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THE EU AIR TRANSPORT LIBERALIZATION AND RE-REGULATION

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**Summary:** Over the last decades, international air transport liberalization has steadily evolved. As a consequence, many initiatives all over the world have paved the way to enhance international air transport liberalization, and numerous models have been hypothesized for a new multilateral aviation regime to supplant bilateralism, which however, remains the primary vehicle for liberalizing international air transport services for most States. The present study aims at investigating the EU experience in the field of liberalization and re-regulation of air transport, taking into account the other approaches developed internationally, where relevant. The paper is divided into four sections. After having introduced, in the first section, the different forms and venues of liberalization and regulation of international air transport, the process of Community liberalizations is analyzed, taking into account, on one side, the most recent air transport agreements in this field between the EU and third countries and, on the other side, the actual and potential benefits and drawbacks stemming from the implementation of these liberalization policies, which are still ongoing. In the last part of the paper, a new legal order in international air transport - stemming from the recent liberalization and re-regulation policies in the "Old Continent" - will be identified. In order to overcome the political and legal issues brought about by the liberalization and re-regulation of air transport worldwide, the paper concludes that stronger cooperation between international and regional actors must be implemented, and a global approach within a specialized international organization should be enhanced.

**Keywords:** EU Law, national courts, national procedural rules, interim measures
1. The regulation of international air transport: From bilateralism to regionalism.

1.1 The Chicago Convention.

International air transport has always been one of the most regulated of industries. Traditionally, it has been regulated on the basis of the Chicago Convention, which most countries in the world (including all EU Member States) have ratified.

The Chicago Convention of 1944 was based on international bilateral air service agreements, by which nations could trade the freedom of the skies among themselves. As a result, thousands of bilateral agreements were stipulated among States, and these agreements decided which airlines could fly between them, the capacity of each airline, the fares to be charged, as well as other clauses.

1.2 Globalization, liberalization, and re-regulation: The new legal order of international air transport.

This regulatory system has been changing recently because of worldwide initiatives that have paved the way for enhancing air transport liberalization. This

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1 K. Button, The impact of US-EU “Open Skies” agreement on airline market structures and airline networks, 15 Journal of Air Transport Management, 59, 59–60 (2009); W. Hubner and P. Sauvé, Liberalization scenarios for international air transport, 35 Journal of World Trade, 973, 973 (2001); L. E. Gesell and P.S. Dempsey, Air Transportation: Foundations for the 21st Century, Chandler, Coast Aire Publications, 373 (2005), who state that in the US, despite the Airline Deregulation Act, the air transport sector has never been “deregulated”, and “today the airlines are the most regulated industry on earth”. Moreover, regulation “has been around for a long time and will not likely be going away in the foreseeable future”.


3 The bilateral air transport system applies not only to passenger transport, but also to air cargo.

4 H.W. Bashor, A New Legal Order in Air Transport, 2 Journal of Diplomatic Language, 1 (June 2005); Gesell and Dempsey, supra note 1, at 402; P.S. Dempsey and L.E. Gesell, Airline Management: Strategies for the 21st Century, Coast Aire, Chandler, 441 (1997); ICAO,
is why numerous models have been hypothesized for a new (multilateral) aviation order to supersede bilateralism, which still remains the primary vehicle for liberalizing international air transport services for most States.

Those models have to take into account the globalization process of the airline industry that is already under way. In light of this process, “[g]overnment intrusion should be restricted to competition law discipline,” and government intervention should be limited (only) to ensure, on the basis of objective criteria, public service obligation concerning links with isolated destinations.

The liberalization of air transport has entailed another phenomenon that is connected and consequent to that process: the re-regulation of air transport. As pointed out by some authors, air transport liberalization never represents complete deregulation because it brings about a re-regulation of the sector under other political and legal systems that are based on, for example, the application of antitrust rules, which are considered a form of governmental intervention. The public intervention, in terms of applicable regulation in the field of air transport, may take different forms, related, inter alia, to security regulations defined multilaterally by ICAO.

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7 Havel, supra note 3, at 524. See also Bashor, supra note 6, at 1–2; S. Morris, Competition in air transport in Europe under a World Trade Organization (WTO) umbrella, XXXII Annals of Air and Space Law, 536 (2007); Hubner and Sauvé, supra note 1, at 976; M. Geloso Grosso, The political economy of liberalizing air transport in APEC: Regulatory aspects and negotiating options, GEM Working Paper, at 2 (June 2010), on line http://www.gem.sciences-po.fr/content/publications/pdf/GelosoGrosso_political_economy_airTransportLiberalisation062010.pdf.


9 I. Lelieur, Law and Policy of Substantial Ownership and Effective Control of Airlines. Prospects for Change, Aldershot, at 129 (2003), who argues that the globalization process demands “the choice of which markets to enter, and how to compete efficiently in those markets, should ultimately be the province of individual carrier managements”.

10 Havel, supra note 3, at 524.

This new legal order in the field of air transport is being developed at different levels: at regional, multilateral\textsuperscript{12}, plurilateral\textsuperscript{13}, bilateral\textsuperscript{14}, and national.\textsuperscript{15} Moreover, the industry has recently undertaken initiatives in promoting liberalization.\textsuperscript{16}

\textsuperscript{12} ICAO represents one of the most important example of World-Wide multilateralism in the field of aviation. Other global multilateralism organizations in the field of air transport are, \textit{inter alia}, WTO (World Trade Organization), OECD (Organization for Economic Cooperation and Development) and UNCTAD (United Nation Conference on Trade and Development).

\textsuperscript{13} See, for example, the Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT), known as the ‘KONA’ open skies agreement, which was signed in 2001 by five like-minded Members of the Asia-Pacific Economic Cooperation (APEC), namely Brunei, Chile, New Zealand, Singapore and the United States.

\textsuperscript{14} As concerns bilateral approaches, it is well known that bilateral regulation of international air transport is formed by agreements, understandings or arrangements between two states. As opposed to both national and multilateral regulation, bilateral regulation involves no permanent institutions or organizations: see ICAO, \textit{Manual}, \textit{supra} note 8, at 2.2–1.

\textsuperscript{15} Initiatives at national level have been undertaken recently: see, for instance, the new international air policy announced by the Government of Canada called “Blue Sky” in 2006, concerning air service negotiations, and envisaging a change from the previous gradual reduction of restrictions of bilateral air services agreements to “open skies” agreements. Other initiatives have been undertaken with regard to market access for foreign airlines by Bahrain, Cambodia, Chile, China, Ecuador, Guatemala, Honduras, India, Kuwait, Lebanon, Morocco, Pakistan, Philippines, Sri Lanka, Tunisia, the United Arab Emirates, Japan; as for airline pricing, by the United Kingdom Civil Aviation Authority; as for designation of airlines, by Bangladesh, India, Kuwait and Nigeria, while, in the field of domestic air transport, Brazil, China, India, Japan, Indonesia, Mozambique, Saudi Arabia and Thailand have been fostering liberalization measures: see ICAO, \textit{Overview}, \textit{supra} note 8, at paragraph 2.17.

\textsuperscript{16} In particular, in 2004, the International Air Transport Association (IATA) developed a Study on ownership and control liberalization. See IATA, \textit{Advancing the Liberalization of Ownership and Control}, Paper presented to the ICAO Assembly’s 35th Session, A35-WP/64 (July 8, 2004). Furthermore, 14 governments and the European Commission were invited by the same international Association to an “Agenda for Freedom Summit” in October 2008, with the goal to discuss how to further liberalize market access and airline ownership and control rules. A second Summit was held in November 2009, when seven governments and the European Union signed a common policy statement on liberalizing market access, pricing and ownership. See ICAO, A37-WP/5 EC/1, \textit{supra} note 6, at paragraph 3.5.
1.3 Regional experiences in liberalizing air transport: An overview. Multilateralism and regionalism concepts. Purpose of the study.

As far as regional levels are concerned, many initiatives toward liberalization have been undertaken in their relevant areas. Before the 1994 ICAO Fourth Worldwide Air Transport Conference\(^\text{17}\) there were just two regional agreements, namely the Single Aviation Market in the European Union (1987) and the Decision of Integration of Air Transport amongst five Andean Pact States (Andean “Open Skies” Policy) in 1991.\(^\text{18}\)

Since 1995, a considerable number of regional groups have been developed, and numerous regional arrangements have emerged. Currently, many agreements or arrangements for the liberalization of intra-regional air transport services are in operation, such as the Single Aviation Market within the European Union established in 1987 amongst the Member States (today, 27 States); the Decision of Integration of Air Transport of the Andean Community (CAN, then Andean Pact) amongst four States in 1991; the Multilateral Air Service Agreement (MASA) of the Caribbean Community (CARICOM) in 1998 amongst 15 States in the Caribbean, which entered into force in 1999 for nine States; the Agreement on Sub-regional Air Services (Fortaleza Agreement) of the Southern Common Market of 1999 amongst six MERCOSUR States (in South America); the Banjul Accord for an Accelerated Implementation of the Yamoussoukro Declaration of 1997 amongst six States; the Multilateral Air Service Agreement for the Banjul Accord Group of 2004 amongst seven States; the Agreement on the Establishment of Sub-Regional Air Transport Cooperation amongst Cambodia, Lao People’s Democratic Republic, Myanmar, and Viet Nam of 1998 (CLMV) (but a formal multilateral Agreement was signed in 2003); and the Agreement on the Liberalization of Air Transport of the Arab League States of 2007 amongst six States.

The 2007 Agreement enacted the Intra-Arab Freedoms of the Air Programme, which dates back to 2000, amongst 16 States of the Arab Civil Aviation Commission (ACAC) in the Middle East and Northern Africa; the Agreement on Air Transport signed in 1999 amongst the six States of the Economic and Monetary Community of Central Africa (CEMAC); the regulations for the implementation of Liberalization of Air Transport Services of the Common Market for Eastern and Southern Africa (COMESA) of 1999 amongst 12 States; the Yamoussoukro II Ministerial Decision amongst 52 African Union States, signed in 1999 and entered into force in 2000; the Pacific Islands Air Services Agreement (PIASA) of the Pacific Island Forum, which was signed in 2007 amongst six States; the Air Transport Agreement of the Association of Caribbean States (ACS), signed in 2008 amongst seven States; the ASEAN Multilateral Agreement on the Full Liberalization of Air Freight Services, signed in Manila on May 20, 2009.\(^\text{19}\)

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\(^{17}\) ICAO Worldwide Air Transport Conference ATConf/4, 1994.
\(^{18}\) See ICAO, Regulatory and Industry Overview, supra note 6, at paragraph 2.4.
\(^{19}\) ICAO, Overview, supra note 8, at paragraph 2.5.
ther liberalization initiatives have been undertaken by the ten Member States of ASEAN, which adopted a Multilateral Agreement on Air Services.

Other regional arrangements are in the process of formal signature or ratification, such as the Common Air Transport Programme amongst eight Member States of the Economic and Monetary Union of West Africa (WAEMU) of 2002.20 Another important regional forum is the Asia-Pacific Economic Cooperation (APEC), which has developed liberalization initiatives since 1995.

Within regional initiatives, the EU experience represents, as we will clearly see below, the most prominent example of regional liberalization in the field of air transport.

The present study aims at investigating the EU experience in the field of liberalization and re-regulation of air transport, taking into account the other approaches developed internationally, where relevant.

Before entering in medias res by analyzing the different features of international air transport liberalization’s approaches, it has to distinguish between regionalism and multilateralism concepts.

Professor Wassembergh points out the difference between bilateralism and multilateralism, and he argues that the latter represents “any international cooperation between more than two States.”21 Moreover, he makes a distinction between global (or “World-Wide”) multilateralism, which encompasses most of the world’s States, and regional multilateralism, namely regionalism, which implies cooperation between States of a particular region.22 Both these kinds of multilateralism are, in turn, different from plurilateralism, which involves coop-

20 ICAO, Overview, supra note 8, at paragraph 2.7.
21 H. A Wassembergh, The future of multilateral air transport regulation in the regional and global context, 8 Annals of Air and Space Law, 263 (1983). See also B. Stockfish, Opening closed skies: the prospects for further liberalization of trade in international air transport services, 57 Journal of Air Law and Commerce, 639 (1991–1992), who describes multilateralism as “a universal regime encompassing all the nations of the world”. According to ICAO, multilateral regulation “is regulation undertaken jointly by three or more States, within the framework of an international organization and/or a multilateral treaty or agreement, or as a separate specific activity, and may be broadly construed to include relevant regulatory processes and structures, outcomes or output written as treaties or other agreements, resolutions, decisions, directives or regulations, as well as the observations, conclusions, guidance and discussions of multinational bodies, both intergovernmental and non-governmental”: ICAO, Manual, supra note 8, at 3.0–1. Moreover, ICAO analyses the arguments favouring and those opposing multilateral international air transport regulation (therein, at 3.3–1, 3.3–2).
22 Wassembergh, supra note 21, at 263. See also Stockfish, supra note 21, at 642–643. On regionalism approach in general see further J. R. Bonin, Regionalism in International Civil Aviation: A Reevaluation of the Economic Regulation of International Air Transport in the Context of Economic Integration, 12 Singapore Year Book Law andContributors, 113 (2008).
eration between more than two States regardless of their geographic location and
does not include a majority of the world’s States.\textsuperscript{23}

Some commentators claim that since the aviation industry is currently “over-
fragmented” regional approaches are necessary to foster and consolidate liberali-
zation initiatives in this sector.\textsuperscript{24} Furthermore, with the creation of regional areas
(such as, \textit{inter alia}, the European Union, ASEAN, APEC, LACAC), the power
to negotiate in the field of air transport belongs to groups of States, which act at
regional level.\textsuperscript{25}

2. European Union liberalizations in the field of air transport: legal fra-
framework, historic development, and current policies.

2.1 The Treaty of Rome of 1957 and the progressive shift towards an integrated
European market.

Article 80 of the EEC Treaty of Rome of 1957 lays down that the provisions
on common market policy contained in Title IV of the Treaty are applicable to,
\textit{inter alia}, the air transport sector as long as the Council, acting by a qualified
majority, decides “whether, to what extent and by what procedure appropriate”
to set down provisions.\textsuperscript{26}

The Council never enacted these legislative measures, and the European
Union liberalizations in the air transport sector were influenced by external
factors of the (then) European Economic Community itself. One of these fac-
tors was US deregulation, which dates back to October 24, 1978, when Con-
gress passed the \textit{Airline Deregulation Act}.\textsuperscript{27} Despite this “boost” to EU liberali-

\begin{itemize}
\item \textsuperscript{23} Wassembergh, \textit{supra} note 21, at 263. According to ICAO (ICAO, \textit{Manual}, \textit{supra} note 8, at
2.4–1), a plurilateral approach refers to a plurilateral agreement, which could initially be
bilateral but be capable of being expanded to involve additional parties, or could, from
the start, involve three or more parties, in both cases parties that share similar regulatory objectives
which are not so widely held as to make feasible a typical multilateral negotiation. This
latter kind of plurilateral agreement is generally open to other States to join (see, for example,
the “Kona Agreement”).
\item \textsuperscript{24} Lelieur, \textit{supra} note 9, at 117.
\item \textsuperscript{25} Lelieur, \textit{supra} note 9, at 117.
\item \textsuperscript{26} J. Balfour, \textit{EC external aviation relations: the Community's increasing role, and the new EC/}
\item \textsuperscript{27} P.S. Dempsey, \textit{European Aviation Regulation: Flying Through the Liberalization Labyrinth},
15 \textit{Boston College International & Comparative Law Review}, 313 (1992); Balfour, \textit{supra} note
gulation “boosted the liberalization forces in Europe”; Stockfish, \textit{supra} note 21, at 613;
M. Dupont-Elleray, \textit{La politique communautaire de l’aviation civile, de la liberalization du}
transport aérien au ciel unique européen, in 224 \textit{Revue Française de droit aérien et spatial},
354–355 (2002); Bashor, \textit{supra} note 6, at 3.
\end{itemize}
izations, the path of regulatory reform in these two experiences has not been the same.\textsuperscript{28}

The EU air transport liberalization process was gradual, and it implied a progressive shift from a sector controlled tightly by States towards an integrated European market.\textsuperscript{29}

In general, regionalism in air transport can only be implemented provided that States are willing to closely coordinate their aviation policies to integrate the interest of their flag carriers into one regional aviation interest. This aim may be reached if States’ national air sovereignty merges into one regional air sovereignty, creating a regional air space and a regional flag in the air.\textsuperscript{30} In the EU experience, which remains the most prominent example of regional liberalization in the field of air transport\textsuperscript{31}, this close coordination towards regionalism was mostly determined by initiatives taken at the EU level.

Among many regional approaches currently in operation, the EU liberalization process has been the most active.\textsuperscript{32} This trend is continuing, as the EU is currently involved in pursuing liberal agreements with its major partners.\textsuperscript{33}

2.2 The “Nouvelles Frontieres” case and the Single European Act.

Historically, the EU liberalization process began in 1986, when the EEC’s competition law was considered applicable to the air transport sector by the European Court of Justice (hereinafter: ECJ).\textsuperscript{34} This judgment was very important because it enabled the European Commission to intervene in the civil avia-

\begin{footnotesize}
28 Y-C. Chang and G. Williams, \textit{European major airlines’ strategic reactions to the Third Package, Transport Policy}, 129 (2002); Bashor, \textit{supra} note 6, at 3.
29 ICAO, A37-WP/5 EC/1, \textit{supra} note 6, at paragraph 3.4.
30 Wassembergh, \textit{supra} note 21, at 266. See also B.F. Havel and G.S. Sanchez, \textit{Restoring global aviation’s “cosmopolitan mentalité”}, 29 \textit{Boston University International Law Journal}, 1, at 28–29 (2011), who speak of “interactive” sovereignty as a new meaning of the concept of sovereignty developed above all in the EU, especially after the post-Communist decade since 1989; C.W. Henderson, \textit{Understanding International Law}, Chichester, 36 (2010), which points out that the EU is the most developed International Government Organization in the world. The Author further notes that the EU is not a “super state”, and it «still has a long way to go before it can become the “United States of Europe”», as hypothesized by some European scholars in the past.
31 Stockfish, \textit{supra} note 21, at 644. See also Havel and Sanchez, \textit{supra} note 30, at 29; Lelieur, \textit{supra} note 9, at 118.
32 ICAO, Economic Commission, \textit{Development and Economic Regulation of International Air Transport}, presented by the Council to the ICAO Assembly’s 36th Session, A36-WP/16 (June 26, 2007), at paragraph 3.3.
33 ICAO, A37-WP/5 EC/1, \textit{supra} note 6, at paragraph 3.4.
34 ECJ judgement of April 30, 1986, “Nouvelles Frontieres”. It has to be bear in mind that the European legal System sets down a specific regulation in the field of competition law (Articles 101–109 TFUE), which applies to the air transport sector.
\end{footnotesize}
tion policies of individual Member States. Although this judgment was hailed as a “philosophical victory”, it pressured the Council to enact regulations discouraging future litigation.

Another step towards liberalization was the Single European Act, which was passed by the Council in 1986. Through this Act, the EEC was committed to establishing a European Internal Market by 1992. This Act was significant because it represented new momentum in European integration so as to complete the internal market. According to Article 8A of the SEA, “internal market shall comprise a market without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.” Moreover, the SEA replaced the possibility of a single State veto by weighted voting. That way, the possibility to freeze political initiatives due to a one State’s opposition was abolished.


36 Dempsey, supra note 27, at 338–339, who notes that the judgment represented a “philosophical victory” for those seeking greater liberalization, and was actually “a practical defeat”, since it “created a right without a remedy”, at least until either the Council adopted regulations or the Commission issued a reasoned decision.


37 The Single European Act was signed in Luxembourg on February 17, 1986 (OJ L 169 June 29, 1987), by nine Member States, and on February 28, 1986, by Denmark, Italy and Greece. It entered into force on July 1, 1987.


2.3 The three Packages of aviation liberalizations.

Between 1987 and 1992 the EEC Council enacted the well-known three Packages of aviation liberalization.

The First Package\(^{40}\) came into force on January 1, 1988, and its adoption was advocated by the European Commission, which, according to the Nouvelles Frontières principles set down by the ECJ, was intended to prompt the application of the EEC Treaty competition rules to the air transport sector.\(^{41}\)

The legislative measures contained in this Package were important inasmuch as some strict rules in Bilateral Air Service Agreements between Member States were superseded by more liberal rules.\(^{42}\)

In this stage of liberalization, Member States were enabled to designate several of their airlines to operate certain air services, and created new traffic rights. Furthermore, the requirement to share capacity on a 50/50 basis became less strict, and also regulatory supervision on tariffs was reduced.\(^{43}\) Finally, block exemptions to competition rules were implemented.\(^{44}\)

It is clear that EEC institutions were considering this First Package as a transitory passage, in other words, the first step towards the building of a European Internal Market.

The Second Package\(^{45}\), which was adopted by the EEC Council in June 1990, basically envisaged a more liberal regime of bilateral agreements, and a greater

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\(^{40}\) The First Package includes: Council Regulation 3975/87, 1987, O.J. (L 374) 1, laying down the procedure for the application of the rules on competition to undertakings in the air transport sector; Council Regulation 3976/87, 1987, O.J. (L 374) 10, on the application of Article 85, § 3, EC Treaty, to certain categories of agreements and concerted practices in the air transport sector; Council Directive 601/87, 1987, O.J. (L 374) 12, on fares for scheduled air services between Member States; Council Decision 602/87, 1987, O.J. (L 374) 19, on the sharing of the passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air services routes within Member States.

On the First Package of liberalizations see generally Crans, supra note 27, at 10; Dempsey, supra note 35, at 677–682; Balfour and Bischoff, supra note 36, at 15; M. Bartlik, *The impact of EU Law on the Regulation of International Air Transportation*, Aldershot, 12 (2007); Masutti, supra note 3, at 174–175.

\(^{41}\) Ortiz Blanco and Van Houtte, supra note 3, at 165–166; Dempsey, *European*, supra note 39, at 55; Dempsey, supra note 27, at 357.

\(^{42}\) Ortiz Blanco and Van Houtte, supra note 3, at 166.

\(^{43}\) Ortiz Blanco and Van Houtte, supra note 3, at 166; Adkins, supra note 27, at 216; D. Gillen, *Recent Air Transport Developments in the EU*, Presentation to Viessmann Research Centre on Modern Europe, 1st Annual Conference: Developments in Europe, 9, 11 (October 19, 2001); Dempsey, supra note 27, at 359–360; Dempsey, supra note 35, at 677; O’Reilly and Stone Sweet, supra note 35, at 461–462.

\(^{44}\) Dempsey, supra note 27, at 361; Dempsey, supra note 35, at 677. Bashor, supra note 6, at 3; O’Reilly and Stone Sweet, supra note 35, at 454–457.

\(^{45}\) By the Second Package the Council adopted three Regulations: Regulation 2342/90, 1990,
flexibility on fares and capacity-sharing was reached\textsuperscript{46}, without establishing an internal market in the field of air transport.\textsuperscript{47}

With the Third Package\textsuperscript{48}, which came into force on January 1, 1993, the EEC Council completed the development of a Single European Aviation Market. Based on these legislative measures, if an undertaking satisfies the conditions laid down in those provisions (now contained in Regulation 1008 of 2008), such as professional and technical abilities, financial fitness and an organization such to ensure the safety of operations, that undertaking shall receive an operating license (an authorization)\textsuperscript{49} granted by a Member State, in order to operate air services within the EU market (in base of freedom of establishing and freedom to provide services), without discrimination on grounds of nationality. The undertaking may also make its own decision regarding fares and capacity.\textsuperscript{50}

Therefore, as of 1993, EEC institutions removed capacity restrictions and created traffic rights, these being subject to exceptions for regional services and services operated under a public service obligation regime.\textsuperscript{51} As far as pricing is concerned, Article 22 of Regulation 1008 of 2008 lays down that EU air carriers “shall freely set air fares and air rates for intra-Community services”.\textsuperscript{52} Moreover,

\begin{itemize}
\item O.J. (L 217) 1, on fares for scheduled air services; Regulation 2343/90, 1990, O.J. (L 217) 8, on access of air carriers and on the sharing of passenger capacity between air carriers; Regulation 2344/90, 1990, O.J. (L 217) 15, which modifies Council Regulation 3976/87.
\item On the second phase of liberalizations see generally Balfour and Bischoff,\textit{ supra} note 36, at 15; Ebke and Wenglorz,\textit{ supra} note 36, at 493 ff.; Adkins,\textit{ supra} note 27, at 216–219; Bartlik,\textit{ supra} note 40, at 14; Masutti,\textit{ supra} note 3, at 175.
\item Bashor,\textit{ supra} note 6, at 3.
\item Ortiz Blanco and Van Houtte,\textit{ supra} note 3, at 166; Dempsey,\textit{ European},\textit{ supra} note 39, at 55; Adkins,\textit{ supra} note 27, at 217; Gillen,\textit{ supra} note 43, at 11.
\item Council Regulation 2407/92, 1992, O.J (L 240), 1, on the EU licence; Council Regulation 2408/92, 1992, O.J (L 240), 8, on the freedom of access to the EU market; Council Regulation 2409/92, 1992, O.J (L 240), 15, on fares and rates for air services. In addition, are included in this Package: Council Regulation 2410/92, 1992, O.J (L 240), 18; Council Regulation 2411/92, 1992, O.J (L 240), 19. In 2008, the first three Regulations, forming the Third Package, have been replaced by Regulation 1008/2008, 2008, O.J. (L 293) 3.
\item On the third phase of liberalizations see generally Havel,\textit{ supra} note 3, at 402; Crans,\textit{ supra} note 27, at 10; Dempsey,\textit{ European},\textit{ supra} note 39, at 55; Balfour and Bischoff,\textit{ supra} note 36, at 16; Adkins,\textit{ supra} note 27, at 219–235; L. Giani and A. Police,\textit{ Le funzioni di regolazione del mercato}, in\textit{ Diritto amministrativo} (edited by F.G. Scoca), Torino, 525 (2008); Bartlik,\textit{ supra} note 40, at 15–16; Bashor,\textit{ supra} note 6, at 3; Masutti,\textit{ supra} note 3, at 175 ff.; S. Zunarelli,\textit{ Lezioni di diritto dei trasporti}, Bologna, 8–13, (2005).
\item Article 3, Regulation 1008/2008.
\item See Havel,\textit{ supra} note 3, at 407–408. See also Chang and Williams,\textit{ supra} note 28, at 129; Ortiz Blanco and Van Houtte,\textit{ supra} note 3, at 166; Bashor,\textit{ supra} note 6, at 3; Adkins,\textit{ supra} note 27, at 219; Gillen,\textit{ supra} note 43, at 11; Communication from the Commission on the consequences of the Court judgments of 5 November 2002 for European air transport policy, COM (2002), 649 final, at 6 (November 19, 2002).
\item Ortiz Blanco and Van Houtte,\textit{ supra} note 3, at 166; Havel,\textit{ supra} note 3, at 405–406.
\item As it has been pointed out, the 2008 Regulation “abandons the vestigial advance filing
\end{itemize}
Article 4 of Regulation 1008/2008 sets down that an undertaking shall be granted the operating license as long as “its principal place of business is located in the licensing Member State” (letter (a)), and that “Member States and/ or nationals of Member States own more than 50% of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings, except as provided for in an agreement with a third country to which the Community is a party” (letter (f)). As a consequence, Regulation 1008 “multilateralizes” the Chicago nationality rule.53

2.4 The “EU air carrier” concept. EU ownership and control. Slot allocation. Cabotage.

The Third Package has introduced the “EU air carrier” concept, which means an air carrier with a valid operating licence granted by a competent licensing authority according to (today) Regulation 1008/2008 (Article 2, No. 11). As a result EU ownership and control has superseded national ownership and control.54

After having opened up market access and set airlines free to compete on intra-European Union routes, other two aims had to be reached: full cabotage within the EU market and slot allocation.

Airport slot is a scarce resource; hence, it represents – at least in congested airports – an entry barrier to the air transport common market. As a consequence, despite the adoption of the three Packages, the liberalization process in the field of air transport was not complete yet.

In order to do so, Regulation 95/93 was enacted in 199355, which aimed at completing the process at issue.56
Airport congestion problems were mostly brought about by liberalizations, after which a “growing imbalance” between the increasing demand of air services and “the availability of adequate airport infrastructure to meet that demand” arose.\textsuperscript{57} Despite Regulation 95/93, the main international airports in the EU are still dominated by the traditional “flag carriers.”\textsuperscript{58}

As far as cabotage is concerned, it is known as a creature of the medieval law of maritime transport\textsuperscript{59}, and it prevents foreign air carriers from supplying point-to-point flights within national territory.\textsuperscript{60} Although full cabotage rights to EU air carriers were granted by Regulation 2408/1992, this principle of full freedom of traffic rights was subjected to a compromise, according to which it would not have been applied until April 1, 1997.\textsuperscript{61} As a consequence, from that date onwards all eight freedoms are allowed for EU carriers within the air transport European market.\textsuperscript{62}

2.5 The Open Skies judgments and its aftermath.

On November 5, 2002, the ECJ pronounced the Open Skies judgments, which represent the starting point of a metamorphosis of international air service agreements.\textsuperscript{63}

It is well-known that the cases were brought by the European Commission against eight Member States, which had made open skies bilateral agreements with the US in EU competence areas such as airport slots, air fares and Computer Reservation Systems (CRSs). This way, according to the ECJ, these eight Member States violated not only the external competence of the EU, but also the right of establishment set down in the EC Treaty, since they permitted the US to refuse traffic rights to air carriers designated by a Member State if a substantial part of the ownership and effective control of those carriers was not vested in that Member State.\textsuperscript{64}

\textsuperscript{57} See the first and the eighth recitals of the Preamble to Regulation 95/93.
\textsuperscript{58} Button, \textit{supra} note 1, at 69.
\textsuperscript{59} Havel, \textit{supra} note 3, at 9.
\textsuperscript{60} Havel, \textit{supra} note 3, at 9. “Cabotage” is generally defined as the “carriage of passengers, cargo and mail between two points within the territory of the same nation for compensation or hire”: see W.M. Sheenan, \textit{Air Cabotage and the Chicago Convention}, 63 Harvard Law Review, 1157 (May 1950).
\textsuperscript{62} Chang and Williams, \textit{supra} note 28, at 129.
\textsuperscript{63} Bashor, \textit{supra} note 6, at 2.
\textsuperscript{64} Bashor, \textit{supra} note 6, at 4; Dempsey, \textit{European}, \textit{supra} note 39, at 88–89; Abeyratne, \textit{supra} note 61, at 30–31; Bartlik, \textit{supra} note 40, at 89–93; Masutti, \textit{supra} note 3, at 151; A.K-J. Tan, \textit{Liberalizing Aviation in the Asia-Pacific Region: The Impact of the EU Horizontal Mandate},
In light of these ECJ judgments, all Member States were required to rectify the bilateral agreements they had made with the US, even though the ECJ did not indicate how this was to be done.

What can be noted is that even in the field of external competence in air transport, EU institutions adopted a progressive approach.\(^{65}\)

In the aftermath of these judgments, the European Commission issued two Communications. In the first Communication\(^{66}\), the European Commission asked to Member States to ensure compliance with the judgments at the earliest possible date, and to refrain from taking international commitments of any kind in the field of aviation before having clarified their compatibility with EU law. As a first step forward in this area, the Commission urged the EU Council to agree a mandate for negotiations to replace the existing bilateral agreements with the US with an agreement at the EU level.\(^{67}\) On February 26, 2003, the EU Commission published the second Communication\(^{68}\), which concerns relations between the EU and third countries in the field of air transport. In this Communication, the Commission explained how it intended to proceed with conducting external relations in this field.

On June 5, 2003, the EU Council gave a double mandate to the Commission to open negotiations with the US on an Open Aviation Area, from one side, and to open negotiations with third countries on the replacement of the nationality clauses on the other side.

2.6 The 2007 EU-US Agreement.

As far as the first mandate is concerned (also known as the “vertical mandate”), the EC and US delegations were involved in two consecutive sets of negotiations between October 2003 and March 2007.\(^{69}\)

On April 30, 2007, the US and EU signed an air transport agreement that aimed to supersede the existing bilateral agreements between the 27 EU Member States and the US.\(^{70}\) The Agreement entered into provisional application on

\(^{31}\) Air &Space Law, 443–444 (November 2006); Zunarelli and Comenale Pinto, supra note 26, at 12; Zunarelli, supra note 48, at 13.


\(^{66}\) Communication from the Commission, supra note 50.

\(^{67}\) Communication from the Commission, supra note 50, at 63–70.

\(^{68}\) Communication from the Commission on relations between the Community and third countries in the field of air transport, February 26, 2003, COM(2003), 94 final.

\(^{69}\) Havel, supra note 3, at 66; Balfour, supra note 26, at 455; Tan, supra note 64, at 443–447.

\(^{70}\) Havel, supra note 3, at 66; Balfour, supra note 26, at 455; Masutti, supra note 3, at 159; Button, supra note 1, at 64; D.E. Pitfield, The assessment of the EU-US Open Skies Agreement: The counterfactual and other difficulties, 15 Journal of Air Transport Management, 308 (2009). It has been pointed out that since 1995 attempts to get the EU and the US – which are the two main aviation regions of the world – together in a so-called Transatlantic
March 30, 2008. Article 21, paragraph 3 of the Agreement, entitles each party to suspend certain rights if no second stage agreement has been reached by November 30, 2010. In accordance with Article 21, the European Commission began second stage negotiations with the US in May 2008. The Council reviewed the progress made in December 2009 and also in March 2010. After eight rounds of second stage negotiations, an agreement was reached on March 25, 2010, on a draft Protocol to amend the 2007 EU-US Agreement. The aims of the Protocol are: launching a process towards additional foreign investment opportunities in the airline industry, further opening up market access, including further access by EU airlines to US Government financed air transportation, and further strengthening the regulatory cooperation in all fields of aviation policy, particularly on addressing the environmental impact of aviation. On June 24, 2010, representatives from the US and EU formally signed the “second-stage” Protocol to the 2007 US-EU Air Transport Agreement in Luxembourg.

The Protocol strengthens the cooperation between the two parties, not only through the Joint Committee established under the first Agreement but also by addressing some thorny issues, such as those related to the environment, social protection, competition, and security. Moreover, the Protocol gets rid of the suspension clause set down in Article 21, paragraph 3, of the first Agreement. The parties have, instead, failed to reach an agreement on concessions of investments rights due to the reluctance of the US to modify its current 25% cap on foreign ownership in US air carriers. A limited compromise was reached, as Article 6, paragraph 2, of the Protocol envisages that the EU “shall allow majority ownership and effective control of their airlines by the United States or its nationals, on the basis of reciprocity, upon confirmation by the Joint Committee that the laws and regulations of the United States permit majority ownership and effective control of its airlines by the Member States or their nationals.”

The 2007 EU-US Agreement is an “open sky” agreement, which is different from a “common aviation area” agreement. Therefore, the 2007 Agreement lays down unlimited third and fourth freedom rights, and fifth freedom rights on beyond routes. As regards pricing, Article 13, paragraph 1, sets down that prices for air transportation services, pursuant to the Agreement, shall be established

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73 Balfour, supra note 26, at 455.
freely and shall not be subject to approval nor be required to be filed, except as provided for in paragraph 2 of the same Article. Seventh freedom rights are more restricted.\textsuperscript{74}

The most important provision in the 2007 EU-US Agreement allows any EU airline to operate between any point in the US and any point in the EU.\textsuperscript{75} Cabotage, however, is not covered by the Agreement.\textsuperscript{76}

2.7 The “horizontal mandate” and Regulation 847/2004.

With regard to the second mandate (also known as the “horizontal mandate”)\textsuperscript{77}, the EU Council authorized the Commission to carry out simultaneous bilateral treaty revisions with non Member States (apart from the US) to bring the air services agreements concluded between these States and the EU Member States into compliance.\textsuperscript{78} As a result, in 2004 the European Parliament and the Council adopted Regulation 847\textsuperscript{79}, which represents the new legal framework of EU air services negotiations as it allows the EU Member States to exercise the “horizontal mandate.”\textsuperscript{80} In other words, Regulation 847/2004 allows Member States to enter into negotiations with third countries to stipulate new air service agreements, or to modify the existent air service agreements, their

\textsuperscript{74} See Balfour, supra note 26, at 455–456; Masutti, supra note 3, at 161.
\textsuperscript{75} Balfour, supra note 26, at 456; Pittfield, supra note 70, at 308.
\textsuperscript{77} Generally, horizontal agreements can correct existing air service agreements through two different methods. Firstly, bilateral negotiations between each Member State concerned and its partners can operate. In this option, each bilateral air service agreement has to be amended separately. Secondly, it is possible to negotiate single horizontal agreements, through which the Commission acts on a mandate of the EU Member States. This method has the advantages of simplicity, costs, and speed. Indeed, according to this latter approach, between June 2003 and December 2008 it has led to changes with 37 partner States and one regional organization with 8 Member States representing 651 bilateral agreements. With the former method, 132 bilateral agreements with 60 third countries have been amended: see http://ec.europa.eu/transport/air/international_aviation/external_aviation_policy/horizontal_agreements_en.htm.

Currently, there are 46 such horizontal aviation agreements between the EU and partner countries worldwide. To date, more than 900 bilateral Air Service Agreements have been modified: see EU, Press Releases, EU and Indonesia sign deal that will boost air transport (June 30, 2011).
\textsuperscript{78} Havel, supra note 3, at 66; P. Van Fenema, EU Horizontal Agreements: Community Designation and “free rider” clause, 31 Air & Space Law, 172 (2006); Balfour, supra note 26, at 448–449; Tan, supra note 64, at 447.
\textsuperscript{80} See Abeyratne, supra note 61, at 31. See also Masutti, supra note 3, at 162–164.
annexes, or any other related bilateral or multilateral arrangement that falls partly within the competence of the EU.\footnote{Article 1.}

Since 2004, the European Union has proposed to launch targeted negotiations to achieve comprehensive air transport agreements with selected partners all over the world, with the aim of strengthening and promoting the European industry and ensure fair competition on one side, and to seek to reform of international civil aviation on the other side.\footnote{See Communication from the Commission, Developing an EU civil aviation policy towards Brazil, COM(2010) 210, final, at 1.1 (May 5, 2010).} In light of this, the EU has modified existent agreements and concluded new agreements.

### 2.8 Some recent air transport agreements between the European Union and third parties.

#### 2.8.1 The EU and Canada Agreement.

Recently, a new agreement on air transport has been concluded between the EU and Canada. The Agreement was signed on November 30, 2008, in London, and was politically endorsed by the EU-Canada summit on May 6, 2009. The Agreement allows airlines to operate direct flights to Canada from anywhere in Europe, and it removes all restrictions on routes, prices, or the number of weekly flights between the two countries involved. Other traffic rights will be liberalized gradually. Moreover, the EU and Canada will cooperate closely in the fields of security and the environment.\footnote{EU Press release, EU and Canada sign Air Transport Agreement, IP/09/1963 (December 17, 2009). See also Havel and Sanchez, supra note 30, at 22 ff.}

#### 2.8.2 The EU and Brazil negotiations on several agreements.

A strong cooperation between the EU and Brazil in the field of civil aviation has developed since 2007. An agreement on certain aspects of air services (“Horizontal Agreement”) between the EU and Brazil was negotiated in early 2009.\footnote{European Commission, Proposal for a Council Decision on the signature of the Agreement on certain aspects for air services between the European Community and the Federative Republic of Brazil, August 3, 2009, COM(2009) 411 final. On October 9, 2009, the Council authorised the signature of the agreement.} In December 2009, negotiations of a bilateral agreement on civil aviation safety between the EU and Brazil began. An EU-Latin America civil aviation summit was organized jointly between the EU and Brazil in Rio de Janeiro on May 24–26, 2010.\footnote{Communication from the Commission, supra note 82, at 1.2.} Many important issues were addressed during the summit, such as the abolition of barriers to air transport in the EU and Latin America.\footnote{EU Press release, Vice-President Kallas leads high-level delegation to the EU-Latin America civil aviation summit, IP/10/591 (May 21, 2010).}
At the summit, European Commission Vice-President Siim Kallas together with Brazil’s Minister of Defence Mr Nelson Jobim, and Mr José Blanco, Transport Minister of Spain, announced that the negotiations on two important agreements between Brazil and the EU had been finalized. In particular, negotiations focused on an agreement on certain aspects of air services (the above mentioned “Horizontal Agreement”) and an agreement on aviation safety.  

Moreover, as for air safety, on May 21, 2010, the European Commission put forward a proposal for a Council Decision on the signature of an agreement between the EU and Brazil. The EU and Brazil will cooperate also in the specific field of the environment to mitigate the climate change impact of aviation.

In general, at the same summit, two “joint declarations” between the EU and Latin America aviation leaders were signed. These commitments will lay the foundation for closer cooperation in the field of civil aviation between the EU and Latin America.

On March 18, 2011, the European Commission vice-President Siim Kallas, responsible for transport, announced that negotiators from the EU and Brazil have initialed a comprehensive agreement on air transport services. This breakthrough in EU-Brazil negotiations is significant for the further development of the strategic partnership between the countries involved. According to the Agreement, all EU airlines will have the ability to operate direct flights to anywhere in Brazil from anywhere in Europe. The Agreement will remove all restrictions on routes, prices, and the number of weekly flights between the countries involved. Another key point of the agreement lies in the close cooperation between the EU and Brazil on a number of areas, including competition law, safety, security, environment, air traffic management, consumer protection, and social and labour issues.

87 The horizontal agreement modernizes the existing legal framework and establishes full legal certainty for all air carriers operating flights between the two markets (the EU and Brazil) involved. The aviation safety agreement will expand the cooperation between the EU and Brazil in all areas of safety facilitating trade in aeronautical products and services. The two agreements were expected to be signed at the EU-Brazil Summit in Brasilia on July 14, 2010 (see EU Press release, EU and Latin America agree to Strengthen cooperation in civil aviation, IP/10/608 (May 25, 2010)), but they were not. However, at the summit two joint declarations between the EU and Latin America aviation leaders were signed: see infra.


89 Communication from the Commission, supra note 82, at 3.3.

90 EU Press release, IP/10/608, supra note 87.

91 EU Press release, Breakthrough in EU-Brazil negotiations on far-reaching aviation agreement, IP/11/327 (March 18, 2011).

92 EU Press release, IP/11/327, supra note 91.
2.8.3 The EU and Turkey negotiations.

Among the most recent initiatives between the EU and third countries, it is important to note that on March 25, 2010, the European Union and Turkish authorities initiated an aviation agreement with the aim to remove nationality restrictions in the bilateral air service agreements between EU Member States and Turkey. The Agreement allows any EU airline to operate flights between any EU Member State and Turkey, providing a bilateral agreement with Turkey exists and traffic rights are available. The Agreement opens the way for further cooperation between the EU and Turkey in the field of civil aviation, including in the areas of aviation safety, security, air traffic management, technology, research and industrial cooperation, consumer and environment protection, and competition.\footnote{EU, Press Releases, \textit{EU and Turkey initial civil aviation agreement}, IP/10/369 (March 25, 2010).}

2.8.4 The EU and Mexico Agreement.

Another very recent aviation agreement was signed on December 15, 2010, between the EU and Mexico. The Agreement aims at removing nationality restrictions in the bilateral air services agreements between the countries involved.

Like others, this horizontal Agreement allows any EU airline to operate flights between any EU Member State and the third country, in this case Mexico, where a bilateral agreement with that country exists and traffic rights are available.\footnote{EU, Press Releases, \textit{EU and Mexico sign civil aviation agreement} (January 5, 2011).}

2.8.5 The EU and Russian negotiations. The Siberian overflight charges issue.

Currently a very small number of third countries, among which Russia, still do not accept the new European Union legal framework\footnote{We obviously refer to the current European Union legal framework, derived from the liberalization process which started in the EEC in the early 1990s, when a single European aviation market was created and when the Open Skies rulings of 2002 were pronounced by the ECJ (as we have already seen above in this paragraph 2).}, according to which,\textit{ inter alia}, bilateral air service agreements between an individual Member State and a non-EU country have to include an “EU designation clause” recognizing that the terms apply equally to all EU airlines, and not just the airlines of that Member State.\footnote{EU, Press Releases, \textit{Air transport: Commission launches infringement procedures against France, Germany, Austria and Finland over agreements with Russia on Siberian overflights}, IP/10/1425 (October 28, 2010).} Most agreements with non-EU countries have complied with this legal framework, but Russia fails to recognize that all EU carriers must be treated equally, and that the terms of any bilateral agreement must include an “EU designation clause” and apply to all.
Moreover, EU airlines are obliged to pay Siberian overflight charges for routes to many Asian destinations. These charges, imposed by Russia in the bilateral agreements with Member States through mandatory commercial agreements between EU airlines and Aeroflot, are not related to normal payments for Air Traffic Control services\(^97\) and are clearly in breach of Article 15 of the Chicago Convention, according to which “no charge shall be imposed by any Contracting State solely for the right of transit over or entry into or exit from its territory of any aircraft of a Contracting State or persons or property thereon.”\(^98\) Furthermore, the charges seem to be incompatible with EU competition laws, as airlines are forced into concluding a commercial agreement with a direct competitor.

In short, the bilateral aviation agreements between Russia and Member States hinder competition, breach EU rules on freedom of establishment\(^99\), and provide a basis for Siberian overflight charges, which are illegal.

This is why the European Commission has launched infringement procedures against the Member States involved.\(^100\) Essentially, the Commission has not activated Article 15 of the Chicago Convention, as the EU is only an “observer” and not a Party to the ICAO.\(^101\)


\(^98\) In 2004, Russian government submitted a commitment to the European Commission, according to which the system of overflight payments would be abolished by 2013. An agreement (“Agreed Principles”) between the European Commission and the Russian Federation on the abolishment of overflight payments by 2013 was initialled in 2006 at the EU-Russia summit held in Helsinki, but to date the agreement was adopted only by the EU Council in 2007. In 2005, the Commission proposed a framework to enhance cooperation with the Russian Federation in the field of aviation (Communication from the Commission, supra note 97), but it could start after the implementation of the “Agreed Principles”: see http://ec.europa.eu/transport/air/international_aviation/country_index/russia_en.htm.

\(^99\) These illegalities need to be addressed in the context of a future EU-Russia air transport agreement: see Communication from the Commission, supra note 97, at 3.2.1.

\(^100\) From October 28, 2010, to May 19, 2011, the European Commission launched infringement procedures against 26 Member States. The last infringement procedure was launched against Romania, and the Commission is now assessing the compliance with EU law of the remaining Member State’s bilateral aviation agreement with Russia: see EU, Press Releases, Air transport: Commission launches infringement procedures against Romania over agreements with Russia on equal treatment of EU airlines, IP/11/586 (May 19, 2011).


As concerns the most recent developments on the relationship between the EU and ICAO,
3. Effects of European Union liberalizations.

3.1 Benefits: a) on intra-EU market.

It has been argued that the effects of EU liberalizations were less significant than in the US, because in the former there has been no dramatic decline in fares, no spectacular disappearances of major carriers, and no substantial penetration of traditional domestic markets by foreign competitors.\textsuperscript{102} As a matter of fact, recent statistics and data show that European liberalizations have shifted European Union air transportation.

According to IATA, only 17\% of international air traffic is operated in a deregulated environment, and full liberalization to the eighth freedom was achieved only within the EU.\textsuperscript{103}

The opening up of the market in the field of air transport has led to more efficiency and lower costs. Indeed, the number of cross-border intra-EU routes increased by 220\% between 1992 and 2009, and intra-EU routes with more than two competitors increased by 415\% (from 93 to 479) during the same period.\textsuperscript{104} Today low-cost carriers represent over a third of total intra-EU scheduled capacity.\textsuperscript{105} As Vice-President of the European Commission has recently noted, the EU air transport liberalization has led to concrete benefits for businesses and consumers, since the frequency of flights has increased by 78\%, while the standard cost of flights has decreased by 66\%. At the same time, connections to islands or remote territories are ensured through public service obligations.\textsuperscript{106}

Air traffic in Europe has tripled between 1980 and 2000, and if demand for air traffic continues in line with current trends, this will double again in 20 years.\textsuperscript{107}

\begin{footnotesize}
\textsuperscript{102} See Gillen, supra note 43, at 11.
\textsuperscript{103} IATA, Airline Liberalization, Geneva, at 16 (2007).
\textsuperscript{104} D. Calleja, Aviation in the European Union – An overview, Speech given at the EU-Latin America Civil Aviation Summit, held in Rio de Janeiro on May 24–26, 2010. The data confirms those contained in the Communication from the Commission, A sustainable future for transport: Towards an integrated, technology-led and user friendly system, COM(2009) 279 final, at 3, No. 8 (June 17, 2009). More recently, see EU, Money where it matters – how the EU budget delivers value to you, MEMO/11/469, at 4 (June 29, 2011).
\textsuperscript{105} Communication from the Commission, COM(2009) 279 final, supra note 104, at 3, No. 8.
\textsuperscript{107} See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, An action plan for airport capacity, efficiency and safety in Europe, COM(2006) 819 final (January 24, 2007), where it is pointed out that the liberalization of the European air transport sector is a
\end{footnotesize}
Of all the different modes of transport, air transport has shown the largest increase over the last twenty years by far. Expressed in passenger/kilometres, air traffic has increased by 7.4% a year on average since 1980, while the traffic handled by the airports of the Fifteen has shown a five-fold increase since 1970.\textsuperscript{108}

In 2005, the total number of passengers transported by air in the EU25 rose to more than 700 million, or 8.5% when compared with 2004. Passenger numbers rose by 8.8% in 2004 and by 4.9% in 2003.\textsuperscript{109}

The total number of passengers transported by air in the EU27 rose to 793 million in 2007, or 7.3% when compared with 2006. In 2006, passenger numbers in the EU27 rose by 4.7%.\textsuperscript{110}

Due to the economic crisis, the total number of passengers transported by air in the EU27 rose to 798 million in 2008, or by just 0.6% when compared with 2007. This was the lowest annual growth rate in the EU since 2002.\textsuperscript{111}

From the first part of 2009, monthly data shows that the total number of passengers in the EU27 who were transported by air came to 343 million. In the first quarter of 2008–2009, there was a decrease by 13.79%, while the number of passengers fell by 7.4% in the second quarter of the same period.\textsuperscript{112} In the last

\textsuperscript{110} Eurostat, \textit{Air transport in the EU27, Air passenger transport up by 7% in 2007}, News release, 6/2009 (January 13, 2009). In 2007, the highest numbers of passengers were registered in the United Kingdom (217 mn, +3%), Germany (164 mn, +6%), Spain (164 mn, +9%), France (120 mn, +6%) and Italy (106 mn, +11%). Detailed figures of the year 2007 have been published in a report by Eurostat, the Statistical Office of the European Communities, on air transport in the EU27 in 2007 (Eurostat, \textit{Statistics in Focus 1/2009, Air passenger transport in Europe in 2007}).
\textsuperscript{111} Eurostat, \textit{Air transport in the EU27, Air passenger transport up by 0.6% in 2008. Declining trend through the year}, News release, 174/2009 (December 4, 2009). Quarterly data for 2008 helps to evaluate the impact of the economic crisis on air transport, and shows a declining trend through the year. Passenger numbers rose by 6.1% in the first quarter of 2008, compared with the same quarter of 2007, and by 3.0% in the second quarter, then they fell by 0.4% in the third quarter and by 5.6% in the fourth quarter. In the EU27, the number of passengers on extra-EU flights rose by 4.2% in 2008, compared with 2007, to 282 million. The number of passengers decreased by 0.5% to 345 million on intra-EU flights, and by 2.9% to 171 million on national flights. These figures are published in a report by Eurostat, the Statistical Office of the European Communities, on air transport in the EU27 in 2008 (Eurostat, \textit{Statistics in Focus 91/2009, "Air passenger transport in Europe in 2008"}).
\textsuperscript{112} Eurostat, \textit{Passenger air transport – monthly data for the first half of 2009}, April 15, 2010.
quarter of 2009, the situation did not change. However, in the second half of the year, there were signs of recovery. Recent data indicates that compared to 2008, 2009 witnessed a decrease of 6% in the total number of air passengers transported by air in the EU27.

In 2009, in terms of on intra-EU flights, the number of passengers decreased by 8% to a total of 318 million. On extra-EU flights there was a 4% decrease to a total of 271 million. Finally, on national flights there was a 5% decrease to a total of 162 million.\textsuperscript{113}

As far as airports are concerned, European airports directly employ 156,000 staff, and airport sites play host to a total of 1,200,000 employees. Airport-related jobs in Europe amount to €59 billion in annual contribution to GDP.\textsuperscript{114}

Moreover, the demand for new airplanes in Europe is expected to go up to 7190 between 2010 and 2029. In the same period, there will be a higher demand for new airplanes in the Asia Pacific Region and in North America, which will grow to 10320 and 7200 respectively.\textsuperscript{115}

The growth of the European air transport since 1995 has boosted the European Union GDP by 4%.

The expected growth on the GDP of the 27 European countries by 2025 is 1.8%.\textsuperscript{116} In terms of GDP, the European economy is expected to increase by 1.9% between 2010 and 2029, while air traffic (RPK) is expected to increase by 4.4%.\textsuperscript{117}

In terms of Revenue Passenger Kilometres (RPKs), the Airline Passenger Traffic within Europe experienced a steady growth between 2001 (449,3 billion) and 2008 (660,5 billion), while, in 2009 the traffic decreased slightly by 35 billion compared to that in 2008, and reached 624,9 billion. It is expected to increase by about 4.1% between 2010 and 2029, reaching 1.409,1 billion in 2029.\textsuperscript{118}

Overall, it can be argued that the internal air transport market has become an industrial reality and is an engine for growth. Restructuring and integration are well advanced, and the market has been broadened with the multiplication of routes served in Europe, the entry of low-cost carriers, and the development


\textsuperscript{114}O. Jankovec, \textit{Removing barriers for air transport & unleashing the power of airports}, Speech gave at the EU-Latin America Civil Aviation Summit, held in Rio de Janeiro on May 24–26, 2010.


\textsuperscript{116}The Economic Catalytic Effects of Air Transport in Europe, Eurocontrol Experimental Centre Bretigny Sur Orge Cedex (2005). Internationally, IHS/Global Insight forecasts an average 3.5% growth in the world GDP for the next three years: ICAO News Release, \textit{ICAO medium-term forecast points to continued industry growth through 2013, PIO 15/11} (July 19, 2011).

\textsuperscript{117}Boeing, \textit{supra} note 115, at 14.

\textsuperscript{118}Boeing, \textit{supra} note 115, at 19.
of regional airports. The internal market has brought considerable benefits to customers.\textsuperscript{119} The EU is a major world player both in air transport equipment and aviation services.\textsuperscript{120}

\textit{b) on air cargo.}

European Union liberalizations had a significant impact in the air cargo industry too. In the EU, although the direct effects of liberalization were considerably less when compared to the US cargo deregulation of 1977, due to the fact that air cargo in the internal market plays a limited role compared to other transport modes, such as rail and road, the EU reforms represented an important point for set wider air transport liberalizations. Open skies agreements fostered air cargo services in bilateral routes and facilitated hub-and-spoke operations.\textsuperscript{121} Intra-Europe air cargo grew by 3.7\% in 2007.\textsuperscript{122} Air cargo (RTK) will increase by 5\% between 2010 and 2029.\textsuperscript{123}

\textit{c) on EU-third countries markets.}

With regard to the 2009 EU-Canada Agreement, 2008 data shows that more than 9 million people travelled between the two countries. When the Agreement was signed, eight EU Member States did not have yet an agreement with Canada, and even the Member States already had one, it was not as liberal as the 2009 Agreement as it did not offer full access to the respective markets. The Agreement is expected to bring economic benefits of at least €72 million and create more than 1000 direct jobs in the first period. The number of passengers in the open aviation area between the EU and Canada is expected to increase by 3.5 million in the first few years.\textsuperscript{124}

As far as the EU and Brazil negotiations are concerned, recent data indicates that 4.4 million passengers travel each year between the EU and Brazil, and there are high growth rates of air traffic between the EU and South America.\textsuperscript{125}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{121} OECD, \textit{Liberalization of Air Cargo Transport}, document DSTI/DOT(2002)1/REV1, Paris (2002).
\item \textsuperscript{122} Boeing, \textit{World Air Cargo Forecast 2008–2009}.
\item \textsuperscript{123} Boeing, \textit{supra} note 115, at 14.
\item \textsuperscript{124} EU Press release, IP/09/1963, \textit{supra} note 83.
\item \textsuperscript{125} Communication from the Commission, \textit{supra} note 82, at 1.2. See also EU Press release, \textit{EU to negotiate an ambitious air transport agreement with Brazil}, IP/10/1342 (October 17, 2010); EU Press release, IP/11/327, \textit{supra} note 91.
\end{enumerate}
\end{footnotesize}
Data published by the Brazilian Civil Aviation Authority (ANAC) confirm that the air transport market is growing to and from Brazil. Over the last five years there was an increase in the number of passengers carried, number of the served cities, and rate of frequencies per city (638 in 2005 to 771 in 2008). Moreover, new routes have been established in 2008–2009.\(^{126}\)

According to the European Commission, an agreement between the EU and Brazil concerning the gradual opening of market access would bring economic benefits to air carriers, airports, passengers, shippers, tourism, and the economies of the countries involved.\(^{127}\)

A recent study, undertaken on behalf of the European Commission, shows that opening aviation markets between the EU and Brazil could generate up to €460 million consumer benefits per year.\(^{128}\) The study indicates other economic benefits of an agreement between the EU and Brazil. Firstly, airlines would be able to expand their services due to the removal of bilateral capacity and frequency restrictions. Secondly, competition would be fostered because of the removal of price controls. Thirdly, airlines will be able to offer wider network connectivity to their passengers due to the removal of code share restrictions. Fourthly, new entrants would be enabled to introduce new services in the relevant market thanks to the removal of the limitation on the number of designated airlines. Finally, air cargo in the two markets would benefit from an agreement.\(^{129}\)

Another important consequence of such an agreement would be the reform of the regulatory framework governing air services between the EU and Brazil.\(^{130}\)

Notwithstanding, it will be safeguarded by the principle of reciprocity, which is a cornerstone in the Brazilian Aeronautical Code and special aviation laws and regulations.

Thanks to this legal framework, it is likely that reciprocal benefits will be achieved, at a bilateral level, in a modernized regulatory framework between the EU and Brazil.\(^{131}\) This will make it possible to reach a “normalization” of the international aviation industry, because the agreement between them will gradually

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126 S.P. Vieira, *Removing Barriers for Air Transport*, Speech gave at the EU-Latin America Civil Aviation Summit, held in Rio de Janeiro on May 24–26, 2010.

127 Communication from the Commission, *supra* note 82, at 1.4. See also EU Press release, *European Commission proposes to open the aviation market with Brazil*, IP/10/546 (May 6, 2010); EU Press release, IP/10/1342, *supra* note 125.

128 Booz & Co, *The Economic Impacts of Opening Aviation Markets between the EU and Brazil* (June 2009), online at http://ec.europa.eu/transport/air/international Aviation/country_index/study_brazil_EN.

129 Booz & Co, *supra* note 128. The economic benefits as indicated above are summarized in the Communication of the Commission cited *supra* note 82, at 3.2.

130 Communication from the Commission, *supra* note 82, at 1.4.

131 Communication from the Commission, *supra* note 82, at 3.3.
remove outdated restrictions on prices and traffic rights and will facilitate cooperation between the authorities, even for international matters.\textsuperscript{132}

More generally, the number of passengers within the Latin America air transport area doubled between 1997 and 2008. This market is forecast to be among the fastest growing in the world over the next 20 years. According to the European Commission, the number of passengers travelling between these two markets will exceed 20 million each year.\textsuperscript{133}

With regard to the EU-Turkish civil aviation cooperation, recent data indicates that passenger traffic between the EU and Turkey exceeded 25 million people in 2008, making Turkey the third largest external aviation market for the EU in number of passengers, after the United States and Switzerland.\textsuperscript{134}

The recent EU-Mexico civil aviation agreement, signed in December 2010, also aims to strengthen relations and encourage traffic between the countries involved.\textsuperscript{135}

As concerns the EU-Russian aviation market, it has been pointed out that Russian international passenger traffic is largely concentrated on European destinations, and further growth is forecast. Currently, about 75\% of all Russian passenger traffic is directed toward European destinations.\textsuperscript{136}

Recent data indicates that air traffic has risen significantly in Russia. According to the Russian Federal Aviation Agency, the first quarter of 2010 showed a 33.5\% increase following a 9.4\% drop in Russian domestic air traffic during 2009.\textsuperscript{137}

The growth potential of the Russian market is widely recognized. Along with China, Russia is one of the largest “high potential” tourist markets in the world.\textsuperscript{138}

According to a study carried out on behalf of the Commission, a fully open market between the EU and Russia could create benefits of up to €680 million per annum for both sides, by virtue of job creation in the aviation industry, expenditure by tourists and travelers, and support services to the wider aviation industry.\textsuperscript{139}

Another significant economic benefit would derive from the phasing-out of Siberian overflight payments. As a consequence, substantial savings would be

\begin{itemize}
  \item \textsuperscript{132} EU Press release, IP/11/327, supra note 91.
  \item \textsuperscript{133} EU Press release, IP/10/591, supra note 86.
  \item \textsuperscript{134} EU, Press Releases, IP/10/369, supra note 93.
  \item \textsuperscript{135} EU, Press Releases, EU and Mexico, supra note 94.
  \item \textsuperscript{136} Communication from the Commission, supra note 97, at 1 and 3.
  \item \textsuperscript{137} Boeing, supra note 115, at 17.
  \item \textsuperscript{138} Communication from the Commission, supra note 97, at 3.1.
  \item \textsuperscript{139} Communication from the Commission, supra note 97, at 4.1.
\end{itemize}
made by EU airlines and it would create a more liberal environment for expanding services to the Far East over Russia would be created.140

\[ \textit{d) on the 2007 Open Aviation Area between the US and the EU.} \]

As regards the Open Aviation Area between the US and the EU, the 2007 EU-US Air Transport Agreement represented a significant change in transatlantic aviation relations, providing broad new commercial freedoms for airlines and a comprehensive framework for regulatory cooperation with the United States on a wide range of issues. The Agreement created substantial benefits for airlines, airports, and air transport users in Europe.141

A 2007 report analysed the potential economic benefits from establishing the agreement.142 According to the Report, the removal of restrictions imposed by the bilateral agreement system should result in new routes and market entrants, generating 26 million additional passengers over five years, and this represents an estimated increase in growth of 6.4%. The removal of output constraints will be worth – in terms of consumer surplus – between €6.4 and €12 billion over the five year period. Moreover, it will be created 72,000 jobs because additional demand requires additional resources. Economic benefits will also concern the cargo market, which should increase between 100,000 and 170,000 tonnes of freight. As a consequence, between five and nine-thousand new jobs will be generated.

The Open Aviation Area aims at extending full freedoms of the air to both parties, removing restrictions on investment by foreign entities and permitting wet leasing of aircraft under non discriminatory and transparent conditions.143 Likewise, cabotage and investment rights should be extended within EU and US carriers and within the EU Member States to US carriers.144

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140 Communication from the Commission, \textit{supra} note 97, at 4.1.
141 European Commission, \textit{Explanatory Memorandum, supra} note 71, at 1.
143 Booz, Allen, Hamilton, \textit{supra} note 142, at iii.
144 Booz, Allen, Hamilton, \textit{supra} note 142, at xii.
e) on the implementation of the freedom of movement of EU citizens within the European Union.

It is already well-known ever since the adoption of the Maastricht Treaty that the European Union has superseded the European Economic Community, with the consequence that the Community system has become more political than it previously was.

In this respect, the European Commission significantly points out that “[i]n a modern society connectivity is the basis for economic competitiveness, social and regional cohesion and cultural development”, with the consequence that “not only do the economic and commercial needs of globalization drive the growing demand for air transport,” but such demand is also “boosted by evolving societal and cultural needs.”

In this new political scenario, thanks to some factors – the broadening of the European Union’s membership, the establishing of EU citizenship, which has allowed every person holding the nationality of a Member State, without replacing national citizenship (Article 20, TFEU), the freedom of establishment (Articles 49 ff, TFEU) and the freedom of movement of persons, goods, services, and capital (ex Article 26, § 2, and Articles 45 ff, TFEU) within the Union – air transport became the most important method to make effective the exercise of these freedoms and rights. Moreover, we can say that nowadays air transport is decreasingly reserved to upper-class people (just like it was until the liberalization Era), but it is more open to everyone (thanks to low cost flights).


148 See European Commission, supra note 146, at 1.


150 See Communication from the Commission, COM(2011) 174 final, supra note 147, at 2.1, according to which “[t]ravelling by air is no longer perceived as a luxury, but has become a necessity to meet business needs and a self-evident right for European citizens.”
3.2 Drawbacks.

3.2.1 Obstacles to further development of liberalization policies within the EU and with its third country partners.

Air transport liberalization policies have to take into account drawbacks stemming from their implementation.

Firstly, the quality of the air transport growth is negatively affected in some respects, such as: delays due to airspace congestion; crowded airports and insufficient contingency planning in case of severe bad weather; stricter security measures; bigger airports with longer distances which imply, for passengers, risks in retrieving luggage and missing flights; and some commercial practices for air carriers which may negatively impact upon passengers (such as the so-called “no show policy” or practices linked to the mishandling of luggage that show loopholes and deficiencies in the application of current legislation).

Secondly, with specific regard to the recent EU-US liberalization initiatives (despite the fact that following considerations can be generalized, that is, extended to many other Open Skies agreements), airlines operating on EU-US services will face additional competition and pressure costs.

By liberalization policies, there has been a significant increase in the number of low cost airlines. Indeed, the EU currently has twenty low-cost carriers representing 40.2 % of the internal EU market. In 1990, there were nine only: see EU, MEMO/11/469, supra note 104, at 4. See also M.E. Levine, Airport Congestion: When Theory Meets Reality, 26 Yale Journal on Regulation, 58, at 59 (2009), who states that air transport deregulation “is one of the most successful policy changes in the last fifty years”, as “flying from a luxury to an accessible necessity, bringing families and the country together, fostering economic growth, and living ordinary people access to a wealth of experiences previously reserved for the upper-middle class”. As “[t]oday, the universe is global”, some Authors point out that “[b]y shrinking the planet, aviation is a principal means of intermingling and integrating disparate economies and cultures, stimulating social and cultures cross-fertilization, economic growth and diversity in an increasingly inter-dependent global environment”: see P.S. Dempsey – L.E. Gesell, Airline Management, supra note 6, at 2. See also Havel and Sanchez, supra note 30, at 4; K.G. Debbage, Airport runway slots. Limits to grow, in 29 Annals of Tourism Research, 933 ff. (2002); D. Nikomborirak, Strategic Directions for ASEAN Airlines in a Globalizing World. Competition and Consumer Protection Policy. Final Report, at 29 (October 2003), who states that “[a]ir transport liberalization and the emergence of low cost airlines have made air travel much more affordable”; IATA, The Economic Impact of Air Service Liberalization, at 3 (May 30, 2006); ICAO, A36-WP/16, supra note 32, at paragraph 3.6; ICAO, A37-WP/5 EC/1, supra note 6, at paragraph 3.3; J.K. Brueckner and E. Pels, Institutions, Regulation, and the Evolution of European Air Transport, Working Paper, VU University Amsterdam, Faculty of Economics, Business Administration and Econometrics, Serie research Memoranda, No. 10, at 1 (June 2003).

152 Booz, Allen, Hamilton, supra note 142, at iii.
Thirdly, States lose control on air transportation as a consequence of the passage from the reciprocal designation of aircraft between two States (according to the old bilateral system) to the EU-US Open Skies agreement.\textsuperscript{153}

Fourthly, it is likely that there will be a significant increase of airport congestion due to the growth in the number of air passengers, which in turn will generate increased pollution.

Fifthly, the re-regulation process, consequent to liberalization policies, could represent a drawback giving rise to over-regulation, excess of bureaucracy, lack of transparency and other similar phenomena belonging to the past when the main actors in the field of air transport were national governments within a monopolistic policy. In that sense, regionalism could “weight” (or even eliminate) liberalization process benefits.

Sixthly, the potential effects of the EU-US Agreement (which sets down no provision on the subject of slot allocation\textsuperscript{154}) could come to naught because of the lack of slots in most EU international airports (including those long under Open Skies agreements) which are allocated according to Regulation 95/93 whose cornerstone is the grandfather’s rule.\textsuperscript{155} In contrast, in the US there are no explicit slot allocations\textsuperscript{156} (apart from at Washington National\textsuperscript{157}) since the \textit{High Density Rule} was phased out.\textsuperscript{158}

Furthermore, the US protectionist stance on airline ownership makes it difficult to envision further steps toward a more liberalized market due to the fact

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{153}] Within the European Union system, Member States cede powers of regulation and enforcement to supranational institutions.
\item[\textsuperscript{154}] Humphreys and Morrell, supra note 142, at 77; Balfour, supra note 26, at 456.
\item[\textsuperscript{155}] In the EU slot allocation system it does not exist a buy-sell slot rule, like that enacted in the US in 1986. Notwithstanding, a “grey market” of slots is well-established, above all in the UK. Moreover, a recent Communication issued by the European Commission (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, on the application of Regulation (EEC) No. 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports, as amended, COM(2008), 227 final, § 5 (April 30, 2008)) introduces, \textit{ex facto}, a secondary trading of slots. As a result, US airlines can currently buy slots allocated freely at EU congested airports. In that way, the lack of slots is, at least partly, reduced. See Humphreys and Morrell, supra note 142, at 77.
\item[\textsuperscript{156}] Button, supra note 1, at 69.
\item[\textsuperscript{157}] Steer, Davies, Gleave, \textit{Impact assessment of revisions to Regulation 95/93. Final report (sections 1–12)}, March 2011, 125.
\item[\textsuperscript{158}] On April 5, 2000, was promulgated the \textit{Wendell H. Ford Aviation Investment and Reform Act for the 21st Century} (FAIR-21), which set down the elimination of slot restrictions at Chicago O’Hare by July 1, 2002, and at New York LaGuardia and Kennedy by January 1, 2007. As a consequence, slot restrictions in those High Density Airports were statutorily terminated: see Havel, supra note 3, at 196, especially note No. 399; Levine, supra note 150, at 61; P.S. Dempsey, \textit{Airport landing slots: Barriers to Entry and Impediments to Competition}, 26 Air & Space Law, 39 (February 2001); P.S. Dempsey and L.E. Gesell, \textit{Air Commerce and the Law}, Coast Aire, Chandler, 502 (2004); Button, supra note 1, at 69.
\end{enumerate}
\end{footnotesize}
that in the 2010 US-EU Protocol, only a limited compromise on investment rights was found (see Protocol, Article 6, paragraph 2).

Last but not least, several differences exist between the EU and the US. Clear examples of these differences exist within Labour and Environment laws.

With specific regard to EU-Russia relations, although a new strategy for air transportation towards liberalization and privatization is under way, the Russian State continues to play an influential role in the aviation industry. For this reason the aviation market in Russia is still characterized by a restrictive approach, and market access is limited.\textsuperscript{159} Moreover, the longstanding problem of Siberian overflight payments has yet to be resolved. This issue is of major importance for European air carriers, as it affects services between Europe and the growing and lucrative markets in the Far East, particularly China.\textsuperscript{160}

More generally, relations between the EU and Russia are very fragmented as Member States still act individually, thus they are neither able to bring bilateral agreements into conformity with EU law, nor solve crucial issues such as Siberian overflight payments, nor achieve significant progress in market access.\textsuperscript{161}

3.2.2 Safety and security.

The European Commission is aware that air transportation is both a target and an instrument of terrorism. Following the events of September 11, 2001, the EU reacted swiftly with legislation and quality control inspection regimes to enhance security in aviation transportation.\textsuperscript{162}

An Open Aviation Area, like that established between the EU and the US, needs a regulatory convergence and harmonization of air transportation standards in safety, security, and the environment.\textsuperscript{163} Indeed, the 2007 EU-US Agreement itself envisages cooperation in several areas, among which are safety and security.\textsuperscript{164} In 2007, the European Commission drew up a Proposal to strengthen cooperation between the EU and the US in the field of safety.\textsuperscript{165}

\begin{itemize}
\item \textsuperscript{159} Communication from the Commission, \textit{supra} note 97, at 1 and 4.2.
\item \textsuperscript{160} Communication from the Commission, \textit{supra} note 97, at 1.
\item \textsuperscript{161} Communication from the Commission, \textit{supra} note 97, at 1.
\item \textsuperscript{162} Communication from the Commission, \textit{supra} note 120, at 4.4. Moreover the Commission observes that a “level playing field needs to be stimulated where the cost of security measures is likely to distort competition. […] Careful consideration needs to be given to international cooperation in order to improve worldwide standards and avoid unnecessary and costly duplication of controls” (\textit{ibidem}). As an “action”, the Commission envisages, \textit{inter alia}, to strengthen the functioning of the European safety agency (EASA) and gradually extend its safety-related tasks.
\item \textsuperscript{163} Booz, Allen, Hamilton, \textit{supra} note 142, at iii. See also ICAO, \textit{Declaration of global principles for the liberalization of international air transport}, Montreal (March 2003).
\item \textsuperscript{164} Balfour, \textit{supra} note 26, at 457; Masutti, \textit{supra} note 3, at 161.
\item \textsuperscript{165} European Commission, \textit{Proposal for a Council Decision on the Signature of an Agreement between the European Community and the United States of America on the cooperation in
\end{itemize}
Much more complicated are the safety and security issues within the aviation relations between the EU and Russia, due to the fragmented relations between them. Indeed, it has been pointed out that the different approaches to safety and noise are a constant source of potential misunderstandings in aviation relations.\textsuperscript{166} The future agreement between the EU and Russia should establish a close cooperation to ensure that the highest international security standards could be met. To this end, joint mechanisms and procedures could also be developed under the agreement.\textsuperscript{167}

As ICAO pointed out in 2003, safety (and security) is one of the most important goals in the field of air transport, and it has to be reached irrespective of any change in economic regulatory arrangements.\textsuperscript{168} In light of this, the European Commission states that the increased competitive pressure and greater freedom to invest internationally that might result from agreements should never lead to compromise on global standards.\textsuperscript{169}

In EU law, significant progress has been made towards improving aviation safety, including the introduction of a blacklist of unsafe airlines, which has been recently updated.\textsuperscript{170} A broad set of common safety standards is enforced with the help of the dedicated European aviation agency, namely the EASA.\textsuperscript{171} In 2008, Regulation 300 of 2008 was adopted.\textsuperscript{172} It establishes common rules to protect civil aviation against acts of unlawful interference that jeopardize the security of civil aviation (Article 1).

In this context, safety standards, which are developed and set internationally by ICAO and which are adhered to by all nations under the EU-US Agreement, remain essential, even though some commentator points out that there is no

\textsuperscript{166} Communication from the Commission, \textit{supra} note 97, at 1.
\textsuperscript{167} Communication from the Commission, \textit{supra} note 97, at 4.5.
\textsuperscript{168} ICAO, \textit{supra} note 162.
\textsuperscript{169} Communication from the Commission, \textit{supra} note 50, at 54–62.
\textsuperscript{170} EU, Press Releases, \textit{Aviation: Commission updates the EU list of air carriers subject to an operating ban}, IP/11/1375 (November 21, 2011).
\textsuperscript{171} Communication from the Commission, \textit{supra} note 120, at 4.3. The EASA is the centerpiece of the European Union’s strategy for aviation safety. Its mission is to promote the highest common standards of safety and environmental protection in civil aviation. The Agency monitors the implementation of standards through inspections in the Member States and provides the necessary technical expertise, training and research. It works in close cooperation with the national authorities (which continue to carry out many tasks, such as certification of individual aircraft or licensing of pilots). In general, on the EASA see V. Randazzo, \textit{Alcuni profili problematici relativi all’attribuzione di funzioni all’Agenzia europea per la sicurezza aerea}, in \textit{Dir. Un. Eur.}, at 847–867 (2004).

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evidence that the increase in Open Skies style arrangements across the globe has in any way impacted adversely on air transport safety.173


4.1 Liberalization, re-regulation and cooperation between the EU (and other regional organizations) and international organizations.

Article 80 of the 1957 EEC Treaty of Rome specified that the provisions on common market policy contained in Title IV of the Treaty were applicable to the air transport sector, but the Council did not enact these legislative measures until the end of the 1980s. Liberalization policies in the EU were implemented gradually, mostly due to factors that were external to the European Economic Community. The main factor was the 1978 US deregulation.

The EU air transport liberalization has produced positive and negative results. Despite the fact that this new policy has yielded some disadvantages, we have to take into account the important benefits for all the Member States.

The EU liberalization policies implied that EU institutions were making precise political choices. These institutions founded the policies on a balance of interests, which always occurs when reforms are implemented. In the air transport field it was necessary to open up the market to make freedoms (e.g., of movement) and rights truly exercisable, but it was also necessary to keep certain standards (e.g., those concerning safety and security) unchanged.

Consequently, it was not a surprise that liberalization policies brought about a new regulatory Era based on, inter alia, competition rules. These re-regulatory policies have been driving all the recent experiences in the field of air transport liberalization (at national, regional and international levels).

If regional contributions are needed to foster and consolidate liberalization initiatives in the air transport sector, this adds a third level of regulation to national and international. This third level brings about an over-regulation and contributes marginally to solving the problem of “over-fragmentation” of air transport worldwide174, as has been backed up by some authors.175

This international fragmentation should be addressed and regulated by international organizations specialized in the air transport field, such as ICAO, whose mandate covers a broad range of actions, including those concerning economic

173 Button, supra note 1, at 70–71.
174 The phenomenon of fragmentation in air transport has many implications, among which some are related to European airspace. The recent Regulation EU No. 176/2011, on the information to be provided before the establishment and modification of a functional airspace block, issued by the Commission on February 24, 2011, will help to solve this fragmentation, and will give an important contribute to the creation of the Single European Sky.
175 Lelieur, supra note 9, at 117.
regulation (and so, *inter alia*, competition issues: see Article 44 of the Chicago Convention). Only such organizations can assure that air transport policies comply with safety and security standards as set out internationally by ICAO.

Furthermore, the political role of ICAO would be encouraged with some issues that are currently involving the EU. Indeed, one of the thorniest issues that have to be solved in the foreseeable future is the aviation relations between the EU and Russia. In this respect, a comprehensive EU-Russia air transport agreement would aim to bring about the broadening of aviation relations and establish a framework in which both the industry and users can benefit from improved market conditions, a stable and consistent legal environment between the two markets, and mechanisms through which differences are avoided or resolved.¹⁷⁶

As concerns the Siberian overflight payments issue, given that thus far the bilateral negotiations between the EU and the Russian Federation have not yielded the necessary results to overcome this issue, a parallel action under the ICAO umbrella may be pursued in order to lead the Russian Federation to abide by Article 15 of the Chicago Convention.¹⁷⁷

In any case, it would be necessary that the EU would be given the status of a Party of ICAO, rather than its current status of an “observer.” In other words, the EU should act with one voice only. Actually, this problem is directly linked to the legal nature of the European Union, which so far is not yet a “State” from a legal point of view.

The importance of a stronger cooperation between the EU and ICAO is shown by the recent Memorandum of Cooperation, which has just been signed between the Commission and ICAO.¹⁷⁸

The prominent role of ICAO would not entail any exclusion in terms of international cooperation among supranational or international organizations, such as the WTO.¹⁷⁹ Indeed, it has been argued that these international Organizations (ICAO and WTO) are not in competition with each other because their roles are different.¹⁸⁰ Accordingly, the current and future (new) legal order in internation-

¹⁷⁶ Communication from the Commission, *supra* note 97, at 1.
¹⁷⁸ According to the MoC, a stronger European involvement in the ICAO activities will be implemented, above all in the fields of safety, security, environment and traffic management: see EU, Press Releases, IP/11/540, *supra* note 101.
¹⁷⁹ See A. Mencik Von Zebinsky, *The General Agreement on Trade in Services: Its Implications for Air Transport*, 18 *Annals of Air and Space Law*, at 391 (1993). The idea of a closer cooperation between ICAO and WTO has been backed up by ICAO itself, as it declared itself to be willing ‘to share its expertise and participate actively in the WTO’s future work on the classification of international air transport activities for the purpose of negotiation or application of the GATS to air transport’: see ICAO, *supra* note 17, at 4.1.
¹⁸⁰ Lelieur, *supra* note 9, at 131, who argues that ICAO, WTO and OECD cooperate in order to improve and accelerate the liberalization process. They provide new ideas and advocate debates as concerns complex issues regarding air transport liberalizations. See also R.
al air transport should be based on the cooperation at plurilateral level, which is considered an alternative to regionalism and multilateralism. This does not mean that regional fora are less important in setting and intensifying business relations and promoting economic growth between regional organizations, as recent initiatives have pointed out. We believe that regional organizations should operate under supra-national and supra-regional organizations, which are able to harmonize and set provisions regardless of territorial boundaries.

ICAO is the “natural” international organization that deals with aviation issues. In spite of this, as we have seen above, ICAO is not in competition with other international organizations that address aviation matters; rather, a stronger cooperation with other international organizations is encouraged also by the ICAO Council itself in order to address issues of common interest in the field of air transport.

4.2 Final remarks.

In conclusion, the pursuit of normalization of the international aviation industry can be reached providing that a stronger cooperation between international and regional actors will be implemented. This cooperation should be enacted under the ICAO umbrella, which is the only specialized international organization able to cover (almost) any international air transport matter. In that way, the current process of re-regulation of air transport as a consequence of the

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182 We refer to the recent first EU-ASEAN Business Summit held in Jakarta in May 2011 (on which see EU, Press Releases, 1st EU-ASEAN Business Summit in Jakarta set to strengthen regional trade and investment, IP/11/520 (May 2, 2011). On this Summit see also the speech given by the European Commissioner for trade, Karel De Gucht, Closing Remarks to the first ever ASEAN-EU Business Summit, Speech/11/309, Jakarta, May 5, 2011), and to the strategic partnership between EU and Africa (on which see EU, The Joint Africa-EU Strategy, MEMO/11/351, May 27, 2011). Moreover, as concerns regional integration, see EU, Press Releases, An important step towards regional integration: EU and Central America initial Association Agreement, IP/11/336 (March 22, 2011).

183 ICAO, Economic Commission, Developments in International Air Transport Regulation and Liberalization, A37-WP/5 EC/1, Presented by the Council of ICAO to the ICAO Assembly’s 37th Session, at 4.2 (June 18, 2010). See also, ICAO, ICAO’S role in facilitating air transport liberalization, Presented by the ICAO Secretariat, at 4.2 (November 28, 2000); ICAO, Executive Committee, Cooperation with regional organizations and regional civil aviation bodies, Presented by the Council of ICAO to the ICAO Assembly’s 37th Session, A37-WP/28 EX/11 (June 17, 2010). See also L. Weber, International Civil Aviation Organization: An Introduction, Alphen aan den Rijn, at 49–52 (2007).
implementation of the EU (and other regional organizations) liberalization policies may be completed.
The Rules and Practice of the Investiture Vote in the Czech Republic

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Summary: Text analyzes in detail legal situation dealing with the Czech government investiture vote. Constitutional foundations are tested against political practice, which is often quite different. The results confirm the construction of investiture vote is less important than notorious weakness of the government majority in the Chamber of Deputies.

Keywords: investiture vote, Czech government, political practice, Czech Chamber of Deputies

1. Introduction

The Czech Republic, established in 1993 as one of the successors of the former Czechoslovakia, is a relatively young state. It of course also belongs to the group of post-communist countries, which had been under the dominance of communist party for 40 years, which prohibited any development of democratic instruments. On the other hand, unlike many other Central and Eastern European (CEE) states, it could have built on the experience with regime between World Wars, which was praised by numerous at that time (but contemporary as well!) experts as one of the most modern democratic political systems in Europe. The positive example of the First Republic (1918–1938), together with the relatively advanced economy, were probably the main reasons that contributed to the successful transformation of the Czech Republic to a democratic state with a market economy. Surely there have been numerous glitches and drawbacks on

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the way, but generally speaking the journey was more straightforward than in the other countries of Central (not to say Eastern) Europe.²

From a political viewpoint the Czech Republic is a very interesting case. It is a unitary state with a classic parliamentary political system. The legislative power is represented by bicameral parliament. While both chambers are selected by direct vote, the lower chamber (Chamber of Deputies) serves as the real powerhouse, the upper one (Senate) has only a moderating function.³ Asymmetry between chambers is confirmed by the legislature-executive relations, as the Constitution proclaims that government is responsible only to the Chamber of Deputies. The President is selected indirectly by the Parliament, but at the same time his role is far from ceremonial (see below). The Chamber of Deputies is elected by a proportional system with modified D’Hondt formula, the threshold is set to 5%.⁴

While there is nothing exceptional in this outline, the practical functioning of the system is unusual. With a pinch of salt, we could describe it as simultaneously highly stable and unstable. The first pattern is represented by the main actors. First, so far the Czech Republic had only two presidents: Václav Havel (1993–2003) and Václav Klaus (since 2003), their position has been even stronger than the Constitution would suggest. Among the political parties, the left-wing social democrats (ČSSD) and right-wing civic democrats (ODS) have consistently been by far the strongest political parties, followed by communists (KSČM) and several smaller centre-right parties (eg. Christian democrats – KDÚ-ČSL). Here comes the instability factor. Due to the proportional system, no party was ever been able to gain an absolute majority of votes, which means coalitions need to be formed. ODS and ČSSD are fierce ideological rivals and although there were moments when big coalitions were considered, it never (openly) happened. In light of this and the fact that KSČM is intentionally left out of any coalition negotiations by both main parties, the possible win set for majoritarian government is indeed quite small and in reality could be reached only with the aid of those few centre-right parties that side either with ČSSD (2002–2006) or ODS (1993–1998, 2006–2009, since 2010). The winning coalition has usually been able to hold a miniscule majority in the Chamber of Deputies, sometimes only with the help of deputies that changed their allegiance (so called “přeběhlík” / crossrunner).

³ Due to the low competences of the Senate, its composition has never been a factor during formation of the government, even in case of the minority one, so the hypothesis of Druckman et al. is not confirmed in the Czech case (DRUCKMAN, James et al. Influence without Confidence: Upper Chambers and Government Formation. Legislative Studies Quarterly, 2005, vol. 30, no. 4, pp. 529–548).
The vote of investiture is without doubts an important part of the government formation process in many countries, while at the same time the amount of literature devoted to the topic is quite negligible. The ambition of the presented article is to provide an empirical case study of the process and impact of the investiture vote in the Czech Republic. At first sight, single case-studies are less useful than comparative papers covering many countries. On the other hand, the rules of the investiture vote and their application are so diverse that any comparison is naturally but a schematic one, in this case a detailed discussion of one country’s experience might be valuable as well. The vote of investiture in the Czech Republic follows a positive parliamentarism pattern. Given the background sketched in the previous paragraph, the Czech Republic underwent a wide variety of situations including minority and caretaker governments. In order to form a government, the politicians were forced to “invent” numerous innovative instruments that modified or broadened the constitutional rules. Description of these mechanisms and analysis of their efficiency might shed some light not only on the Czech situation, but also serve as a comparative basis for other states’ practice or possible amendment of their own rules. The article deals only with the obligatory vote of investiture faced by new governments, not the voluntary ones (vote of confidence) the ruling governments sometimes decide to endure for various reasons.

Apart from the introduction, this article is divided into four parts. The second chapter describes the formal rules dealing with the process of government formation both in Constitutional and ordinary laws, including several problematic black spots in the Czech legal order. The subsequent part forms the core of the text and analyses practical experience with government formation with the emphasis on the vote of investiture. It is divided into three subsections; the first concentrates on the preliminary phase characterized by the importance of the President, then there is an interim explanation how the Czech governments were able to obtain support in practice and finally I move onto the closing phase in the Chamber of Deputies. As some political parties or experts were dissatisfied with the functioning of the present system, various reforms were offered, these are discussed in part four. The Conclusion assesses the Czech experience and tries to ascertain if the vote of investiture forms a deciding factor in the Czech political system, finally a short comparison is made to the situation in other states.


Usually in order to show unity to the opposition or public. There have been so far only two such votes since 1993 in the Czech Republic (1997, 2003). Third possibility is a vote of no-confidence initiated by the opposition, there have been about twenty attempts made, only one of them successful (2009).
2. Constitutional framework

The formal process of government formation in the Czech Republic is relatively straightforward; the necessary rules are given in Art. 68 of the Constitution (see below). As I already said, it is a clear example of positively formulated formation rules, if we use a more detailed classification of Lieven De Winter, than it belongs to the group of “weakest positive”, because a simple majority is sufficient to gain confidence. When I pointed out the importance of the First Republic legacy for the Czech Constitution, it is worthy to note that in this case the tradition was breached. The Constitution from 1920 prescribed the negative formation rules, which was exploited for the formation of non-political governments. The investiture vote was introduced by the first Communist constitution from 1948, the constitution from 1960 dismissed any notion of the division of powers and established the dominance of the National Assembly, so the duty for the government to undergo investiture vote was implicitly still there. Of course, it was the Communist Party that held all the power and therefore practically it hardly mattered. After the Velvet Revolution in 1989 numerous parts of the 1960 Constitution were changed, but the vote of investiture procedure remained. During the drafting of the Constitution of the new Czech Republic, there was no real discussion on the issue, return to negative rule of the First Republic was probably rejected on the basis of the mentioned undesirable effects which lead to periods of instability. The subsequent part describes and analyses the outline of the process.

Article 68

1. The Government shall be accountable to the Chamber of Deputies.
2. The Prime Minister shall be appointed by the President of the Republic who shall appoint on the Prime Minister’s proposal the other members of the Government and shall entrust them with the direction of individual ministries or other agencies.

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8 See Art. 70–78 of Act no. 121/1920 Coll.
10 Art. 82 of Act no. 150/1948 Coll.
11 Compare Art. 44 para 1 of Act no. 100/1960 Coll.
3. Within thirty days after its appointment the Government shall present itself to the Chamber of Deputies and shall ask it for a vote of confidence.

4. If a newly appointed Government fails to win the confidence of the Chamber of Deputies, the procedure specified in paragraphs 2 and 3 shall be followed. If a thus appointed Government again fails to win the confidence of the Chamber of Deputies, the President of the Republic shall appoint a Prime Minister on the proposal of the Chairman of the Chamber of Deputies.

5. In other cases the President of the Republic shall appoint and recall on the proposal of the Prime Minister the other members of the Government and shall entrust them with the direction of ministries or other agencies.

Art. 68 para 2 to 4 is applicable to all government formations, both after the general elections or in case the actual government resigns. The first step is entrusted to the President, who appoints the Prime Minister (PM). It is her of his autonomous decision not dependent on any proposal, he does not need a co-signature from the government. The President’s free hand is strengthened by the fact that he is constitutionally irresponsible and there are no time limits set for the selection. Indeed, the only legal limits of his behaviour are rather a vague proclamation in the President’s oath, he must also respect the pluralism of political parties (see Art. 5 Const.). In light of this, the decision is not entirely arbitrary, not to speak about the political dimension of the question (see further).

After the appointment the PM (in waiting) forms his government, now it is him who is not restrained by any rules, indeed the text of the Constitution does not (nor any other laws) put any limit on the number of ministers or their qualification, apart from the obvious ones. The role of President in the appointment of ministers is hotly debated. The strictest interpretation claims he is bound by the proposal of the PM and simply confirms his decision, according to the intermediate version he could only review legal issues such as incompatibility of

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14 As Czech politics is (unfortunately) predominantly male environment, I will use only „he“ or „his“ throughout the text.
15 Czech Constitution divides the President’s competences into two groups: those that need to be confirmed by the signature of the PM (see Art. 63 para 1 Const.) and those that are his “own” (see Art. 62 Const.). In this case even practically it would hardly be logical to require PM’s signature (the leaving one? the newly appointed one?).
16 „...I shall perform my office in the interest of all the people...” (Art. 59 para 2 Const.).
18 Eg. age and sanity (see Art. 70 Const.). For example strangely there is no requirement for Czech citizenship, and there was already a minister with only German citizenship.
functions, the last group supports wide discretion of the President, who could reject any proposal for whatever reason, including the personal or political dislike of the nominated minister. I personally tend to agree with the second view, but the whole issue remains so far mainly theoretical as the PM did not propose anybody too controversial. What is more important is the timeframe of the appointment process. Although the Constitution does not prohibit the appointment of the PM and his government in one moment, a two step procedure is more likely. This enforces the PM by giving him time space to negotiate his team and prepare for the showdown in the Chamber of Deputies. The question is for how long this space should be. Theoretically it is unlimited and the PM could even artificially prolong it when the bulk of government is already formed, on the other hand he is at this point not a proper PM, the actual executive powers are still held by the previous (leaving) government. The Czech Constitution thus does not preclude a period with two legitimate PMs, no matter how undesirable this state of affairs is.

By the official appointment of the government starts the 30 day deadline, during which the government has to ask for the vote of investiture. However the situation is more complicated after elections than the Constitution would suggest. According to the Chamber of Deputies Rules of Procedure (RP), the first session after elections is so called the “founding” one with a fixed programme such as the selection of its own leadership or committees. The vote of investiture could be placed on the agenda of regular session only, which might not start sooner than the founding one is closed. It is therefore not inconceivable that the government will be appointed during the founding session, but it would be a risky step because the deadline could run out in vain.

If the government is rightly appointed (and the founding session concluded), the chairman of the Chamber of Deputies has a duty to place the vote of investiture on the agenda in order to meet the 30 days deadline (Art. 82 para 2 RP). As

22 One of the Czech Acts (No. 2/1969 Coll.) contains a list of obligatory ministries, the term „appointment of government” indicates there must be the whole government, so the PM might not for example nominate the minister of finance and the whole process is blocked.
was already said, a simple majority of the present deputies suffices. Because the lowest quorum is set to one third of the full house which consists of 200 deputies (Art. 70 para 1 RP), theoretically the government could win the investiture with the active support of only 34 deputies. If the government survives the investiture vote, it gained confidence and might proceed to perform its task as a “fully legitimate” executive.

Art. 68 para 4 Const. deals with situation when the appointed government fails to win the investiture vote. Firstly it must resign (Art. 73 para 2 Const.), if the government hesitates, the President will dismiss it himself (Art. 75 Const.). Then the whole process described above is repeated with the hope that the President will be more luck in his second choice and the Chamber of Deputies will be more conciliatory. If the expectations are not fulfilled, the third PM is again appointed by the President, but this time on the proposal from the chairman of the Chamber of Deputies.\textsuperscript{25} The logic of this solution is based on the assumption that the chairman should be more knowledgeable with the situation in the Chamber of Deputies than the President and his choice will have more chances to succeed. I find numerous objections against this reasoning, namely that the chairman’s decision is based simply on his personal wishes and therefore does not have to be based on the opinion of the Chamber’s majority. If even the third attempt fails the President has a right to dissolve the Chamber of Deputies (Art. 35 para 1 let. a) Const.), which might serve as a motivation to deputies to act more “positively”. The Constitution does not foresee a situation in which the Chamber is not dissolved in this case, I guess a logical interpretation indicates there will be a new third attempt by the chairman of the Chamber of Deputies.

A more detailed analysis of the abovementioned procedure will reveal many loose ends, but these are rather pet objects of hardcore constitutional jurists and therefore out of article’s reach. Still there are two open issues that require closer inspection. The first of them is the problem of what would happen if the appointed government misses the 30 days deadline and will not ask for the vote of investiture. The Constitution does not anticipate it and the situation is not specifically mentioned as a reason for obligatory government resignation in Art. 73 para 2 Const.\textsuperscript{26} Some experts\textsuperscript{27} infer from the text’s silence that actually there are negative rules of government formation in the Czech Republic and the appointed government may fully perform its duties unless the Chamber of Deputies forces it to resign by a vote of no-confidence.\textsuperscript{28} It must be said such views are in absolute minority and despite the fact that the deadline is only formal, all noticeable lawyers in the Czech Republic argue that failure to ask for investiture represents

\textsuperscript{25} This mechanism is somewhat similar to standard procedure in Sweden.
\textsuperscript{26} Therefore the President is also not entitled to dismiss the government.
\textsuperscript{28} Which requires absolute majority of votes in the Chamber (at least 101), see Art. 72 para 2 Const.
a grave constitutional offence which was simply out of the Constitution’s drafter’s imagination.29

The last point requiring discussion is the issue when exactly the government has to undergo the vote of investiture. Clearly it concerns the governments after elections and the successors of governments forced to resign after the vote of no-confidence. But what about other cases, such as major reconstruction of the government? Although the Constitution lacks any leads, the question revolves around the position of the PM. One group of scholars argue he is the central element of any government, if he resigns, a new government must be appointed and ask for the investiture vote. Reversely, if the PM remains in office he is able to replace even all ministers or change the parties in the coalition. This position is based on the notion that there could hardly exist a government without its head and on the interpretation of Art. 68 Const., which seems not to allow the appointment of a new PM by other means than those described above.30 Opponents claim total dependence of government on the PM is inconvenient and unfair, what if he simply dies or resigns because of his personal failure? Is it not sufficient then to simply appoint a new PM rather than undergo the cumbersome process of old government resignation and new government formation? Theoretically this opinion is based on the notion that the Czech government is a collective body (see Art. 76 para 1 Const.) and the PM is only primus inter partes, there is no tradition of a Chancellor system as in Germany.31 Practice has tended to develop towards the first position.

3. Vote of investiture in practice32

The first Czech government came to office on 1st January 1993. The Constitution directly declared (Art. 108) that it did not have to undergo the regular appointment process, because it was the successor of the government of the Czech Republic (as part of Czechoslovakia), appointed after the general elections in 1992. Because this government ruled for the rest of the full election period, it was not until after the 1996 elections the first government formation process took place. Since then, ten governments have undergone the vote of investiture, five of them following new elections. Out of the ten, there were three minority governments and two caretaker (half-political) ones, so we have quite a varied

29 But see former PM Topolánek’s creativity below.
32 Information in the article is also based on dozens of articles published in various newspapers (Mladá Fronta, Lidové Noviny, Právo, Hospodářské noviny) between 1996 and 2010. They are available on request from the author.
sample (see table in the annex). Surely there are certain differences between formations of each type of government, but as I want to point out only the interesting points, all instances will be tended together, with the emphasis on the post-election process.

3.1 Introductory phase: Role of the President

Czech politics has little experience with pre-election coalitions or presentations of promises with whom each party wants to govern. Politicians aim to increase their share against all competitors; even those ideologically close, and always justify their silence by saying that “only the voter will decide how the next government will look”. Conversely, they rather stress with whom they will never form a government, often the mutual incompatibility among parties is so complex it would seem there is mathematically no chance for any government, barring the unlikely gain of majority for one party. In light of this and numerous previous breaches of such “never” vows “forced” by electoral results, nobody takes them seriously.

The informal negotiations among parties typically start the minute the first predictions of results are made public. In 2006 or 2010, ODS together with smaller center-right parties very swiftly announced agreement on future cooperation in government, but the first official move must be made by the President. As was emphasized above, so far the Czech Republic has experienced only two persons in this office. Both Havel and Klaus had a very strong position and acted actively during the negotiations. The major difference between them was their political affiliation – while Havel was traditionally non-partisan, Klaus used to be a long-term chairman of ODS. On the other hand, he did not like his successor Mirek Topolánek, therefore there was hardly any positive bias towards this party. Another important factor in Klaus’s behaviour proceeded from his previous experience: when Klaus’s second government was forced to resign in 1997, he strongly criticized the course of action Havel chose and labelled his steps as activist, there were afterwards even efforts to constitutionally curb the President’s powers (see below). When Klaus later acquired presidential office, he indicated he would have a more passive attitude in these situations.

Despite the opportunity to appoint whoever they want, both President’s course of action was traditionally careful and reflected the electoral results. It means that in almost all cases it was the leader of the strongest party in the Chamber of Deputies who was the entrusted initiative. Several times he was not directly appointed, but asked (formally – see the table, or informally) to start the negotiations. The role of informateur is not constitutionally sanctioned and sometimes it is criticized because it prolongs the whole procedure (there is no time limit) and strengthens the President, who is not risking forfeiting his first official nomination. He could also lay conditions to the informateur, an activity

enjoyed heartily by Václav Klaus, who exploited unclear majorities in the Chamber of Deputies. In 2004 he conditioned the appointment of Stanislav Gross on delivery of 101 signatures from deputies supporting his planned government.\textsuperscript{34} Such an obligation constitutionally does not make sense, because first it changes the required simple majority to absolute one, secondly the deputies have a free mandate and any signature does not bind them to vote accordingly. Still Gross complied. Similar conditions were laid on Mirek Topolánek in 2006, however this was further complicated by the added requirement that there should be no cross runners.\textsuperscript{35} As the Chamber was divided 100:100 and the opposition represented by ČSSD and KSČM, the only solution to Klaus’s wish would be great coalition of ODS and ČSSD. In this case it was Klaus who relented. In spite of the mentioned doubtful practises, the informateur’s phase is generally accepted and slowly has become a constitutional custom.\textsuperscript{36} Both presidents were usually heavily involved in the negotiations, asked informateurs for regular reporting on their progress, invited the leaders of political parties for conversations or even organized common meetings when deadlock was looming. At the same time they however pretended to be “above” the quarrels and did not comment on their personal attitudes.\textsuperscript{37}

After the successful conclusion of informal negotiations by informateur, The President appoints the PM. One might think that The President has more room for manoeuvre during the formation of caretaker governments, which during the First Republic were basically selected solely by the head of state. But as the Constitution requires a similar vote of investiture for any government, even in these cases there must be an agreement of political parties and in the past they have informally made it known who were acceptable candidates for the caretaker PM. Apart from caretaker governments, the only exception to the “leader of the strongest party=appointed PM” rule was in 2010, when the post was entrusted to Petr Nečas as the chairman of the second most successful party (ODS). Although the previous custom was broken, it was no arbitrary behaviour from the President, because ODS had already negotiated support from two other parties and with a common majority of 118 deputies, there was no chance of success for any other configuration.

Only after the 2006 elections the President had to progress to the second round of the PM’s appointment, because his first choice, Mirek Topolánek, was

\textsuperscript{34} Originally Klaus indicated that a majority of 102–105 deputies will be needed.
\textsuperscript{35} Paradoxical request indeed as Klaus himself relied on crossrunners when he was PM between 1996 and 1997.
\textsuperscript{37} The consequences of this attitude were sometimes perplexing, as the leaders of each political party argued with the support or promises of Presidents that were clearly contradictory.
not able to gain enough support for his team in the vote of investiture. After prolonged negotiations, during which the leader of second strongest party (ČSSD) Jiří Paroubek demanded his turn, Klaus again opted for Topolánek. Although the Constitution does not directly proscribe such a step, the decision was considered controversial by many. The general viewpoint is that it would be logical and fair to give a chance to somebody else, 38 A well-known constitutional lawyer from the First Republic even claimed President is not allowed to name a person that was forced to resign. 39 Theoretically it sounds fool proof, practical politics however does not always follow the blueprint: at that point Topolánek was able to lure two deputies from ČSSD and therefore had the needed majority. On the other hand it does not mean the President´s attitude did not have any impact, had Paroubek been given a nod, it is not unlikely he would be able to persuade somebody else from the other camp to gain the vote he required.

After the PM is appointed, the role of the President is diminishing. With the exception of Václav Klaus, who (with no impact) raised objections against nomination of Karel Schwarzenberg to the post of Foreign Minister, 40 presidents left a free hand to the PMs in selection of ministers, the governments as a whole were duly appointed once the teams were complete. At the beginning Václav Havel came to the Chamber of Deputies before the vote of investiture, defended the governments appointed by him and asked the deputies to support them, but after 1998 he ceased to do that and Klaus has never considered it.

3.2 Interim explanation: How to create a “majority” in the Czech Republic 41

The appointed government requires the support of the majority of deputies in order to overcome the vote of investiture. Given the usually complicated situation in the Chamber of Deputies, resulting from irreconcilability of some subjects and the balance between left-wing and right-wing political parties, it could be indeed very difficult to succeed. How were the politicians able to overcome the hurdle? I will provide a brief historical sketch first. Sometimes circumstances predestined the results. In 1996, the parties of ruling coalition received only 98 votes, but the remaining 102 votes were divided among ČSSD, KSČM and extreme right-wing Republicans. These parties were too diverse to form a coalition, and as the governing parties rejected to cooperate with anybody else, the only other option than minority government was new elections. ČSSD assessed its options and preferred to act as “constructive” opposition, which meant its deputies left the chamber during the vote of investiture. Later the balance shifted thanks the first occurrence of cross runners, still Klaus´ government resigned prematurely because of internal disputes. The subsequent caretaker government

38 Eg MIKULE 2007, p. 509.
40 He argued Austrian origin of Schwarzenberg was not compatible with defending Czech national interests.
41 See also the annual country reports in European Journal of Political Research.
of Tošovský ruled for only few months and won the investiture vote on a promise of early elections.

Elections in 1996 were won by ČSSD, which proposed a coalition to center-right parties and even offered a post of PM to them. They rejected, and the coalition between those parties and ODS was impossible due to personal hatred caused by the government’s downfall in 1997. Surprisingly, ODS and ČSSD were able to close the so called “Opposition agreement”, according to its text ODS tolerated social democratic government and promised not to initiate or vote for a vote of no-confidence. In return they received the position of Chamber of Deputies chairman for Klaus and together both parties planned to adapt the Constitution (see below) and change the electoral system to the majoritarian formula. Despite grave minority, the government was able to rule quite successfully for the whole period. While many Czech intellectuals criticized the arrangement as a simple division of power that breached any democratic standards, foreign commentators evaluated it through more pragmatic lenses.

In 2002 ČSSD won again, this time the same center-right parties agreed to a coalition which mastered the slightest majority of 101 deputies. The coalition survived for the whole period, however internal problems in its biggest member party meant three PMs took office in four years and due to abovementioned practice, a new investiture vote had to be organized each time, although both the composition of the coalition and even the majority of ministers remained the same. There were deputies crossing allegiance on both sides, somehow the government always had the upper hand.

The most difficult situation was after the 2006 elections. Parties positioned on the right side of the spectrum immediately announced an agreement, but they had only 100 deputies. A deadlock loomed, politicians were even not able to agree on the establishment of the Chamber's leadership, partly because any concession would be taken as a gesture of weakness, secondly because of the role the chairman plays during third attempt to appoint the PM. As was also explained, if the founding session is not finished, no appointment of new government could take place. In the end a low-figure deputy from ČSSD was elected as chairman based on a public promise he would step down before he had a chance to nominate the PM. Still this did not solve the governments’ conundrum. Finally Klaus appointed Topolánek, but he still commanded only 100 votes. Therefore his advisers invented an interpretation that a tie during the vote of investiture is actually sufficient, but this crazy theory was rejected even by some of the ODS deputies. Finally Topolánek gambled and formed an ODS minority government

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42 Electoral Act changes were annulled by the Constitutional Court for their unconstitutionality.
with a promise that new elections will be organized soon. Opposition rejected the offer, Paroubek still hoped he would receive his chance in the second round (see above), yet Klaus opted for Topolánek again and his second attempt lead to a successful outcome thanks to the two cross runners.

Disputes within the ODS and the smallest coalition party (Greens) caused the premature end of this government in 2009, and again a caretaker government consisted of minor politicians was installed with the purpose to lead the country to early elections. But as these were annulled by the Constitutional Court, this government remained in office until the regular date of election in June 2010. Once more a close result was expected, but while ČSSD won, amazingly the right-wing parties received 118 mandates and for the first time in the history of the Czech Republic were able to form government without difficulties.45

3.3 Closing phase: Chamber of deputies steps in

Once the role of President is over, the responsibility turns to the hands of deputies in the Chamber. The chairman sets the date of the investiture vote, usually it is the only agenda for the day. The question arises what exactly one means by the “confidence”. Chamber of Deputies only proclaims in its resolution that “government gained confidence”. As the government has hardly done anything yet, the deputies are not able to assess its real activities such as in the case of no-confidence vote.46 But, in a political system based on the competition of political parties, confidence is best expressed as the support for a political programme representing the compromise agreed among the coalition parties.47

Even before the government is appointed, its member parties often conclude a coalition agreement which is endorsed by the parties’ structure. The coalition agreement however usually dedicates a large part of space to internal working mechanisms of the coalition and allocation of seats in the executive rather than programmatic aims. The intentions of future government are thus described in detail in its programme. In Czechoslovakia government’s programme was an obligatory part of the investiture vote.48 Contemporary Constitution dropped the requirement, still all governments prepared the programme and it has already become a constitutional custom. The 30 days window between the appointment and vote of investiture might be viewed as time for preparation of the programme. It is not easy to make any generalizations about these texts. Caretaker governments tend to issue the shortest documents (see table in annex),

45 Since July 2010, this government has been on the verge of internal breakout several times, but that is for another story.
46 If the government has similar composition as the previous one, this objection does not hold.
48 According to the 1960 Constitution, the vote of investiture was taken by a vote on government’s programme.
but (political) the government of Topolánek I. and Paroubek were also supposed to rule only for about a year and still they submitted above average texts. One would expect that the fewer parties in government, the shorter the text as compromises theoretically tend to prolong any agreement, but the correlation is not there. It is clear the texts are not mere proclamations and often contained very detailed prescription of planned activities, in this they served more as a binding contracts to the coalition (and supporting deputies) rather than tools aiming to persuade the opposition.

During Czechoslovak times, the programme was first read by the PM during the investiture vote. In 1996 the coalition wished to continue the tradition and tried to reject the demand of ČSSD to provide it in advance, but had to yield and submitted it to all parties several hours before the vote. On the other hand, PM Zeman in 1998 provided the programme to the deputies in advance and said it would be useless to read it. His successor Špidla also had the text printed out, but undaunted proceeded to read the whole 50 pages to an almost empty chamber. Subsequent governments did not establish any pattern, again some of them even tried to keep it secret until the vote. This attitude could be explained by the fact that if the government counts on tacit support of any party, revealing the programme might lead to another round of concession requests, while the presentation during the vote leave no time for manoeuvre. But if the (tacit or direct) support is really needed, the programme might reflect the agreements with objects outside the government, case in point is the Opposition Agreement. In 2006 Topolánek included parts of the written agreement he made with the cross runners, ČSSD supported the caretaker government in 1998 only after the Chamber itself adopted a resolution that the Social Democrats conditions on new government will be met.

The presentation of programme (if it is read) is followed by debate. Although it could hardly change the result of the vote, it is traditionally a high point of the Chamber’s life, also because it is transmitted live on TV. Usually dozens of deputies are rotating behind the lectern and the debate continues for many hours (see table in annex). Again there is little that could be deduced from the process. Data confirms that generally the length of debates has slightly decreased over time and the more controversial the formation of the government was, the longer the debate. In practice the whole endeavour is debated only by name, because the majority of deputies prefer to read their prepared speeches, the bulk of time is taken by the parties leaders. Obviously opposition is more active, but coalition is involved as well, the exception being the last government of Nečas, which left the opposition to speak with no interference from coalition deputies.

After the conclusion of the debate a vote is taken. In light of the slight majorities in the Chamber in the past, each deputy was important. That caused numerous problems as naturally not all deputies were healthy enough to participate. Traditionally this situation is solved (not only during the vote of investiture, but any vote) by the so-called pairing, an informal process when excused deputy...
of the opposition is counterbalanced by a deputy from the ruling parties (or vice versa) who intentionally does not vote. This system is conventional for both sides, as it is impossible to maintain full participation throughout the whole election period. But sometimes the tempers during the investiture vote were so bad that the opposition rejected pairing, arguing that the expected tragic consequences of the new government prevailed over moral issues. Therefore, the viewers had to experience disturbing pictures of seriously ill deputies taken from the hospital with great risks just to vote. Voting is taken by names, when each deputy has to stand up and clearly express himself.\textsuperscript{49} “For proposal” means support for government, “against proposal” opposition, everything else is taken as abstention. Amusing situations happened, for example in 2006 social democratic deputy answered “I am against proposal”, which had to qualify as abstention.\textsuperscript{50} The votes are counted by the registrars, a brief break is taken and after that the (already well-known) results are announced. If confidence is proclaimed, new government gained legitimacy and might fully immerse in its duties.

4. Proposals for reform

The rules dealing with the process of government formation has remained the same since the adoption of the Constitution. But there were several proposals how to reform the mechanisms. Few concentrated on the streamlining of steps, namely by introducing fixed deadlines. Each time instability in the Chamber of Deputies occurred, arguments for positive impact of constructive veto of no confidence were raised. But these ideas were only tentative and never made it to the legislative proposals, although the constructive veto has become part of the latest government programme.\textsuperscript{51}

The only proposal discussed in the Parliament was the one tabled in 1999 by ODS and ČSSD during the times of the Opposition Agreement.\textsuperscript{52} It planned to amend numerous parts of the Constitution, including the process of government formation. The core of the adaptations in this area concerned the initial phase, namely the role of the President. According to the new rules, after the elections he had to ask the representative of the strongest party to propose him the composition of a government within a 30 day limit. If his request was not accepted or the appointed government did not win the vote of investiture, the representative of the second party with most mandates had its turn. An unsuccessful result would move the baton to the chairman of the Chamber of Deputies, who had seven days to choose a citizen, who would be asked by the President to compose

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{49}] See Art. 85 para 1 RP. The name of the starting deputy is taken by draw.
\item[\textsuperscript{50}] It had no impact on the result, as Topolánek had two crossrunners. The “confused” deputy later also became crossrunner, so maybe his mistake was intentional.
\end{itemize}
\end{footnotesize}
a government in ten days. In case the vote of investiture failed for the third time, the Chamber had to be dissolved by the President. Similar rules applied when government resigned or was voted out between elections, only the limits for the selection of governments were reduced to ten days. In all cases the appointed government had to undergo the vote of investiture in 15 days.

Clearly the amendment aimed to reduce the scope of President’s discretion and made him basically just a notary initiating prescribed parts of the script. Secondly, the position of informateur was constitutionalized, he or she would have the option to choose the PM and ministers, because the whole team would be appointed together. Thirdly, new deadlines were introduced and the existing ones were shortened.

Proposing parties defended the changes by claiming that the amendment “only introduces mechanisms commonly self-evident in parliamentary democracies”, but without any concrete references.\(^5^3\) Realistically it was obvious they wish to limit the role of President Havel, who strongly criticized the Opposition Agreement and personally intervened into the solution of the government’s crisis in 1997–1998. One of the proposal’s authors openly admitted that there was need to reduce the space for the “subjective attitude of the President”.\(^5^4\) In practice, both ČSSD and ODS expected one of them would always be the strongest party in the foreseeable future, therefore the rules could have guaranteed them first formation turns for a long time.\(^5^5\)

The proposal was successfully adopted by the Chamber of Deputies, but it was unable to obtain the necessary constitutional majority in the Senate, where ČSSD and ODS did not command enough votes. Senators also condemned the content of the changes, arguing that it is an attempt “to constrain in useless detail situations which are ... easier to solve by heeding to relatively free manoeuvring space of each constitutional institution.”\(^5^6\) Numerous experts criticized the amendment as well, disproving it with historic, logical and comparative arguments.\(^5^7\) With a chance of hindsight, I could say that if the proposal is applied on the real situations in the last ten years, it would have brought similar results in

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53 Explanatory Memorandum available on the address in previous footnote.
55 See MOLEK 2010, pp. 834–835.
the majority of cases, but rather damaging effects in others, while any possible positive impact would be hard to find.

Conclusion and comparative snapshot

Positively formulated investiture rules are nowadays deeply entrenched in the Czech constitutional culture and apart from few eccentric experts (see above), nobody contradicts them. Generally speaking, three main advantages to negative rules are mentioned in relation to the procedure. Firstly there is a question of legitimacy. The Constitution says that all power stems from the people (Art. 2 para 1 Const.). The President is elected indirectly by the Parliament. Had negative rules sufficed and the government would base its position only from the head of state, the link to the people would be simply too weak. Secondly, positive rules should contribute to effective administration of the state. The vote of investiture confirms the government is able to command enough deputies in the Chamber in order to force it will and ideally to fulfil the promises the coalition parties gave to the (majority) of the voters. Finally, it balances the power relations within the executive, that is between the government and the President. If the latter knows the PM appointed by him must have support in the Chamber, he is bound to choose wisely and should not pursue his own political agenda.

It is difficult to assess how the theoretical assumptions are converted into practice. The legitimacy link could hardly be questioned, as in Czech politics the Chamber maintains a strong position vis a vis other institutions, to base the power only on the head of state would hardly be acceptable. The Effectiveness of the government provides however a much bleaker picture. The miniscule majorities the governments usually had meant that while they were able to scrap enough votes for the investiture, this did not necessarily happen for the regular votes on acts or other issues. It is difficult to lead a country if each coalition’s deputy knows he or she has the decisive vote and blackmails the government accordingly. The role of the President was discussed above in detail, while there were occasions where both Havel and Klaus interpreted their rights somewhat extensively or even praeter constitutionem, all in all the decisions they took could hardly be labeled undemocratic or even unfair, despite all the critique. In this sense the threat of investiture indeed has a constraining impact on the President.

If we use the typology proposed by Kaare Strøm et al, the Czech Republic is an example of a state in which the electoral results influence the government formation much more than the institutional constraints. Indeed the number of constraints are very limited and politicians are able (or must) to invent innovative ways out of the looming deadlock. Reconciliation between the biggest foes, sudden change of positions, violations of “unbreakable” promises, drafting of opposing deputies by whatever means, that all was experienced with incessant lamenting of commentators on ever decreasing political morality. On the other

hand, maybe these instruments, despising as they might be, have contributed at least to the illusion externally that the Czech Republic has political stability.

As was explained in the introduction, while I deliberately omitted comparative insights in the article, at least a very brief sketch is limited to this closing paragraph. Each reader interested in comparison of various data with other CEE countries is kindly referred to articles by Zeynep Somer-Topcu together with Laron Williams and by Courtenay Conrad with Sona Golder, the length of government formation in Western European states is provided by Daniel Diermeier and Peter van Roozendaal. Despite all the methodological difficulties with measurements and the fact that the averages could change very quickly with the limited number of cases in new democracies, it is quite obvious that the postelection government formation process has been much slower than in other both Western and CEE countries. We can thus confirm the expected impact of positive investiture rules, exacerbated by often very close results of elections. In the case of Czech governments’ stability the positive rules have helped as well. While at first sight the duration of Czech governments is about average compared to CEE and shorter to Western Europe, given the circumstances it is quite an unexpected result, and I even do not take into account that between 2002 and 2006 there was actually only one government, because everything remained the same but the PMs, who were replaced for intraparty reasons. On the other hand, not all theoretical hypotheses are confirmed, for example the number of minority governments in the Czech Republic has been relatively high for positive rules.

62 In 2004, article by Müller-Rommel set the average duration of government in the Czech Republic to 869 days, which was second longest in CEE (MÜLLER-ROMMEL, Ferdinand et al. Party government in Central Eastern European democracies: A data collection (1990–2003). European Journal of Political Research, 2004, vol. 43, no. 6, p. 876), six years later the number plummeted to 569 days and resulting 5th position (CONRAD and GOLDER 2010, p. 127.
<table>
<thead>
<tr>
<th>Government (Prime Minister)</th>
<th>Date of elections</th>
<th>Date of informateur nomination</th>
<th>Date of PM appointment</th>
<th>Date of investiture vote /result</th>
<th>Date of resignation</th>
<th>Days of govt formation after elections</th>
<th>Days in office</th>
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<th>Dissenting Votes</th>
<th>Length of debates (minutes)</th>
<th>Length of government programme (words)</th>
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<td>Josef Tošovský</td>
<td>123</td>
<td>71</td>
<td>517</td>
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<td>Stanislav Gross</td>
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<td>100</td>
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<td>69</td>
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Notes:
- Government (Prime Minister)
- Number of supporting votes
- Number of dissenting votes
- Length of investiture debates
- Length of government programme
- Average
SERIOUS HUMAN RIGHTS VIOLATIONS – ECLIPSE OR MERE TWILIGHT OF STATE IMMUNITY?

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Summary: Presented article contributes to the extensive discussion over the mutual relationship between serious human rights violations (violation of ius cogens) and the law of state immunity. The structure of article derives from the argumentation presented by Germany and Italy in current dispute before the International Court of Justice. Author focuses his attention on delimitation of existing international legal framework and particularly on assessment of friction areas in German and Italian submissions. Three separate issues are analyzed: temporal, territorial and material.

Keywords: State immunity, human rights violations, ius cogens

Introduction

At the end of 2008 Germany initiated proceedings against Italy before the International Court of Justice (hereafter ICJ) alleging that “Italian judicial bodies have repeatedly disregarded the jurisdictional immunity of Germany as a sovereign State.” The matter of the dispute rests in the judgment in Ferrini case of the Italian Corte di Cassazione rendered on 11 March 2004. Italian Supreme Court was seized by civil claim brought against Germany by plaintiff who was deported in 1944 by German troops from Italy to German Reich where he was forced to work for war industry. Ferrini petitioned Germany for physical and psychological harm due to the inhuman treatment he was subjected to during his imprisonment. While lower instances dismissed the case arguing by lack of

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2 DE SENA, Pasquale – DE VITTOR, Francesca. State Immunity and Human Rights: The
jurisdiction, Italian Supreme Court completely overturned these opinions and ruled in favor of appellant. Ferrini decision opened notional Pandora’s box and stimulated already hot discussion over the mutual relationship between serious violations of human rights and the law of state immunity. Obvious question, which is in the centre of presented article, is whether the law of state immunity is perforated by a newly established exception, i.e. by serious violation of human rights which form part of *ius cogens*? This issue has always been popular among scholars, but thanks to ongoing proceedings before the ICJ it currently gains the highest possible recency.

Presented article is divided into three parts. In the brief first part, the emphasis is put on the notion of state immunity as such, with particular focus on the evolution of state immunity, which is significantly marked with its continuous limitation. Second part describes current legal framework (treaties, relevant case-law) in specific area of state immunity which is of primary importance for this article, namely in the area of state immunity for serious violations of human rights. Third part analyzes potential arguments in favor of change of existing law, it explores whether in cases of human rights violation it is already valid to make state immunity inapplicable. Primary source of reference is the argumentation presented by German and Italian governments in the *Jurisdictional Immunities of the State Case* (hereafter *Immunity Case*), both in its written and oral part. The third part also tries to predict final judgment of the ICJ which, if rendered, would be of the highest importance for international law in this area as it is for the very first time when the ICJ is engaged in such kind of dispute.

1. The Notion of State Immunity and Its Historical Evolution

State immunity protects a state and its property from the jurisdiction of the courts of another state. State immunity “*is a plea relating to the adjudicative and enforcement jurisdiction of national courts which bars the municipal court of one State from adjudicating the disputes of another State.*” It is product and direct consequence of unique character of public international law which provides for sovereign equality of states: *par in parem non habet imperium.* State immunity evolved in connection with the development of the concept of sovereignty and the territorial state, it is fundamental principle of the international legal order. State immunity is still based on customary international law as its codification effected by the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (hereafter *UN Convention*) adopted in 2004 has not yet entered into force.

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5. Convention shall enter into force on the thirtieth day following the date of deposit of the
The doctrine of state immunity has evolved significantly over the last centuries. Originally, immunities enjoyed by states were of absolute character. State could invoke them even in entirely private legal relations. When states became increasingly engaged in commercial activities, it was felt there was a need to secure their accountability in business transactions and thus to limit their immunity only to activities which were done in public capacity. During 19th and 20th century some domestic courts therefore applied restrictive doctrine of state immunity which distinguishes as between acta iure imperii and acta iure gestionis. Very first case to be usually given as example of this historical shift dates from as early as 1840, when the Attorney-General of the Court of Appeals of Brussels argued in favor of the denial of foreign state immunity with regard to private acts. Under the restrictive state immunity doctrine there are proceedings in which immunity cannot be invoked. The UN Convention enumerates following exceptions: commercial transactions (Art 10), contracts of employment (Art 11), personal injury and damage to tangible property (Art 12), ownership, possession and use of property (Art 13), intellectual and industrial property (Art 14), participation in companies or other collective bodies (Art 15), ships owned or operated by states which are used for commercial purposes (Art 16).

There is quite broad agreement among states that exceptions in the UN Convention reflect international custom and are “in line with current state practice.” Practically identical opinion has been adopted by the Czech courts. In 2008 the Czech Supreme Court considered labor dispute between Poland and petitioner, who was employed as driver at Polish embassy in Prague, and ruled in favor of claimant despite Poland pointed out to its sovereign immunity and objected that the Czech courts lack jurisdiction. In its reasoning the Supreme Court held that if “State acts not as sovereign but as a legal person in disputes arising out from legal thirtieth instrument of ratification. As on the date of writing (December 2011) there were only 13 state parties to this convention. The Czech Republic is signatory from 2006, but has not yet ratified the treaty. Despite very low support which has been shown until nowadays, the UN Convention is “the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases.”

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9 Compare Section 3b).
10 Fox, H.: supra note 3, p. 532.
relations defined by equality between their parties, this legal person – foreign State—according to the norms of public international law does not enjoy immunity from national proceedings.” The court referred to the Report of the Working Group on Jurisdictional Immunities of States and highlighted exactly the same exceptions to state immunity as those mentioned in the UN Convention. Following parts shall consider whether the same argument can be presented with respect to serious violations of human rights.

2. State Immunity for Serious Human Rights Violation – Legal Framework

After short introduction of subject-matter, it is necessary to specify legal framework (treaties, international case-law, relevant domestic case-law used as evidence of state practice) in specific area of state immunity, i.e. in the area of state immunity for serious human rights violations.

Currently, there is no international treaty which would address this particular issue, callings for conventional regulation remain to be limited on doctrinal sphere. There are no hard exceptions regarding non-immunity for serious human rights violations, but certain indicia worth to be mentioned. Of importance are Art 11 of the European Convention on State Immunity (hereafter European Convention) and similar provision of Art 12 of the UN Convention. These articles provide for so-called tort exception to state immunity, which is nevertheless limited to the territory of the forum state. If tort (wrongful act) is committed abroad, i.e. not on the territory of the state whose courts are seized in the matter, these provisions are inapplicable. Unfortunately, such scenario would be rather rule than exception. As far as potential existence of a customary rule is concerned, it shall be further discussed in the following section.

Due to the lack of primary sources, one must take into account existing judicial practice as subsidiary mean for the determination of rules of law. The European Court of Human Rights (hereafter ECHR) dealt with the matter in at least four decisions which are therefore seminal for every discussion over the topic. In 2001 (at the same day though in separated proceedings) judgments in Al-Adsani,14 McElhinney15 and Fogarty16 were rendered. First case concerns a British and Kuwaiti national who had allegedly been tortured while in Kuwait. After his

return to the UK he initiated proceedings against Kuwait claiming damages for suffered injury. Second case deals with incident from March 1991 which came about at the Northern Ireland border – a British soldier was carried over the border on the tow-bar of the McElhinney’s vehicle. After all, the applicant was allegedly assaulted by the soldier in Ireland. Last of the trinity touches rather labor dispute. In 2002 the ECHR decided about inadmissibility of claim presented by 257 victims of WW 2 massacre committed by German soldiers in Greece. This case refers to infamous killing of Distomo villagers in 1944. In all cases considered by the ECHR, violation of Art 6 (right to fair trial) was claimed, but all applications were finally unsuccessful, as the ECHR denied withdrawal of immunities of respondent states. Currently, there are few other cases still pending before the ECHR. Factual background of these cases is similar to Al-Adsani. In Jones v. the United Kingdom (conjoined with Mitchell and others v. the United Kingdom) applicant, British national, was falsely accused of involvement in a bombing campaign which occurred in Saudi Arabia in 2001. He had been taken away by secret police directly from hospital and then tortured and mistreated for no less than 67 days. In Naït-Liman v. Switzerland Tunisian national, while living in Italy, was arrested and abducted to Tunis. Over a period of 40 days he was arbitrarily detained and subjected to torture. He later fled to Switzerland where he was granted refugee status. National courts in both cases refused to award claimed damages with argument they did not have jurisdiction as alleged acts were committed abroad and they must have respected state immunity of Saudi Arabia and Tunisia.

Relevant practice of domestic courts is far more extensive and cannot be enumerated at full length. Germany puts forward cases from Poland, Serbia, Belgium, Slovenia, France (Bucheron v. Germany), the United Kingdom (Jones v. Saudi Arabia), the United States (Princz v. Germany), Canada (Bouzari v. Iran) and Greece, understandably all supportive of its own position. Especially Greek case-law is of the utmost importance for Immunity Case. In Voiotia v. Germany Greek Supreme Court for the first time addressed massacre in Distomo village. With reliance on the tort exception, as described above, it applied restrictive doctrine of state immunity and decided in favor of petitioners. No enforcement of this judgment was nevertheless reached in Greece, due to Minister of Justice’s refusal to authorize it (Art 923 of the Greek Civil Procedure Code), moreover this decision was overruled in 2002 by Special Supreme Court in Margellos v. Germany. After Ferrini decision was released in Italy, Greek petitioners moved

17 Kalogeropoulou et al. v. Greece and Germany. Appl. no. 59021/00, ECHR Decision on Admissibility, 12 December 2002.
19 Thereupon claimant introduced application against Greece and Germany before the ECHR – compare supra note 17.
20 Special Supreme Court was convened according to Art 100 of the Greek Constitution with the aim (and constitutional power) to settle controversies related to the designation of
with its claims to Italy and finally succeeded, as Court of Appeal of Florence found Distomo judgment enforceable in Italy. Due to the considerable cohesion between Ferrini and Distomo cases, the ICJ granted Greece permission to intervene in the Immunity Case as a non-party in 2011 order. Last, but not least, state practice can be revealed not only in judicial practice, but surely in practice of legislature. This would concern above all statutes enacted in common law countries (e.g. the UK State Immunity Act, the US Foreign Sovereign Immunities Act, the Canadian State Immunity Act) – these documents are nevertheless silent about human rights.

3. Friction Areas in Parties’ Submissions – What Solution for German-Italian Dispute?

In the last and central part of presented paper the focus is given on particular friction areas in German and Italian submissions presented both in written and oral part of the proceedings in Immunity Case before the ICJ. By friction areas fundamental disagreement over specific legal issues is meant. Among these issues attention shall be given to following questions: (a) whether state immunities are of substantive or procedural character; (b) whether locus delicti commissi has relevance for granting or withholding of immunities; (c) whether ius cogens norms can prevail over dispositive rules of state immunity? The first question reflects temporal application of state immunity, the second deals with territorial application. Last issue refers to hierarchy of norms in current public international law.

a) Character of State Immunity and Aspect of Inter-Temporal Law

German and Italian submissions differ significantly from the very starting point. Germany describes state immunities as substantive rules which derive from the sovereign equality of states (Art 2 (1) of the UN Charter) and which have “little, if anything to do with procedure.” Contrary to German arguments, Italy describes immunity as a procedural rule which affects the jurisdictional competence of a court, i.e. which acts as a procedural bar once judicial proceedings is initiated. Proper classification of state immunity nature is not only of academic relevance, as it has significant impact on applicable law. If state immunity is defined as substantive rule, it is widely accepted that it must be assessed according to the law in force at the time when relevant juridical facts occurred – in framework of Immunity Case this should be law in force between 1943 and 1945. On the other hand, if state immunity is defined as procedural rule, it should be assessed on the basis of the law in force at the time when the court is...
seized. The latter variant opens door for evaluation of development which public international law has undergone from the end of WW 2 till 2008, when current dispute was initiated.  

Character of state immunity has been described in procedural terms in case-law of international and national tribunals. It determines the forum before which the case is held and, at the same time, does not affect underlying substantive right or duty of petitioner or defendant. In Al-Adsani the ECHR ruled that “[t]he grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts’ power to determine the right.” The same wording was adopted in McElhinney and Fogarty rendered by the ECHR on the same day. In 2006 House of Lords issued its judgment in Jones v. Saudi Arabia where Lord Bingham with reference to The Law of State Immunity, leading treatise in area written by Hazel Fox, observed:

State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a jus cogens mandate can bite.

Procedural character of immunities was stressed even by the ICJ in Democratic Republic of Congo v. Belgium, though subject matter of this dispute dealt with immunities of state organs granted for purpose of criminal proceedings. The ICJ held that “[w]hile jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law.” In the ICJ advisory opinion over Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, one can find similar conclusion. It seems that prevailing opinion describes state immunity as procedural rule. Having made this conclusion, there is still one question left: what law to apply for state immunity? This brings us to the doctrine of inter-temporal law.

The doctrine of inter-temporal law was famously analyzed in Island of Las Palmas by Max Huber who pointed out that “a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time

23 Ibid, p. 60.
25 Al-Adsani, § 48.
when a dispute in regard to it arises or falls to be settled.” This principle acts as guarantor of stability and legal certainty of law and as such is of the utmost importance in any legal system. Huber’s statement has been widely accepted to this very day despite its frequent misinterpretation, especially with connection to the second element of his dictum. Generally speaking, judicial facts must be assessed according to the law in force at the time when the facts occurred. There is no law without exceptions however, and it holds true for inter-temporal rule as well. First exception is adherent to human rights treaties which are to be interpreted in the light of present-day conditions. Most known examples of this progressive interpretation emanate from the practice of the ECHR. In cases dealing with state immunity and serious violation of human rights, the ECHR has not yet accepted that Art 6, guaranteeing right to fair trial, of the Convention on Human Rights and Fundamental Freedoms, which is always invoked by petitioners, should be interpreted in such a manner, as to allow penetration of state immunity. Quite contrary, with reference to margin of appreciation doctrine, the ECHR stresses the lack of state practice in area, or more precisely, its heterogeneity – it is therefore up to states to make up relevant and constant precedents which could be approved subsequently by international judicial bodies. Arguably this creates egregious vicious circle.

Second exception points to the area of procedural rules. There is stable practice that any courts (both national and international) should apply procedural rules which are in force at the time when the courts are seized. If state immunity is considered as procedural rule, one can make conclusion that inter-temporal principle is not applied. As far as dispute between Germany and Italy is concerned, relevant time framework would be year 1998, when Corte di Cassazione declared that Italy held jurisdiction with regard to claim in Ferrini case, and year 2008 when dispute was presented before the ICJ. Such outcome is to the certain extent undesirable (as there is ten years gap which can be of some importance, i.e. the ICJ should take into account potential development of law within these

29 Immunity Case, Memorial, p. 57, § 93.
32 McElhinney, § 38, § 40, Al-Adsani, § 53.
ten years), but if state immunity is considered thoroughly as the institute of procedural law, it is at the same time the only possible solution and interpretation. Immunity Case before the ICJ is moreover somewhat specific, as it refers to the events which occurred during WW 2 – the problem of inter-temporal law would not be topical if wrongful act is committed in recent years. Anyway, it must be assessed whether current international law allows for newly created exception in the law of state immunity, namely penetration of state immunity in situation of serious violations of human rights. Before this crucial issue is answered relevance of loci delicti commissi shall be considered.

b) Territorial Aspect in the Law of State Immunity

Question which is to be addressed in the following section is whether the venue, where wrongful acts take place, has influence on granting or withholding of state immunities. To give example, one may ask whether legal assessment would be different if offence is done abroad or on the territory of a forum state. This issue is important even in the Immunity Case, as the wrongful act committed by Germany took place at least partly in Italy. The most important rule dealing with territorial aspects of state immunity is Art 12 of the UN Convention. Although this convention is not yet in force, it is the most relevant source of the law of state immunity and therefore has to be taken into account.

This article (i.e. Art 12 of the UN Convention) is listed among exceptions to state immunity. It says that state A cannot invoke immunity from jurisdiction before a court of state B which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the state A, if the act or omission occurred in whole or in part in the territory of state B and if the author of the act or omission was present in that territory at the time of the act or omission. This rule is rather complex, but at the first sight it is clear that immunity can only be invoked in situations where wrongful act was committed on the territory of the forum state. The rationale behind this rule is simple – the most convenient court is that of the state where the delict was committed. There is no similar rule which would make state immunity inapplicable when such conduct occurred outside the territory of the forum state. According to Fox, “[t]he possibility of removing immunity [in such situations] […] was never discussed by the ILC and would certainly have been treated as out of order.” Territorial aspect was crucial even in Al-Adsani where majority of the ECHR ruled out that it did not “find established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum

34 By forum state a state, where proceedings against another state is initiated, is meant.
35 Immunity Case, Counter-Memorial, p. 15, § 2.8.
36 Fox, H.: supra note 3, p. 587.
State.” There is at least accepted, even though supporters of human rights would like to push the rule much further, that death or injury to the person which result from incidents committed in the forum state are not covered by the law of state immunity. It is worth to dwell on the matter for a while.

The original scheme of Art 12 was narrower. It should have been tailored and “mainly concerned with accidental death or physical injuries to persons or damage to tangible property involved in traffic accidents, such as moving vehicles, motor cycles, locomotives or speedboats.” All proposals to limit Art 12 only to traffic accidents were fortunately rejected. In one breath the International Law Commission (hereafter ILC) commentary adds that the “scope of article 12 is wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination.” The rule has dispositive character, it is used unless otherwise agreed between the states concerned, plus, the existence of two cumulative conditions has to be fulfilled for application of this exception. First, the act must be committed at least partly in the territory of the forum state and second, the author of such act or omission must also be present in that state at the time of the act or omission. Such solution was criticized, because it excludes some transboundary damages (firing or shooting across the border), e.g. those resulting from an armed conflict.

Next, there is no need to distinguish between acta iure imperii and acta iure gestionis, as the exception covers all types of acts irrespective of their character. Finally, as one commentator stressed, Art 12 of the UN Convention “is helpful only in a very small number of cases” – more typical would be Al-Adsani like scenario where petitioner suffers damage abroad and is unable to obtain redress directly in the forum state.

The most difficult issue connected with interpretation of Art 12 of the UN Convention is whether it covers claims arising from the armed conflict. It was argued that claims for damages resulting from transboundary effects of armed conflicts would be rejected without else, the answer is not so much clear with regard to armed conflicts occurring directly in the territory of the forum state. The UN Convention, contrary to its European regional counterpart, contains no express rule excluding its applicability to armed forces. The European Convention provides for such rule in Art 31 according to which “nothing in the present Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State.” It is of no wonder that Ger-

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37 Al-Adsani, § 66.
39 Ibid
41 STOLL, P.-T.: supra note 6, § 80.
many argues against inclusion of armed forces to tort exception contained in Art 12, whilst Italy reasons just in favor of it. According to Germany this article was not tailored for situations of macro-injustices.\textsuperscript{43}

Such argumentation has for sure merits and rests on variety of sources. Reference should be made again to the ILC commentary to \textit{Draft Articles of Jurisdictional Immunities of States and Their Property} (commentary to Art 12) which speaks about inapplicability of Art 12 to situations involving armed conflicts.\textsuperscript{44} The ECHR, while interpreting Art 12 of the \textit{UN Convention} in \textit{McElhinney}, came to similar conclusion saying that “\textit{the trend may primarily refer to “insurable” personal injury, that is incidents arising out of ordinary road traffic accidents, rather than matters relating to the core area of State sovereignty such as the acts of a soldier on foreign territory}”.\textsuperscript{45} The same is true for \textit{Margellos} case heard before Greek Special Supreme Court, which departed from previous \textit{Distomo} case. Greek court came to conclusion that at the present stage of development of international law, a generally accepted rule of international law that allows an action to be brought against one state before the courts of another state for compensation arising from any type of tort that took place in the territory of the forum, and in which the armed forces of the defendant state were involved in any way, either in peace or in time of war, has not yet emerged.\textsuperscript{46} Lastly, rules excluding armed activities from framework of domestic legislation (e.g. \textit{State Immunity Act} of the UK) can be traced in most common law countries.

Exhaustive investigation of the subject was conducted by A. Dickinson, who concludes that question of applicability of the \textit{UN Convention} towards activities of armed forces is far from being answered.\textsuperscript{47} There are categories of privileges and immunities which are not affected by the convention (Art 3), the absence of any specific mention about immunities of armed forces tends (\textit{a contrario}) to the conclusion that the \textit{UN Convention} is simply applicable to armed activities. General regulation can be nevertheless replaced by specific agreements (e.g. status of force agreements) whose existence and availability are anticipated in Art 26 of the convention. Finally, Dickinson admits that “[t]here may […] be scope for bringing claims against individual members of foreign armed forces of States party to the Convention who commit war crimes outside the forum state”.\textsuperscript{48} This conclusion gives

\textsuperscript{43} \textit{Immunity Case}, Memorial, p. 46, § 75.
\textsuperscript{45} \textit{McElhinney}, § 38.
\textsuperscript{46} \textit{Germany v. Margellos}, §§ 14–15.
\textsuperscript{48} Ibid
floor for final section which deals with mutual relationship between ius cogens and dispositive rules of state immunity.

c) Hierarchy of Norms in International Law – Ius Cogens and State Immunity

It was already mentioned that Italian submission is based on simple assumptions: serious violations of international humanitarian law committed by German troops in Italy during WW 2 can be described as violations of ius cogens (a), as state immunity has only dispositive character (b), there is no doubt that a contradiction between two binding legal norms ought to be resolved by giving precedence to the norm with the higher status.49 At the very outset it needs to be stressed that mutual relation between ius cogens and state immunity concerns a linkage between peremptory and dispositive rules. The law of state immunity has in no way obtained status of imperative norms therefore there is no conflict of peremptory norms at stake.50

The opinion of scholars in this question is, without any surprise, divided. There are opinions arguing in favor of primacy of ius cogens over rules of state immunity and opinions which argue against51 – tertium non datur. Proponents usually argue by hierarchy of norms, opponents point out to the lack of practice in area, or refer to different character of peremptory norms and rules of state immunity. According to the latter plea, there is no space for contact between ius cogens and state immunity, because first rules have substantive content whilst second only procedural one. Accordingly, “state immunity only concerns the enforcement, not the material content of the jus cogens rule.”52 It seems that such opinion is of no use in Immunity Case, as Germany from the very beginning contends that state immunity is of material character and Italy adopts position according to which ius cogens have effects even in area of procedural law. It is worth to describe relevant arguments at some length.

According to Italy, there are at least three reasons which can be submitted to give support for its position. First one rests in analogy with development in international criminal law. Perpetrators of crimes under international law cannot further shield behind the cloak of their function. At the latest from 1945, there is constant rule in international law according to which the official position of defendants, whether heads of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment.53 Neither personal nor functional immunities are relevant in pro-

49 Immunity Case, Memorial, p. 51, § 83.
50 For contrary opinion compare OELLERS-FRAHM, K.: supra note 33, p. 1072.
53 Charter of the International Military Tribunal, Art 7.
ceedings before international tribunals. As far as proceedings before domestic courts are concerned, only personal immunities are applicable, but once a person ceases to hold the office, he or she will no longer enjoy any such protection – functional immunities are not relevant for crimes under international law.\(^{54}\) To put it differently, as Italy suggests, it is untenable to maintain that while *ius cogens* have procedural effects in criminal proceedings, it cannot cause similar consequences in civil proceedings where state responsibility is concerned. To use another analogy, this situation somehow brings back discussion over criminalization of violation of international humanitarian law in non-international armed conflicts. It took some time before the ICTY famously ruled out that “[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.”\(^{55}\) Tadić decision marked important step toward overcoming of that time prevailing doctrine of divided humanity which distinguished between different kinds of conflicts.

Second argument speaks about tacit waiver of immunity in situations of serious violations of human rights. This theory asserts that violation of *ius cogens* cannot be considered as sovereign act, and therefore, “[w]hen a State act is no longer recognized as sovereign, the State is no longer entitled to invoke the defense of sovereign immunity.”\(^{56}\) In the opinion of present author this line of reasoning however lacks persuasiveness. It seems that such reading of waiver goes too far behind what would be acceptable for states, as waiver deals with expression of will, which would be simply missing in described situations. It is acceptable that waiver can be implied (e.g. state voluntarily takes part in initiated proceedings), but anyway states must still express somehow its readiness or willingness to confer jurisdiction to a court of another state. Mere fact that subject matter of the dispute deals with violation of *ius cogens* does not automatically generates jurisdiction of any court. Such conclusion has its resonance even in case-law of the ICJ.\(^{57}\)

The last argument deals with already mentioned hierarchy of norms in public international law. Unfortunately, the source Italy refers to in its submission is only the minority opinion in Al-Adsani. Although the judgment of the ECHR Grand Chamber was decided only by the tightest possible majority (9:8), it is

\(^{54}\) *Arrest Warrant Case*, § 61.

\(^{55}\) *Prosecutor v. Tadić*. Case no. IT-94–1, Appeal Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, § 119.

\(^{56}\) *Immunity Case*, Counter-Memorial, p. 65, § 4.69.

\(^{57}\) *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Judgment, 3 February 2006, p. 32, § 64 – according to the ICJ, „the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court’s Statute that jurisdiction is always based on the consent of the parties.“
still this majority which prevailed. Minority opinion refers again to procedural effects of *ius cogens* in civil proceedings against states:

The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions. […] Due to the interplay of the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect.\(^{58}\)

German argumentation, if inter-temporal aspect discussed above is omitted, is twofold. First one deals with lack of any relevant state practice. In fact, Italy builds its arguments mainly on the judicial practice of its own courts. Even the closest counterpart of Ferrini judgment, namely the Greek Distomo case, was finally overcome by later ruling by the Special Supreme Court. As far as the ECHR is concerned, all cases connected with mutual relationship between serious human rights violations and state immunity (*Al-Adsani, McElhinney, Fogarty, Kalogeropoulous*) were decided in favor of the latter. Finally, even Ferrini case, which lies in the center of whole dispute, uses very cautious language, since *Corte di Cassazione* merely ruled out “*it could be presumed that a principle limiting the immunity of a State which has committed crimes against humanity was in the process of formation.*”\(^{59}\) The court speaks about the process of formation of custom, not about already created customary rule.

An exception to state immunity which would be applicable in situations of serious human rights violations is not part of any international instrument, in the opinion of present author it can enter floor of international normativity only through the formation of new customary rule. Potential pronouncement in a decision of the ICJ or any other international tribunal would be of only declaratory character, as courts cannot create law, they can only apply it. Formation of custom in international law is subject to widely shared conditions, among which uniformity, extensiveness and representativeness are usually mentioned.\(^{60}\) It seems that practice, as far as immunity for human rights violation is concerned, is uniform, extensive and representative only in so far, as immunity is retained and preserved for states. Only one inter-state dispute which had been decided in favor of non-immunity was subsequently presented to the ICJ. Italian cases should be therefore “*treated as breaches of [existing] rule, not as indications of the recognition*”。

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58 *Al-Adsani*, Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, § 3.

59 *Immunity Case*, Memorial, p. 52, § 84.

of a new rule.\textsuperscript{61} Despite sympathy for Italian submission, especially in the part speaking about analogy to the development in international criminal law, one cannot disregard fact that ius cogens and state immunity are shaped by will of the states, element of consent retains its importance in this area. In current state of international law states are evidently not ready to accept idea that they should sacrifice their immunity on the altar of omnipresent emphasis on human rights. Fortunately, all relevant practice and case-law in area favoring immunity do not exclude development in customary international law in the future.\textsuperscript{62}

\textit{Ad abuntandiam}, one more argument supportive of German position should be mentioned in this section. Until recently, claims brought by individuals relating to damages suffered during armed conflicts were unsuccessful, as they were governed by the law of armed conflict which provides no right to claim compensation on the part of individual.\textsuperscript{63} Reference is usually made to Art 3 of the Hague Convention respecting the Laws and Customs of War on Land and Art 91 of the Additional Protocol I to the 1949 Geneva Conventions. These provisions provide that belligerent party which violates the provisions of the said instruments shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces. The acceptance of Italian argumentation would mean that cited rules of international humanitarian law have self-executing character which is far from being settled. Such position should be first accepted across the state practice and only after promulgated by international forum. It is preferable that situations of macro-injustices are compensated in macro terms as well, i.e. by lump-sum agreements. It means at the same time that cases of isolated violation of human rights should be governed differently. In the light of previous analysis it is clear that such idea has not yet been accepted by states.

\textbf{Conclusion}

It is often said that every paper should be reformulable into simple question-answer scheme. The question was revealed in the very title of present article: is state immunity already non-applicable (eclipse) in situations of serious human rights violations? The answer is simple: no! More complex answer would be: not yet (twilight). This position takes into account development of international law, its shift towards individual, but at the same time reflects the lack of relevant state practice in the area.

\textsuperscript{61} Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, 27 June 1986, p. 98, § 186. Similar argumentation was used by Lord Bingham in Jones v. Saudi Arabia. Lord Bingham opined that “\textit{Ferrini decision cannot [...] be treated as an accurate statement of international law as generally understood, and one swallow does not make a rule of international law.”} Jones v. Saudi Arabia, § 22.

\textsuperscript{62} Al-Adsani, § 66.

\textsuperscript{63} FOX, H.: supra note 3, p. 582.
It was argued that state immunity concerns rules which are of procedural character, with the consequence that assessment of these rules follows the law in force at the time when a court is seized. The doctrine of inter-temporal law is not applied here and therefore state immunity can be interpreted in the light of current international law. Second, it was argued that well established exception, which provides for non-immunity once death, injury or damage is at least partly done on the territory of the forum state, is rather not applicable in relation to the armed forces. This conclusion is supported by the ECHR case-law (McElhinney), domestic case-law (Margellos) and work of the ILC. At the same time, some hesitation was revealed as to the interpretation of the UN Convention Art 12 – while state practice tends to exclude armed forces from its scope, there are arguments (modes of interpretation) which are indicative of their inclusion. Lastly, it was submitted that current international law of state immunity has not yet absorbed exception enabling to claim damages before domestic courts for serious human rights violation committed by foreign states. The most persuasive argument points to the lack of relevant state practice in this area. It was argued that as far as compensation for damages suffered during armed conflict is concerned, international humanitarian law does not accept right of individual to present claims on his/her own.

At the same time sympathy for Italian initiative was presented. Even the ECHR admitted that customary international of state immunity can develop in the future. Uniqueness of German-Italian dispute should be taken into account. Immunity Case contains three aspects which are of some difficulty and controversy – first one deals with inter-temporal law (events occurred during WW 2), second one concerns territorial facet (damage was at least partly caused on the territory of the forum state), last one aims to the author of wrongful act (atrocities were committed by the armed forces). If one imagines situation of violation of human rights which is current, isolated and not committed by the armed forces, despite it takes place outside the territory of the forum state (Al-Adsani scenario), much of the convincingness contained in German arguments simply disappears. It should be exactly this path which can lead to overall acceptance among states not to claim immunities where serious human right violations are at stake. It remains to be seen how long this path will be.
**Die US-amerikanische Class Action: Struktur und rechtsökonomischer Hintergrund**

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**English title:** The US-American class actions: structure and legal-economic background

**Summary:** The article is dealing with the new German legal regulation concerning so called securities class actions. The author sees the new possibilities to bind together claims which arose from false information in capital market as a followor of the US class actions, therefore the article explains with the aim to simplify the interpretation of the new German legal rules the current American legal regulation of class actions. This means it analyses mainly the article 23 of the Federal Rules of Civil Prodecure and brings opinions of the author whether its particularities may function in Germany or not.

**Keywords:** Germany, USA, class actions, capital markets, securities

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**I. Einleitung**


Die Class Action beinhaltet eine Gruppen- bzw. Sammelklage,\(^2\) die Securities Class Action die spezielle Sammelklagemöglichkeit für Kapitalmarktgeschädigte.

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2 Beuchler, Class Actions und Securities Class Actions in den Vereinigten Staaten von
Diese unterliegt in den USA höheren Anforderungen als die normale Class Action. Der Grund dafür war und ist, dass Klagen von Kapitalmarktgeschädigten in Class Action-Form Konjunktur haben, auch dann, wenn sie missbräuchlich sind.


II. Überblick zu den Regelungen der Class Action

Die Möglichkeit der Führung einer Sammelklage in Form der Class Action ergibt sich aus einer besonderen Regelung des US-amerikanischen Zivilprozessrechts. Verantwortlich hierfür ist Rule 23 der Federal Rules of Civil Procedure. Diese Regelung bestimmt: „One or more members of a class may sue or be sued as representative parties on behalf of all …“. Kennzeichnend ist nach dieser Vorschrift für die Class Action, dass eine einzelne Person Klage erhebt, und zwar als Gruppenrepräsentant im Namen der gesamten Gruppe von potentiellen Klägern, deren Mitglied sie ist.4

1. Anwendbarkeit von Bundesrecht (Rule 23 FRCP) und deren Teilüberlagerung durch Spezialrechtsakte

Obgleich das US-amerikanische Zivilprozessrecht aufgrund des föderalen Systems der USA zweigeteilt ist und neben dem Landesrecht der 50 Bundesstaaten Bundesrecht für Klagen vor den Bundesgerichten steht,5 führt dies zu keiner

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5 Aufgrund Art. 3 Sec. 3 der US-amerikanischen Verfassung ist die Zuständigkeit der Gerichte
Rechtszersplitterung für die kapitalmarktrechtliche Sonderform der Class Action. Denn für diese, d.h. die Securities Class Action, greift immer die bundesrechtliche Regelung ein, was sich aus einem Spezialgesetz (dem Securities Litigation Uniform Standards Act von 1998 – vgl. dazu § 15 U.S.C. §§ 77p und 78 bb (f)) ergibt. Die Heraufzonung dieser Klagen auf die Ebene des Bundesrechts soll dazu dienen, die Restriktionen, die hier für sie vorgesehen sind, stets zur Anwendung zu bringen.\(^6\)

2. Voraussetzungen zur Führung einer (Securities) Class Action


\(a\). Zulassungsverfahren

In dem dem Hauptverfahren vorgeschalteten Zulassungsverfahren wird durch das Gericht geprüft, ob es sinnvoll ist, die Vielzahl der gleichgerichteten Einzelklagen in Form einer Class Action zu bündeln. Dazu sind gewisse Anforderungen an die Gruppenstärke, aber auch den möglichen Gruppenkläger, der die Gruppe vertritt, und an seinen Anwalt zu stellen.

\(aa\). Anforderungen an die Gruppe

Das Gesetz, d.h. Rules 23 (a) (1) und (2) der Federal Rules of Civil Procedure, stellt zunächst bestimmte Anforderungen an die Gruppe, d.h. die Class. Maßgeblich sind hierbei zwei Kriterien. Erfüllt sein muss das Kriterium der „Numerosity“ und der „Commonality“.\(^8\) Die Zulässigkeit der Erhebung einer Class Action setzt voraus, dass es eine Mehrzahl klagwilliger Personen gibt, angesichts deren Klagen die einfache verfahrensrechtliche Verbindung zur gemeinsamen Verhandlung, sog. joinder, unzweckmäßig wäre, weil die Gruppe der klagwilligen Personen entsprechend groß ist („Numerosity“) und es i.Ü. tatsächliche oder rechtliche Fragen
gibt, die die Ansprüche aller Gruppenmitglieder (dieser großen Gruppe) verbindet („Commonality“).

(1) Zum Merkmal der Gruppenstärke (Numerosity)


Im kritischen Bereich von 39 bis 20 gleichgerichteten Klagen, kommt es für die Zulassung zur Class Action darauf an, welche praktischen Schwierigkeiten tatsächlich bei dem Versuch auftreten würden, Einzelverfahren im Wege eines „joiners“ zur gemeinsamen Verhandlung zusammenzufassen. Das Gericht, das über die Zertifizierung der beantragten Class Action entscheidet, hat hier prognostizierend abzuwägen, wie teuer, zeitaufwendig und logistisch schwierig eine derartige Unternehmung wäre. Relevant als logistisches Hindernis kann dabei auch der Umstand sein, wie weit entfernt voneinander die Gruppenmitglieder wohnen.

(2) Zum Merkmal der Gleichgerichtetheit der Klagen (Commonality)

Es muss ferner – so bestimmt es Rule 23 (a) (2) der Federal Rules of Civil Procedure – eine Gruppenbildung möglich sein. Das ist dann der Fall, wenn die in hoher Anzahl erhobenen Einzelklagen (s.o.) über zu klärende tatsächliche und/oder rechtliche Fragen, die „in die gleiche Richtung laufen“ verbunden sind. Hervorzuheben ist, dass die Rechtsprechung bei der Identifizierung der Gruppenmerkmale und der darauf bezogenen Entscheidung über das Bestehen einer Class-Action-fähigen Gruppe einen weiten Entscheidungsspielraum hat, den sie auch ausschöpft, und zwar unter Beachtung aller Umstände des Einzelfalls. Die Judikatur befindet daher relativ frei darüber, ob und inwieweit Klagen nach dem Sinn und Zweck der Regelung durch rechtliche oder tatsächliche Gesichtspunkte

11 Bergmeister, Kapitalanleger-Musterverfahrensgesetz (KapMuG) (2009), S. 58.
13 Die Judikatur hat bislang bewusst auf die Herausbildung einer allgemeinen subsamtsfähigen Formel für die Class, die über gemeinsam zu klärende rechtliche und/oder tatsäch-

Die hinreichend präzise Gruppendefinition, die letztlich, über das Herausfiltrieren der rechtlichen und tatsächlichen Fragestellungen, die „gleichgerichtet“ sind bzw. als solche gelten, erreicht wird, ist letztlich auch zentraler Bestandteil des Beschlusses, mit dem die Class Action aufgrund der sog. „Certification Order“ durch das Gericht zugelassen wird. Die eventuell unterschiedliche Höhe des Schadensersatzes, der nach den Einzelklagen gefordert wird, ist jedenfalls – das dürfte auf der Hand liegen – kein Hindernis für die Bewertung sonst gleichgerichteter Klagen als „innerlich verbunden“.


**bb. Anforderungen an den Kläger als Repräsentant der Gruppe**


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15 In re Agent Orange Product Liability Litigation, 818 F. 2d 145, 166–167 (2d Cir. 1987).
17 Bergmeister, Kapitalanleger-Musterverfahrensgesetz (KapMuG) (2009), S. 60.
18 Bergmeister, Kapitalanleger-Musterverfahrensgesetz (KapMuG) (2009), S. 60.
(1) *Typicality und Fairly/Adequately – als allgemeine Anforderungen bei der Class Action*

Erforderlich ist nach Rule 23 (a) (3) zunächst, dass der Kläger, der beansprucht Führungskläger der Class Action zu sein, Inhaber eines Anspruches ist, der typisch, d.h. *repräsentativ für die Ansprüche der Gruppenmitglieder* ist. Weiter muss annehmen sein, dass der Kläger, der sich um die Stellung des Führungsklägers der class bemüht, die Interessen der Gruppe fair und angemessen wahrnimmt. Das Gericht hat hier eine Prognose anzustellen. Bezugspunkt ist dabei die angemessene Interessenvertretung der Gruppe im Hauptverfahren durch eine Partei, die dieses Verfahren für alle anderen Mitglieder der Gruppe betreibt. Ist diese anzunehmen, wird der Kläger, der sich um die Stellung des Führungsklägers bemüht, durch das Gericht zum Lead Plaintiff bestellt.

Zumeist ist der Führungskläger des Hauptverfahrens auch derjenige, der bereits im Zertifizierungsverfahren das Heft des Handelns als Vertreter der Gruppe in die Hand genommen hat. Das muss aber nicht so sein. Besonders hervorzuheben ist, dass es i.U. ein Charakteristikum der kapitalmarktrechtlichen Variante der Class Action ist, dass nicht derjenige, der seinen Rechtsstreit als erster zu Gericht trägt, auch derjenige ist, der automatisch in die Rolle des Führungsklägers übernimmt. Denn es kann sein, dass dieser, weil er bspw. „Berufskläger“ ist, primär seine eigenen Interessen verfolgt und das Gericht daher keine faire Interessenwahrung bzgl. der übrigen Kläger als gegeben ansieht.

(2) *Daneben bestehende Anforderungen für die Securities Class Action aufgrund von Spezialregelungen*


21 Bei Securities Class Action ist deshalb der sonst so entscheidende „Run to the Court“ nicht von Bedeutung, vgl. dazu *Bergmeister*, Kapitalanlegermusterverfahrensgesetz (KapMuG) (2009), S. 98.

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Plaintiff, d.h. Gruppenrepräsentant sein darf, der in den letzten fünf Jahren bereits fünfmal diese Rolle innehatte.  


(3) Vom Führungskläger zu erfüllende Benachrichtigungspflichten


cc. Anforderungen an den Gruppenanwalt

Beachtenswert im Zusammenhang mit der Zulassung der Class Action ist weiter, dass der Gruppenanwalt (sog. Class Counsel) auf Vorschlag des Führungsklägers mit Zustimmung des Gerichts bestellt wird. Die Einbeziehung des Gerichts soll gewährleisten, dass der Gruppenanwalt, der bei der Class Action nicht nur

22 Bergmeister, Kapitalanlegermusterverfahrensgesetz (KapMuG) (2009), S. 94.
23 Zum Ganzen siehe Bergmeister, Kapitalanleger-Musterverfahrensgesetz (KapMuG) (2009), S. 63.

**dd. Entscheidung über die Zulassung (Zertifizierung) der Class Action**

Die Entscheidung über die Zulassung der Class Action, die ggf. durch die Beschränkung der Gruppe oder des Gegenstandes ergeht, verfügt am Ende des dem Hauptverfahren vorgeschalteten Zertifizierungsverfahren das Gericht in Form eines schriftlichen Beschlusses, der wiederum vom Lead Plaintiff den übrigen Gruppenmitgliedern mitzuteilen ist. (Ein solcher Beschluss ist nur dann entbehrlich, wenn es schon im Zulassungsverfahren zu einer vergleichsweise Einigung kommt, wobei das dabei gefundene Vergleichsergebnis nur noch der gerichtlichen Genehmigung bedarf. In diesem Fall spricht man von einer *Settlement Class*. Kommmt es nicht zu einer vergleichsweise Einigung im Zulassungsverfahren, entscheidet das Gericht – was gerade auch im Bereich des Kapitalmarktrechts gilt – im Zweifel für die Zulassung der Class Action.

Insofern spielt häufig die Einschätzung der Gerichte eine Rolle, dass Einzelkläger wegen der oft unverhältnismäßig hohen Kosten eine Klage ohne Zertifizierung als Class Action scheuen und die Zertifizierung des Verfahrens als Class Action hilft, die Einhaltung kapitalmarktrechtlicher Haftungsnormen auch über gerichtlich durchsetzbare Schadensersatzansprüche sicherzustellen. Der entsprechende Zulassungsbeschluss muss allerdings bestimmte Angaben enthalten, die für die effiziente Führung des Hauptverfahrens unentbehrlich sind. In diesem Sinn hat er (abstrakt) die Gruppe der Kläger, die Ansprüche und Streitpunkte, die Gegenstand des Class Action-Verfahrens sind, den Führungskläger sowie den *Class Counsel* auszuweisen.

Um die Effizienz des Kollektivverfahrens zu gewährleisten, kann gegen die (bloße) Zulassungsentscheidung des Gerichts noch kein Rechtsmittel eingelegt

25 *Bergmeister*, Kapitalanlegermusterverfahrensgesetz (KapMuG) (2009), S. 103.
werden. Der Grund dafür ist, dass eine Berufung grds. nur gegen verfahrensabschließende Entscheidungen statthaft ist (vgl. 28 U.S.C. § 1291) und der Suprime Court entschieden hat, dass dem Zulassungsbeschluss im Zertifizierungsverfahren zur Class Action noch nicht diese Wirkung zufällt;29 es handelt sich eher um eine Art Zwischenentscheidung.

b. Hauptverfahren

Nach der Zertifizierung der Class Action ist der Weg frei für das Hauptverfahren (sog. „Trail“30).

aa. Benachrichtigung der Gruppenmitglieder durch den Führungskläger

Das Hauptverfahren beginnt damit, dass alle Gruppenmitglieder von seiner Eröffnung zu benachrichtigen sind (vgl. dazu Rules 23 (c) (2) (B) der Federal Rules of Civil Procedure). Die Information über die Eröffnung des Hauptverfahrens wird zwar durch das Gericht abgefasst (ist also amtlich), die Verbreitung der Information obliegt aber dem Gruppenrepräsentanten. Wichtig ist, dass sie auf der bestmöglichen Art und Weise zu erfolgen hat („Best Practicable Notice“). Wurde abstrakt gesehen die bestmögliche Art und Weise der Benachrichtigung gewählt, hat ein Gruppenmitglied oder haben einige Mitglieder die Benachrichtigung aber gleichwohl nicht erhalten, ist dieses bzw. sind diese dennoch an das Verfahrensergebnis gebunden.


Unterbleibt die Nachricht über die Eröffnung des Hauptverfahrens oder ist die gewählte Art und Weise der Bekanntmachung ungenügend, hat das Urteil mit Ausnahme der namentlich benannten Parteien keinerlei Bindungswirkung für die


bb. Inhalt der Benachrichtigung und die Kostenträger, Verfahrensleitung durch das Gericht

Damit sich das Gruppenmitglied von der Benachrichtigung angesprochen fühlt, sich mithin zur „Class“ zuordnen kann, muss die Benachrichtigung über die Eröffnung des Hauptverfahrens erkennen lassen, worum es geht und wie die Gruppe definiert ist. Auch hat eine Rechtsbelehrung darüber zu erfolgen, dass bei nicht erklärtem Austritt aus der Gruppe innerhalb einer gewissen Zeit (die vom Gericht festgesetzt wird), das Ergebnis des Prozesses Bindungswirkung erzeugt (Rules 23 (c) (2) (B) der Federal Rules of Civil Procedure).


Die Verfahrensleitung durch das Gericht geht im Hauptverfahren so weit, dass das Gericht selbst die bereits getroffene Zulassungsentscheidung zur Sammelklage noch vor Erlass des Endurteils abändern kann. Möglich ist dies mittelbar, durch nachträgliche Änderung der Gruppendefinition oder der Bildung von Untergruppen. Zulässig, wenn gleich selten, ist auch die generelle Rücknahme der Zulassung.

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33 Beuchler, Class Actions and Securities Class Actions in den Vereinigten Staaten von Amerika (2008), S. 134.
35 Conte/Newberg, Newberg on Class Actions (3. Aufl., 2006), § 22.85.
36 Bergmeister, Kapitalanleger-Musterverfahrensgesetz (KapMuG) (2009), S. 117.
38 Conte/Newberg, in: Newberg on Class Actions (3. Aufl., 2006), § 22.86.
40 Bergmeister, Kapitalanleger-Musterverfahrensgesetz (KapMuG) (2009), S. 128.
Derartige Statusveränderungen ziehen allerdings wie der umfängliche Benachrichtigungspflichten nach sich.

cc. Stellung des Führungsklägers und Rechte der übrigen Class-Mitglieder

Die Besonderheit der Class Action wird aber überhaupt nur verständlich, indem auf die Stellung des Führungsklägers sowie der übrigen Class-Mitglieder im Hauptverfahren eingegangen wird. Insoweit ist es entscheidend herauszustellen, dass der Führungskläger die Gruppe im Hauptverfahren repräsentiert. Das durch ihn betriebene Hauptverfahren zeitigt Wirkung für die gesamte Class, die alle Geschädigten umfasst. Die Class wird dabei nicht durch ein Opt-In, d.h. durch eine aktive Beitrittserklärung der Betroffenen mit gleichlaufenden Ansprüchen gebildet. Sie konstituiert sich vielmehr umgekehrt durch die abstrakte Gruppendefinition im Zulassungsbeschluss, die alle potentiell Geschädigten erfasst, wobei aus der Class nur diejenigen Betroffenen herauszurechnen sind, die sie innerhalb der gesetzten Frist durch ausdrückliche Erklärung verlassen haben. Die Class Action basiert damit auf einem Opt-Out-Modell,42 über das sie erst ihre Schlagkraft entwickelt.43 Das rührt daher, dass Austritte eher selten erklärt werden und es damit zur Vertretung aller denkbar Geschädigten durch den Führungskläger kommt, was wiederum für die Höhe der Schadenssumme, die abstrakt gesehen den Gesamtschaden umfasst, von Bedeutung ist.


41 Im Fall der Decertifikation kann das Verfahren gegen den Beklagten zwar nicht mehr im Wege der Class Action (also als Sammenklagemitglied) betrieben werden, wohl aber im weiterhin offen stehenden Individualverfahren.
42 Ein erklärter Austritt aus der Gruppe führt dazu, dass das Verfahren und sein Ergebnis keine Bindung für das betreffende Gruppenmitglied erzeugt. Es kann dann seine Ansprüche individuell durchsetzen oder darauf verzichten.
43 Für die Opt-Out-Erklärung stellt das Gericht regelmäßig ein Formular zur Verfügung (sog. „Opt-Out-Form“), das nach Ausfüllung an das Gericht oder die von ihm benannte Stelle zu senden ist.
45 Bergmeister, Kapitalanleger-Musterverfahrensgesetz (KapMuG) (2009), S. 134.
**dd. Bedeutung des im US-amerikanischen Zivilprozess generell zulässigen Ausforschungsbeweises**

Der US-amerikanische Zivilprozess wird weiter geprägt durch die sog. „Discovery“ – den Ausforschungsbeweis. Dieser ist auch bei Sammelklagen zulässig. Er vergrößert die Chancen des Klägers, seine Behauptungen mit Beweisen untermauern zu können,46 die ihm der Gegner, der auskunftspflichtig ist, liefert. Der Begriff Discovery steht für ein Beweiserhebungsverfahren, bei dem eine Partei auf Antrag der anderen umfassend zur Tatsachenaufklärung beizutragen hat.47

**ee. Abschluss des Verfahrens**


**ff. Schadens- und Verteilungsverfahren**


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47 Bergmeister, Kapitalanleger-Musterverfahrensgesetz (KapMuG) (2009), S. 135.
49 Gegen die Genehmigung des Vergleichs ist das Rechtsmittel der Berufung einlegbar. Das Gruppenmitglied muss insofern vorbringen, dass es rechtzeitig Einwendungen gegen die Angemessenheit des Vergleichs geltend gemacht hat und es damit nicht gehört wurde.
51 Bergmeister, Kapitalanleger-Musterverfahrensgesetz (KapMuG) (2009), S. 135.
oder aber mit statistischen Modellen, die beide auf empirische Erfahrungen, ggf. auch auf Unterlagen des Prozessgegners basieren.\footnote{Bergmeister, Kapitalanleger-Musterverfahrensgesetz (KapMuG) (2009), S. 136.}

Wird der Gruppe unter Zulassung des kollektiven Schadensnachweises pauschal eine Summe zugesprochen, die etwa an einen Fond zu zahlen ist, erweist sich häufig die Verteilung der Summe an die einzelnen Gruppenmitglieder als ein besonderes organisatorisches, aber auch inhaltliches Problem, insbesondere, wenn die Gruppe groß ist. Denn die Gruppenmitglieder sind vom Prozessausgang zu benachrichtigen und haben nun ihre individuellen Forderungen (auch dem Umfang nach) konkret anzumelden und nachzuweisen (Individual Proof of Claim).\footnote{Eichholtz, Die US-amerikanische Class Action und ihre deutschen Funktionsäquivalente (2002), S. 188; Beuchler, Class Actions and Securities Class Actions in den Vereinigten Staaten von Amerika (2008), S. 165.}


\textit{gg. Kostenfragen}

II. Fazit


CONSUMER BANKRUPTCY IN POLAND

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Summary: The article analysis the legal aspects of the problem of consumer bankruptcy within the Polish legal system. It covers the substantive and also procedural aspects of this legal instrument. Author describes the requirements and conditions for the consumer bankruptcy, scope and effects of this form of bankruptcy. Moreover he deals with the procedural aspects of the declaration of the personal consumer bankruptcy and discusses the practice of use of this institution in Poland.

Keywords: Bankruptcy, consumer, requirements, conditions, scope, procedures

Introduction

The Act of 5 December 2008 on amending the Bankruptcy and Reorganization Law and the Act on Court Costs in Civil Proceedings introduced to the Bankruptcy and Reorganization Law of 28 February 2003 the rules concerning special bankruptcy proceedings against natural persons not conducting commercial activity (“the consumer bankruptcy”).¹ The former Ordinance of the

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President of the Republic of 24 October 1934 – Bankruptcy Law, the first Polish modern source of the bankruptcy law, and the Bankruptcy and Reorganization Law of 28 February 2003 until the above mentioned amendment applied only to the entrepreneurs. In other words bankruptcy capacity had been given mainly to the persons or entities conducting commercial activity. *De lege lata* the consumer bankruptcy should be consider as separate, special bankruptcy proceedings among other specific proceedings i.e. bankruptcy proceedings against banks, mortgage banks, credit institutions, bond issuers, developers, etc. Bankruptcy proceedings against natural persons not conducting commercial activity is regulated in art. 491–491 b.r.l. The legal norms of the Polish bankruptcy law are divided into norms of substantive, political (structural) and procedural law. The European law does not provide any special regulation in the matter of the consumer bankruptcy. In the time of the global financial crisis the consumer bankruptcy in Poland in the present legal shape is not a popular institution in practice. The aim of this paper is to give a short overview of the Polish bankruptcy law for consumers and the reasons of unpopularity of the present bankruptcy law.

**Subjective scope of applicability of the consumer bankruptcy (“consumer bankruptcy ability”)**

The consumer bankruptcy, as special bankruptcy proceedings, shall apply only to those natural persons to whom the provisions of the general bankruptcy proceedings do not apply (art. 491 b.r.l.). The Act of 23 April 1964 – Civil Code in art. 22 defines the phrase “consumer”. The scope of the word “consumer”

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2 The Act sets forth some minor exemptions of the general rule that bankruptcy capacity is
given to an entrepreneur.

3 Consumer bankruptcy shall be conducted according to the provisions on the general
bankruptcy proceedings by liquidation of the bankrupt’s assets applied accordingly, how-
ever some of the provisions shall not apply (art. 491 sec. 1 b.r.l.).

4 R. Adamus, Miejsce Prawa upadłościowego i naprawczego w systemie prawa, Przegląd
Ustawodawstwa Gospodarczego, 2011, no 1, p. 3.

Witosz, in: Prawo…, p. 808.
under the regulation of the Civil Code and the scope of the phrase “natural person not conducting commercial activity” are not the same.  

It should be stated that general bankruptcy proceedings apply to the natural persons who are entrepreneurs as defined in the Act of 23 April 1964 – Civil Code – art. 43  

Entrepreneur under the Civil Code is a natural person, legal person, or an organizational entity not possessing legal person-ality, yet whose legal capacity is recognized by a separate statute, engaging in a commercial or professional activity exclusively in its own name. It is obvious that entrepreneurs cannot start consumer bankruptcy. Secondly general bankruptcy proceedings applies to the natural persons who are partners in commercial partnerships, liable without limitation with their whole property for the obligations of the partnership or partners in a professional partnership (art. 5 sec. 2 point 2,3 b.r.l.). The above mentioned partners may be declared bankrupt under general rules of the bankruptcy proceedings. On the contrary, the consumer bankruptcy is available for shareholders of a joint stock company because they are not responsible for the debts of the company. Thirdly general bankruptcy proceedings apply to a natural persons who was an entrepreneur and not more than one year has passed between the date the entrepreneur had been deleted from the appropriate register and the date of the submission the declaration of bankruptcy (art. 8 br.l.). In fact it depends on passage of time if ex-entrepreneur may start general bankruptcy or consumer bankruptcy. Fourthly general bankruptcy proceedings applies to a natural person who conducted commercial activity and failed to perform his legal obligation to notify the appropriate register (art. 9 b.r.l.). In fact, as a general rule, the consumer bankruptcy may be declared to the natural persons who are consumers. The consumer bankruptcy also applies to a natural person operating an agricultural farm as the general bankruptcy proceeding cannot be declared in respect of such a person (art. 6 point 5 b.r.l.).

The legal nature of debts of the natural persons (“commercial” or “private”) has no importance on the commented matter. In theory the bankruptcy court may declare bankruptcy of the natural person – the entrepreneur with the “private” debts and the bankruptcy of the natural person – consumer with “commercial” debts. The age of the natural person has no importance in the discussed matter. Bankruptcy courts are entitled to declare bankrupt a person aged under

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6 W. Głodowski, A. Hrycaj, Zakres podmiotowy..., p. 71.
7 General bankruptcy proceedings also applies to the entrepreneurs who are a legal person or an organizational entity not possessing legal personality, whose legal capacity is recognized by a separate status.
18 years old. An incapacitated person may be declared bankrupt as well. Such a person should act in the proceedings by a statutory agent. Citizenship or nationality does not influence the legal capacity in the consumer bankruptcy. The consumer bankruptcy may not converse into the entrepreneur bankruptcy as well the entrepreneur bankruptcy may not converse into the consumer bankruptcy. It also should be clearly stated that the reorganization proceedings (art. 492 – 521 b.r.l.) is available exclusively for entrepreneurs\(^{12}\) with the exemption of natural persons not conducting commercial activity.

**Grounds for declaration of consumer bankruptcy**

Under Polish bankruptcy law bankruptcy shall be declared to a debtor who has become insolvent (art. 10 b.r.l.). A debtor who is a natural person shall be deemed insolvent when he fails to perform his due financial obligations (art. 10 sec. 1 b.r.l.). This ground for declaration of bankruptcy is called “the lack of disposable assets”. The bankruptcy cannot be declared if there is only one creditor of the debtor because the bankruptcy proceedings are collective pursuits of claims by creditors against the insolvent debtor. Insolvency is the positive ground for declaration of the consumer bankruptcy.\(^{13}\) The separate ground for declaration of bankruptcy called “the excessive debts”\(^{14}\) does not apply to natural persons.

The amended Act also sets forth the special grounds for declaration of the consumer bankruptcy.\(^{15}\) The bankruptcy court shall dismiss the petition to declare bankruptcy if the insolvency of the debtor was not caused by extraordinary circumstances not attributable to the debtor (art. 491\(^3\) sec. 1 br.l.). What are the “extraordinary circumstances not attributable to the debtor”? The amended Act gives two legal examples. First, the debtor contracted obligations while being insolvent. Second, debtor’s employment relationship was terminated due to the reasons attributable to the employee or upon the mutual consent of both parties.\(^{16}\) In fact the consumer bankruptcy is not available for any natural person not

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\(^{12}\) Reorganization proceedings shall apply to entrepreneurs who are threatened with insolvency. An entrepreneur shall be deemed to be threatened with insolvency even he duly performs its obligations when – based on rational estimate of economic condition – it is apparent than the entrepreneur will become insolvent within a short period of time (art. 492 sec. 1, 2 b.r.l.). Additionally the court upon motion of the debtor may allow the debtor to institute reorganization proceedings if the court dismisses the petition to declare bankruptcy when the delay in performing the obligations does not exceed three months and the amount of unperformed obligations does not exceed 10 per cent of the balance sheet value of the debtor’s enterprise (art. 12 sec. 1, 3 b.r.l.).


\(^{14}\) Article 11 sec. 2 b.r.l. sets forth that a debtor who is a legal person or an organizational entity not possessing legal personality, yet whose legal capacity is recognized by a separate statute shall also be deemed insolvent when the sum of his obligations exceeds the value of his assets, even if the debtor duly performs the obligations as they fall due.

\(^{15}\) See among others: O. Zachmielewska, Upadłość konsumencka…., p. 97.

conducting commercial activity, but there are strong limitations. *De lege ferenda* consumer bankruptcy shall be available for any natural person not conducting commercial activity who is insolvent. Special grounds should be provided only for discharging of the unsatisfied obligations of the bankrupt in the bankruptcy proceedings. *De lege lata* the above mentioned grounds for declaration of consumer bankruptcy are similar to the basis for discharging obligation of the bankrupt – entrepreneur, who is a natural person, under art. 369 b.r.l. The institution of the repayment plan and discharging obligations in consumer bankruptcy is similar to discharging obligations of the bankrupt – entrepreneur.\(^{17}\)

The list of the grounds for declaration of consumer bankruptcy is not finished yet. The bankruptcy court shall dismiss the petition to declare bankruptcy of the consumer if, within the period of 10 years prior to the filing of petition to declare bankruptcy, any of the following proceedings were conducted with regard to the debtor (negative grounds):

1. bankruptcy proceedings or other proceedings, in which all or a part of the debtor’s obligations were discharged or in which an arrangement was made
2. bankruptcy proceedings in which not all of the creditors had been satisfied, and after the closure or discontinuance or the proceedings the debtor failed to perform his obligations
3. former consumer bankruptcy proceedings were discontinued for reasons other than upon a motion of all of the creditors
4. any legal act of the debtor was validly declared performed to the creditor’s detriment.

A very long list of special grounds for declaration of the consumer bankruptcy seems to be one of the crucial reasons of unpopularity of the consumer bankruptcy in practice. The main principles of general bankruptcy proceedings is listed in art. 2 b.r.l.: the proceedings governed by the Bankruptcy and Reorganization Law should be conducted in a manner which provides for the maximum satisfaction of the creditors’ claims and when rational – for the preservation of the debtor’s enterprise. In case of the consumer bankruptcy the main principles should be modified. The consumer interest should be protected as well because a typical consumer is a weaker participant of the legal relationships. The law should compromise the two opposite interests: the interest of the creditors and the interest of the debtor – consumer.

**Entitlement to file the petition to declare consumer bankruptcy**

As a general rule the power to file the petition to declare bankruptcy has the debtor or any of his creditors (art. 20 br.l.).\(^ {18}\) But the petition to declare consumer

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bankruptcy may be filed only by the debtor – consumer (art. 491 sec. 1). Creditors (for example banks) are not entitled to file the petition for a declaration of bankruptcy of the debtor. *Ratio legis* of this provision is the consumer protection. The legal effects of declaring bankruptcy are very serious. In these circumstances the choice of the solution is given exclusively to the insolvent debtor. Execution proceedings could be more advantageous for a consumer than bankruptcy proceedings. The consumer, in contrast to the entrepreneur, has no legal duty to file the petition. Article 21 b.r.l., which states that the debtor shall, no later than within two weeks of the day on which the grounds for declaring bankruptcy occurred, file a petition to declare bankruptcy, does not apply to the consumer bankruptcy. This regulation should be evaluated as reasonable. The consumer has possibility to file in court the petition for a declaration of bankruptcy.

**Formal requirements of the petition**

The petition to declare consumer bankruptcy is one of the most complicated motions in the Polish civil proceedings. The list of formal requirements of the petition and of the additional documents which are strictly required is in art. 22 and 23 b.r.l. The petition to declare bankruptcy shall contain, among other requirements, the description of circumstances justifying the petition as well as demonstration of their probability (art. 22 sec. 1 point 3 b.r.l.). The court fee of the debtor’s petition to declare consumer bankruptcy is 200 Polish zlotys. The court fee of the petition do declare “ordinary” bankruptcy is 1000 Polish zlotys. The separate provisions on exemption from court costs shall apply with respect to the debtor (see art. 491 sec. 1 and art. 31 sec. 1 b.r.l.). Consumers may apply to the court for an agent for litigation, as well. The conclusion of the practical researches in this matter is the following: formal requirements are two difficult for an average consumer.

**The problem of insufficiency of the assets of the insolvent debtor**

Consumer bankruptcy keeps a general rule of art. 13 b.r.l. Article 13 section 1 b.r.l. stipulates that the bankruptcy court shall dismiss the petition to declare bankruptcy when the assets of the insolvent debtor are not sufficient to cover the costs of the proceedings. The costs of the consumer bankruptcy proceedings include court fees and expenses necessary to achieve the purpose of the proceedings. The expenses include the remuneration and expenses of the trustee, costs of service, announcements and notices, taxes and other public levies due

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22 The announcement of the ruling declaring consumer bankruptcy shall be made by publication of the announcement In at least one national daily newspaper (art. 491 sec. 2 b.r.l.). While the announcement of the ruling declaring entrepreneur’s bankruptcy shall be made by publication of the announcement In a local daily newspaper (art. 53 sec. 1). O.
for the period following the declaration of bankruptcy, expenses connected to liquidation of the bankruptcy estate (art. 230 b.r.l.). The costs of the bankruptcy proceedings shall be paid out from the bankruptcy estate (art. 231 sec. 1 b.r.l.). In practice bankruptcy courts very often dismiss petitions of consumers because, in many cases, the debtors are too poor to cover the estimated costs of the proceedings.

In fact there are two main goals of the bankruptcy proceedings: satisfaction of the creditors’ claims based on liquidation of the bankruptcy estate and recovery of the debtor by discharging of the unsatisfied obligations of the bankrupt. *Ratio legis* of art. 13 is clearly connected with the satisfaction of the creditor’s claims. It is useless to conduct liquidation if the assets are not enough to cover the costs of the proceedings. Nevertheless the crucial goal of the consumer bankruptcy is to give a “fresh start” to the consumer. In other words there are reasonable reasons to conduct bankruptcy proceedings despite of the lack of assets to cover the costs of the proceedings. *De lege ferenda* it should be found a solution which allows to conduct bankruptcy proceedings even if the consumer’s estate is not sufficient to satisfy the costs of proceedings.

**Proceeedings to secure the assets**

After the petition to declare consumer bankruptcy has been filed the bankruptcy court should *ex officio* secure debtor’s assets. The court shall make the decision with regard to securing the debtor’s debt immediately (art. 36 b.r.l.). Proceedings to secure the assets of the consumer are obligatory. The court may secure the debtor’s assets through the appointment of an interim court supervisor23 (art. 38 sec. 1 b.r.l.). The court may apply other measures to secure the assets of the debtor, in particular may order mandatory administration24 of debtor’s assets, if reasons exist to fear that the debtor might conceal his assets or otherwise act to the detriment of the creditors, or if the debtor does not obey the instructions of the interim court supervisor (art. 40 sec. 1 b.r.l.). Upon declaring bankruptcy security in the form of appointing an interim court supervisor or ordering mandatory administration shall be revoked at the moment the administration of the bankrupt’s assets is taken over by a trustee. Other security ordered by the bankruptcy court shall be revoked upon the date the bankruptcy is declared (art. 43 b.r.l.).

**Effects of declaring consumer bankruptcy**

Under the Bankruptcy and Reorganization Law there are two manners of conducting bankruptcy proceedings of the debtor: bankruptcy with the possibility to make an arrangement (art. 14 b.r.l.) and bankruptcy involving the liq-
uidation of debtor’s estate (art. 15 b.r.l.). In case of consumer bankruptcy the proceedings shall be conducted exclusively according to the provisions of bankruptcy involving the liquidation of debtor’s estate (art. 491 section 1 b.r.l.). Reorganization proceedings in the case of treat of insolvency are not available for a consumer.25 The consumer bankruptcy cannot convert into the “general bankruptcy proceedings”.26 On the other hand the “general bankruptcy proceedings” cannot convert into the consumer bankruptcy. The changes of the status of the bankrupt, after decision declaring bankruptcy has been passed, have no influence on the type of the proceedings.

In approving the petition on a declaration of bankruptcy the court shall issue a ruling on the declaration of bankruptcy in which, among others, appoints a trustee27 and a judge – commissioner (art. 51 sec. 1 point 6 b.r.l.).28 The ruling declaring bankruptcy shall be effective and enforceable from the date of its issuance.

There are many legal results of declaring consumer bankruptcy. First of all it should be pointed that the declaration of the consumer bankruptcy shall not effect the bankrupt’s legal capacity and his capacity to perform legal acts (art. 185 sec. 2 b.r.l.).29 The bankrupt shall indicate and release all of his assets to the trustee and shall provide all necessary explanations concerning his assets to the judge-commissioner and the trustee (art. 57 b.r.l.).30

On the day bankruptcy is declared the bankrupt’s assets shall become the bankruptcy estate. The bankruptcy estate shall comprise assets belonging to the bankrupt on the day of announcement of bankruptcy as well as those acquired by the bankrupt in the course of bankruptcy proceedings (art. 61 – 62 b.r.l.). The bankrupt shall lose the right of administration and the possibility to use and dispose of the assets included in the bankruptcy estate (art. 75 sec. 1 b.r.l.). Legal acts of the bankrupt concerning the assets included in the bankruptcy estate, with regard to which the bankrupt has lost the right of administration shall be null and void (art. 77 sec. 1 b.r.l.). On the day of declaration of the bankruptcy

26 In general bankruptcy proceedings bankruptcy by liquidation may convert into bankruptcy with the possibility to make an arrangement. Bankruptcy with the possibility to make an arrangement may convert into bankruptcy by liquidation (art. 16, 17 b.r.l.). R. Adamus, Zmiana trybu postępowania upadłościowego upadłej spółki handlowej, Prawo Spółek 2011, no 1, p. 23.
27 In Polish: „syndyk”.
of one of the spouses a “separate property regime” (as defined in art. 53 sec. 1 of the Act of 25 February 1964 – the Family and Guardianship Code) shall be created between the spouses. If the marital estate was held by the spouses as “joint, indivisible property”, the joint marital estate shall be included in the bankruptcy estate and its division shall be inadmissible (art. 124 sec. 1 b.r.l.). It also should be mentioned that the bankrupt’s spouse may, in the bankruptcy proceedings, assert a claim arising from his share in the joint marital estate by submitting the claim to the judge – commissioner (art. 124 sec. 3 b.r.l.). The legal position of the bankrupt’s spouse is much worse in the consumer bankruptcy than in case of execution proceedings against the debtor. Of course both spouses may file the petition to declare bankruptcy. There are not any provisions concerning the consolidation of the bankruptcy cases conducted against the spouses. De lege ferenda art. 215 b.r.l. concerning the consolidation of the bankruptcy cases against the partners of a civil partnership and against partners liable without limitation with their all property for the obligations of the commercial partnership should apply accordingly in the case of the spouses in bankruptcy.

The judge-commissioner shall determine the manner and the time period during which the apartment located in the premises or in the building included in the bankruptcy estate, may be occupied by the bankrupt and his close associates who occupied the apartment at the time the consumer bankruptcy was declared (art. 75 sec. 2 b.r.l.). The judge-commissioner may decide that the bankrupt cannot leave the territory of the Republic of Poland without court’s permission (art. 57 sec. 3 b.r.l.).

As a general rule, monetary obligations of the bankrupt, the payment date of which has not yet become due, shall become due on the day of declaring consumer bankruptcy (art. 91 sec. 1 b.r.l.). Non–monetary obligations shall – on the day of declaring bankruptcy – be converted into monetary obligations and on that day they shall become payable, even if the day of their performance has not yet become due (art. 91 sec. 2 b.r.l.). Interest accrued on claims due from the bankrupt for a period prior to the declaration of bankruptcy, may be satisfied from the bankrupt estate (art. 92 sec. 1 b.r.l.).

If on the date bankruptcy is declared the obligations arising under a reciprocal agreement (do ut des) have not been performed in part or in full the trustee may perform the obligation of the bankrupt and request that the other party render the reciprocal performance or the trustee may rescind the reciprocal agreement (art. 98 sec. 1 b.r.l.). If the trustee performs the reciprocal agreement

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35 M. Pannert, Wpływ upadłości likwidacyjnej na wykonywanie zobowiązań z umów wzajemnych, Warszawa 2010, p.57, J. Kruczałak – Jankowska, Ogłoszenie upadłości. Skutki dotyczące zobowiązań w krajowym i transgranicznym postępowaniu upadłościowym,
amounts resulting from the actions of the trustee are classified in the class one of the distribution scheme (art. 342 sec. 1 point 1 b.r.l.). The trustee shall satisfy the claims of the class one as the appropriate amounts are successively contributed to the bankruptcy estate (art. 343 sec. 1 b.r.l.). If the trustee rescinds the reciprocal agreement, the other party shall not be entitled to the return of the render performance, even if the performance remains in the bankruptcy estate. The party is entitled to pursue in the bankruptcy proceedings both the remuneration for the performed obligation and compensation for the damage suffered, submitting the claims to the judge-commissioner (art. 99 b.r.l.). The Bankruptcy and Reorganization Law provides special effects of declaring the bankruptcy for concrete types of legal relationship: mandate agreement, loan, use agreement, bank credit agreements, safe – keeping agreements etc.\(^{36}\)

As the legal effect of declaring consumer bankruptcy court and administrative proceedings concerning the bankruptcy estate may be opened only by the trustee or against him (art. 144 sec. 1 b.r.l.). Execution proceedings – court and administrative – against the bankrupt prior to the declaration of bankruptcy shall be suspended by force of law on the day of the declaration bankruptcy. Execution proceedings shall be discontinued by force of law after the ruling on the declaration of bankruptcy becomes legally valid (art. 146 sec. 1 b.r.l.).\(^{37}\)

The bankruptcy court shall immediately request information from the head of the relevant tax office for the bankrupt, whether the bankrupt within last five years prior to filing of the bankruptcy petition reported the conduct of any taxable activities and the court shall examine in Krajowy Rejestr Sądowy (the National Court Register) whether the bankrupt is a partner or a shareholder in any commercial partnership or company (art. 491 \(^2\) sec. 4 b.r.l.).

**Submission and confirmation of claims**

A personal creditor of the bankrupt who wishes to participate in the bankruptcy proceedings shall, if the establishment of his claim is necessary, within the period stated in the ruling on a declaration of bankruptcy, submit his claim to the judge-commissioner (art. 236 sec. 1 b.r.l.). Some of the claims shall be recorded on the list of claims *ex officio* (art. 236 sec. 2–3, art. 237, 238 b.r.l.). The list of claims shall be drafted by the trustee (art. 244 b.r.l.). Creditors have right to file objections against the drafted list of claims (art. 255 b.r.l.). Finally the list of claims shall be confirmed by the judge – commissioner (art. 260 b.r.l.).\(^{38}\) If a claim is filed after the deadline for filing the claim has already elapsed such claim should be recorded on a supplementary list of claims (art. 261 sec. 1 b.r.l.).

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practice the establishment of the list of claims (including objections to the list of claims, approval, rectification and supplementation of the list of claims) takes a very long period time. The extract from the list of claims approved by the judge – commissioner, containing the specification of the claim and the amount received on his account by the creditor, shall represent an enforcement title against the bankrupt. In fact the extract from the list of claims is equal to the court sentence.

**Liquidation of the bankruptcy estate**

There are two main stages of the consumer bankruptcy proceedings: the liquidation of the bankruptcy estate and the repayment plan with its further consequence – discharging unsatisfied obligations of the bankrupt. The sequence of the two stages of the proceedings clearly shows the legal nature of the Polish consumer bankruptcy in the present shape. The characteristic feature of consumer bankruptcy is rather relatively strong protection of the creditors. Article 2 b.r.l. stipulates that the proceedings govern by the Bankruptcy and Reorganization Law should be conducted in a manner which provides for the maximum satisfaction of the creditor’s claims.\(^{39}\)

If a bankrupt goes into hiding or conceals its assets the judge – commissioner may impose coercive measures to execute non – pecuniary performances on the bankrupt, as specified in the Code of Civil Proceedings (art. 58 sec. 1 b.r.l.). Under art. 491\(^4\) b.r.l. if the bankrupt does not disclose and realize all of his assets or necessary documents to the trustee or in any other manner fails to perform his duties, the court shall discontinue the proceedings.

As a rule the process of the liquidation of the assets of the bankruptcy estate is the duty of the trustee. Article 308 b.r.l. clearly provides that after preparing inventory the trustee shall carry out the liquidation of the bankruptcy estate. There is one significant exemption of the above mentioned rule in the consumer bankruptcy. The judge – commissioner may allow for the liquidation of the bankruptcy estate by the bankrupt under the supervision of the trustee (art. 491\(^2\) sec. 5 b.r.l.).\(^40\) The liquidation conducted by the bankrupt himself may decrease the costs of the proceedings.

If an apartment or a single – family house in which the bankrupt reside is included in the bankruptcy estate an amount equivalent to an average apartment lease rent for a period of twelve months shall be assigned to the bankrupt from the proceeds of a sale thereof, according to the ruling of judge – commissioner (art. 491\(^6\) b.r.l.).\(^41\)

\(^{39}\) R. Adamus, Przedsiębiorstwo upadłego w upadłości likwidacyjnej, Warszawa 2011, p. 49.
After bankruptcy by liquidation of the bankrupt’s assets has been declared, the trustee shall immediately proceed to prepare the inventory and the appraisal of the property of the bankruptcy estate and the liquidation plan. The liquidation plan shall include the proposed method of selling the bankrupt’s assets, in particular the day of sale, estimate of expenses, etc. (art. 306 b.r.l.). The liquidation of the bankruptcy estate shall be performed by selling all immovable and movable property, be enforcing claims against the debtors of the bankrupt, and by exercising other proprietary rights included in the bankruptcy estate or by alienation thereof (art. 311 sec. b.r.l.). The sale of some kinds of assets (real property, perpetual usufruct right, co-operative ownership right to premises) shall be effected by the way of tender or auction (art. 320 b.r.l.). The bankrupt’s claims shall be liquidated by way of their execution. If the execution of the bankrupt’s claims is impaired or the claim is not yet due, such claims should be liquidated by their alienation (art. 331 b.r.l.). The bankrupt’s proprietary rights shall be liquidated by the way of exercising or alienation (art. 332 b.r.l.).

The bankruptcy estate funds shall be distributed to the creditors once or several times as the bankruptcy estate is successively liquidated, following the approval of the list of claims (art. 337 sec. 1 b.r.l.). The trustee shall prepare and submit to the judge – commissioner a distribution plan of the bankruptcy funds (art. 347 sec. 1 b.r.l.). The creditors are entitled to submit objections to the distribution plan (art. 350 b.r.l.).

The Bankruptcy and Reorganization Law provides particular rules on distribution scheme related to claims secured be a mortgage, pledge, registered pledge, tax lien and maritime mortgage (art. 345 b.r.l. and following). There are also general rules on distribution scheme to unsecured claims (art. 342 b.r.l. and following). There are five classes of amounts subject to satisfaction from the bankruptcy estate funds. In the class one there are inter alia the costs of bankruptcy proceedings, alimony payments, amounts resulting from the actions of the trustee, In the class two there are amounts which very seldom occur in consumer bankruptcy. In the class three there are mainly taxes or other public levies. In the class four there are other amounts if they are not subject to satisfaction within class five. And in the class five there are interest not included in the classes of higher priority, to be satisfied in the order in which the principal amount is to be satisfied.

**Repayment plan and discharging obligation**

The repayment plan is a new institution in the Polish Bankruptcy and Reorganization Law. After the final distribution plan has been prepared, however not

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earlier than after the bankrupt vacates the single-family house or apartment, the bankruptcy court shall issue a ruling on the establishment of the bankrupt’s creditors repayment plan. The repayment plan should specify the extent and timeframe in which the bankrupt shall pay all the claims not satisfied under the distribution plan and specifying the part of the bankrupt’s obligations shall be discharged after the bankrupt performs the creditors repayment plan. The above mentioned timeframe should not exceed a period of 5 years. The creditors repayment plan shall include all of the obligations of the bankrupt which arose to the day of the plan’s establishment (art. 4917 sec. 1 b.r.l.). In other words the repayment plan shall include amounts resulting from the actions of the trustee, as well. In matters concerning the bankruptcy estate the trustee acts on behalf of the bankrupt but in his own name (art. 160 sec. 1 b.r.l.). If all obligations of the creditors are satisfied in the effect of the distribution of bankruptcy estate funds, which comprise the proceeds of liquidating the bankruptcy estate, the repayment plan is not necessary. On the day the ruling on establishment of the creditors repayment plan becomes final and valid the appointment of the trustee shall expire by virtue of law (art. 4918 b.r.l.).

During the performance of the creditors repayment plan the bankrupt may not perform legal transactions exceeding the scope of ordinary management (art. 4919 sec. 1 b.r.l.). In the same time the bankrupt may incur obligations necessary to support himself and the persons with regard to whom the bankrupt is under a statutory obligation to support, except for the purchases in consideration for payment in installments or deferred payment (art. 4919 sec. 2 b.r.l.).

If the bankrupt may not perform the obligations prescribed in the creditors repayment plan, due to temporary impediments, the bankruptcy court, upon the motion of the bankrupt and after having heard the creditors, has power to amend the repayment plan. The court may extend the deadline to repay the creditors up to total period of 2 years or change the amount of individual payments (art. 49110 sec. 1 b.r.l.). On the hand if the bankrupt’s financial condition has remarkably improved during the period of performance of the creditor repayment plan (but due to the reasons other than the increase of remuneration for work or income derived from gainful activity performed by the bankrupt) any of the creditors is entitled to demand that the creditors repayment plan be changed and the amounts due to the creditors be increased. The bankruptcy court shall decide in the matter after conducting a trial (art. 49110 sec. 1 b.r.l.).

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46 In practice courts appoint shorter periods of time for repayment plans.
The bankruptcy court may revoke the creditors payment plan, upon the motion of a creditor, after having conducted a trial, if the bankrupt does not perform his obligations stipulated in the repayment plan (art. 491\textsuperscript{11} sec. 1 b.r.l.). The Act prescribes a couple of other reasons which result the revocation of the repayment plan (art. 491\textsuperscript{11} sec. 2 b.r.l.).\textsuperscript{51}

After the bankrupt has performed all the obligations under the repayment plan the bankruptcy court shall issue a ruling on the discharge of the unsatisfied obligations of the bankrupt included in the repayment plan. The court shall indicate the creditor, the title and the amount of the obligation to be charged. The discharge of the obligation shall not concern those obligations of the bankrupt which include periodic payments to which the legal title has not yet expired and obligation which arose after the declaration of bankruptcy (art. 491\textsuperscript{12} sec. 1, 2, 3 b.r.l.).\textsuperscript{52} The court ruling in the matter of discharging obligations gives “a fresh start” for the debtor. Discharging obligations is an aspect of the consumer protection.

**Closure of the consumer bankruptcy**

The last item to be shortly presented is the closure of the consumer bankruptcy. The problem is not very complex. The bankruptcy court passes a ruling on the closure of the bankruptcy proceedings together with the ruling on discharging obligations (art. 491\textsuperscript{12} sec. 1 b.r.l.).\textsuperscript{53} The bankruptcy court shall discontinue the proceedings if the bankrupt does not disclose and release all of his assets or necessary documents to the trustee or in any other way fails to perform his duties (art. 491\textsuperscript{4} b.r.l.).\textsuperscript{54} The bankruptcy court shall also discontinue the proceedings if there are no sufficient assets to satisfy the costs of the proceedings (art. 361 point 1 b.r.l.).\textsuperscript{55}

**Conclusions**

The practice in Poland shows that legal knowledge of the debtors who are natural persons and who are not entrepreneurs is very small. It happens that debtors are unaware that bankruptcy proceedings involves selling out their apartments and the estate. The present legal construction of the bankruptcy proceedings is not available for many debtors. There are a couple of reasons of such a situation.

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The legal basis for declaration of consumer bankruptcy are very complex. The bankruptcy courts very often dismiss the petition for a declaration of consumer bankruptcy because the consumer’s estate is not sufficient to satisfy the costs of the proceedings. The perspective of liquidation of the bankrupt’s estate does not encourage the debtors for submitting the petitions for declaration of bankruptcy, etc. The present regulation of the consumer bankruptcy is waiting for the very serious legal changes in order to be useful in practice.
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