Semi-annual scholarly legal journal of Faculty of Law,
Comenius University in Bratislava.

BRATISLAVA LAW REVIEW

Wolters Kluwer

1/2018

Published twice a year by Wolters Kluwer SR, Mlynské nivy 48, 821 09 Bratislava, Slovak Republic, IČO: 31348262, in cooperation with Comenius University in Bratislava, Faculty of Law.

Volume 2, no. 1, 2018. This volume was issued in Bratislava in September 2018

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EV 5519/17

ISSN 2585-7088

ABOUT THE JOURNAL

Bratislava Law Review is an international legal journal published by the Faculty of Law of the Comenius University in Bratislava, Slovakia. It seeks to support legal discourse and research and promote the critical legal thinking in the global extent. The journal offers a platform for fruitful scholarly discussions via various channels – be it lengthy scholarly papers, discussion papers, book reviews, annotations or conference reports. Bratislava Law Review focuses on publishing papers not only from the area of legal theory and legal philosophy, but also other topics with international aspects (international law, EU law, regulation of the global business). Comparative papers and papers devoted to interesting trends and issues in national law that reflect various global challenges and could inspire legal knowledge and its application in other countries are also welcomed.

The Bratislava Law Review has adopted multidisciplinary and interdisciplinary, but also cross-disciplinary coverage. This is also the reason why members of the Bratislava Law Review Editorial Board are experts both in legal sciences and legal practice as well as in related disciplines – to ensure cross-cutting knowledge throughout all legal sciences, branches and fields of law. The Editorial Board consisting of foreign scholars-experts in the above fields, as well as a double-blind peer review provide a guarantee of high standard of the contributions published. In this way, the Bratislava Law Review hopes to provide space for presenting a diversity of opinions and approaches to up-to-date legal issues and problems, aiming in this way to contribute to overall rise in standards of legal scholarship in the CEE region.

In the Bratislava Law Review, we are aware of the responsibility connected to issuing this type of journal. Therefore, before we publish any article, we take two things into consideration. First of all, respect for ethical rules of the Bratislava Law Review is required, making sure that only original and novel legal studies, articles, reviews, and annotations will get published. Closely connected thereto, the second important requirement is that any potential publication meets the standards of the highest scholarly quality. Therefore, a double-blind peer review process was introduced within the BLR publication process.

More details are available at the BLR website.

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CONTENT

STUDIES

ABUSE OF RIGHT IN ADMINISTRATIVE LAW : THE FOUNDATIONS OF THE CONCEPT[1]

Jerzy Parchomiuk
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Abstract: The concept of abuse of rights is universal in nature and is present in all branches of law. The development of scholarly opinion and jurisprudence led in time to the introduction of the prohibition on abuse of rights as a general principle of administrative law, understood as a ban on the use of rights or powers in a manner inconsistent with the purposes for which they were established or in violation of constitutional and axiological order. This paper is a presentation of a model that describes basic characteristics of abuse of right in administrative law. These basic characteristics can be summarized in a few theses as follows: (1) subjective variability – prohibition of abuse applies to both the authority as well the individual; (2) strong links between abuse and circumvention of law – abuse of right is often aimed at avoiding the application of those norms of administrative law which the individual considers to be disadvantageous to her/him; (3) different legal basis of the prohibition of abuse – general principles of law (e.g. the principle of good faith), specific regulations referring to specific powers, immanent limits of the powers or the right; (4) "axiological entanglement" – links with universal, basic administrative law values: legality, rule of law, certainty, justice and common good; (5) vague boundaries and casuistic nature, making it difficult to formulate generalized conclusions, especially with regard to the consequences of abuse of right.

Key words: abuse of right – abuse of discretionary power – circumvention of law – common good – good faith – principle of proportionality

1 INTRODUCTION

The concept of abuse of rights has grown from roots stemmed in civil law. However, due to the common philosophical fundamentals and general construction, it is universal in nature and is present in all branches of law.[2]

In the sphere of administrative law, first concepts referred to the abuse of discretionary pow-

[1] The paper was prepared as part of the research project "Abuse of Rights in Administrative Law", financed from funds of the National Science Centre, Poland (Ref. UMO-2015/17/B/HS5/00430).

[2] As Louis DUBOUIS writes, the concept of abuse of rights was established as one of the classic theories of private law, and has grown to the rank of general law theory construct (DUBOUIS, L. La théorie de l'abus de droit et la jurisprudence administrative. Paris : LGDJ, 1962, p. 13).

ers (classic: French *detournement de pouvoir*;[3] German *Ermessensmissbrauch*,[4] elements of English concepts of *ultra vires* and so-called *Wednesbury principles*[5]). These classic concepts form a common element of the European legal culture.[6] Irrespective of the differences in detail, the underlying idea is the same: it is about the body's error involving the exercise of discretionary powers in a manner contrary to the purpose for which the body was granted the freedom of action. All the concepts and instruments used to counter the abuse of discretionary powers are based on the same principle: to strike a balance between providing the administration with a certain degree of discretion (necessary for the efficient performance of tasks) and the need to effectively ensure judicial protection of an individual against excessive interference by the public administration.

The development of scholarly opinion and jurisprudence led in time to the introduction of the prohibition on abuse of rights as a general principle of administrative law, understood as a ban on the use of rights or powers in a manner inconsistent with the purposes for which they were established or in violation of constitutional and axiological order.[7]

The concept of abuse of right has long been present in the studies of administrative law. Beside the large number of less extensive studies analysing a particular aspect, or mentions in studies on other issues, one can also point to broad, comprehensive studies.[8] Their main disadvantage is that they are not comparative studies, and they discuss the issue only from the perspective of a particular legal system.[9]

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3 WELTER, H. Le côntrole juridictionnel de la moralité administrative. Paris : Sirey, 1929, p. 85 – 118; DUBOUIS, L. La théorie de l'abus, p. 184 – 199; VIDAL, R. L'evolution du détournement de pouvoir dans la jurisprudence administrative. In Revue de droit public (RDP), no. 2 (1952), p. 275 – 316; GROS, M. Fonctions manifestes et latentes du détournement de pouvoir. In RDP, 9 – 10 (1997), p. 1237 – 1253. The prohibition on abuse of power is also known in administrative law of the Netherlands (SEERDEN, R., STROINK, F. Administrative law in the Netherlands. In SEERDEN, R., STROINK, F. Administrative law of the European Union, its member states and the United States: a comparative analysis. Antwerpen : Intersentia, 2002, p. 168 – 169), Belgium (see: BATSELÉ, D., MORTIER, T., SCARCEZ, M. Manuel de droit administratif, Bruxelles : Bruyllant, 2010, s. 851), Spain (desviacion de poder – see: RETORTILLO BAQUER, s. M. La desviación de poder en el derecho español. In Revista de administración pública, N° 22 (1957), p. 129 – 178; CLAVERO ARÉVALO, M. F, La desviación de poder en la reciente jurisprudencia del tribunal supremo. In Revista de administración pública, N° 30 (1959), p. 105 – 130) or Italy (sviamento di potere – see: CASSESE, S. Istituzioni di diritto amministrativo. Milano : Giuffré Ed., 2004, p. 265).

4 WADE, W., FORSYTH, Ch. Administrative Law. 9th ed. New York : Oxford University Press, 2004, p. 35 – 36; CRAIG, P. Administrative Law. 7th ed. London : Thomson, 2012, p. 5 – 6 and 562 – 581.

5 LEWIS, C. Judicial Remedies in Public Law. London : Sweet & Maxwell, 2015, p. 1 – 2, 183 – 185.

6 In the light of Article 263.2 TFEU, the concept of misuse of powers is one of the cornerstones of judicial review of legal acts enacted by the EU authorities. The whole system of judicial review of EU acts expressly refers to classical French and German concepts of judicial review of public administration – see: CLEVER, F. Ermessensmiβbrauch und détournement de pouvoir nach dem Recht des Europäischen Gemeinschaften im Licht der Rechtsprechung ihres Gerichtshofes. Berlin : Duncker & Humblot, 1967, p. 15 and 17, BEBR, G. Development of Judicial Control of the European Communities. The Hague-Boston-London : Martinus Nijhoff Publishers, 1981, p. 117; CRAIG, P. EU Administrative Law. New York : Oxford University Press, 2006, p. 462; BUSTILLO BOLADO, R. O. La desviación de poder en el derecho comunitario y en el Convenio Europeo de derechos humanos. In Revista de Administración Pública, No 188 (2012), p. 65 – 97.

7 WOLFF, H. J., BACHOF, O., STOBER, R. Verwaltungsrecht I. München : C.H. Beck, 1994, p. 264): „(…) das Verbot, Rechte (auch Grundrechte) und rechtlichen Formen zu Zwecken zu gebrauchen, die den Zwecken, um derentwillen się gewährt sind, oder allgemein der Enthaltung einer rechtsstaatlichen Verfassungsordnung widersprechen".

8 See: DUBOUIS, L. La théorie de l'abus, passim; KNÖDLER, Ch. Miβbrauch von Rechten, selbstwidersprüchliches Verhalten und Verwirkung im öffentlichen Recht. Herbolzheim : Centaurus Verlag, 2000; GÄCHTER, T. Rechtsmissbrauch im öffentlichen Rechts. Zürich/Basel/Genf : Schulthess, 2005; HÄSLINGER, M. Umgehungsphänomene im Spiegel der Judikatur der österreichischen Gerichsthöfe öffentlichen Rechts. Wien : Holzhausen, 2012.

9 There are some comparative studiess, but they only deal with certain aspects of the abuse of right in administrative law. An example of it may be BYERS, M. Abuse of Rights: An Old Principle, A New Age. In McGill Law Journal, vol. 47 (2002), p. 389 – 431), which discusses, in principle, abuse of right in international law, or the valuable monograph edited

This state of the art results in a rather chaotic and accidental use of the concept of abuse of right in the practice of the application of administrative law. There is a multitude of administrative courts judgements in which the term "abuse of right" is used. In many cases, however, its application is intuitive, referring to terms used in the common language, without a deeper reflection on the foundations of the construct and considering whether the situation subject to legal qualification can be described as an abuse of right in strictly legal sense.

One can notice the lack of a "foundation" in the form of a systematic theory explaining the essence of the abuse of right in administrative law. To develop a comprehensive theory is a task requiring the preparation of a comprehensive monograph. My article is intended to be a kind of "prolegomena" to this theory. I would like to point out some basic assumptions, describe a model to demonstrate the basic characteristics of abuse of right in administrative law. Naturally, the model is a simplified image, based rather on general outlines than detailed analyses. However, on the other hand, it gives the opportunity to look from a further perspective, to list those elements that form the foundations of the fragment of reality being described, which sometimes could not be grasped when performing a detailed analysis of individual issues. I was guided by such a perspective when writing this paper.

2 THE GENERAL CONCEPT OF ABUSE OF RIGHT IN ADMINISTRATIVE LAW

In terms of basic construction assumptions, the prohibition of abuse of right in administrative law does not deviate from the general theoretical approach: it is about the use of legal capability to act (defined as conceptual categories of powers or subjective right) in a manner inconsistent with the goal assumed by legislature who created the legal provisions from which this capability to act is derived, or in a manner that is unacceptable under the basic axiology of the legal system. To make the argumentation brief, I will use the following terms in further considerations: teleological and axiological elements of the prohibition of abuse of right.

The following three explanatory notes must be made to the above definition.

First of all, the element of axiological contradiction first comes up in the definitions used in legal theory and civil law. In my opinion, however, the element of incompatibility with the purpose of the authorising norm is more visible in administrative law. Why is it so? In my opinion, this is due to a certain reluctance of scholars and jurisprudence to use axiology as an instrument for delimitation of boundaries of powers of an authority or freedom of an individual. Axiology is based on assessments, and these naturally interfere with the value of legal certainty. Administrative law, much more than civil law, emphasizes the exact definition of what an authority or an individual is allowed to do. Using axiological assessments to establish the limits of powers of an authority and the limits of freedom of an individual creates the risk that these boundaries may be blurred. Axiological reasoning gives less precise results than the purely logical argumentation.

Secondly, there is a disjunction between the two structural elements of abuse (teleological and axiological). One can speak of abuse of right both in the case of non-compliance with the purpose of the authorising norm and with the axiology of the legal system. In administrative law, both elements

by TARUFFO, M. Abuse of Procedural Rights: Comparative Standards of Procedural Fairness. The Hague [u.a.] : Kluwer law international, 1999, which regards abuse of right in procedural law, but focused more on civil procedure.

are often used jointly. A particular behaviour is treated as incorrect exercise of powers or rights, not only because it is inconsistent with the purpose of the authorisation granted by the legislature, but also because it violates the essential values protected by law. For example: the mere incorrect use of discretionary powers by an administrative body does not constitute a sufficient basis for an administrative court intervention. Court intervenes (e.g. by repealing an administrative act) when the authority's action additionally violates the basic values protected by administrative law, especially when the authority, wrongly using its discretionary powers, will incorrectly resolve the conflict between the public interest and the interest of the individual.

Likewise, in the case of abuse of right by an individual, the need to counter the manner the individual exercises the freedom granted to him stems not only from the fact that he does so contrary to intentions of the legislature who created guarantees of subjective right. There is also an element of "condemnation" of the individual's behaviour, due to the violation of public interest or legitimate interest of another individual.

In my opinion, mutual complementation of the teleological and axiological elements of the prohibition of abuse of right is more evident in the field of administrative law than in civil law. Therefore, it is typical for the prohibition of abuse of right in administrative law.

Thirdly, the prohibition of abuse of right in civil law is based on a general clause (good faith, principle of equity, principles of social coexistence). A characteristic feature of general clause is that it refers to assessments and values falling outside the legal system, to the basic social axiology.[10] In administrative law, references to values located outside the legal system are cumbersome. To reiterate: the construct of abuse of right is an instrument for determining the limits of powers of an authority and freedom of an individual. When defining these limits, we should not go beyond the legal system. This is clearly seen in the collision between public and individual interest. When solving this collision for a specific case, one must find specific values that stand behind these abstract concepts. When seeking these values, we must stick to the legal order. In my opinion, there is no public interest outside the sphere of law, as there is no legitimate interest of an individual outside this sphere, which can effectively compete with the public interest. In other words: when seeking a solution for the collision of the public interest and the interest of an individual, we rely on the axiology of the legal system, we cannot go beyond this area. An interest based on values which are not within the legal system is not a legal interest. For this reason, the prohibition of abuse of right in administrative law is based on a general clause, but a specific one, since it is an intra-system reference to the basic axiology of the legal system, and not outside this system.

3 SUBJECTIVE VARIABILITY OF ABUSE OF RIGHT IN ADMINISTRATIVE LAW

One of the characteristic features of abuse of right in administrative law is subjective variability: the prohibition of abuse applies to both the authority and the individual. And the fundamental question arises: how this subjective variability affects the construct of abuse of right? Does this influence refer to its basic structural elements or can it only be visible in the consequences of its use?

For the structural elements, there is no significant difference between the prohibition of abuse of right related to an authority and related to an individual. In both cases, there is both a teleologi-

[10] LESZCZYŃSKI, L. Stosowanie generalnych klauzul odsyłających. Kraków : Zakamycze, 2001, p. 21 – 22.

cal element and an axiological element. They only differ in terms of emphasis put on them. In my opinion, the teleological element prevails in relation to the authority, which is especially visible in the prohibition of abuse of discretionary powers. Generally, the mere use of powers contrary to the purpose of authorisation results in a defective administrative act. On the other hand, when applying the prohibition of abuse of right in relation to an individual, both elements are equally important, complementing each other. By applying the prohibition of abuse of right in relation to an individual, we almost always refer to the conflict between the action and the purpose of the right, and the collision with other legally protected values. As pointed out above, the mere fact that an individual exercises the right contrary to the intentions of the legislature is not enough to challenge the action of that individual. The teleological element of the prohibition of abuse of right must be complemented by the axiological element: it must be demonstrated that the behaviour of the individual violates a public interest or a legitimate interest of another individual.

The difference in consequences of their use is quite obvious. The prohibition of abuse of right applied to the authority limits the scope of its power, and thus extends the sphere of individual freedom. On the other hand, abuse of right related to an individual restricts his or her freedom. However, one needs to pay attention to some specific results.

First of all, it is difficult to say that the prohibition of abuse of right extends the sphere of power of the authority by limiting the freedom of the individual. The sphere of power of the authority must be precisely defined by law and cannot be based on vague constructs, such as abuse of right. It is only about the extension of the scope of the authority's obligation to intervene. There is no doubt that the authority must oppose the activity of the individual, which – due to its abusive character – puts the public interest or legitimate interest of other individuals at risk. In such a situation, the authority must apply legal means that are within its powers.

Secondly, restricting the sphere of individual freedom by applying the prohibition of abuse of right may result in the extension of the sphere of legally protected freedom of another individual. This can be seen in so-called multi-polar legal relations (*multipolare Verwaltungsrechtsverhältnisse*).

To explain the essence of this concept, a triangular arrangement is used, in which individuals with colliding private interests face each other on opposite vertices at the base, while the administrative body which is to settle this dispute can be placed at its apex. The main problem concerns the relationship between individuals. Referring to the above-mentioned triangular model, it is to be noted that there is no administrative-law link connecting the vertices occupied by the disputing individuals (*verwaltungsrechtliche Verbindungslinie*). An example of this is legal disputes as part of investment and construction process between the investor and owners of neighbouring plots of land (located in the construction project impact area).[11]

In a multi-polar legal relationship, there is a collision between the interests of two (or more) individuals which needs to be balanced. It is difficult and even impossible to settle this kind of collision using traditional methods of describing and analysing administrative law relations. In this respect, the jurisprudence and scholars use new instruments based on the principle of good faith (*Treu und Glauben*), such as the prohibition of abuse of right, estoppel (*venire contra factum proprium*, *Verbot des widersprüchlichen Verhaltens*) or forfeiture of rights (*Verwirkung*).[12]

[11] SCHMIDT-PREUB, M. Kollidierende Privatinteressen im Verwaltungsrecht (Das subjektive öffentliche Recht im multipolaren Verwaltungsrechtsverhältniss). Berlin : Duncker & Humblot, 1992, p. 1 – 3 and 17 – 20; THIENEL, R. Mehrpolige Rechtsverhältnisse und Verwaltungsgerichtsbarkeit. Wien : Verlag Österreich, 2001, p. 14 – 15 and 149 – 150.

[12] DE WALL, H. Die Anwendbarkeit privatrechtlicher Vorschriften im Verwaltungsrecht. Tübingen : Mohr Siebeck, 1999,

4 ABUSE OF RIGHT AND CIRCUMVENTION OF LAW IN ADMINISTRATIVE LAW

The administrative law is characterized by very strong links between abuse of right and circumvention of law, which is reflected in their frequent concomitance. Abuse of right is often used to circumvent law, i.e. to avoid applying the norms of administrative law which the individual considers to be disadvantageous to her/him. The scholarly opinion notes that abuse of right is a factor enabling the goal of circumvention of law (*Erfolgungsfaktor zur angestrebten Erreichung des Umgehungsziels*). One can also find terms that bring both constructs even closer, such as: "abusive circumvention of statute" *("missbräuchliche" Gesetzesumgehung*),[13] or the statement that in the case of circumvention the abuse of right affects the legal norm ("extorted" norm – *erschlichene Norm*), under which the entity acting *in fraudem legis* wants to subsume the facts created with its own activity.[14]

As in the case of abuse of right, the circumvention of law is caused by inevitable content imperfection of the legal provisions (*inhaltliche Unvollkommenheit*). A provision refers to typical behaviours, the legislator is not able to anticipate and regulate in detail all possible social situations. The inevitable collision with high creativity of addressees of legal norms, who look for gaps in the law or deliberately shape the elements of their factual state.[15]

Scholars of law point to two key elements of circumvention of law: it is a purpose-oriented construct (*zielorientiert-manipulative Konstruktion*), in order to thwart the implementation of the norm (*auf die Vereitelung des Normzwecks abgezielt*),[16] by choosing appropriate methods. In other words: an individual, in order to achieve a more favourable legal situation, deliberately chooses a form of shaping the legal relationship (*Gestaltungsform*), for which the legislature provided for other legal consequences. The "circumventor" commits manipulation of legal forms (*manipulative Benutzung von Formen des Rechts*). As in the case of abuse of right, the key element is the discrepancy between the purpose of the legal norm and the objective of the action.[17]

There are classic forms of circumvention of law occurring in the administrative law, in which the entity artificially creates conditions to prevent being qualified as falling under the scope of a prohibitive or imperative norm.

An example for the first situation may be attempts to circumvent the prohibition on running business without having the required licence, by creating the appearance of performing a completely different type of activity, which is not subject to such regulation.[18] Another example is the circum-

p. 246 – 256; HÄFELIN, U., MÜLLER, G. Grundriss des Allgemeinen Verwaltungsrechts. Zürich : Schulthess, 1998, p. 144 – 145; HUFEN, F. Verwaltungsprozessrecht. München : C.H. Beck, 2013, p. 418; STICH, R. Die Verwirkung im Verwaltungsrecht. In DVBl. (1959), p. 234 – 237; KAISER, A. – B. Bauordnungsrecht. In EHLERS, D., FEHLING, M., PÜNDER, H. (eds.). Besonderes Verwaltungsrecht, Band 2, Planungs-, Bau- und Straβenrecht, Umweltrecht, Gesundheitsrecht, Medien- und Informationsrecht. Heidelberg : C.F. Müller, 2013, p. 291 – 292.

13 HÄSLINGER, Umgehungsphänomene, p. 365 – 366.

14 KNÖDLER, Miβbrauch, p. 168.

15 HÄSLINGER, Umgehungsphänomene, p. 365.

16 Ibidem.

17 KNÖDLER, Miβbrauch, p. 168.

18 In Swiss law: TANQUEREL, T. L'abus de droit en droit public suisse. In ANCEL, P., AUBERT, G. (eds.) L'abus de droit, comparaisons franco-suisses. Saint-Etienne: Publ. de l'Université de Saint-Etienne, 2001, p. 179; in Austrian law: HÄSLINGER, Umgehungsphänomene, p. 305 and the case-law referred to therein. An example from Polish case-law is the circumvention of the requirement to obtain a taxi license, see: Supreme Administrative Court (*Naczelny Sąd Administracyjny*): 8 November 2011 (II GSK 1123/10); 18 April 2012 (II GSK 298/11); 12 October 2012 (II GSK 1801/11); orzeczenia.nsa.gov.pl.

vention of regulations providing for prohibition in terms of waste management. It is a problem of the so-called "junk tourism", i.e. export of hazardous waste, especially to third world countries. For waste consisting of a mixture of various substances, entrepreneurs try to show that the substance is not a waste but a product, which would circumvent the restrictive requirements for the export of waste.[19] Examples of this kind can be continued.

An example of circumventing imperative provisions may be the so-called "Tourism for driving licences" ("*Führerscheintourismus*"),[20] which has been addressed by numerous judgments of EU and national courts, and even legal regulations.

In brief, this phenomenon means that people whose driving license has been withdrawn or restricted in their home Member State are trying to use the institution of mutual recognition of driving licences,[21] to evade national sanctions and the need to undergo the recovery procedure in their home country. To this end, they go abroad (to another Member State or a third country) and obtain new licence there, and then demand recognition of these rights in their home country, by invoking the principle of mutual recognition of driving licences.

There is already quite abundant case-law of the ECJ on these issues. The judgement of 20 November 2008 (C-1/07, *Weber*) is of particular importance here.[22] The Court decided that the principle of mutual recognition does not preclude a Member State from refusing to recognise, in its territory, a right to drive under a driving licence issued by another Member State to a person whose right to drive was withdrawn, in the territory of the first Member State, even though that withdrawal was ordered after the issue of that driving licence, provided that the licence was obtained during a period in which a licence issued in the first Member State was suspended and both the suspension and the withdrawal are based on grounds existing at the date of issue of the second driving licence.[23] The wide occurrence of this practice has also led to the response of national legislatures which introduce exceptions to the principle, by allowing for refusal of acceptance of rights resulting from foreign documents in cases where the authority in the home state determines that there are grounds for deprivation of rights, or when the driver has already been banned from driving.[24]

Apart from classic forms, another form of circumvention of law occurs in administrative law. It involves creating artificially conditions enabling an entity who strives to circumvent the law

19 HÄSLINGER, Umgehungsphänomene, p. 282.

20 por. MOSBACHER, A., GRÄFE, J. Die Strafbarkeit von „Führerscheintourismus" nach neuem Recht. In NJW (2009), p. 801; SAURER, J. Anerkennungsgrundsatz und Rechtsmissbrauch im europäischen Fahrerlaubnisrecht. In Jura 4, (2009), p. 260 – 264.

21 In international law, this principle is derived from Article 41 of the Convention on Road Traffic of 8 November 1968. In EU law: Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (OJ L 403, 30. 12. 2006, p. 18–60).

22 ECLI:EU:C:2008:640, no 39 – 41.

23 The Court's arguments have been confirmed and developed in subsequent case-law: ECJ: 19 Mai 2011, C-184/10, Grasser, ECLI:EU:C:2011:324; 13 October 2011, C-224/10, Apelt, ECLI:EU:C:2011:655; 1 December 2012, C-467/10, Akyüz, ECLI:EU:C:2012:112; 26 April 2012, C-419/10, Hofmann, ECLI:EU:C:2012:240; 23 April 2015, C-260/13, Aykul, ECLI:EU:C:2015:257; 21 Mai 2015, C-339/14, Wittmann, ECLI:EU:C:2015:333. In the Polish case-law: Woivodship Administrative Court (*Wojewódzki Sąd Administracyjny*) of Gliwice: 1. 10. 2014, II SA/Gl 775/14; of Szczecin: 22. 5. 2014, II SA/Sz 1409/13; of Lublin: 9. 10. 2012; III SA/Lu 317/12; orzeczenia.nsa.gov.pl.

24 See, for example, § 30 of the Austrian Driving Licence Act (Führerscheingesetz, BGBl. I Nr. 120/1997): „Besitzern von ausländischen Lenkberechtigungen kann das Recht, von ihrem Führerschein in Österreich Gebrauch zu machen, aberkannt werden, wenn Gründe für eine Entziehung der Lenkberechtigung vorliegen. Die Aberkennung des Rechts, vom Führerschein Gebrauch zu machen, ist durch ein Lenkverbot entsprechend § 32 auszusprechen". Similarly, § 28 (4) of the German regulation of 13. 12. 2010 regarding the admission of road users to traffic (Verordnung über die Zulassung von Personen zum Straßenverkehr-Fahrerlaubnis-Verordnung, BGBl. I, p. 1980).

to qualify that entity's factual situation as falling under the norm which gives the entity more benefits.

There are legal norms that grant rights if the individual meets the requirements set out in conditions of these norms (R_n). Benefits granted vary depending on the conditions met (R_1, R_2…, $R_n \rightarrow N_1$, N_2, N_n). An individual that meets the conditions of R_1 related to the benefits set out in the norm N_1 artificially aims to create such conditions (R_2), which would give the individual the possibility of qualifying its legal situation under the norm N_2, which gives more benefit. The legislature, in order to avoid artificially creating the conditions for obtaining a greater advantage, creates a metanorm (N_m) excluding the application of the more favourable norm (N_2) if the classification of that individual's situation under this norm results from artificially creating conditions of R_2.

An example of this practice is the EU regulations on counteracting the creation of conditions that increase the benefits as part of support from EU funds – including export refunds,[25] or farming subsidies. In this regard, the general legal norm is Article 4.3 of Council Regulation No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests.[26]

The mechanism of abuse of right by creating artificial conditions for being granted the payment can be seen well on the example of farming subsidies. Since support systems are usually based on degressive models (the larger the area, the lower the amount of support), and, moreover, part of the aid funds is addressed to small farms, farmers apply various methods of artificially reducing and dividing the area of their lands (e.g. by submitting applications covering smaller areas by closely affiliated entities). In response to this type of practice, the legislature waives the possibility of obtaining payments in an increased amount (or avoiding a reduction in payments) for farmers who artificially create conditions for obtaining higher support.[27]

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25 See especially the ECJ judgement in Case *Emsland* (14. 12. 2000, Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas, C-110/99, ECLI:EU:C:2000:695, no. 52 – 53): "A finding that there is an abuse presupposes an intention on the part of the Community exporter to benefit from an advantage as a result of the application of the Community rules by artificially creating the conditions for obtaining it. Evidence of this must be placed before the national court in accordance with the rules of national law, for instance by establishing that there was collusion between that exporter and the importer of the goods into the non-member country". These arguments were developed in the subsequent case-law of the Court: ECJ: 21. 7. 2005, Eichsfelder Schlachtbetrieb, C-515/03, ECLI:EU:C:2005:491, no 39 – 41; 11. 1. 2007, Vonk Dairy Products BV v. Productschap Zuivel, C-279/05, ECLI:EU:C:2007:18, no 33 – 38.

26 OJ L 312, 23. 12. 1995, p. 1 – 4. In view of this provision: Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal. Actions to prevent misuse of public funding are also taken by the national legislator, for example: German Gesetz gegen missbräuchliche Inanspruchnahme von Subventionen – Subventionsgesetz from 29. 7. 1976; BGBl. I p. 2034.

27 Article 11.4 of Regulation No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009, OJ L 347, 20. 12. 2013, p. 608 – 670. According to this provision, no advantage by means of avoiding reductions of the payment shall be granted in favour of farmers in respect of whom it is established that they artificially created, after 18 October 2011, the conditions to avoid the effects of this Article. Likewise, Article 61.4 provides that: no advantage provided for under this Title shall be granted in favour of farmers in respect of whom it is established that they artificially created, after 18 October 2011, the conditions to benefit from the small farmers scheme. See also the ECJ: 12. 9. 2013 r., C-434/12, *Slanczeva sila*, ECLI:EU:C:2013:546, issued under previously applicable provisions, but indicating some universal principles for the issue of assessing abuse of the right to farming subsidies. On the national level, see for example: HÄSLINGER, Umgehungsphänomene, p. 305 and the case-law cited therein. This issue also appeared in numerous rulings of Polish administrative courts - see: Supreme Administrative Court: 25. 9. 2012, II GSK 1435/11; 12. 10. 2012, II GSK 1399/11; 14. 11. 2014, II GSK 2579/14; 15. 7. 2015, II GSK 1519/14; 4. 8. 2016, II GSK 689/15; 11. 8. 2016, II GSK 475/15; 30. 8. 2016, II GSK 569/15; orzeczenia.nsa.gov.pl.

The examples cited show a close relationship between the constructs of circumvention of law and abuse of right. This can be seen in the example of the above-mentioned driving licence cases. The obligation of mutual recognition of driving licences issued by other countries (expressed in EU directives and international conventions) results in the right of drivers to be granted recognition of their licenses obtained in another country. The purpose of this regulation is to improve the free movement of people who settle in other Member States.[28] These provisions are used in an abusive manner by persons deprived of their right to drive a vehicle in their home countries as a result of criminal or administrative punishment. The recovery of one's rights in their home country requires additional conditions to be met. To circumvent these provisions, a person deprived of rights attempts to use, contrary to the purpose (thus: abuse), the rights resulting from the principle of mutual recognition of driving privileges.

The link between circumvention of law and abuse of right can also be seen in the case of authority's activities. An example of this is the French concept of *détournement de procedure* (abuse of procedure), referring to a situation where an authority applies a particular procedure in circumstances where another procedure should be applied.[29] This practice can be described using both the construct of abuse of right and circumvention of law. On the one hand, the authority misuses its powers by exercising them for purposes not provided for by the legislature. On the other hand, the authority attempts, in a manner inconsistent with the intentions of the legislature, to qualify a factual situation as falling under provisions regulating a more favourable procedure for the authority. This is typical for circumventing the law, which is aimed at avoiding the application of a norm considered by the given entity as less beneficial.

5 LEGAL BASIS: GENERAL PRINCIPLES OF LAW – DETAILED REGULATIONS – IMMANENT LIMITS OF SUBJECTIVE LAW (POWERS)

The analysis of jurisprudential and judicial views points to several basic sources of prohibition of abuse of right in administrative law. It must be stipulated that these sources should not be considered separately. The prohibition of abuse of right is often derived from various sources.

The first source are the general principles of law. This is particularly evident in the German and Swiss scholarly opinion and case-law, which refer to the principle of good faith known from civil law (*Treu und Glauben*, § 242 of the German *Bürgerliches Gesetzbuch*, Article 2 (1) of the Swiss *Zivilgesetzbuch*). This principle is recognized as a general principle of law, applicable in all fields of law, thus also in the field of administrative law. One of manifestations of the principle of good faith is the prohibition of abuse of right.[30]

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[28] See recital 2 of Directive 2006/126/WE (*supra* note 21).

[29] por. CAMUS, G. Réflexions sur le détournement de procédure. In Revue de Droit Public, no 1 (1966), p. 66 – 67; CHAPUS, R. Droit administratif général. Tome I. Paris : Motchrestien, 2001, p. 1048 – 1054; GAUDEMET, Y. Traité de droit administratif. Paris : L.G.D.J., 2001, p. 495 – 498; LEBRETON, G. Droit administratif général. Paris : L.G.D.J., 2007, p. 476 – 480; LOMBARD, M., DUMONT, G. Droit administratif. Paris : Dalloz, 2007, p. 474; WALINE, J. Droit administratif. Paris : Dalloz, 2008, p. 606 – 608.

[30] GÄCHTER, Rechtsmissbrauch, p. 4 – 5, 23; ACHTERBERG, N. Allgemeines Verwaltungsrecht. Heidelberg : C.F. Müller, 1986, p. 598; BULL, H. P., MEHDE, V. Allgemeines Verwaltungsrecht mit Verwaltungslehre. Heidelberg, München, Landsberg, Frechen, Hamburg : C.F. Müller, 2009, p. 138; DE WALL, Die Anwendbarkeit, p. 242. The principle of good faith has long traditions among German scholars of administrative law – see SCHMITT, K. H. Treu und Glauben im Verwaltungsrecht. Berlin : Junker und Dünnhaupt, 1935, passim.

The second source includes detailed regulations that express the prohibition of abuse of right with respect to certain specific legal institutions. Such regulations are not very frequent, however they can be pointed out in European administrative law, as evidenced by the examples of provisions prohibiting abuse of right in regulations concerning support from public funds, including farming subsidies, cited in the previous paragraph.

The third source the prohibition of abuse of right in administrative law originates from includes immanent, internal limits of powers or right.

An example are classic constructs defining the limits of discretionary powers of the public administration (mentioned above: French concept of *detournement de pouvoir*; German concept of *Ermessensmissbrauch*¸ elements of English concepts of *ultra vires* and so-called *Wednesbury principles*). The scholarly approach to the problem of abuse of discretionary powers in various legal systems is diverse. Regardless of some differences, the essence of the problem is similar in all these systems. All the legal concepts of abuse of discretionary powers use a teleological element: each of them considers an authority's error in the exercise of discretionary powers in a way inconsistent with the purpose this sphere of freedom of action was granted for. The purpose should be determined based on a teleological interpretation of the competence norm.

All public administration activities are "objective-driven". In contrast to an individual who can freely choose the purpose of his or her actions, the administration must pursue specific objectives set by public tasks. Each competence to act within discretionary power was entrusted by the legislature for the pursue of specific objectives. This thesis is referred to as "purpose axiom". It is the administrative body's obligation to implement the purpose of the act, the body may not pursue an objective other than set by the legislature. If the body is guided by other reasons, or where it points to the alleged fulfilment of the legitimate objective in order to hide the actual intentions, then its decision is unlawful, illegal.[31]

A common feature of these constructs is the emphasis on the purpose of the competence norm. Although the essence of discretionary powers is a certain scope of freedom of action, this freedom is not unrestricted, and its basic limitation is the purpose of the authorisation. Actions that fall outside this purpose are unlawful, because they go beyond the scope of powers of this authority.

Also, as regards activities of an individual, abuse of right is a situation where the individual exercises their right in a manner that is contrary to the objectives assumed by the legislature. For example, the purpose of the right of action is to seek real legal protection before administrative court. If activities of an individual are a kind of play with public administration bodies, excessive litigiousness expressed in submitting hundreds of requests to authorities, and then complaints to administrative court, when the individual's goal is to use procedural means to harm the opponent (e.g. by prolonging the proceedings), it is to conclude that the individuals don't seek real legal protection in proceedings before administrative court. In this situation the individual uses his right for purposes other than assumed by the legislator, moreover: in a way that is against the public interest or legitimate interest of other entities. This is just abuse of right. Such an action may not be given effective legal protection.[32]

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31 CRAIG, Administrative law, p. 568; BRINKTRINE, R. Verwaltungsermessen in Deutschland und England. Heidelberg : C. F. Müller, 1997, p. 379.

32 More on the subject, see: PARCHOMIUK, J. Abuse of Procedural Rights in Administrative Law. In Collection of Papers from the International Academic Conference Bratislava Legal Forum 2015. Bratislava : PraF UK, 2015, p. 683 – 696, and the references cited therein.

Speaking about sources of the concept of abuse of right in administrative law, one must also emphasize the special role of judicature, which, through established traditional case-law created the foundations of the concept of abuse of right, based on very general legal grounds. This is particularly evident in the French concept of *détournement de pouvoir* established in the case law of the Council of State (*Conseil d'Etat*). This concept was derived from the very essence of powers of public administration, without basing on any single, specific legal principle.

6 AXIOLOGICAL DETERMINATION OF THE ABUSE OF RIGHT.

The construct of abuse of right is an institution that is strongly "axiologically determined". This is so also in administrative law.

The concept of abuse of right is a tool to correct the *stricti iuris* rules in a specific case, when too rigid regulations do not allow for finding the right solution. As a consequence, the construct of abuse of right faces universal values that are fundamental to administrative law: legality, the rule of law, certainty and justice. Flexibility of the clause of abuse of right may lead to an axiological collision, due to the risk of loosening the bonds resulting from the principle of rule of law which guarantee the certainty of applying the law. Undoubtedly, there is an antinomy between legal certainty, which requires stability and immutability, and flexibility in the application of law, assuming that the resolution must be adjusted to the specificity of a particular case, in accordance with the requirements of equity.[33] This is an axiological conflict rooted in the very nature of law.[34]

The prohibition of abuse of right refers to axiological criteria, and these are, by nature, vague and blurred. The problem arises particularly with respect to the individual. This poses the threat of blurring the limits of admissible limitations of individual freedom by the public administration.[35] A question arises whether it is possible to set the limits of individual freedom in administrative law based on axiological and teleological criteria.

On the other hand, this is where the advantages of the construct of abuse of right can be found – in the axiological „loosening" of too rigid frameworks of administrative law. The limits of a right or power cannot always be expressed in the „strict" language of legal norms. The exercise of powers by an authority or exercise of right by an individual can lead to injustice in particular circumstances of a case. The prohibition of abuse of right is just to prevent this, to establish an additional limit for

[33] This is a problem of all general clauses, including the clause of prohibition of abuse of right – see: LESZCZYŃSKI, Stosowanie, p. 208 – 220.

[34] This ontological "ailment" of law was seen even by classical philosophers – see ARISTOTLE. *Nicomachean Ethics* (V, 10, 1137 b): "When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission – to say what the legislator himself wold have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, that about some things it is impossible to lay down a law, so a decree is needed". (ARISTOTLE. *Nicomachean Ethics*. In Ross, W. D. *The Works of Aristotle*. Vol. II. Chicago-London-Toronto-Geneva-Sydney-Tokyo : Encyclopædia Britannica Inc., 1952, p. 386.

[35] This is the main source of objections to the construction of abuse of right in administrative law raised in Polish literature on the subject: PRZYBYSZ, P. Nadużycie prawa w prawie administracyjnym. In IZDEBSKI, H., STĘPKOWSKI, A. (eds.). Nadużycie prawa Warszawa : Liber, 2003, p. 197 – 198, HADEL, M. Nadużycie prawa w prawie administracyjnym. In Przegląd Prawa Publicznego, no 5 (2016), p. 46.

the exercise of powers or rights. In order to correct excessively rigid laws, the legislature allows the administrative body or the administrative court to apply assessments based on values not expressed explicitly in the rules of the legal system, for example to the rules of good faith and equity.

Abuse of right occurs in situations where there is a conflict of values protected by law. The conflict of values is not to be solved by a zero-one rule method, but by balancing them.[36] Such a mechanism links abuse of right strictly with the fundamental values of administrative law – the common good and individual interest, and the key problem of balancing these goods in administrative law.

The construct of abuse of discretionary powers creates an additional limit to the exercise of powers, forcing the administrative body to look for the proper purpose of its powers, as indicated by the legislature. Thus, the prohibition of abuse should prevent distortion of discretionary powers by using it contrary to the intentions of the legislator. In turn, in relation to an individual, the prohibition of abuse can also be understood as introducing the internal boundary of rights. Prohibition of abuse of right is contrary to the exercise of a right in a way that at first glance seems to fit into the legally admitted sphere, but in fact goes beyond this sphere, distorts the purpose of the right and leads to the violation of legitimate interests of other individuals or the public interest.

Thus, the construct of abuse of right becomes an instrument to resolve collisions between the values of the common good and the individual interest.[37] It forces a search for a balance between these values.

The fact that abuse of right is a construct strongly determined by axiological criteria leads inevitably to questions about the relationship between law and morality. Some authors even believe that the very concept of abuse of right contains an element of negative moral evaluation of someone's behaviour.[38]

The entanglement between law and morality can be seen in the classic French concepts of abuse of discretionary powers, where it was directly said about the control of "administrative morality" (*moralité administratif*). It was considered that judicial review did not only concern the formal compliance of administrative activities with the law, but also was intended to serve the interest of good administration (*l'intérêt d'une bonne administration*), that is one that respects the rights of individuals and effectively performs public service tasks.[39]

Similar elements can be seen in English administrative law, where "bad faith" is listed as a traditional basis for repealing the act because of misuse of discretionary powers. In the strict sense, this includes cases of deliberate abuse of power, as opposed to a situation where the body misuses discretionary powers, but does it as a result of ignorance or misunderstanding of the intent of the legislature. To be classified as bad faith, the deed concerned must be an intentional dishonest action.

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36 Cf. the Dworkin's and Alexy's concepts regarding the resolution of the conflict of principles and the conflict of principles: DWORKIN, R. Taking Rights Seriously. Cambridge, Mass : Harvard University Press, 1978, p. 60 – 68; ALEXY, R. Theorie der Grundrechte. Frankfurt am Main : Suhrkamp, 1986, p. 74 – 87.

37 See the classical thesis formulated by the Polish Supreme Court that in a state governed by the rule of law there is no place for a mechanically and rigidly understood principle of the supremacy of public interest over individual interests. This means that in each case, the authority concerned is obliged to indicate what general (public) interest it is about and to prove that it is so important and significant that it absolutely requires that individual citizens' rights be restricted (Supreme Court [*Sąd Najwyższy*]: 18 November 1993, III ARN 49/93; "Orzecznictwo Sądu Najwyższego" 1994, no 9, p. 181.

38 BIERVERT, B. Der Miβbrauch von Handlungsformen im Gemeinschaftsrecht. Baden-Baden : Nomos, 1999, p. 24.

39 The view supported in his classic coursebook by HAURIOU, M. Précis de droit administratif. Paris : L. Larose et Forcel, 1893, passim, and then developed by Henri WELTER (Le contrôle juridictionnel, passim).

This includes intentional damage, fraudulent manipulation, dishonesty, malice and other deliberate infringements.[40]

In contemporary approaches, the relationship between abuse of right and morality has been somewhat blurred. Nevertheless, the concept of abuse of power continues to express the general imperative of fairness in the exercise of discretionary power. It contains a very important idea that the administrative body cannot use the discretionary power to fulfil any public interest. This can be seen in the classical form of *détournement de pouvoir*, involving the use of police and administrative powers not to enforce public order, but in the fiscal interest of the state or a municipality.[41]

The relationship between the prohibition of abuse of right and morality can also be seen in the situation when actions of an individual is subject to moral assessment. Opposing abusive exercise of a subjective right includes an element of moral condemnation. The prohibition of abuse of right is usually employed where the individual's use of right is morally unacceptable, as it affects the protected goods of another individual or the value of the common good. It should be noted, however, that the mere negative moral evaluation of how the individual exercises a right is not enough to apply the prohibition of abuse of right. It is too strong interference with the rights of the individual, therefore it must be based on law. The consequences of moral condemnation must be justified by legal arguments. This may be a reference to the purpose of the legal norm from which the individual derives his right or to the principle of balancing the public interest and a legitimate interest of the individual.

7 DIFFERENTIA SPECIFICA OF THE ABUSE OF RIGHT IN ADMINISTRATIVE LAW

Despite the unquestionable similarities resulting from common sources, the "philosophy" of the prohibition of abuse of right in private law and in administrative law differ. In my opinion, three basic differences can be identified.

Firstly: the above mentioned subjective variability of abuse of rights exerts a significant influence on its functions.

In private law, the vector of influence of abuse of right is uniform: it is a means of limiting the freedom of an individual if he or she violates legitimate interests of other individuals. In administrative law, the vector of influence of abuse of right is not so unequivocal. As far as administrative bodies are concerned, the construct of abuse of powers is intended to limit administrative power. This applies especially to those spheres where the limits of authority are not strictly defined by law, i.e. the spheres where the bodies exercise their discretionary powers.

In the aspect regarding an individual, the abuse of rights has an opposite "vector" of influence – just as in private law, it constitutes a barrier to individual freedom. However, the direction of influence is not unequivocal. There are situations in which the restriction of freedom of an individual by way of the prohibition on abuse of rights leads to the extension of the sphere of freedom of another individual. This applies in particular to the above mentioned multipolar legal relationships (Ger-

40 CRAIG, Administrative law, p. 576; BRINKTRINE, Verwaltungsermessen, p. 399 – 400; WOOLF, H., JOWELL, J., LE SUEUR, A. De Smith's Judicial Review. 6th ed. London : Sweet & Maxwell, 2007, p. 266 – 267; WADE, FORSYTH, Administrative Law, p. 416.

41 WALINE, Droit adminitratif, p. 607; CHAPUS, Droit adminitratif, p. 1051; LEBRETON, Droit administratif, p. 476.

man: *multipolaren Verwaltungsrechtsverhältnisse*). Concepts referring to the general prohibition of abuse of right may, in these cases, form a tool for resolving collisions between areas of legally protected interests.

Secondly, the abuse of right in administrative law is based more on the idea of common good rather than the protection of the freedom of other individuals.

Civil law governs the relationship between peer entities. Its essence is to determine the limits of freedom of mutually equal individual. Therefore, in civil law, abuse of rights is a tool for determining the boundaries between the conflicting spheres of individual's freedom.

The basic characteristic of the classic relationship governed by administrative law is the inequality of entities. So, it mostly covers relationships between an individual and the state/government (its organs). There is another value relationship: between the interest of an individual and the public interest. These concepts are tools expressing broader conceptual values of the common good and the individual good. Therefore, the prohibition on abuse of right in administrative law is reasonable both due to the reference to freedom of another individual and to the common good. What is more, the value of common good in administrative law goes to the foreground, unlike in civil law where the common good is given less priority as to the arguments justifying the prohibition of abuse of right.

Thirdly, the prohibition of abuse of right in administrative law in certain situations is not supposed to make the law more flexible in application, but on the contrary – it is a chain that restrains freedom of the body that wrongly perceives the flexibility of applying the law.

The origin of the general concept of abuse of right lies in the tendency to correct an overly "rigid" legal norm in order to find a just solution in a specific case. This mechanism is undoubtedly evident in civil law as well as in administrative law, if we relate abuse of rights to the activity of individuals.

However, if we relate abuse of rights to the activities of an administrative body, then the mechanism of abuse of rights operates quite different. This is evident in the case of abuse of discretionary powers.

Administrative bodies are entrusted with discretionary powers where a certain amount of decision-making discretion is needed. This need arises from an overly rigid abstract legal regulation that does not allow for specific circumstances to be taken into account. The reason for granting discretionary powers to a body is that with a certain degree of discretion the body is able to flexibly and responsibly find fair solutions in real-life situations that are not fully foreseeable and which can be classified and systematised only in the general outline.[42]

In this situation, the concept of abuse of discretionary powers operates inversely – it is not a correction of the law, but rather a chain holding the discretionary powers of the authority in relation to the adjustment of the resolution to the particular circumstances of the individual case. The prohibition on abuse of discretionary powers is applied where the authority uses the powers contrary to the purpose established by the legislature.

[42] DAVIS, K. Discretionary Justice: A Preliminary Inquiry. Baton Rouge, Lousiana : Louisiana State University Press, 1969, p. 25 – 26; KOCH, Ch. Judicial Review of Administrative Discretion. In The George Washington Law Review, Vol. 56 (1986), p. 471 – 472; WOLFF, BACHOF, STOBER, Verwaltungsrecht, p. 374; ACHTERBERG, Allgemeines Verwaltungsrecht, *p*. 346.

8 LEGAL CONSEQUENCES OF ABUSE OF RIGHT

The general prohibition of abuse of right is an institution with vague limits. The case-law is very casuistic in this respect. This effect is, to a large extent, due to the nature of the prohibition of abuse of right, which is intended to be an instrument of correction of the overly "rigid" statutory law, where the considerations of equity require so. Such a correction is necessary due to the specific circumstances of a particular case. The application of the prohibition of abuse of right is determined by the circumstances of a particular case. It is an ad hoc institution that can hardly be defined in a general and abstract form.[43] The specificity of abuse of right makes it difficult to formulate generalised conclusions regarding legal effects.

In general terms, the effect of abuse of powers, as regards the administrative body, is the incompatibility of the act or action with the law. Acting in a way that is incompatible with the purpose of the powers cannot be considered to fall within the scope of the authorisation and is therefore unlawful. Specific effects depend on the type of the act and the violated component of the powers (procedural or substantive).

It should be stated that by analysing the abuse of right, administrative courts avoid examining the very merits of the decision. The prohibition of abuse of power refers to the discretionary powers of the administration. In European legal culture, courts generally show self-restraint in terms of review of the merits of a discretionary decision.

Judicial review covers only the legality of an administrative decision, its compliance with legal rules that determine the work of the administration. As *Georges Vedel* notes, if the administration operates within circumscribed powers, its activities can be assessed in terms of their legality. The administration can only decide to the extent allowed by law. Its decision may, therefore, be compliant or non-compliant with law. On the other hand, if the administration has discretionary powers, its decision can only be judged in terms of opportuneness (*opportunité*): the decision may be adequate or not adequate, right or wrong, but it cannot be illegal until the administration has the freedom to act.[44]

Since the legislation grants the body freedom to assess, the court cannot examine it, because there are no criteria for assessing what are the rules determining the way the body acts. Consistently following this argument, it would entail allowing any arbitrariness of the administration, and thus the possibility of abusing the body's discretionary powers.

The prohibition of abuse of powers arises in relation to the merits of the decision where the court claims that the authorities failed to take into account all the relevant circumstances (the English concept of *reasonableness*[45]). In this area, however, the concept of abuse of powers as an instrument of

[43] Similarly TANQUEREL (L'abus de droit, p. 191), who writes about the "irregular" (*hétéroclite*) nature of the cases where the issue of abuse of right in public law occurs, and Nathalie MERLEY (L'abus de droit dans la jurisprudence administrative française. In ANCEL, P., AUBERT, G. (eds.). L'abus de droit, comparaisons franco-suisses Saint-Étienne : Université de Saint-Étienne, 2001, p. 216), who notes that the concept of abuse is used so rarely and in so different situations that it is difficult to formulate generalised conclusions based on case-law analysis.

[44] VEDEL, G., DELVOLVÉ, P. Droit adminitstratif, T. 1. Paris : Presses Universitaires de France, 1992, p. 529; SERRAND, P. Le contrôle juridictionnel du pouvoir discrétionnaire de l'administration à travers la jurisprudence récente. In Revue du droit public, no 4 (2012), p. 906.

[45] In the light of Lord GREEN'S classic approach: "It is true the discretion must be exercised reasonably. Now what does that mean? […] [The word "unreasonable"] has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters

judicial review is displaced by other constructs referring to the proper assessment of relevant facts in the case (the concepts of manifest error of assessment – *erreur manifeste d'appréciation*,[46] balance control) or by the principle of proportionality.[47] It is easier to provide grounds for illegality of an administrative act by invoking the argument of disproportionate interference in the legal sphere of the individual, rather than using a fairly complicated instrument of abuse of powers.[48]

From the perspective of evaluation of the individual's activities, abuse of right generally means that the individual's activity does not fall within the sphere of permissible behaviour defined by the limits of the right. Therefore, the general consequence will be the ineffectiveness of invoking the guarantees provided by the right. This is the only conclusion that can be reached at such a general level of consideration. More specific conclusions can only be made at the level of detailed case studies.

Generally speaking, abuse of right will result in the refusal to grant the right claimed by the abusively acting individual, or the application of the sanction which the individual wants to evade in an unlawful manner. In the sphere of procedural rights, the question of legal consequences of abuse of right comes down to the question of whether the abuse has a formal or substantive effect. In the first case, the court will reject the complaint, considering that it is inadmissible, in the second it will refuse to accept the complaint, deciding that it is groundless for substantive reasons. The jurisprudence does not give a definite answer, as it applies both options, depending on the procedural right involved.

With reference to circumvention of law, the sanction in administrative law is generally consistent with the findings of legal theory. If we adopt the *Christian Pestalozza's* reasoning that circumvention of law is a "failure of subsumption attempt",[49] the sanction will be to challenging the qualification requested by the party and qualifying an action without the „trick" of artificially created conditions.

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which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. […] That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another." (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation; Court of Appeal: 10 November 1947, [1948] 1 KB 223). The rationality test describes the outermost, final limit of admissibility of discretionary action, the authority is not allowed to exceed (CRAIG, Administrative law, p. 562; BRINKTRINE, Verwaltungsermessen, p. 393).

46 The construct of manifest error is aimed at limiting abuses that may occur during exercise of discretionary powers. For this reason, it is similar to the construct of *détournement de pouvoir*. The purpose of the prohibition of abuse of power is to subject the administration to certain minimum standards of morality and prevent the use of powers to pursue objectives inconsistent with the public interest (Judge of the Council of State Guy BRAIBANT In the commentary on the Council of State's judgement in case Lambert of 13. 11. 1970, AJDA 1971, p. 35, as cited in: SERRAND, Le contrôle, p. 907). The concept of manifest error also occurs in the case-law of European courts (ECJ: 14 March 1973, 57/72, Westzucker GmbH p. Einfuhr- und Vorratsstelle für Zucker, no 14, ECLI:EU:C:1973:30; 25 January 1979, C-162/96, Racke v. Hauptzollamt Mainz, no 5, ECLI:EU:C:1998:293).

47 The effect of displacing the concept of abuse of power by the review of proportionality is seen in the case law of the EU courts in terms of review of discretionary powers of the EU administration (CLEVER, Ermessensmiβbrauch, p. 118; Van RAEPENBUSCH, S. Droit institutionnel de l'Union et des Communautés européennes. Bruxelles : Larcier, 2001, p. 509 – 510; STĘPKOWSKI, A. Zasada proporcjonalności w europejskiej kulturze prawnej. Warszawa : Liber, 2010, p. 232 – 239). Similarly, there are opinions in English administrative law about the decline of the classical ideas, which are being superseded by the principle of proportionality (por. WADE, FORSYTH, Administrative law, p. 371 – 372).

48 Quite rare cases of the invalidation of an act based on the construct of *détournement de pouvoir* induced some authors to express the opinion of decline (*déclin*) or marginalisation of this institution (FERNANDEZ-MAUBLANC, L.-V. Le prétendu déclin du détournement de pouvoir. In Mélanges offerts à Jean-Marie Auby. Paris : Dalloz 1992, p. 239. The Belgian administrative law's literature provides similar reasons for the very rare use of the power abuse concept by the Belgian Council of State (BATSELÉ, MORTIER, SCARCEZ, Manuel de droit administratif, p. 851).

49 PESTALOZZA, Ch. Formenmiβbrauch des Staates. München : C. H. Beck, 1973, p. 66 – 68. To put it in a certain simplification, which allows a short summary of the complex theory by this author: an abuser wants to apply a certain norm to a specific fact, but this attempt to subsume does not succeed, because it is not accepted by the law.

Sometimes, however, the law introduces another type of sanction. An example is the regulations on farming subsidies referred to above, where the sanction is a refusal to grant a benefit.

9 CONCLUSIONS – PERSPECTIVES OF APPLYING THE PROHIBITION OF ABUSE OF RIGHT

The answer to the question, what is the future of the concept of abuse of right in administrative law, depends on the subjective perspectives.

When analysing the case law regarding the review of the exercise of discretionary powers by the administration, it is evident that the classic concept of abuse of power has clearly lost its significance. Although it is still referred to in administrative law course-books by scholars, it appears less and less frequently in the case law. At the same time, one may note that, while applicants with persevering "enthusiasm" invoke charges of abuse of power, the courts are less and less concerned about these charges. The causes of this phenomenon are in the specificity of the concept of abuse of powers, which, in classical terms, makes it necessary to assess the intentions of an official acting on behalf of the authority. On the one hand, this causes evidence finding difficulties. On the other, it makes it difficult to formulate objectively verifiable arguments in a legal dispute regarding the legality of the act. In that situation, the construct of abuse of power is superseded by other grounds of complaint that allow for the same effect (repealing the act), but are based on more transparent and objectively perceptible criteria (in particular the principle of proportionality or the concept of manifest error in assessment).

Despite the declining practical significance, the concept of abuse of powers remains an *ultima ratio* means to challenge administrative acts that are unacceptable from the point of view of the axiology of the legal system. It is the "ultimate weapon" of an administrative court judge. The value of this concept is also expressed in the fact that it emphasizes the importance of the objective of the competence norm. Without denying that competence provisions should be strictly interpreted, it must be recognized that each power of an administrative body has its own specific purpose. The use of powers for purposes others than that originally intended leads to an unacceptable restriction of the rights of the individual. The search for the purpose of the powers, characteristic for prohibition of abuse of powers, does not blur the limits of sovereign interference, but on the contrary: allows them to be given a rational sense.

It should be noted that the prohibition of abuse of power under the European soft law is still one of the basic standards for exercising powers by a public administration body and one of the basic criteria for judicial review of public administration (art. 7 of the European Code of Good Administrative Behavior; Recommendation no. R (80) 2 of the Comittee of Ministers Concerning the Exercise of Discretionary Powers by Administrative Authorities,[50] Recommendation Rec(2004)20 of the Committee of Ministers to member states on judicial review of administrative acts[51]).

[50] Among basic principles applicable to the exercise discretionary powers by administrative authorities the recommendation points to the principle of reasonableness: "An administrative authority, when exercising a discretionary power: 1. does not pursue a purpose other than that for which the power has been conferred (II.1)".

[51] According to the point 1.b, referring to the scope of judicial review: "The tribunal should be able to review any violation of the law, including lack of competence, procedural impropriety and abuse of power".

The future of the concept of abuse of right in administrative law is, in my opinion, primarily in its aspect relating to the individual. I do not share concerns of those scholars who rule out the reception of the concept of abuse of right in administrative law.[52] I see the problems related this, in particular the risk of blurring the permissible „limits of limitation" of individual freedom. However, in my opinion, in view of the „feedback" between the individual and his environment, increasingly stronger in the modern world, as well as the resulting complexity of legal relations in administrative law, new methods of shaping these relations need to be sought for. The classical forms in which we have traditionally considered these relations can be insufficient, as evidenced, inter alia, by the above-mentioned problem of multi-polar legal relations in administrative law.

The prohibition of abuse of right by an individual may be a source of some flexibility, as this is the role of this concept. It is obvious, however, that its application should be accompanied by far-reaching caution. It should be borne in mind that even under private law the prohibition of abuse of right is considered an exceptional instrument for the correction of statutory law, applied only in exceptional cases. The same is true for the abuse of right in administrative law.

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52 Przybysz, Nadużycie, p. 197 – 198.

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FAILURE TO REPATRIATE FUNDS IN FOREIGN CURRENCY FROM ABROAD AND MODERN ISSUES OF CURRENCY REGULATION

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Abstract: The monetary policy of the European Union has recently undergone changes that cannot but have an impact on national economies. Thus, starting in 2018, the new rules for calculating the liquidity of banks and the ratio of borrowed funds to assets will come into full force in the European Union. Several large banks in France, dissatisfied with the policy of the European Central Bank (ECB), even appealed to the European Court of Justice for a change in the rules. Meanwhile, this is another step towards establishing financial transparency and strengthening the banking system. Meanwhile, at the international level, uncertainty still remains over issues of currency and legal responsibility, which is largely due to various legal regulations. In most cases, companies that carry out foreign economic activity violate currency legislation. At the same time, civil measures may not be sufficient to protect the normal functioning and development of the domestic foreign exchange market.

Keywords: monetary responsibility, the Russian Federation, the Czech Republic, the European Central Bank, repatriation of funds, currency regulation, virtual currency.

1 INTRODUCTION

The monetary regime in the Russian Federation is regulated by Federal Law No. 173-FZ of December 10, 2003 (as amended on July 3, 2016) "On Currency Regulation and Currency Control" (hereinafter – Fe deral Law No. 173-FZ). According to the preamble, the purpose of Federal Law No. 173-FZ is to ensure the enforcement of state monetary policy, as well as the stability of both the currency of the Russian Federation and the domestic foreign exchange market of the Russian Federation as factors in the progressive development of the national economy and international economic cooperation.

Monetary policy of the Czech Republic has exactly the same objectives, and the favorable functioning and development of the country's economy also largely depend on the stability of the domestic foreign exchange market.[1]

According to FxPro analysts' reports, economic growth in Europe has accelerated to a slightly higher trend, and the ECB is on the verge of abandoning the ultra-soft monetary policy in the di-

[1] SALVATORE, D., RENGIFO, E., OZSOZ, E. Dollarization as an Investment Signal in Developing Countries: The Case of Croatia, Czech Republic, Peru, Slovak Republic and Turkey. Available at <https://ssrn.com/abstract=1272092>.[q. 2018-05-29].

rection of neutral and is further preparing for tightening. Since the ECB adheres to inflation targeting quite rigidly, and the trade and budget balance has long been in favor of the euro, discipline in monetary policy could turn into a new long-term trend of strengthening the euro.[2] It should be mentioned that this is not only a European trend. Thus, there have been major problems with the economy of Argentina because of double-digit inflation every year since 2002.[3] Of course, when public money and the country's central bank notes are unable to provide individuals with the quality and availability they demand of their money, people feel free to switch to other options, which include not only digital currencies, but also the U.S. dollar, etc. That is why the new President of Argentina Mauricio Macri made a move to strengthen monetary control.[4]

Under these conditions, completely different mechanisms for protecting the domestic foreign exchange market can be used, including criminal law measures. The article examines the doctrinal and practical aspects of the functioning of laws on liability for non-repatriation of funds and modern issues of currency regulation.

2 FAILURE TO REPATRIATE FUNDS IN FOREIGN CURRENCY FROM ABROAD

An analysis of the legal regulation of foreign systems allows us to consider our own national experience through the lens of international practice, which forces us to analyze and evaluate this problem from a different angle, in a new aspect, with an enriched understanding of the essence of the problem.[5]

For nearly all countries with a developed market economy, protection of currency and currency assets by criminal law is typical, but only from the point of view of their falsification and forgery. This approach applies, for instance, in Austria, Germany and Switzerland. There is complete freedom of foreign exchange operations and there is no criminal liability for operations related to the movement of foreign exchange capital. Thus, the criminal laws of Germany do not provide a generally accepted and precise definition characterizing criminality in the area of currency circulation. Furthermore, the movement of capital to and from the country is practically unlimited, as a result of which there are no norms in the legislation establishing liability for crimes in the sphere of currency regulation and currency control.

In the criminal legislation of these countries there are no criminal prohibitions covering the export of currency assets outside the country and their non-repatriation, since such movement is carried out by free settlements under foreign economic transactions and investments. Currency control in these countries is based on other principles. In France, to make a foreign economic transaction or investment to an offshore jurisdiction one must pay all taxes first. In Japan, one must have a special license when such foreign transaction will be made outside an authorized bank or by an unusual method.

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2 Available at <https://news.rambler.ru/business/37423029-kurs-evro-podnimetsya-bolee-chem-na-50/?utm_source=twsharing& utm_medium=social>. [q. 2018-05-29].

3 Available at <http://data.worldbank.org/indicator/NY.GDP.DEFL.KD.ZG?locations=AR>. [q. 2018-05-29].

4 RASKIN, M., YERMACK, D. Digital Currencies, Decentralized Ledgers, and the Future of Central Banking. Available at <https://ssrn.com/abstract=2773973>. [q. 2018-05-29].

5 BLANPAIN, R., ENGELS, Ch. (eds.). Comparative Labour Law and Industrial Relations in Industrialized Market Economies. The Hague : Kluwer Law International, 2001, p. 4.

In contrast, countries with another type of economy (a transitional economy) provide special liability for failure to repatriate funds in foreign currency from abroad. In all the criminal codes of the countries of the former Soviet Union there are provisions that establish a criminal prohibition on the production or sale of counterfeit money or securities, their illegal transfer across the customs border, and non-repatriation of funds from foreign countries in foreign currency (the Criminal Code of Azerbaijan – Art. 208, the Criminal Code of Belarus – Art. 225, the Criminal Code of Georgia – Art. 217, the Criminal Code of Kazakhstan – Art. 213, the Criminal Code of Tajikistan – Art. 287, the Criminal Code of Uzbekistan – Art. 178, the Criminal Code of Ukraine – Art. 207).

However, the scale and significance of fraudulent actions in economic activity are increasing every year. Therefore, there is a need for common mechanisms to counter currency crimes.

The monetary regime in the Russian Federation is defined "… as an aggregate of legal means with the common subject of its regulation being the sphere of currency relations that determine such behavior of the subjects of these relations, under which the protection of the national currency and the normal functioning and development of the domestic foreign exchange market are guaranteed".[6]

But "the development of offshore markets in a foreign currency poses several challenges to a central bank's responsibility for maintaining monetary stability. An offshore market in a foreign currency can increase the difficulty of defining and controlling the money supply in that currency. Equally, an offshore market in a foreign currency can pose a challenge to measuring and controlling bank credit. If monetary policy is based to some extent on the control of money or credit, then the effect of offshore use of the currency on money or credit should be factored in when setting monetary or credit targets or monitoring ranges"[7].

That is why in the Russian Federation in accordance with Art. 19 of Federal Law No. 173-FZ, when carrying out foreign trade activities, residents are required to provide the following by the deadlines stipulated in foreign trade agreements (contracts):

- the receipt from non-residents in their bank accounts in authorized banks of foreign currency or Russian Federation currency which is payable in accordance with the conditions of these agreements (contracts) for goods transferred to non-residents, work performed for them, services rendered to them and information and results of intellectual activity, including exclusive rights thereto, which have been transferred to them;
- the return to the Russian Federation of funds which were paid to non-residents for goods which have not been imported into the customs territory of the Russian Federation (have not been received in the customs territory of the Russian Federation), work which has not been performed, services which have not been rendered and information and results of intellectual activity, including exclusive rights thereto, which have not been transferred.[8]

Failure to comply with this obligation entails administrative and criminal liability stipulated by the laws of the Russian Federation. Administrative liability is stipulated for officials and legal entities, and consists in imposing an administrative fine. Criminal liability is regulated by Art. 193 of the Criminal Code of the Russian Federation. Let us dwell on this in more detail.

6 KUCHEROV, I. Currency Law of Russia (Academic Lecture Course), 2011, p. 38.

7 DONG, H., MCCAULEY, R. Offshore Markets for the Domestic Currency: Monetary and Financial Stability Issues. Available at <https://ssrn.com/abstract=1699740>. [q. 2018-05-29].

8 English version of the Federal Law 173-FZ. Available at <http://russiaindiabusiness.com/Federal_Law_On_Currency_Regulation_and_Currency_Control.pdf>. [q. 2018-05-29].

Evasion of obligations to repatriate funds in foreign currency or in the currency of the Russian Federation from abroad consists in failure to enroll or repatriate, in accordance with the established procedure, funds in foreign currency or in the currency of the Russian Federation in a large amount from one or several non-residents to the accounts of a resident in an authorized Bank or a resident's accounts with banks located outside the territory of the Russian Federation to the resident in accordance with the terms of foreign trade contracts (contracts) for goods transferred to non-residents, work performed for them, services rendered to them, information and results of intellectual activity transferred to them, including exclusive rights thereto.

First of all, it is necessary to clearly define what is meant by the term "currency", i.e., with the subject of currency crimes. The subject of crimes related to the non-repatriation of funds are currency and currency assets. At the same time, Federal Law No. 173-FZ deals with currency terms and currency assets, but does not contain an independent definition of currency. Moreover, Part 2 of Art. 1 Federal Law No. 173-FZ states that the use of terms and concepts of civil, administrative and other branches of legislation of the Russian Federation is applied in the sense in which they are used in such branches of legislation. Therefore, the content of the term of "currency" may be qualitatively different in the civil, administrative and criminal legislation of the Russian Federation.

The Civil Code of the Russian Federation in a number of articles uses the terms "money (currency)", "payment instrument", "foreign currency" – Art. 140, "currency assets" – Art. 141, in other cases – "funds" – Art. 854, and so on.

At the same time, a citizen's money can also be in his bank accounts. With respect to a bank account statement, it is interesting to look at the ruling of the Supreme Court of the Russian Federation of April 26, 2016 No. 45-KG16-2, according to which the depositor indicated that the bankruptcy trustee refused to pay him an insurance benefit, citing non-receipt of the funds by the Bank at the time the contract was concluded. At the same time, the depositor was in possession of a receipt and cash warrant confirming the deposit of funds to the account opened with the bank.

The Supreme Court of the Russian Federation explained[9] that in the context of Art. 140 of the Civil Code of the Russian Federation, technical records on a customer's accounts in a bank made in conditions of its insolvency cannot be considered as money, and they do not entail legal consequences in connection with the actual insolvency of the lending institution.

In the event that a certain bank is insolvent at the time the funds are deposited in the account and does not have sufficient funds to fulfill its obligations to creditors (which can be confirmed, for example, by a statement of account balances of the bank), the bank deposit contract cannot be recognized as signed. This situation entails the absence of an insured event. The funds in the form of an electronic statement of the owner's account will be recognized as such only when such a record was made at a time when the bank was solvent.

The Criminal Code of the Russian Federation uses the term "funds" and determines that they can be expressed in the form of a foreign currency or currency of the Russian Federation. Judicial practice distinguishes the money of the debt and the money of payment. In this case, the money of payment in the territory of the Russian Federation will always be expressed in Russian rubles. However, the money of the debt can be expressed in a foreign currency or conventional monetary units

[9] Judicial Review of the Supreme Court of the Russian Federation № 4 2016 as approved by the Presidium of the Supreme Court of the Russian Federation 20 December 2016. Available at <http://www.vsrf.ru/Show_pdf.php?Id=11201>. [q. 2018-05-29].

with an indication in the contract that it is payable in rubles in an equivalent amount.[10] Art. 200.1 of the Criminal Code of the Russian Federation also deals with the notion of a "monetary instrument", which according to Clause 5 of the note to this article means traveler's checks, bills of exchange, checks (bank checks), as well as securities in documentary form certifying the issuer's (debtor's) obligation to pay cash, in which the person to whom such payment is made is not specified.

Meanwhile, in accordance with "OK (MK (ISO 4217) 003-97) 014-2000. Russian Classifier of Currencies" (approved by Decree of the State Standard Office of Russia No. 405-st of 25. 12. 2000), the objects of classification of the Russian Classifier of Currencies are currencies, i.e., monetary units of countries and territories.[11]

Then, for the purposes of criminal law, funds mean in the form of foreign currency or currency of the Russian Federation, as well as monetary instruments in the form of traveler's checks, bills of exchange, checks (bank checks), securities in documentary form certifying the issuer's (debtor's) obligation for payment of funds, in which the person to whom such payment is made is not specified.

Accordingly, currency and currency assets are the subject of currency crimes, including those related to non-repatriation of funds, from the point of view of qualitative characteristics. But in addition to the qualitative aspect, the subject of currency crimes has a quantitative component, which is expressed by a specific amount in a note to the article to the Special Part of the Criminal Code of the Russian Federation.

The main object of currency crimes is public relations developing within the currency regime of the Russian Federation. These relations arise between an authorized bank and a legal entity and are associated with the return of currency assets to the territory of the Russian Federation.[12]

The objective side of a currency crime is non-repatriation by the head of an organization of a large amount of funds in foreign currency from abroad that are subject to compulsory transfer to accounts with an authorized bank in accordance with the legislation of the Russian Federation. Authorized banks are credit institutions that are established in accordance with the legislation of the Russian Federation and are entitled to carry out transactions with foreign currency on the basis of a license.

The subject of a currency crime is the head of the organization who has not repatriated the foreign currency from abroad.

The subjective side of a currency crime is direct intention, because the subject realized that he did not repatriate the foreign currency, and wanted this.[13]

Again, it should be mentioned that such obligation to repatriate funds from abroad currently does not exist in countries with developed market economies. On the contrary, modern countries strive to make capital movement free. In this sense, the experience of China is also of interest.

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10 See: para 27 Ruling of the Plenum of the Supreme Court of the Russian Federation of 22 November 2016 № 54 "On certain matters of the application of general provisions of the Civil Code of the Russian Federation on obligations and the fulfillment thereof".

11 In Japan, the Bitcoin is recognized as legal tender along with the national currency. Australia even levies a tax on virtual currencies. Available at <http://www.coinfox.ru/novosti/zakonodatelstvo/5021-japanese-government-approves-new-bitcoin-regulations-2>. [q. 2018-05-29]. However, this currency is neither a unit of a particular country, nor any territory. Despite this, a number of other countries (Denmark, Sweden) have stated that they will neither prohibit nor regulate the Bitcoin or other virtual currencies. See: LEJBA, A. Real Life of Virtual Money. In *EZh-Yurist* (2014), pp. 1, 4.

12 See: KONDRAT, E. Financial violations in Russia. The threat to financial security and how to counteract it. Moscow : FORUM publishers, 2014. 928 pp.

13 See: GAUKHMAN, L., MAKSIMOV, S. Criminal law protection of the financial environment: new types of crimes and their classification. Moscow, 1995. 96 pp.

Foreign currency was mentioned for the first time in Chinese law in the Order on Strengthening Punishments for Persons Who Have Committed Serious Economic Crimes of 1982. However, amendments to the Criminal Code did not follow until 1988, when the illegal placement of foreign currency abroad was criminalized. Article 190 of the Criminal Code of China stated that any state-owned company, enterprise or any other state-owned unit that, against State regulations, deposits foreign currency outside China or illegally transfers foreign currency to any other countries shall, if the circumstances are serious, be fined, and the persons who report directly and other persons who are directly responsible for the crime shall be sentenced to fixed term imprisonment of no more than five years or criminal detention.

Today, the Criminal Code of China includes some other types of currency crimes, namely counterfeiting currency and securities. For example it provides different penalties for the following criminal activities: counterfeiting or altering a currently used coin, paper currency, or banknote with the intention to circulate; circulating a counterfeit or altered coin, paper currency, or banknote or collecting it from or delivering it to another with the intention to circulate; reducing the weight of a coin with the intention to circulate; circulating a coin of reduced weight or collecting it from or delivering it to another with the intention to circulate; manufacturing, delivering, or receiving an instrument or material with the intention of using it to counterfeit or alter a currently used coin, paper currency, or banknote or using it to reduce the weight of a currently used coin.

Undoubtedly, the experience of China is also of interest because of its new monetary policy concerning relationships with other countries. For example, between the Russian Federation and the People's Republic of China there is an agreement on mutual settlements in national currencies (RUB/CNY) without using the USD as a transfer currency, which was reached in 2011 and confirmed in 2014. However, many issues still have to be resolved by both parties to the agreement. Thus, the USD is still a priority in many contracts between Russian and Chinese companies, etc. However, this trend in monetary policy of China cannot help but affect the global economy.

Today, globalism and modern international processes have such a strong influence on the modern world economy that the economic decisions of individual countries, regardless of their type, influence each other as well as the overall world development trend. Therefore, there is a need for common mechanisms to counter currency crimes. This is especially associated with the appearance and popularization of virtual currency.

3 MODERN ISSUES OF CURRENCY REGULATION

Along with the doctrinal problems of identifying, investigating and suppressing currency crimes for non-repatriation of funds from abroad, there is also uncertainty in the regulation of relations associated with the use of virtual currency in mutual settlements.

Given the urgency of counteracting currency crimes, in accordance with the order of the Prosecutor General of the Russian Federation, in March 2016 a working group was formed on the issues of repatriating from abroad assets obtained as a result of corrupt activities. Its main task is to organize interaction with competent Russian and foreign authorities for the return of such assets obtained as a result of corrupt activities. In addition, a National Contact Point (NCP) is operating under the

Prosecutor General's Office, and is called upon to identify, seize, confiscate and return such assets through international channels.[14]

It is important to note that the NCP was created at the suggestion of the Ministry of Foreign Affairs within the framework of the UN Convention against Corruption and subject to the operations of the Prosecutor General's Office of the Russian Federation for coordination of the fight against corruption and cooperation with foreign countries on legal assistance in criminal matters, including recovery of assets received from criminal activity.

When an NCP is being created, the recommendations of the Open-ended Intergovernmental Working Group on Asset Recovery established by the Confederation of States Parties to the UN Convention against Corruption on the need for the NPC to form a unified network of such points are taken into account. Representatives of the Prosecutor General's Office of the Russian Federation take part in the meetings of this Intergovernmental Working Group.

The practical expediency of the activities of the NCP is to ensure the fastest and most effective interaction with the competent authorities of foreign states in the search for, confiscation and return of assets. Such contact points make it possible to resolve current issues of cooperation, including those related to the preparation and execution of requests for legal assistance.

The operation of the NCP is aimed at improving the effectiveness of monitoring and supervising compliance with the norms of legislation of the Russian Federation on currency regulation. In this case, the experience of Russia in this area may be of interest to Croatia, as our countries proclaim unified goals and principles of monetary policy.

This assertion is especially topical in connection with the increasing prevalence of virtual currency. Quite indicative in this regard is the June 17, 2016 event, when Ethereum (an analog of the Bitcoin) crypto currencies totaling about $ 50 million disappeared from circulation for users. Although from the outside, this project seemed to be ideal, since distributed electronic money systems cannot be hacked. Therefore, people quietly invested their money, and in return received so-called tokens, which they used to vote for where to invest the total capital – the expected profit was supposed to be distributed among the participants of the initiative. However, the money suddenly appeared on the account of one of the project participants, who could not rightfully claim it, but he did not violate the terms of the contract. If this had happened in the real world, people could go to court or challenge the terms of the contract, contact the bank and ask to block the account. But these events occurred on the Internet, the invested money was calculated not in dollars, but in units of the distributed Ethereum ("ethers") crypto currencies. At the same time, the contract itself was of an innovative nature – it was a machine code that could not be changed without crashing the entire system; i.e., it was represented by a program that executed all the rules of the system when a transaction was made.[15] In particular, it was also the fact that actions under an electronic contract were made not by people, but by computers. Therefore, it was almost impossible to break, cancel or bypass it, and if a participant wanted to leave the organization, a subsidiary organization was created to return the invested money, where funds were transferred from the main one. And as it turned out later, as a result of a mistake in the machine code, this operation could be repeated countless times, which was used to advantage by the attacker. In a short time, he transferred an amount equal to approximately $ 50 million to his subsidiary organization. And this money could be returned only by the attacker

[14] Available at <https://rns.online/economy/Genprokuratura-sozdala-spetsgruppu-po-vozvratu-zarubezhnih-aktivov-korruptsionerov-2016-03-28/>. [q. 2018-05-29].

[15] Available at <https://lenta.ru/articles/2016/09/03/ethereum/>. [q. 2018-05-29].

himself, but he did not intend to do this, because he had not formally violated the terms of the contract. In the end, it turned out that there were no other participants of the project in the position to make claims and no one to apply for protection of their rights. As a result, it became obvious that the use of organizational and legal means to prevent such situations was more than relevant, and rules governed by self-executing smart contracts and decentralized (autonomous) organizations did not always work. It appears that the widespread use of this new decentralized technology will lead to an increase in the scope of new legislative regulation, which will determine the use of such rules. The features of such laws will most likely be determined by the fact that centralized authorities, such as government agencies and large multinational corporations, may lose the ability to monitor and shape the activities of individuals.[16]

This determines the need to focus on how to regulate and how to set up the creation and deployment of new decentralized organizations. And also on how to apply government regulations to combat money laundering via Bitcoin and similar virtual currencies.[17]

The use of a digital currency narrowing the relations between citizens and central banks and eliminating the need for the population to keep deposits in commercial banks may have profound consequences for the banking system. In particular, holders of crypto currencies can replace traditional shareholders, and can then appoint members of a governing body similar to a board of directors. This governing body can vote to issue the currency to the account holder, who can then act similarly to the chief financial officer to pay salaries to managers, employees and directors.[18]

At the same time, the anonymity in blockchain technology is preserved, in spite of the fact that the information about networks of chains is kept forever and its growing size, which works against anonymity.[19] Ensuring effective management of blockchain technologies and smart contracts is essential to ensure its further evolution. Based on the mathematical principles underlying the location of the blocks, an alternative approach to existing legal practice is already being proposed.[20] The so-called distributed jurisdiction is an open source platform ecosystem for reasonable resolution of contractual disputes, which allows users to select a conflict resolution mechanism by using crypto resources, as well as a mechanism for inherited enterprises that want to participate in the growth

16 WRIGHT, A., DE FILIPPI, P. Decentralized Blockchain Technology and the Rise of Lex Cryptographia, p. 4. Available at <https://ssrn.com/abstract=2580664>. [q. 2018-05-29].

17 See: BRYANS, D. Bitcoin and Money Laundering: Mining for an Effective Solution, 2014, pp. 441 – 472. Available at <https://ssrn.com/abstract=2317990>. [q. 2018-05-29].

18 See: LEONHARD, R. Corporate Governance on Ethereum's Blockchain. Available at <https://ssrn.com/abstract=2977522>. [q. 2018-05-29].

19 It is often emphasized in legal doctrine how the Bitcoin can be used for illegal activities. "There are concerns about the secretive purchase of illegal goods and the cross-border transfer of money either for money-laundering or to finance terrorism (Ron & Shamir, 2014; Tropina, 2014). Bitcoin was the normal means of settlement for the trade in illicit goods (such as drugs, pornography and weapons) via online marketplaces such as the infamous Silk Road (Christin, 2013). On the other hand, due to the pseudo-anonymous character of the currency, detection of criminals is not impossible, as demonstrated by the closure of Silk Road in October 2013 and the prosecution of its founder" (POLASIK, M., PIOTROWSKA, A., WISNIEWSKI, T., KOTKOWSKI, R., LIGHTFOOT, G. Price Fluctuations and the Use of Bitcoin: An Empirical Inquiry. Available at: <https://ssrn.com/abstract=2516754>. [q. 2018-05-29].) One of the most important regulatory developments has recently taken place in France. "While French authorities admit that Bitcoin does not pose a threat to financial markets, they have recognised that there is clearly room for concern with regards to criminal activity and fraud. These concerns are mostly concerned with the anonymity of transactions, which could have tax and money laundering implications" (GUADAMUZ, A., MARSDEN, Ch. Bitcoin: The Wrong Implementation of the Right Idea at the Right Time. Available at: <https://ssrn.com/abstract=2526736>. [q. 2018-05-29].).

20 KAAL, W., CALCATERRA, C. Crypto Transaction Dispute Resolution. Available at: <https://ssrn.com/abstract=2992962>. [q. 2018-05-29].

of opportunities for crypto business and hope to avoid the inherited intermediary and transaction losses associated with it.

4 CONCLUSION

Today current international processes have such a strong influence on the modern world economy that the economic decisions of individual countries, regardless of their type, influence each other, as well as the overall world development trend. The ECB is now on the verge of abandoning the ultra-soft monetary policy in the direction of neutral and is further preparing for tightening. Since the ECB adheres to inflation targeting quite rigidly, and the trade and budget balance has long been in favor of the euro, discipline in monetary policy could turn into a new long-term trend of strengthening the euro. To achieve this goal, it is necessary not only to analyze the phenomenon of currency crimes and study the experience of combating currency crimes in other countries, but also evaluate common mechanisms to counter currency crimes, despite the economic type of a particular country.

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FREEDOM OF LAWYERS TO PROVIDE SERVICES UNDER DIRECTIVE 77/2491

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Abstract: The following article deals with one of the different forms of free movement of lawyers in the EU, i.e. the freedom to provide services on a temporary basis. The relevant primary law alongside the applicable legislation, as interpreted by the Court in its case-law, is analysed. Special attention is paid to certain peculiarities of cross-border provision of services by lawyers, in particular the respect of rules of professional conduct.

Key words: European Union, Free Movement of Lawyers, Freedom to Provide Services, Directive 77/249, Rules of Professional Conduct

1 INTRODUCTION

The legal profession in the European Union plays a peculiar role in the context of achieving a true European market where free movement of professionals is guaranteed. The 'hall of fame' of the Court's case-law includes a wide array of names of lawyers that ring a bell with anyone familiar with EU law: Reyners, van Binsbergen, Thieffry, Klopp, Vlassopoulou, Morgenbesser and many others. It is quite logical that lawyers, given their legal erudition, were among the first professionals to invoke their rights under the Treaty. In a culture characterised by 'taking rights seriously'[2], it is, beyond doubt, for lawyers to claim the guarantees offered by EU law not only on behalf of their clients, but also, *a fortiori*, on their own behalf. Indeed, the Court proved to be favourable to such endeavours. Despite the absence of relevant secondary legislation, it did not hesitate to declare the Treaty provisions granting the rights to free movement to European professionals, including lawyers, directly applicable.

The following article deals with one of the different forms of free movement of lawyers in the EU, i.e. the freedom to provide services on a temporary basis. The relevant primary law alongside the applicable legislation, as interpreted by the Court in its case-law, is analysed.

With respect to the freedom to provide services and the relevant primary and secondary law, besides the scope of application and the purpose of the applicable EU rules, special attention is paid to certain peculiarities of cross-border provision of services by lawyers, in particular the respect of rules of professional conduct in two Member States and the duty of a migrant lawyer to work in conjunction with a local lawyer.

[1] This work was supported by the Slovak Research and Development Agency under the contract No. APVV-14-0893 (Free movement of persons and recognition of qualifications in the European Union and Slovak Republic).

[2] Cf. DWORKIN, R. Taking rights seriously. Cambridge Mass. : Harvard University Press, 1978.

2 PURPOSE AND SCOPE OF APPLICATION

Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services,[3] which deals only with measures to facilitate the effective pursuit of the activities of lawyers by way of provision of services and recognises the need to adopt more detailed measures to facilitate the effective exercise of the right of establishment, constituted a major step towards achieving the free movement of lawyers in the EU. As clearly stated by the Community legislature, that directive solely concerns provision of services and does not contain provisions on the mutual recognition of diplomas. In fact, Directive 77/249 is based on mutual recognition of national authorisations for lawyers issued by their home Member States.

S. Claessens observes that the fact that there seems to be a complete mutual recognition of lawyers who provide services in other Member States is actually most striking about that directive, which was, beyond doubt, very liberal for its time.[4] The Council of Bars and Law Societies of the European Union (CCBE) also points out that the combination of Directives 77/249 and 98/5 has created a 'simple, non-bureaucratic and very liberal' system, which has led to easy cross-border mobility for lawyers and allowed them to reach a level of free movement in the EU, which is inconceivable in other parts of the world, even in the framework of federal structures, including the USA. At the same time, the special regime applicable to lawyers is 'far in advance of the structures which exist for other liberal professions in the EU'.[5] The Maastricht University/Panteia Study also shows that, thanks to Directive 77/249, 'cross-border provision of services has become a common, largely unproblematic practice in the legal sector in the EU'.[6]

It should be observed that the original proposal of Directive 77/249 dates back to 1969. However, at that time, it was rejected because certain Member States claimed that the profession of lawyer was subject to the derogation concerning official authority. In this respect, the Court's rulings in *Reyners*[7] and *van Binsbergen*[8] opened the door to adopting such a measure of Community law.

Even though Directive 77/249 was adopted in the context of vertical harmonisation, no minimum criteria for education of lawyers were laid down, because such harmonisation would be impossible. Therefore, similarly to the Architects Directive,[9] no educational standards were imposed with respect to lawyers, but, unlike in the case of architects, only the freedom to provide services (and not the freedom of establishment) was covered by the measure in question.[10]

With respect to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market,[11] it must be emphasised that, as stated in recital 88

3 OJ 1977 L 78, p. 17.

4 See CLAESSENS, S. Free Movement of Lawyers in the European Union. Nijmegen : Wolf Legal Publishers, 2008, p. 28.

5 CCBE position, Evaluation of the Lawyers' Directives, pp. 1 – 3. Available at <http://ccbe.eu/fileadmin/ speciality_distribution/public/documents/FREE_MOVEMENT_OF_LAWYERS/FML_Position_papers/EN_FML_20140912_CCBE_position_on_Evaluation_of_the_Lawyers__Directives.pdf >. [q. 2018-05-29].

6 CLAESSENS, S. et al. Evaluation of the Legal Framework for the Free Movement of Lawyers, Final Report. Zoetermeer : Maastricht University/Panteia, 2012 (Maastricht University/Panteia Study), p. 230.

7 Judgment of 21 June 1974, *Reyners*, 2-74, EU:C:1974:68.

8 Judgment of 3 December 1974, *van Binsbergen*, 33-74, EU:C:1974:1299.

9 Council Directive 85/384/EEC of 10 June 1985 on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (OJ 1985 L 223, p. 15).

10 See CLAESSENS, S. Free Movement of Lawyers in the European Union. Nijmegen : Wolf Legal Publishers, 2008, p. 26.

11 OJ 2006 L 376, p. 36.

of that directive, the provision on the freedom to provide services should not apply in cases where, in conformity with EU law, an activity is reserved in a Member State to a particular profession, for example requirements which reserve the provision of legal advice to lawyers. Accordingly, Article 16 of that directive, which enshrines the freedom to provide services, does not apply to matters covered by Directive 77/249.[12] However, it seems that not all legal services are exempted from Directive 2006/123 and on a more general level, it may be concluded that this directive applies also to those matters related to the provision of services by lawyers that are not covered by Directive 77/249. It follows that if an issue is not governed by Directive 77/249, other provisions of Directive 2006/123 than Article 16 (e.g. Article 24 on commercial communications by the regulated professions) will apply even in the case of services provided by lawyers.[13]

Article 1(1) of Directive 77/249 states that this directive applies, within the limits and under the conditions laid down therein, to the activities of lawyers pursued by way of provision of services. However, Member States may reserve to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land.

As confirmed by the Court, that derogation does not cover, in general terms, the various categories of legal professions, with the result that Member States would have the right, relying on that provision, to limit the pursuit of the activity of drafting formal documents for the creation or transfer of rights to property to certain categories of legal professionals — such as notaries — and thus to prohibit foreign lawyers from exercising the activities in question within the territory of those Member States. By contrast, that provision provides for a derogation with a more limited scope aimed specifically at certain prescribed categories of lawyers, which are, moreover, explicitly identified in that directive. In particular, the purpose of that derogation was to prevent lawyers from other Member States from pursuing the activities concerned in the United Kingdom or in Ireland.[14]

Any person listed in paragraph 2 of Article 1 of Directive 77/249 must be recognised by each Member State as a lawyer for the purpose of pursuing those activities. Any such lawyer must adopt the professional title used in the Member State from which he comes, expressed in the language or one of the languages, of that State, with an indication of the professional organisation by which he is authorised to practise or the court of law before which he is entitled to practise pursuant to the laws of that State. The competent authority of the host Member State may request the person providing the services to establish his qualifications as a lawyer.[15]

It follows that the automatic recognition of lawyers in the EU is based on mutual trust between the Member States. The host Member State cannot question the qualification of the lawyer concerned provided that the lawyer is recognised as such in the Member State from which he comes. Given the fact that the lawyer must provide services under the professional title of his home Member State, he can be easily identified as a foreign lawyer, i.e. a lawyer established in another Member State. Unlike Directives 2005/36 and 98/5, Directive 77/249 does not allow migrant lawyers to be fully integrated in the host Member State, i.e. to become a lawyer using the professional title of that Member State.

12 See Article 17(4) of Directive 2006/123.

13 Maastricht University/Panteia Study, pp. 64 – 66.

14 See judgment of 9 March 2017, *Piringer*, C-342/15, EU:C:2017:196, paragraphs 40, 41 and 44.

15 For further details see Articles 2, 3 and 7 of Directive 77/249.

As the Court stated, Directive 77/249 does not expressly define what is covered by the term 'lawyer's activity' within its meaning. However, by the definition of 'lawyer', the EU legislature left it to the Member States to define that notion themselves and referred to the designations used in each Member State to identify the persons entitled to pursue those professional activities. In other words, the EU legislature wished to preserve the power of the Member States to define activities that may be pursued by lawyers by leaving them with a broad margin of discretion in that regard. The notion of 'lawyer's activity' within the meaning of that directive covers not only the legal services typically provided by lawyers, such as legal advice or representing and defending a client in court, but may also cover other kinds of services, such as the authentication of signatures; the fact that those latter services are not provided by lawyers in all Member States being of no relevance in that respect. To the extent to which it seeks to facilitate the effective exercise by lawyers of the freedom to provide services, Directive 77/249 must be interpreted as applying both in the typical case of the lawyer travelling to a Member State other than that in which he or she is established in order to provide his or her services and in the case where that professional does not travel, namely where it is the recipient of the service who travels outside his or her Member State of residence in order to visit another Member State and to avail of the services of a lawyer established there.[16]

3 RESPECT OF RULES OF PROFESSIONAL CONDUCT

Activities relating to the representation of a client in legal proceedings or before public authorities must be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State. A lawyer pursuing these activities must observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes.[17] The term 'without prejudice' simply means that in case of a conflict of rules of professional conduct, the stricter rules will apply.[18] Therefore, Directive 77/249 introduces duplicity of rules of professional conduct (double deontology, also known as *Kumulationsprinzip*).[19]

A lawyer pursuing activities other than those listed above remains subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity. The latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the host Member State and to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility.

16 See judgment of 9 March 2017, *Piringer*, C-342/15, EU:C:2017:196, paragraphs 28 – 30, 31 and 36.

17 See Article 4 of Directive 77/249.

18 SISKIND, G., Freedom of Movement for Lawyers in the New Europe. In The International Lawyer, Vol. 26, No. 4 (1992), pp. 899 – 931, at p. 916.

19 See CLAESSENS, S. Free Movement of Lawyers in the European Union. Nijmegen : Wolf Legal Publishers, 2008, p. 27.

In the event of non-compliance with the obligations referred to in Article 4 of Directive 77/249 and in force in the host Member State, the competent authority of the latter must determine in accordance with its own rules and procedures the consequences of such non-compliance, and to this end may obtain any appropriate professional information concerning the person providing services. It must notify the competent authority of the Member State from which the person comes of any decision taken. However, such exchanges do not affect the confidential nature of the information supplied.[20]

It follows that Directive 77/249 distinguishes between two categories of activities: (a) representation of a client in legal proceedings or before public authorities ('judicial activities') and (b) other activities ('extrajudicial activities'). In the case of the first category of activities, migrant lawyers are subject to two sets of rules of professional conduct: both those applicable in the host Member State and the rules of their home Member State. If the lawyers pursue extrajudicial activities, a 'relaxed duplicity of professional rules' applies. Thus, the migrant lawyer remains, in the first place, subject to the rules applicable in his home Member State. At the same time, he must respect the rules applicable in the host Member State (which are included in the non-exhaustive list contained in the Directive), but only to a certain extent defined by the Directive. It follows that Directive 77/249 establishes, in the case of extrajudicial activities, a certain hierarchy in favour of the rules applicable in the home Member State.[21] In this respect, it must be observed that the term 'representation' is not devoid of ambiguity and the activities regarded as assistance in one Member State may be qualified as representation in another. Therefore, it is for the migrant lawyer to determine the activities that he is entitled to carry out on the basis of the professional title used by lawyers in the host Member State.[22]

As the Court has held, by requiring compliance with the rules relating to professional ethics of the host Member State, Directive 77/249 assumes that the person providing the services has the capacity to comply with those rules. If the competent authority of the host Member State has already found in the course of proceedings concerning access to the legal profession that that person lacks such capacity so that he is barred from access to the profession on that ground, he must be considered not to satisfy the very conditions laid down by the directive with regard to freedom to provide services. Therefore, the provisions of that directive may not be relied upon by a lawyer established in one Member State with a view to pursuing his activities by way of the provision of services in the territory of another Member State where he had been barred from access to the legal profession in the latter Member State for reasons relating to dignity, good repute and integrity. Moreover, a Member State whose legislation requires lawyers to be registered at a bar may prescribe the same requirement for lawyers who come from other Member States and who take advantage of the right of establishment guaranteed by the Treaty in order to establish themselves as members of a legal profession in the territory of the first Member State.[23]

Even though Directive 77/249 establishes duplicity of rules of professional conduct, it does not resolve the issue of conflicts between such rules. Coordination of such rules at the European level seems to be, by far, the best solution. In this respect, the Code of Conduct for European Lawyers

20 See Article 7 of Directive 77/249.

21 See KREMLIS, G. La libre circulation des professions juridiques. In Le droit d'établissement et la libre prestation de services dans la Communauté européenne, 1986, p. 109.

22 ROODT, H. C. Harmonisation of the legal profession in the wake of the freedom to practise law in Europe 1992: diversities and commonalities. In The Comparative and International Law Journal of Southern Africa, Vol. 25, No. 2 (1992), pp. 208 – 231, at p. 211.

23 See judgment of 19 January 1988, *Gullung*, 292/86, EU:C:1988:15, paragraphs 21, 22 and 31.

drawn up by CCBE[24] is a very commendable achievement. In fact, the very purpose of that code is to mitigate the difficulties which result from the application of 'double deontology', notably as set out in Articles 4 and 7(2) of Directive 77/249 and Articles 6 and 7 of Directive 98/5. However, that code is not binding in the Member States.

The Maastricht University/Panteia Study identifies the parallel application of the deontology of the home Member State and the host Member State when providing services as an obstacle that can preclude lawyers from providing temporary services and suggests revising the current system of double deontology. The authors of that study claim that that problem could be solved by dismissing the double deontology in favour of a single deontology, i.e. the rules of the home Member State should be applied in the case of temporary services and the rules of the host Member State should apply to established lawyers.[25] Nonetheless, the CCBE is of the opinion that the only interpretation of Article 4(2) of Directive 77/249 (in the sense of a conflict rule), which is compatible with the wording of that directive, is the same interpretation as adopted on Article 6 of Directive 98/5, i.e. 'in case of a conflict between home and host State professional rules the host Member State's professional rules prevail'. Therefore, the CCBE sees no reason to amend Directive 77/249 with regard to the representation of clients in legal proceedings.[26] Therefore, irrespective of the suggested dismissal of the double deontology in favour of a single deontology, it can be concluded that in case of a conflict of rules of professional conduct, the rules applicable in the host Member State shall prevail.

Furthermore, it must be pointed out that any Member State may exclude lawyers who are in the salaried employment of a public or private undertaking from pursuing activities relating to the representation of that undertaking in legal proceedings in so far as lawyers established in that State are not permitted to pursue those activities.[27] However, the wording of this article implies that a salaried lawyer may represent a party who is not the lawyer's employer. Moreover, extrajudicial activities (such as advising a client abroad in the negotiation of a contract) carried out by in-house lawyers are not explicitly regulated, but seem to be accepted, even prior to the adoption of that directive.[28]

Moreover, the Court has held that Directive 77/249 does not preclude a judicial rule of a Member State limiting to the level of the fees which would have resulted from representation by a lawyer established in that State the reimbursement, by an unsuccessful party in a dispute to the successful party, of costs in respect of the services provided by a lawyer established in another Member State. The Court stated that apart from the exceptions expressly mentioned in Article 4 of that directive, all other conditions and rules in force in the host country could apply to the transfrontier provision of services by a lawyer. The reimbursement of the fees of a lawyer established in a Member State may therefore also be made subject to the rules applicable to lawyers established in another Member State. This solution is, moreover, the only one which complies with the principle of predictability, and thus of legal certainty, for a party which enters into proceedings and thus incurs the risk of having to bear the costs of the other party in the event of being unsuccessful.[29]

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24 Available at <http://ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/ EN_DEON_CoC.pdf >. [q. 2018-05-29].

25 Maastricht University/Panteia Study, p. 230.

26 CCBE, Position on the Evaluation of the Lawyers' Directives, p. 3.

27 See Article 6 of Directive 77/249.

28 SISKIND, G., Freedom of Movement for Lawyers in the New Europe. In The International Lawyer, Vol. 26, No. 4 (1992), pp. 899 – 931, at p. 917.

29 See judgment of 11 December 2003, *AMOK*, C-289/02, EU:C:2003:669, paragraphs 30 and 31.

4 DUTY TO WORK IN CONJUNCTION

Article 5 of Directive 77/249 empowers the Member States to require lawyers, for the pursuit of activities relating to the representation of a client in legal proceedings, to be introduced, in accordance with local rules or customs, to the presiding judge and, where appropriate, to the President of the relevant Bar in the host Member State and to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority, or with an 'avoué' or 'procuratore' practising before it.

The first duty of lawyers concerning the introduction to the presiding judge or to the President of the relevant Bar in the host Member State is, more or less, a formality. By contrast, the second duty ('duty to work in conjunction') that may be imposed by the host Member State can constitute a real 'burden' for the migrant lawyer.[30]

First and foremost, it must be emphasised that the Court excluded the possibility of a Member State requiring the lawyer providing services to act in conjunction with a lawyer established on its territory if there is no requirement of representation by a lawyer under national law. In fact, Article 5 of Directive 77/249 may not have the effect of imposing upon a lawyer providing services requirements for which there is no equivalent in the professional rules which would apply in the absence of any provision of services within the meaning of the Treaty.[31]

Similarly, in the context of the EEA Agreement, the Court ruled that a provision of national law, according to which, in court proceedings in which a party is represented by a lawyer or a defending counsel must be engaged, a lawyer from another EEA State providing services must call in a national lawyer to act in conjunction with him or her, did not fall under Article 5 of Directive 77/249, referred to at point 2 of Annex VII EEA, and was incompatible with Article 36 EEA and the Directive if it required the appointment of a national lawyer in cases where representation by a lawyer was not mandatory.[32] It is equally clear from the case-law that the duty to work in conjunction cannot be imposed for the pursuit of activities before bodies or authorities which have no judicial function.[33]

The Court has also held that the refusal, on the part of the competent authorities of a Member State, to issue a router for access to the private virtual network for lawyers to a lawyer duly registered at a Bar of another Member State, for the sole reason that that lawyer is not registered at a Bar of the first Member State, in which he wishes to practise his profession as a free provider of services, in situations where the obligation to work in conjunction with another lawyer is not imposed by law, constitutes a restriction on the freedom to provide services under Article 4 of Directive 77/249, read in the light of Article 56 TFEU and the third paragraph of Article 57 TFEU.[34]

More specifically, it follows from the case-law[35] that, whilst Directive 77/249 allows national legislation to require a lawyer providing services to work in conjunction with a local lawyer, it is intended to make it possible for the former to carry out the tasks entrusted to him by his client, whilst at the same time having due regard for the proper administration of justice. Seen from that

30 See KREMLIS, G. La libre circulation des professions juridiques. In Le droit d'établissement et la libre prestation de services dans la Communauté européenne, 1986, p. 109.

31 See judgment of 25 February 1988, *Commission v Germany*, 427/85, EU:C:1988:98, paragraphs 13 and 46.

32 See judgment of 3 October 2007, *Criminal proceedings against A*, E-1/07, OJ 2008 C 17, p. 13.

33 See judgment of 10 July 1991, *Commission v France*, C-294/89, EU:C:1991:302, paragraph 16.

34 Judgment of 18 May 2017, *Lahorgue*, C-99/16, EU:C:2017:391, paragraph 42.

35 Judgment of 25 February 1988, *Commission v Germany*, 427/85, EU:C:1988:98, paragraphs 23 – 26.

viewpoint, the obligation imposed upon him to act in conjunction with a local lawyer is intended to provide him with the support necessary to enable him to act within a judicial system different from that to which he is accustomed and to assure the judicial authority concerned that the lawyer providing services actually has that support and is thus in a position fully to comply with the procedural and ethical rules that apply. Accordingly, the lawyer providing services and the local lawyer, both being subject to the ethical rules applicable in the host Member State, must be regarded as being capable, in compliance with those ethical rules and in the exercise of their professional independence, of agreeing upon a form of cooperation appropriate to their client's instructions. That does not mean that national legislatures cannot lay down a general framework for cooperation between the two lawyers. However, the resultant obligations must not be disproportionate in relation to the objectives of the duty to work in conjunction.

In the particular context of the German legal system, the Court ruled that the presence of the German lawyer throughout the oral proceedings nor the requirement that the German lawyer must himself be the authorised representative or defending counsel nor the detailed provisions concerning proof of work in conjunction were in general necessary or even useful for the provision of the support required by the lawyer providing services. The same applied to the provision of German law stipulating that a lawyer providing services may not, as defending counsel, visit a person in custody unless accompanied by the German lawyer with whom he is working in conjunction, and cannot correspond with a person held in custody except through that German lawyer, without any exception being allowed.[36]

The Court also dealt with the question whether lawyers providing services under Directive 77/249 may be subject to the rule of territorial exclusivity, which allows lawyers in the host Member State to practise only in certain geographical areas and imposes a duty to work in conjunction with another lawyer outside their own area. The Court concluded that the rule of territorial exclusivity could not be applied to activities of a temporary nature pursued by lawyers established in other Member States, since the conditions of law and fact which applied to those lawyers were not in that respect comparable to those applicable to lawyers established on German territory.[37] However, this finding only applied subject to the obligation of the lawyer providing services to work in conjunction with a lawyer admitted to practise before the judicial authority in question.

In the context of the French legal system, the Court held that France could not require a lawyer providing services who appeared before a Tribunal de Grande Instance, in civil cases where it was compulsory to be represented by a lawyer, to retain a lawyer who was a member of the Bar of that court or was authorised to plead before it in order to plead or carry out the procedural formalities. Modern methods of transport and telecommunications enable lawyers to maintain the necessary contacts with clients and the judicial authorities and the aim of expeditious conduct of the proceedings could be achieved by requiring the lawyer providing services to have an address for service at the chambers of the lawyer in conjunction with whom he works, where notifications from the judicial authority in question could be duly served. Although the Court recognised that he rule of territorial exclusivity could facilitate disciplinary proceedings against the local lawyer, it held that such a rule was not necessary for the conduct of such proceedings.[38]

36 Ibid., paragraph 32.

37 Ibid., paragraphs 42 – 43.

38 See judgment of 10 July 1991, *Commission v France*, C-294/89, EU:C:1991:302, paragraphs 35 – 37.

Furthermore, the Court has held that Directive 77/249 precludes a judicial rule of a Member State which provides that the successful party to a dispute, in which that party has been represented by a lawyer established in another Member State, cannot recover from the unsuccessful party, in addition to the fees of that lawyer, the fees of a lawyer practising before the court seized of the dispute who, under the national legislation in question, was required to work in conjunction with the first lawyer.[39]

5 CONCLUSION

Those lawyers who do not seek integration into the legal profession of the host Member State and immediate establishment under the professional title of that State may benefit from Directive 77/249. Even though Directive 2005/36 has introduced a simplified mechanism for providing services, that mechanism does not apply to lawyers and the provision of services by lawyers is still governed by the former directive, which has proved to be a true success and managed to ensure a full mutual recognition of lawyers providing services in the EU. In fact, that directive has been of great help in transforming the idea of unhampered cross-border provision of services by lawyers in the EU into a common reality. It is not based on mutual recognition of professional qualifications of lawyers, but on automatic recognition of lawyers recognised as such in their Member States of origin. Thus, a migrant lawyer provides services in the host Member State under the professional title of his home Member State and continues to be bound by the rules of professional conduct of that latter State, alongside the rules applicable in the host Member State.

One of the major problems raised by Directive 77/249 is the application of that principle of double deontology coupled with the distinction between judicial and extrajudicial established by that directive, in particular in case of a conflict of rules of professional conduct.

It has been argued above that such a conflict could be resolved by applying (i) the stricter rule, irrespective of its origin, or (ii) the rule of the host Member State, or by (iii) dismissing the double deontology in favour of a single deontology, which means that the rules of the home Member State should always be applied in the case of temporary services. It has been concluded that, irrespective of the suggested dismissal of the double deontology in favour of a single deontology, which may seem more straightforward, but perhaps not entirely justified, as the law stands, in case of a conflict of rules of professional conduct, the rules applicable in the host Member State must prevail.

Another serious problem encountered by lawyers providing cross-border services relates to the application of the duty to work in conjunction with a local lawyer in the host Member State. However, that problem has already been, to a large extent, solved by the Court's case-law, which has, in particular, excluded the possibility of a Member State requiring the lawyer providing services to act in conjunction with a lawyer established on its territory if there is no requirement of representation by a lawyer under national law as well as the application of the rule of territorial exclusivity to activities of a temporary nature pursued by lawyers established in other Member States.

[39] See judgment of 11 December 2003, *AMOK*, C-289/02, EU:C:2003:669, paragraph 41.

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THE REALISATION OF THE CONSTITUTIONAL PRINCIPLES – THE RIGHT TO GOOD ADMINISTRATION AND THE RIGHT TO LEGAL REMEDY – IN HUNGARY

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Abstract: The paper aims to present the realisation of two procedural principles – the right to good administration and the right to legal remedy – regulated also in the Fundamental Law of Hungary, which entered into force on 1st January 2012. The right to legal remedy has been a constitutional principle since the change of regime (in 1989) and the right to good administration has been constitutionally named only by the Fundamental Law of Hungary. The actuality of the paper is the fact that in Hungary from the 1st of January 2018 completely new codes regulate the general public administrative procedures and the administrative justice. Based on these Acts, a new legal remedy system has been introduced regarding administrative decisions in which the judicial review procedures became – instead of the internal administrative appeal procedures – in most of the cases the firstly used legal remedy possibility regarding administrative decisions. After a short overview of the new legal remedy system which has been introduced regarding administrative decisions, the paper presents the constitutional basis of the right to good administration and the right to legal remedy. Finally, we analyse in detail the latest and most relevant decisions of the Constitutional Court of Hungary and some cases of the Curia of Hungary about the practice of the direct enforcement of the constitutional principles: the right to good administration and the right to legal remedy regarding administrative decisions.

Key words: the right to legal remedy, the right to good administration, Hungary, principle of procedural fairness, reasonable time, duty to justify decisions, obligation for cooperation between the administrative bodies and the clients.

1 INTRODUCTION

The right to good administration and the right to legal remedy, are constitutional principles, fundamental rights, more precisely procedural rights.[1] Examining the application of these rights in administrative authority's decision-making process is one of the most interesting and current questions in Hungary. This analysis is even more actual, because from 1st January 2018 the new Code of Administrative Procedures called Act CL. of 2016 on General Public Administration Procedures entered into force. It includes all general regulations regarding administrative procedures.[2] At the

[1] See: VICE ÁDÁNY, T., BALOGH-BÉKESI, N., BALOGH, Z., HAJAS, B. Rights and Freedoms. In VARGA, A. Zs., PATYI, A., SCHANDA, B. The Basic (Fundamental) Law of Hungary, A commentary of the New Hungarian Constitution. Dublin : Clarus Press, NUPS, 2015, pp. 79 – 123.

[2] Administrative procedures can be determined as the proceedings of the administrative authorities, including the issues of the administrative actions in accordance with the legislation. See: PATYI, A. et al. Közigazgatási hatósági eljárásjog. Budapest-Pécs : Dialóg Campus Kiadó, 2009, pp. 19 – 30.

same time, one of the last years most important codification has been realised in Hungary: Act I. of 2017 on Administrative Justice entered into force on 1st January 2018 and contains rules of the judicial review procedures of the administrative decisions.[3]

Before the detailed examination of this complex topic, the paper includes a general overview of the constitutional basis of the right to legal remedy and the right to good administration. Furthermore, the paper examines the relation between the right to legal remedy and the right to good administration. In the last part of the paper, we analyse few relevant cases regarding the realisation of several rights and obligations like the requirement of a decision within a reasonable time, the duty to justify decisions and the obligation for the cooperation between the administrative bodies and the clients.[4],[5] These rights and obligations are also part of the right to good administration. We need to note that the right to good administration can be better understood by the rights derived from it, but unfortunately – considering the limitation on the length of the paper – we can only highlight the latest and the most relevant cases regarding the realisation of the right to good administration and can not cover all aspects of this principle.[6] The presented cases in the paper are decisions of the Constitutional Court of Hungary and the Curia of Hungary. We have to emphasize that the Constitutional Court of Hungary – among other competances – has the right to (at the initiative of a judge) review the conformity with the Fundamental Law of any legal regulation applicable in a particular case with priority but within ninety days at the latest. The Constitutional Court of Hungary has also the possibility to review – on the basis of a constitutional complaint – the conformity with the Fundamental Law of any legal regulation applied in a particular case. The Constitutional Court of Hungary reviewes – on the basis of a constitutional complaint – the conformity with the Fundamental Law of any judicial decision too. In the first two cases, the Constitutional Court of Hungary can annul any legal regulation or any provision of a legal regulation which conflicts with the Fundamental Law. In the last case, the Constitutional Court of Hungary has the right to annul any judicial decision which conflicts with the Fundamental Law.[7] We should also mention that the Curia of Hungary is the supreme judicial organ and can review final decisions of the lower courts (also the decisions made by the Administrative and Labour Courts) if these are challenged through an extraordinary remedy.[8] Without a detailed examination of the Hun-

3 The Code of Administrative Justice was first accepted on 6th December 2016, and abolished by the Constitutional Court by the Decision 1/2017. (I. 17.) because one part of the Act was unconstitutionally accepted by Parliament. See: POLLÁK, K. Quo Vadis: Codification of Administrative Procedure Rules in Hungary and in France In NEMEC, J (ed.). 25th NISPAcee Annual Conference: Innovation Governance in the Public Sector, Kazan, Oroszország, 2017. 05. 18 – 2017. 05. 20. Bratislava : NISPAcee, 2017, pp. 1 – 8.

4 Article 10 of the Act CL. of 2016 on General Public Administration Procedures defines the notion client as follows: "(1) Client means any natural or legal person, other entity whose rights or legitimate interests are directly affected by a case, who is the subject of any data contained in official records and registers, or who is subjected to regulatory inspection.

(2) An act or government decree may define the persons and entities who can be treated as clients – in connection with certain specific types of cases – by operation of law."

5 That part of the paper is based on a thesis regarding procedural fairness prepared by BALOGH-BEKESI Nora in a co-project of the Constitutional Court of Hungary and the Curia of Hungary.

6 See: SULYOK, T. A tisztességes eljáráshoz való jog újabb kihívásai. In Alkotmánybírósági Szemle, 2. szám (2015).

7 See the competences of the Constitutional Court of Hungary: Article 24 of the Fundamental Law of Hungary, BALOGH, Z. Alkotmánybíróság. In TRÓCSÁNYI L., SCHANDA B. (eds.). Bevezetés az alkotmányjogba. Az Alaptörvény és Magyarország alkotmányos intézményei. Budapest : HVG-ORAC, 2016, 406 – 423, Téglási, A. Az Alkotmánybíróság. In TÉGLÁSI, A (eds). Az állam szervezete. Budapest : NKE, 2018, p. 160 – 180.

8 PATYI, A. The Courts and the Judiciary In VARGA, A. Zs., PATYI, A., SCHANDA, B. The Basic (Fundamental) Law of Hungary, A commentary of the New Hungarian Constitution. Dublin :Clarus Press, NUPS, 2015, p. 204 – 213, BALOGH-BÉKESI, N. A bírói hatalmi ág az Alaptörvény rendszerében. In IUSTUM AEQUUM SALUTARE, XII., 4 (2016), pp. 9 – 19. Available at <http://ias.jak.ppke.hu/hir/ias/20164sz/02_BaloghBekesi_IAS_2016_4.pdf >. [q. 2018-05-29].

garian judicial system, we would like to point out that from 1st of January 2013, twenty Administrative and Labour Courts located in the seat of regional courts started to function. The Administrative and Labour Courts proceed in first instance in cases reviewing administrative decisions, however we can not regard these Courts as an independent administrative judicial branch.[9] We shall state also that according to Article 28 of the Fundamental Law of Hungary: "In the course of the application of law, courts shall interpret the text of legal regulations primarily in accordance with their purposes and with the Fundamental Law. When interpreting the Fundamental Law or legal regulations, it shall be presumed that they serve moral and economical purposes which are in accordance with common sense and the public good."

2 CONSTITUTIONAL BASIS OF THE RIGHT TO GOOD ADMINISTRATION AND THE RIGHT TO LEGAL REMEDY

Due to the changes in 1989, the Hungarian Constitution which was at that time Act XX. of 1949 was almost completely modified. The right to legal remedy was amended and became part of the Constitution at that time with the following wording: "In the Republic of Hungary everyone may seek legal remedy, in accordance with the provisions of the laws, to judicial, state administrative or other official decisions, which infringe on his rights or justified interests."[10] Meanwhile, the principle of procedural fairness expressis verbis was not mentioned in 1989 in the Constitution of Hungary. This principle word-for-word became only the part of the Hungarian legal system and was mentioned by the Act XXXI. of 1993, which incorporated into the Hungarian legal system the European Convention on Human Rights. Article 6 of the European Convention on Human Rights declares the right to fair trial as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[11]

In 2011, a new Constitution of Hungary, named the Fundamental Law of Hungary was adapted, which came into force on the 1st January 2012. The Fundamental Law mentions the principle of procedural fairness in two aspects: one is regarding administrative procedures. The principle of procedural fairness is regulated as the right to good administration in paragraph 1 of Article XXIV. of the Fundamental Law of Hungary as follows: "Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to give reasons for their decisions, as provided for by an Act." The other one is regarding court proceedings, where the principle of procedural fairness is named as the right to a fair trial and regulated in paragraph 1 of XXVIII. of the Fundamental Law of Hungary as follows: "Everyone shall have the right to have any charge against him or her, or his or her rights and obligations in

9 KÜPPER H. Magyarország átalakuló közigazgatási bíráskodása. MTA Law Working Papers 2014/59. Budapest : Magyar Tudományos Akadémia, 2014, pp. 19 – 29.

10 POLLÁK, K. Historical roots of articicle XXVIII, section 7 of the fundamental law of Hungary: On the right to seek legal remedy. In BALOGH, E., SULYOK, M. (eds.). Fundamental rights in Austria and Hungary: Research seminar Vienna, 24 – 25. april 2015. Szeged : Iurisperitus Bt., 2015, pp. 29 – 32.

11 See also: BOROS, A. Az alapelvek szerepe az uniós és tagállami közigazgatási eljárásjogok rendszerében – A Modell Szabályok értékelése és javaslatok megfogalmazása az uniós alapelvek eljárásjogi szabályozását illetően. In Pro Publico Bono, /2 (2017), pp. 30 – 47.

any litigation, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act."

We can point out from the quoted paragraphs of the Fundamental Law of Hungary that the Fundamental Law of Hungary mentions the requirement of a decision within a reasonable time and several other requirements as the part of the principle of procedural fairness.[12] The two aspects of the principle of procedural fairness can be understood in connection with each other too; for example, the duty to justify decisions can be found in administrative procedures as well as in judicial proceedings. We should also emphasize that the right to good administration includes several requirements and rights like the right to legal remedy, the requirement of a decision within a reasonable time, the duty to justify decisions and other procedural rights such as the obligation for the cooperation between the administrative bodies and the clients, which we will discuss in the following parts of this paper.

3 THE RELATION BETWEEN THE RIGHT TO LEGAL REMEDY AND THE RIGHT TO GOOD ADMINISTRATION

The right to a legal remedy can be considered as the strongest right between the rights and obligations of the principle of procedural fairness. The practice of the Constitutional Court of Hungary clarifies the exercise of the right to legal remedy: the substantive content of the right to legal remedy is the possibility regarding final decisions to turn to a different body or a higher forum within the same organization.[13] This requirement can be accomplished by a single appeal system, but the legislator may also provide further remedies.[14] The essence of all remedies is the possibility to have an effective remedy: to correct infringements.[15] We should note that administrative procedures would not comply with the Fundamental Law of Hungary without providing the opportunity for legal remedy.[16]

The basis of the relation between the right to good administration and the right to legal remedy was laid down in the Decision 39/1997 (VII.1.) of the Constitutional Court of Hungary.[17] This Decision dealt with questions related to the Hungarian Medical Association and its membership's provisions. The Hungarian Medical Association is one of the Professional Chambers in Hungary, which are found to be the governing bodies of the traditional professions, composed of their members, so

12 CHRONOWSKI, N. Mikor megfelelő az ügyintézés? Uniós és magyar alapjogvédelmi megfontolások. In Magyar Jog, 3 (2014), pp. 137 – 145.

13 Decision 5/1992. (I. 30.) of the Constitutional Court of Hungary See in relation with administrative prodecures: BOROS, A., PATYI, A. Administrative Appeals and Other Forms of ADR in Hungary. In DRAGOS, D. C., NEAMTU, B. (eds.). Alternative Dispute Resolution in European Administrative Law. Berlin, Heidelberg : Springer-Verlag, 2014, pp. 279 – 339.

14 Decision 9/1992. (I. 30.) of the Constitutional Court of Hungary.

15 Decision 49/1998. (XI. 27.) of the Constitutional Court of Hungary.

16 See: POLLÁK, K. Achievement of the right to legal remedy in the Hungarian Administratives Procedures. In CICKANOVA, D., ILLYOVA, Z., MICATEK, V., RUZICKA O. (eds.). Collection of Papers from the International Academic Conference Bratislava Legal Forum 2013. Bratislava : Comenius University in Bratislava, Faculty of Law, 2014, pp. 121 – 131.

17 See: Official Translations/Summaries of the Decisions of the Constitutional Court of Hungary. Available at <http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1997-2-008?fn=document-frameset.htm$f=templates$3.0>. [q. 2018-05-29].

as to exercise a form of self-government. In the current case, the Hungarian Medical Association decided on the non-Hungarian citizens medical practitioner's membership, but the problem was that there was no legal provision regulating the circumstances under which the Hungarian Medical Association should accept or refuse the request of the foreign medical practitioner. Therefore, the right to appeal to the courts in case of a refusal does not make any sense in this situation, since the Court cannot examine the legality of such a decision. Consequently, the Constitutional Court of Hungary held the challenged provision unconstitutional. In this decision, the Constitutional Court of Hungary also expressed that in a case concerning the supervision of the legality of a public administrative authority's decisions, it is a constitutional requirement that the Court shall decide the case according to the rights and obligations set forth in Article 57 of the Constitution, under which all persons are equal before the law and have the right to defend themselves against any charge brought against them, or, in a civil suit, to have their rights and duties judged by an independent and impartial court of law at a fair public trial or hearing. The rule regulating a public administrative authority's right to decide cases must contain provisions under which the Court has supervisional jurisdiction over the legality of this kind of decision. In summary, all legislation that excludes or restricts the Court's review of the administrative decision is contradictory to the requirement of fair trial and to the right to a legal remedy. Consequently, any Act is unconstitutional, which gives an unlimited discretion to the administrative authorities without any legal background.

In connection with the practice regarding the realisation of the right to legal remedy another interesting case[18] should be notified from the latest Decisions of the Constitutional Court of Hungary. The background of this case is the following: the administrative authority made a decision in which it mentioned that the right to legal remedy against this administrative decision can be exercised within thirty days. The problem was that the law stated not thirty days, but only fifteen days as a period within which it is possible to bring an action against this kind of administrative decision. The Administrative and labour court – which proceeded in the first instance in this case of reviewing the administrative decision – dismissed and rejected without examination the applicant's request for judicial review of the administrative decision, on the ground that the request for judicial review was brought out of time. After the decision made by the Administrative and labour court, a constitutional complaint was lodged. The Constitutional Court of Hungary found unconstitutional and annulled the decision of the Administrative and labour court on the basis that the constitutional right, the right to good administration, more precisely the right to legal remedy, was infringed because of the fact that an incorrect information was given by the administrative authority in its own decision regarding the time frame of the exercise of the right to legal remedy. As a result, the applicant did not have an adequate and effective remedy, therefore it can be considered as an infringement of his fundamental right which had a decisive impact on the content of the Administrative and labour court's decision.

Finally, we should remark that in the practice of the Curia of Hungary the right to legal remedy and the right to good administration is related. One of the basis of the application of the right to good administration is the right to legal remedy. The Decision Kfv.IV.37.038/2016 of the Curia of Hungary stated that if the administrative authority does not make its decision in a correct form, and therefore it is impossible to exercise the right to legal remedy, the content of the decision should be taken into account, not its name or form how it was made. If the administrative authority finally

[18] Decision 9/2017. (IV. 18.) of the Constitutional Court of Hungary.

decides on the case in a form that there is no legal remedy possibility, this fact infringes the right to a legal remedy, the right to good administration.[19]

4 ASPECTS OF THE RIGHT TO GOOD ADMINISTRATION

As mentioned previously, the right to good administration contains several requirements and rights not only the right to legal remedy. Regarding the limitation on the length of the paper, only the requirement of a decision within a reasonable time, the duty to justify decisions and the obligation for cooperation between the administrative bodies and the clients are examined in the following part of the paper.

4.1 The requirement of a decision within a reasonable time and the duty to justify decisions

We can highlight from the practice of the Constitutional Court of Hungary, the Decision 5/2017. (III.10.) of the Constitutional Court of Hungary as the latest example of a case regarding the requirement of a decision within a reasonable time. The background of this case is the following: a thread company's wastewater exceeded the limit of the emissions of water pollutants. This was detected by the water channel service company, which proposed to the administrative authority on 18th February 2014 to impose a penalty on the thread company. The administrative authority decided – one year later after this notification – on 17th February 2015 that a penalty should be paid by the thread company. The thread company asked for a judicial review of this administrative authority's decision. The Administrative and Labour Court – which proceeded in the first instance in this case of reviewing the administrative decision – considered that the fact that administrative authority exceeded the administrative procedural time limit does not affect the substance of the case. The applicant presented a constitutional complaint against this decision of the Administrative and Labour Court. Contrary to the decision of the Administrative and Labour Court, the Constitutional Court of Hungary found that the Court decision is unconstitutional and annulled it. According to the Constitutional Court of Hungary, the basic condition for the fairness of an administrative procedure is that the administrative authority respects the time-limit of the decision-making period regulated in the law. The disrespect of the time-limit by an administrative authority can not cause a disadvantage for the applicant (in this case to the thread company). As we can see from the above mentioned case too, the requirement of a decision within a reasonable time is often linked to the question if it affects the substance of the case. The judicial practice shows that the violation of the time-limits by the administrative authority, if it causes a disadvantage for the client, affects the substance of the case.

We need to note, that the judicial practice also shows that the substance of the case is also affected if the decision was not justified well or was not at all justified by the administrative authority. The administrative authority's obligation to justify decisions is also the part of the right to good administration as declared in Paragraph 1 of Article XXIV of the Fundamental Law of Hungary. The latest practice of the Court of Hungary mentions regarding this question that the judgment of

[19] See: Decision1/2009 KJE of the Curia of Hungary.

the administrative authority should be always coherent with the justification. The reasoning should contain all facts, proofs and of course the legal background.[20]

Finally, we should state that the enforcement of the principle of the requirement of a decision within a reasonable time seems to be even stricter in the latest practice of the Curia of Hungary.[21] According to the previously mentioned Decision of the Constitutional Court of Hungary, the Curia of Hungary declared that the tax authority does not have the right to impose tax penalty after a deadline defined in the law. The background of this case is the following: the applicant received on the 17th October 2014 a report of the tax inspection of the VAT returns carried out a posteriori by the Hungarian Tax Authority. After more than a half year later of this report's reception, the Hungarian Tax Authority decided on the report and in its decision the Hungarian Tax Authority ruled that the applicant should pay tax difference, tax penalty and late payment surcharge. After the 1st instance Court's dismissal of the applicant's claims regarding this decision of the Hungarian Tax Authority, the applicant made a review request of its claims to the Curia of Hungary. The Curia examined the case and found that on the one hand, the Hungarian Tax Authority was right and its decision is lawful regarding the notification of a tax difference; because the declaration of a tax difference is not a sanction, but it is a correction of the taxpayer's unlawful behaviour. On the other hand, the Curia of Hungary detailed that the Hungarian Tax Authority imposed the tax penalty and the late payment surcharge as a sanction. Meanwhile regarding the late payment surcharge, the Curia of Hungary specified that it can not be considered as a disadvantage within the meaning of the previously mentioned Decision of Constitutional Court. The late payment surcharge can be identified as a general principle regarding financial delays. The Curia of Hungary also highlighted that the tax penalty is a sanction, thus a disadvantage within the meaning of the previously mentioned Decision of Constitutional Court; because it is not a general principle, but it is based on the decision of the legislator to punish the cases of VAT debt. The Curia of Hungary also agreed with the previously mentioned Decision of the Constitutional Court of Hungary, that it is part of the right to good administration and from this right it can be deduced as a constitutional requirement that no sanction can be imposed after the time-limit established in the law. In view of that, the Curia of Hungary concluded that the imposed tax penalty is unlawful. The Hungarian Tax Authority has only the right to impose tax penalty in the time-limit indicated in the law. It is part of the right to good administration that all administrative authorities – therefore the Hungarian Tax Authority too – respect the time-limits indicated in the law. If an administrative authority does not respect the time limit indicated in the law – as it was in this case –, it can not cause disadvantage for the taxable person.

4.2 The obligation for cooperation between the administrative bodies and the clients

Another important aspect of the right to good administration is the obligation for cooperation between the administrative authorities and the clients. One of the most striking examples of a lack of cooperation between the administrative authorities and the clients is the following decision of the Curia of Hungary.[22] The background of the case can be summarized as follows: the client who fulfilled all

[20] See: Decision 7/2013. (III.1.) of the Constitutional Court of Hungary; and Decisions of the Curia of Hungary: Kfv. II.37.078/2012/8., Kfv.II.37.794/2013/4., Kfv.I.35.122/2016/6., Kfv.II.37.574/2015/4., Kfv.III.37.825/2015/8., Kfv. II.37.621/2013/7.

[21] See: Decision of the Curia of Hungary: Kfv.I.35.760/2016/6.

[22] See: Decision of the Curia of Hungary: Kfv.IV.35.038/2014/5.

the conditions required by law applied for a state aid. Unfortunately, the client failed to fulfil his obligations regarding a registration required by law. The administrative authority did not alert the client about this obligation in the beginning of the grant period, but made a positive decision regarding the client's grant request and started to allocate the grant, more precisely 90% of the grant amount. In the following five years, the administrative authority did not ask the client to fill the missing registration and did not inform the client that the failure of this registration will lead to a repayment of the grant. The client used in good faith the grant for its company filling all other requirements. After five years, the client applied for the last 10% of the grant, and instead of the allocation of the last 10% of the grant, the administrative authority in its decision reclaimed the 90% of the grant. The client turned to the court for judicial review of the administrative authority's decision, and the case ended in front of the Curia of Hugary. After the examination of the case, the Curia of Hungary declared that after five years the administrative authority can not reclaim the grant and put the client into this situation regarding a failure which has been already present in the beginning of the grant period and which the administrative authority forgot to mention in the beginning of the grant period. Therefore, in this case the Curia of Hungary expressed that the absence of the cooperation of the public authority directly conflicts with the requirements of the right to good administration.

In another case[23] regarding the lack of cooperation between the administrative authorities and the clients the following happened: the administrative authority found that in the clients' request there is a deficiency, which may be corrected, therefore the administrative authority asked the client to correct it. The problem was that the administrative authority did not specify the deficiency what the client had to fulfill. We shall note that this deficiency was regarding only one code number, while the whole request of the client except this number was correct. Instead of the correction, the client withdrew his request and made a completely new wrong one. The client later in the court proceedings complained that the administrative authority's request for correction was insufficiently precise. The Curia of Hungary accepted the client's argument that the administrative authority did not clearly state the deficiency. According to this judgement as part of the principle of procedural fairness the obligation for the cooperation between the administrative bodies and the clients should be always taken into consideration by the administrative authority.

Finally, we need to note that both of the above-mentioned cases concerned economic support for young farmers. Therefore, we could expect from the administrative authority a supportive attitude for the realisation of the political objectives. Meanwhile in the mentioned cases we could find the opposite to this expectations. We should also emphasize that the new Act CL. of 2016 on General Public Administration Procedures states in its Basic Principles the obligation for the cooperation between the administrative authorities and the clients. Paragraph 1-2 of Article 2 of this Act expresses that: "(1) The administrative authority (hereinafter referred to as "authority") shall exercise its powers delegated by law within the framework thereof, under the principle of due course of the law. (2) In exercising its powers, the authority shall handle cases: a) professionally and in good faith, having regard to the objectives of simplicity and cooperation with clients; […]." Regarding the client the obligation for cooperation is declared in Paragraph 1 of Article 6 of this Act, as follows: "All parties to the proceedings are required to act in good faith, and to cooperate with the other parties." We should lastly highlight that the obligation for the cooperation between the administrative authorities and the clients is part of the right to good administration, the non-respect of this obligation may violate the right to good administration.

[23] See: Decision of the Curia of Hungary Kfv.IV.35.058/2016/7.

5 CONCLUSION

After discussing the constitutional basis of the right to good administration and the right to legal remedy, we examined the relation between the right to legal remedy and the right to good administration. Moreover, we presented several important cases from the last years related to the realisation of the right to good administration: the application of the requirement of a decision within a reasonable time, the duty to justify decisions and the obligation for cooperation between the administrative bodies and the clients.

As a conclusion, we should emphasize that the principle of procedural fairness can be considered the basis of all procedural rights. In its nature it resembles more the principle of human dignity. In its kind it is an absolute right,[24] but the rights derived from it[25] – such as the right to legal remedy – are rights which can be restricted in case of the conditions specified by the Fundamental Law of Hungary. The paragraph 3 of Article I. of the Fundamental Law of Hungary defines the general framework of the way of restricting the fundamental rights as follows: "The rules for fundamental rights and obligations shall be determined by special Acts. A fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of such fundamental right." This is the so-called necessity-proportionality test, which was specified in the Constitutional Court's Decision in 1992.[26] This paragraph of the Fundamental Law of Hungary also introduces the full respect for the objective essential content of such fundamental right.

The principle of procedural fairness as well as the principle of human dignity can be only understood by the examination of its component rights and the effective exercise of these procedural rights is closely linked to the level of the rule of law of a State.

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[26] Decision 30/1992. (V. 26.) of the Constitutional Court of Hungary.

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SERVICES CONFERENCE AS AN ANSWER TO CHALLENGES OF ADMINISTRATIVE PROCEDURE[1]

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Abstract: The paper presents the services conference as one of the forms of conducting administrative proceedings. The starting point is to present an institution shaped in the Italian procedural law in the light of its administrative system and its evolutionary transformations. The paper involves a comprehensive analysis of the services conference in the context of the competence of public administration authorities, the procedural guarantees enjoyed by parties to the proceedings and decisions that may be taken in the course of the services conference, as well as the legal possibility of their change. One of the assumptions of the paper is the possibility of recognition of the services conference as a kind of a resultant of proceedings in a form of hearing, and the mode of co-operation between the bodies. As a result, it should lead to presenting prospects and opportunities to adapt the institution of the services conference in the Central European countries also as a future solution for the Slovak Code of Administrative Procedure.

Key words: administrative procedure, services conference, convergence

1 INTRODUCTION

The aim of the article is to present the services conference as one of the forms of conducting administrative proceedings. The starting point is to present an institution shaped in the Italian procedural law in the light of its administrative system and its evolutionary transformations. It will require a discussion of the origin and functioning of the Law of 7 August 1990, n. 241 – New rules concerning administrative proceedings and the right of access to administrative documents (*Nuove norme in materia di procedimento amministrativo e diritto di accesso ai documenti amministrativi*),[2] and in particular its numerous amendments dictated by the needs to simplify, streamline and modernize the law. The paper involves a comprehensive analysis of the services conference in the context of the competence of public administration authorities, the procedural guarantees enjoyed by parties to the proceedings and decisions that may be taken in the course of the services conference, as well as the legal possibility of their challenge.

To understand the concept and importance of the services conference, it will be distinguished from the structure of cooperation of public administration authorities by presenting European solutions in this area. The analysis of form and the legal nature of "taking position by the cooperating body", evidence proceedings before a co-operative body, the control of acts of cooperation

[1] The project was financed by the National Science Centre, Poland in the framework of the research grant no. 2016/21/N/HS5/02029.

[2] *Gazzetta Ufficiale* of 18 August 1990, no. 192.

and the confrontation of these findings with decision-making in accordance with the provisions of the services conference need special attention. A distinction between the services conference and administrative procedure in the form of a hearing is also important. It will require a comparative analysis, including primarily the need to confront with the oral hearing (*mündliche Verhandlung*) well-known to the members of the German legal culture (Austria, Germany) and hearing practiced in common law systems.

Moreover, the aim of the article is to introduce the Italian experience as adopted by new Portuguese Code of Administrative Procedure of January 7, 2015 (*Codigo de procedimento administrativo*).[3] It is clearly indicated in the preamble to the act that the inspiration to take a legislative initiative was the implementation of a number of new solutions to the Portuguese administrative proceedings, mainly the institutions of the processual conference (*conferencia procedimental*), adjusting the duty of good management (*boa gestao*), provisions on liability for breach of terms and codes of good practice (*codigos de conduta*). The article will address the issue of implementation of modern trends to the Portuguese procedural law after the use of comprehensive comparative analysis, including the achievements of the Italian, Spanish, German and European Union law. From that point of view the study can also verify the hypothesis of progressive convergence of administrative law, not only in the plane of the "top-down" unification (globalization, Europeanization), but also through "grassroots" initiatives associated with the mutual exchange of the most effective solutions between different systems.

To present the institution as a specific expression of concentration of evidence and coordination of public administration and the establishment of extensive comparative research can be considered as pioneering. The research problem is the most current, and the achievement of the intended objective of the paper can exert an impact on the development of the discipline of administrative law. New function of comparative law involves to identify trends and patterns with a view to respond to these. Auxiliarily, a historical method will also be used, because law is a social phenomenon of a dynamic nature.

2 SERVICES CONFERENCE AS A FORM OF ADMINISTRATIVE PROCEEDINGS

2.1 Services conference in Italian administrative law

2.1.1 History and legal nature of the institution

In Central European literature lack any articles contributing to the development of the institution of the services conference. Furthermore, an institution of the services conference did not actually go through a thorough, comprehensive discussion outside the Italian and Portuguese literature, despite the fact that research into various types of legal forms of cooperation between authorities and coordination of their functioning in the framework of the so-called administrative networks are currently being conducted in Europe and in the world. From that point of view, the presentation of the genesis and evolution of the Italian system of proceedings before public administration authorities, the basic principles of the Law of 7 August 1990, n. 241 – New rules concerning administra-

[3] Approved by the Decree-Law no. 4/2015 of 7 January 2015 (*Decreto-Lei n° 4/2015, de 7 de janeiro*), *Diário da República, 1.a série-N.o 4 – 7 de janeiro de 2015.*

tive proceedings and the right of access to administrative documents, the idea of simplifying and informalisation guiding subsequent amendments of this Act and a services conference attempting to answer to the ills of the Italian public administration, have crucial importance. The services conference should be presented on the background of the Italian system of administrative procedure, because only such approach will allow for a full understanding of its specificity. The history of the formation of this institution, the most significant modifications of its construction, the reasons for their implementation, an explanation of the related terminology and its reconstruction in the science of law and jurisprudence will be indicated.

Since the late fifties of the twentieth century in Italy, the first doctrinal reflections concerning the development of the institution of the services conference in the administrative practice have been emerging.[4] In that period concepts describing its legal nature have begun to emerge: as an instrument of unstructured cooperation (*collaborazione non organica*), an administrative consortium (*consorzio amministrativo*) or inter-ministerial committee (*comitato interministeriale*). It is now possible to draw at least three main theoretical reconstructions that shape the conference as an instrument related to the conclusion of a contract between public administrations, as a separate authority – independent in relation to other individual participants or as a simple procedural form.[5]

2.1.2 Types of services conference

We must focus on the functioning of the institution of the services conference in the Italian administrative proceedings and impact of the conference on the competences of the bodies taking part in it, as well as on the procedural guarantees for the parties and other participants in the proceedings, during which the conference is carried out and the individual and collective interests, that can be represented on it. This will allow discussion about the types of decisions taken at the services conference, including ways of overcoming the situation associated with the inertia of public administrations, understood as the silence of the administration, the lack of a decision within the time limit, the absence of consent of cooperating body, or other forms of unjustified prolongation of the proceedings or the stalling of time to take a final settlement.

A relatively simple typology scheme of the services conference is reduced by a part of the doctrine to a single model. However, the analysis of the moves of the Italian legislator requires to adopt a more complex typology.[6] The legislator, despite introducing more than twenty amendments relating to the services conference, did not negate their differentiation. It is also reflected in the jurisprudence of the Italian administrative courts and the Council of State (*Consiglio di Stato*).[7] According to the most common division we have: explanatory conference (*la conferenza istruttoria*), decision-making conference (*la conferenza decisoria*) and predecision-making (*la conferenza predecisoria*). Moreover, according to the structural criterion we can divide them into internal decision-making and predecision-making conferences (*la conferenza decisoria / istruttoria interna*) and external ones (*la conferenza decisoria / istruttoria esterna*). Another scheme involves the division according to the

4 TALANI, M. La conferenza di servizi. Nuovi ordinamenti giurisprudenziali. Milan : Giuffrè, 2008, p. 5, MUSONE, R. La conferenza di servizi in materia ambientale. Rome : Aracne, 2013, p. 13 – 14 and D'ORSOGNA, D. Conferenza di servizi e amministrazione della complessità. Turin : Giappichelli, 2002, p. 68. It should be mentioned that the last author indicates also one example from the law no. 1822 of 1939.

5 MUSONE, R. La conferenza di servizi…, op. cit., p. 41. Similarly D'ORSOGNA, D. Conferenza di servizi…, p. 106.

6 MUSONE, R. La conferenza di servizi…, p. 61.

7 D'ORSOGNA, D. Conferenza di servizi…, p. 102 – 107.

criterion of the number of proceedings. There are therefore conferences monoprocedural (*la conferenza monoprocedimentale*) and pluriprocedural (*la conferenza pluriprocedimentale*)[8].

The authority conducting the procedure may call a services conference when the joint consideration of several public interests involved in an administrative procedure should be appropriate. A services conference may also be convened for the joint consideration of interests involved in several connected administrative procedures regarding the same activities or results. In such a case, the conference shall be called by the authority or, after reaching an informal understanding, by one of the authorities that are responsible for the prevalent public interest. The calling of a conference may be requested by any of the other authorities involved. In this case we are dealing with *conferenza istruttoria*.[9]

Another type is *conferenza decisoria*, which shall always be called when the authority conducting the procedure has to acquire understandings, agreements, permissions or assent documents of whatever denomination from other public authorities and does not obtain them within thirty days of the competent authority's receipt of the related request. That kind of conference may likewise be called when, within the same timeframe, dissent has been expressed by one or more of the authorities addressed or in the cases where the authority conducting the procedure is permitted to make provision directly in the absence of determinations by the authorities with competence. When the activity of a private party is subject to the formal consent, howsoever defined, of more than one public authority, a services conference shall be convened, including at the request of the interested party, by the authority with competence to adopt the final measure.[10]

Unlike the preceding types, *conferenza predecisoria* may be convened at the request of the interested party before the presentation of a definitive application or project for particularly complex projects or projects concerning installations producing goods or services. The request must contain a statement of reasons and, in the absence of a preliminary project, be documented by a feasibility study. The conference shall have the purpose of examining on what conditions the necessary formal consent may be obtained when the definitive application or project is presented. In such cases, the conference shall state its conclusions within thirty days of the date of the request and the related costs shall be borne by the party making the request. In procedures concerning the realisation of public works or works in the public interest, the services conference shall evaluate the preliminary project for the purposes of indicating the conditions under which the understandings, opinions, concessions, authorizations, licences, permissions or assent documents of whatever denomination required by the legislation in force for the definitive project may be obtained. On that occasion, the authorities responsible for protection of the environment, the landscape and territory and the historical and artistic heritage or protection of health and public safety shall assess the project's proposed solutions with reference to the interest that each one protects. If, on the basis of the available documentation, no elements definitively precluding the project's realisation emerge, the aforesaid authorities shall, within forty-five days, indicate the conditions and elements necessary for obtaining formal consent when the definitive project is presented.[11] In that case, the officer with exclusive responsibility for the procedure shall send the authorities concerned a copy of the definitive project, drawn up on the basis of the conditions indicated by the same authorities during the services con-

8 See more in TALANI, M. La conferenza di servizi…, p. 42 – 71.
9 MUSONE, R. La conferenza…, p. 62.
10 Ibidem, p. 62 – 63.
11 Ibidem, p. 63 – 64.

ference on the preliminary project. He/she shall convene the conference on a date falling between the thirtieth and sixtieth day following the project's transmission. In cases where public works are entrusted by way of a procurement contract, competitive tendering or the grant of a licence, the contracting authority shall convene the services conference on the sole basis of the preliminary project. The services conference shall express its view on the basis of the documents at its disposal and the indications given on that occasion may be modified or integrated only if significant elements emerge during subsequent phases of the procedure, including following observations made by private parties in relation to the definitive project. Such modifications or integrations must include a statement of reasons.

2.1.3 Functioning of services conference

The first meeting of the conference shall be convened within fifteen days or, in cases where the preliminary fact-finding activities are particularly complex, within thirty days of the date on which it was called. The services conference shall take decisions concerning the organization of its work by way of a majority of those present and may be conducted electronically. The communication convening the first meeting must reach the public authorities concerned (including by electronic or computerised means) at least five days before the relevant date. Should they be unable to participate, the authorities convened may, within the next five days, request that the meeting be held on another date; in such case, the authority conducting the procedure shall arrange a new date, within ten days of the first, in any case. The new date for the meeting may be fixed within the following fifteen days in cases where the request is made by an authority responsible for cultural heritage. The officers responsible for the single offices covering productive activities and building (*i responsabili degli sportelli unici per le attività produttive e per l'edilizia*), where established, or the municipalities shall agree with the superintendents having territorial competence on the programme (lasting at least three months) for those meetings of the services conferences that involve the formal assent or advisory papers of whatever denomination falling within the competence of the Ministry of Cultural Assets and Activities.[12]

During the first meeting of the services conference or, in any event, during that immediately following transmission of the application or the definitive project, the authorities participating in it shall determine the timeframe for adopting the final decision. The conference proceedings shall not exceed ninety days (with some exceptions). Upon expiry of such timeframe without result, the authority conducting the procedure shall take action when every authority that has been convened shall participate in the services conference through a sole representative, which shall have the competent organ's authorisation to express the authority's will bindingly in relation to all the decisions falling within the latter's competence. Clarifications or further documentation may be requested only once from the application's proponents or the design engineers during the services conference. If the clarifications or further documentation are not supplied to the conference within thirty days of the request, the conference shall proceed to consider the final measure to be adopted.[13]

The parties proposing the project to be discussed at the services conference shall be summoned to the services conference and shall participate in it without voting rights. The licensees and public service providers may participate, without voting rights, in the conference in those cases where the administrative procedure or the project to be discussed at the conference implies duties for them or

12 D'ORSOGNA, D. Conferenza…, p. 188 – 198.
13 D'ORSOGNA, D. Conferenza…, p. 207 – 213.

affects their activities directly or indirectly. Communication of the services conference's convocation shall be sent to the same, including electronically and suitably in advance. The authorities responsible for managing any existing public incentive may also participate in the conference without voting rights.[14] The parties should participate in the services conference on the basis of the chapter III of the Italian law on administrative procedure (law no. 241 of 1990). From the parties' point of view especially important is the article 7 of that law, according to which if there exist no impediments deriving from the need to conduct a procedure particularly swiftly, the commencement of a procedure shall be communicated, using the methods provided for by article 8, to the parties who will be directly affected by the final measure and to those who are required by law to intervene. Likewise, provided there exists none of the aforesaid impediments, should a measure be capable of adversely affecting identified or easily identifiable parties other than its direct addressees, the authority shall have the duty to inform them, using the same methods, of the beginning of the procedure.[15]

Analysis of the Italian services conference must be combined with the analysis of the concepts related to the rationalization (*razionalizzazione*), effectiveness (*efficacia*) and efficiency (*efficienza*) of administrative activities. The provisions concerning that institution are placed in the chapter IV of the law of administrative procedure entitled simplification of the administrative action. There is no doubt that the intention of the legislator was to make from the services conference one of the main remedies to fulfil the simplification of administrative procedure. In the operating conferences, routine decisions are replaced by the complex decisions. Because of the blurring of the difference between the main and secondary interest, the rule of the exercise of discretion power changes, in order that specific interest be protected. Individual proceedings merge into a single administrative action. A thorough discussion of the indicated types of services conferences is necessary for the presentation of the opportunity to question its results in an administrative or judicial mode.

The dissent of one or more representatives of the authorities duly summoned to a services conference, including those responsible for protection of the environment,[16] the landscape and territory, the historical and artistic heritage or the protection of health and public safety, must, on pain of inadmissibility, be expressed during the services conference, must include an appropriate statement of reasons, cannot refer to related issues that do not constitute the subject-matter of the same conference and must specifically indicate the amendments to the project that are necessary in order to obtain assent.[17]

2.2 Services conference and other forms of administrative proceedings

Now to present the distinction between services conference, cooperation between administrations and proceedings in the form of hearings, I will use comparative method involving the analysis of

14 TALANI, M. La conferenza…, 71 – 77 and D'ORSOGNA, D. Conferenza…, p. 133 – 137.

15 The article 8 of the Italian law no. 241/1990 states that the authorities shall give a notice of a procedure's commencement by way of a personal communication (section 1) and that communication must indicate: the authority with competence, the object of the procedure commenced, the office and the person responsible for the procedure, the date by which the procedure must be concluded and the remedies available, in the case of the authority's failure to act, in procedures initiated by an interested party, the date on which the related application was presented and the office at which the documents may be inspected (section 2).

16 Without prejudice to the provisions of article 26 of *Decreto legislativo* no. 152 of 3 April 2006 (*Norme in materia ambientale*), *Gazzetta Ufficiale* no. 88 of 14 April 2006, *Supplemento Ordinario* no. 96.

17 See more in D'ORSOGNA, D. Conferenza di servizi…, p. 230 – 237.

the cooperation and other similar solutions, as well as oral hearings in different jurisdictions. Preliminary findings have shown considerable diversity in this respect.

2.2.1 Interadministrative relations

In administrative procedures of Iberian countries and referring to their achievements, in Ibero-American countries there are forms such as: coordination (coordinación), cooperation (*cooperación*) and collaboration (*colaboración*). New Spanish Law on the Legal Regime of Public Sector[18] provides as a one of the general principles that the public administrations must respect in their own activities and relations principles of cooperation, collaboration and coordination (article 3 section 1 letter k). Title III devoted to the interadministrative relations (*relaciones interadministrativas*) enumerates these three and in addition electronic relations between administrations. The different public administrations act and relate to other administrations and entities or organizations linked to or dependent on them according to the principles of institutional loyality, adequacy to the distribution of competences established in the Spanish Constitution, in the Statutes of Autonomy (*Estatutos de Autonomía*) and in the regulations of the local regime, collaboration (understood as the duty to act together with the rest of Public Administrations for the achievement of common goals), cooperation (when two or more public administrations, voluntarily and in the exercise of their powers, assume specific commitments for the sake of common action), coordination (under which a public administration and, in particular, the general state administration, has the obligation to ensure the consistency of the actions of the different public administrations affected by the same subject matter in order to achieve a common result), efficiency in the management of public resources, sharing the use of common resources, unless it is not possible or justified in terms of their best use, responsibility of each public administration in the fulfillment of its obligations and commitments, guarantee and equality in the exercise of the rights of all citizens in their relations with the different administrations and inter-territorial solidarity in accordance with the Constitution (first section of article 140 entitled "principles of interadministrative relations").[19]

Among the technics of multilateral cooperation is included first of all the creation of the organ of cooperation, which is the so-called conference. In the field of Spanish law we can distinguish two types of that institution: presidential conference (*Conferencia de Presidentes*) and sectoral conferences (*Conferencias Sectorales*). First of them is the structure of cooperation between national government and governments of autonomous communities (article 146 of Law on the Legal Regime of Public Sector). The second one is the body of cooperation between the members of national and autonomous communities' government responsible for the same matters (article 147 of Law on the Legal Regime of the Public Sector). Sectoral conferences may exercise consultative function, decision-making or coordination aimed at reaching agreements on common matters so they could be comparable with Italian services conference. However, we must remember that the Spanish institution is still a new organ of administration, not the procedural form of administrative interaction, which can be definitely more flexible (like it is in Italy). We must also take into account that the Spanish administrations cooperate in the service of the general interest (not in

[18] Law 40/2015 of 1 October 2015 on the Legal Regime of Public Sector (*Ley de Régimen Jurídico del Sector Público*), *Boletín Oficial del Estado* no. 236 of 2 October 2015.

[19] COLL COSTA, J. Principios de las relaciones interadministrativas. In RECUERDA GIRELA, M.Á. (ed.). Régimen jurídico del Sector Público y Procedimiento Administrativo Común de las Administraciones Públicas. Pamplona : Aranzadi, 2016, p. 1725 – 1730.

indvidual administrative procedure) and may voluntarily agree on in which form exercise of their respective competences best serves the principle of cooperation (article 143 section 1 of Law on the Legal Regime of Public Sector). The formalization of cooperation relations will require the express acceptance of the parties of that cooperation, formulated in accords of cooperation organs or in agreements (second section of the aforementioned article), therefore it is much more strict and formal that Italian provisions.[20]

Many of the Ibero-American states have approved legal solutions quite similar to Spanish. According to the article 3 of the Colombian Code of Administrative Procedure and Administrative Dispute Procedure,[21] coordination is one of the principles of procedure. Section 10 of that article states that the public authorities should coordinate their activities with the other authorities in carrying out their duties and recognizing the rights of individuals. As A. R. Brewer-Carías underlines, in comparative law, the principle of coordination (*el principio de la coordinación*) is traditionally viewed as a rule of the organisation of administration rather than a procedural principle.[22] The article 4 of the Ecuadorian Decree no. 1634 of 1994 states that all bodies of executive power must act in the general interest of the public and respect, inter alia, principles of cooperation and coordination (*los principios de cooperación y coordinación*). Among the general principles (*principios generales*) of the procedure in article 101 the legislator indicated coordination (section 1) and the requirement for public administration bodies to respect the principle of cooperation and collaboration (*principio de cooperación y colaboración*) in their relations and in their activities, as well as the criteria of efficiency and utility for the citizens (section 2).[23] Other examples of that kind of institutions can be found in the laws of administrative procedure in Mexico,[24] Bolivia,[25] Costa Rica,[26] Panama,[27] Peru[28] and Venezuela.[29]

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20 See MANCILLA I MUNTADA, F. Cooperación entre Administraciones Públicas and RECUERDA GIRELA, M.Á. *Órganos de cooperación*. InRECUERDA GIRELA, M.Á. (ed.). Régimen…, op. cit., respectively p. 1755 – 1762 and p. 1766 – 1767.

21 Colombian Law no. 1437 of 18 January 2011 (Código de Procedimiento Administrativo y de lo Contencioso Administrativo).

22 BREWER-CARÍAS, A.R. Los principios del procedimiento administrativo en el Código de procedimiento administrativo y de lo contencioso administrativo de Colombia (Ley 1437 de 2011). In RODRÍGUEZ-ARANA MUÑOZ, J., BELARMINO JAIME, J., SENDÍN GARCÍA, M.Á., MEJÍA, H.A., CARDOZA AYALA M.Á., (eds.). Congreso Internacional de Derecho Administrativo. X Foro Iberoamericano de Derecho Administrativo El Salvador 2011. El Salvador : San Salvador, 2011, p. 901.

23 *Estatuto del Régimen Jurídico Administrativo de la Función Ejecutiva*, *Registro Oficial* no. 411 of 31 March 1994, second suplement.

24 Federal Law of 14 July 1994 on Administrative Procedure (*Ley Federal de Procedimiento Administrativo*), *Diario Oficial de la Federación* of 4 August 1994, article 69-D.

25 Law no. 2341 of 23 April 2002 on Administrative Procedure (*Ley n° 2341 de 23 de abril de 2002, Ley de procedimiento administrativo*) as an element of the principle of good faith (*buena fe*) established in article 4 letter e.

26 General Law no. 6227 of 2 May 1978 on Public Administration (*Ley General de la Administración Pública*), *La Gaceta* no. 102 of 30 May 1978, article 100.

27 Law no. 38 of 31 July 2000, which approved Organic Statute of the Procuraduría de la Administración, regulate administrative procedure and enacted special provisions (*Ley que aprueba el Estatuto Orgánico de la Procuraduría de la Administración, regula el Procedimento Administrativo y dicta disposiciones especiales*), article 6 section 2 and 8, articles 8 and 19.

28 Law no. 27444 on General Administrative Procedure (*Ley N° 27.444 - Ley de Procedimiento Administrativo General*), *Diario Oficial „El Peruano"* of 11 April 2001, especially articles 74.2 and 76 – 79.

29 Organic Law on Administrative Procedures of 1 July 1981 (*Ley Orgánica de Procedimientos Administrativos*), *Gaceta Oficial de la República Bolivariana de Venezuela* extraordinary no. 2818, article 40.

2.2.2 Hearings in administrative proceedings

In opinion of D. R. Kijowski, Austrian provisions concerning on the oral hearings contained in § 40 – 44 of AVG[30] can be treated as a typical.[31] According to these provisions, all known persons involved as well as all witnesses and experts required shall be called in to oral hearings and, provided that such hearings include a judicial inspection, they shall preferably be held on site, or otherwise at the office of the authority or at such place deemed most feasible in accordance with the situation. In choosing the place for holding the hearing, attention is to be paid that it is accessible for handicapped persons without any danger and without having to resort to help by third persons unless the hearing is combined with a judicial inspection of the premises. In such case, the officer of charge will preside.

That form of administrative proceedings is also accepted in the other countries connected with Austrian (Austro-Hungarian) tradition of administrative law. In the Slovak codification of administrative procedure – *Zákon o správnom konaní (správny poriadok)*[32] § 21 indicates verbal hearing (*Ústne pojednávanie*). According to this provision, the administrative authority shall order the verbal hearing to be held if the nature of the matter so requires, in particular if it would contribute to clear the matter up or if required by special legislation. If an inspection is to be part of the verbal hearing, it is usually held in the place of inspection. The administrative authority shall invite all the parties asking them to present their comments and make their proposals. Special legislation shall determine the cases in which the comments and objections made subsequently shall not be considered, the participants must be explicitly warned of this fact. Unless otherwise provided by special legislation or by the administrative authority the verbal hearing is closed to public.

In German Federal Administrative Procedure Act (VwVfG),[33] § 67 provides requirement for an oral hearing. The authority shall decide, which participants shall be invited in writing on due notice. The invitations should point out that if a participant fails to appear, the discussions can proceed and decisions be taken in his absence. If more than 50 invitations must be sent, this may be done by public announcement. Only in situations enumerated in § 67 section 2 of VwVfG, the authority may reach a decision without an oral hearing. According to § 68 VwVfG the oral hearing shall not be public. It may be attended by representatives of the supervisory authority and by persons working with the authority for training purposes. The person in charge of the hearing may admit other people only if no participant objects. The person in charge of the hearing shall discuss the matter with the parties concerned. He shall endeavour to clarify applications which are unclear, to see that relevant applications are made, inadequate statements supplemented and that all explanations necessary to ascertain the facts of the case are given. The person in charge is responsible for keeping order. He is also obligated to prepare a written record, which after hearings shall be signed.[34]

That kind of hearings (*mündliche Verhandlung*, *ústne pojednávanie*, *rozprawa*) has many of the characteristics corresponding to the proceedings before the court and this leads us to the conclu-

30 General Administrative Procedure Act of 21 July 1925 (*Allgemeines Verwaltungsverfahrensgesetz – AVG*), last consolidated text was published in *Bundesgesetzblatt für die Republik Österreich* no. 51/1991.

31 KIJOWSKI, D.R. Austria. In KMIECIAK Z. (ed.). Postępowanie administracyjne w Europie. Warsaw : Wolters Kluwer, 2010, p. 64.

32 Law no. 71 of 29 July 1967 on Administrative Procedure, *Zbierka zákonov* no. 27/1967, p. 284 with ammendments.

33 Federal Law of 25 May 1976 on Administrative Procedure (*Verwaltungsverfahrensgesetz*, VwVfG), *Bundesgesetzblatt* I, p. 1253.

34 KRAWCZYK, A. Republika Federalna Niemiec. In KMIECIAK Z. (ed.). Postępowanie administracyjne w Europie, op. cit., p. 331 – 332.

sion about progressive judicialisation of administrative procedure. Hearing mode practice in common law systems is contrasting to this. Preliminary studies indicate the different approach than in continental systems to the trial as a form of hearing before an administrative authority. Namely, it assumes only one party defending its interests and, therefore, is devoid of adversarial element, which assimilates it to the court proceedings.

2.3 Services conference in Portugal

The Italian Law on Administrative Procedure has been amended several times. Moreover, in Portugal a new codification has been adopted, departing significantly from a number of structures known from the Act of 1991 and introducing a number of new institutions, an example of which is modeled on Italian solution (*processual conference*). Due to the short time since the entry into force in April 2015, the local Code of Administrative Procedure has not been previously analyzed outside Portugal. Its characteristic feature is in particular the limitation of the implementation of the services conference to one of its modified forms. The Portuguese legislator in the implementation of Italian experience saw the possibility of streamlining administrative activities and bringing them closer to the citizen. The procedural conferences (*conferências procedimentais*) are designed to jointly exercise the competences of various organs of the public administration in order to promote efficiency, economy and speed of administrative activity. Conference may be related to a single procedure or to several related procedures, and accordingly should involve a single decision or several joint decisions. Procedural conferences relating to a number of related procedures or to a single complex procedure, where different decisions may be taken by different bodies, may take the form of deliberative conference or coordination conference. *Conferência deliberativa* is intended to jointly exercise the decision-making powers of the participating bodies through a single act of complex content, replacing the practice by each of them of autonomous administrative acts. *Conferência de coordenação* is intended for the individual but simultaneous exercise of the competences of the participating bodies, through the practice, by each of them, of autonomous administrative acts.[35]

3 CONCLUSION

On this background, findings of Polish doctrine and case law and practices associated with the cooperation of authorities, including the form and the legal nature of „taking position by the cooperating body", the possibility of conducting evidence proceedings before a cooperative body, and the control of acts of cooperation, can be compare to the services conference. One of the assumptions of the paper is the possibility of recognition of the services conference as a kind of a resultant of proceedings in a form of hearing, and the mode of cooperation between the administrative bodies. Services conference may be treated as an effective tool, mainly as an attempt to deal with the needs

[35] For detailed informations see especially SÉRVULO CORREIA, J.M. Da Conferência Procedimental and SERRÃO, T. A Conferência Procedimental no Código do Procedimento Administrativo: primeira aproximação. In O Novo Código do Procedimento Administrativo, Centro de Estudos Judiciários. Lisbon : Centro de Estudos Judiciários, 2016, p. 109 – 121 and 123 – 147 or SERRÃO, T. A conferência procedimental no novo Código do Procedimento Administrativo: primeira aproximação. In AMADO GOMES, C., NEVES, A.F., SERRÃO, T. (eds.). Comentários ao Novo Código do Procedimento Administrativo, vol. 1. 3rd edition. Lisbon : AAFDL, 2016, p. 655 – 681.

of tackling the problem of excessive length of proceedings and disadvantages of formalized procedures. On the other hand, we can indicate many barriers and constraints in the implementation of the idea of the services conference and proposals for specific legislative solutions in other European countries. Most important of these are the strict approach to the competences of administrative authorities, strong formalization of the provisions related to their activities and a lack of legal tradition of such a kind of institution.

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ARTICLES

ARE INSPECTIONS CONDUCTED BY SELECTED ADMINISTRATIVE BODIES COMPLIANT WITH THE CONSTITUION OF THE SLOVAK REPUBLIC AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS?

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Abstract: This paper analyses the case law of the Slovak Constitutional Court and the Slovak Supreme Court dealing with inspections conducted by selected Slovak administrative bodies – especially by the administrative bodies in the area of foodstuffs administration – where inspected companies complain that their rights guaranteed by the Slovak Constitution and the European Convention on Human Rights, namely the protection of their business premises, have been violated. The paper thus also deals with and analyses the related case law of the European Court of Human Rights and its (non)-application by the Slovak judicial bodies in their decision-making practice.

Key words: inspection, Supreme Court of the SR, Constitutional Court of the SR, fundamental rights and freedoms, business premises, Constitution, European Convention on Human Rights

1 INTRODUCTION

Inspections conducted by administrative bodies in the area of foodstuffs administration (namely by the Regional Food and Veterinary Administration of the Slovak Republic and the State Food and Veterinary Administration of the Slovak Republic) have recently been quite frequently disputed by companies subjected to them.

Given the wide range of powers enjoyed by the aforementioned administrative bodies in conducting their inspections, the companies claim that these administrative bodies violate their rights which are conferred upon them by the Constitution of the Slovak Republic ("*Constitution*") and the European Convention on Human Rights ("*Convention*"). They have been trying to defend themselves by arguing that these inspections are not permissible in consideration of the case law of the European Court of Human Rights ("*ECtHR*") and the European Court of Justice ("*ECJ*").

Food inspections were frequently reviewed by the Supreme Court of the Slovak Republic ("*Supreme Court*") on the basis of actions for unlawful interference of administrative bodies lodged by the relevant companies under the provisions of Act No. 99/1963 ("*Code of Civil Procedure*") and currently under Act No. 162/2015 Coll. ("*Code of Administrative Justice*")[1] and later by the Constitutional Court of the Slovak Republic ("*Constitutional Court*") on the basis of constitutional complaints lodged under Act No. 38/1993 Coll. on the Organizational Structure of the Constitutional

[1] The Code of Administrative Justice came into effect in Slovakia on 1 July 2016 replacing its predecessor – the Code of Civil Procedure – which, despite the fact that its title contains the term "civil", also dealt with the judicial review of decisions and processes of administrative bodies. Under the Code of Civil Procedure, it was the Supreme Court of the Slovak Republic which had jurisdiction over actions for unlawful interference of administrative bodies.

Court of the Slovak Republic, on the Proceedings Conducted before the Court and on the Status of Its Justices ("*Act on the Constitutional Court*").

We believe that one of the key issues which need to be analysed in determining whether inspections conducted by the above-mentioned administrative bodies are compliant with the Constitution and the Convention is, *inter alia*, the protection of business premises enjoyed by companies. Protection of business premises became a debatable and questionable issue dealt with by the Supreme Court and the Constitutional Court namely in connection with inspections conducted by the Antimonopoly Office of the Slovak Republic ("*AMO*") which have also sparked outrage among companies given the fact that in conducting its inspections, the AMO enjoys a wide range of powers some of which, one could claim, even correspond to the criminal law institutes.

2 BUSINESS PREMISES FROM HUMAN RIGHTS PERSPECTIVE

2.1 Right to the protection of business premises

In the beginning, we have to say that there currently should be no doubt as to whether business premises enjoy any protection from human rights perspective, at least not in the decision-making practice of the ECtHR and the ECJ.

As for the Slovak law, there are a number of provisions contained in the Constitution which, we believe, could be applicable to the protection of business premises. Article 16(1) of the Constitution provides that "the inviolability of an individual and his privacy shall be guaranteed. Restriction of such inviolability is permissible only where the law so prescribes." Article 19(2) of the Constitution states that "everyone shall have the right to be protected from unlawful interference with his private and family life" and Article 21(1) of the Constitution provides that "home shall be inviolable and entrance without a consent given by the person residing therein is not permitted." Furthermore, Article 21(3) of the Constitution states that "other infringements of the inviolability of the home shall be legally justified only if it is necessary in a democratic society to protect life, health, or property, to protect rights and freedoms of others, or to avert a serious threat to public order. If the home is used for business or other economic activities, such infringements may be allowed by the law also for the purposes of fulfilling the tasks of public administration."

From our point of view, it is mainly Article 21 of the Constitution which, we believe, should be applicable to the protection of business premises (namely in consideration of the wording of its Section 3 where "business and other economic activities" are mentioned). However, Drgonec states that the foregoing provision applies only to those homes which are used for residential purposes and at the same time for carrying out business activities.[2] In case of natural persons, this provision would most likely not cause any difficulties in its application. However, the situation differs in the application of this provision to artificial persons (companies in our case) which are not human beings capable of residing in a particular place. They, on the other hand, are very often created with the view to carry out a particular business activity. Given the fact that the protection guaranteed by Article 21 should apply to both natural as well as artificial persons, we therefore are still of the view that business premises of artificial persons should be protected in the same way as the homes of natural persons.

[2] DRGONEC, J. Ústava Slovenskej republiky. Teória a prax. Bratislava : C. H. Beck, 2015, p. 559.

However, the decision-making of the Constitutional Court does not support our aforementioned conclusion with respect to Article 21 of the Constitution. Despite this fact, we still personally believe that the approach and stand of the Constitutional Court in this regard has not fully developed yet given the fact that the Constitutional Court itself stated in one of its decisions that the law of inspections conducted in business premises (and thus the protection guaranteed to business and corporate premises) is currently developing both within the area of administrative law as well as the constitutional law. It further stated that the relevant case law established in this regard is thus still in progress and mainly established only with respect to the competition law.[3]

In one of its findings, the Constitutional Court argued quite surprisingly that business premises (in particular, the business premises of a retailer selling foodstuffs) cannot be subsumed under the term "home" used in Article 21 of the Constitution. It claimed that this term differs from the term „home" used in Article 8 of the Convention which shall be interpreted in a wider sense and shall thus also cover an office where an individual performs his/her liberal profession or, under special circumstances, it can also refer to a registered seat and business premises.[4] The Constitutional Court explicitly stated that business premises of the above-mentioned company do not enjoy the protection under Article 21 of the Constitution but should be protected by other articles of the Constitution which provide for the protection of privacy. Although the Constitutional Court (unfortunately) failed to specify these particular articles of the Constitution, we believe that it most likely referred to Article 16(1) of the Constitution and Article 19(2) of the Constitution.[5]

In light of the above conclusions, according to the Constitutional Court, it is the term "privacy" which should be interpreted in a wider sense and should also include operational or business premises of companies. However, from our point of view, this conclusion of the Constitutional Court is rather confusing given the fact that Article 21(3) of the Constitution could, in our opinion, be interpreted in a way that the term "home" used in this article also covers premises where business or other economic activities are conducted and should thus also enjoy protection under Article 21. Even Drgonec actually notes in this regard that the term "home" should be construed more broadly due to the fact that the Constitutional Court should interpret the term "home" in accordance with the case law of the ECtHR. In addition to this, Drgonec also argues that the ECtHR stated that the term "home" used in the English language version of Article 8 of the Convention also covers business premises in some member states of the Council of Europe, e.g. in Germany. This interpretation is also in accordance with the French language version of the text where the term "domicile" could be interpreted in a wider extent than the term "home". A narrow interpretation of the term "home" and "domicile" could potentially lead to the risk of unfair treatment.[6]

The Convention states in its Article 8 that everyone has the right to respect for his private and family life, his home and his correspondence. Section 2 of this Article states that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or

[3] See e.g. Resolution of the Constitutional Court No. II ÚS 446/2017-20.

[4] See e.g. Finding of the Constitutional Court No. II ÚS 792/2016-62.

[5] Given the fact that the Constitutional Court was not able to identify any causal link between the challenged violation of the right to the protection of home provided for in Article 21 and the facts described by the complainant in this case, it dismissed the constitutional complaint. We believe that such dismissal was based mainly on grounds of "formalities" thus enabling the Constitutional Court not to deal with the real subject matter (which the Constitutional Court actually did to a very limited extent).

[6] DRGONEC, J. Ústava Slovenskej republiky. Teória a prax. Bratislava : C. H. Beck, 2015, p. 553 – 554.

the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[7] Schwarcz notes in this regard that the application of these provisions to artificial persons (companies) was not common at all in the past.[8] Gradually, both the ECtHR and the ECJ inclined to a solution by which the rules contained in the above-mentioned provisions should be interpreted broadly, i.e. also in favour of artificial persons. In 2002, both the ECJ as well as the ECtHR definitely accepted the fact that Article 8 of the Convention shall be applied to business premises as well. One of the most important and ground-breaking judgement of the ECtHR was issued in its case Colas Est and Others v. France.[9] The ECtHR ruled that the rights guaranteed by Article 8 of the Convention can be interpreted in a way that they, under some circumstances, also cover the right of a company to have its business seat, organizational units as well as professional or business premises respected.[10]

Even the ECJ expressed in one of its judgements[11] that the exercise of powers of the Commission during its inspections under Article 20(4) of the Regulation No 1/2003[12] is a clear interference with the right of a company to the respect of its private life, home and correspondence, thus acknowledging that companies enjoy this right.

2.2 Limitations of the right to the protection of business premises

Both the Constitution (Article 21(3) of the Constitution) as well as the Convention (Article 8(2) of the Convention) provide for certain limitations of the right to the protection of business premises. Comparing the relevant provisions contained therein, we can see that both the Constitution as well as the Convention state the following with respect to the possibility of limiting one's right to the protection of business premises. In both cases interference by an administrative body with the exercise of this right is permissible provided that such interference is (i) in accordance with the law, (ii) necessary in a democratic society, (iii) pursuing a legitimate aim. With respect to the third precondition, the Constitution in particular states that this legitimate aim consists in the protection of life, health, personal property, rights and freedoms of others, in averting a serious threat to public order or in the exercise of the tasks of public administration by administrative bodies. The Convention, on the other hand, provides that this legitimate objective covers national security, public safety or the economic well-being of the country, prevention of disorder or crime, protection of health or morals, or protection of the rights and freedoms of others.

The ECtHR has already developed quite a significant case law in this regard and has been applying a so called "three-stage test" (as we have already pointed out above in connection with the

7 The application of the Convention takes precedence over the application of the laws of the Slovak Republic only if the conditions set out in Article 154c(1) of the Constitution are met.

8 SCHWARCZ, J., STEC, A. Inšpekcia vo svetle európskeho práva. Available at <http://www.antimon.gov.sk/data/files/437_1-juraj-schwarcz.pdf>. [q. 2017-09-29].

9 Colas Est. and Others v. France, no. 37971/97 of 16 July 2002.

10 Point 41 of the given decision reads as follows: "[--]. Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises."

11 Judgement of the Court of 18 June 2015, *Deutsche Bahn and Others v Commission*, C-583/13 P, EU:C:2015:404

12 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

permissibility of interference) in determining whether inspections conducted by administrative bodies are in accordance with the Convention. In terms of the second precondition for a lawful interference, i.e. "necessity of interference", the ECtHR allows the states a certain level of discretion in determining such necessity, namely in cases where the rights of artificial persons are concerned.[13] However, the ECtHR always examines whether the state sufficiently explains what such necessity consists in – whether this interference is proportional. In one of its first important judgements – the judgement rendered in the Colas case – the ECtHR stressed in its decision that the fact that employees of the respective French administrative bodies entered the registered seats of companies, their business premises and branches during their raids without prior judicial authorisations amounted to the violation of their right to the respect of their "home" under Article 8 of the Convention. Despite the fact that the ECtHR acknowledged that the raid was conducted in accordance with the law and did not lack the legitimate aim, it stated that the raid was not necessary in the democratic society. It eventually concluded that in analysing the proportionality of the raid, no sufficient guarantees against the abuse of the power to conduct the raid were provided. It further noted that the respective administrative body had exceptionally vast powers in this case and had no mandate granted by the judge. In addition to this, the ECtHR criticised the fact that no police officer was present during the raid. We could therefore derive some important rules from this judgement of the ECtHR, namely that the wide powers exercised by administrative bodies during their inspections can be balanced by both (i) the presence of an independent third person supervising such inspections and (ii) a mandate or an authorisation for such inspections granted by the judge. This is how the proportionality could, in the opinion of the ECtHR, be reached and how the second precondition for lawful interference be met.

The approach of the ECJ in this regard is the same given the fact that even the ECJ stressed the importance of proportionality of interference in its judgement concerning the case Dow Chemical Iberica[14] and noted that in conducting its inspections, the European Commission shall act not only in accordance with the law, but also in a way which is proportional to the aim pursued.

However, we can see a certain development in the decision-making practice of both the ECtHR and the ECJ in assessing the proportionality of interference. In this connection, both courts have stressed the importance of certain procedural guarantees which have to be observed under Article 8 of the Convention. Both courts namely dealt with an "*ex post*" review of inspections of the business premises and concluded that in the case of a missing prior judicial authorisation for inspection, the proportionality of interference is still achieved by means of a later or subsequent judicial review of inspections. We can therefore see a certain shift from the notion of proportionality established in the earlier Colas case where the absence of a mandate granted by the judge (along with the absence of an independent third person supervising the inspection) automatically led to unlawful interference.

The ECJ dealt with the above-mentioned issue in its judgement in case Deutsche Bahn and Others v Commission.[15] Moreover, it also dealt with the fact whether the system established by Regulation No 1/2003 provides sufficient guarantees of protection in case of a missing prior judicial authorisation.[16] The ECJ held and established a very important principle under which a missing prior

[13] See e.g. the judgement of the ECtHR in *Delta Pekárny, a. s. v. Czech Republic*, no. 97/11.

[14] Judgement of the Court of 17 October 1989, *Dow Chemical Ibérica, SA, and others v Commission*, joined cases 97/87, 98/87 and 99/87, EU:C:1989:380.

[15] Judgement of the Court of 18 June 2015, *Deutsche Bahn and Others v Commission*, C-583/13 P, EU:C:2015:404.

[16] Even the ECtHR emphasized the importance of a due review of guarantees, particularly where inspections may be conducted without a prior judicial authorisation. See e.g. *Harju v. Finland*, no. 56716/09, *Heino v. Finalnd*, no. 56715/09.

judicial authorisation may be compensated by a comprehensive and effective review made after the inspection, i.e. by an effective judicial review *a posteriori*. Furthermore, the ECJ stated in this particular case that there are altogether five categories of guarantees which may be provided in inspections conducted by the Commission: (i) justification of the decision to conduct an inspection, (ii) limitations imposed on the Commission during inspections, (iii) Commission may not resort to any violence during inspections, (iv) interference made with the assistance of state's bodies and (v) existence of *a posteriori* remedies.

The principle of subsequent effective judicial review was repeatedly emphasized in another landmark case dealt with by the ECtHR, in the case of Delta Pekárny, a. s. against the Czech Republic. Here, the ECtHR dealt with "effectiveness" of subsequent judicial review and held that the Czech law did not provide the complainant with any procedural tool to challenge the course of the inspection, i.e. purpose of the inspection, its aim, extent, necessity and proportionality. Neither the Czech Supreme Administrative Court reviewed these aspects of the inspection. It further criticised the fact that the competent courts did not deal with the analysis of the matters of fact based on which the Czech administrative body conducted the inspection.

2.3 How do Slovak courts assess inspections conducted by administrative bodies in the area of foodstuffs administration?

Food inspections by administrative bodies in the area of foodstuffs administration are conducted in accordance with Act of the Slovak National Council No. 152/1995 Coll. on Foodstuffs ("*Act on Foodstuffs*") and Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules ("*Regulation on Official Controls*"). During these food inspections companies have to allow inspectors to enter their business premises, provide them with information, explanation, data, documents, and allow them to inspect them, copy them, or take photographs, if necessary, and if any non-compliance is discovered on their part, different types of sanctions can be imposed on them (in cases of fines, these can sometimes have a "destructive" effect on companies and their business activities).

Companies (namely food retailers) have in these cases also been defending themselves against unlawful interference by administrative bodies by referring to the above-mentioned case law of the ECtHR and the ECJ concerning the protection of business premises, namely the landmark Colas case, which they believe should also be applicable to food inspections. One of the most debatable issue which arose in connection with food inspections is the absence of a prior judicial authorisation for conducting food inspections.

In light of Article 8 of the Convention, they have been arguing that administrative bodies may interfere with the protection of business premises only on the condition that such interference is in accordance with the law, pursues a legitimate aim and is necessary in the democratic society. According to them, administrative bodies do not respect the requirement of "necessity of interference" which, in accordance with the Colas case, is not satisfied especially if (i) administrative bodies exercise wide range of powers during their inspections (e.g. they have an exclusive right to set the number, duration and extent of inspections), (ii) inspections are conducted without a prior judicial authorisation and (iii) there is no independent third person supervising the course of inspections. In light of the Delta Pekárny case, they believe that "if the national law empowers administrative

bodies to carry out their inspections without a prior judicial authorisation, it is always extremely important to ensure that adequate and sufficient guarantees against the abuse of this empowerment are provided – a company subjected to an inspection should primarily be able to verify the purpose of inspection."

Even companies subjected to inspections conducted by the Antimonopoly Office of the Slovak Republic ("*AMO*")[17] have complained in a number of cases[18] that the authorization for inspection issued by the AMO to its employees fails to specify its particular purpose or such purpose is specified rather broadly and thus does not enable companies to challenge the lack of connection between the documents required by inspectors and the real purpose of inspection.[19] As we have already pointed out above, both the ECtHR and the ECJ have stressed the importance of justification of the decision to conduct an inspection being an important guarantee provided to companies during inspections (namely in the absence of a prior judicial authorisation for inspection). Such situation may otherwise lead to undesired fishing expeditions when the AMO requires that companies provide it with a large number of various documents and information which may be unrelated to the purpose of inspection and obtained in the hope of discovering any useful information for a later proceeding and punishment of the company.

However, these arguments have been rejected by the Constitutional Court.[20] First of all, the Constitutional Court argues that the above-mentioned case law is not applicable to food inspections at all due to the fact that it concerns the competition law and not the food law. It notes that these two areas (their relevant legislation and inspections) should be distinguished between. The Constitutional Court noted that "inspections conducted in the area of competition law are aimed at examining documents, information and thoughts whereby the likelihood of infringement of company's privacy is higher. Food inspections are more visual and personal ones and their purpose is usually clearer beforehand."[21]

We personally believe (and thus share the opinion presented by the relevant companies) that the above-mentioned case law should also be applicable to food inspections due to the fact that (i) sanctions imposed for the discovery of any non-compliance with the relevant legislation are similarly serious, (ii) both the competition law and the food law fall within the field of public law, (iii)

17 The AMO conducts its inspections under the provisions of Section 22a of Act No. 136/2001 Coll. on Protection of Economic Competition.

18 See e.g. Resolution of the Constitutional Court No. II ÚS 319/2017-22.

19 The Supreme Court has already dealt with and criticized the issue of a broadly specified purpose of inspections in authorizations in a number of cases (see e.g. decisions of the Supreme Court No: 5 Sžnz 1/2015, 5 Sžnz 2/2015, 8 Sžnz 2/2015, 3 Sžz 1/2011) and stated that generally, such authorization for inspection constitutes a fundamental legal act based on which the AMO conducts inspections. Its lawfulness is a precondition for the lawfulness of further procedure undertaken by the AMO on the basis of an authorization. The Supreme Court emphasized the fact that the authorization should primarily be based on a reasonable suspicion that economic competition has been breached. The authorization shall be sufficiently justified and sufficiently specific. To put it unequivocally, the Supreme Court stated that the justification of an authorization to conduct inspections should contain the following information: (i) description of basic characteristic features of an alleged offence, (ii) specification of the relevant market, (iii) nature of an alleged restriction of competition, (iv) explanations leading to general indications (with a general specification of their nature and type) as well as material indications with respect to the entity suspected of being an accomplice. Furthermore, it is necessary to explain how the respective offence was committed and provide the most direct and exact specification of what an inspection is intended for and what it concerns.

20 See e.g. the Finding of the Constitutional Court No II. ÚS 792/2016-62, Resolution of the Constitutional Court No. II ÚS 446/2017-20.

21 Resolution of the Constitutional Court No. II ÚS 446/2017-20.

both competition law and food law are aimed at the protection of consumers. Guarantees provided in Article 8 of the Convention (and even Article 16, Article 19 or 21 of the Constitution) should not be dependent on the type of an inspection or on administrative bodies conducting them, if in both cases such inspections concern the right to the protection of one's home. We believe that the purpose of these rights, in light of the decision-making practice of the ECtHR and the ECJ, primarily lies in the protection of companies from "fishing expeditions".

We strongly believe that these food inspections could truly turn into fishing expeditions in some cases given the fact that administrative bodies in the area of foodstuffs administration might be politically motivated to conduct them[22] in order to be able to impose extremely high fines which the currently effective Act on Foodstuffs prescribes for repeated violations of the Act on Foodstuffs.[23] The likelihood of discovering a repeated violation is extremely high in the area of foodstuffs and these devastating fines would thus be really imminent. Given the foregoing, we therefore firmly opine that it is crucially important to provide these companies with certain guarantees during inspections, such as those the lack of which has been criticised in the Colas case.

In assessing the lawfulness of food inspections, the Constitutional Court arrived at a very interesting conclusion in one of its decisions.[24] The Constitutional Court assessed food inspections within the limits of Article 8(2) of the Convention and argued that (i) food inspections are conducted in accordance with the law, namely the Act on Foodstuffs, which does not even prescribe the requirement for a prior judicial authorisation (the precondition of legality is thus satisfied), (ii) food inspections are aimed at ensuring that food retailers comply with the relevant legislation (the precondition of legitimacy is thus satisfied), and (iii) food inspections are necessary in order to protect consumers, their life and health (the precondition of necessity is thus satisfied, too). Furthermore, the strongest argument used by the Constitutional Court is that even if a food inspection is conducted without a prior judicial authorisation (one of the requirements established in the Colas case) because this one is not statutorily prescribed, this inspection could still be compliant with the Convention provided that a subsequent effective judicial review follows. Slovak courts deal with such inspections on the basis of (i) actions for unlawful interference or (ii) actions for a judicial review of decisions rendered by the relevant administrative bodies.[25]

3 CONCLUSION

All things considered, what would be the right answer to the question used in the title of our paper? Generally, according to the Constitutional Court, the sensitive issue in these cases is always the right to the protection of business premises. Despite the fact that the Constitutional Court has stated that its decision-making practice and the notion of the constitutional right to the protection of business

22 This is solely our opinion based on some newspaper articles which we have read. See e.g. the following articles published online: <https://finweb.hnonline.sk/ekonomika/539774-jahnatek-hrozi-retazcom-likvidacnymi-pokutami>. [q. 2018-05-29], <https://dennikn.sk/368803/tesco-uz-nie-jedine-milionovu-pokutu-vymeral-stat-uz-aj-kauflandu/>. [q. 2018-05-29].

23 E.g. Section 28(8) of the Act on Foodstuffs states that if there is any repeated violation of obligations for which a fine was imposed under Section 7 [of the Act on Foodstuffs] and such violation occurs within one year of the day on which the decision on imposing a fine becomes final, the inspection body may this time impose a fine in the amount of 1 to 5 million euro.

24 Finding of the Constitutional Court No. II ÚS 792/2016-62.

25 *Ibidem.*

premises is still developing, we have to argue that this notion was established in the decision-making practice of the ECtHR and the ECJ long ago and is quite unequivocal. Business premises should enjoy the right to their protection under Article 8 of the Convention.

In terms of food inspections, the situation can be a bit more complicated given the fact that there are currently no decisions by the ECtHR or the ECJ made specifically in connection with food inspections. Therefore, the Constitutional Court seems to be quite "lost or uncertain" in assessing their compliance with the Constitution and the Convention. On the one hand, it states that food inspections are radically different from inspections in the area of competition law and thus the competition case law established by the ECtHR and the ECJ (which the parties concerned refer to) is not applicable to them. On the other hand, its strongest argument for confirming the compliance of food inspections with the Convention is derived from the competition case law established by the ECtHR and the ECJ. This approach thus seems to be quite confusing and might cause uncertainty.

As we have already mentioned and explained above, we believe that the competition case law should be applicable to food inspections. Therefore, in accordance with this belief and actually also the opinion presented by the Constitutional Court in its confusing finding referred to above, we would have to conclude that food inspections conducted without a prior judicial authorisation could be compliant with the Constitution and the Convention provided that these inspections are subsequently reviewed by the competent courts and such review is deemed as effective and comprehensive, i.e. concerning both the matters of fact and the points of law.

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TAX TREATY OVERRIDE IN SLOVAKIA – DIGITAL PLATFORM PERMANENT ESTABLISHMENT

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Abstract: The article analyses the new "digital platform permanent establishment" concept as a legal fiction establishing a fixed place even in situations where there is no actual fixed place. The authors conclude that in the Slovak legal environment this concept is not capable of (i) being applied through the interpretation of the tax treaty, or (ii) overriding the tax treaty. Its practical implications in a tax treaty situation must be analysed on a case-by-case basis. The ineffectiveness of the concept mainly stems from the fact that Slovak statutory rules are generally incapable of overriding tax treaties. It may still be applicable in a dualist legal environment, but international law treaty override implications would still remain valid.

Key words: corporate income tax, treaty override, permanent establishment, digital services, digital platform

1 INTRODUCTION

The topic of this article is the relatively new initiative of the Slovak Republic aiming at the taxation of digital services through a legal fiction establishing a permanent establishment in the territory of the Slovak Republic even without the actual physical presence of the enterprise. The doctrinal problem lies in the co-existence of a local rule with income attribution rules in the Double Tax Treaties to which the Slovak Republic is a party. The article builds on the previous doctrinal work dealing with treaty overrides[1] and takes into account the implications of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI").[2] The article is topical from the perspective of testing new approaches to the taxation of the digital economy.[3]

2 THE DIGITAL PLATFORM PERMANENT ESTABLISHMENT CONCEPT

On 1 January 2018, the Slovak Republic introduced the "digital platform" concept to the Income Tax Act[4] ("ITA").

1 For an up to date list of literature on the topic, see MIKIC, M. *Selective Bibliography on Tax Treaty Override*. In European taxation, 53(9). From Slovak perspective, particularly in the view of implications of Slovak GAAR see also KORONCZIOVÁ, A. KAČALJAK, M. Gaar As Tax Treaty Override–Slovak Perspective. In DANUBE: Law and Economics Review, 8.3 (2017), pp. 139 – 155.

2 See further on the topic of MLI e.g. OWENS, J. BEPS Implementation: The Role of a Multilateral Instrument. In Int'l Tax Rev., 26 (2015), p. 18. and BRAVO, N. The Multilateral Tax Instrument and Its Relationship with Tax Treaties. In World tax journal, 8.3 (2016).

3 See further OLBERT, M., SPENGEL, Ch. International taxation in the digital economy: challenge accepted? In World tax journal, 9.1 (2017).

4 Act No. 595/2003 Coll. on Income Tax as amended

Definition of Digital Platform

The Digital Platform is now defined in Section 2(ag) of the ITA a "*a hardware or software platform required for the creation of applications and their management*".[5]

In the Explanatory Notes to the draft amendment of the ITA ("**Explanatory Notes**") the digital platform is further described as an "*innovative technological business model that allows the exchange of information between several groups of users, especially between end-users and holders of a movable or immovable property or service providers. It is available to other users and shares data with third-party developers. It is easy to use without the need of training and represents an innovative business model*".

Therefore, though the definition in the Working Draft is not ideal and may result in uncertainty and controversies in the future, taking into account its wording and explanations in the Explanatory Notes, it seems clear that it should cover businesses that intermediate accommodation services, such as Booking, AirBNB and Uber.

Nevertheless, it is not the definition itself that may cause controversy, but the concept of a "digital platform permanent establishment" which is structured around this definition.

Digital Platform Permanent Establishment

As of 1 January 2018, the following wording was included in the ITA "*The performance of activities with a permanent place in the Slovak Republic is considered also the repeated intermediation of transport and accommodation services, even via a digital platform.*"

Thus a fiction of a permanent establishment under Slovak law for digital platforms was created, **even if there is no fixed place located in the Slovak Republic.**

Pursuant to the Explanatory Notes, "*[t]he aim of the expansion of the permanent establishment definition is to introduce a legal fiction because the current wording of the [ITA] does not reflect modern business models of recent years, where activities are provided without the physical presence of the entrepreneur in the relevant territory. Nowadays, the virtual presence of an entrepreneur is sufficient enough for the performance of activities in another country. This leads to discrimination between entrepreneurs. Entrepreneurs doing business in the Slovak Republic through digital platforms thus earn Slovak-sourced income without taxing it in the Slovak Republic.*"

Accordingly, such income of this "digital platform permanent establishment" is deemed a Slovak sourced income and is subject to income tax in Slovakia.

Finally, an already existing withholding tax obligation was amended with effect from 1 January 2018 so that Slovak sourced income attributable to a permanent establishment of a non-Slovak tax resident in Slovakia is not subject to withholding tax **only** if such permanent establishment is registered for income tax purposes in Slovakia. Previously there was no registration requirement and the existence of the permanent establishment was sufficient.

[5] It is interesting to note that the original wording in the working draft of the bill introducing the digital platform concept "digital platform" as "*a hardware and software platform required for the creation of applications and their management*". It is difficult to see the reason of a change of the definition from "hardware and software platform" to "hardware or software platform", as pure hardware platform without software running on it can hardly provide any services. In other words, the mention of "hardware platform" in the definition seems to be obsolete and irrelevant – it is software that allows provision of intermediation services, not the hardware on which the software is running.

3 CRITICAL ASPECTS OF THE DIGITAL PLATFORM PERMANENT ESTABLISHMENT CONCEPT

The concept of a "digital platform permanent establishment" clearly goes beyond the current concept of a permanent establishment under both the OECD Model Tax Convention and UN Model Tax Convention and treaties based on these models (jointly the "**Model Tax Conventions**"), which is based on the existence of a fixed place. Therefore, it raises several issues with respect to potential treaty overrides, which will be discussed in detail below. In particular:

(i) if the concept could be in line with the *renvoi* method anticipated in Art. 3(2) of the OECD Model Tax Convention and Art. 3(2) of the UN Model Tax Convention and all the tax treaties based on these models or containing similar language; if not

(ii) if the concept is capable of overriding the tax treaties to which Slovak Republic is a party; and, if not

(iii) what are the practical legal implications that might be reasonably anticipated from the concept.

Compatibility with the *renvoi* method

The wording of the digital platform permanent establishment concept implies that the Slovak legislator was under the impression that the term "fixed place" may be regarded as an undefined term and, as such, may be subject to interpretation through the *renvoi* method, i.e., through reference to a rule of domestic law.

Firstly, to allow for the application of the *renvoi* method, it must first be concluded that the term "fixed place" is in fact **undefined**.

The literature[6] concludes that the term "permanent establishment" should be used in line with the autonomous interpretation method, i.e., the "*interpretive activity is carried out entirely within the treaty system and covers terms and concepts that are sufficiently defined by the treaties*". Applying the *argumentum a maiori ad minus*, if the entire permanent establishment term is to be interpreted within the treaty system, this implies that no partial term forming the whole of the permanent establishment concept may be interpreted with reference to domestic law (as the entire term "permanent establishment" would then clearly not be autonomous).

Secondly, the application of the *renvoi* method is limited to situations where "*the context does not require an alternative interpretation and the competent authorities do not agree on a different meaning [pursuant to a mutual agreement procedure]*"[7]. Though there are various approaches to what comprises the "context" of the treaty[8], some relevance is given to the commentaries to Model Tax Conventions existing at the time of entering into the relevant tax treaty and, these rather unequivocally refer to the term "fixed place" in its material meaning without regard to any diverging domestic definitions.[9]

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6 GARBARINO, C. Judicial Interpretation of Tax Treaties: The Use of the OECD Commentary. Cheltenham UK : Edward Elgar Publishing, 2016, p. 21 (I.63).

7 Commentary to Article 3(2) of the OECD Model Tax Convention, OECD. (2015) Model Tax Convention on Income and on Capital 2014 (Full Version). Paris : OECD Publishing, p. 102.

8 GARBARINO, C. Judicial Interpretation of Tax Treaties: The Use of the OECD Commentary. Cheltenham UK : Edward Elgar Publishing, 2016, p. 22 (I.66).

9 Commentary to Article 5 of the OECD Model Tax Convention, OECD. (2015) Model Tax Convention on Income and on Capital 2014 (Full Version). Paris : OECD Publishing, p. 116.

Finally, even if we conceded[10] that the term "fixed place" is capable of being interpreted through the *renvoi* method, one must bear in mind the basic interpretation principles within public international law, in particular, the rules of the Vienna Convention (1969)[11], where a "treaty" is defined as "*an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation*". With the absence of any derogation with respect to tax treaties, the Vienna Convention (1696) should apply to all tax treaties entered into between its members after its entry into force with regard to such states.[12] "*As regards tax treaties between states that are not parties to the Convention or tax treaties that were concluded prior to the entry into force of the Convention [its] principles may be applicable as [it] codifies the rules of customary international law.*"[13]

In particular, Articles 26 and 27 stand out in this respect. Article 26 embodies the pacta sunt servanda principle and reads: "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*" Further, Article 27 reads that "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.*"

In this perspective it must be concluded that only such reference to domestic law which adhered to the *pacta sunt servanda* principle[14] may be acceptable in the *renvoi* interpretation method.

The interpretation of the term "fixed place" in line with the "digital platform permanent establishment" would inevitably shift income attribution in favour of the Slovak Republic. *A fortiori* one may think of other domestic concepts that could thus be implanted in the permanent establishment definition by (pseudo) defining the term "fixed place". *Ad absurdum* one could enact a rule stating that a "fixed place exists in every case even if there is no fixed place".[15]

Thus, it must be concluded that the Slovak "digital platform permanent establishment" concept is not in line with the *renvoi* method and, thus, is incapable of being applied to tax treaty situations through interpretation.

MLI Aspects

The MLI modifies the application of existing bilateral double taxation treaties in several aspects agreed between its signatories. On 7 June 2017, the MLI was signed by 67 countries (including the Slovak Republic) covering 68 jurisdictions. Each jurisdiction was required to provide a list of bilateral treaties to be covered and details on how they would be modified by the MLI ("**MLI Position**").

Pursuant to the Slovak MLI Positions, there are significant changes to the tax treaties. The following changes to the tax treaties are relevant from the perspective of digital platforms:

a) Prevention of treaty abuse;
b) Artificial avoidance of permanent establishment status through commissionaire arrangements and similar strategies (Article 12 of the MLI); and

10 Purely hypothetically and for the sake of expanding our argumentation.
11 Vienna Convention on the law of treaties concluded at Vienna on 23 May 1969. The Slovak Republic is bound by the Vienna Convention as a successor state of Czechoslovakia, upon which it was binding from 28 August 1987.
12 Article 4 of the Vienna Convention (1969).
13 GERZOVA, L., POPA, O. Compatibility of Domestic Anti-Avoidance Measures with Tax Treaties. In European taxation, 53, 9 (2013). See also MAISTO, G. (ed.). *Tax treaties and domestic law*. Amsterdam : IBFD, 2006
14 Similar conclusion was reached also by the Court of Justice of the European Union in its judgements from 12 September 2017, C-648/15.
15 It is worth noting that is exactly what the Slovak "digital platform permanent establishment" concept does.

c) Artificial avoidance of permanent establishment status through specific activity exemptions (option A under Article 13 of the MLI).

Prevention of Treaty Abuse

As follows from the Slovak MLI Position, there is an intention to modify the tax treaties by including the following:

a) a new text in the preamble declaring the intent to eliminate double taxation without creating opportunities for non-taxation or tax avoidance (Article 6 of the MLI); and
b) the principal purpose test ("**PPT**"), being a general anti-abuse rule and denying treaty benefits in cases where one of the principal purposes of an arrangement was to obtain a treaty benefit (Article 7 of the MLI).

Theoretically, with regard to the MLI Position, Slovak tax authorities might possibly argue that a narrower definition of a permanent establishment under the DTT would not apply as a result of the PPT and they would instead apply the definition in the ITA, effectively denying treaty protection. Overall, however, we believe that this argumentation line stems from the generality of the wording of the PPT and the absence of specific guidance, but in principle we think it may be very difficult to sustain such argumentation.

Provisions on the artificial avoidance of permanent establishment status through commissionaire and similar arrangements – Article 12 of the MLI

By using commissionaire agreements and similar strategies, and under certain circumstances, the current rules allow enterprises from one state to sell their products in another state through local agents without technically having a permanent establishment in that other state. Commissionaire agreements and similar agreements rely on the exemptions in Article 5(5) and (6) of the Model Tax Conventions, under which no permanent establishment should arise in commissionaire structures.

The main purpose of the changes made by Article 12 of the MLI is to limit the use of the exemption in cases where the activities of an intermediary from the second state regularly result (and the intermediary plays a principal role) in the conclusion of contracts to be performed by an enterprise from the first state. In such case, the foreign enterprise should be deemed to have a permanent establishment in the second state, unless the intermediary is an independent agent.

However, in the context of the digital economy, the involvement of a local dependent agent is rarely needed and the "digital platform" definition seemingly anticipates that no such presence will exist in the Slovak territory. Therefore, these changes should be without relevance to the "digital platform permanent establishment" concept.

Provisions on the artificial avoidance of permanent establishment status through specific activity exemptions – Article 13 of the MLI

The activities listed in Article 5(4) of the OECD Model Convention were historically implied to be preparatory or auxiliary in nature, and as such, they did not generally give rise to permanent

establishments, i.e., these activities were an exemption from the general rule of when a permanent establishment is created.

However, under some circumstances such activities may form core business activities of an enterprise. Therefore, the exemption to these activities should only apply if these activities are indeed of a preparatory or auxiliary nature (rather than being automatically so classified).

The changes made by Article 13 of the MLI limit the activities listed in Article 5(3) of the tax treaties based on the Model Tax Conventions (or in similar provisions of treaties not based on these models) only to such an extent that indeed they are of a preparatory or auxiliary nature.

In any case, the above should in principle **only** be considered if there is a fixed place.

Thus, this change should also be without relevance to the "digital platform permanent establishment" concept.

Tax treaty override

Having concluded that the "digital platform permanent establishment" concept may not be applied through an interpretation of a tax treaty, the question of whether it is capable of overriding the respective tax treaty needs to be analysed.

In general "*treaty override by way of application of domestic legislation or interpretation of such legislation leading to failure to perform a treaty, in principle, constitutes a breach of states' obligations under international law, regardless of the permissibility of such an override under domestic law.*"[16] Nevertheless, the set of available remedies under international law is relatively limited (the suspension or termination of the tax treaty being one of them) [17] and for various reasons tax treaty overrides still occur.

The approach of states to treaty overrides varies greatly even within the OECD member states.[18] The interaction between domestic law and international law depends on the constitutional order of the particular states.[19] While in states adhering to the dualistic approach it is more likely that a treaty override would be found in line with their legal principles,[20] in states applying the monistic approach with a clearly defined precedence of international treaties before local law provisions, any provisions of local laws or judicial practice would be found unconstitutional per se.[21]

As an example, the United States of America overrides its treaties based on the *lex posterior derogat legi priori* principle embedded in legislation and judicial practice.[22] Similarly, relatively recently the Federal Court of Germany held that the treaty override is constitutional.[23]

16 GERZOVA, L., POPA, O. Compatibility of Domestic Anti-Avoidance Measures with Tax Treaties. In European taxation, 53, 9 (2013).

17 GERZOVA, L., POPA, O. Compatibility of Domestic Anti-Avoidance Measures with Tax Treaties. In European taxation, 53, 9 2013). See also MAISTO, G. (ed.). *Tax treaties and domestic law.* Amsterdam : IBFD, 2006.

18 For illustration consult the observations of states to the OECD Commentary to Article 1 of the OECD Model Tax Convention OECD (2015).

19 SACHDEVA, S. Tax Treaty Overrides: A Comparative Study of the Monist and the Dualist Approaches. In Intertax, 41, 4 (2013), pp. 180 – 207.

20 International law consequences are not taken into account for this part of analysis.

21 For discussion of monism and dualism see further AUST, A. Modern treaty law and practice. Cambridge : Cambridge University Press, 2007, p. 159 et seq.

22 GERZOVA, L., POPA, O. Compatibility of Domestic Anti-Avoidance Measures with Tax Treaties. In European taxation, 53, 9 (2013). See also MAISTO, G. (ed.). *Tax treaties and domestic law*. Amsterdam : IBFD, 2006.

23 CLOER, A., HAGEMANN, T. Constitutionality of Treaty Override. In European taxation, 56, 7 (2016).

On the other hand, in states where the precedence of international treaties[24] is clearly stated in their constitutions, neither the legislator nor the courts have the power to ignore (or reverse) this order even if the circumstances might justify such approach.

In Slovakia the theoretical difference may stem from the fact that dualistic theory prevailed within the territory of the Slovak Republic until the amendment of Act No. 460/1992 Coll. – the Constitution of the Slovak Republic in 2001. This amendment brought the change in favour of the monistic theory with the primacy of the international law.

The theoretical possibility of a tax treaty override would then depend on whether the tax treaty was ratified and promulgated:

(A) before 1 July 2001 (where a soft dualist approach would apply and their precedence over national law would stem from local law provisions); or

(B) on or after 1 July 2001 (where a monist approach would apply and their precedence over national law would stem directly from the Constitution).[25]

It seems clear that the new "digital platform permanent establishment" concept would be incapable of overriding tax treaties referred to in (B) above.

With respect to treaties referred to in (A), it would be theoretically possible to override these by a local law rule. However, it would need to be settled that such local law rule derogates the general rule in Section 1(2) of the ITA, which stipulates that an international treaty "*has precedence over this act*". In the absence of a clear expression stating that such precedence would not apply in relation to (e.g.) the permanent establishment definition, we would conclude that the new "digital platform permanent establishment" concept is not capable of overriding this general tax treaty precedence rule (and, thus, the tax treaty itself).

We are of the view that the rule setting precedence of a tax treaty is a special rule to all the remaining rules in the ITA and, thus, should always prevail (*lex posterior derogat legi priori* approach, as inferior approach, is thus not applicable).

Thus, it must be concluded that the "digital platform permanent establishment" concept is not capable of overriding tax treaties.

Practical implications

Having concluded that the "digital platform permanent establishment" concept is not capable of (i) being applied through interpretation of a tax treaty, or (ii) overriding the tax treaty, its practical implications in a tax treaty situation must be analysed.

These would differ depending on whether the concept and corresponding obligations result in the assessment of tax or in another obligation / circumstance.

With respect to the potential assessment of tax it seems clear that no tax could be assessed with respect to incomes of a non-Slovak tax resident attributable solely to the digital platform. In this respect we find it relevant to note that Article 5 of the Model Tax Conventions might not be regarded as "self-executing", i.e., the definition of permanent establishment would likely not be implemented

[24] For example, Czech Republic and Slovak Republic, Greece, Spain, Croatia. See further MAISTO, G. (ed.). *Tax treaties and domestic law*. Amsterdam : IBFD, 2006.

[25] See further KORONCZIOVÁ, A., KAČALJAK, M. Gaar As Tax Treaty Override–Slovak Perspective. In DANUBE: Law and Economics Review, 8.3 (2017), pp. 139 – 155.

into Slovak law and applied as if it were a local law rule. Invariably, it is essential in the application of Article 7, which is self-executing and clearly states that "*profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein*".[26]

Thus, a "digital platform permanent establishment" might come into existence under Slovak law (and the Slovak tax authorities would register it for income tax purposes on an *ex offo* basis), but still under the respective treaty such non-Slovak tax resident could rely on the protection of Article 7 and no tax could be levied on the profits of such digital platform in Slovakia.

Likewise, although Slovak law imposes a withholding obligation with respect to profits of an unregistered permanent establishment, it would still first need to be concluded that such profits were attributable to this permanent establishment and may theoretically form a Slovak sourced income. With respect to the above, clearly not.[27]

In practice, it would then be without practical implications if the "digital platform permanent establishment" were registered for tax in Slovakia.

Thus, the new concept seems to only result in additional administrative obligations of Slovak tax offices, which would have to perform searches and register "digital platform permanent establishments", but clearly without any further potential for generating tax income.

4 CONCLUSION

Since the "digital platform permanent establishment" concept in the Slovak legal environment is not capable of (i) being applied through interpretation of a tax treaty, or (ii) overriding the tax treaty, its practical implications in a tax treaty situation must be analysed.

In practice it would only result in additional administrative obligations for the Slovak tax offices, which would have to perform searches and register "digital platform permanent establishments", but without any potential for generating tax income.

As such, the concept would very likely become redundant and removed from the ITA.

Nevertheless, certain credit must be given to Slovak legislators for identifying the problem and their pioneering efforts at addressing it.

Finally, the ineffectiveness of "digital platform permanent establishment" concept mainly stems from the fact, that Slovak statutory rules are generally incapable of overriding tax treaties. This concept might still be applicable in a dualist environment, but the international law treaty override implications would remain valid.

Acknowledgements

Supported by the Slovak Research and Development Agency (APVV) Grant APVV-16-0499.

[26] Assuming there are no specific provisions in the respective tax treaty expressly dealing with digital economy.

[27] In this perspective it needs to be reminded that a tax at source (through e.g. withholding tax) is "*a particular taxation technique, rather than a type of tax, intended essentially to secure (minimum) taxation* ", see e.g. Opinion of Advocate General Kokott delivered on 1 March 2018, Case C-115/16, section 85.

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THE EFFECTS OF TRADEMARKS ON FRANCHISING

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Abstract: The authors of the paper discuss the use of a legal institute of trademark in a franchise business concept. Besides addressing the economic aspects, the relevant institute is mostly analysed from the perspective of the needs of the EU Single Market and in the light of Brexit. In the article is devoted special place to the European Union Trademark (EUTM), where the author examines the most appropriate means of designation of goods and services in franchising within the territory of the EU.

Key words: Franchising, Trademark, European Union trademark, The EU Single Market, Brexit

1 INTRODUCTION

A trademark is the most essential tool for identification of goods and services provided in the franchise system, therefore it can be seen as one of the basic attributes of franchising.[1] First and foremost, within distributional franchising a franchiser mainly sells goods and services designated by a franchiser's trademark.[2] Goods and services are basis of successful business conceptions and thanks to a trademark they become distinguishable for consumers, because the trademark designates goods and services in a clear way.[3] A franchisor's trademark is the key in business strategy, because it contributes essentially in the definition of goods' image and reputation in consumers' eyes whose often relate a trademark to the quality of provided goods or services.[4] Indeed, trademark value should increase as the number of people using it expands. When a trademark has been successfully franchised for several years, a franchisor no longer needs to signal the value of his network to potential new franchisees, which should make franchising easier.[5] For a franchisor to use his disposing and property rights related to a trademark via licensing a trademark for use, i.e. a franchisee's rights to use a franchisor's trademark, it is necessary that a trademark is exclusively owned by a franchisor. A trademark's license is part of a franchise agreement.[6] Apart from private legal aspects of the transfer of right to use a franchisor's trademark, the license has public legal aspects in the form of registra-

1 UNIDROIT: Guide to International Master Franchising Agreement, second edition. Rome : UNIDROIT, 2007, p. 118.

2 A trademark only exists in connection with the specific products which it identifies or with particular services provided under this mark.

3 „*Trademark rights have a fairly significant role in the market economy and have an irreplaceable role in combating competition. These rights contribute to creating a good competitive position against other competitors. Within the European Union, trademark rights are an important tool for regulating free movement of people, goods and services.*" VOJČÍK, P. et al. Právo duševného vlastníctva. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2012, p. 297.

4 MALY, J. Obchod nehmotnými statky. Praha : C. H. Beck, 2002, p. 257.

5 PFISTER E. et al. Institutions and contracts: Franchising. In European Journal of Law and Economics, Volume 21, Issue No. 1 (2006), p. 62.

6 Some authors explicitly designate a franchise contract as a special kind of license agreement, e.g: TELEC, I. Přehled práva duševního vlastníctví. Brno : Doplněk, 2002, p. 108.

tion in the public register of country where a trademark will be used by a franchisee.[7] The registering obligation related to a trademark in the respective country is prerequisite to a franchise agreement. When considering international franchise cooperation granting a license for using a trademark is determined by the law of country where a trademark will be used by a franchisee.[8]

Taking into account international franchising cooperation, the most essential issue to solve is the question of trademark's territoriality,[9] because trademarks are protected only within the registered territory of a respective country or trademarks are protected by a different way of registration.[10] Consecutive content and way of protection is therefore governed by the national law of the country. It follows from law that a franchisor is obliged to register a trademark under the national law of country where he wants to franchise before granting license to a franchisee. After the registration of a trademark, the granted license can be registered into the national trademark register. From the point of international franchisee this process greatly complicates franchising.

2 THE TRADEMARK PROTECTION IN EUROPEAN UNION

2.1 The history and advantages of European Union trademark

The solution of trademark protection in the EU stems from special character of EU legal system which through harmonization and unification gradually overcame the principle of territoriality typical for Trademark Law. The need of unified trademark legislation came from basic community aims – when created the internal market as economic space with free movement of goods, services, people and capital.[11] The territorial character of national trademark protections created a hurdle for the internal market. According to art. 295 of Treaty establishing the European Community (further "TEC") provisions of the Treaty are not related to the legislation of property relationships in Member States. Although the article does not mention specifically Intellectual Property Rights, it is

7 According to the Slovak law, pursuant to paragraph 509 of the Commercial Code, the execution of trademark rights granted under a license agreement requires registration in the trademark register. The registration duty arises directly from art. 20 sec. 3 of Act no. 506/2009 Z.z. on Trade Marks, in the form of determining the condition for validity of the license agreement with third parties on the day of its registration in the trademark register. The license agreement shall be effective between the contracting parties on the date specified by the contracting parties and shall not be bound by its entry in the trademark register. So the registration only has effects on third parties, so the purpose of registration is mainly to protect the rights of third parties.

8 The trademark law has the nature of immediately applicable (imperative) regulations that do not permit the use of another right within the scope of the subject matter (KUČERA, Z. Mezinárodní právo soukromé. Brno : Doplněk, 2004, p. 283).

9 The basic principle in the protection of industrial rights beyond the boundaries of a given state is the principle of territoriality. According to this principle, the question whether in a particular state and, where appropriate, under what conditions the protection of intangible property rights is granted to individual rights, is governed in principle by the national law of that state. This principle applies not only to rights the creation or duration of which is subject to the fulfillment of certain conditions laid down by the law of that country but also to the right to individual results arising informally (JEŽEK, J. et al. Prosazování práv z duševního vlastnictví, 2003, p. 84. Available at <http://www.dusevnivlastnictvi.cz/images/dokumenty/prosazovanipravdusevnivlastnictvi.pdf>. [q. 2018-05-29].).

10 The European continental system of trademark protection is based on the registering principle where a mark becomes a trademark by a formal registration in the trademark register. On the other hand, the Anglo-American system of protection is based on an informal principle where the creation of a trademark and its protection is linked to the moment of the first genuine use of a mark.

11 Article 2 of the Treaty establishing the European Community.

necessary to classify it under the article. It results that Member States governed protection of Intellectual Property Rights in their national legislations. Separate legislations meant different national legislations and the exclusivity of protection granted by the Member States solely for the territory of respective state. A separate legislation was also directly related to the entitlement of industrial property rights' holder for restriction or exclusion of imported goods and services by other legitimate related rights' holders from a different Member State which contradicts the nature of creation and existence of single internal market.

This way the intellectual property rights' holder built an intrinsic legal monopoly in the market of free movement of goods and services, because only he was entitled to grant a territorially limited consent for use of these goods and services. As a result, these goods and services re-created borders among Member States.[12] Harmonization of Trademark Law in the EU resulted in the form of Directive 89/104/EHS from 21. December 1988 to approximate laws of the Member States relating to trademarks (further "Directive"), but its implementation into national legislations did not reach expected goal. Although implementation converged national legislations of Member States closer, the negative effects of territoriality principle was not surpassed. Overcoming the territoriality principle required to adopt a uniform legislation for all Member States which is possible to achieve only through legislation in the form of regulation.

The unification of Trademark Law in the EU was feasible after determination of legal basis. A solution was found where missing legislation was causing the most important problem. In this case, article 308 of TEC was used as missing legal foundation. The article allows the Council on the Commission's proposal, acting unanimously after consulting the European Parliament, to take appropriate measures to achieve some of the objectives of the Community in the functioning of single internal market, provided that the TEC does not provide the necessary powers. The aim of Community was to remove obstacles of proper functioning of single market inflicted by trademarks in the form of volume limitations for export and import which are prohibited according to articles 28 and 29 of TEC among Member States. Despite the provision of first sentence of art. 30 of TEC based on which effects of articles 28 and 29 of TEC are limited in case of industrial property rights› and business ownership's protection, the second sentence of art. 30 rules that prohibitions under articles 28 and 29 of TEC cannot be means of arbitrary discrimination or hidden limitation of business among Member States. When the exclusive right of trademark's owner to grant license for the use of trademark can be misused to limit business among Member States, for proper functioning of the single internal market the trademark's owner has to bear restrictions of ownership to a trademark. The unification process resulted in the adoption of Council Regulation No. 40/94 of 20 December 1993 on the Community Trademark (further «Regulation»), thereby creating the uniform protection system of trademarks for entire territory of the EU.

The rationale for the adoption of this Regulation proclaims the need for adoption of uniform protection which will be effective throughout the Community,[13] where the formally acquired trademark in a single process registration system removes barriers to the free movement of goods and services and creates suitable conditions for companies. As result the uniform protection will enable companies within its economic activities connected to production or distribution of goods and services in the EU to use a single trademark validated for the whole territory of EU. The Regulation

[12] TICHÝ, L., ARNOLD. R., SVOBODA, P., ZEMÁNEK, J., KRÁL, R. Evropské právo, 2. edition. Praha: C. H. Beck, 2004, p. 441.

[13] Article 1, sec. 1. (2) of Regulation (EU) 2017/1001 of the European Parliament and of the Council.

overrides the territoriality principle because the European Union trademark is directly applicable in all Member States, independently of trademarks that are in the national treatment regime of the Member States. The existence of the European Union trademark thus creates, in the EU, alongside national and international trademarks, the third regime of trademark protection. We can state that it is an optional tool of trademark protection in European Law which functions alongside trademark protection regimes at WIPO level and national protection level.[14]

The two most prominent multi-filing applications are the European Union Trademark system (formerly known as the European Community Trademark system) and the Madrid Protocol system. Pursuing a multi-filing application can save time and money. Franchisors that apply using the European Union Trademark system through the European Union Intellectual Property Office ("EUIPO") have the benefit of filing a single application in the twenty-eight European Union member countries at a cost equivalent to filing directly in four or five countries. Franchisors that apply using the Madrid Protocol system through the World Intellectual Property Organization ("WIPO") have the opportunity to receive trademark protection in up to ninety-eight countries with a single filing.[15]

In addition to the abovementioned overriding principle of territoriality, it was necessary to address the issue of parallel imports of goods bearing its trademark, in particular the question of whether the proprietor of a trademark may prevent parallel imports of such goods, in order to restrict the proprietor's trade mark's exclusivity. Under Article 13 (1) of the Regulation, the European Union trademark does not entitle the proprietor to prohibit its use for goods which have been marketed in the Community under such a trademark when they have been put on the market by the proprietor of trademark himself or with his consent. However, it does not apply if the status of the goods changes or deteriorates after their placing on the market or the further commercialization of the goods is prevented. In that case, under Article 13 (2) of the Regulation the exhaustion of rights under article 13 (2) would not have been applied. The registration of a franchisor trademark at the European Union level brings benefits which arise, in particular, from its unified nature. A properly registered European Union trademark is effective in all EU Member States, which means for the franchisor to obtain protection in a simpler registration process than if he would have to register his trademark in each country separately.

2.2 The impacts of Brexit on European Union trademarks

The advantages of EUTM validity across all EU Member States is diminished by Brexit.[16] The most significant effect of Brexit on international franchisors will be in terms of brand protection strategy for the U.K. and Europe. It is likely that EU rights, such as registered and unregistered community designs and EU trademarks (formerly referred to as Community Trade Marks or CTMs), will no longer have effect in the U.K. and there will be questions about what will happen to the "U.K. portion" of such rights obtained before Brexit. If existing rights automatically reduce in geographical scope to exclude the U.K. their value will diminish, which will have a commercial impact on the rights holder.

14 Also in recitals of the Regulation, it is emphasized that European union trademark law does not replace the trademark law of Member States, as the EU is aware of the lack of legitimacy to require companies to register their trademarks as European union trademarks. National trademarks are necessary for companies which do not need protection at EU level.

15 EMERSON W. R., WILLIS R. C. International franchise trademark registration: legal regimes, costs and consequences. In Wake Forest Law Review, vol. 52 (2017), p. 12.

16 Brexit is an abbreviation for "British exit," referring to the UK's decision in a June 23, 2016 referendum to leave the European Union. Available at <https://www.investopedia.com/terms/b/brexit.asp>. [q. 2018-05-29].

This is something that franchisors with EU trademarks need to keep an eye on as it may at some point mean that they have to re-apply for some of their trademarks in the U.K.[17] However, it is clear that transitional provisions are required to preserve EU trademark owners' existing rights in the UK from the date of Brexit, and the UK Chartered Institute of Trade Mark Attorneys (CITMA) has already been working hard on the details of those provisions. CITMA is currently discussing its proposals with the UK Intellectual Property Office. In summary, CITMA is considering in detail two options whereby existing EU Trademarks will be entered onto the UK Trade Mark Register as corresponding national rights upon the UK's exit from the EU. The first option ("the Montenegro model") would allow all existing EU Trademark Registrations to be automatically entered onto the UK Register as UK Trademark Registrations. The second option ("the Tuvalu model") would require EUTM owners to file a form to request extension of their existing EUTM Registrations to the UK.[18] The European Union trademark regime is established by the EU legislation and European Union Trademarks (EUTMs) give protection in every Member State of the European Union. When Brexit comes into effect, existing EUTMs will cease to cover the United Kingdom.[19] The European Union trademark is currently also of interest to the franchisor in terms of registration fees,[20], since the enjoyment of protection at the same time in all Member States through the European Union is the cheapest.[21]

The franchisor may register the European Union trademark through the European Union Intellectual Property Office[22] in one of the 23 official languages, thus also in the Slovak language. In the application, the applicant is required to indicate also a second language, which is one of the five languages[23] of the Office[24] used in the applicant's communication with the Office in cases of

17 Available at <https://www.franchise.org/how-does-brexit-impact-international-franchisors-with-franchisees-in-the-eu >. [q. 2018-05-29].

18 ATKINS, R. UK: European union trademarks and Brexit. In LexisNexis, 6. 3. 2017.

19 TRAUB F., HALEEN I., CLAY A. Brexit – what next for Intellectual property rights? In The Licensing Journal (2016), p. 11.

20 Regulation (EU) 2015/2424 of the European Parliament and of the Council, amending the Community Trade Mark Regulation (the amended regulation), entered into force on 23 March 2016, amended the fee system. The registration fee for EUTM in the first class is 850 euros, for the second class the fee is 50 euros, for third class the fee is 150 euros and for each additional class the fee is 150 euros.

21 The Community trade mark included protection for three classes, with the cost of the electronic application being EUR 900 and EUR 1 050 per paper application. The Amendment to Regulation (EU) 2015/2424 states that the European Union Intellectual Property Office goes into the system of one class for a fee of EUR 850 for an electronic application. In paper form, the application is charged for one class of EUR 1000. This means that in practice applicants will pay a lower fee if they only apply for one class, almost the same fee if they apply for two classes (50 euros more), and a higher fee if they apply for three or more classes. Renewal fees are substantially reduced in all cases and set to the same level as the application fee, and there are also reductions in opposition, cancellation and appeal fees.

22 The Amendment to Regulation (EU) 2015/2424 establishes the European Union Intellectual Property Office as the only place where it is possible to register an EU trademark from 23. 3. 2016. Prior to the amendment, the places of filing of the application were the relevant national offices conducting the trademark agenda (in the case of the Slovak Republic it was the Industrial Property Office in Banská Bystrica).

23 Under Article 146, sec. 2 of Regulation (EU) 2017/1001 of the European Parliament and of the Council are the languages of the Office English, French, German, Italian, Spanish.

24 Article 2 of the Regulation (EU) 207/2009 establishes the Office for Harmonization in the Internal Market (hereinafter "the Office" or "OHIM"), established in Alicante, Spain, which has become an independent administrative body of the Community with legal personality and executive power conferred by this Regulation operating under Community law within the framework of Community law, without encroaching on the powers of other Community bodies, while making the applications subject to review in the light of the absolute grounds for refusal (Articles 7 and 38); otherwise, it rejects the Community trademark application only on the basis of objections (Article 8) or, if the absolute or relative grounds for invalidity are given, declare the mark invalid or not used as canceled (DAUSES, M.A. et al. Příručka hospodářskeho práva EU. München : Verlag C. H. Beck oHG, 2002, Praha : ASPI, 2002, p. 148).

notice of objection, cancellation or invalidation of the trademark.[25] In case of seamless registration, the applicant is the only party to the proceedings which means that the applicant uses only the language of proceedings as the language of submitted application, any official language of the European Union.

2.3 The challenges of European Union trademarks

The European Union trademark in the role of a legal remedy that is effective for all EU countries also has its own weaknesses which concern, in particular, the registering capacity. In the light of the absolute grounds for refusal of registration, the descriptive character of a trademark within the meaning of article 7 (1) (c) [26] and the customary designation referred to in article 7 (1) (d)[27] Regulation (EC) 2017/1001 for the lack of ability to distinguish can be particularly disputable. The assessment of ability to distinguish is strongly shaped by the ECJ case law. For example, in the case of the BABY-DRY designation[28] of a baby diaper manufacturer that he wished to register for his products, the ECJ found that, despite the fact that the designation obviously consists of two English terms, where each word separately has a descriptive character and both terms designate the purpose of using the product, these words have a sufficient degree of distinctiveness in their connection.

According to its settled case-law, when assessing the descriptive character of a trademark, the ECJ states that *"obtaining a distinctive character through the use of a trademark requires that at least a significant part of the relevant public, through that trademark, recognizes that the concerned goods or services come from a specific undertaking"*.[29] Two years after the "BABY-DRY" decision, the ECJ reaffirmed its conclusions in case C-191/01,[30] dubbed "DOUBLEMINT". Despite above mentioned results, the "ecoDoor" sign, which EUIPO refused to register because of the descriptive character of the sign,[31] produced a different result.

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25 Article 146, sec. 3 of the Regulation (EU) 2017/1001.

26 According to Art. 7 sec. (1) (c) of Regulation (EC) 2017/1001 on the European Union trademark *„trademarks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value of the geographical origin or the time of production of the goods or the provision of services other characteristics of goods or services"* shall not be registered in the register.

27 According to Art. 7 sec. (1) (c) of Regulation (EC) 2017/1001 on the European Union trademark *„trademarks which consist exclusively of signs and indications which have become customary in the common language or in good faith and in the commercial practice used"* shall not be registered in the register.

28 ECJ judgment C-383/2001 of 20 September 2001.

29
- Judgment of the Second Board of Appeal of 12 July 2007 in Case T 141/06, Glaverbel v. OHIM, action brought against the decision of OHIM of 1 March 2006 (R 0986 / 2004-4), concerning the registration of the Community trademark consisting of a representation of the structure of the surface of the glass;
- ECJ judgment of the European Union of 4 May 1999 in Cases C 108/97 and C 109/97,Windsurfing Chiemsee Produktions- und Vertriebs GmbH (WSC) against Boots- und Segelzubehör Walter Huber (C-108/97) and Franz Attenberger -109/97), application for a preliminary ruling on the interpretation of Art. 3 sec. 1(c) and Art. 3 sec. (3) of Directive;
- ECJ judgment of 7 July 2005 in Case C 353/03 Société des produits Nestlé SA v Mars UK Ltd, application for a preliminary ruling on the interpretation of Art. 3 sec. 3 a Art. 7 sec. 3 of Directive;
- ECJ judgment of 18 June 2002 in Case C 299/99 Koninklijke Philips Electronics NV v Remington Consumer Products Ltd, application for a preliminary ruling on the interpretation of Art. 3 sec. 1 and 3, Art. 5 sec. 1 and Art. 6 sec. (1) (b) of Directive.

30 ECJ judgment of 23 October 2003 in Case C-191/01 OHIM v Wm. Wrigley Jr. Company.

31 OHIM explained the descriptive character of the ecoDoor mark by stating that the concerned public consists of consumers with average English knowledge. For the mark applied for, the public distinguishes both the element 'eco', which indicates the meaning of 'ecological' and the element 'door', which means 'doors'. Consequently, according to OHIM, the public perceives the mark applied for as something which means 'environmentally friendly doors' or 'doors whose

The ECJ decision has derived from the interpretation of article 7 (1) (c) of Regulation under which the general interest requires that signs or indications which may serve in business to designate the characteristics of the goods or services for which registration is sought may be freely used by all and that provision therefore precludes such signs or data from registration as a trademark. In such case those signs would be reserved to one entity only. Assuming the sign falls under the prohibition laid down in article 7 (1) (c) of Regulation, there must be a sufficiently direct and specific link between the sign and the goods or services in question, where the link in question enables the public concerned to immediately and without further consideration perceive the description of those goods or services, or more precisely one of their characteristics. It follows from the foregoing that the descriptive character of the sign must be assessed, first, in relation to the goods and services for which registration is sought and, secondly, in relation to the perception of the relevant public group made up of the consumers of those goods or services.[32]

In case of signs which have become customary in the common language or in good faith and used in the commercial practices, which is the absolute ground for refusal of registration, the assessment of registrability is based on assessment of the distinctive character of sign. The assessment of commonness of sign in common language is based, first, on the assessment of sign in relation to the goods and services applied for and on the assessment of commonness of sign among the target public. This is best explained by the judgment of the ECJ in Alcon Inc.,[33] where the manufacturer of pharmaceutical products registered to OHIM (now EUIPO) in 1998 the trademark "BSS" for ophthalmic pharmaceutical preparations and sterile solutions for ophthalmic surgery. The competitor challenged that registration by stating that the trademark was entered in the register contrary to the provisions of the abovementioned art. 7 (1) (d) since, in the field of ophthalmology, the terms "balanced salt solution" and "buffered salt solution" are used to indicate the expression "BSS". It means that "BSS" is the usual term in the target the public, i.e. ophthalmologists and surgeons consider it to be the usual term. The ECJ upheld the decision of the Board of Appeal of OHIM and the trademark "BSS" was declared invalid.

The assessment of distinctive character of trademark, in the light of the fact that the trademark, having regard to the principle of unity of European Union trademark, must have the same distinctive character in all the Member States,[34] may give rise to problems. The EU has 23 official languages, which must also be taken into account when assessing the registrability of a sign, and therefore the

production and operation are ecological'. Lastly, in view of the fact that the goods covered by the trade mark may include doors and use of energy, OHIM considered that the trade mark applied for provided information on their energy efficiency and ecological characteristics and was therefore descriptive. (Judgment of the General Court of 15. 1. 2013 – BSH Bosch and Siemens Hausgeräte GmbH v Office for Harmonization in the Internal Market in Case T 625/11, point 7).

32 Judgment of the General Court of the EU of 15. 1. 2013 – BSH Bosch and Siemens Hausgeräte GmbH v Office for Harmonization in the Internal Market in Case T 625/11, point 14 – 17.

33 ECJ judgment C-192/03 of 5 October 2004.

34 Judgment of the Court of Justice of the European Union of 22 June 2006 in Case C 25/05 August Storck KG v OHIM, appeal against the judgment of the Civil Service Tribunal of 10 November 2004 (T 402/02).

- judgment of 10 March 2009 in Case T 8/08, GM Piccoli Srl v OHIM, action brought against the decision of OHIM of 28 October 2007 (R 530/2007 1), concerning the application for a three-dimensional Community trademark shaped in the form of a shell,
- judgment of 30 September 2009 in Case T-75/08 JOOP! GmbH v OHIM, appeal against the decision of OHIM of 26 November 2007 (R 1134/2007 1) concerning the Community trade mark application (!),
- ECJ judgment of 7 September 2006 in case C 108/05, Bovemij Verzekeringen NV v Benelux-Merkenbureau, application for a preliminary ruling on the interpretation of Art. 3 sec. 3 of the Directive.

term which is in a specific language eligible for registration in another language for the reasons mentioned in article 7 (1) c) and d) do not have to be.[35]

3 CONCLUSION

The European Union Trademark provides a franchisor who expands to several EU countries one of the most attractive tools for protecting trademarks and a mean of registering license agreements[36] concluded with franchisees from the EU. The already mentioned territorial scope and unification effect for the EU and suppression of territoriality principle, relatively low registration fees, the possibility of registration in one of the official EU languages are benefits which thanks to the trademark unification in the EU an applicant can gain, and in case of successful registration a trademark owner as well.

The fractional violation of unique registering effect of EUTM caused by Brexit is minimal and temporary. The ideal solution for the existence of EUTM in the United Kingdom is to provide the same legal protection for EUTMs as UK national trademarks enjoy. It would appear to be wrong to look at the European Union trademark as a trouble-free legal tool, because issues of registrability may give rise to problems of trademark uniformity throughout the EU, such as the aforementioned language problems.

However, benefits stemming from the suppression of territoriality principle – such as the solution to the European Union trademark rights' exhaustion – are invaluable in ensuring the free movement of goods and services within the internal mark. Therefore, the European Union trademark is EU law tool that, in the light of current EU law options, a franchisor can make full use of in its cross-border penetration into the EU Members.

We believe that franchising needs to address trademark issues from the point of view of cross-border and, in our economic space, mainly intra-European economic cooperation. Therefore, trademarks in franchising receive, through the European Union trademark, the appropriate means of its protection in the EU, and its further development and exploration are inextricably linked to the possibilities of its use in franchising in the single EU internal market.

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[35] The Regulation also addresses the issue of the admissibility of the registration of signs which fulfil the criteria of absolute grounds for non-registrability. On the basis of Article 7 (3) of the Regulation in the cases referred to in Article 7 (1) (b), (c) and (d), the sign shall not be regarded as an improper registration unless the applicant demonstrates that the sign has a distinctive character prior to its registration, and it is necessary to assess the distinctive character of the sign in relation to the goods and services for which registration is sought.

[36] Licensing in the Regulation (EU) 2017/1001 is relatively stiff. Article 25 (1) provides that „an EU trade mark may be licensed for some or all of the goods or services for which it is registered and for the whole or part of the Union. A licence may be exclusive or non-exclusive".

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M. WALZER AND CONTEMPORARY COMMUNITARIANISM[1]

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Abstract: The author in her article focuses on the views of M. Walzer, encompassed specifically in his works „Spheres of Justice" – „The Defence of Equality and Pluralism", and „The Just and Unjust Wars". The focus is given to equality, pluralism, and justice which represent the main issues considered by the contemporary communitarianism.

Key words: equality, complex equality, freedom, justice, society, injustice, democracy

1 INTRODUCTION OR WHAT IS COMMUNITARIANISM?

Communitarianism, represented by James M. Buchanan (Theory of the Public Choice) and John Rawls (Theory of Justice), reflects the academic reaction to the academic challenges of the liberal political philosophy in the USA in the seventies of the previous century. Let us compare the bases of liberalism and communitarianism:

Liberal Idea: Individual freedom is the ultimate moral challenge. For a member of an individual society the law with its purpose to organize the strengthened individual freedom enjoys only secondary importance. The state represents an abstract, contract-based system of general and sensitive cooperation between the individuals in their pursuit for profit or justice. Buchanan: the economic dimensions of the private interest represent the main source of reasonable political decisions. ("Theory of Public Choice"; Locke) Rawls: the generalization of the personal interests to abstract levels creates reasonable political decisions.

Communitarian Idea: Not necessarily must the individuals be understood in their whole complexity without their social dimension, the state represents a substantial legal order for the individuals, guaranteed by the society: justice/law represent a true relationship (Plato describes it as „harmony") between an individual and society, between the social responsibility and personal choice; family tradition, belief, education create substantial criteria for decision-making in the meaning of the relevant „Sittlichkeit" (Rousseau, Hegel).

Who are the Communitarians? This movement consists of variety of distinct and special scientists and activists, e.g. Benjamin Barber *(Strong Democracy,* 1984), Robert N. Bellah *(The Good Society,* 1991*),* Amitai Etzioni (*The Spirit of Community,* 1994)**,** Hans Jonas (*The Genesis of Values,* 1997), Alasdair MacIntyre *(After Virtue,* 1984*),* Martha Nussbaum *(Cultivating Humanity,* 1998), Robert Putnam *(Bowling Alone,*1995), Michael Sandel *(Liberalism and Its Critics,*1984), Charles Taylor *(The Ethics of Authenticity,* 1992), Michael Walzer *(The Spheres of Justice,*1984). What puts them together is their critical attitude towards the contemporary academic and social developments.

[1] The paper is a partial outcome of the project VEGA 1/0138/18 Marxizmus stále živý? K prehodnoteniu učenia K. Marxa v súčasnom právnom a ekonomickom myslení.

Critics of Liberalism. Sandel, Taylor, and Walzer represent the main critics of liberalism. It is not their main goal to extinguish the American liberalism as the main representative of the political theory of the contemporary American society, much more they are the followers of both the American civil law and anti-Vietnam war movements, etc. The descendants of the extreme hyper-idealistic views of the initial liberal thinkers, libertarians or utilitarians, who systematically and improperly construed Aristotle in his political engagement and individual position for the benefit of a society formed by the so called "elbow" ethics, belong to this group. Thus, the main argument was to ignite the social dimensions of both the political establishment and life. This is the area of New Hegelianism within the communitarianism movement. Relying on Aristotle, Rousseau and Hegel and their attitudes to the concepts of politics, state and society, this first generation of communitarians tried to object the linear and abstract arguments of the representatives of the one-sided liberalistic conceptions of society and state as not matching the complex political reality of the modern life. So they tried to "add" the dialectically necessary second, or modified argument with the purpose to get closer to the complicated truth of the human existence in a society.

Political activism is represented by the global campaign of Amitaio Etzioni, the establisher of Social Network, having Al Gore, Tony Blair, Gerhard Schroder, Kurt Biedenkopf as its members. This was the attitude of the 90-ties, successful, however, lacking the real academic theoretical grounding, especially in the context where there existed a threat of transforming the communitarian thought into cultural relativism – each culture on the Earth creates (not only by being "culture") more or less similar normative consequences (e.g. against the universal concept of human rights). Such ideas were not the communitarian stratagems, as these understood their commitment towards the community as a dialectic supplement of the classical (not neo-libertarian) liberalism. However, the communitarians needed the new academic research to develop proper argumentation against the neo-liberal, economic "glob-ideology" which was spreading around the world continually.

Thus, the last stage of communitarianism is represented by the intention to bring the systematic development of the general conception within the technically and economically globalized world back to the academic ground. Today, the re-establishment of the communitarian conception of political thought on the academic basis brings about the idea of re-consideration of the sources and the discourse of the political philosophy of the 20th century.

2 POSITION OF M. WALZER IN COMMUNITARIANISM

M. Walzer is a cultivated political philosopher and the author of very well-known works, e.g. "Spheres of Justice"[2]; or "Just and Unjust Wars", where he analyses the social distribution of wealth and power, as well as the other social values, e.g. education, work, free time, etc.

M. Walzer and J. Rawls view these issues from different perspectives. J. Rawls, in his analysis of justice, gives precedence to economy and psychology, while Walzer gives more attention to history and anthropology. This defence of history against its deprecation is typical for Walzer – a historian. On the basis of historical analysis, Walzer fosters his key position concerning the development of civil society and democracy. These issues have already been analysed in several fields (philosophy,

[2] WALZER, M. Spheres of Justice. Oxford : Basil Blackwell, 1983, p. 34.

ethics, history, law, etc.), however, we cannot but state that the satisfactory level of theoretical analysis has not yet been reached.

It is obvious, that the concept of democracy has always been connected with the desire to put all its predominant values into practice. However, in reality, it seems rather difficult and problematic. And it is namely the issue of equality and other democratic values in a civil society that Walzer focuses on. We can say that it represents his main goal, while the plurality of thought and real complexity of distribution systems play also a very important role in his work.

In his considerations concerning equality, Walzer highlights the notions of simple and complex equality.[3] For the purpose of illustration, he presents a society where everything is for sale and all citizens have an equal amount of money. Such a situation is described by Walzer as the "regime of simple equality". Equality as a multiple variable process spreads through a number of chains of further social values.

The "regime of simple equality", however, cannot last for long as the free market exchange definitely brings about inequality. If somebody seeks to preserve the simple equality, he can do it only via a centralized state, alternatively via an active state power (which is also rather difficult and dubious in its result). Many problems, e.g. unwillingness and lack of capacity of the bureaucracy to participate in the aforementioned activity may arise. In practice, breaking the monopoly of money neutralizes its importance.

Also other values step in, whereby the inequality achieves new forms. These forms operate in different ways. For example, in the regime of simple equality, it has been provided that everything is for sale and each person has an equal amount of money. At the same time, everybody enjoys an equal opportunity of investment. Some invest in education, some, on their own discretion, meet a different choice. Purchase, however, is made universal through the system of taxation.

In case of investment into education, as illustrated, the educational institution (the school) becomes a competitive ground.

M. Walzer believes that also in this world of education, the educational success and certificates can become a subject of monopolization by a new group of people, he denotes as the "talented group". The members of this group control the dominant features of the school to the outside. They will take hold of different office posts (grant the academic degrees, etc.) M. Walzer poses a question: What response to choose under such circumstances? He asks whether it is possible to set limits to the new recognized models or whether to force the monopoly of power of the "talented" to observe the stipulated rules.

Here Walzer responds to a different principle presented by Rawls, under which the inequalities are justified only if they bring the greatest benefit to the most disadvantaged social groups.

According to Walzer, simple equality requires a continual state intervention to make the monopolies to observe stipulated rules and supress new forms of dominance. However, there exists a danger, that the state power itself would become a central object of competitive fight. The political power, or politics are always directed towards dominance; this is the most important and dangerous value in the human history.

M. Walzer explains what he understands under the notion of political power. He perceives it as a special kind of value and believes it enjoys a dual character. Firstly, political power belongs to a category of issues freely used by the people due to their momentary importance. Sometimes it is

[3] Ibidem, p. 56.

important and dominant, sometimes it is not. Secondly, the political power as a regulatory phenomenon influences the social values in general.

Political power is used for the protection of borders of all the distributive spheres, including its own, as well as, for the enforcement of the common understanding of what is right or wrong. It is this latter meaning we can be made use of. We can conclude that the political power is always dominant within certain borders, and not without them.

The central problem of the political life is represented by the necessity to preserve the decisive distinctions, as the American put it, between "at" and "in". However, this is a problem which cannot be solved by the given imperatives of simple equality.

Therefrom arises also the need for the agents of pressure creating the constitutional governance and different balances. These borders are very important for a variety of different social and economic monopolies, as well as for their abolishment. M. Walzer believes that the main danger for a democratic government is represented by the new born monopolies with a social power of plutocracy, bureaucracy and technocracy, etc.

In theory, the good dominates the political power, however, in practice, at the breach of power of the monopolies, the dominance of the good is neutralized.

To support his argument, Walzer cites Marx[4] that democracy is an essential and reflective system, reflecting the predominance of the distribution of the social good.

If the power over monopolies should be preserved, then this power would be centralized or monopolized. Thus, the state must be very strong if it wants to meet the stipulated intentions through the distinctive or differentiated principles. In this context, there can appear certain tension between the new-born monopolies and the political pressure, between the goal to give precedence to the talented, and the pressure of the distinctive, differentiated principle, as well as between the agents of pressure and democratic constitution.

Such problems arise from the negotiating monopoly and not dominance being the main result within the distributive justice. However, this is a different kind of equality. Here we approach the issue of the complex equality.

The arguments for the complex equality, in Walzer's view, find their roots in our understanding of the current, concrete, positive, as well as special character of the social values.

As mentioned above, the simple equality represents a simple distributive condition.

Equality is a complex human relationship, communicating the values we create, we share and divide among ourselves. Thus, it is necessary to distinguish the distributive criterion from the social values.

M. Walzer, for the purpose of illustration, mentions the views of B. Pascal and K. Marx. He takes the argument from Pascal's work The Persées (England, 1961, p. 244) and Marx's Economic and Philosophic Manuscripts (London, 1963, p. 193 – 94).

Pascal expressed his understanding of complex equality in his characteristics of tyranny. "Tyranny stems in the wish to rule the world, even outside its own sphere. Tyranny equals the endeavour to obtain what another could only have. We own different duties, qualities: love is the true answer, reflection of magic, fear of power, belief in wisdom" – these could make tyranny weaker.

[4] Ibidem, p. 61.

Marx in his early work shares this view.[5] The relation of a human to a human and to the world is humane. Love can be exchanged only for love, etc. These are the borders and possible limits to tyranny.

If you wish to enrich and move arts further, you must be an artistically cultivated person, if you wish to influence other people you must enjoy the capacity to exert impact on others.

I believe that the example related to the complex equality was chosen by Walzer deliberately in order to highlight its foremost goal, i.e. the focus on the personal qualities and social values having their own spheres of operation. The social opinion represents a special value, which is well observable in the political sphere. According to Pascal, in the political terminology, it is not the ruler who orders what is right or wrong with the thoughts, even though he may think so due to the fact that he is in power.

In Marx's opinion, it is the right goal that gives direction to my conduct, to my deeds. If the ruler wants to put something into practice, he must be convincing, practical, initiative, etc. These arguments depend on the power – its share of influence, its understanding and comprehension. The social values have a social grounding, the way to the distributive justice can be found through their interpretation.

The first goal is to look for the internal principles of every distributive sphere.

The second one is contained in the warning that not enough attention is paid to the principles leading to tyranny, which is shown in the abuse of political power.

The regime of the complex equality represents a counterpart to tyranny.

The complex equality creates a structure of relationships where the dominance becomes impossible. M. Walzer believes that the distributive principle seeks to investigate the perception of the social values, as well as to research the internality of the distributive spheres.

He highlights the fact that the modern democracy is based on two requirements: the first one is the universal wish of the people to decide on their own issues, or, at least, to co-decide on who would decide on them. Liberalism represents the second requirement; it is understood as a set of social and political beliefs, positions and values presuming the universal, i.e. equal, application of law.

The structural and functional relations and processes suffer due to the existence of pluralism in definition of the contents of democracy.

Walzer believes that it is necessary to pursue pluralism while, at the same time, to require a coherent protection of the pluralistic views.

To put it simply, there must be principles, which are fair in view of the selection and arrangement of their limits.

In connection to pluralism, we are not required to approve all the distributive criteria or to accept every possible agent.

M. Walzer expresses critical views to majority of philosophers who elaborated on the problem of justice, Plato being the first of them, in connection with the existence of the sole and only distributive system according to which philosophy can correctly operate.

Currently, this system is mostly described as one of the ideally rational systems where the people, in their quest to find impartiality, are totally unaware of their own situation, of particular goals confronted with the abstract structure of values.

[5] MARX, K. Economic and Philosophic Manuscripts. In Karl Marx : Early Writings. London : Watts, 1963, p. 193.

Particularism of history, culture and other relations represents, however, a more critical issue. The problem what a reasonable person understands under the concept of universal conditions gains more and more importance. What do individuals from our own strata seek in their participation in culture while being determined by this participation? Do these questions transform into the choices we make during our common life?

Another problem arises in this context. Justice represents a human characteristic, thus, as we are very different, it is highly disputable whether it can be established only in one way. This is the moment of philosophical approach, Walzer focuses on. The questions stemming in the theory of distributive justice allow for many answers, and also provide for a possibility of cultural diversity and political choice. Not only the simple principle or principles of various historical approaches can be implemented in this way. There is no doubt that there exist a lot of morally admissible implementations.

M. Walzer, first of all, stresses the fact that the principles of justice themselves are of pluralistic character, more precisely, they enjoy the pluralistic form. The different social values resulted from different procedures, different agents and all these differences are derived from the different understanding of the social good as such, which represents an unavoidable product of both the historical and cultural particularism.

According to Walzer, the theories of distributive justice focus mainly on the social processes. The distributive notion is understood as a concept to give, allocate, exchange. The main focus is not given to the producers and consumers, but to the distributive agents, as well as to the recipients of values. People are always interested in themselves, especially in situations when they are in positions of persons giving and persons taking. Inevitably, they face the following questions: What represents our substance? What are our rights? What do we need? All these questions are related to the distributive principles presuming the control of the movement of values.

M. Walzer describes the process, which he considers dominant, precisely and in its complexity. It is a process where the people think and create values which they later distribute among themselves. The values and the concept of the Good do not appear unexpectedly and without any control. The human comprehension is a critical and decisive medium of the social relations entering the human mind earlier than human hands.

By focusing his attention on the concept of distributive justice itself, M. Walzer does not underestimate the role of a human agent. He tries to explain and specify the distributive principles into 6 presumptions:

1. All the Good that is concentrated in the distributive justice represents social values. The concept of the Good is conditioned by the social opinion. The same rational perception of the Good enjoys different perceptions in different societies. The same "thing" is evaluated by different reasoning, it can be considered priceless here and worthless there.
2. "The state of – this is me and this is mine" is very difficult to describe. History plays very important role in this context. In reality, there exists a certain history of transactions not only among people, but also in the perspective of their interaction with the moral and material world they live in. Without history, there would be no sensible recognition of the existence and reasonableness of distribution.
3. This is not a simple structure of primary values or perception of the Good we acquire via the moral and material world. It is a well-known truth that the question is much more difficult than the answer. The answer can be incorporated only if we abstract from different views.

4. Distribution can be just or unjust. It represents a relative relation to the social perception of the Good the distribution is connected to. These encompass the ways and principles of legitimacy, as well as the critical principle.
5. The social opinion has its own historical perspective, so the distributions, weather just or not, change from time to time. A certain clue to understanding the Good can be found in the normative structures, in the concrete time and space lines.
6. If the opinions vary, the distribution must be autonomous. Each social Good is constituted by the distributive sphere with a certain number of organized criteria.

In connection with the issue of pluralism, Rawls' theory of justice equalling to decency and a form of political liberalism, is considered by many as defining the political institutions as instrumental and serving the purposes of individuals and associations.

J. Rawls denounces this objection stating that the conception of justice as decency resigns to the ideal of political sociability if, this ideal, is only coupled with the religious, moral and philosophical doctrine. Pluralism, per se, excludes such a conception. In Rawls's extended consensus, a political conception is confirmed by citizens recognizing different doctrines.

Rawls[6] believes that if we allege that some society is well governed by a certain conception of justice, the main presumption is that it is a society where all the citizens accept and mutually recognize the same principles of justice.

Further, he anticipates that its main structure, the main political and social institutions are accountable to the stipulated principles, and that the citizens enjoy the awareness of justice, apply these principles, and act accordingly. Such a social unity represents the most effective and, in practice, optimal concept of unity.

However, according to Walzer, the plurality of theoretical thought, as well as the usage of terminology by which the structures, relations and operation of the society are expressed and evaluated, do not define their weakness or strength.

Along with the issue of simple equality, M. Walzer, on the comparative level, considers also the issue of complex equality. The arguments related to complex equality root in the position of our understanding, the current, positive perception of various social values, including the aspects of concreteness and particularity.

As already mentioned, simple equality represents a simple distributive condition. Equality itself is a complex relationship among people through which the values are communicated and created. However, it does not represent the identity of property. The distributive criterion, reflecting the distinction of the social values, plays an important role here.

M. Walzer puts the main stress on the three distributive principles, i.e.: free exchange, credits and needs. These principles enjoy the real power and are the substantial pillars of distribution.

Firstly, we would like to elaborate on the issue of the three aforementioned distributive principles, then, we will express our view to complex equality.

Walzer understands the free exchange as an open and, at the same time, a closed structure. He believes, that in the *free* process of exchange it will be possible to anticipate the specific division of the social values and, at the same time, it will be possible also to predict the general structure of division. On the theoretical level, the free exchange creates a market where all the values can be ex-

[6] RAWLS, J. A Theory of Justice. Cambridge Mass : Harvard University Press, 1971, p. 77.

changed for all the other values through a neutral medium – money. No values or monopolies are dominant in this context. Every exchange represents an expression of social opinion. The market, in its very basis, is radically pluralistic and in its operations and inputs very sensitive, especially in connection to the individual values.

M. Walzer imposes a question: What can interfere with the free exchange in the name of pluralism?

It is necessary to keep in mind that the everyday operation on the market, the real and current experience of the free exchange very much differs from the presumed theory.

Money is considered a neutral medium which represents a dominant value in the real life and is monopolized by those enjoying a special talent in the business sphere. There arises a situation where other people, not enjoying this talent, require a re-distribution of money to establish the system of simple equality. However, when we focus on the first and non-problematic moment of simple equality – the free exchange on the basis of equal shares – we will always need certain limits setting the possibilities of exchange, i.e. what can be exchanged for what.

3 POLITICAL POWER ACCORDING M. WALZER

Political power is used by Walzer for the purpose of illustration. He defines the political power as a system of values having a volatile price, votes, influence, offices, etc. Some of these values can become a subject of trade on the market and accumulated by the willing persons to sacrifice them in favour of other values. Always, when the sacrifice becomes real, it results in a certain form of tyranny – more precisely, the minute tyranny establishing the conditions of simple equality.

There can be doubts, and in reality they really do exist, whether the result is tyrannical from the standpoint of two or more persons who should reach the voluntary agreement.

It is definitely tyrannical from the standpoint of other citizens who are subjected to my disproportionate power. Walzer further believes that in a democratic society the democratic politicians sometimes buy the votes or, at least, try to win over the voters by giving promises, or by directing the public expenditures to specific voluntary groups of voters.

Free exchange is not a general criterion. Only extensive analysis, preferably based on the philosophical and not the authoritative system, make it possible to specify its limits. It is known that money have no limits – this is the primary form of the monetary cycle. The attempt to prevent their uncontrolled operation is the matter of convenience, as well as principle. Omission of this rational standpoint has its consequences through the chain of distributions.

Similar to the free exchange, also the credits enjoy the open-closed and pluralistic character.

M. Walzer asserts that it is always the ruling group that sets the criterion of credit.

Credit is the dominant goal, however, it also presumes and seeks objective judgment. Who is in the society authorized to regulate the distribution of influence within the bureaucracy, in the artistic sphere, and in politics? What should the criteria be? How can a person deserve to be instated in certain position? How can his objectivity be guaranteed?

According to Walzer, God is the only one who can read the secrets of human hearts. He is the only one capable of making important distributions.

If this task is done by people, the distributive mechanism is seized mainly by the aristocratic group. Afterwards, the credits cease to be a pluralistic criterion. M. Walter states that: "we will find our own face in the face of a new order (the old type) of tyrants."

And eventually, the criterion of needs: "To each according to his needs" is generally understood as the distributive half of Marx's maxim: Let's distribute the social wealth so that the needs of its members are fulfilled.

In reality, the first half of the maxim represents a distributive offer and does not provide for order within the second half of the maxim.

"To each according to his needs" presumes the work to be distributed on the basis of individual qualifications. However, the individuals usually do not experience the need to perform work for which they are qualified. Such type of work is very rare and there are a lot of qualified candidates to perform it. Who are the candidates who need it most?

What about the commission? What are the criteria of its decision-making? Walzer finds one question very interesting, i.e. what does the commission for selection of a director of a hospital in its decision-making prefer? Is it the qualification of candidates or the needs of patients? He concludes that a set of needs, if not based on the political controversy, will always lack simple distributive decision. He alleges that, after all, the Marx's maxim does not, in reality, facilitate the real distribution of political power.

Using the children's terminology, expressed in the concept of "I want", we need to recognize that we still would not acquire an adequate distributive criterion. Not everybody considers the honours, fame, valuable books as needs.

The examples enumerated by Walzer cannot be distributed equally among people having the same desires, as some of them are of general character while others are more or less important in view of the rational ownership.

The needs generate a specific distributive sphere with its own reasonable distributive principle.

Every founded criterion encounters a general rule in its own sphere. Basically, it is an effective rule distinguishing the values of distinctive groups of people based on different rational explanations and different procedures. This situation, eventually, represents the mapping of the entrance to the social world.

Walzer gives special attention to the social world. The analysis he provides enjoys the phenomenological character. It is not the ideal mapping that he pursues, his goal is much more to provide an analysis adequate to people and their reflection of life. Reflexion is the goal, of course, a special reflection stressing the understanding of the social values which are not predominantly reflected in the everyday practice. However, absence of the effort to attain such an understanding and comprehension would also represent a problem.

M. Walzer believes, that, for a very long time, the social understanding has been seeking the autonomy or the relative autonomy of the distributive spheres. It is not impossible to imagine a society where the dominance, as well as the role of the monopolies, is not breached. In this context, Walzer pays attention to the social castes (India). He understands them as strictly divided groups in a pluralistic society. The system of castes is constituted on an exceptional integration of the social opinion. Prestige, wealth, knowledge, bureaucracy, occupation, etc. – they all represent social values which are integrated in both the intellectual, as well as, natural hierarchies. The hierarchy itself determines the simple values of ritual purity.

Some kind of collective mobility, which can cultivate the outside markets highlighting the strict limits and presuming the rise of their position on the social scale, is possible for castes and subcastes.

The system as a whole rests on the religious doctrine promising the equality of chances not in this life, but through the lives of the soul. The individual status "here and now" represents the consequence of its conduct in the last incarnation. If the status is not satisfactory, it can be remedied by achievement of some credits in the current life, thus increasing its potential for the future. The distribution "here and now" is a part of a simple system, where the purity represents the predominant value. The birth and blood are dominant in the entire purity. All the values are as laurels in the hereditary monarchies. This is not the forum or criterion of the autonomous distributions.

The social understanding within the dimension of the imperial power encompasses some of the concepts of the God's favour, magic talent or human empathy. These represent the criteria for the ruling bureaucracy, potentially independent from the descent and blood. The social values are not integrated fully into bigger systems which are comprehensive only within their own terminology and mentality of the pertinent nation. The theory of values explicates the understanding of this type of values according to the system of their operation.

Tyranny always has a specific character, specific overstepping of the border, specific desecration of the social opinion.

The complex equality demands the protection of borders, as it works with a different type of values, as well as with different people. According to Walzer, we can speak only about the "regime" of complex equality due to existence of more limits. Simple equality is simpler. One dominant Good is distributed and makes the society egalitarian. Complex equality is, however, more complicated. Within these dimensions and limits of the complex equality, Walzer poses a question: What values must be autonomously formulated to become communicative relations of the equality among people? The answer to this question is not unequivocal and, consequently, there is no possibility to establish an ideal regime.

4 CONCLUSION

The social values are distributed and exchanged also through the political diversity. In a concrete society, the monopolies operate along these borders, but also within them. The political community is principally a closed one and can be entered into only through the world of common understanding. The language, history and culture together create the collective awareness. The national character created as a fixed and permanently mental order is predominantly a myth. Usually, it lacks the aspect of sensitivity and intuition within a society which represents the expression of the real life. In the contemporary world, the number of states where there exists no moment of sensitivity or intuition is on the rise. These attributes characterise mostly smaller states. In this situation, if we want our arguments to achieve the moral basis, it is necessary to appeal to the understanding of the cultural diversity and local autonomy. However, this is not just a task for philosophers, but for all of us, including, first of all, the politicians.

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CONSTITUTIONAL PRINCIPLES IN PUBLIC ADMINISTRATOR'S DECISION-MAKING UNDER THE CASE LAW OF THE SUPREME ADMINISTRATIVE COURT OF LITHUANIA

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Abstract: This paper serves few purposes. First, it examines the principles of public administration in Lithuania. Good administration principle is analysed as constitutional principle relying on the case law of the Supreme Administrative Court of Lithuania. Second, it explores impact of the decisions of Constitutional Court of the Republic of Lithuania to the contemporary judicial review of Lithuanian administrative courts. Therefore, one of the latest rulings of the Supreme Administrative Court of Lithuania related to the spelling of names and family names in the passports of citizens of the Republic of Lithuania will be reviewed.

Key words: constitutional principle, good administration, public administration

1 INTRODUCTION

The Law on Public Administration was adopted in Lithuania in 1999.[1] This act is important because of several reasons.

First, it establishes the notion of public administration. Article 5 of the Law on Public Administration governs five main spheres of the activity of public administration entities. These five spheres are: administrative regulation (adopting of administrative acts, namely regulatory), control of subordinate entities and supervision of non-subordinate entities, provision of administrative services (licensing, authorizing, submission of information, provision of consultations, etc.), administration of the provision of public services (services in the sphere of education, healthcare, science, culture, sport, etc.), internal administration of public administration entity.

Second, Article 4 of the Law on Public Administration establishes system of public administration entities in Lithuania. It is composed of state administration entities and entities of municipal administration. State administration bodies are institutions of executive power and independent regulatory bodies. There are 59 municipalities in Lithuania and all of them have their own organs of municipal administration.

Third, Article 8 of the Law on Public Administration governs general requirements for individual administrative acts. They are: an act should be based on objective data (facts) and the provisions of legal acts, if sanctions are applied by the act then reasons should be established, rights and duties should be clearly established or granted in the act, an act must be signed by a competent authority. Each person to whom an act is designated or whose rights and duties are directly affected, not later than within three working days of its adoption, should be notified in writing about the adoption of

[1] Law on Public Administration. 17 June 1999 No VIII-1234, Vilnius.

the act and receive a copy of this act. In contrast, requirements to regulatory administrative act are governed by different act – Act on the Basis of Law-making.[2]

Fourth, Article 3 provides principles which should be followed by public administrators. They are: the supremacy of law, objectivity, proportionality, absence of abuse of power, institutional assistance, efficiency, subsidiarity, "one-desk" principle, equality, transparency, responsibility for the adopted decisions, novelty and openness to change, principle of completeness or particularity. Among these principles easily could be identified constitutional principles. For example, the supremacy of law, proportionality, equality of persons before the law.

Following the aforementioned provisions of the Law on Public Administration of the Republic of Lithuania we can draw some conclusions. First, areas of activity of Lithuanian public administrators are regulated by the law, they do not stem from case law of national courts. Second, Lithuanian public administrators system consists of state administration and municipal bodies. Third, Article 8 of the Law on Public Administration is the main provision according to which Lithuanian administrative courts make judicial review over individual administrative acts. Fourth, Article 3 of the Law on Public Administration does not provide principle of good administration, except we can find some similarities with Article 41 of the EU Charter of Fundamental Rights. Thus, the report is mainly dedicated to analyze the principle of good administration as a constitutional principle.

For the introduction of this discourse we gave some legal backgrounds on the legal framework of Lithuanian public administration.

2 PRINCIPLE OF GOOD ADMINISTRATION AS A CONSTITUTIONAL PRINCIPLE

In Lithuania there are no commentaries on the Law on Public Administration or the Law on Administrative Proceedings.[3] However, the Supreme Administrative Court of Lithuania published a set of case law when the provisions of the Law on Public Administration are applied.[4]

Consequently, one chapter in this publication was dedicated to principles of public administration. Above we noticed that there is no definition of the principle of good administration in the Law on Public Administration, the Supreme Administrative Court in its publication begins the chapter on principles of good administration with Article 41 of the Charter of Fundamental Rights of the EU[5] which establishes the right to good administration. According to Article 41 the right to good administration includes the right to be heard before the individual decision could be taken, the right to have access to his or her file, reasoning decisions of public administrator. Moreover, administration should be impartial, fair and reasonably organize the time of decision-making.

The Supreme Administrative Court in its case law emphasizes that the principle of good administration is set in the main national acts and the Charter of Fundamental Rights of the EU.[6] Here the

2 Act on the Basis of Law-making. 18 September 2012 No XI-2220, Vilnius.

3 Law on Public Administration or Law on Administrative Proceedings. 14 January 1999 No VIII – 1029, Vilnius.

4 Case law of the Supreme Administrative Court of Lithuania applying the provisions of the Law on Public Administration of the Republic of Lithuania. Approved by the justices of the Supreme Administrative Court of Lithuania in 1st of June, 2016.

5 Charter of Fundamental Rights of the European Union (2000/C 364/01).

6 Case law of the Supreme Administrative Court of Lithuania applying the provisions of the Law on Public Administration of the Republic of Lithuania, p. 464 – 465.

Court as the "main national acts" meant namely Article 5(3) of the Constitution of the Republic of Lithuania: "*State institutions shall serve the people*". Thus, Supreme Administrative Court states that "Notwithstanding the fact that the principle of good administration is not directly enshrined in the Law on Public Administration, according to the case law of the Supreme Administrative Court of Lithuania it comes from the provisions of the Constitution".[7] The institutions of public administration are bound by the principle of good administration with the help of which Article 5(3) of the Constitution is implemented.[8] Consequently, the principle of good administration could be considered as a constitutional principle.[9]

According to the case law of Lithuanian administrative courts the principle of good administration contains various imperatives.[10] Each of them will be briefly described.

First, the obligation of public administrators to state reasons. This imperative reflects Article 8 of the Law on Public Administration and Article 41 of the Charter of Fundamental Rights of the EU. In the case law it is stated, that "an individual administrative act, which does not sufficiently detail the circumstances and legal provisions on which the legal act is based, does not <…> comply with the principle of good administration".[11] Moreover, the principle of good administration obliges a public administration entity to make a decision on the matter and to specify the whole set of the facts and legal rules on the basis of which the decision was made.[12]

Second, the duty of public administrators to interpret the procedure for appeal of an administrative act. According to the Supreme Administrative Court, the principle of good public administration and the principle enshrined in the Constitution that public authorities serve people does not coincide with the failure to explain the procedure for appealing against an administrative act.[13]

Third, the obligation of public administrators to inform about an infringement of public interests. The Court emphasizes that public administrators shall inform the prosecutor or other competent entity about the possible violations of the public interest.[14]

Fourth, a duty to be impartial. It means that the priority in decision-making is in the public interest. This principle should prevent the emergence and spread of corruption in civil service. One of the instruments in order to prevent corruption in civil service are the provisions of the Law on the Coordination of Public and Private Interests.[15]

Fifth, the duty of public administrators to take active steps, help and act diligently. This means that public administrators shall act with care and diligence when making administrative decisions. Moreover, they have to ensure that applicable legal provisions are complied with during the admin-

7 Case law of the Supreme Administrative Court of Lithuania applying the provisions of the Law on Public Administration of the Republic of Lithuania, p. 465.

8 Supreme Administrative Court of Lithuania. Administrative case No eA-1245-662/2015.

9 EUCJ in its case law regards the principle of good administration as part of the general principles. See: Supreme Administrative Court of Lithuania. Administrative case No A858-47/2014.

10 Case law of the Supreme Administrative Court of Lithuania applying the provisions of the Law on Public Administration of the Republic of Lithuania, p. 465 – 472.

11 Supreme Administrative Court of Lithuania. Administrative case No A444-878/2013.

12 Case law of the Supreme Administrative Court of Lithuania applying the provisions of the Law on Public Administration of the Republic of Lithuania, p. 466.

13 Supreme Administrative Court of Lithuania. Administrative case No AS858-284/2014.

14 Supreme Administrative Court of Lithuania. Administrative case No A146-335/2008.

15 Law on the Coordination of Public and Private Interests. 2 June 1997 No VIII-371, Vilnius.

istrative procedure. This also means that a public administrator must provide the person concerned with objective and correct information on a matter of his/ her interest.[16]

Sixth, cooperation between the parties. It is related with the availability of administrative services. The latter means that a public administration entity is required to advise an applicant on how to initiate a process on an issue and provide information to help a private person to find the most effective ways of achieving the goal.[17]

Seventh, the right to be heard and informed. This imperative means that public administrator in the decision-making process if it negatively and directly affects the rights of individuals must give the opportunity within a reasonable time and in a manner prescribed by laws to express their views. Lithuanian administrative courts rely on Article 41 of the Charter of Fundamental Rights of the EU, Article 8 of the Law on Public Administration of the Republic of Lithuania and Article 14 of Recommendation to Member States on Good Administration[18] explaining this right of individuals.

Eighth, the right to effectively protect individual's rights. This principle, according to national administrative courts is related to "one-desk" principle. This principle is established in Article 3(8) of the Law on Public Administration: "person shall receive information, submit an application, a complaint or a notification and receive an answer to them at one workplace. An entity of public administration who is considering an application, a complaint or a notification and adopting an administrative decision shall consider the application, complaint or notification and shall receive information from its administrative units, subordinate entities and, where necessary, from other entities of public administration, and shall not impose such obligation on a person who has submitted the application, complaint or notification".

3 ON THE SPELLING OF NAMES AND FAMILY NAMES IN THE PASSPORTS OF CITIZENS OF THE REPUBLIC OF LITHUANIA

According to Article 72 of the Law on Constitutional Court of the Republic of Lithuania,[19] the rulings of the Constitutional Court are binding on all authorities, courts, all enterprises, institutions and organizations, officials and citizens. However, in the last few years a new trend has occurred. The Lithuanian courts, including administrative courts appeal less to the Constitutional Court and instead rely on the jurisprudence of the EUCJ and ECHR.

This new development can be found in the case concerning the writing of foreign names and surnames in passports of Lithuanian citizens.[20]

1. The Constitutional Court in 1999 rendered a decision in which it ruled that:

16 Supreme Administrative Court of Lithuania. Administrative case No eA-2142-624/2015; Case law of the Supreme Administrative Court of Lithuania applying the provisions of the Law on Public Administration of the Republic of Lithuania, p. 467.

17 Supreme Administrative Court of Lithuania. Administrative case No A822-2220/2012; Supreme Administrative Court of Lithuania. Administrative case No A143-1486/2014; Supreme Administrative Court of Lithuania. Administrative case No eA-2266-858/2015; Case law of the Supreme Administrative Court of Lithuania applying the provisions of the Law on Public Administration of the Republic of Lithuania, p. 470.

18 Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on Good Administration.

19 Law on Constitutional Court of the Republic of Lithuania. 31 May 1994 No I-480, Vilnius.

20 There are no „q", „x", „w" characters in Lithuanian language alphabet.

- "Attention should be paid to the fact that individuals residing in Lithuania regard themselves as belonging to more than a hundred nationalities. Various characters are used in their languages which often are totally or in part different from Lithuanian characters. In case legal norms provided that the names and family names of these citizens had to be written in other, non-Lithuanian characters, then not only the constitutional principle of the state language would be denied but also the activity of state and municipal institutions, that of other enterprises, establishments and organisations would be disturbed. Due to this citizens would face more difficulties in implementing their rights and legitimate interests and the principle of their equality before the law established in the Constitution would be violated".
- "Writing entries in the passport of a citizen of the Republic of Lithuania in the state language does not deny the right of citizens regarding themselves as belonging to various national groups to write their names and family names in any language as long as it is not linked with the sphere of the use of the state language pointed out in the law".[21]

2. In less than 10 years Lithuanian courts in contrast to above-mentioned decision of the Constitutional Court instructed the migration and other competent authorities to issue passports of the Republic of Lithuania with the original characters of foreign names and surnames. The panel of justices of the Supreme Administrative Court ruled that:
   - "The jurisprudence of supranational courts has revealed that the use of a person name and surname is an integral part of the right to private and family life and state interference, prohibiting the original spelling of the person's name and surname, can only be carried out if there is a proportionate measure for achieving legitimate aims".[22]
3. The panel of justices relying on the preliminary ruling of the EUCJ[23] noted that it would be inconvenient for a person to be able to write his or her surname on his identity card and passport of the Republic of Lithuania differently from his father's surname. Moreover, justices relied also on the jurisprudence of the ECHR.[24]

In May of 2017 the ECHR asked the Government of Lithuania for explanations regarding the writing of names and surnames in personal documents of Lithuanian citizens because the petition of Lithuanian woman married to Austrian man was filed to the ECHR. The woman argued a breach of her right since she was not able to enter her surname with the character "W" in the passport and marriage certificate. The Strasbourg court pointed out that these decisions cannot be enforced until the law is amended.[25] In spring of 2017 several drafts of the Law on the Writing of Names and Surnames were released. However, the new law is still not adopted. The current law is adopted in 1991[26] and it governs that the name and surnames of non-native persons are written in Lithuanian characters when a passport of the Republic of Lithuania is issued.

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21 Ruling of Constitutional Court of the Republic of Lithuania on the spelling of names and family names in the passports of citizens of the Republic of Lithuania, 21 October,1999. Case No 14/98.

22 Supreme Administrative Court of Lithuania. Administrative case No eA-2176-662/2017; other case related to the same topic: Supreme Administrative Court of Lithuania. Administrative case No A-2445-624/2017.

23 Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn *v* Vilniaus miesto savivaldybės administracija and Others. Case C-391/09; ECLI:EU:C:2011:291.

24 Znamenskaya v. Russia – 77785/01 [2005] ECHR 361 (2 June 2005); Johansson v. Finland, no. 10163/02, ECtHR (Fourth Section) (6 September 2007); Mentzen v. Latvia, no. 71074/01, ECtHR (Fourth Section) (7 December 2004); Bulgakov v. Ukraine, no. 59894/00, ECtHT (11 September 2007).

25 <http://www.lrt.lt/naujienos/lietuvoje/2/179894/eztt-praso-lietuvos-paaiskinimu-del-pavardziu-rasymo-dokumentuose>.

26 Decision of Supreme Council of the Republic of Lithuania on writing of names and surnames in the passport of the citizen of the Republic of Lithuania, 31 January1991 No I-1031, Vilnius.

4 CONCLUSIONS

1. There is no definition of good administration in Lithuanian legal regulation. The Supreme Administrative Court of Lithuania presumes that it could be derived from Article 5(3) of the Constitution of the Republic of Lithuania where it is stated that "*State institutions shall serve the people*". According to the jurisprudence of the Supreme Administrative Court, the principle of good public administration includes 8 imperatives: obligation to state reasons, the duty to interpret the procedure for appeal of an administrative act, obligation to inform about a public interest infringement, impartiality, the duty to act carefully, cooperation between the parties, the right to be heard and informed, and the right to effectively protect individual's rights.
2. A new development in the Lithuanian courts has occurred. The Lithuanian courts, including administrative courts, rely less on the case law of the Constitutional Court and rely more on the jurisprudence of the EUCJ and ECHR.

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GOOD ADMINISTRATION THROUGH THE LENS OF THE CJEU: DIRECTION FOR THE ADMINISTRATIVE BODIES[1]

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Abstract: The CJEU has played significant role in forming the principles applicable to administrative law, the provisions of EU treaties not being able to cover all situations. The Court re/defines the general principles of administrative law applicable to the Member States and the paper analyses the way in which these principles have been evolved and implemented.

Keywords: administrative law, principle of good administration, EU, Member States, Charter of Fundamental Rights

1 INTRODUCTION

With the creation of the Charter of Fundamental Rights, the Union sought to strengthen its commitment to fundamental (human) rights. The Charter outlined the general human rights policy in 50 articles, with Article 41 with the right to good administration.[2] According to the Charter of Fundamental Rights, every person, that is to say, union citizen and third-country citizen, can rely to the right to good administration in their relations with European Union institutions and bodies. Also, each Member State of the European Union should concern itself with identifying and promoting the most adequate measures for ensuring good governance and good administration. In order to understand the concept of good administration, the common principles applicable to public administration are recognized and promoted especially by national and European courts. The Court of Justice's role in this field is of utmost importance, because it is the main judicial body which has played and is playing very important role in unfolding principles, among others principles applicable to administrative law, and being the interpreter of EU law. Also, the provisions of EU treaties could not and cannot cover all life-situation.

2 THE PRINCIPLE, THE RIGHT

The right was mentioned for the first time in the Treaty of Nice that proclaimed the first draft of the Charter of Fundamental Rights of the European Union, which became binding only on 1 December 2009 based on the Treaty of Lisbon. The explanations of the right to good administration were originally prepared under the authority of the Praesidium of the Convention which drafted

1 The paper was written under the aegis of the Bolyai Research Grant of the Hungarian Academy of Sciences.

2 With the active involvement of the EU Ombudsman, the Charter was incorporated even into the draft European Constitution.

the Charter of Fundamental Rights of the European Union: Article 41[3] is based on the existence of a Community subject to the rule of law whose characteristics were developed in the case law which enshrined inter alia the principle of good administration.[4] It is important to note that the wording for that right in the first two paragraphs of Article 41 results from the case law,[5] and the wording regarding the obligation to give reasons comes from Article 253 of the EC Treaty.[6] The principle of good administration requires that EU law provisions are given full effect so as to achieve the result sought by the Directive (to provide for family reunification where the conditions are met) by good administrative practice. The CJEU found that Article 41 of Charter was restricted to the right to good administration by the 'institutions, bodies, offices and agencies of the Union' to whom that Article is addressed. However, the principle of the right to good administration is still applicable to Member States.[7]

3 THE CJEU CASE LAW IN PROMOTING THE RIGHT TO GOOD ADMINISTRATION

The European Court has stressed the importance of procedural guarantees as a counterbalance to administrative discretion and recognised an array of general administrative principles e.g.:

1. the principle of good administration,
2. the principle of legal certainty,
3. the principle of equality,
4. the principle of proportionality,
5. the principle of non-discrimination.

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3 1.Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:
   - the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
   - the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
   - the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

4 See Court of Justice judgment of 31 March 1992 in Case C-255/90 P, Burban [1992] ECR I-2253; Court of First Instance judgments of 18 September 1995 in Case T-167/94 Nölle [1995] ECR II-2589; and 9 July 1999 in Case T-231/97 New Europe Consulting and others [1999] ECRII-2403).

5 Court of Justice judgment of 15 October 1987 in Case 222/86 Heylens [1987] ECR 4097, paragraph 15 of the grounds, judgment of 18 October 1989 in Case 374/87 Orkem [1989] ECR 3283, judgment of 21 November 1991 in Case C-269/90 TU München [1991] ECR I-5469, and Court of First Instance judgments of 6 December 1994 in Case T-450/93 Lisrestal [1994] ECR II-1177, judgement of 18 September 1995 in Case T-167/94 Nölle [1995] ECR II-258.

6 Draft Charter of Fundamental Rights of the European Union – Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50 http://www.europarl.europa.eu/charter/convent49_en.htm

7 See CJEU (Joined Cases), C-141/12 and C-372/12, YS v. Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v. M. S. 17 July 2014, paras 66 – 69.

The EU principle of the right to good administration, requires that one should have their affairs handled impartially, fairly (transparently) and within a reasonable period of time by the institutions, bodies, offices and agencies of the Union.[8] It also requires that parties to proceedings should not be penalised by virtue of the fact that they did not comply with procedural rules 'when this non-compliance arises from the behaviour of the administration itself'.[9] Following we can see some examples of the case-law:

Principle of good administration

According to Advocate General Kokott in C-109/10 P, in accordance with the principle of good administration, the Commission has an obligation to ensure the file's proper management and safe storage. Proper management of the file includes not least the production of a meaningful index to be used for the purposes of granting access to the file at a later date.

The principle of legal certainty

According to Case C-209/96, the principle of legal certainly requires that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them, and individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly as recalled in Case C-143/93.

The principle of equality

The Case C 186/87 had a significant impact on the evolution of ***the principle of equality*** taking into account the discrimination criterion based on nationality. In this case, the Court stated, that as a recipient of services a tourist was entitled to take advantage of the freedom of provision of services concept set out in Article 49EC. Everyone is a potential recipient of services so every citizen crossing Member State borders inside the Community is protected by the free movement principle and the right to equal protection in the Member States he or she visits.

The principle of proportionality

In Case C-265/87, the Court of Justice of the European Union has interpreted the principle of proportionality to require that any measure of the European administration be based on law; to be appropriate and necessary for meeting the objectives legitimately pursued by the act in question; where there is a choice among several appropriate measures, the least onerous measure must be used; and the charges imposed must not be disproportionate to the aims pursued.

8 In HN the CJEU held that 'as regards the right to good administration, enshrined in Article 41 of the Charter, that right reflects a general principle of EU law'. Case C-604/12,H.N v Minister for Justice, Equality and Law Reform, Ireland 8 Mary 2014, para 50.

9 CJEU, Case C428/05, Firma Laub GmbH & Co. Vieh & Fleisch Import-Export v Hauptzollamt Hamburg-Jonas, 21 June 2007.

The principle of non-discrimination

In Case C 184/99, a domestic court addressed the CJEU two preliminary questions on the interpretation of Articles 12, 17 and 18 of the Treaty establishing the European Community (TEC). The case was about a French citizen who came to study in Belgium, had been self-supporting during the first three years of study, but in the last year of study, in order to focus on the study, he applied for the so-called minimex, a social security benefit. This has been originally granted to him, but later withdrawn on the ground that he is a European Community national registered as a student. The Court ruled that if a Belgian citizen had been in the same position as the French citizen he would have received the social security benefit, hence there was a ***discrimination based on nationality***, and ruled for the protection of all persons, regardless of their nationality, in exercising their rights and applying legal regulations equally.

4 THE CJEU, THE ECHR AND THE RIGHT TO GOOD ADMINISTRATION

In Case C-308/07 P the Court decided among others whether the Parliament had breached Article 20 of the Code of Good Administrative Behavior, which establishes the obligation to notify the decisions that affect the rights or interests of individuals.[10] The Court dismissed that ground because the Code is not a legally binding instrument,[11] even though elements of the Code overlap, however, with the fundamental right to good administration, which is enshrined in Article 41 of the Charter of Fundamental Rights of the European Union. But the Court made several very important steps unfolding the right to good administration.

The Court underlined that although the EU has not joined the European Convention on Human Rights (ECHR), which excludes, on legal grounds, a direct application of the provisions of this international convention in the Community legal order, nevertheless, the fundamental rights form an integral part of the general principles of law whose observance is ensured by the Court. To this effect, the Court draws upon the constitutional traditions common to the Member States, as well as from the guidelines provided by international instruments concerning the protection of human rights on which Member States have cooperated or which they joined. In this regard, the ECHR has a special meaning.[12]

The subsequent evolution of the European integration process established this case law on Article 6 (2) TEU, stating that the Union observes fundamental rights, as they are guaranteed by the ECHR signed in Rome on 4 November 1950, as well as how they result from the constitutional traditions common to the Member States, as general principles of Community law. Therefore, the ECHR provisions and the case law of the European Court of Human Rights have always been considered by the CJEU, although the EU has not yet joined the ECHR. The Court pointed to the very issue of the definition: the principle of good administration is not a single principle of the administrative law, but gathers several principles and is, in a way, a generic notion that includes all the principles

10 1. The official shall ensure that decisions which affect the rights or interests of individual persons are notified in writing, as soon as the decision has been taken, to the person or persons concerned. 2. The official shall abstain from communicating the decision to other sources until the person or persons concerned have been informed.

11 Recommended by the European Ombudsman and approved by the European Parliament.

12 Paras. 54 – 56.

of administrative law or some of these. The mentioned principle is sometimes used as a synonym for the principles related to an administrative procedure based on complying with the law. The principle of good administration requires especially the national authorities to remedy the mistakes or omissions, to carry out the procedure impartially and objectively and to make a decision within a reasonable time. Furthermore, this principle implies an extended obligation of diligence and solicitude devolving on the authorities, the right of defense, namely the obligation of agents to enable the persons concerned by a decision to express its point of view, as well as the obligation to justify the decision.[13] However, the Court points to the fact that the principles coming under the concept of good administration principle vary and are not always easy to determine, and there is difficulty of evaluating whether it is about principles whose observance falls exclusively on the administrative authorities or about powers that confer individuals a subjective right to require those authorities a determined obligation of acting or not acting.[14] This depends, on the one hand, on the legal nature of the original text and, on the other hand, on the normative principle resulting from the relevant provisions. It also reinforced that the case law was the main source for the formulation of Article 41 of the CFREU that transformed the principle of good administration into a fundamental right.[15]

5 GOOD ADMINISTRATION: A LINK BETWEEN THE CJEU AND THE EU OMBUDSMAN

The European Ombudsman recommended the institutions, bodies and agencies to apply rules that record the good administrative procedure for their own officials in relations with citizens. The development of principles of public administration would provide a framework for citizens to expect good administrative behaviour and set out procedural guarantees and would help citizens and officials to understand, what good and bad administrative procedure means. In order to clarify the right to good administration the European Ombudsman has drawn up the European Code of Good Administrative Behaviour, which contains guiding principles for the relationship between citizens and civil servants. In addition, the principle of good administration requires from the Community institutions and bodies the compliance with their obligations, the service-minded attitude and it ensures the appropriate treatment of citizens. The ombudsman promotes the Charter through his procedure: takes into account its principles and rules when investigates instances of maladministration. The Code of Good Administrative Behaviour was approved, with some amendments, by the European Parliament in its Resolution of 6 September 2001. This approval gives a strong legitimacy to the principles contained therein, which can subsequently be considered as applicable to all Community institutions and bodies. At present, there are at the EU institutions' level the Code of Good Administrative Behaviour and a numberof individual codes which the Community institutions, bodies and decentralised agencies have all adopted with various forms and content, some of which are textually the same as the European Code of Good Administrative Behaviour.The European Code of Good Adminisrative Behaviour sets out a number of principles which should be observed by European officials, including lawfulness (Article 4), absence of discrimination (Article 5), pro-

[13] Para. 89.
[14] Para. 90.
[15] Para. 91.

portionality (Article 6), consistency (Article 10), absence of abuse of power (Article 7), impartiality and independence (Article 8), objectivity (Article 9), fairness (Article 11), courtesy (Article 12), duty to reply to letters in the language of the citizen (Article 13). There are also important rules on procedure such as the obligation to notify all persons concerned of a decision (Article 20), the obligation to keep registers and the obligation to document administrative processes (Article 24).[16] The special relationship with the European Court must be touched on, too. The Court considers the complaint procedure as an alternative procedure next to its own, and this is the way how the complementary role of the European office can be explained. However, the Court clearly set up the border of the Ombudsman's mandate and activity in several judgments. Thus, when an applicant referred to a draft recommendation of the ombudsman, the Court of First Instance declared that an 'act of maladministration' by the Ombudsman does not mean in itself, that the conduct constitutes a sufficiently serious breach of a rule of law within the meaning of the case-law. According to the Ombudsman, an error of legal interpretation is a form of maladministration, and in a court case the applicant relied on the ombudsman's non-binding draft recommendation which included the ombudsman's own legal interpretation of a provision, the Court of First Instance stated that the conclusive interpretation of the law is not within the remit of the Ombudsman. Thus, it did not eliminate the Ombudsman's interpretation only limited it. The Court of First Instance also pointed out that it has jurisdiction to entertain an action for compensation against the Ombudsman; it can examine the decisions and inquiries taken by the ombudsman thus has judicial control over them. This is very important because the Ombudsman has no jurisdiction to question a decision of an institution or body but as we saw the ombudsman gives his opinion even in connection with the merit of a decision. With action of damages against the Ombudsman the Court has the option to state that even the Ombudsman's actions can lead to maladministration – for whose prevention the office was established.[17]

6 CONCLUSION

The Court defined the general principles of administrative law applicable to Member State. But it is like a never-ending work, as it has analyzed time to time in its decisions the emergence and development of the good administration principle. When the principle of good administration turned into a fundamental right through the Charter of Fundamental Rights, the variety of principles under the umbrella right did forecast the continuous interpretation of this notion taking into account the ever changing life situtation. However, we shall point out that the European Ombudsman is an active participant next to the Court, as the office was created to act on behalf the European citizens, as a mediator between the EU administration and the EU citizen when their right to good administration is infringed. Thus, the right to good administration is protected by the Court and as a non-judicial body, the European Ombudsman.

16 Council of Europe: European Commission for Democracy through Law (Venice Commissionstocktaking on the Notions of "Good Governance" and "Good Administration" Strasbourg, 9 March 2011.

17 See more FRIEDERY, R. Representing European Citizens? The EU Ombudsman's Forum in Shaping the Common European Identity. In Common European Identity in the context of current legal challenges. Bratislava : Comenius University in Bratislava, Faculty of Law, 2017, pp. 95 – 101.

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Forthcoming issue: 2018, volume 2, number 2
Deadline for submissions of papers: 31st October 2018
Review procedure and editing processes: November 2018
Foreseen date of publication: December 2018

STUDIES

ARTICLES

ISSN 2585-7088
EV 5519/17