration formula was not sufficient anymore and it was necessary to form independent organizational units equipped with separate legal personality”\textsuperscript{6}. Apart from the notion “public administration entity”, there are other similar notions in the literature: public entity\textsuperscript{7}, public law entity\textsuperscript{8}, administration entity\textsuperscript{9}.

\textsuperscript{3} M. Stahl, 
\textit{Zagadnienia ogólne}, (w:) 

\textsuperscript{4} J. Borkowski, 
\textit{Pojęcie władztwa administacyjnego}, Acta Universitatis Wratislaviensis no 167, „Przegląd Prawa i Administracji” no 31, Wrocław 1972, pp. 43 i n.; Z. Pulka, 
\textit{Władztwo administacyjne jako szczególna postać władzy państwowej}, Acta Universitatis Wratislaviensis no 1313, Prawo CCVI, Wrocław 1992, pp. 137 i n.; J. Jendrośka, 
\textit{Zagadnienia prawne wykonania aktu administacyjnego}, Wrocław 1963, pp. 15 i n.

\textsuperscript{5} Look at: S. Kasznica, 

\textsuperscript{6} M. Stahl, 
\textit{Zagadnienia ogólne}, op. cit., p. 15.

\textsuperscript{7} This term is a wider than the definition of the concept of entity administration. The concept of a public entity is in particular in the acts on public-private partnership and the operations of the entities performing public tasks.

\textsuperscript{8} This term of a public body is narrower than the concept of scope as an administrative entity. This is due to the list of entities that belong to him. First of all, the basis for determining the public body is the nature of the standards of its establishment and the functions performed.

\textsuperscript{9} The administration entity belongs to the category of “public law entities” which perform public tasks of administrative nature. According to the theory, each entity obliged under statutory provisions to perform public administration tasks is considered an administration entity. “Public law entity” has been defined in Article 2, Paragraph 1 Subparagraph 4 of the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Official Journal of the European Union 2014, L 94/65) and in Article 3 Paragraph 4 of the Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing
The essential constituents of the notion of public administration entity are: performance of public administration tasks in the public interest, and acting under statutory provisions. It is a wide notion covering all organizational forms of performing public tasks. For this reason, it is not the legal character of a unit’s organizational form but the performance of public tasks in the public interest that plays an important role. It must be noted that public administration entities have rights and obligations of administrative nature, stemming from statutory regulations. When viewed from that angle, the notion covers the following entities: government administration entities, decentralized administration entities, and authorized private law entities.

An organizational unit can be categorized as a public administration entity if its exclusive or main activity involves performing public tasks. It is a sine qua non condition. Thus the entities formed pursuant to private law (e.g. limited liability companies and joint stock companies), or the entities in which majority interest belongs to public law institutions, may be classified as public administration entities if they meet the aforementioned sine qua non condition. It is however important to pay attention to the problem of how to classify a given organizational unit under a given group of public administration entities. One must bear in mind all conditions determining the participation of those units in performance of public administration tasks in a wider and wider scope. All in all, one should consider the notion of public administration entity in the strict sense limiting the range of entities to the ones functioning and acting pursuant to public law.

Taking into account the diverse standpoints advocated by theoreticians, it must be noted that some of them consider “administering entity” a more suitable term. It stems from the fact that on the doctrinal plane the term has become an equivalent of the notion of public administration system in the functional sense. The term “administering entity” encompasses a group of entities included among public administration apparatus and situated outside the structure

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10 The term of the administrative entity to be understood class of persons performing public administrative functions in the subjective sense.
11 M. Stahl, Zagadnienia ogólne, op. cit, p. 25.
of the administration, regardless of whether they perform functions of ruling nature or otherwise. However, it must be pointed out that the list of those entities is non-exhaustive. The diversity of administering entities leads to chaos within administrative law system, which in turn leads to problems that are at times difficult to solve.\footnote{Look at: J. Zimmermann, Prawo administracyjne, Kraków 2006, pp. 103 i n.} For this reason, attention must be paid to the fact that the legislator continuously creates new notions as well as new organizational forms classifying them as “untypical public administration entities”, for they do not fit within the traditional notion of public administration entity due to their legal structure.

Again, it must be stressed that the notion of public administration entity, as well as the conditions for considering an entity one, depend on several factors. Firstly, one must decide whether to define a public administration entity in the wide or in the strict sense. Secondly, a given entity should be considered a public administration entity if it is a part of public administration apparatus and meets essential conditions. Using the phrase ‘meets essential conditions’ it must be borne in mind that the public administration entity performs public tasks in the public interest, makes use of power while performing public tasks, is formed in compliance with a legislative act or other normative act, and is subject to supervision by state organs.

It is stressed in the literature that the continuous changes of the society’s needs in modern states contribute to the increase of the number of tasks of diverse legal nature. As a consequence, public administration is faced with the problem of how to perform those tasks. The problem entails numerous political, organizational, praxeological, personnel, and legal-structural issues. The latter deserves a closer look, for it concerns organizational forms of performing public tasks, and adaptation of those forms to new needs.\footnote{J. Jagielski, M. Wierzbowski, A. Wiktorowska, Nietypowe podmioty administrujące – kilka refleksji na tle organizacyjnych form wykonywania zadań publicznych, (w:) Podmioty administracji publicznej i prawne formy ich działania. Studia i materiały z konferencji jubileuszowej Profesora Eugeniusza Ochendowskiego, Toruń 2005, p. 203.} The subjective catalogue of organizational units performing public administration tasks is continuously updated. It stems from the formation of new organizational units that do not fit within the traditional notion of public administration entity.

As it has already been said, the political changes that took place at the end of the 20th century contributed to the establishment of new organizational forms of public administration entities. Their objective was to adapt administration, its operations, and its organizational forms to perform new public tasks in the area of economy. The entities operating within those new organizational forms were in conflict with the traditional notion of public administration entity. They include public foundations, funds, government agencies\footnote{Also called: administrative agencies, state agencies, and government agencies.}, the National Bank of Poland, and the Polish Post, among others.
The discussion of specific public administration entities will be focused first on the National Bank of Poland’s position within the legal system. That entity is included among specific entities, for on the one hand it displays features of an economic entity, while on the other it is the state’s central bank which is at the same time the bank authorised to issue banknotes, and the bank of other banks.\textsuperscript{15} Pursuant to Article 52 Paragraph 4 of the Act on the National Bank of Poland, the Bank can possess and trade in foreign currencies on its own behalf, on its own account, and on account of other entities.\textsuperscript{16} The bank is also allowed to perform activities concerning foreign currency trading nationally and abroad, giving and taking foreign loans, granting and taking bank sureties and guaranties in international trade.

Pursuant to the constitutional regulations, the central Bank is independent of the Council of Ministers. Furthermore, the constitution regulates the structure of the Bank’s organs and the mechanisms of their actions in accordance with the constitutional principle of separation, balance and cooperation of public authorities functioning as organs of executive power. The complexity of the Bank’s legal position is also reflected in its essential objective, that is sustaining stable prices along with supporting the economic policy of the government.\textsuperscript{17} The latter cannot however restrict the former. The fact that the chairman of the Bank is not politically accountable to legislative authorities cannot be considered one of the constituting features of public administration apparatus.\textsuperscript{18} The Bank’s independence of executive authorities stems from the fact that its reports are examined by an independent expert auditor appointed by the Monetary Policy Council. What is more, the chairman of the Bank is appointed by the lower house of the parliament on a proposal from the President of Poland. The chairman and other organs of the bank are appointed to a six-year term. They can be dismissed only for so called personal reasons.

Under the provisions of Article 227 of the Polish Constitution, the autonomy of the Bank manifests itself in its exclusive competence for issuing money and the implementation of monetary policy. It must be stressed that, when it comes to the actions undertaken to perform its tasks, the Bank operates within the framework of public and private law. On the one hand, as the bank of banks, the Bank sets by means of a normative act the percent rate of cash deposits obligatorily held by banks as reserves. On the other hand, the Bank enters into civil

\textsuperscript{16} The Act of 29\textsuperscript{th} August 1997 on Polish National Bank (Journal Laws of 2013, item 908, as. amended.).
\textsuperscript{17} The stabilization of inflation at a low and level optimal for the economy.
\textsuperscript{18} Article 3 Paragraph 1 of the Act on the National Bank of Poland.
\textsuperscript{19} Look at: the article 9 paragraph 1.
law contracts with banks to grant them refinancing loans. As stressed by H. Gronkiewicz-Waltz, the National Bank of Poland, though employing private law forms of operation, performs public functions. Hence it can be said that public law functions of the Bank are more important than other functions.

The theory of Polish administrative law describes organizational units the formation of which depends on the capital factor. They include entities performing tasks of administrative nature like for instance public law foundations and funds. It must be stressed that the word “foundation” does not stand for a uniform legal category. In the theory there are private law foundations, public law foundations, and public foundations. Public law foundations are public administration entities characterized by specific legal character. The literature describes them as decentralized public administration entities, whereas during the interwar period they were being established by way of public law acts and described as property equipped with legal personality and intended for performance of concrete public administration tasks. The distinguishing features of public law foundations include: formation by way of a legislative act or on the basis of statutory authorisation, and capital and property provided by the state to perform public tasks.

Currently, there are three foundations of that kind: National Ossoliński Institute, Public Opinion Research Center, and Kórnik Institute. Each one of those public law foundations has been established by way of a given legislative act, and performs its public tasks pursuant to the provisions of that act. It must be stressed however that those entities acquire legal personality not under their acts but with the entry to National Court Register. According to H. Cioch, the provisions of the Act on foundations are not applicable to public law foundations

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21 Ibidem.
23 W.E. Rappé, Fundacje, (w:) Encyklopedia nauk politycznych, t. II, Warszawa 1937; idem, O „publiczno-prawnej” fundacji w ustawodawstwie polskim, Lwów 1930.
established under separate acts. The aforementioned provisions concern private law foundations established by way of foundational acts. It is justifiable therefore to question such regulations, for the discussed entities should acquire legal personality by way of a given legislative act. They perform public tasks falling within the scope of tasks generally stipulated by the act on foundations. Supervision over the operations and tasks performed by those entities is exercised by organs of government administration, that is the competent minister and the Prime Minister (as regards Public Opinion Research Center). Simultaneously, those organs are authorised to equip foundations with statutes, and to revoke decisions issued by organs of foundations (if those decisions are in conflict with legal regulations or a given statute).

As far as funds are concerned, they display features of financial institutions. They own separate public property and perform public tasks devolved upon them by a legislative act. One of the basic problems here is to determine the legal status of funds as decentralized public entities. Even the word “fund” is ambiguous itself. The theory says about government and self-government (regional) special purpose funds. Their statutorily stipulated tasks and operations include management with isolated financial resources. They are equipped with legal personality and statutorily stipulated organizational structure. As stated in the literature, special purpose funds classified as public institutes and decentralized public entities include: Bank Guarantee Fund, Guaranteed Employee Benefits Fund, Labour Fund, and Funds for Environmental Protection and Water Management. It must be noted, however, that the tasks devolved upon those entities are characterized by a rich diversity. On the one hand, they can take actions


28 In the Act of 14th December 1994 on Banking Guarantee Fund (Journal. Laws of 2009, No. 84, item. 711, as amended). In accordance with the article 3a objective of the Fund is to work for the stability of the domestic financial system, in particular by ensuring the functioning of the mandatory deposit protection scheme, assistance and support, and providing or performing recapitalization guarantee under the terms of the Act.

29 From the 1st January 2012 the Guaranteed Employee Benefits Fund became a state fund within the meaning of the Act of 27th August 2009 on Public Finance (Journal Laws of 2009, No. 157, item. 1240, as amended), then u.f.p., which introduced new rules for action and change the status (loss of legal personality) of state funds.

30 The Act of 6th April 1984 about foundations (Journal Laws No. 21, item. 97, as amended).

31 Fundamentals of the functioning of their business are set out in the Act of 27th April 2001 on Environmental Protection Law (Journal Laws of 2013, item. 1232, as amended).

designed to co-finance investment projects and to finance retraining courses. On the other, they can disburse benefits to entitled entities.

However, in 2009 the amendments to the Act on public finance brought changes concerning the legal status of state special purpose funds. Under the provisions of the Act, a special purpose fund is established pursuant to a separate act in the form of an isolated bank account. The account is managed by a minister or an organ designated by that act. Yet another significant amendment to the Act on public finance deprived special purpose funds of legal personality. Both in the theory of financial law and in judicial decisions one can find the view that such a diversity of funds leads to disintegration of public finance economy, and significantly complicates the processes of accumulation and expenditure of public money. In the view of the Constitutional Tribunal of Poland, the establishment of special purpose funds hinders budgetary management, which in turn makes it impossible to administer with public money in a flexible and efficient way.33

When it comes to the Bank Guarantee Fund, it must be stressed that as a specific public administration entity it performs two basic functions. Firstly, it guarantees the depositors of bankrupt banks disbursement of their money up to the maximum amount stipulated in the Act on Bank Guarantee Fund. Secondly, the Fund provides financial aid to the banks covered by the deposit guarantee scheme. The Fund has its public mission which involves actions for ensuring the safety of the clients of the banks covered by the deposit guarantee scheme. Actions for ensuring stability of banks and the whole banking sector, and actions for building trust for the banking system among citizens. The Fund operates through its organs, that is the Council and the Management Board. The latter represents the Fund, performs tasks concerning giving aid, and deals with guarantee issues. The supervision over the operations performed by the Fund is exercised by the Minister of Finance in accordance with the criteria of legality and compliance of undertaken actions with the statute.34

The Bank Guarantee Fund operates in compliance with the risk minimizer35 rule according to which the Fund, apart from its essential activity, can provide aid to the banks threatened with bankruptcy. The main objective of the Fund is to guarantee the deposits made by natural and juridical persons in the banks covered by the scheme. The actions undertaken by that entity are performed in the public interest, which displays itself in factual and legal actions aimed at increasing public trust for the banking system.

33 The judgment of the Constitutional Court of 21th February 2005.
35 This principle consists in the fact that in addition to the guarantee function is granted financial assistance to banks at risk of bankruptcy.
The Polish Post is another entity characterized by specific legal status. Its operations involve conducting business activity that consists in providing postal services nationally and abroad. The activity called “postal activity” is regulated in the Act of 23rd November 2012 on Postal Law. Postal services involve a variety of commercial activities performed jointly or separately which include receiving, sorting and delivering addressed mail and unaddressed advertising mail, translocating parcels and unaddressed advertising mail, sending mail by means of electronic communication if at the stage of registration, translocation or delivery it takes the physical form of letter mail; running exchange offices enabling the clients to send and receive correspondence, and to place and cash postal orders.

Postal activity is regulated activity as stipulated in the provisions of the Act of 2nd July 2004 on Freedom of Conducting Business Activity (Journal of Laws from 2013, item 672). For that reason, it is required to be entered in the postal operators register. It is not however necessary to register: postal activity that consists in collecting, sorting, translocating and delivering unaddressed advertising mail; activity conducted by a postal agent acting under a contract of agency concluded with a postal operator; and postal activity conducted by a subcontractor on behalf of a postal operator under a contract concluded in written form. The organ responsible for registering is the President of the Office of Electronic Communications. Under the legal situation as of today, the Polish Post performs the function of an “appointed operator” only throughout the transition period lasting up to the end of 2015. After that time, the Polish Post will have to take part in competition for postal services held by the President of the Office of Electronic Communications.

It should be pointed out that postal services market is becoming more and more crowded as there are new independent postal operators. The Polish Post is not well prepared for that situation. It is believed that the Polish Post will become more competitive and provide services of higher quality if it is transformed into sole-shareholder joint-stock company of the State Treasury.

The establishment of new forms of organizational units intended for satisfying social needs by the state forces the legislator to employ untypical organizational and legal forms. Those specific entities include also agencies which can serve as an example of adaptation of organizational forms of administration to constantly changing public tasks. The lack of common and uniform legal regulations concerning all agencies stems from the existing classification of those entities according to their legal nature. They can act as civil as well as public law entities.

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In the theory of administrative law, agencies are often wrongly systematized. They can be divided according to their legal and organizational form. Because of the diversity of agencies, the unification of their formation procedures is not possible. Some of the agencies functioning as sole-shareholder companies of the State Treasury are formed by way of a notarial deed whereas other ones by way of a legislative act. The division of agencies according to formation procedure and legal basis makes it impossible to unambiguously classify them as public administration entities organized as public law entities (administrative offices and state juridical persons) or private law entities (sole-shareholder companies of the State Treasury). The doubts concerning proper classification of agencies among those entities stem from proper defining, for that is what enables one to place them among public or private entities. What is more, the actions undertaken by those entities take legal forms characteristic of both public and private law. In general, agencies can be considered untypical administering entities because of their eclectic legal nature which manifests itself in a mixture of administrative, civil and financial forms of organization as well as in the direct implementation of economic and social policies by the state.\footnote{Look at: K. Pawłowicz, \textit{Nietypowe podmioty administrujące w sferze gospodarki}, (w:) \textit{Prawo gospodarcze. Zagadnienia administracyjnoprawne}, red. M. Wierzbowski, M. Wyrzykowski, Warszawa 2001, p. 139.}

The foregoing analysis of Polish administrative law theory along with selected legal acts allows the conclusion that in the current legal situation the basic notions of administrative law need updating. In other words, administrative law (and administration itself) should be adapted to constantly changing social needs which force the state to create new organizational and legal forms. As a consequence, what is formed are organizations (institutions) derivative of typical public administration entities, though displaying elements of novelty. That is what makes them untypical (specific). It seems reasonable, however, to reflect on why the legislator forms them, for it is not always justifiable. Sometimes the Polish legislator senselessly transfers forms functioning in other countries into the Polish legal system forgetting about peculiarities of different systems. Hence some of organizations (institutions) are in advance doomed to failure or inefficiency in performing the tasks devolved upon them. It is therefore important to reach harmony between the state, its legal system, and satisfying needs of modern society.
Introduction

It was through the Act N. 338/2011 Coll. coming into effect on January 1, 2012 that the Civil Procedure Code, Act N. 99/1963 Coll. was amended (the Civil Procedure Code is further referred to as CPC). Apart from other things the amendment also covers the issues of personal enforcement of the court judgment. Ordinance N. 474/2011 Coll. defining the details of enforcement of judgment on upbringing of minors came into effect on the same day.

It should be said that the fundaments of the original legal regulation remained the same. There were only a few alterations made in reaction to the insufficiencies occurring in the enforcement of judgment on upbringing of minors as quoted by the press department of the Ministry of Justice in Slovakia. These alterations
specifically relate to the enforcement of judgment and the regulation covering visitation order with respect to a minor child. The insufficiencies consisted mainly in unclear definition of the court powers in enforcement of judgment on the upbringing of minors. Under the original regulation it was impossible to enter the abode where the child was detained unlawfully.

It is clear that the efficiency of these measures can only be tested after a longer period of time. However, it can now be said that it will not be possible to solve all the cases through the newly adopted regulation (e.g. the cases where the parties avoid the fulfilment of the obligations as ordered by the court in the judgment). Apart from that the adopted regulation shows signs of insufficiencies which could significantly obstruct the pursuit of justice.

The pursuit of justice can significantly be obstructed through the provision § 272 clause 2 of the Civil Procedure Code. Under this provision it is not the § 251 clause 4 of the Civil Procedure Code that can be applied to the enforcement of judgment on the upbringing of a minor. However, this provision is very important when talking about the enforcement of executive proceedings as it refers to the application of provisions in the preceding part of the Civil Procedure Code. It is logical that in cases of ruling out the application of the provision in the process of the enforcement of the judgment on upbringing of a minor there are aftereffects.

In fact the legal regulation dealing with the enforcement of judgment on the upbringing of a minor is very concise. The terms covered by this regulation are those such as request, fines, taking a child away, the enforcement of judgment, concurrence as well as delivering and local jurisdiction. Many other institutes or important issues are not covered at all.

Among those issues that are not covered at all the following can briefly be mentioned, such as e.g. the issue of what essentials are necessary in order to file the motion for the beginning of the enforcement of judgment or the issue of what the court procedure should be in cases when the motion for the enforcement of judgment does not have any prescribed essentials. The issue that is not covered either is e.g. the process of hearing, delivering the verdict and making a copy of this official document in a written form, remedial measures and so on. The area that is not covered no matter whether explicitly or based on some other provisions frequently referred to in this context is also the issue of certain specific conditions of action. It is necessary to realize that the enforcement of judgment on the upbringing of a minor is a proper civil procedure where it is essential that all the procedural steps have to be properly taken and all the requirements met at every stage of the action.
The absence of a specific legal regulation of these issues related to the enforcement of judgment and at the same time the ruling out of reasonable application of the preceding parts would have negative impact on the execution of the rights to court protection if the law was supposed to be interpreted literally.

In such a case, there is no other possibility than to base the decision on the Slovak Constitutional Court\(^3\) ruling saying that in cases of the interpretation of regulation on the application of provisions and legal regulations it is essential that the literal meaning should primarily be taken into account. However, the court shall not be bound by the literal interpretation absolutely.

The court can do this and it could be said that there is in fact no other possibility in such cases when it is required for the purposes of the applicability of the law, the systematic continuance or if it is required in order to secure the harmony between the interpretation of Constitutional Court rulings and other general legally binding regulations (article 152 clause 4 of the Constitution). It is obvious that in such cases the court has to avoid making an arbitrary decision and it must base its interpretation of the legal norm on a rational argumentation.

Even under the ruling of the Czech Constitutional Court\(^4\) is it not admissible to base the application of the law solely on the literal language interpretation. Mechanical application of the law torn out of context, not taking into account its meaning and purpose of the law either intentionally or as a result of the lack of erudition of the professionals makes the law a tool of dissociation and absurdity.

Thus if we take into account all these facts there is no other possibility than to apply the provision § 42 clause 3 in combination with § 79 clause 1 of the CPC in connection with the essentials for the motion for the commencement of the proceedings. When talking about the form of the motion for the commencement of the proceedings it is necessary to apply the provision § 42 clause 1 of the CPC and as far as the court procedure in cases of lack of essentials it is necessary to apply § 43 clause 2 of the CPC.

Among all the requirements for the action as far as the enforcement of judgment is concerned the only legal regulation covering this area is the regulation dealing with jurisdiction and the participants of the proceedings.

The court that is under the provision of the § 273 clause 5 of the CPC defined as the court according to the local jurisdiction is the one that can be called as the general court of the minor. However, it is not further specified which court it is that can be called as the general court of the minor in the legal regulation covering the issue of the enforcement of judgment. Taking into account the fact that the provision § 251 clause 4 of the CPC is again disqualified through the § 272 clause 2 of the CPC it is only possible to solve the problem connected to the issue

\(^3\) The ruling filed under the mark III. Constitutional Court 2012/2011 the same ruling filed under the mark I. Constitutional Court 334/2011.

\(^4\) The ruling filed under the mark Pl. Constitutional Court 33/97.
of which court will be the one to act in the local jurisdiction through following the rulings of the Constitutional Court in such cases. In such cases when the Constitutional Court ruling is supposed to be taken into account it is necessary to apply the provision § 85 clause 1 of the CPC, according to which the general court is the one in the jurisdiction where the minor has a place of residence, in cases when the minor does not have the place of residence then it is the court jurisdiction in the same area where the minor has whereabouts. It is also possible to apply the provision § 11 clause 3 of the CPC according to which it is the Supreme Court of the Slovak Republic which shall decide which court will deal with and decide the matter in such cases when the requirements of the local jurisdiction are not met or if it is not possible to find the required information.

In cases of the lack of the court jurisdiction this will also be solved through the ruling of the Constitutional Court based on the provision § 105 of the CPC.

The regulation covering the issue of the participants in the proceedings is not complete either. The provision § 272 clause 2, the second section of the CPC merely says that the § 94 of the CPC can be applied. It means that in the enforcement of judgment on upbringing of a minor the group of participants is defined by third definition of the participants of the proceedings along with the regulation covering the issue how the court is going to proceed if the participants who are the part of the proceeding have not been dealt with yet or on the contrary if the participants who are not part of the proceeding have already been dealt with. However, in connection with the issue of participants in the proceedings there is no further regulation covering this area of law. This is for example the issue of how the court should proceed if e.g. the obligated party does not have the procedural capacity or how the court should proceed if the minor dies? The answer to this question that can be used for the purposes of court procedure can only be given when referring to the ruling of the Constitutional Court as mentioned above. It means that in cases when participant in the proceeding does not have the procedural capacity the court then has to discontinue the proceedings until a statutory representative has been officially established or the court can also use other measures that can be taken under the law. In the case of a death of a minor the proceeding shall be terminated as the death is regarded as a reason for discontinuance under the provision § 107 of the CPC as the enforcement regards the rights and duties of personal nature.

Even when trying to analyse other requirements for the proceedings (such as e.g. the absence of litispedence) it is necessary that the procedure enacted in the provision § 103 and subsequently in the CPC should be followed.

Among the institutes there is also one that should be briefly touched upon and it is the institute of the service of document. The only provision which mentions the service of the judgment during the enforcement of judgment on upbringing of a minor is the § 273 clause 6 of the CPC. However, this provi-
sion relates solely to the service of a single procedural step taken by the court, namely the judgment on the taking away of the child. However, when analyzing this provision closely it can be said that it only regulates the issue of time when the service should be done. It does not cover the other related issues such as e.g. through whom it can be delivered, in what way, alternative service and the fiction of service. In spite of this it is important to apply general provisions about service enshrined in the provision § 45 and subsequently those in the CPC according to the ruling of the Constitutional Court.

After a short introduction focused on general issues the next part of this paper is limited to the explanation of the most important changes brought about by the current amendment. The list of the issues discussed further is as follows: the institute of notice, fine, the discontinuance of the payment of state welfare benefits, the taking away of the child, the discontinuance of the proceedings and the court costs.

**Notice**

The legal regulation is still centred on two phases of the enforcement of the judgment – the phase before the court order and the phase after the court order stipulating the details of the enforcement of judgment.

In the first phase, i.e. before the court order to enforce the judgment, the notice of the compulsory participant is obligatory in cases when he or she refuses to subdue to the judgment (§ 272 clause 3 of the CPC). The notice can be carried out in three different ways:

a. in a written form. Based on the text of the law it is not clear that written form should have the nature of a judicial resolution. Thus it means that there is no way to defend against this form of notice.

b. in an oral form. The court can order the hearing if it seems to be an effective way for the court to secure the purpose of the notice. The provision § 272 clause 3 of the CPC gives a list of persons which can be summoned for such a hearing. This regulation can be generally considered as an exception to the rule that it is essential that all persons should be summoned for such a hearing. The notice can also be made as a

c. part of a written record made immediately before the ordering of the enforcement of judgment on taking away of the child, which shall be serviced along with the decision upon the taking away of the child.

It is purely upon the discretion of the court which option it will take. However, the facts that can be considered as the key ones are those that can be found out about the obligated party, their conduct, their reasons for which they refuse to subdue themselves to the enforcement based on which it can be presupposed which form of notice will be more effective or theoretically which form may
obstruct the enforcement of judgment. When trying to find these facts the court can ask the authority focused on the social protection of the minor for assistance, it can also ask for help some other institutions or the municipal bodies.

Now matter which form of notice the court employs it always has to a) inform the obligated party that they have to comply with this requirement and b) warn the party against any potential sanctions in case of disobedience of the party as regulated in the execution title (the provision § 272 clause 3 of the CPC). According to the § 3 clause 1 of the ordinance No 474/2011 Coll. it means that it has to warn that there can be a fine imposed, even repeatedly, it also has to warn against the possible discontinuance of the payment of the parental welfare benefit and other payments supporting the child including allowance as a part of the payment supporting the minor. It also has to warn that it is essential to participate in the hearing, it has to warn against the crime of obstruction of the execution of official decision including the sanctions (§ 349 of the Criminal Code) and then what should be viewed as the most effective measure against the obligated party the court should warn that it is possible to change the decision about the personal care under the § 25 clause 4 of the Family Code even without filing the motion to do so.

Imposing fines is not obligatory and so it is left solely upon the discretion of the court whether to use this type of enforcement of not. It is not bound to impose such a fine if it is clear that the fine will not be of any use, i.e. it will not have the desired effect (e.g. the person does not own a property that can be seized)\(^5\), and the same applies to cases when it is likely that the repeated notice for a hearing could lead to a successful procedure.

The amount to be paid in one fine has been increased up to 200 euro. However, based on the provision § 273 clause 1 of the Civil Procedure Code it is clear that the fine that can be imposed can only be equal to the amount of 200 euro. The statement of the intent of the legislators is in conflict with the current law. In the statement the legislator intended to set a fine only in the maximal amount that can be imposed at one time. This legislation is also different from the preceding legal regulation.

Such a fine can also be imposed repeatedly. The whole amount that can be imposed in this way has not been specified nor has it been limited by any special provision or regulation.

Every fine imposed in this way must be imposed through a separate provision which must be serviced to all the participants of the hearing. In cases of enforcement of a contact than it is necessary to impose a fine for failing to comply with the decision of court stating that there is a special time limit which has been breached. Otherwise such a provision is not reviewable.\(^6\) It is possible

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to appeal against the decision to impose a fine; the competent person who can also appeal is also the participant to the hearing.

Such a fine does not have the nature of a procedural fine, which means it cannot later be forgiven.

The discontinuance of the payment of the state social benefits

The innovation brought about by the Amendment to the Civil Procedure Code effective from January 1, 2012 is the fact that it is possible to discontinue the payment of the parental allowance (Act N. 571/2009 Coll. upon the parental allowance), the child benefits and the special allowance to the child benefits (the At N. 600/2003 Coll. upon the child benefits). The discontinuance of the payment is carried out by the employment office dealing with the social affairs and the issues related to family matters according to the place of residence of the obligated party, i.e. the receiver of the specific state social benefit (§ 5 clause 1 of the Act N. 571/2009 Coll. upon the parental allowance or § 6 clause 1 of the Act N. 600/2003 Coll. upon the child benefit), based upon the written notice of the court serviced to the obligated party.

One of the deficiencies that can be found in the current legal regulation is the fact that it uses the expression ‘notice’ which seems to be unclear. No provision can be interpreted in such a way that this notice should be in the form of resolution. However, if it is not to be in the form of a resolution than it means that the obligated party cannot defend against such a notice as there are not procedural institutes that can be used in such a case.

Analyzing the legal regulation covering these issues it is not clear whether the court can issue a notice to discontinue the payment of some of the social benefits listed above or notice to discontinue all of them at one time, i.e. those that the obligated party receives.

Logical interpretation of the law suggests that if the notice of the court is enshrined in the § 273 clause 2 of the CPC just as the right of the court to do so and not as its duty than the court can discontinue the payment of all the state social benefits at one time based upon its own discretion or it can discontinue the payment alternatively, i.e. it can discontinue some of the benefits only. In cases when the court decides to discontinue the benefits alternatively the chronology of such discontinuances listed in the legal regulation is not important. However, based on the literal interpretation of the law it cannot be understood in such a way that the court could issue a notice merely ordering that the benefits should be lowered.

The expected efficiency of these measures currently adopted could, however, be questioned. There are two main reasons for this.

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See the reasoning of the ruling filed under the mark I. Constitutional Court 138/03 p. 2
The first reason is the fact that this type of enforcement can only be used against obligated party which is the receiver of the state benefits listed above, i.e. against the parent who was by the decision of the court assigned the duty to look after the child and this parent refuses to allow the second parent to visit the child. It cannot be used against the parent who merely has the visitation rights and refuses to return the child to the first parent, i.e. the one who has been assigned the duty to look after the child. The same applies to cases of joint custody where this enforcement measure cannot be used. In such cases it is also just one parent who is entitled to parental allowance, the state child benefit or the special allowance added to the child benefit (§ 2 clause 5 of the Act N. 571/2009 Coll. upon the parental allowance, § 2 clause 2 and 4 of the Act N. 600/2003 Coll. upon the child benefit). It is a pity that there is no other enforcement tool that could be used in cases when the parent who merely has visitation rights refuses to return the child to the other parent.

The second reason that can be used is the fact that this enforcement tool recently adopted can only be considered as effective in cases of parents with a lower income. In cases of parents who are well off this enforcement measure would probably not be effective at all.

The court is, however, allowed to use this enforcement measure only after it has issued a notice which has not been complied with by the obligated party. In other words unless a notice has been issued for the obligated party to comply with the decision of the court it is not possible to discontinue the payment of the social state benefits (§ 273 clause 1 of the Civil Procedure Code). However, it is not necessary to impose a fine first. It is even possible for the court to discontinue the payment of the benefits along with imposing a fine at the same time as the law allows that both measures can be applied at the same time.

The law takes into account the fact that the payment of the state social benefits will be commenced after it has been discontinued. It is, however, conditioned by the obligated party’s compulsory compliance with the execution title. Thus the fact that plays the role in such cases is the fact that the obligated party has compulsorily started to fulfil the conditions of the execution title. It is not required to prove that the obligated party will continue fulfilling the conditions compulsorily, it is merely enough to prove that the party has begun to fulfil the conditions, i.e. the party has allowed the other parent to visit the child in such a way that is stipulated in the execution title.

Along with the commencement of the payment of the state social benefits the Act N. 571/2009 Coll. upon the parental allowance or the Act N. 600/2003 Coll. upon the child benefits also allows to balance the discontinued payment if the conditions stipulated by the law have all been fulfilled.

In connection with the newly adopted enforcement measures it would be good to consider adopting certain rights of the court to apply some education-
al measures which could be more effective when dealing with such cases. The Czech legal regulation could serve as a good source of inspiration as it allows the Czech courts to impose a duty upon the obligated party to participate in an out-of-court settling or mediation procedure or in a family or other possible therapy for up to three months [§ 273 clause 2 letter a) of the Civil Procedure Code].

Taking away of the child

In cases when the preceding measures ordered by the court have not had the desired effect, the court shall order that the child should be taken away from the parent.

Under the law the court can only use this type of enforcement of the duty imposed in such cases when the preceding notice addressed to the obligated party has not been successful. The taking away of the child is not possible without preceding notice. It is important to say again that in order to eliminate the possibility that the enforcement of the judgment will be obstructed (e.g. in case someone may place the child in a different location, the place being unknown to the court) it is only possible to service the notice to comply with the judgment along with the decision to take the child away (§ 272 clause 4 of the Civil Procedure Code). Thus the obligated party learns about the enforcement of judgment before the act of taking the child away itself. It is not necessary to impose a fine before such a decision has been made.

The decision-making process during which it is considered whether the child should be taken away or not should be thoroughly weighed as it is the most radical step that can be taken in this procedure. This step is regulated under the § 273 clause 2 of the CPC (currently it is under the section 4)]. This careful consideration must take into account the possible negative impact of such a step taken in relation to a minor. Such a consideration must also be based upon the finding of the facts of the specific case.

The rights of the court in the act of taking the child away are more precise in comparison with the older legal regulation. The new legal regulation includes rights such as e.g. the right to give orders to the objects participating in the taking away of the child, the right to ask for an explanation from the objects that can contribute to the clearance of the circumstances important for the enforcement of the judgment, the right to give an order for anybody not to enter a certain area or location within a specific time period or not to stay in a specific area or not to leave a specific area as far as the right to secure the opening of an apartment or other space with the aim to enter the space and take the child away (§ 273aa clause 1 to 3 of the CPC).

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8 Slovak Constitutional Court finding as of November 2, 2011 filed under the mark III. Constitutional Court 181/2011.
The opening of a flat or an apartment is only possible if two conditions have been satisfied, namely:

a) based on the reasonable belief that the child is present at the apartment (or other type of location); This reasonable belief does not necessarily have to mean that the judge must have clear evidence that the child really is present at the specific place or location and so this evidence does not necessarily have to be proved;

b) if the person who has a right to dwell in the apartment or space does not respect the notice made by the judge issued with the aim to take the child away. It is not relevant whether the person who legally is allowed to dwell in the apartment or other space is at the same time the obligated party or any other person. This also applies to cases no matter whether the person who as a right to dwell in the apartment or the space is a private person or a legal person. The law uses the word ‘notices’ i.e. a word in the plural which means that there should have been at least two notices made before the actual opening of the apartment or another space by force with the aim to take the child away.

In the act of the carrying out of the taking away of the child the court is allowed to impose a procedural fine of up to the amount of 820 euro.

The judge is under the obligation to secure the opening of the apartment or the space through a specially designated person (§ 8 clause 1 of the ordinance N. 474/2011 Coll.). After the act of taking away of the child has been completed the judge is obligated to secure the closing of the apartment or the space no matter whether the taking away of the child was successful or not.

The termination of the enforcement of judgment

Until December 31, 2011 it had not been possible for the court to terminate the enforcement of the judgment upon the upbringing of a minor or the contact with the minor as this area was covered by the provision § 272 clause 1 of the Civil Procedure Code. However, it has been allowed since January 1, 2012 as regulated by § 268 of the Civil Procedure Code as these two provisions do not mutually exclude themselves.

It should be widely accepted and welcome that it is possible to terminate the enforcement of judgment upon the upbringing of a minor. There may be different reasons – the competent authority may propose, the execution title is still not enforceable, the execution title has been cancelled, it has become ineffective (e.g. as a result of the renovation of the parental cohabitation or as a result of a decision upon the divorce) etc. and thus any further continuation of the enforcement of judgment would deny the fundamental principles of logic, law and rights to just and fair court protection.

Similar also the explanatory report to the Act . 388/2011 Coll. § 273aa, point 55.
If the obligated party states that their reason for the termination of the enforcement of judgment under the § 268 clause 1 letter b) of the CPC is reversed decision which serves as the fundament for the enforcement of judgment it is then necessary to wait for the lawfulness of the decision issued in the hearing according to the third section of the CPC (compare also the decision published under the N. 9/1996), unless this is the type of decision preliminarily enforceable or unless the preliminary enforceability has been specifically stated\textsuperscript{10}.

At the same time it is also important to say that it is not possible to postpone the enforcement of judgment upon the upbringing of a minor. It is not even the filing of a motion by the obligated party to supplement the evidence by a specialist in the field of psychology as far as it is good to hand the minor over to a legitimate person under the execution title without any negative impact upon the development\textsuperscript{11} of the child that could have an effect on the execution of the enforcement of the judgment as it is not possible to apply the provisions on the postponement of the execution of the enforcement of the judgment in these cases under the § 266 of the Civil Procedure Code [§ 272 clause 1 of the CPC (currently the original § 266 regulating the postponement of the execution of the enforcement of judgment is cancelled – author's note)]. Thus the process of evidencing could only be carried out in the subsequent hearing initiated upon the motion to the change of the placement of a minor\textsuperscript{12}.

The only exception to this rule is the enforcement of judgment of a foreign court the enforcement of which can be postponed by the local court if the decision had been challenged by a remedial measure in the foreign state in which it was issued (§ 273b clause 2 of the CPC). The postponement is only possible based upon a motion until a final decision about a remedial measure has been made.

The Court Costs

As regulated by the newly adopted legal regulation the court costs shall be paid by the obligated party (§ 273 clause 1 of the CPC). At this point it is good to point to the carelessness of the legislator using the term “bear” the court costs even though this term does not correspond with the legal terminology frequently used. In connection with the court costs the terms used in the Civil Procedure

\textsuperscript{10} See more R 21/ 1981, p. 521.

\textsuperscript{11} According to the facts of the case stated in the finding of the Constitutional Court, filed under the mark I. Constitutional Court 70/1998 (N. 12/1999) it is clear that “The mother had not seen her child from May 1996 and then subsequently in the act of enforcement of judgment on July 16, 1997 at the presence of the police officers, i.e. after more than a year, the child did not recognize the mother.”

\textsuperscript{12} The regional court in Košice as an Appeal Court in the matter filed under the mark E 127/97 [used from the finding of the Constitutional Court filed under the mark I. Constitutional Court 70/1998 [N. 12/1999].
Code are either “to pay the court costs” (§ 140 and subsequently in the CPC) or the term “to cover the court costs” (§ 142 and subsequently in the CPC).

Court costs as a part of the enforcement of judgment are fully listed in the provision § 273 clause 2 of the CPC. These are namely:

- compensation for the lost wages of the individuals participating in the enforcement of judgment except for the wages of the obligated party
- costs related especially to the opening of an apartment or another space
- transportation costs paid for the participants of the hearing except for the transportation of the entitled person
- transportation costs paid for the transportation of the minor connected with the return of the minor in cases when the minor had been relocated unlawfully or arrested in accordance with the international treaties
- costs related to the essential needs of the child in the process of the enforcement of judgment (e.g. expenses paid for the baby car seat used when transporting the child, securing of clothes, medicine, nutrition etc.).

It is obvious that these are costs burdening also the state during the process of the enforcement of judgment. In terms of legal terminology these are costs that have to be paid by the state. If it is subsequently the obligated party that is supposed to bear these costs than this is the same expression used for the covering of court costs. This means that the obligated party always has to compensate the state for the costs no matter whether the taking away of the child was successful or not.

The effort of the legislator to amend the legal regulation of the enforcement of judgment upon the upbringing of a minor is certainly widely accepted and welcome especially by those who have become personally involved in such cases. However, the procedural legal regulation still seems to be rather incomplete. At this point it is probably the legal regulation enacted under the § 25 clause 4 of the Family Code (Act N. 36/2005 Coll. of the Family Code) that can be seen as the most effective provision to be used in these cases. Under this provision the court is allowed to reverse a decision upon personal care even without a motion if one of the parents repeatedly, without any sound reason and intentionally does not allow the other parent to see the minor child as prescribed by the court in the verdict on the divorce. Being without one’s child even for one day truly is one of the biggest pains a parent can ever experience. In order to secure the voluntary fulfilment of duties in accordance with the execution title it would probably be enough if the public was aware of the fact that this provision has begun to be used more in practice.

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