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CONTENT

STUDIES

JUDICIAL REVIEW OF DISCRETIONARY POWERS IN THE ACTIVITY OF HISTORICAL MONUMENTS PROTECTION BODIES. THE EXPERIENCE UNDER THE CASE LAW OF POLISH ADMINISTRATIVE COURTS[1]

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Abstract: The sovereign nature of the forms of operation of cultural heritage protection authorities, the polarization between the individual interest and the public interest, discretion margin in the activities of the authorities, all these elements create a kind of "explosive mixture", which is the source of the legal disputes between the owners of historical monuments and historical monuments protection bodies. The key element of the guarantee of individual freedom is judicial review of public administration. Therefore, it is a matter of dispute to which extent the public administration is subject to judicial review when performing the tasks entrusted. The aim of this article is to analyze how Polish administrative courts approach the problem. What methodology of the review of discretion margin they use? How they solve the dilemma: who makes the final decision – the body or the court? Do they retain the judicial self-restraint or rather they are willing to interfere in the merits of the decision?

Keywords: protection of monuments, judicial review, discretionary powers, decision-making freedom, public and individual interest, property right

1 INTRODUCTION

Protection of historical monuments is an area of particular polarization of the public and individual interests. Inevitably, there is a state of tension between the freedom to use the subject of property rights and the public interest expressed in the need to protect one of the key elements of the cultural heritage of the state. Almost every form of monument protection is a limitation of the property right. Protection of historical monuments is an expression of the care for the memory and cultural identity of the nation, and this is an element of the raison d'être. The State cannot survive without the foundation of history and culture.

The legal forms of the implementation of tasks by the historical monument protection authorities must be sufficiently flexible. The object of protection is of a specific character. To determine what is a monument and, consequently, what is the subject of protection, requires an assessment based on expertise in the field of art, history and science. It is difficult to describe the subject of the protection in an abstract way, using the rigid language of legal norms. This creates the first sphere of discretion margin.

[1] The paper was prepared as part of the research project "Legal acts of the provincial monument conservator", financed from funds of the National Science Centre, Poland (Ref. UMO-2015/19/B/HS5/02525).

In addition, the administrative body's activities must be adequate to the needs of a particular object of protection, so the body must creatively and dynamically adjust the activities to the needs. This creates the second sphere of discretion margin. The legislature is not able to describe in a rigid way the determinants for taking appropriate protective measures by the authorities.

The sovereign nature of a significant part of the forms of operation of cultural heritage protection authorities, the polarization between the individual interest and the public interest, the necessary discretion margin in the activities of the authorities, all these elements create a kind of "explosive mixture" that creates legal disputes between the owners of historical monuments and historical monuments protection bodies.

In a democratic state governed by the rule of law, an individual must be guaranteed real legal protection against acts of public administration. The key element of the guarantee of individual freedom is judicial review of public administration. Therefore, it is a matter of dispute to which extent the public administration is subject to judicial review. It is about appropriate separation of functions: the public administration is to implement the administrative policy, while the role of administrative courts is to review whether this function is correctly exercised under the legal provisions governing the activity of the administration. Due to the separation of functions, the court cannot substitute the administrative body, and it cannot take a discretionary ruling instead of the ruling the body has issued under its discretionary power. The key question is who has the decisive voice, and who makes the final decision (*Letztentscheidung*)?[2]

The purpose of my article is to analyze how Polish administrative courts approach the problem so defined – what methodology of review of the discretion margin of administration they use as they try to solve the dilemma: who makes the final decision. Whether they retain the judicial self-restraint or rather in the name of protecting the rights of the owner of the monument, they are willing to interfere in the merits of the decision.

2 DISCRETION MARGIN IN THE ACTIVITIES OF HISTORICAL MONUMENTS PROTECTION BODIES

2.1 Discretion margin in the activities of public administration

The approach to classifying the types of discretion margin in the activities of public administration bodies differs in different legal systems.

Without going too far into a wider reflection on this subject, it should be remembered that for French administrative law a broad notion of discretionary powers of the administration is characteristic, without strictly distinguishing between its various categories.[3] The discretionary powers (*pouvoir discrétionnaire*) are generally described as a situation in which legal rules leave the administration a wide margin of assessment (*large marge/pouvoir d'appréciation*). In other words: when making a decision, the body has the power to assess the facts as a result of which it can choose

[2] MAURER, H.: Allgemeines Verwaltungsrecht. München: C. H. Beck 2011, p. 142.

[3] Similarly: SCHWARZE, J.: Grundlinien und neure Entwicklungen des Verwaltungsrechtschutzes in Frankreich und Deutschland. In: Neue Zeitschrift für Verwaltungsrecht, 1996, no. 1, p. 25.

between different decisions, each of which must be judged by the court as lawful. The key elements are the freedom to choose a settlement and freedom of assessment.[4]

Similarly, English administrative law does not pay much attention to classification, focusing rather on delineating the limits of discretion margin. For an English court, more important are the limits in which it can control the use of discretionary powers by the administration, rather than precise conceptual classifications.[5]

In turn, for German-language science, it is characteristic to separate the spheres of the discretionary powers in the activities of public administration through the distinction between discretion (*Ermessen*) and the vague terms (*unbestimmte Begriffe*). The notion of discretion should refer only to the element of a legal norm specifying the legal consequences. Discretion occurs when the statutory conditions of the actual state are related to an alternative, equivalent from the point of view of the lawfulness of the settlement.[6]

In the sphere related to the determination of the facts, a form of discretion margin is the concept of free evaluation areas (*Beurteilungsspielräume*).[7] The legislature introduces this form of discretion margin in administration activities through the use of vague terms. However, these forms do not constitute a uniform category.

It is distinguished, on the one hand, by the "empirical" notions which can be clarified on the basis of objectively verifiable indicators. Their vagueness is conditioned by the factual circumstances regarding time or place, which means that the meaning of this term in a specific place and at a specific time can be objectively clearly specified (defined). Such a degree of objectivity cannot be achieved in relation to vague terms in the strict sense. In the case of these terms, all that falls under the type is legal, and everything that goes beyond this area is illegal.[8] It is impossible to state, by cognitive reasoning, what is the correct meaning of the vague term in an individual case. The legally permitted content is on a certain scale of assessments.

The Polish studies of administrative law remain under the influence of the German-language legal scholarly opinion, maintaining the division into two different areas of discretion margin: administrative discretion and other types of freedom of assessment resulting from the use of vague terms.[9] This is important because Polish courts refer to these concepts, but not always consistently, which will be discussed in further considerations.

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4 CHAPUS, R.: Droit administratif général. Tome I. Paris: Montchrestien, 2001, p. 1056; DUBOUIS, L.: La théorie de l'abus de droit et la jurisprudence administrative. Paris: LGDJ, 1962, p. 37; SERRAND, P.: Le contrôle juridictionnel du pouvoir discrétionnaire de l'administration à travers la jurisprudence récente. In : Rev. du droit public, 2012, no. 4, p. 901-902.

5 BRINKTRINE, R.:Verwaltungsermessen in Deutschland und England. Heidelberg: C. F. Müller, 1997, p. 334-337; CRAIG, P.: Administrative Law. 7th ed. London: Thomson, 2012, p. 561-563; WADE, W. – FORSYTH, Ch.: Administrative Law. 9th ed. New York: Oxford University Press, 2004, p. 343-344.

6 MAURER, H.: Allgemeines, op. cit., p. 143-144; ACHTERBERG, N.: Allgemeines Verwaltungsrecht. Heidelberg: C.F. Müller, 1986, p. 345-346.

7 BACHOF, O.: Beurteilungsspielraum, Ermessen und unbestimmter Rechtsbegriff. In: Juristenzeitung, 1955, no. 4, p. 97–98.

8 OSSENBÜHL, F.: Rechtliche Gebundenheit und Ermessen der Verwaltung. In: ERICHSEN, H.-U. (ed.): Allgemeines Verwaltungsrecht. Berlin–New York: Walter de Gruyter, 1995, p. 182-183.

9 See: JAŚKOWSKA, M.: Uznanie administracyjne a inne formy władzy dyskrecjonalnej administracji publicznej. In: HAUSER, R. – NIEWIADOMSKI, Z. – WRÓBEL, A. (eds.): System prawa administracyjnego. Tom I. Instytucje prawa administracyjnego. Warszawa: C.H. Beck, 2010, p. 298-303.

2.2 The specificity of discretion margin in the monument protection

Legal regulations defining the tasks of monument protection authorities create a specific accumulation of discretion margin. First of all, there are different species of discretion margin at different levels of regulation: both at the level of the description of the facts (vague terms), and on the other, there is also a typical discretion in the regulations, and thus an element of the description of legal consequences. Secondly, at the level of the description of facts, there is another aspect of the specificity of discretion margin, resulting from a peculiar mix of technical, historical and art-related knowledge, but also assessments of the value. The specificity of discretion margin appears at the very basics – the normative definition of the object of protection. Various terminology is used in different legal systems, indicating a broader (cultural heritage) or narrower (historical monument) scope of the concept. The terminology used by the legislature can be dictated by various motives. Of course, the scope of regulation is a general motive – whether it is generally about all the cultural assets (broadly understood), irrespective of the era they come from, or the regulation is to deal with a slightly narrower aspect – "memorabilia of the past" deserving protection as a testimony of the development of cultural heritage in various geographical aspects (global, regional, national).

One example is the Convention Concerning the Protection of the World Cultural and Natural Heritage, which considers a monument a subcategory of the cultural heritage, and therefore covers it with a broader scope of protection.[10] The Convention describes monuments as part of the cultural heritage and defines them as: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science. In addition, the Convention protects groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; as well sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

However, it is not the only determinant of the methodology used in legal regulations. For example L. V. Prott and P. J. O'Keefe prove the superiority of the term "cultural heritage" over the concept of "cultural property", claiming that the concept of cultural property does not allow the problem of the owner's duties in the protection of the asset to be recognized.[11] The terminology used in the regulations may, therefore, have a deeper meaning, it constitutes the expression of a specific "legislator's philosophy" in the approach to the problem of protection of historical monuments. Terminology can therefore be one of the guidelines to read the legislature's will regarding protected values, and consequently one of the hints on how to resolve the aforementioned collision of individual and public interests.

Guided by the methodological assumptions adopted at the outset, I will refer to Polish legal regulations. The Polish Act of 23 July 2003 on protection and guardianship of historical monuments uses a narrower concept of a historical monument.[12] The act defines a historical monument as: immov-

[10] Adopted by the General Conference at its seventeenth session Paris, 16 November 1972. The text of the Convention is available at: whc.unesco.org/archive/convention-en.pdf (accessed on 5th November 2018).

[11] PROTT, L. V. – O'KEEFE, P. J.: Cultural Heritage or Cultural Property. In: International Journal of Cultural Property, 1992, no. 1, p. 309.

[12] Currently: Official Journal 2017, file 2157. Next: APHM.

able or movable object or part or group thereof, made by man or connected with man's activity and constituting a testimony to a past era or event, the preservation of which is in the interest of society due to its historical, artistic, scientific or academic value (Article 3.1).

The statutory definition of a historical monument contains a number of vague terms, ranging from determining whether an object "a testimony to a past era or event", by assessing its "historical, artistic or academic value", to determining whether the preservation of this object is in the "interest of society". The discretion margin of the body has a different character in each of these elements. The evaluation of historical, artistic or academic value of a historical monument undoubtedly refers to empirical knowledge. However, it is also a reasoning in the sphere of values, that is, assessments, and these can never be fully objectified.

A number of key questions from the point of view of the judicial review of the public administration arise: who is to assess – do the officials employed in the historical monuments protection bodies have adequate knowledge in this regard? How to make the assessments more objective? Which criteria should be adopted, especially by the administrative court? I will get back to these questions later, because they are directly related to the issue of the methodology of judicial review of discretion margin of historical monuments protection authorities, in the jurisprudence of Polish administrative courts, which is essential to my article.

The most susceptible element to the possibility of an objective approach seems to be the concept of "testimony to a past era or event". On closer examination, such a statement becomes doubtful. There are questions: what is this past era, what are its chronological limits? What criteria should be adopted when setting these limits?[13] The colloquial way of perceiving a historical monument seems to point to a distant time frame, but after all, a past era can be defined by the period of the previous socio-political and economic system. If the aim of protection of historical monuments is to protect the evidence of the state's cultural heritage in various stages, it is difficult to overlook the shorter time perspective, in this way we can deprive future generations of material testimonies of the past. Although this is a near past for us, but for future generations the prospect of looking at the historical character of this type of objects will be completely different. Nevertheless, the adoption of a shorter temporal perspective pushes us to the boggy ground of assessments that are no longer legal but political.

This shows the analysis of the last of the conditions from the definition of the monument: to recognize an object as a historical monument, it is necessary to investigate whether its preservation "is in the interest of the society".

This is perhaps the most problematic of the conditions that make up the definition of a historical monument. First of all, the notion of social interest is the so-called general reference clause. The essence of a general reference clause is the authorization for the body to determine the basis for qualifying the activity of the addressee of the norm based on criteria that are expressed in the legal text, but their content has not been incorporated into the legal system, is outside this system.[14] To determine what elements, what factors in the conditions of a case express the public interest, requires making evaluative, axiological assessments. However, the public interest must be based on

[13] PŁAŻYŃSKA, K.: Świadectwo minionej epoki czy dobro kultury współczesnej? Problemy ochrony prawnej architektury nowoczesnej. In: ZEIDLER, K. (ed.): Prawo ochrony zabytków. Warszawa-Gdańsk: Wolters Kluwer, 2014, p. 108.

[14] LESZCZYŃSKI, L.: Stosowanie generalnych klauzul odsyłających. Kraków: Zakamycze, 2001, p. 21; JAKIMOWICZ, W.: Wykładnia w prawie administracyjnym. Kraków: Zakamycze, 2006, p. 124–125; WRÓBLEWSKI, J.: Wartości a decyzja sądowa. Wrocław: Ossolineum, 1973, p. 211.

law, so the public interest refers to assessments in the sphere of the axiology of the legal system. The desired state can be considered to be in the public interest only if it passes through the "filter" of the axiology of the legal system.[15]

If we take into account previous considerations regarding the concept of "testimony of a past era", in this way legal assessments may become entangled with political assessments. If in the perspective of the values on which the new system is based, the previous system is assessed extremely negatively, it is deemed necessary to remove the material remnants of this system from the public space. Thus a conflict of values arises at the level of legal policy (in terms of both lawmaking and applying the law): should we protect the evidence of the previous system existing in the public space, regardless of the negative assessments of this system, because they are evidence of a bygone era and, therefore, of cultural changes in the country? Or maybe we need to remove these objects as symbols of values that are contrary to those on which the current social and political system is based? Such discussions are characteristic for the countries of Central and Eastern Europe, due to the political changes that occurred at the turn of the 80s and 90s of the last century.

The assessment of whether the preservation of the object is in the social interest must take into account a huge range of factors. On the one hand, the care for the memory of the cultural identity of the nation requires preserving as much evidence of the past as possible. On the other hand, protection means restrictions of the right to property and, hence, social costs. Contrary to appearances, in many situations the financial criterion becomes important: the problem of financing the protection. In the face of limited public resources, we often face an answer to the question of whether we can afford a very wide range of protection of historical relics.

The numerous discretion margin clauses presented in the definition of historical monument induce many authors to criticize the definition adopted by the Polish legislature. The authors formulate postulates of greater precision in the definition of historical monument and the departure from the use of vague terms.[16] In my opinion, this is an expression of misunderstanding of the application of law in such a specific field as the protection of historical monuments. It is just because of the need to seek a compromise between the interests of the owner and the public interest. A too rigid legal regulation makes it impossible to find the right solution.

The granting of discretion margin to the public administration bodies is also an expression of a certain degree of trust of the legislature. Sometimes the legislator does not want to regulate a specific issue in a strict way, because it wants to leave some freedom to the body.[17]

Of course, there is another side of this coin – to be trusted, a law enforcement body must be a specialist. In this context, the following question remains: do officials employed in the historical monument protection administration have adequate expertise in history, art and technology? Are they capable of performing their tasks in terms of these competences, or are they also using third-party expertise due to deficiencies in this area?[18] The specificity of vague terms contained in

15 PARCHOMIUK, J. Nadużycie prawa w prawie administracyjnym. Warszawa: C.H. Beck, 2018, p. 620–621.

16 KOWALSKI, W. – ZALASIŃSKA, K.: Strategia regulacji prawa ochrony dziedzictwa kulturowego. In: ZEIDLER, K. (ed.): Prawo ochrony zabytków. Warszawa-Gdańsk: Wolters Kluwer, 2014, p. 75; PŁAŻYŃSKA, K.: Świadectwo, op. cit., p. 105; TRZCIŃSKI, M.: Definicja zabytku archeologicznego – problemy i kontrowersje wokół stosowania prawa. In: Ibid., p. 115–122.

17 LESZCZYŃSKI, L.: Stosowanie, op. cit., p. 232–233.

18 KOBYLIŃSKI, Z. – WYSOCKI, J.: Ujęcie problematyki ochrony zabytków archeologicznych w ustawie o ochronie zabytków i opiece nad zabytkami – stan obecny i postulaty zmian. In: ZEIDLER, K. (ed.): Prawo ochrony zabytków. Warszawa-Gdańsk: Wolters Kluwer, 2014, p. 134.

the legal definition of historical monument results is that their interpretation and application in a specific case requires scientific knowledge. Therefore, the question arises: will a decision-making officer, who does not have adequate knowledge but who relies of third-party expertise, be able to make good use of discretion margin? This is a problem of administrative policy in the field of creating human resources bodies responsible for the protection of monuments. The problem has a legal aspect in that it is up to the legislator to formulate any requirements as to the employed, at least at the decision-making positions. As I will show in the next part of the discussion, the Polish administrative courts show more confidence in the specialist knowledge of officials employed in the monument protection bodies.

The statutory elements of the definition of the subject of protection determine the first "circle" of discretion margin of monument conservation bodies. The legislator creates the next circle of discretion margin by defining the premises for applying specific forms of interference. To describe these premises, the legislator often uses indefinite terms, and in some cases introduces an even wider discretion margin in the form of administrative discretion. Duplication of both areas of discretion margin significantly increases the level of vagueness in the limits of interference.

Examples of this are institutions of temporary seizure of the movable or immovable monuments. These are more moderate forms of interference than the more radical expropriation of the monument. According to article 50.1 of the APHM, in the event of a threat to a movable monument entered into the register in the form of its potential destruction, damage, theft, loss or illegal export abroad, the voivodeship inspector of monuments may issue a decision on securing this monument in the form of a temporary seizure until the threat has been removed. Whereas in the light of Article 50.3 of the Act, in the event of a threat to an immovable monument entered into the register in the form of its potential destruction or damage, the head of the district, upon a request of the voivodeship inspector of monuments, may issue a decision on securing this monument in the form of a temporary seizure until the threat has been removed.

The notion of threat to a historical monument belongs undoubtedly to the above-mentioned empirical vague terms. In their case, there is the possibility of objective concretization and refinement. The authority using this form of restriction must provide specific arguments referring to the factual situation, when indicating the threat. This argumentation is in principle subject to full control of the administrative court, however, taking into account the specificity of the judicial model of control, which limits the role of the court to the verification of evidence gathered by the authority.

Such forms of protection of monuments are based on classic administrative discretion: awarding the status of a monument of history (by an ordinance of the President of the Republic of Poland; Article 15.1) or establishing of a cultural park (by a resolution of the commune council; Article 16.1 of the APHM). The discretion of the bodies in this case is limited by the conditions set out in the act, therefore the discretion is of a targeted nature. Nevertheless, the reasons that limit the freedom of the authorities are in the form of indefinite terms, which is the source of a different kind of discretion margin and weakens the legal limits on the use of discretionary powers. In the first example: the status of a monument of history can be given to a monument or park of special value for culture

In turn, a cultural park is established in order to protect a cultural landscape and preserve areas of outstanding landscape with immovable monuments characteristic of local construction and settlement tradition. The body introducing this form of monument protection must assess, among other things, whether we are dealing with elements characteristic of the local building and settle-

ment tradition. This is empirical knowledge that can be controlled based on some criteria. However, the question arises whether the administrative court, unable to appoint experts independent of the authority, is able to verify the correctness of such classification.

Generally speaking, in the case of discretionary forms of action, the decision-making power of the body is partially limited by legally determined premises, however, sometimes these premises are formulated using indefinite terms, which opens up another sphere of discretion margin and weakens the restriction of administrative discretion.

Sometimes the legislature tries to clarify the conditions by referring to objectively measurable assessment criteria. An example is the entry of a movable monument into the List of Heritage Treasures (the entry is made by the minister competent for culture and protection of national heritage, Article 14a of the APHM). In this case, the legislator uses premises of a different nature of discretion margin. On the one hand, we have a vague term: it is to be a "monument of special value to cultural heritage". This is a typical vague term of an evaluative character, its interpretation is not subject to fully objective measures, the evaluations will be on a certain scale. On the other hand, the monument must be included in the category specified in the Act, described with the use of measurable criteria: age (over 50, 75, 100 or 200 years, depending on the monument and category) and value (EUR 15,000, 30,000, 50,000, depending on the monument and category.[19]

However, there is a problem, to what extent these indicators reflect something significant from the point of view of values subject to protection in the historical monument protection law. This is clearly visible on the example of the category of photographs, films and negatives. In this case, the analyzed form of protection covers objects of this type that are more than 50 years old, their value is higher than 15,000 euro and they are not owned by their creators (Article 14a.1.8 of the APHM). Of course, the age of a photograph can be relatively easily determined, but how to assess the value of a photograph? The material value, if determined by the market price, may not have any impact on the value of the object as a testimony of the past or culture of a nation.

The legal form of the authority for the protection of monuments may also be a source of discretion margin. An example is the choice of a less formalized form (entering the object into the voivodeship lists of monuments) instead of an entry in the register of the monuments. This choice may be motivated by the intention of the authority avoiding a more formal procedure, which can in extreme cases be assessed in the context of abuse of the procedure. I will return to the problem more broadly in point 3.5.

3 DETERMINANTS OF THE JUDICIAL REVIEW OF DISCRETION MARGIN

There are three factors determining the court's approach to controlling the use of discretionary powers by the administration. They relate to the systemic functions of public authorities, the criteria for judicial review and the institutional capacity of courts to exercise administrative control.

[19] A similar method was used in art. 51.1 of the Act. This provision specifies cases in which a single permit for permanent export abroad is required. Also in this case, setting out the conditions for the requirement to obtain a permit, the legislator referred to objectively measurable criteria of age and value.

3.1 Constitutional conditions

Constitutionally shaped roles of public authorities, resulting from the division of power, result in that the primary responsibility for shaping and implementation of social and economic policy rests with the legislature and executive. The task of the judges is to control the administration, not to discuss and speculate about social, economic or political preferences.[20] The role of courts is to stop any excess from the limits of the powers. On the other hand, the court must respect the will of the legislature, which can broadly define the scope of the discretion margin of the public administration, bearing in mind the reasons of expediency, better implementation of public tasks. Executive functions in the state cannot be seen in the categories of "subsumption automate"(*Subsumtionautomat*), a blind executor of orders of the legislature. It is necessary to leave to public administration bodies a certain area of freedom to act on their own responsibility while performing the tasks entrusted.[21] Due to the principle of separation of functions, the court cannot replace the body, it cannot, in place of the decision left to the discretion of the body, make its own discretionary decision.[22] On the other hand, it is difficult to assume that for the legislature the power should be open to serious abuse. The legislature assumes that the body will act properly and responsibly, taking into account the best solution from the point of view of public interest and in accordance with the policy specified in the Act. For this reason, the courts must ensure that the legal limits of each, even the widest discretion, are respected.[23] As Dworkin put it, "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction",[24] it is not a lawless void.

The review powers of the court gain additional legitimacy in cases concerning violation of human rights. Even a wide general power must make way for fundamental rights. Courts have the legitimacy to defend against interference in these rights, it is the basis of constitutional democracy.[25] This means less restraint of the courts, more intensive application of the criteria for the review of discretionary acts where interference with fundamental rights is involved.[26]

3.2 Legality as a criterion for judicial review

Due to the constitutional separation of the functions of public administration and the courts that control it, judicial review covers only the legality of an administrative act, its compliance with legal rules that determine the work of the administration. If such a legal rule allows the administrative body to act freely, the body decides based on opportunity (*opportunité*). The administrative court

20 WOOLF, H. Lord – JOWELL, J. – LE SUEUR, A.: De Smith's Judicial Review. 6th ed. London: Sweet & Maxwell, 2007, p. 16–17 and the case-law cited there; CRAIG, P.: Administrative Law, op. cit., p. 6; WADE, W. – FORSYTH, Ch.: Administrative Law, op. cit., p. 345.

21 ACHTERBERG, N.: Allgemeines Verwaltungsrecht, op. cit., p. 336 and 340.

22 Bundesverwaltungsgericht: 9 Mai 1956 (III C 123.54, BVerwGE 3, 279); WOLFF, H. J. – BACHOF, O. – STOBER, R.: Verwaltungsrecht I. München: C.H. Beck, 1994, p. 378; HÄFELIN, U. – MÜLLER, G.: Grundriss des Allgemeinen Verwaltungsrechts. Zürich: Schulthess, 1998, p. 93–94; RODE, L.-H.: § 40 VwVfG und die deutsche Ermessenslehre. Frankfurt am Main: Peter Lang, 2003, p. 95–98.

23 WADE, W. – FORSYTH, Ch.: Administrative Law, op. cit., p. 350: "(…) the courts take their warrant to impose legal bounds on even the most extensive discretion)".

24 DWORKIN, R.: Taking Rights Seriously. Massachusets: Harvard University Press, 1978, p. 31.

25 WOOLF, H. Lord – JOWELL, J. – LE SUEUR, A.: De Smith's Judicial Review, op. cit., p. 18; WADE, W. – FORSYTH, Ch.: Administrative Law, op. cit., p. 393.

26 CRAIG, P.: Administrative Law, op. cit., p. 566–567.

does not review opportunity.[27] As *Georges Vedel* notes, if the administration operates within circumscribed powers, its activities can be assessed in terms of their legality. The public administration can only decide to the extent allowed by law. Its act may, therefore, be compliant or non-compliant with law. On the other hand, if the administration has discretionary powers, its act can only be judged in terms of reasonableness: the act may be opportune or not opportune, right or wrong, but it cannot be illegal until the administration has the freedom to act.[28]

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 abuse of the body's discretion in the area of assessing the factual basis of the decision.

Therefore, constructs have been developed to prevent leaving the discretionary sphere of administration activities out of the scope of judicial review. These include the concept of manifest error in assessment (*erreur manifeste d'appréciation*), also known in European administrative law.[29]

3.3 Institutional capacity of courts to control the discretionary powers of the administration

The third factor shaping the scope of judicial review of the discretionary powers is the so-called institutional capacity of courts. This factor consists of various components. The first of these is the model of judicial review adopted in a legal system: whether the responsibilities of the court are solely of a controlling or a substantive nature? What is the admissible scope of evidence proceedings before the courts? If in the model of the judiciary it was assumed that the court has only a control function (it reviews the legality of the contested act), the admissibility of the court's own factual findings will be significantly reduced. The court's role will be the control of whether the body correctly established these facts (in accordance with the rules of evidence) rather than independent determination of facts. The problem is well illustrated by the example of the Polish model of judicial review, in which there is no possibility to appoint expert's opinion evidence, which undoubtedly hinders judicial review. I will return to this issue in further considerations.

The second component within the analyzed factor is the nature of discretion margin. In those legal systems, in which different sphere of discretion margin is distinguished, the case law shows greater restraint by courts in the scope of control of administrative discretion. Courts are limited to review the compliance with statutory limits of discretion and the compliance with procedural requirements.

Furthermore, here comes the third element shaping the institutional capacity of the courts to review the case: the matter of the case in which the act was issued. It is believed that there are some

27 SERRAND, P.: Le contrôle juridictionnel, op. cit., p. 906.

28 VEDEL, G. – Delvolvé, P.: Droit adminitstratif, T. 1. Paris: Presses Universitaires de France, 1992, p. 529.

29 European Court of Justice in Judgement of 25 January 1979 (98/78, A. Racke v Hauptzollamt Mainz, ECLI:EU:C:1979:14, § 5): "[…] since the evaluation of a complex economic situation is involved, the Commission enjoy, in this respect, a wide measure of discretion. In reviewing the legality of the exercise of such discretion, the Court must examine whether it contains a manifest error or constitutes a misuse of power or whether the authority did not clearly exceed the bounds of its discretion". See also: VAN RAEPENBUSCH, S.: Droit institutionnel de l'Union et des Communautés européennes. Bruxelles: Larcier, 2001, p. 509–510; TOTH, A.: The Oxford Encyclopedia of European Community Law. Oxford: Oxford University Press, 2005, p. 368.

spheres of administration activity in which decisions are not "predestined" for judicial review. These include the issues of choosing the preferred objectives of socio-economic policy; decisions in fields which require highly specialized, expert knowledge that courts do not have; decisions regarding the distribution of limited resources, where a possible change in the authority's decision by the court will trigger a chain of events requiring the change of other decisions; assessment decisions of independent experts; complex prognostic and risk-based decisions.[30]

3.4 Judicial self-restraint

The key issue for the understanding of the models of judicial review of the discretionary powers is the fundamental principle that the role of the court is not to substitute the administration with regard to the merits of decisions. This concept, accepted in various legal systems, is particularly emphasized in English administrative law. An example of this may be the argumentation of Judge *Laws* in the case *Somerset County Council, ex parte Fewings.*[31] Trying to explain the essence of judicial review, Judge *Laws* stated:

"It is that, in most cases, the judicial review court is not concerned with the merits of the decision under review. The court does not ask itself the question "Is this decision right or wrong?" Far less does the judge ask himself whether he would himself arrived at the decision in question. […] The only question for the judge is whether the decision taken by the body under review was one which it was legally permitted to take in the way it did."

Judicial self-restraint does not mean weakening the efficiency of judicial protection of individual rights. This is the expression of a change in the methodology of judicial review of discretionary powers, which is characterized by two features. First, the courts prefer the so-called rights-based approach, whose main assumption is that the courts interpret the scope of discretionary powers in accordance with the guarantees of fundamental rights, if it is possible. The second characteristic feature is the change of court approach to the discretionary power in public law – the transition from the "culture of authority" to the "culture of justification", which obliges the author of the decision to carefully consider the relationship between the means and the purposes for which the decision was issued. Courts require a richer explanation of the decision, although its merits will remain at the discretion of the author of the decision (authority). It is the duty of the authority to indicate the factors that were taken into account and to explain why one of them gave priority to others. The courts require a particularly scrupulous justification for such discretionary decisions that lead to a conflict with fundamental rights.[32]

Both of these features are visible in the methodology of review of the discretion margin of historical monuments protection authorities, applied by Polish administrative courts. I will refer to this issue in more detail further on.

30 WOOLF, H. Lord – JOWELL, J. – LE SUEUR, A.: De Smith's Judicial Review, op. cit., p. 19–20, 547–549; MAURER, H.: Allgemeines Verwaltungsrecht, op. cit., p. 159–160; OSSENBÜHL, F.: Rechtliche Gebundenheit, op. cit., p. 196–201; WOLFF, H. J. – BACHOF, O. – STOBER, R.: Verwaltungsrecht I, op. cit., p. 368–370; SCHENKE, W.-R.: Verwaltungsprozessrecht. Heidelberg – München: C.F. Müller, 2012, p. 261–262; ODE, L.-H.: § 40 VwVfG, op. cit., p. 53–57.

31 High Court (Queens Bench Division): 10 February 1994, [1995] 1 All ER 513.

32 WOOLF, H. Lord – JOWELL, J. – LE SUEUR, A.: De Smith's Judicial Review, op. cit., p. 17, 544, 597.

4 THE SPECIFICITY OF DISCRETION MARGIN IN THE ACTIVITIES OF MONUMENT PROTECTION BODIES AND THEIR JUDICIAL REVIEW

Judicial review of administrative acts of historical monument protection bodies illustrates all the above-mentioned problems of judicial review of the discretionary powers.

Particularly noticeable is the complex problem of delineating the limits of admissible interference by the court, resulting from the fact that the role of the court is to review the implementation of the administrative policy, not the independent implementation of this policy. Since the historical monument protection bodies implement the policy of protection of cultural heritage adopted by the state, administrative courts should intervene in this area with a great caution.

On the other hand, courts must enforce compliance by administrations with the rule of law and provide the individual with effective legal protection. As I mentioned in the introduction, a characteristic feature of most forms of operation of historical monument protection bodies is a deep interference in the sphere of individual rights. This is due to the strong polarization between the interest of the owner of the monument and the public interest, expressed in the need to protect the evidence of cultural heritage of the State. Courts must therefore walk along a narrow and bumpy road leading between respecting the functions of administration implementing the policy of protection of historical monuments and the need to ensure effective and not only illusory judicial protection for the owner of a historical monument.

Further problems arise from the fact that the criterion of judicial review is legality. The effectiveness of judicial review depends on the possibility of building a reference standard, which will serve as a model for the review of the contested act. This is where the fundamental difficulty arises, resulting from the specificity of the activities of the monument protection bodies. The nature of discretion margin makes it difficult to formulate objectively verifiable criteria for assessing administration activities that are based on law.

What is more, the activities of historical monument protection bodies are largely based on non-legal norms, in particular the so-called monument preservation rules. These rules do not have a normative form such as the law. They are therefore the source of a kind of discretion margin for historical monument protection authorities. These unspecified criteria often provide historical monument preservation bodies with guidelines on the imposition of specific duties on the monument's owner. Due to the fact that these principles, on the one hand, are of a non-legal nature, on the other, significantly determine the activity of historical monuments protection bodies, deciding about significant interferences in the sphere of property law, there are postulates in the literature to include these principles in the form of legal acts falling within the constitutional catalog of sources of law.[33]

These postulates, though probably right, seem difficult to implement. Considering the divergence of scientific views, the fundamental question is whether the body is capable of establishing permanent (at least relatively) principles that can be expressed in the language of abstract legal

[33] ZEIDLER, K.: O znaczeniu teorii konserwatorskiej w procesie stosowania prawa. In: SZMYGIN, B. (ed.): Współczesne problemy teorii konserwatorskiej w Polsce. Warszawa-Lublin: Międzynarodowa Rada Ochrony Zabytków ICOMOS, 2008, p. 173–180; TAJCHMAN, J.: Konwencja o ochronie dziedzictwa architektonicznego Europy a przyczyny jego degradacji w Polsce oraz drogi do jej powstrzymania. In: ZEIDLER, K. (ed.): Prawo ochrony zabytków. Warszawa-Gdańsk: Wolters Kluwer, 2014, p. 91.

norms. Moreover, these principles are, by their essence, very general, and so there would be a need to interpret them in the light of specific facts.

In relation to the review of acts in the field of historical monuments protection, also the problems of the institutional capacity of courts to control the discretionary powers of the administration emerge.

In cases where the object of judicial review is a decision based on specialist knowledge in the field of history, art and technology, the institutional capacity of the court significantly determines the rules specifying the rules for evidence-taking proceedings before a court. For obvious reasons, the court does not have such a level of expertise to independently review the assessments of the body, based on such knowledge. The effectiveness of judicial review therefore depends on the admissibility of the court to summon an external expert to obtain answers on issues related to the correctness of the assessments of a monument protection authority.

In the Polish model of judicial administrative review, evidence proceedings before a court are limited solely to additional documentary proof, if this is necessary to resolve substantial doubts and will not extend excessively the proceedings on the case (Article 106.3 The Act of 30th August 2002 Law On Proceedings before Administrative Courts[34]). The lack of the possibility to use the assistance of an independent external expert undoubtedly weakens the efficiency of judicial control of the activities of historical monument protection bodies based on arguments referring to specialist knowledge.

Analyzing the problem of institutional capacity of courts, it should also be noted that not all forms of protection of historical monuments are subject to judicial review.

An example may be awarding the status of a monument of history, where interference takes the form of an ordinance of the President of the Republic of Poland, and thus an act that is not reviewable by administrative courts in the Polish legal system. This does not mean, however, that forms of protection taking the form of general acts are excluded from the administrative courts' review. A similar form of protection – establishment of a cultural park – is introduced in the form of a resolution of the commune council, which is subject to full judicial review (Article 3. 2. 5 LPAC).

5 METHODOLOGY OF THE JUDICIAL REVIEW OF DISCRETIONARY MARGIN OF HISTORICAL MONUMENTS PROTECTION BODIES IN THE CASE LAW OF POLISH ADMINISTRATIVE COURTS

5.1 A way to understand discretion margin

Proper court recognition of the type of discretion margin that the authorities of monument protection have at their disposal is crucial for the effectiveness of judicial review. The discretion margin is diverse, and the scope of the review and the "depth" of the court's interference in the content of the decision should be adapted to the kind of freedom (in particular, a significant distinction between administrative discretion and indefinite terms).

Analysis of the case law shows that the courts do not always see these differences and do not always correctly recognize the type of discretion margin that the legislators have granted to the

[34] Dziennik Ustaw (Official Journal) 2018, file: 1302; in next: LPAC.

authorities. One can also notice the lack of uniformity of views expressed in the case-law. In some situations, the responsibility for the lack of consistency of the courts in the analyzed area is on the legislature, which does not specify the conditions of the protection of historical monuments.

According to the traditional view, administrative discretion refers to the choice of the consequences of the established facts, the assignment of this form of discretion is confirmed by the modal phrases included in the regulation, such as "the body may".

However, legal practice creates a more complicated situation in which the sources of discretion margin can result simply from the lack of clearly defined criteria for issuing an act. An example is the basic form of historical monument protection, which is an entering into the register of monuments. In the content of the legal basis of this act (Article 9.1 of the Act on protection of historical monuments), it is in vain to look for the characteristic feature of administrative discretion, which is the modal expression "the body may". According to this provision, immovable monuments shall be entered into the register pursuant to a decision issued by the voivodeship inspector of monuments ex officio or upon a request of the owner of an immovable monument or the perpetual lessee of the land on which an immovable monument is located. It should be noted, however, that the legislature did not specify any conditions, so it is not known what criteria the authority should follow when entering the monuments in the register.

It is even more important because not every monument is entered into the register. The legislature also introduced a less restrictive form of protection, which is the entering of the object into the voivodeship lists of monuments (commune inventory of monuments; Article 22 of the APHM). The question arises, where is the "demarcation line" between these two forms of monument protection? This problem will be discussed further on.

Polish administrative courts are not unanimous about what form of discretion margin we deal with in the analyzed case. On the one hand, it is to note the judgments where it is emphasized that the decision to enter the historical monument into the register is not discretionary, it is a different kind of discretion margin, based on the vague terms. If the authority determines that the object has the features specified in the statutory definition of a historical monument, it is obliged to enter this object into the register of historical monuments. The specification of the reasons for making an entry into the register using vague terms ("a testimony to a past era or event, the preservation of which is in the interest of society due to its historical, artistic, scientific or academic value"), does not constitute grounds for accepting the thesis about the operation of an administrative body based on administrative discretion. These terms are of an evaluative nature and therefore are subject to clarification in the process of applying the law.[35]

The quoted argumentation of the courts indicates a reference to the classic views of the scholars of law, distinguishing the sphere of discretion margin, characterized by a different scope of freedom (the discretion margin resulting from the use of vague terms is different than that resulting from the classical administrative discretion).

On the other hand, opposing views can be noted, indicating that the decision to enter a historical monument in the register is discretionary.

In this case law, the courts observe that the provisions governing the entry of an object into the register of historical monuments do not introduce detailed criteria which the authority should fol-

[35] Supreme Administrative Court: 31 October 2012 (II OSK 1115/11); 11 April 2013 (II OSK 2382/11); 24 August 2017 (II OSK 1052/15). All cited judgements are available on the website: orzeczenia.nsa.gov.pl (accessed on 5th November 2018).

low in assessing the desirability of covering a monument with protection. The decision of the body is therefore discretionary and is based on the evaluation of a subject through the prism of the statutory definition of historical monument, the documentation collected and knowledge and experience of the voivodeship inspector for historical monuments and employees of the voivodeship office for historical monuments.[36]

The above arguments can be considered justified in the absence of precise determination of the criteria of the entry of a historical monument into the register and the absence of the abovementioned line defined by the legislature, drawing a line between the cases when the monument is subject to entry in the register and when it is subject to other forms of protection.

More controversial are judgments in which courts, contrary to the views of the scholars of law, clearly combine different spheres of discretionary power. An example is the judgment of the Voivodeship Administrative Court in Warsaw of 17 January 2013 (I SA/Wa 1041/12), providing for that the decision on the approval for a building insulation is discretionary in the sense that the assessment of the conditions of the decision is made on the basis of vague terms the interpretation of which must be made during the application of law in an individual case. Once these conditions are established by the authority, its resolution is binding by their nature.

The Court's argumentation method is definitely irrelevant. First of all, the provision cited by the court clearly does not give grounds for the authority to act in the context of administrative discretion. Pursuant to Article 36. 1. 1 of the APHM, a permit from the voivodeship inspector of monuments shall require carrying out preservation, restoration and construction works in relation to a historical monument entered into the register. Secondly, the court, contrary to the views of scholars, confuses two different areas of discretion margin: the use of vague terms and administrative discretion. Thirdly, the argument that the decision is no longer issued under the conditions of administrative discretion but is a binding decision, because the authority determined the meaning of the vague term under the conditions of a specific factual state, it becomes completely incomprehensible. Such a method of argumentation cannot be accepted by any means.[37]

Another example may be the judgment of the Voivodeship Administrative Court in Warsaw of 20 February 2018 (VII SA/Wa 1059/17), wherein the Court stated that the decision ordering the restoration of the monument to its previous state has a discretionary character.

If we analyze the provision that forms the basis for issuing such a decision, the position expressed in the court's ruling raises fundamental doubts. According to Article 45.1 of the APHM, if preservation, restoration or construction works, or conservation or architectural research, have been carried out in relation to a monument entered into the register without the required permission from the voivodeship inspector for historical monuments, the authority shall issue a decision ordering the restitution of the monument to its previous state or the arrangement of the site, setting the time limit for carrying out these actions, or imposing an obligation to bring the monument to the best possible condition by means of the indicated methods and within the specified time limit.

Contrary to the Court's reasoning, the decision of the voivodship inspector for historical monuments is not discretionary, because the occurrence of the criteria set out in that provision obliges the

[36] Voivodeship Administrative Court in Warsaw: 9 Mai 2013 (VII SA/Wa 143/13); 9 November 2015 (VII SA/Wa 220/15); 20 February 2018 (VII SA/Wa 1019/17).

[37] Similarly, the judgment of the Voivodeship Administrative Court in Warsaw of 28 June 2017 (VII SA/Wa 1816/16) should be judged critically, because the court also mixed up the various areas of discretion of the monument protection authorities in a faulty way.

authority to issue a decision. The authority has no discretion as to whether or not to take action, nor the type of the settlement. Therefore, there is a lack of basic elements characteristic of administrative discretion. What is more, it is also difficult to find the basis for a different type of decision-making in this provision. The grounds for interference are not based on indefinite terms. The authority is to examine whether the work is carried out without a required permit or in a manner that differs from the scope and conditions specified in the permit. There is no field of discretion in these arrangements. The only "undefined" element is the period of time in which the contractor is to restore the monument to its previous state or perform other prescribed actions. The logic indicates that the date should be determined in a realistic way, enabling the performance of duties.[38]

The proper understanding of the kind of discretion margin is not only a problem of theoretical correctness, but is of great practical importance. This becomes obvious if we look at the different attitudes of the courts to review different types of discretion.

While the review of the use of vague terms is more strict (additionally, it depends on the type of concept we are dealing with, as I mentioned above), the courts show more self-restraint in terms of typical administrative discretion. Therefore, incorrect determination of the type of discretion margin by the administrative court affects the incorrect narrowing of the scope of review. This, in consequence, may undermine the effectiveness of judicial review of the sovereign interference in the protection of historical monuments.

5.2 The duty of the body to comprehensively explain the facts of the case

The key elements of the judicial review of the discretionary power of historical monuments protection authorities include the assessment of compliance with all procedural requirements and proper explanation of the facts of the case. Insofar as the courts restrict intervention in the very substance of the discretionary decision, they, on the other hand, emphasize that the authority can only properly apply the discretionary powers if it has a proper, full picture of the case

This is clearly visible on the example of the basic form of historical monument protection, namely an entry in the register of monuments. As the courts argue, due to the discretionary nature of the decision, the body is particularly bound by general principles of administrative proceedings. In particular, the authority is required to take all necessary steps to thoroughly explain the facts of the case, must take into account the legitimate interest of the owner of the monument insofar as it does not interfere with the public interest in the protection of monuments, allow the parties an active participation in each stage of the proceedings and explain to the parties the prerequisites that the court is compliant with. The decision to enter an object in the register of historical monuments should be preceded by a thorough analysis of the legitimacy of such an action, taking into account the constitutional prohibition of violation of the essence of the property right. In addition, it should result from the determination of the undisputed historical value of the object. The justification of the decision should show that all circumstances relevant to the case have been considered and evaluated and the final resolution is their logical consequence. The judicial review of the decision on entry into the register of monuments consists in particular in checking whether its issuance was preceded by properly conducted proceedings and an explanation of the facts of the case. The administrative

[38] A similar example of incorrect recognition that the body has discretionary powers, despite the lack of prerequisites in the provision is a judgment of Voivodeship Administrative Court in Warsaw of 15 March 2006 (IV SA/Wa 2213/05).

court controls whether during the administrative procedure all necessary steps have been taken to clarify the factual situation, so that all evidence was gathered to determine whether there were any statutory grounds for issuing the decision.[39]

As indicated in the case law, the body must clearly indicate not only historical, artistic or scientific values, but also the current technical condition of the object with an indication of the impact of this state on the preservation of these assets. As a consequence, the body's knowledge about the historic values of a given object must be up to date.[40]

However, the question arises what it means in practice? How far does the court interfere with the decision of the body when it considers that the authority's findings as to the historical and scientific value of the object are not sufficient? In these matters, some general theses can no longer be formulated. It all depends on the individual approach of the court to a particular case. These problems regard another issue related to the independence of the authorities for the protection of monuments when finding the facts relevant in the case.

5.3 The obligation to consult the external experts when assessing the conditions of interference

When analyzing in section 1.2 the basic issues related to the specificity of discretion margin in the sphere of historical monuments protection, I signaled the problem of whether the historical monuments protection authority can independently make the necessary factual findings in the field of interference conditions. For example: whether, when evaluating if the object can be considered as a monument, the body can do it independently or it must consult an expert who has appropriate specialist knowledge in the field of history, art, technology. In turn, in case of imposing obligations related to the execution of specific construction works on the monument, the question arises: can the body independently determine the scope of this work, or must it consult an expert with relevant expertise in the field of construction or art history (for example as regards the obligation to restore the previous state of the object)?

Generally, courts recognize that regulations do not impose on historical monuments protection bodies an obligation to consult experts before entering an object into the register of monuments. The historical monuments protection authorities with specialized personnel in this area are able to objectively assess, based on the collected evidence, whether the object has historical qualities or not.[41]

The voivodship historical monuments conservator is a specialized body, and officials employed in his office should have specialist knowledge and experience in historical monuments protection. As a rule, the knowledge of officials should allow to determine the nature of a specific object. Authorities should have appropriate substantive competences in the cases examined, necessary even to assess whether the case should be examined by an expert. A specific object can be entered in the register of monuments without the need for a specialist opinion, if its historical character is obvious. It is not necessary that the authority ordered the expert opinion to be drawn up in order to confirm the historic values. Only in doubtful, controversial situations, in particular at conflicting

39 Voivodeship Administrative Court in Warsaw: 9 Mai 2013 (VII SA/Wa 143/13); 9 November 2015 (VII SA/Wa 220/15); 20 February 2018 (VII SA/Wa 1019/17).

40 Voivodeship Administrative Court in Warsaw: 1 March 2013 (VII SA/Wa 1897/12).

41 Voivodeship Administrative Court in Warsaw: 20 February 2018 (VII SA/Wa 1019/17).

assessments as to the historic values of the object, the authority should allow evidence from an expert in a specific field.[42]

In another judgment, the Supreme Administrative Court pointed out that the assessment made by the monument protection authority, whether the monument should be entered into the register, is affected by the authority's professional awareness of the principles of methods of historical monument protection and existing organizational and technical possibilities. While the criteria for the assessment of historical values based on theoretical and legal premises should have universal character for the entire heritage, the methods of the preservation of these values are often diverse. Differences are determined by the specific features of the building that determine the conservation process. The individual approach of each preservation official and his knowledge depends on how the individual regulations will be interpreted.[43]

On the other hand, if the authority, when determining the facts relevant to the case, used the expertise of an external entity, this does not mean that in this way it violated the obligation to assess the case independently. The possibility of basing the decision on the opinion of an independent expert does not change the fact that the assessment of the criteria for an entry into the register of monuments is made by the historical monuments protection authority.[44]

In this case-law, one can see the expression of court's reliance upon the specialist knowledge possessed by monument protection authorities, necessary for the proper performance of the tasks entrusted to them. Of course, this reliance does not preclude the obligation to review the correctness of factual findings and to indicate possible errors. However, due to the limitations on the possibility of evidence taking by the court (see: paragraph 3) questioning the correctness of factual findings of a specialized body for the protection of monuments will be difficult.

5.4 The review of the proportionality of interference and compliance with other constitutional standards in the field of fundamental rights

As I mentioned in the introduction, almost all forms of protection of historical monuments are connected with far-reaching interference with the rights of the monument's owner, which inevitably results in conflicts between public and individual interests. For this reason, courts that review the legality of decisions of historical monuments protection bodies point to the need to respect the constitutional standards for the protection of fundamental rights, including the principles of proportionality and protection of property (Article 21, 31 and 64 of the Constitution of the Republic of Poland).

For example, in the judgment of 7 February 2018 (II OSK 909/16), the Supreme Administrative Court stated: "The decision to enter the object into the register of historical monuments must take into account the constitutional prohibition of violating the essence of the property right. In addition, the decision raises the legal obligations of the owner, because the Act imposes on the owner of a historical monument a number of restrictions connected with the disposal of the monument, as well as grants the owner certain rights resulting from the public status of the monument. For

[42] Supreme Administrative Court: 14 December 2012 (II OSK 1512/11); 24 January 2017 (II OSK 1052/15); 20 November 2017 (II OSK 2926/16).

[43] Supreme Administrative Court: 19 December 2017 (II OSK 1417/16).

[44] Supreme Administrative Court: 26 January 2012 (II OSK 1885/11).

this reason, the decision must be based on undisputed findings as to the ownership of the object to which it relates. These arrangements are crucial because they give the owner the basis for granting the status of a party to proceedings regarding the entry into the register of historical monuments."

In another judgment, it was pointed out that due to the scope of interference in the sphere of rights of citizens, the institution of entering the surroundings of the monument in the register should be used with great caution. In particular, it is necessary to comply with the basic directives of the administrative procedure and prohibit the use of an extensive interpretation.[45]

The courts also place great emphasis on the proportionality of interference, which is particularly important in the case of acts based on discretionary powers. For example, one of the judgments pointed out that the decision to establish a cultural park is left to the administrative discretion of the competent commune council. This does not mean, however, that the act can be issued in an unrestricted manner. The body must respect the principle of proportionality, which precludes the establishment of prohibitions and orders over and above the real need. Because of the scope of interference in the sphere of citizens' rights the analyzed institution should be used with great caution, in particular taking into account the prohibition on the use of extensive interpretation.[46]

Proportionality makes it necessary to set precise limits of interference. As indicated by the Supreme Administrative Court in the judgment of 18September 2014(II OSK 629/13), the elementary requirement to make a decision about entering a urban settlement area or individual objects in the register of monuments, as well as establishing the boundaries of the monument's surroundings entered in the register is a clear indication of the motives followed by the body. It was therefore the duty of the body to demonstrate why the property belonging to the complainant should be under conservation supervision. Covering real estate property with historical monument preservation supervision is an exception and must therefore be very precisely justified.

It is an approach, convergent with contemporary European standards in the field of review of administrative discretion, emphasizing the proper balance of conflicting interests. Arguments representing the balancing of these interests should be presented by the authority in of the grounds for the sovereign interference.[47]

5.5 Appropriate justification for the use of a specific form of interference

The far-reaching effects of using forms of historical monuments protection mentioned in the previous paragraph, in particular, the "depth" of interference in the sphere of property rights, explain the requirement of special care for the justification of the decision. Furthermore, due to limited competences to enter into the very substance of the decision, the courts place particular emphasis on the review of the justification for interference. The general thesis is that the authority is obliged to explain and present rational arguments related to the circumstances of the case, why it was neces-

45 Voivodeship Administrative Court in Warsaw: 9 November 2015 (VII SA/Wa 220/15).

46 Ibid.

47 See the classical concept of "fair balance" in the case law of European Court on Human Rights: "[…] the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention […]" (Judgement of 23 September 1982, Sporrong & Lönroth v. Sweden, case no 7152/75, § 69). See also: STĘPKOWSKI, A.: Zasada proporcjonalności w europejskiej kulturze prawnej. Warszawa: Liber, 2010, p. 216–220.

sary to use such and no other form of interference, why the body in this particular way settled, in a specific case, the conflict of public and individual interests.

As indicated in the case law, the basic requirement to make a decision about covering a specific object with historical monuments protection (including entering it into the register of historical monuments) is to indicate in unambiguous way what is the object of protection and to present reasons that justify such a qualification. The indication of what is the subject of protection must be so precise, that in the case of a decision ordering the restoration of the monument to its previous state or development of the area, there is no doubt what the previous state looked like and the decision is feasible. Imprecise definition of what is the subject of protection at the time of issuing such a decision prevents the implementation of later decisions.[48]

In the judgment of 18 September 2014 referred to above, the Supreme Administrative Court stressed that, within the limits set by the Act, it is possible to restrict ownership by prohibiting the planned investment as proposed by the investor. However, the case lacks a detailed explanation of why the protected area, in particular the property of the complainant, was protected. The acquisition of real estate with historical-monument protection supervision must be precisely justified. Certainly, it cannot be a decisive argument that some unfavorable transformations of the surrounding area currently under way can form a possibility of further degradation of this area, to the detriment of the historic area.

Another example is the judgment of the Supreme Administrative Court of 13 November 2008 (II OSK 1438/07), which states that classification of certain objects as parts of protected collections was left to the authorities appointed to protect historical monuments. Nevertheless, this assessment cannot be arbitrary. Entry into the register of historical monuments is a restriction of the right to property, and it can take place only by way of a statute and only to the extent that does not violate the essence of the right to property (Article 64.3 of the Constitution of Republic of Poland). Provisions restricting the right to property must be interpreted strictly and may only be applied in relation to actual facts covered by their disposition.

The courts put special emphasis on justifying the decisions in cases in which bodies operate under discretionary powers. As indicated in these judgments, the decision about entering an object into the register of historical monuments should be preceded by a thorough analysis of the legitimacy of such an entry, taking into account the constitutional prohibition on violating the essence of the right to property, and should result from undisputed values of the object as a historical monument. The justification of the decision should show that all circumstances relevant to the case have been considered and evaluated and the final resolution is their logical consequence. The authority issuing the decision based on the discretionary power is required to collect and thoroughly examine the evidence, as well as comprehensively justify its decision in terms of facts and law.[49]

5.6 The problem of applying appropriate legal standards in cases of less formalized forms of interference

As I signaled above (see: paragraph 1.2), the sources of discretion margin for historical monuments protection authorities may lie in the sphere of choosing less formalized activities. This choice may

[48] Voivodeship Administrative Court in Warsaw: 15 June 2010 (I SA/Wa 78/10).

[49] Voivodeship Administrative Court in Warsaw: 15 February 2013 (VII SA/Wa 2355/12); 9 Mai 2013 (VII SA/Wa 143/13); 9 November 2015 (VII SA/Wa 220/15); 20 February 2018 (VII SA/Wa 1019/17).

be motivated by the desire to avoid a more formal procedure by the authority, which can in extreme cases be assessed as an abuse of the procedure.

An example may be the situation in which the organ decides to enter the object into the voivodeship lists of monuments (commune inventory of monuments; Article 22 of the APHM), instead of entering the object into the register of historical monuments. This first form is to a much lesser extent regulated by law, so it leaves the body for historical monuments protection more discretion margin. In addition, the scope of judicial review is limited in this case because the court, when reviewing the legality of an act, may appeal only to violation of the conditions laid down by law. For obvious reasons, the fewer conditions specified by law, the more difficult the role of the court reviewing the decision of the authority.

Entry of the object into the voivodeship lists of historical monuments is not even treated by the legislature as a form of historical monuments protection – it is not mentioned in Article 7 of the APHM, which contains a catalog of these forms.[50] Nevertheless, this form of historical monuments protection is also associated with restrictions in the use of the monument being the object of protection, which is why the courts point to the need to retain some basic legal standards of interference in this case too.[51]

The jurisprudence opposes the treatment of such forms as being exempt from minimum standards, at least legal standards, important from the point of view of protecting the interests of the monument's owner. In addition, the use of simplified forms of historical monument protection does not exclude the possibility for the owner of the historical monument to seek legal protection before the administrative court. The owner of the historical monument is entitled to file a complaint to the administrative court against the act of entering the historical monument into the lists of historical monuments, therefore the act will be subject to judicial review of legality.

As indicated in the case law, the authority which keeps the list of historical monuments (commune inventory of monuments) is not obliged to carry out administrative proceedings regarding the inclusion of the object into the list, therefore, it does not make any administrative decision. The body's operation is a public administration activity regarding rights or obligations under the law, which is open to the administrative court pursuant to art. 3.2.4 of the LPAC. In this case, the legislature refrained from treating the actions of the regional historical monuments protection official as jurisdictional actions that require detailed regulation. The lack of provisions determining the course of proceedings results in the fact that the legality check boils down to the examination of the compliance of this action only with the provisions of administrative substantive law, excluding the provisions on administrative proceedings.[52]

On the other hand, case law emphasizes that the lack of formalization of the rules of procedure involving the inclusion of an object into the voivodeship list of historical monuments (commune inventory of monuments) does not mean that this activity can be performed without analyzing the reasons behind it, as well as documenting it even in a simplified form. Above all, the basic barrier to arbitrary decision-making by organs is the need to meet the basic objective prerequisite: even a less formalized form, which is an entry into the voivodeship list of monuments, can be used only in rela-

50 Similarly: Voivodeship Administrative Court in Poznań in the judgment of 15 September 2010 (IV SA/Po 428/10).

51 Voivodeship Administrative Court in Lodz: 20 March 2015 (II SA/Łd 1116/14): "The consequence of including immovable monuments in the communal list of monuments is the limitation of the exercise of ownership of the property, albeit of the lightest nature among all possible effects that the forms of protection of monuments listed in the Act cause."

52 Supreme Administrative Court: 26 October 2016 (II OSK 96/15). Similarly: Supreme Administrative Court: 21 January 2015 (II OSK 2189/13); Voivodeship Administrative Court in Rzeszów: 25 August 2016 (II SA/Rz 1596/15).

tion to an object meeting the statutory criteria of a historical monument. Therefore, the court checks whether the body correctly recognized that the object constitutes a historical monument within the meaning of the Act. As the courts point out, it is obvious that the inclusion of the monument's card into the voivodeship list of historical monuments must result from the authority's conclusion that the object is characterized by features that justify the inclusion of a special form of protection due to its historical, artistic or scientific value. Only such an object that meets the definition of a historical monument can be included into the list of historical monuments.[53]

The lack of proper legal protection of the monument's owner in the case of using less formalized forms of protection of historical monuments raised doubts as to its compliance with constitutional and conventional standards for the protection of property. By virtue of a decision of 13 June 2018 (II OSK 2781/17), the Supreme Administrative Court asked the Constitutional Tribunal whether Art. 22. 5. 3 of the APHM is in accordance with art. 64.1 and 64.2 in conjunction with art. 31.33 of the Constitution of the Republic of Poland and art. 1 of Protocol No. 1 to the Convention on the Protection of Human Rights, to the extent that it restricts the ownership of real estate by allowing the object to be included into the commune inventory of monuments, without providing the owner with a guarantee of legal protection against such restriction.[54]

6 CONCLUSION

In the conclusions of the above considerations one can point out some basic theses, expressing the key elements of the methodology of examining the discretionary power of historical monument preservation authorities by Polish administrative courts.

First of all, administrative courts, when using terms that define different spheres of discretion margin, they are not always fully in line with the views of scholarly opinion. In some judgments, erroneous definitions of discretionary power may be found. It is also possible to note judgments in which, in the court's opinion, the body's discretion margin results from the lack of precise determination of the prerequisites for action taken by the historical monuments protection authority.

Secondly, the courts put a special emphasis on the obligation of the body to comprehensively explain the facts of the case. The fulfillment of this obligation is a key criterion for assessing the correctness of the body's discretionary powers. In this respect, the courts recognize that the monument protection bodies have sufficient competence to provide necessary findings requiring specialist knowledge in the field of history, art and technology, due to the specificity of the field and protected objects. The courts leave to the authorities the choice as to whether it is necessary to seek the assistance of external experts. Only in cases where the body's own knowledge is not sufficient for the proper fulfillment of the obligation of a comprehensive explanation of the facts of the case, the authority is obliged to seek external assistance in the form of an expert opinion as an entity with more extensive expertise.

53 Supreme Administrative Court: 20 November 2017 (II OSK 2926/16). Similarly: Supreme Administrative Court: 21 January 2015 (II OSK 2350/13); Voivodeship Administrative Court in Krakow: 8 February 2018 (II SA/Kr 1570/17); Voivodeship Administrative Court in Warsaw: 3 July 2013 (VII SA/Wa 2652/12).

54 By the time the article was submitted for publication, the legal question raised by the Supreme Administrative Court had not yet been examined by the Constitutional Court.

Thirdly, the courts place great emphasis on the "culture of justification". An important object of review is justification of the form of the settlement. The body must fully explain, using suitably convincing arguments, that in the circumstances of the case, the body correctly exercised its discretion margin.

Fourthly, due to far-reaching interference in the sphere of rights of the historical monument's owner, the courts emphasize the need to make the act compliant with constitutional standards of interference in fundamental rights, in particular the principles of proportionality and protection of property. It is an approach convergent with contemporary European standards in the field of control of administrative discretion.

Fifth, in the case of less formal activities, less determined by legal regulation, the courts point to the importance of complying with procedural standards and proper justification for undertaking the action. This approach is justified by the lack of adequately detailed legal rules determining the actions of the authorities, which may lead to arbitrariness. Considering significant property restrictions that even involve the use of less formalized activities, the verification of compliance with the procedure and proper justification are basically the only instruments of judicial review and protection of an individual against the abuse of discretionary powers by historical monuments protection bodies.

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GENERAL COMMERCIAL TERMS AND STANDARD-FORM CONTRACTS IN INTERNATIONAL BUSINESS RELATIONS

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Abstract: The present paper discusses the importance of general commercial terms and business conditions as basis for the conclusion of commercial contracts. The paper describes the historical development of general commercial terms and the increasing importance of individually stipulated standard-form contracts as well as the influence of both legal sources on the contract practice in international trade. The notion "general commercial terms" (abbr. GCT) designates proposals for standard contracts as produced in many cases by neutral experts of national and international organizations, whereas the notions "terms of business" or "general terms of business" refer to standard-form contracts which one party to a contract or both submit and which are accepted by the parties as basis of their negotiations. Subsequently, the advantages and disadvantages associated with the use of general commercial terms on the one hand, and individually negotiated terms of business on the other will be identified. The paper also distinguishes general contract conditions according to their types and formations, both from the point of view of international law and with regard to Czech statute law, as it is established mainly in the Civil Code. However, this paper does not only present the legal issues affiliated with the employment of general commercial terms and "parties' terms of business", it also focuses on the economic aspects of the use of established contract forms and conditions. Likewise, the paper is working out the areas where general commercial terms are applied in international trade and it points at important international organizations that work with, or contribute to, general commercial terms, such as the International Chamber of Commerce (ICC), the Institute for the Unification of Private Law (UNIDROIT), and the United Nations Commission on International Trade Law (UNCITRAL) *etc*. Thus, the work shall demonstrate the importance and indispensability of general contract terms and individually submitted and negotiated terms of business in the trade of goods, whether international or national.

Keywords: General commercial terms (GCT), (general) terms of business, nature of business conditions, standard form contracts, unification of the laws in international trade, international business, indirect contractual stipulation, direct contractual stipulation, interpretation rules, different contractual arrangements, international sales contract.

1 INTRODUCTION

The use of general commercial terms and pre-formulated business conditions facilitates the conclusion of contracts. The entire content of the contract need not be renegotiated in every particular case as previous consent is enough, if both parties agree on those parts of the contract concerning their mutual rights and duties which are proposed by appropriate general commercial terms or standard-form contracts. This process is economically important since it creates standardized settlements

which are characteristic for the business sector worldwide. Reference to general commercial terms in contracts does not mean that the contracting parties may not include additional provisions which they do not want to give up. By adjustment of individual contracts in reference to general commercial terms or business conditions of the parties, the risk connected with misconceptions and disputes that may be induced by the contract is lower. General commercial terms often make the provisions of law less ambiguous and more precise or eventually regulate questions, which are not considered or not regulated by the parties, or only marginally regulated by statute law.

In the field of international trade the parties to a commercial contract cannot be expected to specifically negotiate all the complex terms of such a contract. Such conduct should not be envisaged as the regular proceeding in international business; rather the parties should use terms and clauses which are already well accepted and offered to contracting businessmen in different forms.[1] Nevertheless, it cannot be neglected that the use of general commercial terms provides not only advantages, but disadvantages for either of the contracting parties as well. Among the most important advantages we may sort out the strengthening of the legal and economic securities of the parties in connection with the choice of the applicable law, the rationalization and acceleration of the contractual process. The express agreements of the parties should be limited to supplementary stipulations only, if other rights and obligations are well adjusted in the general commercial terms to which the parties refer. If the same parties repeatedly conclude contracts of identical or similar content they may identify the most frequently occurring risks and problems and counteract by incorporating a suitable set of covenants. From this point of view, the general commercial terms, in fact, make the contractual process less expensive and save the time of the parties. Within the range of party autonomy it is possible to deviate from the content of statutory provisions whenever the legal adjustment would not deal with all the answers which could be in the interest of the parties. The precise definition of the rights and obligations of the parties may ultimately minimize the risk of the dispute and save procedural costs. It is also important to realize that conducting litigation abroad may be lengthy, costly, and often unpredictable as to its outcome.

One of the disadvantages that are frequently connected with the use of general commercial terms and pre-formulated terms of business is the restriction of contractual freedom, which is generated by the one party to the contract refusing to allow the modification of her/his business terms, while the same party is holding a stronger economic position than the other. Such a situation will leave to the other party only one choice, either to conclude the contract, or to abstain thereof. Thus, the generalization resulting from the use of standard terms for all the contracts concerning identical or very similar performances may have a detrimental effect for the weaker of the contracting parties, whenever it would be more proper to negotiate the contract in regard of its particular performance and content. In practice, each party to the contract is trying to enforce the terms and conditions which are incorporated in the standard contract forms which the party is using as a basis for contracts, and to reject the proposed contract terms of the other party. This scenario often appears as the so-called "battle of forms", which means that each of the contracting parties resorts to the own business conditions, notwithstanding their divergent content. Or, one party sends a proposition of the contract to the other thereby referring to the terms as included in her/his standard form, the other accepts the offer and encloses her/his own terms of business which provide diverging clauses. In the end the crucial question is, whether and on which basis an agreement has been reached. This situation is undesirable and a better approach would be a consultation of individual points of the

[1] RAMBERG, J.: International commercial transactions. Stockholm: Kluwer Law International, 1998, p. 17.

general commercial terms conditions and a search for the interpretation of the parties' statements that is more suitable for both parties and would render a compromise possible.[2]

With regard to national as well as international business contracts, it must not be neglected, that standard form contracts are usually used by contracting parties of a certain dimension, not by small traders or by consumers. Usually the legally and economically stronger party to a contract is in the position to enforce the contract in accordance with the own favourable conditions of business. In international trade many general commercial terms suggest the use of model contract clauses which would guarantee a neutral treatment of the interest of both commercial parties. For contracts between businesspersons and consumers protective measures in favour of the latter are stated in national consumer laws implementing the relevant EU-Directives.[3]

In connection with the disadvantages it should be mentioned at this point, that in international business there cannot be provided the same protection for businessmen as is granted to the consumers in consumer contracts. Dangers stemming from the fact that in commercial contracts both parties are businesspersons are somehow mitigated by the use of standardized proposals of general commercial terms elaborated by international organizations; however, some risks and a certain platform of difficulties still remain.[4]

The main functions of internationally unified general commercial terms include, in particular,[5] the rationalization of contract negotiations. Parties can prepare and clarify at an early time already some complicated questions, which could prolong the negotiation of the contract. They can also have a positive psychological influence which may contribute to the elimination of stress in the formation of the contract and may have a positive impact for future developments and negotiations with the foreign partner. The use of general terms and conditions may be helpful in overcoming the differences between the legal systems involved by finding solutions which are acceptable for businesspersons from different countries, with different legal systems and dissimilar economic stages of development. circumstances. Indeed, the idea of unification of the rules of international trade and commerce is strongly promoted by the international and supranational institutions offering model contracts on the European and global scale.

2 HISTORICAL CONCEPT AND ESTABLISHMENT OF GENERAL COMMERCIAL TERMS

From the historical point of view, the general terms and conditions and their successful establishment relate to the interest for the most profitable approach to the realisation of the high number of

2 SCHMITTHOFF, C.: Schmitthoff's export trade. The law and practice of international trade. London: STEVENS & SONS, 1986, p. 83.

3 Former Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises; former Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts. Replaced by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, O.J. 2011, L 304/64.

4 ROZEHNALOVÁ, N.: *Standardizované formy uzavírání obchodních smluv v mezinárodním obchodě.* Brno : Masarykova Univerzita, 1991, p. 33.

5 ROZEHNALOVÁ, N.: Právo mezinárodního obchodu. 2nd Edition. Praha : ASPI, 2006, p. 235.

contractual relations in the commercial business. Modern history clearly shows that general commercial terms developed and found an increasingly widespread application in the context of the industrial revolution with its industrialized mass production requesting conformable contracts.[6] Despite the many references in the Anglo-American literature on the law of commercial contracts in this time,[7] general commercial terms were used already much earlier.[8] There is evidence of their use in ancient Roman law.[9] Landlords were the first among the businessmen of that time who resorted to unilaterally advantageous clauses in their contractual arrangements.[10] Further development proceeded in connection with the medieval evolution of Private International Law as a result of the impressive development of the law of international trade in the legal systems of the northern Italian cities from the 12th to the 15th centuries.[11]

In the context of early border-crossing contracts general commercial terms mainly concerned contracts of transport, whether by land or sea. In particular, maritime trade was significantly more dangerous than it is today.[12] The amount or level of risk also corresponded to the necessary insurance of the transported goods, eventually, a loss of valuable cargo. Similarly, insurance contracts became soon standardized, and new model contracts were formulated, which were recognized by the judicial institutions of the concerned states.[13] Thus, the maritime insurance industry was strongly expanding in the 16th century and, as a result of the economic power of the Hanseatic cities, standardized contracts became an acknowledged tool in trade and commerce in Northern Europe as well. However, the true appearance of the mass use of general commercial terms was a reaction to the Industrial Revolution.[14] Not only the transport sector benefited from the technological progress as it had to comply with the demands for the most flexible, economical, and least time-consuming means of transporting. The break-through of steam-powered railways and their undoubted benefits for business and trade accelerated the use of general commercial terms. This development continued with the increasing haulage of goods by steam liners and trucks driven by combustion-engines and the entry of air transport and shipping, thereby expanding the scope of border-crossing business relations. Over the centuries, the content of general commercial terms has been gradually changing and has switched from the questions concerning the insurance of the transport of goods to other aspects which became standardized and have led to the creation of general commercial terms for the delivery of goods to the final consumer.

It was not only the technological progress, that played a significant role in the development of general commercial terms, rather, that striking development was attributable to a change in legal

6 ROZEHNALOVÁ, N.: Standardizované formy uzavírání smluv v mezinárodním obchodě. Brno: Masarykova Univerzita, 1991, p. 14.

7 SCHMITTHOFF, C.: Schmitthoff's export trade. The law and practice of international trade. London: STEVENS & SONS, 1986, p. 62.

8 Compare with WESTERMANN, H. P. (ed.): Bürgerliches Gesetzbuch: Handkommentar, Band 1. 13. Edition. Köln: Verlag Dr. Otto Schmidt, 2011, commentary to § 305.

9 HELLWEGE, Ph.: Allgemeine Geschäftsbedinyungen, einseitig gestellte Vertragsbedingungen und die allgemeine Rechtsgeschäftslehre. Tübingen: Mohr Siebeck, 2010, p. 2.

10 FRIER, B. W.: Landlords, and Tenants in Imperial Rome. New Jersey: Princeton University Press, 1980, p. 63.

11 CORDES, A.: Gut behütet über die Weltmeere. In: Frankfurter Allgemeine Sonntagszeitung, 19. 06. 2011, p. 44., ZIMMERMANN, M.: Mezinárodní právo soukromé. Brno: Cs A.S. Právník, 1933, p. 38.

12 Currently it is necessary to mention problematics of piracy and dangers on sea connected with it, more on Commercial Crime Services. IMB Piracy & Armed Robbery Map 2017, 2017. Available at : <https://www.icc-ccs.org/piracy-reporting-centre/live-piracy-map> (accessed on 5th November 2018).

13 RANIERI F.: Europäisches Obligationenrecht. 3. Edition Wien: Springer, 2009, pp 30–31.

14 Ibid.

conditions as well.[15] This change was attributable to the evolution of free trade and the occurrence of a plurality of national judicial systems on the global market which requested a harmonization of the rules of trade law to which the acting participants of international trade might adhere world-wide.

In the early period of industrialization, in the middle of the 19th century, the development of the law of general commercial terms has been influenced by large professional associations that were creating models of contracts to be applied by the businesspersons of a specific sector of the economy. These non-governmental associations included, for example, the "*Waren-Verein der Hamburger Börse e.V.*", the London Corn Trade Association which exists until today under the name "Grain and Feed Trade Association". "… In that time all the businesses with a type of goods such as wheat, feed, coffee, rubber, sugar which were transported across the seas have been fully controlled by the forms. In the business with other products such as wood, meat, leather, grease, tea it was not used so universal as in the previous group, however, it was showing tendencies to a boom."[16] Indeed, the number of other associations whose members were dealing on the basis of their own general terms and conditions became more numerous since that time. For example: The British Wool Confederation; the Cocoa Association of London Ltd; the Federation of Oilseeds and Fats Associations; the International Wool Textile Organization; the Liverpool Cotton Association, the International Federation of Consulting Engineers (FIDIC), The European Engineering Industries Association (Orgalime), and others.[17]

The content of the general commercial terms as proposed by these organizations was repeatedly modified as time passed by. On the one hand, the content had to be adapted to all the questions, which according to experience were becoming the subject of contractual negotiations, that is the way, time and place of loading of the goods, payment conditions, force majeure, passing of risk, *et cetera*. The need for workable contractual arrangements in practice, and of course the content was shaped by the different positions of the contracting parties in respect of their legal and economic power and, last but not least, by the actual economic situation.

The preparation of model contracts and the use of general commercial terms and conditions quickly developed and, as noted above, the attention has above all been paid to overseas transport. Gradually, the standard form contracts underwent changes not only in respect of their content and quality standards, but also in the persons that compiled them. In the beginning, it was the individual businessman who created the business conditions of his enterprise, but, over the time, the trade unions also took an active part in the process. Two of the aforementioned associations, *viz* the "*Waren-Verein der Hamburger Börse*" and the London Corn Trade Association became supplemented, for example, by the Silk Association of America and the "Bremer Baumwollbörse", which created anew the whole collection of the business terms and conditions employed in their branch.[18]

In the legal regulation of relations in international trade, the so-called unification of the laws has been also playing an increasingly important role, which may be understood as a targeted global or regional integration activity of the sovereign states on an intergovernmental level. At the beginning of the evolution of general commercial terms the international unification as a whole did not attract

[15] Compare major changes with the Council Directive 93/13/EHS from 5. 4. 1993 about unfair terms in the consumer contracts.

[16] ROZEHNALOVÁ, N.: *Standardizované formy uzavírání obchodních smluv v mezinárodním obchodě.* Brno : Masarykova univerzita, 1991, p. 15.

[17] Cf. SCHMITTHOFF, C.: Schmitthoff's export trade. The law and practice of international trade. London: STEVENS & SONS, 1990 pp. 63 seq.

[18] In detail available at: <https://baumwollboerse.de/informationen/download/> (accessed on 5th November 2018).

much attention. At the beginning of the 20th century, when the use of general terms and conditions became more important in international business in general, unification of general commercial terms was rather deemed unnecessary, probably due to its small reach and the extreme nationalism of that time. The importance of the unification process became gradually acknowledged in the early sixties of the 20th century in connection with the steep rise of the European integration process.

Currently, it is hard to imagine that international business relations and the business environment could function without general commercial terms. A statement in the introduction to a contract that would refer to such terms will satisfy both the professional public and the business sector. Reality, theory, and case-law represent other lines, which are a crossing path in the environment of international business and in the separate levels of their collisions. These aspects create the need of finding answers to questions connected with the enforceability and sustainability of specific clauses in general commercial terms in front of the national courts. At the time, the absence of a system of supervision and interpretation by an international court of justice endanger the protective aspects in international business relations. The importance of general commercial terms is, of course, connected with the rise of international business, bound to the intensity of globalization of the world trade and to the demands of the highest degree of simplicity and standardization within the framework of international trade.

Associated with general commercial terms and the problems of their application are the assessment of their implementation and their incorporation into the contract; *viz* an economic view of the use of general commercial terms, a legally defined approach to their incorporation into the contract, a connection with the system of the Law of conflict of laws, and the choice of the law which is more favourable to the use of general commercial terms *et cetera*.

General commercial terms in Private International Law, and thus, in international business are undoubtedly related to the competition of individual legal systems in cases, where a choice of law is available for the contracting parties. Also the "competition" of legal systems and as a consequence thereof the existence of a "battle of promotional materials" may have a perceptible influence on the choice of the applicable law. The Law Society of England and Wales came up in 2001 with promotional materials where they have asserted that England and Wales were jurisdictions worth of the choice.[19] That document was supplemented by the introduction of the Lord Chancellor who proudly reported that people are coming to carry out their businesses in this country because they offer a flexible and reliable legal system. The emphasis was mainly on the economic focus of English law.[20] A first response from abroad was promptly published when the German Lawyers Association issued in 2008 a publication titled "Law made in Germany"[21] and in this promotional material German lawyers emphasize that German law is clear, reliable, systematic and leading to legal certainty.[22]

It is not appropriate to underestimate the ignorance of the law as well as the lack of knowledge of the national legal environment of foreign states. The competition and, in some cases, the export of foreign legal principles or methods may greatly affect real economic issues related to the business

19 The Law Society of England and Wales. England and Wales: The jurisdiction of choice, 2007. Available at: <http://www.eversheds-sutherland.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf> (accessed on 5th November 2018).

20 The fact that the judge-made English Common Law and the codified Civil Law in Continental Europe are in many aspects fundamentally different, may have had an underestimated influence on the BREXIT-referendum.

21 Bundesnotarkammer, Bundesrechtsanwaltskammer U.A. Law – Made in Germany, 2012. Available at : <http://www.lawmadeingermany.de/Law-Made_in_Germany.pdf> (accessed on 5th November 2018).

22 Ibid., p. 6.

and legal environment in the concerned countries. General commercial terms play an important role in the competition of the legal systems as well as in the international advocacy.

National legal systems adhere to different levels of intensity in the control of general commercial terms which are implemented through the general terms and conditions of the national law, that is, by the set of legal rules regulating the procedure of incorporation of general commercial terms into the contract, their implementation, the content of the control of this process, aspects connected with the ineffectiveness and the process of filling up the gaps resulting from the ineffectiveness of these general terms and conditions. The autonomy of the parties' will allow businessmen to escape from the strict regulations and to resort to more favourable legal systems. The contracting parties may also consider their right to choose the law that should apply to their contract in accordance with the unified legal rules of Private International Law as provided in the EU by the "Rome I-Regulation".[23] In the same way, the provisions of autonomous national conflict law of the concerned national legal systems have to be considered.

Apart from the difficult task to single out the most favourable legal solution for the participants in border-crossing business activities and the strictest legal order as well, it is also very difficult to describe the process of integrating the general commercial terms, the associated control of the process and the implications of the application of the relevant legal provisions. Meanwhile, according to some recent studies, popularity of some particular legal orders is declining[24] whereas other legal systems are getting more and more thereof.[25] However, as has already been outlined above, the issue is also related to international unified legislation,[26] in particular to the UN-Convention on Contracts for the International Sale of Goods.

In respect of the European systems of private law it is obvious that general commercial terms constitute a significant part of the business relation "B2B"[27] and, according to some opinions, have even taken the place of business customs.[28]

What is the reason for this undisputed position? At this point, we have to consider an economic concept of general commercial terms where entrepreneurs who standardize their contractual terms not only save much time but also the cost associated with the precise drafting of a complex contract.[29] The current economic situation almost enforces the selection and use of general commercial terms.[30] With the help of their use, it is to some degree guaranteed that the will of the businessperson will be properly communicated by her/his representatives.[31] Additionally, the future potential

[23] MALACKA, M.: Kolizní metoda v kontextu globalizace a europeizace, Kodifikace obecné části kolizního práva – cesta či omyl? In: Acta Universitatis Brunensis Iuridica, vol. 548, 2016.

[24] Cf. for example WESTPHALEN, F. Graf von: Wider die angebliche Unattraktivität des AGB-Rechts. In: Betriebs Berater, 2011, p. 195; JAHN, J.: Zerstörte Vertragsfreiheit!? In: Frankfurter Allgemeine Zeitung, 7. 2. 2012, p. 9; EWER, W.: Unternehmen unter Kontrolle. In: Frankfurter Allgemeine Zeitung, 18. 01. 2012, p. 19.

[25] Management Circle. Schweizer Recht im Anlagenbau, 2017 Available at: <http://www.managementcircle.de/seminar/schweizer-recht-im-anlagenbau.html> (accessed on 5th November 2018)

[26] STOFFELS, M.: AGB-Recht. 2. Edition. München: C. H. Beck, 2009, p. 25 and following.

[27] MERZ, H.: Massenvertrag und allgemeine Geschäftsbedingungen. In: Festgabe für Wilhelm Schönenberger zum 70. Geburtstag am 21. September 1968. Freiburg: Universität Freiburg, 1968, p. 137.

[28] MÜLLER, W. – GRIEBELER, C. – PFEIL, J.: Für eine maßvolle AGB-Kontrolle im unternehmerischen Geschäftsverkehr. In: Betriebs Berater, 2009, p. 2658-2665.

[29] ADAMS, M.: Ökonomische Begründung des AGB-Gesetzes. In: Betriebs Berater, 1989, p. 781-788.

[30] KRAMER, E.: Art. 19-22 OR. Allgemeine Bestimmungen. Inhalt des Vertrages. Berner Kommentar. Bern: Stämpfli, 1991. 282 p.

[31] DiMATTEO, L. – JANSEN, A. – MAGNUS, U. – SCHULZE, R.: International Sales Law. Baden – Baden: Nomos, 2016, p. 51-53.

risks in the process are reduced to a minimum when the general commercial terms apply.[32] General commercial terms find their application also in matters that are not adequately addressed by statute law. Whether by filling gaps in statutes or international conventions or by "easing the burden" of the non-mandatory law, it can be confirmed that, in general, business terms and conditions facilitate negotiations between the parties of an intended contract.

The aforementioned aspects, whether legal or economic, are, from an objective point of view, altogether valuable features. It is true, however, that the application of general commercial terms also reflects subjective aspects that are questionable with regard to the controlling function of the terms whether on a national or international level.

Users of general commercial terms are therefore unilaterally determining the content of the contract in a manner which is consistent with their business intentions. It is necessary to draw the attention to the fact that the user and translator of general commercial terms attempts to transfer to the contractual partner, as much as possible, the risk, which is associated with the implementation of the contractual relationship.[33] This advantage is particularly questionable in view of the fact that avoidance of the danger of an inappropriate transfer of the risk is the fundamental goal of legal and judicial control of general commercial terms.[34]

Together with the common provisions of general commercial terms also clauses which are connected to value issues determine the content of contracts in contemporary international business without being directly connected with the contract and which have not been stated at all in the general commercial terms. Thus, the contract quite often is only a short document that contains only essential elements of the agreement and leaves all other stipulated rights and obligations to the implemented general commercial terms.

The use of general commercial terms in the formation of contracts is, of course, a demanding issue, corrected not only by the provisions of the applicable law but also by the aforementioned perspective, on the basis of which the incorporation and implementation of the general commercial terms are assessed. Economic aspects and the legal environment have already been mentioned as corresponding to the models of the two most important approaches to the control of general commercial terms, namely the legal economic and the contractual theoretical approach. Both approaches are intertwined with the levels of private autonomy as the fundamental principle of the concerned legal orders. Another level consists in respect of possible conflicts of general commercial terms and private autonomy, where contractual theoretical as well as legal and economic perspectives of this issue may also be seen as different ways of finding a solution to these conflicts. The third fundamental path of solving this problem is through the "control of the content" of general commercial terms.[35]

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32 BAUER, W. B.: Der Schutz vor unbilligen Allgemeinen Geschäftsbedingungen (AGB) im schweizerischen Recht (Schweizer Schriften zum Handels- und Wirtschaftsrecht). Zürich: Schulthess, 1977.

33 DiMATTEO, L. – JANSEN, A. – MAGNUS, U. – SCHULZE, R.: International Sales Law. Baden – Baden: Nomos, 2016, p. 51-53.

34 BAUDENBACHER, C.: Ansätze zu einer AGB-Kontrolle im schweizerischen Recht. St. Gallen: Wissenschaftlicher Verlag, 1991, p. 17.

35 Cf. SCHÄFER, H.-B. – OTT, C.: Lehrbuch der ökonomischen Analyse des Zivilrechts. 5. Edition. Berlin: Springer, 2012, p. 423-432; BAUDENBACHER, C.: Ansätze zu einer AGBKontrolle im schweizerischen Recht. St. Gallen: Wissenschaftlicher Verlag, 1991, s. 17.

2.1 General commercial terms and Their Concept in International Trade

In practice, direct contractual stipulations of the parties to the contract are included into the contract in order to determine reciprocal rights and obligations.[36] In the case of a written contract the content of such directly agreed terms shall result from the wording of the agreement or from the proposal for the conclusion of the contract which the other contract party accepts.

Other categories of contractual agreement are the indirect contractual stipulations which can be characterized as certain rules, which determine reciprocal rights and obligations of the parties without being expressly put into words in the contract. Thus, the fact that the reciprocal rights and obligations are determined thereby follows from the parties' intention to be bound. An indirect contractual stipulation is not an explicit legal provision. It appears therefrom that the content of the legal relationship may also be determined by other contractual clauses referring in particular to the terms of trade, business practices, internationally recognized clauses governed by the rules on unloading[37] and on other activities connected with the contract. The application of business custom is allowed by international law in international business and by domestic law in respect of domestic trade.[38]

We distinguish business custom of trade from customary law, which is defined as a spontaneous rule of conduct, generally observed with the knowledge that it is a rule of law to be accepted. To become a legitimate source of customary law (or "legal custom") it has to represent the *opinio necessitatis* or conviction of the necessity to use the rule, and also *usus longaevus, viz t*he unchanged observance of the rule in practice over a long period of time. Legal custom is applicable in international business by itself and it is sanctioned by the state. Business custom which different states created in the trade between one another and is retained by them may differ from that practice.

This customary practice deals with the rules, which have been established and applies only to certain subjects; meanwhile business custom applies to an indeterminate number of subjects, developed mostly by the relevant business sector.

Rules of interpretation may also qualify as indirect contractual stipulations. Their main purpose lies in specifying certain clauses, which are commonly used in business relations and should be interpreted according to clearly defined rules. Probably the most frequently used and best known explanation of how certain trade terms are to be interpreted in international business are the INCOTERMS published and regularly updated by the International Chamber of Commerce in Paris.[39] These INCOTERMS are interpretations of collateral clauses suggested for use in contracts with foreign business partners.[40]

2.2 Characteristics of Business Terms and Conditions

Business terms and conditions are, thus, classified as indirect contractual arrangements. They are not always included in the contract, but more often they are attached to the contract, or they are printed

36 MAREK, K. – ŽVÁČKOVÁ, L.: Obchodní podmínky, obchodní zvyklosti a vykládací pravidla. 1st Edition. Praha : ASPI, Wolters Kluwer, 2008 p. 15.

37 Available at: <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010> (accessed on 5th November 2018).

38 Provision § 558 of Law No. 89/2012 Coll. Civil Code.

39 Another set of frequently used terms in international trade are payment clauses such as COD ("cash on delivery"), CEL ("cash before delivery"), D/P ("documents against payment"), or CAD ("cash against documents").

40 CHUAH, J. – CHIN, T.: Law of international trade. 2nd. edition. London: Sweet & Maxwell, 2001, p. 89.

on the reverse of the contract. Personally, I consider the second method to be more appropriate. In practice, people preparing an international commercial contract can avoid problems if they do not abstain from referring to these terms. Reference to INCOTERMS is considered to be a proper proceeding because in the absence of an indication of the year of their publication, it would not be easy to determine which business conditions had actually been used in a contractual relationship.[41]

Another characteristic of business terms and conditions is that they are considered to be subsidiary contractual arrangements. Business terms and conditions should address issues of a specific obligation in a contractual relationship which is not explicitly referred to in the contract. Only the essential elements of the contract are in such a case expressly stated in the contract itself, whereas other rights and obligations, respectively technical and quality requirements are specified in the terms and conditions. (e.g. transport modalities and passing of the risk of loss during transport).

Other features of business terms and conditions include abstractness. Business terms and conditions are more abstract than stipulations in individually negotiated contracts. Pre-formulated business terms and conditions are basically generalized contractual templates that complement the contract and rationalize and typify in particular frequently repeated and bulk deals.[42] In the contract itself only the type, amount and little more must be specified.

Other attributes of business terms are their unambiguousness and comprehensiveness. However, these features are rather requirements than characteristics. In practice, it is undesirable for general commercial terms to contain unclear arrangements or formulations that could be ambiguous. However, as mentioned above, it will rather be a requirement for eliminating contradictions and avoiding disputes when it comes to mind.

Contractual partners should be fully aware of the terms and conditions incorporated in the contract and should be alerted by their existence since the consent of the contractual partners to their application and wording is required. Such an agreement may in theory be reached orally, because the conclusion of a contract is not dependent on a written form. It should also be possible to make a verbal reference to the content in business terms. Such a procedure cannot be recommended, however, because, it would then be very difficult to prove that consent.

Finally the compliance with mandatory law may be identified as another characteristic feature of business terms. Business terms that would be inconsistent with mandatory standards of the applicable law are absolutely invalid or ineffective. General terms and conditions are also used in domestic relations, but their main purpose is to meet the needs of international trade.

2.3 Terminological Differences in International Context

Further, it is necessary to examine the role of individual contractual terms and their concepts in the context of general commercial terms. Terms and conditions are part of multilateral legal acts and as such their contents are either already closed or should be closed. It is necessary to make a distinction between contract terms and unilateral declarations on the one hand, and legal relationships arising without contract by regulations of public law on the other. Thus, provisions or clauses affecting the creation of a contract which are not a part of its content must be considered, which means that they govern the prerequisites for the conclusion of the contract and the moment of its conclusion.

41 INCOTERMS are overhauled by the ICC every ten years: 1990. 2000, 2010 etc.

42 HAJN, P. – BEJČEK, J.: Jak uzavírat obchodní smlouvy. 2nd Edition. Praha: Linde, 2003, p. 133.

The concept of business terms and conditions is enshrined in the Czech Civil Code in Section 1751.[43] General terms and conditions are designed for multiple application by the user and are implemented into the contract as conditions which are proposed by one party to the contract, *viz* the user, and submitted to the other contracting party when entering the negotiations.[44]

It is not decisive whether general commercial terms of business form a separate part of the contract or whether the contract is incorporated into the document itself. They are often referred to internationally as general terms of the contract, general commercial terms, general sales conditions, or standard form contracts. The lay public also uses the term "small letter prints". This denomination is, however, very inaccurate, because not everything written in small print is a general commercial term and vice versa, not any term of expression that is printed in small types contains general commercial terms. The form in which the general commercial terms are implemented is not primarily decisive, but their content is. Where general terms and conditions are used, there is a generalized abstract part incorporated in the contract. From a practical point of view, this part is standardized and provides important passages of the contract, since it contains specific rules on liability, confidentiality, commercial representation of the framework cooperation *etc.*

These clauses are intended for a larger group of contracts and also formulated for this group.[45] For the assessment, whether they qualify as general commercial terms or not it is neither important that they are an integrated part of the contract or added as an annex to the contract, nor what content they have or how they are drawn up in a specific form.

2.4 Defining the types of business conditions

In defining the types of business conditions, Czech law provides Section 237 (1) of the Commercial Code[46] which recognizes, on the one hand, general commercial terms drawn up by professional or charitable organizations and other manifestations of contractual conditions, on the other, for example stipulations inserted by one of the contracting parties.

The Civil Code deals with general commercial terms in Section 1752, although it retains the categorical classification in terms of the entities by which they are made. Furthermore, the Civil Code does not expressly specify which professional or interest organizations should have the right to draw up business conditions. It is possible that for one business area different organizations may create different general commercial terms in regard to the involved type of contracts.

The distinction between general terms and conditions and other business conditions was linked to the presumption of their general knowledge and acceptance. The terminological link, *viz* "general terms and conditions", is often considered to be in compliance with the established terminology. Often the notions "business terms and conditions" and "general commercial terms" are understood synonymously. For the purposes of this study and with regard to the practice of international business and to the characteristics of the business terms the notion "General Terms and Conditions", abbr. "GTC" shall be used for standardized instruments prepared for use by parties to an international contract.

43 Act No. 89/2012 Coll., Civil Code, until lately named as New Civil Code for its novelty.

44 ULMER, P. – BRANDNER, H. E. – HENSEN, H. D.: AGB-Recht. Kommentar zu den Paragrafen 305-310 BGB und zum Unterlassungsklagengesetz. 12th Edition. Köln: Dr. Otto Schmidt, 2016, p. 2.

45 STAUDINGER, J.: Kommentar zum Bürgerlichen Gesetzbuch, Buch 2, Recht der Schuldverhältnisse, Paragrafen 305-310. Berlin: Sellier – de Gruyter, 2006, Marg.no. 21.

46 Act No. 513/1991 Coll., which replaced the Code of International Private Law; Act No. 89/2012 Coll. Civil Code.

Unification of model conditions may be the result of an international treaty, some of which are developed by international organizations, whether governmental or non-governmental, that are involved in the development of the logistics of international trade. The acceptance and use of these business conditions have grown gradually with the importance of export trade.

Of greater importance have become a number of UNCITRAL-Documents. In 1966, the UN decided to take part in the progressive harmonization of international trade law and constituted the UN Commission on International Trade Law, abbr. UNCITRAL. This Commission focuses on the preparation and negotiation of multilateral international treaties, the negotiation and presentation of unifying model regulations, legislative recommendations, and other activities.[47]

Another set of Documents and principles concerning international trade and commerce has been elaborated by the International Chamber of Commerce, abbr. ICC. The ICC is a global business organization with representations of businesses from the entire world. Among the ICC-documents with the greatest relevance are the INCOTERMS. Other important documents issued by the ICC are The Uniform Custom and Practice for Documentary Credits, The Rules for the ICC Court of Arbitration, Uniform Rules for Contract Guarantees, and the Force Majeure and Hardship Clauses.[48]

In the year 1964 the diplomatic conference in La Hague approved the Uniform Laws on International Sales, *viz* two "unification laws", one of which was focussing on the substantive law of international sale of goods whereas the second focused on "formation" of contracts for international sale of goods. The (Hague) Uniform Laws on International Sales had little success however, since they were found to be too complicated. Cases applying the uniform law have been reported more or less only from German and Italian courts, whereas English Lawyers paid no attention to The Hague Sales Law, since the application of the English Uniform Laws on International Sales Act 1967 depended on an opting in by the parties to an international contract for the sale of goods.[49]

Different model contracts and general commercial terms are also used by parties concluding international contracts in the construction sector.[50] A number of model conditions for international business relations are mainly used in the Anglo-American environment, for example the "Conditions of Contract for Works of Civil Engineering Construction" or the "General Conditions of Contract for Civil Works".[51]

2.5 Business terms, different contractual arrangements, interpretation rules, and their relationship

The relationship between general terms and conditions on the one hand and individual contractual arrangements on the other are dealt with by the Czech Civil Code which indicates preference for individually agreed contractual arrangements. Thus, if in practice a situation arises where general

47 Available at: <http://www.uncitral.org/> (accessed on 5th November 2018).

48 Available at: <https://iccwbo.org/publication/icc-force-majeure-clause-2003icc-hardship-clause-2003/> (accessed on 5th November 2018).

49 SCHMITTHOFF, C.: Schmitthoff's export trade. The law and practice of international trade. London: STEVENS & SONS, 1986, p. 60.

50 In the Czech Republic for example General Terms and Conditions for the construction, issued by S.I.A. Czech Republic – Construction Council and Economic Chamber of the Czech Republic under the auspices of the Ministry of Industry and Trade of the Czech Republic and the Ministry for Regional Development of the Czech Republic, compare further: <http://fidic.org/book-product-type/works-civil-engineering-construction> (accessed on 5th November 2018).

51 As developed by the UNDP (United Nations Development Program).

terms of business would govern a particular matter differently from the individually negotiated contract, the latter will prevail in accordance with Section 1751 (1) of the Civil Code, against any contradictory provisions of the business conditions.

The Czech Civil Code also provides an answer to the question how a possible conflict between business conditions and differing contractual arrangements should be resolved. In practice, such a case could occur if, for example, the contract will set a different clause for the rules of delivery in compliance with the INCOTERMS 2010 rather than with "private" general business conditions forming the basis of a contract. The Czech Civil Code in Section 1754 (1) provides that where the parties apply a clause which is used in the contract, it is considered that they intended to produce the legal effects provided for by the rules of interpretation to which they have resorted in the contract, or those rules of interpretation, which are usually applied in view of the nature of the contract. Under paragraph 2, if one party of the contract is not an entrepreneur, the clause can be invoked if there is evidence that this meaning must have been known by the other party.

2.6 Terms of business in other legislation and set of rules

The Civil Code is not the only legal regulation in Czech law which refers to general terms and conditions and their use. Other laws regulating business conditions, their elaboration and application include, for example, Act No. 363/1999 Coll., On Insurance, as amended, Act No. 21/1992 Coll., On Banks, as amended, Act no. 137/2006 Coll., On Public Procurement, as amended, Act No. 458/2000 Coll., On Business Conditions and Performance of State Administration in the Energy Sectors and on the Amendment to Certain Acts (Energy Act), as amended, and others laws.

Significant attention is also paid to rules in general terms and conditions for the sale of goods in international trade law. The focus of the international instruments in the field of sale of goods lies primarily on business conditions and model contracts created by specialized organizations.

These terms and conditions are binding on the parties if they have negotiated their application in the contract. For contracts for the supply of capital goods in the international trade, it is typical that their realization takes place through several distinct types of transactions. Generally, it is a combination of the supplies of goods and services and the execution of certain works. Another characteristic feature of these types of contracts is their technological complexity and financial difficulty. Investors are often states, represented by their authorities or specialized international corporations acting as suppliers.[52]

As regards the law of conflict of laws, there are several options for the choice of the applicable law in these contracts, of which the most ideal appears to be the inclusion of a choice of law rule by the parties in the contract itself. However, as stated in specialized publications,[53] there exist in many countries appropriate regulations for certain national and international business contracts such as model business conditions and sample contracts which the parties may adopt as a basis for their agreements. These rules on the procurement in the public construction sector are used in the

[52] The World Bank. Procurement for Projects and Programs. Available at: <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,contentMDK:20060840~pagePK:84269~piPK:60001558~theSitePK:84266,00.html> (accessed on 5th November 2018).

[53] KUČERA, Z. – PAUKNEROVÁ, M. – RŮŽIČKA, K. et al.: Právo mezinárodního obchodu. Plzeň: Aleš Čeněk, 2008, p. 285.

Federal Republic of Germany. However, in respect of party autonomy, they are not automatically applied but dependent on parties' consent.

In practice a big number of International Business Conditions has been created by governmental and non-governmental organizations. These contracting regulations generally also contain specific provisions on the determination of the applicable law. For example, Article 5 of the Model Turkey Contract for Major Projects[54] provides that the applicable law is the law of the State into which the investment unit is supplied unless otherwise agreed by the parties.

It is also appropriate to provide a demonstration of commercial terms and model contracts created by governmental and non-governmental international organizations in the field of international supply of goods, including Standard Terms and Conditions of the United Nations Economic Commission for Europe, the World Bank publication, i.e. standardized tender supplies of investment units. The European Development Fund and its general rules and general conditions for work contracts, supply contracts, and service contracts, and contracts funded by the European Development Fund. Business Terms of the International Federation of Consulting Engineers, abbr. FIDIC, and the Model Contracts and Clauses on Drafting and Negotiating Commercial Contracts of the International Chamber of Commerce in Paris.

The importance of general terms and conditions in international trade and international sales contracts is evident not only in the day-to-day legal practice but also in the event of disputes arising in the performance of contracts with an international element. It is clear that both, practice and theory, consider the inclusion of choice-of-law arrangements, of clauses on the international jurisdiction of the court or arbitration clauses, as pillars of treaties that initiate export or import issues. Also clauses on the extent, limitation, or distribution of liability in case of a breach of contracts can be suggested in the form of general commercial terms and can be very helpful for contracting parties who are not familiar with foreign contract practices as well as foreign law and legal terminology.

In practice, not only the assumption of the validity of general commercial terms, but also their interaction with the relevant legislation plays an important role for negotiating and concluding international business contracts. The general problem of international trade is, that it is regulated not only by the provisions of national rules on Private International Law, by international conventions, substantive national contract laws and general terms and conditions for commercial contracts. In recent years a great number of regulations and directives concerning the rules of conflict of laws and the specific features of certain contracts have been enacted by the EU thereby adding complexity and circumstantiality to the already complicated situation. With the implementation and existence of general commercial terms are related questions of their interaction with the emergence of a contract law relationship, the impact on its existence or the avoidance of its occurrence and, of course, the question related to the assessment of the situation in which the general commercial terms can become part of the treaties themselves.

The peculiar problems resulting from the specific situations associated with the application of general commercial terms as well as with the established business practice and the need for a specific reference to the implementation of the general trading conditions are of major concern for modern trade and commerce. Together with the issue of commercial law and other co-occurring phenomena they constitute an important chapter of international business relations. Last but not least, it

[54] Publication of International Commission No. 659 E from 2007. Available at: <http://store.iccwbo.org/icc-model-turn-key-contract-for-major-projects/> (accessed on 5th November 2018).

is also necessary to discuss the possible collision of general commercial terms on which a contract may be based and its solution. The issue of the relevance of general conditions is also related to the manifestations of the parties' intention connected with the conclusion of the contract itself and the creation of its content, which is undoubtedly linked to the control of the scope and impact of the effect of general conditions of trade.

3 CONCLUSION

It is clearly evident, therefore, that both the breadth of the problems and their importance for the commercial practice can, in particular, be demonstrated for international trade relations. From the point of view of mutual interaction, it is, of course, necessary to take into account the practical importance of the international harmonization of certain areas of commercial law. In particular, the interaction of the United Nations Convention on Contracts for the International Sale of Goods (abbr. CISG) with the national regulations of the national laws of the 89 States which have ratified the CISG so far, among them the Czech Republic, The term "general commercial terms", is not defined by the CISG.

Within individual national regulations, we encounter different definitions of general commercial terms, and in the context of the gaps in international conventions, it is a question of whether national laws can fill these gaps. The issue of general commercial terms is important not only from the point of view of the practical and legal analytical approach but also from the point of view of the economic contribution and importance of this institute. Their application occurs not only in the international sales contract between entrepreneurs but also in the consumer legal relations, *viz* in relations between businessmen and consumers. Issues related to the application of widely recognized general terms and conditions concern e.g. the various options and ways of payment, the modes of conveyance, the transfer of risks and the limitation or exclusion of liability.

As discussed above, it must be considered that all issues related to the use of general commercial terms cannot be settled by the reference to national legal concepts only, but depend on the compliance with an international and cross-border perception of many legal relationships, since the question of the existence and evaluation of general commercial terms is linked to the approach of the applicable law or the rules of the CISG if the law of a contracting state is involved.[55] Meanwhile, this international convention has been ratified by virtually all advanced states with the exception of the United Kingdom.[56]

Since 1988, when CISG entered into effect for ten pioneer states, important developments have been launched and numerous adjustments proposed within the activities of international organizations and institutions, such as the Principles for the Use by Parties of UNIDROIT Principles of International Commercial Contracts, the attempt to create a uniform European contract law based

[55] On April 11, 1980, the UN Convention on Contracts for the International Sale of Goods was negotiated in Vienna. On behalf of the Czech and Slovak Federative Republic, the Convention was signed in New York on 1 September 1981 and published under No. 160/1991 Coll.

[56] Until today the convention has been ratified by almost 90 states. The current number may be checked on the web page of UNCITRAL. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG). Available at: <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> (accessed on 5th November 2018).

on the principles of European Contract Law, abbr. PECL and, most intensively of course, questions connected to the Draft Common Frame of Reference, abbr. DCFR. All these activities are the results of the long-term tendency of harmonizing contract law and of comparative research in various scientific circles and practical committees. Currently the reform process has turned towards common principles rather, than to hard and fast statutory rules of the subject matter.[57]

Modifications aiming at unification and harmonization of laws have brought significant progress within the EU in the area of conflict issues for both contractual and non-contractual obligations.[58] In connection with this unification trend, the issue of development within the framework of substantive law and the related issues of the preparation of a European Private Code have also continued, however, less intensively as before. Currently, the negative developments in European integration are indicative of stagnation and failure in such endeavours. There is also no talk of codifying European private law in the context of the European Parliament's motions addressed to the European Commission requesting the creation of a European Civil Law.[59] Thus, even reform projects for a limited field of contract law like the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law[60] apparently have no chance to be realized within a foreseeable time. The evolution within the European Commission has not only stagnated but has even been interrupted and, in the light of current political developments, has been replaced by a direction beyond the unification framework and strictly limited to harmonization.[61] In view of these developments, it appears, at least for the moment, inappropriate to rely on the adaptation of questions relating to general commercial terms and standard-form contracts within EU-law and its unifying impact.[62]

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57 Compare ZIMMERMANN, R.: Die "Principles of European Contract Law", Teil I. In: Zeitschrift für Europäisches Privatrecht, 1995, No. 4, p. 731; ZIMMERMANN, R.: Konturen des neuen Europäischen Vertragsrechts. In: JuristenZeitung, 50, 1995, no. 10, p. 477.

58 For example, the Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (so called Brussels I Regulation), Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (so called Brussels IIa Regulation), Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) and Regulation (EC) No 593/2008 of the European Parliament and of the Council (Rome I).

59 Official Journal of the European Communities No. C 158/400 and 1994 No. C 205/518.

60 COM/2011/0635 final – 2011/0284 (COD).

61 HESSELINK, M.: How to Opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation. In: European Review of Private Law, 20, 2012, No. 1, p. 196.

62 SCHMIDT-KESSEL, M.: Der Vorschlag der Kommission für ein optionales Instrument- ein einheitliches europäisches Kaufrecht? Eine Analyse des Vorschlags der Kommission. München: Sellier European Law Publishers, 2012, p. 1-27.

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ARTICLES

FORCED STERILIZATION AND ABORTION IN JAPAN: FAMILY AND CONSTITUTION

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Abstract: This study analyzes the fight between the Japanese judiciary and legislature. In Japan, under the ex-Eugenic Protection Act, disabled people were obligated to undergo sterilization procedures for about 20 years. This surprising Act was established in 1948 and enabled doctors to sterilize people in order to eliminate hereditary diseases; they could also perform this procedure on physically or developmentally disabled people without their consent. The 2016 Committee on the Elimination of Discrimination against Women advised that research and compensation is urgent and necessary, but the government stated that it was a legal medical operation, and no compensation was necessary. Even under concrete judicial review, the judiciary in Japan may exercise its power to provide remedies for minorities who cannot amend statutes in the political process, or their constitutional rights will be infringed upon. This study argues that even concrete judicial reviews work to prevent serious damage before it occurs. This study will use a legal approach to review the first voting rights decision, as well as several decisions that are relevant to families in Japan. Under a concrete judicial review of the Japanese constitution, a plaintiff needs to bring a dispute in law to the court and allege that the statute or administrative disposition infringes on their human rights as provided for in the constitution. If there is no statute in the case, it is very difficult for a plaintiff to compel the legislature to pass the statute. If the legislature does not function well, the judiciary is obligated to find a way to encourage the legislature or the government to provide a remedy. The judiciary cannot compel the legislature, but may show some of the steps that it follows in its decisions.

Keywords: judicial review, Japan, sterilization, concrete review, compensation, minority.

1 INACTION OF LEGISLATURE AND VOTING RIGHTS

The legislature had ample discretion to pass, amend, or abolish statutes under Article 41[1] of the constitution. Voters may ask the legislature to take action in political processes. Representatives owe voters political, not legal, accountability.[2] There is no system for voters to fire politicians in the Japanese Diet (parliament).

Article 15[3] of the constitution provides universal suffrage, but the requirements for voting are provided in the Public Offices Election Act (POEA).[4] A 2005 Japanese Supreme Court decision[5]

1 Nihon-Koku Kenpō [Constitution of Japan] May 3, 1947, art. 41.
2 ASHIBE, M.: Kenpō [Constitution], 2015, pp. 292-295.
3 Nihon-Koku Kenpō [Constitution of Japan], art. 15.
4 Kōshoku Senkyo Hō [Japanese Public Officer Election Act], law no. 60/2015.
5 Saikō Saibansho [Supreme Court] Sept. 14, 2005, Heisei 13 (gyo tsu) no. 82, 59(7) Saikō Saibansho Minji Hanreishu [Minshu] 2087.

ruled that it is unconstitutional that no provisions of the POEA[6] provide for voters living outside of Japanese territory.

The Court explained that the legislature may not restrict people's voting rights except for those who seek to damage the fairness of an election. The legislature is required by compelling interest to restrict voting rights to maintain the fairness of elections. The Court declared for more than ten years that legislative inaction was illegal and this did not have a compelling interest for the legislature, which was thus liable under the State Redress Act.[7] In 2006, the legislature amended the POEA. In this case, the plaintiff used new litigation in the revised Administrative Case Litigation Act (ACLA).[8]

In 2004, the legislature amended the Administrative Case Litigation Act to expand the scope of judicial review. First, litigation in public law-related actions[9] is an action relating to an original administrative disposition or administrative disposition on appeal that confirms or creates a legal relationship between parties, wherein either party to the legal relationship shall stand as a defendant pursuant to the provisions of laws and regulations, an action for a declaratory judgment on a legal relationship under public law and any other action relating to a legal relationship under public law.[10]

The 2005 decision approved this relatively new litigation that allows for preventive action before damage arises.

Second, Article 3(5)[11] of the ACLA allows to sue in an action for the declaration of the illegality of inaction. A plaintiff asked the Court to declare the illegality of legislative inaction, but the Court rejected the appeal because the legislature had already amended the POEA.

The 2005 decision narrows the wide discretion of legislators. The Japanese Supreme Court may review the restriction of voting rights.

In general, the mission of constitutional review in Japan is to provide remedies in concrete cases. The 2005 Supreme Court decision makes lawyers, who bring forward suits to seek action from the legislature, aware of the expectations of new litigations in the ACLA. The revised ACLA also established mandamus action that compels the government to make dispositions. Article 37-2[12] of the ACLA provides two litigations: one relates to who is eligible to apply, and the other relates to who is not eligible. Today, these two kinds of litigation enable citizens to bring forth actions to seek a declaration or to compel the government to perform an action.

Japanese public law professors can now review the possibility of new litigations in the ACLA.[13] The other cases relating to voting rights are held by two high courts. They reviewed legislative discretion to restrict the voting rights of prisoners who were sentenced to imprisonment. Article 11(1)ii[14] of the POEA restricts voting rights of prisoners who were sentenced to imprisonment.

In September 2013, the Osaka High Court[15] dismissed the claim due to a lack of interest in the confirmation of the illegality of inaction. This reasoning is very tricky. The Osaka High Court ruled

6 Kōshoku Senkyo Hō [Japanese Public Officer Election Act].
7 Kokka Baishou Hō [State Redress Act], law no. 22/1947.
8 Gyosei jiken soshou Hō [Administrative Case Litigation Act], law no. 139/1962, art. 4.
9 Ibid.
10 Gyosei jiken soshou Hō [Administrative Case Litigation Act]. art. 4.
11 Ibid., art. 3(5).
12 Ibid., art. 37-2.
13 SAKURAI, K – HASHIMOTO, H. – Gyosuei Hō [Administrative law]. Kobundo, 2015, pp.350-355.
14 Kōshoku Senkyo Hō [Japanese Public Officer Election Act], art. 11(1)ii.
15 Osaka Kotō Saibansho [Osaka High Ct.] Sept. 27, 2013, Heisei 25 (gyo ko) no. 45, 2234 Hanrei Jihō 29, West Law Japan, 2013WLJPCA09276001.

that there was legally no damage as a result of the inaction of the legislature under the State Redress Act. The court ruled that the POEA's restriction of voting rights in general was illegal on the grounds that they are merely prisoners, and it was illegal because they did not have access to absence voting either. The court explained that the legislature needed compelling interest to restrict voting rights and explained that it is unfair to exclude prisoners. They did so by noting that the constitutional referendum does not exclude prisoners who were sentenced to imprisonment. Prisoners may receive information from the official gazette or television about elections. It is possible to set up an early voting place in prison before the start of official voting.

The Osaka High Court decision is very technical by encouraging the legislature to revise the procedures for voting, such as postal voting.

In December 2013, the Tokyo High Court[16] ruled that the same provision of the Public Official Act[17] for the proportional election of the House of Councilors was reasonable and was not an arbitrary and capricious exercise of legislative power. The citizens who lost their case appealed to the Supreme Court. In 2014, the Supreme Court dismissed the appeal to seek confirmation of illegal election.

Under concrete judicial review in Japan, Article 3(1)[18] of the Court Act provides for disputes on laws and is similar to the term "case and controversy" in Article 3 of the U.S. Constitution. This aims to protect individual rights. The ACLA provides actions for the judicial review of administrative dispositions in Article 3[19] and public law-related action in Article 4.[20] This is called subjective litigation and serves the purpose of protecting the interests of individuals.

Even under concrete review, the ACLA provides for citizen action and interagency action, called objective litigation, in Articles 5[21] and 6.[22] Citizen action seek[s] the correction of an act conducted by an agency of the State or of a public entity which does not conform to laws, regulations, and rules, which is filed by a person based on his/her status as a voter or any other status that is irrelevant to his/her legal interest.[23]

It aims to correct illegal administrative activities and keep legal order. Articles 204[24] and 205(1)[25] of the POEA provides procedures for voters to argue that election administration commissions were illegal and void. By using these provisions in this case, the citizens argued that it is unconstitutional for Articles 11(1)ii and iii[26] of the POEA to uniformly deprive prisoners of their voting rights who was sentenced to imprisonment.

The Supreme Court ruled that the purpose of Articles 204 and 205(1) is to provide litigation for the illegality of the election administrative commission, but did not anticipate litigation in that the plaintiff asked the court to rule on the illegality of the POEA itself. The Supreme Court explained

16 Tokyo Kotō Saibansho [Tokyo High Ct.] Sept. 14, 2005, Heisei 13 (gyo tsu) no. 82, 59(7) Saikō Saibansho Minji Hanreishu [Minshu] 2087.
17 Kōshoku Senkyo Hō [Japanese Public Officer Election Act], art. 11(1)ii.
18 Gyosei jiken soshou Hō [Administrative Case Litigation Act], art. 3(1).
19 Ibid., art.3.
20 Ibid., art.4.
21 Ibid., art.5.
22 Ibid., art.6.
23 Ibid.
24 Kōshoku Senkyo Hō [Japanese Public Officer Election Act], art. 204.
25 Ibid., art. 205(1).
26 Ibid., art. 11(1)ii and iii.

that only a person who has his or her voting rights restricted may bring forth a suit to seek a remedy from the court. A third party may not bring forth a suit. Justice Katsumi Chiba[27] wrote a concurring opinion criticizing the majority. Under concrete judicial review, he argued that the court should have narrowed its scope and avoided an unnecessary decision.

These voting decisions are a clue to the review of family cases, such as those relating to physically or developmentally disabled persons, and those who carry hereditary diseases. These people are marginalized in society, and their families hide their existence because they feel shame for their family honor. In the next section, it is argued that the Court is vital in shaping the consciousness of families in Japanese society.

1.1 ALS and elections

The ALS (Amyotrophic lateral sclerosis) decision[28] illustrates the difficulty of bringing forth a suit alleging legislative inaction in a Japanese court. In this case, the POEA did not allow for postal voting, and required that voters use their own handwriting when voting.[29] ALS patients argued that legislative inaction is illegal under the State Redress Act.

The Tokyo district court held that the government was not liable even though it is unconstitutional to restrict the voting rights of people with ALS. It explained that the government is liable if the legislature illegally violated a clear term of the constitution. The court denied any damage to the rights of people with ALS because it was not clear that the legislature violated a clear term of the constitution. The Tokyo district court also rejected the argument for the confirmation of inaction of the amendment to the POEA because it was not a legal dispute under Article 3[30] of the Court Act.

1.2 Down syndrome

The Osaka High Court decision for the restriction of the voting rights of prisoners followed a famous decision of the Tokyo district court regarding a case[31] about Down syndrome.

In this case, a woman with Down syndrome was born in 1962 and diagnosed with Down syndrome three months after she was born. When she was 47 years old, she used the guardian system to designate her father as her guardian. Ex-Article 11[32] of the POEA deprived her of her voting rights. Under the adult guardianship system, the adult ward was deprived of voting rights.

She brought forward a public law-related action under Article 4[33] of the ACLA to the Tokyo district court for confirmation of her voting rights.

After the Meiji constitution[34] was amended to the current constitution, the Civil Code was revised and has ruled that a person who is non compos (mentis) is deemed incompetent and should

27 Chiba, J., concurring.
28 Kōshoku Senkyo Hō [Japanese Public Officer Election Act], art. 68.
29 Tokyo Chihō Saibansho [Tokyo Dist. Ct.] Nov. 28, 2002, Heisei 12 (wa) no. 502, 1114 Hanrei Taimuz [Hanta] 93 (Japan).
30 Saibansho Hō [Court Act], law no. 59/1947, art. 3.
31 Tokyo Chihō Saibansho [Tokyo Dist. Ct.] March 14, 2013, Heisei 23 (gyo u) no. 63, 1388 Hanrei Taimuz [Hanta] 62.
32 Kōshoku Senkyo Hō [Japanese Public Officer Election Act], art. 11 (abolished).
33 Gyosei jiken soshou Hō [Administrative Case Litigation Act], art. 4.
34 Dai Nihon Teikoku Kenpō (Meiji Kenpō) [Meiji Constitution].

be protected.[35] The incompetent person may not manage property or legally enter into contracts. In 1999, the Civil Code was revised into the current guardian system. Ex-Article 11 of the POEA provides that an adult ward has no voting rights.

In March 2013, the Tokyo district court explained that the ability to manage property and the ability to make political decisions is completely different. There is no compelling interest to restrict the voting rights of a person with Down syndrome such as undue influence on a fair election or a blank ballot. A person with a guardian may be eligible to exercise their voting rights.

Surprisingly, 74 days after its decision, the legislature amended POEA to abolish the denial of voting rights for persons with adult guardianship. Under Japanese constitutional law, the 1985 Supreme Court case[36] illustrates that there is no specific time limit for legislative action after an unconstitutional decision. This case involved a person who was injured while shoveling snow from his roof. Following his injury, the individual could not leave his home to vote, but the POEA had abolished home voting because the legislature believed that at the time, home voting was being abused. The 1985 decision[37] held that it in very limited cases will the judiciary declare the illegality of legislative inaction. Thus, the legislature has wide discretion to pass or abolish a statute. This Down syndrome case illustrates the positive action of the legislature. It is not promising to expect immediate legislative action.[38]

The Tokyo district court decision was a straightforward and clear message from the judiciary to the legislature. The court decision taught the legislature how to respond to its decision. The legislature deleted the provision immediately after the decision. The POEA defines voting requirements and procedures. The POEA may in the future state that disabled persons may exercise their voting rights by gestures or multiple-choice questions in order to more easily exercise their right to vote, but that matter is still subject to legislative discretion.

1.3 Sterilization of disabled people

Even though the current constitution was established 71 years ago and most statutes were amended, one terrible statute remained. In 1948, the legislature passed the Eugenic Protection Act[39] and adopted the forced sterilization of physically and developmentally disabled people, and those with Hansen and hereditary diseases. The Eugenic Protection Act followed the National Eugenic Act which was modeled on the Nazi Germany statute of 1940.[40] The purpose was to prevent the birth of supposedly unwanted people, and doctors performed sterilizations and abortions to achieve this goal. Doctors

35 OHKAWA, S.: Meiji Minpō ni okeru Koui Nouryoku no seigen [Restriction of legal capacity under Meiji Civil Code]. In: Ritsumeikan Ho gaku, vol. 240, 1995. Available at http://www.ritsumei.ac.jp/acd/cg/law/lex/95-2/ookawa.htm (accessed on 5th November 2018).

36 Saikō Saibansho [Sup. Ct.] Nov. 21, 1985, Showa 50(0) no. 1240, 39(7) Saikō Saibansho Minji Hanreishu [Minshu] 1512.

37 Ibid.

38 TSUJI, Y.: Reflection of Public Interest in the Japanese Constitution: Constitutional Amendment. In: Denver Journal of International Law & Policy, Vol. 46, 2018, 2, p. 159, 163.

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39 Yusei hogo Hō [Eugenic Protection Act], law no. 165 (1948) (abolished).

40 The Mainichi Shimbun, Kagakuno na no motoni [Under the name of science] (8, June, 2018). Available at: https://mainichi.jp/articles/20180607/ddm/041/040/141000c(accessed on 5th November 2018).

had a duty to report hereditary diseases to the committee of Eugenic protection. A notice from the Ministry of Health and Welfare[41] announced in 1953 that doctors may operate without the consent of their patients and allowed for deception and physical restraint. Doctors performed these procedures and were reviewed by their prefectural board.

In 1996, legislature abolished most provisions of this Act. A report by the Japanese Bar Association[42] reported that 59000 abortions and 25000 sterilizations were performed.

In June 2017, Miyagi prefecture[43] found one record of compulsory sterilization that was performed on a developmentally disabled person. In Kanagawa prefecture, one record noted that a teenager was targeted on the grounds that she could not clean herself when menstruating. The other record showed that a forced sterilization was performed on a diligent worker who was diagnosed with schizophrenia but recovered six months later.

The government has not paid any compensation and announced that these actions were legal at the time. One man filed a suit seeking damages under the State Redress Act for forced sterilization when he was 20 years old.[44] We are awaiting the outcome of this litigation.

2 INACTION OF GOVERNMENT AND BLANK STATUTES

Statutes established by the legislature are just a collection of words. Statutes need the administrative branch to implement them. This section illustrates governmental inaction even though the legislature wrote the statute, but caused serious damage to human lives. This is illustrated by one of the most famous cases, called Minamata disease.

2.1 Environmental pollution and governmental inaction

Minamata disease is one of the four major pollution diseases in Japan. In this case, mercury pollution occurred in Kumamoto prefecture. Later, as residents moved out of the area, latent diseases were actualized. This environmental pollution case illustrates the liability of the administrative and legislative branch for their inaction.

In this case, the legislature prepared two statutes[45] for water pollution in 1958. The purpose of these two Acts was to prevent a serious dispute between fisheries and factories. They failed to pro-

41 The Mainichi Shimbun, Editorial: Kyosei funin shujutu no chousa [Editorial: investigation on forced abortion]. Available at: https://mainichi.jp/articles/20180513/ddm/005/070/003000c (accessed on 5th November 2018).

42 Japan Bar Association: Kyu Yusei hogohou ka ni oite jisshi sareta yusei sisou ni motoduku yusei shujutu oyobi jinko ninshin chuzetu ni taisuru hoshou tou no tekisetuna soti wo motomeru ikensho [JBA announcement to seek compensation to forced operation, and abortion under Eugenic Protection Act] (February 16, 2017). Available at: https://www.nichibenren.or.jp/library/ja/opinion/report/data/2017/opinion_170216_07.pdf (accessed on 5th November 2018).

43 The Mainichi Shimbun, Kyu yusei hogo ho kyosei funin shujutu issei teiso [Litigation to seek damage for forced abortion under Eugenic Protection Act] (June 3, 2018). Available at: https://mainichi.jp/articles/20180531/ddw/090/040/005000c (accessed on 5th November 2018).

44 The Nikkei Shimbun, Kyu yusei hogo hou ka no kyosei funin [Forced abortion under ex] (May 17, 2018). Available at https://www.nikkei.com/article/DGXMZO30612080X10C18A5CC0000/ (accessed on 5th November 2018).

45 Kokyō you sui iki no suishitu no hozen ni kansuru Hō [Act on the Conservation of water quality of public waters], law no. 181 (1958). Kojō haisui tou no kiseini kansuru Hō [Act on regulations of industrial wastes water, etc.], law no. 182/1958.

vide remedies to pollutions diseases. Under these two Acts, the scope of the regulations had to be designated beforehand, and the regulations were ineffective. They failed to cover lead and cadmium. In 1970, the Diet finally abolished these statutes and passed the Water Pollution Prevention Act.[46]

The judiciary approved the liability of the illegal inaction of the government under these two Acts in 2004.[47] The Supreme Court held that governmental inaction was remarkably unreasonable in terms of the meaning, purpose, and nature of power under these laws. The Minister of International Trade and Industry was designated to regulate water pollution from factories, to seek injunctions against the management of factories, and to order the necessary measures. Considering the seriousness of the diseases, the minister should have exercised his designated power immediately. Governmental inaction increased the damage, and the government was liable under the State Redress Act.

This case showed the difficulty of reviewing illegality in the courts, and in 2004, there were demands that the ACLA be revised. If the obligation of administrative agency was clearly stipulated at that time, it would have been easy to determine the illegality of the inaction of the agency. If an agency's power is not clearly stipulated, the judiciary may find it difficult to review cases of illegality.

One court decision notes that the court may find one clear obligation of administrative agency to take action when see the purpose of statutes, and protected interest. The court may admit that there was a clear duty to take action under some circumstances.

The court may also determine the legality of any action or inaction based on the agency's discretion to take such actions. The court may narrow the agency's discretion in some circumstances. Either approach would require that the court clarify an agency's requirements if it finds that it illegally exercised its power. One solution might be the requirement of serious damage to human life, health, and physical bodies.

Under Article 30 of the ACLA, the Court would today have found the discretion of the agency to be capricious or arbitrary. The Court reviews the process of administrative decision-making involving administrative discretion in several phases: fact finding, legal requirement and application, selection among several regulations and effect, and timing.

2.2 Compelling administrative organs to act

The 2004 revised ACLA added new types of administrative litigation called suits compelling administrative organs to act.[48] This suit is divided in two. In one case, the plaintiff is not qualified to apply for permission. The reason to provide mandamus in the ACLA was that the court recognized that administrative inaction may cause serious damage, Thus, Article 3(6) provides mandamus action in case no alternative measure is available other than this litigation, and the plaintiff has legally protected interest.

The other is the case where an applicant is qualified to apply for permission. In this case, the plaintiff applied for permission, but his/her application was remanded or denied. The plaintiff seeks administrative action to issue permissions or to tell him/her what to do.

For example, a public kindergarten rejected an application from a person who has a child with a disability. The Tokyo district court held[49] that the public kindergarten exercised its discretion in an

[46] Suishitu odaku boushi Hō [Water Pollution Prevention Act], law no. 138/1970.
[47] Saikō Saibansho [Sup. Ct.] Oct. 15, 2004, Heisei 13(0) no. 1194, 58(7) Saikō Saibansho Minji Hanreishu [Minshu] 1802.
[48] Gyosei jiken soshou Hō [Administrative Case Litigation Act], art. 3(6), 37-2.
[49] Tokyo Chihō Saibansho [Tokyo Dist. Ct.] Oct. 25, 2006, 1956 Hanrei Jihō [Hanji] 62.

arbitrary and capricious way. The court compelled the kindergarten to accept the application. This litigation allows a third party, who shall be protected by regulatory administration, to bring forth a suit for incomplete regulation, and to compel administrative organs to act.

Another example of this litigation for families is that of an unmarried couple who submitted a birth certificate to Setagaya ward. The ward rejected the certificate because the father left his relationship to the baby blank and signed the check box of the applicant as "father." This is because he did not want his baby to be registered as an illegitimate child. In Japan, legitimacy with the mother is presumed by birth under Article 772[50] of the Civil Code; however, legitimacy of the child is presumed only to a married father. Thus, under Article 772, even though the child is not the baby of a married father, legitimacy is presumed to a married father. In this case, the ward official asked the man to revise his application, but he refused. The birth certificate was not accepted, and the baby was not registered in the family register.

He brought the matter to court to compel the ward to accept his child's birth certificate. The Tokyo district court held that the rejection of the birth certificate was beyond reasonable discretion and deemed it arbitrary and capricious.

This case shows the problem with Article 772 of the Civil Code that provides for the presumption of the legitimacy of a child. In another case,[51] a mother was abused by her child's father. She escaped and fell pregnant with another man's child shortly before her divorce. She did not want her child to be the baby of her ex-husband, and thus she could not submit a birth certificate. In another case, a 60-year-old mother brought an action to the Kobe district court alleging that Article 772 was unconstitutional under the equal protection of Article 14[52] of the constitution. In Japan, only a father may bring forth an action to rebut the presumption of legitimacy. The Kobe district court rejected her argument and explained that it is legislative discretion that allows fathers to exclusively rebut the presumption of legitimacy. The Kobe court noted that it is necessary to support divorce litigation, and to protect the privacy of mothers and children in domestic violence cases. The Kobe court encouraged the legislature to support mothers and children who have suffered from domestic violence. This case would go to the Supreme Court for another round of consideration.

2.3 Ministerial order

Ministerial orders may work when legislative action is inactive. In unique legislative processes in Japan,[53] many ministerial ordinances established by ministers work to supplement blank statutes. The constitution allows the administrative branch to write ministerial orders only if law-making power has been designated to them.[54]

One case[55] regarding child rearing support illustrates that the designated scope is beyond its designation. In this case, the Child Rearing Support Act[56] provides support for children whose

50 Minpō [The Civil Code], law no. 89/1896, art. 772.

51 Kobe Chihō Saibansho [Kobe Dist. Ct.] Nov. 29, 2018, Heisei (wa) no. 1653, West Law Japan 2017WLJPCA11296001.

52 Nihonkoku Kenpō [Kenpo] [Japanese Constitution], art. 73(6).

53 TSUJI, Y.: Law Making Power in Japan – Legislative Assessment in Japan. In: Korean Legislation Research, vol. 10, 2016, 1, p. 173.

54 Nihonkoku Kenpō [Kenpo] [Japanese Constitution], art. 73(6).

55 Saikō Saibansho [Sup. Ct.] January 31, 2002, Heisei 8 (gyo tsu) no. 42, 56(1) Saikō Saibansho Minji Hanreishu [Minshu] 246.

56 Jidō fuyō teate-hō [Child Rearing Support Act], law no. 238/1961, art. 4(1).

parents are divorced, whose fathers have passed away, and for any child under circumstances that are equivalent to these two cases. The ministerial ordinance was given the power to fill the meaning of the term "equivalent." The ministerial order defined the requirement for support to children of unmarried couples and excluded children whose fathers legally recognized them. The administrative branch thought that if a father legally acknowledged his child, he would support that child. The Japanese Supreme Court questioned its interpretation and explained that it is doubtful that child rearing support was no longer necessary on the grounds that fathers would support their children. The Court carefully made a distinction between children of a divorced couple and those of an unmarried couple. The statute may provide support for children of divorced couples. Thus, the Court held that the ordinance unconstitutionally discriminated between these two categories. It was beyond the designation granted by a law-making organ.

3 EFFECT OF CONSTITUTIONAL DECISIONS ON FAMILIES

The constitution is based on the values of families, but it is unclear to what extent these values are protected because the term of provision in the Constitution of Japan is abstract. Legislature is required to define the scope and value through statutes. The judiciary will take action after litigation arises or may work to prevent serious damage to human lives and health. The Japanese judiciary may be afraid of its decisions being deemed too influential on Japanese families. On the other hand, the Japanese judiciary is far removed from the people, compared to the legislature and cabinet. Japanese judges are not directly appointed by the people. Only fifteen justices of the Supreme Court are reviewed by popular review under Article 79[57] of the Constitution.

3.1 Influence on society

The judiciary may be too afraid to refrain from declaring cases unconstitutional. Judges mainly review cases under concrete judicial reviews. The judiciary is required to render decisions to guarantee foreseeability and to ensure consistency in the application of the law. The judiciary may be required to abstain in judgments that may have an influence on society.

First, after the constitutional decision for the same surname in Article 750 of the Civil Code[58] in 2015, one CEO brought forth a new action alleging that this provision is unconstitutional. In this case,[59] President Yoshihisa Aono of Cyozu, a major software company, sought damages under the State Redress Act. He got married in 2001, one year after his company was listed. He chose his wife's family name Nishihata, not Aono. He used Aono as a common family name in his business dealings. In April 2018, in the Tokyo district court, he spoke of the burden of using two different surnames. He noted that it was expensive to change passports, impacted his dealings as a stock holder, and made it difficult to buy plane tickets. He stated that he was required to work quickly for the sake

[57] Nihonkoku Kenpō [Kenpo] [Japanese Constitution], art. 79.

[58] Saikō Saibansho [Sup. Ct.] Dec. 16, 2015, Heisei 26 (o) no. 1023, 69(8) Saikō Saibansho Minji Hanreishu [Minshu] 2586.

[59] The Nikkei Shimbun, Fufu bessei erabezu, koseki hou wa iken [It is unconstitutional that family register act obligates to choose either one family name on marriage] (January 9, 2018). Available at: https://www.nikkei.com/article/DGXMZO25442100Z00C18A1CR0000/ (accessed on 5th November 2018).

of the management of his company, and such wasteful activities caused serious damage. He argued that Article 750 should be deemed unconstitutional. Unlike the 2015 decision, Aono made a new argument. First, he sought to change the Family Register Act[60] to allow the use of his premarital surname. Second, he argued that a couple, one Japanese and one a foreign national, may use different surnames under the Family Register Act, but this is not the case for Japanese couples. As such, it is unconstitutional under the equality principle of Article 4[61] of the constitution. It is unclear if this case will go to the Japanese Supreme Court. It is not easy for the judiciary to deny it based on the 2015 decision, because Aono brought forward a new claim that the judiciary is required to review. Justice Chiba's concurring opinion reiterated the power balance between the judiciary and the legislature.[62] He argued that the scope of judicial decisions should be narrow to regulate later cases as much as possible. He is now retired, but nonetheless, it should be noted that his opinion is one stream of the Japanese Supreme Court.

Second, Kobe's decision[63] denied the argument that it was unconstitutional that only a father may bring about an action to rebut the presumption of legitimacy. An inferior court may render an experimental decision and does not have to worry about the outcomes and influences of such a decision as much as the Japanese Supreme Court, who is required to render a judgement that is uniform. The inferior court may be vacated or remanded by the higher court. It may encourage the legislature to amend or abolish provisions of statutes. In the Down syndrome case, the Tokyo district court announced the provision of POEA restricting a person with Down syndrome. As Justice Chiba[64] stated in 2014, judges are required to review concrete cases, and narrow their decision based on the issue. Other cases that have the same legal issue would lose their predictability, as well as the equal principle of requesting equal treatment.

In 2008, the Japanese Supreme Court[65] held that Article 3(1) of the Nationality Act that denied nationality to children born of a Japanese father and an unmarried foreign national was unconstitutional; it only allowed for the legal recognition of the unborn child. The Court questioned if legislative facts of the Nationality Act in 1984 is still maintained. When this provision was established, its purpose was reasonable: to demand the marriage between a Japanese father and a foreign mother that connects them to Japan. The Court held that the aforementioned reasonableness was lost due to a change of legislative fact. The scope of this decision only covers families who argued in court as plaintiffs. A court decision is required to ensure equal treatment. In Japan, foreign parents or mothers submit birth certificates to municipal offices. Within 30 days of the birth, the parents or mother submit the birth certificate along with a certificate of eligibility for residence status to the immigration bureau. The baby will then be classified as a foreign national, not as a Japanese citizen.

Thus, if the scope of the unconstitutional decision only covers plaintiffs, unequal treatment would arise. Unless the legislature amends this unconstitutional provision, the local or national government needs to adhere to an unconstitutional decision by ignoring a procedure based on an unconstitutional provision. One of the most famous unconstitutional decisions is that of a parricide

60 Koseki Hō [Family Register Act], law no. 224/1947.

61 Nihonkoku Kenpō [Kenpo] [Japanese Constitution], art. 14.

62 CHIBA, K.: Iken-Shinsa [Judicial review]. Yuhikaku, 2017, p. 122.

63 Kobe Chihō Saibansho [Kobe Dist. Ct.] Nov. 29, 2018, Heisei (wa) no. 1653, West Law Japan 2017WLJPCA11296001.

64 Katsumi Chiba, J., concurring.

65 Saikō Saibansho [Sup. Ct.] June 4, 2008, Heisei 18 (gyo tsu) no. 135, 62(6) Saikō Saibansho Minji Hanreishū [Minshū] 101 (Japan); Saikō Saibansho [Sup. Ct.] June 4, 2008, Heisei 19 (gyo tsu) 164, 228 Saikō Saibansho Minji Hanreishū [Minshū] 101.

case from 1973; it took 22 years to change the unconstitutional provision.[66] While the legislature was deleted, the prosecutor applied a general murder provision, which was not an unconstitutional decision. It is the judiciary's responsibility to answer for what law is used in the courts. It is unproblematic for judges, even if a prosecutor used an unconstitutional provision.

These cases illustrate that unconstitutional decisions that influence society have no clear standard for the disciplining of judges. Judges are required to gain the trust of the people through their judgments. Judges may be required to provides guideline for legislature what to do in law making process after judicial decision. As in the Osaka High Court decision, judges may declare the constitutionality of a provision on an issue, but may still keep the legality for monetary responsibility under the inaction of the legislature. Thus, constitutional and unconstitutional decisions influence and impact society.

3.2 Timeline of decisions

The court may restrict the timeline of unconstitutional decisions by limiting unconstitutional decisions. On September 4, 2013, the Japanese Supreme Court[67] held that Article 900 of the Civil Code that restricts the legal portion of the inheritance of illegitimate children to half of that of legitimate children to be unconstitutional. The Court's order caused confusion because the Court once held it as constitutional in 1995. The 1995 Court order emphasized the importance of legal marriage, and it is within the scope of legislative discretion to restrict the inheritance of an illegitimate child.

In Japan, the inheritance procedure starts when a person passes away. If there is a will, the deceased's successor observes it. Article 900[68] of the Civil Code was soon amended. The new provision applies only in cases where a person has passed away one day after September 4, 2013, the day that the unconstitutionality was proclaimed. The amended provision covers only cases where there are legitimate and illegitimate successors, not cases where the deceased only has legitimate or illegitimate successors.

The Court carefully reviewed and explained this 2015 case which was brought to the trial court on July 1, 2001. Thus, to retain predictability and equal treatment, the Ministry of Justice explained that the amended provision applies to inheritance that starts after July 1, 2001, except in cases where the division of an estate was already completed.

This case illustrates that the judiciary may shut down the scope of a decision by adding an explanation to the legislature for retroactivity. Even under the Civil Law of the country, a judicial decision is also important under the rule of law. The core principle in the reasoning of a decision that binds later cases is called *ratio decidendi*. The other remaining part that does not regulate later cases is called *obiter dictum*.

The problem is how the judiciary may emphasize and include core legal principles and others in its reasoning. Dissenting opinions in family law cases show that minority opinions can influence later cases. The serious problem for predictability is that Japanese courts may not know how and

66 TSUJI, Y.: Decisions That Declared Laws Unconstitutional and Their Impact on Japanese Families. In: ILSA Journal of International & Comparative Law, 24, 2017, 1, Article 2, at 49.

67 Saikō Saibansho [Sup. Ct.] Sept. 4, 2013, Heisei 24 (kyo) no. 985, 67(6) Saikō Saibansho Minji Hanreishū [Minshū] 1320.

68 Minpō [The Civil Code], art. 900.

which factor the judiciary emphasizes in its reasoning for binding power in a judicial precedent. Unlike in common law countries, the Japanese judiciary tends to write its decisions by citing precedent in abstract form, and does not explain how cases are different from past precedents.

4 CONCLUSION

The cases in this study show how legislative inaction has caused serious damage to human life, health, and voting rights. In voting rights cases, the Japanese Supreme Court is obligated to review the process of legislation. However, under concrete judicial review, abstract reviews are the exception, and the Court is obligated to review evidence submitted by the parties. Even under concrete judicial review, the Court needs to review if the constitutional rights of minorities are protected. The Court devised some precedent, and the legislature revised the Administrative Case Litigation Act to expand the scope of judicial review. One piece of litigation, public law-related actions, allowed the judiciary exercise of performing broad judicial reviews.

Under the revised Japanese ACLA, several litigations are available: revocation of administrative measures, revocation of adjudication, confirmation of nullification, confirmation of illegal inaction, compelling the administrative organs to act, and injunctions. In these cases, the judiciary does not perform binding actions, but may show how the legislature should provide or amend the text of the statute in question. If the explanation of the judiciary is incomplete, the legislature cannot receive its message and would not work well to amend statutes. Under the parliamentary system in Japan, the administrative branch is so powerful that the decision-making process of the legislature is weak. Judicial decisions should work to show the limits of broad legislative discretion that is granted by the constitution. If legislative inaction leads to the endangerment of human lives and health, the Court should actively rule that the government is liable. One way to do this is to rule in favor of monetary compensation for damages under the State Redress Act. It might allow the judiciary to exercise abstract judicial reviews. Thus, mandamus action under the ACLA would work better and would allow the judiciary to encourage administrative agencies to take action. Some inferior courts are now reviewing the availability of some mandamus actions. Ministerial order plays an important role in Japanese law making process to clarify ambiguity in statute. Sometimes the court would announce that ministerial ordinances are beyond the designated power that it received from the parliament.

Lastly, while Justice Chiba argues that judicial decisions should be rendered so as to narrowly bind later cases, judicial decisions on families would still influence society even though they are constitutional decisions to approve legislative discretion. Even in civil law countries, judges are obliged to connect current cases with precedents. Dissenting opinions in family law cases show that minority opinions may influence later cases.

Japanese public law scholars are obliged to help the people review the reasoning of decisions made by the judiciary. The Japanese judiciary has a duty to gain the trust of the people through its decisions.

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THE DETENTION OF CHILDREN IN ASYLUM PROCEDURES IN EUROPE: REGULATORY FRAMEWORK AND ALTERNATIVES[1]

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Abstract: The article focuses on the regulation of the detention of children in asylum procedures in Europe with a special focus on EU law. It clarifies the framework of both international and European regulation, relevant case-law of the European Court of Human Rights and EU Court of Justice as well as soft law instruments adopted in this area. The article discusses grounds for detention, the requirements of necessity and proportionality, procedural safeguards as well as the dignity and human conditions in detention. A special attention is paid to the alternatives to detention, including detention of unaccompanied or separated children or families with children. It adds examples of the good practice.

Keywords: detention of children, alternatives to detention, best interest of a child, asylum procedure, Reception Directive, Return Directive

1 INTRODUCTION

The detention of migrant children – that is detention of children in asylum as well as return procedures – has become a crucial issue especially during the most recent migration wave that started in 2015. However, the detention was not a new topic and had been in the focus of international, EU and national regulation well before. When deciding on the rights of migrant children and their potential detention, the EU Member States are bound by their international law obligations as well as obligations rooted in the European Convention on Human Rights[2] and, subsequently, the case law of the European Court of Human Rights (ECtHR). Finally, the EU members are obliged to respect the EU regulation and are bound to properly apply it and implement it in their national legal orders.[3]

Preliminarily it should be noted that although detention of migrant children is not explicitly excluded either by the international or European rules, there is a strong tendency among states not to have recourse to these measures that put the principle of best interest of migrant children and their families to a serious risk. Correspondingly, the EU Member States should take into consideration alternatives to child detention which are formulated in various soft law documents.

The article will first analyse the international as well as the EU regulatory framework on detention of children in asylum procedures and then present the mostly available alternatives to such a detention in asylum procedures.

1 Irena Drdúlová participated in the work on this paper on behalf of project „Status of children in EU asylum law", IGA_PF_2017_006. Václav Stehlík participated in the work on this paper on behalf of project GACR, "Status of third country nationals in EU law", GA17-24822S.

2 European Convention on Human Rights. Available at: https://www.echr.coe.int/Pages/home.aspx?p=basictexts & c (accessed on 5th November 2018).

3 For a survey see for example BARRETO, Th. R.: Human Rights of Refugee Children in Light of Multilevel System. Europa-Kolleg Hamburg, Institute for European Integration, Study Paper No 02/18, 2018, p. 19.

2 REGULATORY FRAMEWORK TO THE DETENTION OF CHILDREN IN ASYLUM PROCEDURES

2.1 Universal instruments

The detention of children must be discussed in the context of the generally accepted human rights perspective, namely that individuals, including children, have the right to liberty and security and any improperly justified detention is in breach thereof. At the universal level this is regulated especially by the International Covenant on Civil and Political Rights,[4] International Covenant on Economic, Social and Cultural Rights[5] and Convention relating to the Status of Refugees.[6] In that regard a special status is held by the Convention on the Rights of the Child[7] as it specifically regulates standards of protection of children and their rights. According to the Convention, no child may be deprived unlawfully or arbitrarily of liberty and any arrest, detention or imprisonment of a child must be in conformity with the law and serve as a measure of last resort and for the shortest appropriate period of time.[8] Thus, although the Convention does not prohibit a child detention, it allows it only as a last resort measure. This requirement is supported by the documents issued by the UN Committee on the Rights of the Child,[9] UN Office of High Commissioner for Human Rights,[10] as well as the UN High Commissioner for Refugees.[11]

According to the UN Committee on the Rights of the Child the states should adopt alternatives to detention that would fulfil the best interests of the child. The aim is to allow children to remain with family members and/or guardians if they are present in the transit and/or destination countries and be accommodated as a family in non-custodial, community-based contexts while their immigration status is being resolved.[12] Furthermore, the unaccompanied children are entitled to special protection and assistance by the state in the form of alternative care and accommodation in accordance with the Guidelines for the Alternative Care of Children.[13] Furthermore the Working Group on Arbitrary Detention concluded that due to existence of alternatives to detention it is hard

4 Available at: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (accessed on 5th November 2018).

5 Available at: https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx (accessed on 5th November 2018)

6 Available at: https://www.unhcr.org/1951-refugee-convention.html (accessed on 5th November 2018).

7 Available at: https://www.ohchr.org/en/professionalinterest/pages/crc.aspx (accessed on 5th November 2018).

8 See art. 37, letter b) of the Convention on the Rights of the Child.

9 UN Committee on the Rights of the Child (CRC), Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration, 28 September 2012, para. 79.

10 UNGA resolution, A/HRC/31/35, Situation of migrants in transit, Report of the Office of the United Nations High Commissioner for Human Rights, para. 44-45.

11 UN High Commissioner for Refugees (UNHCR), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012.

12 See in full in UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para. 11.

13 UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005), Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, paras. 39–40. The guidelines are available at: https://www.unicef.org/protection/alternative_care_Guidelines-English.pdf (accessed on 5th November 2018).

to imagine a situation when an unaccompanied child could be detained under the conditions set up in art. 37 letter b) of the Convention on the Rights of the Child.[14]

This consensus later spread out to the children who have been detained together with their families. Thus, even if the child is accompanied by the family, he or she should not be detained if the best interests require it. Consequently, states are bound to look for alternatives to detention also for the parents of the child and authorities are obliged to look for solutions not including detention.[15]

A similar conclusion was reached by the UN Commission for Human Rights in the context of interpretation of the arbitrary arrest or detention in art. 9, para 1 of the International Covenant on Civil and Political Rights. The Commission on Human Rights noted that the detention may not be justified if there exist less invasive means of achieving the same ends. This includes for example the imposition of reporting obligations, sureties or other conditions.[16]

2.2 Council of Europe

In cases concerning child detention the ECtHR refers most often to art. 3 of the European Convention (prohibition of torture), art. 5 (right to liberty and security) and art. 8 (right to respect for private and family life). The detention of a child in the asylum procedure is not explicitly covered by any provision of the Convention. Still, the ECtHR applies quite rigid criteria when deciding cases concerning detention of migrant children.

The ECtHR case law was reflected also in a resolution on unaccompanied children in Europe issued by the Parliamentary Assembly of the Council of Europe (PACE).[17] The resolution, as a not binding document, enumerates fifteen common substantive and procedural principles. PACE recommended Member States of the Council of Europe to follow these principles and to set up cooperation for their fulfilment. One of the principles focuses on the situation of an unaccompanied child. It proclaims that no child should be detained based on migration grounds and such a detention should be replaced with appropriate alternative care, preferably foster care. In case of necessity to detain the child in a centre, the child must be separated from adults.[18] In 2015 the PACE Committee for Migration, Refugees and Displaced Persons spread the principles also in relation to children that were detained together with their families.[19]

2.3 European Union law – systematic framework

The EU deals with the detention and its alternatives in its secondary law that formulates an obligation of EU Member States to analyse the possibility to use alternatives to detention before they

14 UNGA, Report of the Working Group on Arbitrary Detention, 18 January 2010, A/HRC/13/30, para. 60.

15 Cf. UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para. 11.

16 United Nations Human Rights Committee, 13 November 2002, Communication No. 900/1999, CCPR/C/76/D/900/1999, para. 8. 2.

17 PACE resolution 1810 (2011), 15 April 2011, Unaccompanied children in Europe: issues of arrival, stay and return, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17991 (accessed on 5th November 2018).

18 Cf. ibid, para. 5. 9.

19 Available at: http://website-pace.net/web/apce/children-in-detention (accessed on 5th November 2018).

detain a person in the asylum procedure. This requirement is applicable to all individuals irrespective of their age.

The basic regulation is in the Reception Directive[20] that sets up conditions for reception of applicants for international protection. In the paragraph 18 of its preamble it refers to the Convention on the Rights of the Child. According to this paragraph, applicants in detention must be treated with respect for their human dignity and measures should be specifically designed to meet their needs. The Member States should ensure application of art. 37 of the United Nations Convention on the Rights of the Child.[21] The Reception Condition Directive then defines the detention in its art. 2, letter h) as *confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement*. It should be emphasised that the Directive covers detention of applicants for the international protection.[22] The Reception Directive also contains a definition of a minor in art. 2, letter d) and an unaccompanied minor in letter e). The Directive does not use the term "child" as it does the Convention on the Rights of the Child. It replaces the term by a term often used in national law, namely "a minor". Accordingly, a minor is a third-country national or a stateless person below the age of 18 years.

The Reception Directive contains multiple provisions on detention in its articles 8 to 11. Specifically art. 11 deals with the detention of vulnerable persons and of applicants with special needs, including children regardless of the fact whether accompanied or unaccompanied.[23] The Reception Directive does not exclude detention of children. In its art. 11 para 2) it admits detention of minors as a last resort measure which may be used only if other less coercive alternative measures cannot be applied effectively. Similarly it requires that the detention must be for the shortest period of time and minors should be placed in a suitable accommodation as soon as possible.[24]

The preamble also clarifies that detention of a minor may be justified only after all non-custodial alternative measures to detention have been duly examined. The aim is to preserve physical and psychological integrity of the applicant, and especially a minor whose development undergoes structural changes. Any alternative measure to detention must respect the fundamental human rights of applicants.[25]

The Reception Directive does not elaborate alternatives to detention that should be applied in relation to children. Children are also covered by the general regulation of art. 8 para 4 of the Reception Directive. This provision stipulates several examples of alternatives to detention such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place. The obligation to regulate the alternatives to detention is put on Member States

20 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29. 6. 2013, p. 96–116.

21 Cf. para. 18 of the Preamble of Directive 2013/33/EU.

22 The Directive 2013/33/EU is complemented by the Qualification Directive, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted OJ L 337, 20. 12. 2011, p. 9–26 and Procedural Directive, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection OJ L 180, 29. 6. 2013, p. 60–95.

23 The art. 21 of the Reception Directive provides an exemplary enumeration of vulnerable persons, including minors, unaccompanied minors or disabled people.

24 See art. 11 para 2 of the Reception Directive.

25 Comp. para 20 of the Preamble of Reception Directive.

and their legal orders and the alternatives are not, as such, regulated by the EU law. This is despite the fact that the alternatives may be quite an effective tool which can replace the detention.

The Reception Directive is complemented with the Qualification Directive 2011/95/EU[26] that does not contain any regulation of detention. Next to it there is the Procedural Directive[27] which has one provision on the detention, namely art. 26. This article just refers to the Reception Directive as concerns the grounds for and conditions of detention and the guarantees available to detained applicants.[28]

3 DECISION-MAKING PROCEDURE ON DETENTION

3.1 Legal basis and grounds for detention

Any deprivation of liberty must be prescribed by law. This is required both by art. 5 para 1 of the European Convention, international agreements[29] as well as case law of the ECtHR and the EU Court of Justice (CJEU).[30] The case law of both courts made it clear that the national legislation allowing deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness.[31]

Any detention must be well grounded. The European Convention enumerates the grounds in art. 5 para 1 which specifically in letter f) regulates detention of migrants. In this provision the Convention allows detention of a person to prevent an unauthorised entry into the country or of a person against whom an action is being taken with a view to deportation or extradition.[32] Another ground is formulated in letter b) of the same article according to which the arrest or detention is lawful in case of non-compliance with the order of a court or in order to secure the fulfilment of any obligation prescribed by law.[33]

The EU Reception Directive enumerates grounds for detention in art. 8 para 3. These grounds make a closed list[34] and EU Member States are not allowed to go beyond the grounds set up in this provision. At the same time, EU Member States are bound to introduce the grounds in their national legislation. The grounds can be characterised as general and do not make any difference between detention of adults and children.

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26 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20. 12. 2011, p. 9–26.

27 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection OJ L 180, 29. 6. 2013, p. 60–95.

28 See art. 26 of Directive 2013/32.

29 For example, art. 9 para 1 of International Covenant on Civil and Political Rights or art. 37 letter b) of The Convention on the Rights of the Child.

30 See for example judgement of CJEU in C-528/15, Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie proti Salah Al Chodor a ostatní, ECLI:EU:C:2017:213, para 38.

31 See the ECtHR, Del Río Prada v. Spain, no. 42750/09, 21 October 2013, para 125.

32 See Art. 5. para 1 letter f) of the European Convention on Human Rights.

33 See ibid, art. 5. para 1 letter b).

34 Cf. wording of art. 8 para. 3 of the Reception Directive according to which an applicant may be detained only on the grounds enumerated there.

The Reception Directive allows detention in order to check the identity or nationality of the applicant for international protection. The detention may be justified also by the necessity to clarify circumstances on which the application for international protection is founded and by the necessity to get the information which could not be acquired without the detention, especially if there is a risk of absconding of the applicant. The applicant for international protection may be detained also during the procedures dealing with the right of entry of the applicant. The Member States may decide on the detention also in the procedures based on the Return Directive[35] if other specific conditions are fulfilled. Specifically, a detention is allowed if required by the necessity to protect national security and public order. Finally, under the Reception Directive, a detention is allowed in situations presumed in art. 28 of the Dublin III Regulation.[36]

In this context it is important to point out to the relation between grounds for detention in the European Convention and the Reception Directive. Five out of six grounds for detention in the Reception Directive are formulated in art. 5 para 1, letter f) of the European Convention.[37] The only reason for detention which is explicitly covered only in the Reception Directive and is not contained in European Convention is the detention based on national security and public order grounds. This fact can lead to a differing interpretation as for the compatibility of national regulations with the standards of the EU law.[38]

3.2 Necessity and proportionality of detention

The evaluation of necessity and proportionality of the detention *vis-à-vis* an individual applicant for international protection, irrespective of age, must be done by the competent state authorities. The evaluation must be individualised and any decision on migrant children must respect their best interests. The state authorities are obliged to check whether the detention is the last resort solution. If children are accompanied by parents, it is necessary to respect their right to family life. The detention is allowed only for the necessary time period and living conditions in the detention centre must meet the interests and needs of children.[39]

The above mentioned standards were set up in the case-law of the ECtHR and many of them were formally introduced in EU law. Although the European Convention and EU regulation seem very similar, it is different as far as the necessity test is concerned.[40] The necessity test is regulated in EU secondary law, especially in asylum legislation.[41] The test was inserted in the art. 8 para 2 of the Reception Directive. The authorities of Member States may detain the applicant if it is not possible to apply other, less coercive rules.[42] On the other hand, the European Convention does not regulate

35 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24. 12. 2008, p. 98–107.

36 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29. 6. 2013, p. 31–59.

37 Cf. European Union Agency for Fundamental Rights (FRA), European legal and policy framework on immigration detention of children. Luxembourg: Publications Office of the European Union, 2017, available at: fra.europa.eu (accessed on 5th November 2018), p. 44.

38 See ibid.

39 See ibid, p. 47 and following.

40 Ibid.

41 The necessity test can be found in the Return Directive in art. 15 para. 1.

42 See art. 8 para. 2 of the Reception Directive.

the necessity test. However, if the law of the contracting parties contains the necessity test, they are bound by the ECtHR case law to use it.[43] Anyway, irrespective of the case-law of the ECtHR, the EU Member States are bound to apply the necessity test.

The EU Member States have the obligation to determine whether a detention of an individual child is a last resort solution.[44] The process is composed of three basic steps based on the full respect to the rights of the child. First of all, the child should be placed in a reception centre or other open facility, with the necessary support to guarantee the child's well-being. Second, if the restriction of fundamental rights is necessary (usually only restriction of personal liberty), the authorities should set up for example the obligation of regular reporting or designated residence. Furthermore, it is recommended to manage the case so as to adapt the procedure with respect to the child. The result of the procedure must respect most suitable alternative. Third, if the purpose of the procedure cannot be reach by alternative means, the authorities may order a detention.[45] A lacuna in the national regulation of alternatives to detention may not excuse the detention of the person concerned.[46]

It should be emphasised that there is a plethora of alternatives to detention and most of them only limit, but not deprive the freedom of movement.[47]

3.3 Procedural safeguards

Another condition crucial for setting up legality and non-arbitrariness of detention is the evaluation of procedural safeguards of a child in asylum procedure. In general, the procedural safeguards are applied irrespective of the age of the applicant. One of the procedural safeguards is also the judicial review which is set up in international law,[48] in the European Convention,[49] both in primary[50] and secondary[51] EU law. Among other safeguards set up in EU law belongs the right for free legal assistance and representation, as well as language assistance in a language which the applicant understands or is reasonably supposed to understand.[52]

The general procedural safeguards are complemented by special procedural safeguards justified by the legal dependence and immaturity of the child. The special procedural safeguards are express in the requirement of information duty in an appropriate form and adaptation of the asylum procedure for special needs of children. Adjacently there is an obligation of a Member State to nominate a guardian – a natural or legal person – that would guard the interests of the child. [53]

43 ECtHR, Rusu v. Austria, no 34082/022, 2 October 2008, para. 54-59.

44 FRA, European legal and policy framework on immigration detention of children. Luxembourg: Publications Office of the European Union, 2017.

45 See FRA, European legal and policy framework on immigration detention of children. Luxembourg: Publications Office of the European Union, 2017, p. 49.

46 Ibid.

47 Examples will be given further on in this article.

48 Art. 9 para. 4 of the International Covenant on Civil and Political Rights.

49 Art. 5 para. 4 of the European Convention on Human Rights.

50 Art. 47 of the Charter of Fundamental Rights of the European Union, OJ C 326, 26. 10. 2012, p. 391–407.

51 Art. 9 para. 3 of the Reception Directive, but also art. 15 para. 2 of the Return Directive.

52 See art 9 para 4 of the Reception Directive.

53 FRA, European legal and policy framework on immigration detention of children. Luxembourg: Publications Office of the European Union, 2017, p. 66 and following.

The EU secondary legislation, namely art. 23 of the Reception Directive, emphasises the principle of the best interest of the child.[54] The Member States are obliged to ensure that the interests of the child would be a primary consideration in their implementation of the Reception Directive. The best interests of child are also reflected in the principle of participation embodied in art. 23, para 2 letter d). National authorities are obliged to take into consideration view of minors with respect to their age and maturity. This is one of the obligations which Member States cannot disregard when deciding the best interests of the child. This obligation is applicable also where the detention of a child – applicant for the international protection – is considered. The EU Member States often transposed the EU secondary rules without an explicit referral to the requirement that the child should be heard. Still, some state authorities must respect this condition set up in national rules according to which a child cannot be detained if he/she was not heard by a judge.[55]

The participatory right of the child is based on the art. 12 of the Convention on the Rights of the Child. This participatory right also includes the right of the child to get the information on the detention. This information must be given to the child in an appropriate manner. If the child is detained with the family, it may be presumed that the information will be given by the parents or adult members of the family. Therefore, there are no specific provisions or practices regulating the way how the child should be informed. Anyway, the information should be communicated to the child in an appropriate manner.[56] If the detention concerns an unaccompanied child, all the necessary information on the child's legal status should be communicated by the guardian.

The UN Committee on the Rights of the Child recommends[57] that a competent guardian should be appointed to every unaccompanied or separated child as expeditiously as possible.[58] The asylum procedures should continue after the guardian is appointed. If a child undergoes administrative or asylum procedures, he/she should be provided with a legal representative in addition to a guardian.[59] The legal representative defences the rights and interest of child in every formal procedure.

The task of the guardian is to fulfil three functions, namely, ensure the well-being of the child, protect his/her best interests as well as to exercise the general legal representation and complement the child's limited legal capacity.[60] By this the guardian differs from the qualified lawyer or other legal expert. This qualified lawyer gives a legal assistance to the child and acts on their behalf. It represents the child in administrative or judicial proceedings, especially in criminal, asylum or other procedures based on national legislation.[61]

54 VAN OS, C.: The Best Interests of the Child Assessment with Recently Arrived Refugee Children. In: SORMUNEN, M. (ed.): The Best Interests of the Child – A Dialogue between Theory and Practice. Strasbourg: Council of Europe Publishing, 2016, p. 70-71.

55 FRA, European legal and policy framework on immigration detention of children, Luxembourg: Publications Office of the European Union, 2017, p. 64-65, for example Finland.

56 Ibid. p. 65-66.

57 UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005), Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, para. 21.

58 Ibid.

59 Ibid.

60 Cf. European Union Agency for Fundamental Rights: Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking, Luxembourg: Publications Office of the European Union, 2014.

61 Cf. ibid, p. 15.

3.4 Dignity and human conditions

Both the EU law and the European Convention on Human Rights require that the conditions in detention should be human and with respect to dignity of the detained person. The Reception Directive sets up in art. 10 and 11 the conditions for detention of applicants for international protection. The para 18 of the Preamble of this directive requires that the applicants who are in detention should be treated with full respect for human dignity and their detention should be specifically designed to meet their needs in that situation.[62] These needs include in relation to children especially necessary health treatment, but also access to education and leisure activities, the preservation of the unity of the family and adequate accommodation respecting its privacy.[63]

The crucial impact on the improvement of conditions in detention centres was effected by the case-law of the ECtHR, this being true not exclusively in relation to children, but to all detained persons irrespective of age. In relation to the detention of children, the ECtHR repeatedly found a breach of art. 3 and art. 5, para. 1, letter f) and eventually of art. 8 of the European Convention, as far as concerns conditions in the detention centres.[64] The Court concluded that the detention of a child (even if accompanied by a parent) in a closed environment can rise feelings of anxiety and can endanger their development.[65] In a later case the ECtHR added that also in the child-friendly environment the conditions inherent to the detention centre may represent a significant source of stress and anxiety.[66] The ECtHR further ruled that if the conditions in the detention centre – especially accommodation, hygiene or infrastructure – would be seriously bad then the detention would breach the Convention even though it would last only for two days.[67]

4 ALTERNATIVES TO DETENTION

4.1 Alternatives to detention of children in the case-law of ECtHR

Neither the European Convention nor the EU law gives any definition of the alternatives to detention.[68] In practice more definitions are used; most often the definition created by global network of non-governmental organisations and individuals called *International Detention Coalition*.[69] Thereby as an alternative to detention is to be considered "*any law, policy or practice by which persons are not detained for reasons relating to their migration status*."[70]

62 Ibid.

63 Art. 11, para. 1-4 of the Reception Directive 2013/33/EU.

64 See for example ECtHR, Popov v. France, no. 39472/07 and 39474/07, 19 January 2012 or ECtHR, Mubilanza Mayeka and Kaniki Mitunga v. Belgium, no. 13178/03, 12 January 2007.

65 Cf. ECtHR, Muskhadzhiyeva and others v. Belgium, no. 41442/07, 19 January 2010, para. 34.

66 Cf. ECtHR, A. B. and others v. France, no. 11593/12, 12 July 2016, para. 144.

67 ECtHR, Rahimi v. Greece, no 8687/08, 5 July 2011, para. 110.

68 DE BRUYCKER, Ph. – BLOOMFIELD, A. – TSOURDI, E. – PÉTIN, J.: Alternatives to Immigration and Asylum Detention in the EU., p. 86. Available at: http://odysseus-network.eu (accessed on 5th November 2018).

69 SAMPSON, R. – CHEW, V. – MITCHELL, G. – BOWRING, L.: There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (Revised). Melbourne: International Detention Coalition, 2015, p. II.

70 Ibid, p. II.

The basic argument in favour of alternatives to detention is based on the human rights protection, especially the right to personal liberty. The alternatives to detention are against no internal law obligation guaranteeing the right of a child.[71] The second argument is of a pure economic nature.[72] The alternatives to detention are less expensive than the detention. Third, it is often confirmed that alternatives are more effective means as far as concerns the cooperation, participation and involvement of children if they are used in the appropriate way.[73] Last but not least, the alternatives to detention less intrude into psychological as well as physical development of the child.[74]

Finally, it may be emphasised that the decision-making practice of the ECtHR leads to the conclusion that the Contracting Parties of the Convention should offer alternatives to detention. Thus, the states are bound to put them into their legislation and should consider them in an individual case. According to the case-law of the ECtHR the principle of the best interest of a child includes the obligation to deliberate on all alternatives to detention.[75] In case the state authorities do not properly investigate the situation of the child and do not verify if the detention is a last resort solution, they breach the right of the child to liberty.[76] In this regard the ECtHR concluded that if the state authorities do not verify whether an alternative measure would be available, they would detain the child without a proper justification and would breach its Convention obligations.[77]

4.2 Examples of the alternatives to detention

Most European states did not introduce special alternatives to detention of children.[78] At the same time, there are known and practiced alternatives which are especially appropriate for the families with children, particularly for the separated or unaccompanied children. Alternatives must be adapted to the character and content of the legal system of each country.[79] The introduction of the alternatives to detention and their application should avoid as far as possible the recourse to the institutional solution. In this regard it is advisable that the guardianship system, as an alternative for detention, would be sufficiently developed.[80] The individualised approach is a key solution to the migration situations.[81]

Foster care. The system of the foster care is often a preferable model for alternatives to detention of unaccompanied or separated children. The foster care creates a favourable environment where the child can develop harmoniously. The separated child receives the care, protection and support as in a family.[82] The system of foster care is introduced in a number of European states. Thus, for

71 Conference Report: Immigration Detention of Children: Coming to a Close?, p. 44.
72 Cf. PERELMAN, Ch.: Právna logika. Bratislava: Kalligram, 2014, p. 86.
73 Cf. ibid.
74 Cf. ibid.
75 ECtHR, Popov v. France, no. 39472/07 and 39474/07, 19 January 2012, para. 119.
76 Ibid, para 121.
77 Cf. ECtHR, A.B. v. France, no. 11593/12, 12 June 2016, para. 124-125; ECtHR, R.M. and M.M. v. France, no. 33201/11, 12 June 2016, para. 87, ECtHR, A.M. and others v. France, no. 24587/12, 12 June 2016, para. 93-95; ESLP, R.K. v. France, no. 68264/14, 12 June 2016, para. 113-115, ESLP, Rahimi v. Greece, no. 8687/08, 5 July 2011.
78 FRA, European legal and policy framework on immigration detention of children. Luxembourg: Publications Office of the European Union, 2017, p. 51.
79 Conference Report: Immigration Detention of Children: Coming to a Close?, p. 34.
80 UNGA, resolution 64/142, A/RES/64/142, Guidelines for the Alternative Care of Children, 24 February 2010
81 Conference Report: Immigration Detention of Children: Coming to a Close?, p. 35.
82 Ibid.

example in the Italian region Venice the authorities first ask the child if his/her relatives or family friends live in the region. If not, the authorities place the child in the institutional/residential care. If after the evaluation of the needs of the child is becomes clear that the child should live in an alternative family-like environment, suitable foster families are found. These foster families are of the same cultural background, often of Italian nationality. Under this set-up the communication should not be problematic with the creation of own communication channels.[83]

Kinship Care. This alternative is based on the fact that the child shares the place with the members of the extended family or stay with close friends of the family. The condition is that the child knows the friends. Thus for example in Sweden there is a relatively high number of unaccompanied children placed in the kinship care.[84] In these cases the Swedish authorities check these families and eventually train them before the placement. A research in Sweden has shown that the kinship care gives more stability than the placement in foster families or institutionalised care. In comparison to other alternatives, the kinship care option supports a good communication with the child and the carer who is a relative or familiar to the child. The communication with the child is supported also by the common language. Similarly this care supports cultural identity of the child.[85]

Accommodation Centre for Children (institutionalised care). A placement of an unaccompanied child in a specialised open centre is practiced in Lithuania and Slovenia. The Slovenian law sets up that on condition of an agreement with the guardian an unaccompanied child may be placed in an adequate centre for children. The application of this legislation is conditioned by the real possibilities; thus, for the time being, this possibility was not used and in Slovenia no such centre has been established, yet.[86] On contrary, in Lithuania all children are placed in an open facility which, however, is not specifically designed for children. This facility is used for accommodation of persons with the refugee status, irrespective of their age. Still the establishment of this non-specialised centre in Lithuania led to a favourable situation for separated children who contrary to Slovenia are not detained at all.[87]

4.3 Alternatives to detention of families with children

When detaining families with children it is necessary to take into consideration their right to private and family life. It is undisputable that families can better live without any detention. Therefore, it is necessary that states would search for alternatives to detention also in relation to the families with children. The right to family life includes also the rights of children to live together with their parents and also the right for protection against any interference to the family life.[88] The ECtHR

83 Ibid, p. 36.

84 Approximately 40 % of children.

85 Conference Report: Immigration Detention of Children: Coming to a Close?, p. 36.

86 DE BRUYCKER, Ph. – BLOOMFIELD, A. – TSOURDI, E. – PÉTIN, J.: Alternatives to Immigration and Asylum Detention in the EU, p. 101. Available at: http://odysseus-network.eu (accessed on 5th November 2018).

87 Ibid.

88 Art. 8 of the European Convention and art. 7 of the EU Charter. For the principles of application of EU Charter also in relation to national courts see for example: HAMUĽÁK, O. – MAZÁK, J.: The Charter of Fundamental Rights of the European Union vis-à-vis the Member States – Scope of its Application in the View of the CJEU. In: Czech Yearbook of Public & Private International Law, vol. 8, 2017, pp. 161-172; KERIKMÄE, T. – HAMUĽÁK, O. – CHOCHIA, A.: A Historical Study of Contemporary Human Rights: Deviation or Extinction? In: Acta Baltica Historiae et Philosophiae Scientiarum, Vol. 4, 2016, No. 2, pp. 98-115.

concluded that the best interests of the child cannot be limited to keeping the family together. The state authorities are obliged to take all necessary measures to limit the detention of families with children and effectively preserve the right to family life.[89]

Open centres for families with children. Open centres for families with children are established in a number of European states. Such open centres became one of the first alternatives to detention introduced in the Netherlands. These centres preserve the right to family life, however, with the confinement to the area of the municipality. The adult family members have the obligation to report to local authorities once a week. The representatives of non-governmental organisations have unlimited access to these centres.[90]

Despite this fact the Netherlands recently opened a closed centre for families with the children. Its purpose is to prepare the return of the third country nationals to the countries of origin. Still, the specialised centre has its aim to as far as possible reduce the impression of the fact that it detains family members. The centre is not separated from its neighbourhood by the barbed wire. The centre offers a kitchen, living room and bedrooms. During the stay an emphasis is put on the accessible education, health care and other public services.

In Austria the accommodation of families with children is secured on the outskirts of Vienna. The authorities decide about the alternative to detention in a selected accommodation centre or a regular reporting of adult family members. Both alternatives may be combined.[91] Families with the children can freely move; non-governmental organisations have also a free access to assist the families. There are no uniformed officers in the building. Still, the possibility to detain the family is still preserved, especially in case of its return to the country of origin.[92]

Belgium established a possibility for the families with children to be accommodated in open centres[93] with the support of social workers. This practice was introduced after several proceedings before ECtHR against Belgium.[94] The conditions in these facilities respect privacy and are adjusted to respect family life and needs of children. The families are obliged to stay inside the accommodation during night and morning periods.[95] Otherwise they are free to move. Children are enrolled to local schools and the families can freely have visitors in their accommodation.[96]

During their stay the families are supported by "coaching" from the immigration office.[97] The presence of the coach should help the family to find a permanent solution to their status in the receiving country or return to the country of their origin. This person also prepares various meetings (medical treatment, school, legal representation *pro bono*, etc.) and sees to everyday logistic, administrative or medical support to the families. The expenses, including coupons for purchase of food and other items from supermarkets, is covered by the immigration office and are partially subsidised by the European Return Fund.[98]

89 ECtHR, Popov v. France, no. 39472/07 and 39474/07, 19 January 2012, para. 147.
90 Conference Report: Immigration Detention of Children: Coming to a Close?, p. 37.
91 Ibid, p. 37.
92 Ibid, p. 38.
93 UNHCR, Global Strategy Beyond Detention 2014-2019. Goal 1: Ending the detention of children, Options paper 1, p. 15.
94 ECtHR, Mubilanza Mayeka a Kaniki Mitunga v. Belgium, no. 13178/03, 12 January 2007; FRA, European legal and policy framework on immigration detention of children. Luxembourg: Publications Office of the European Union, 2017, p. 51.
95 The period from 9 o'clock in the evening until 9 o'clock in the morning.
96 UNHCR, Global Strategy Beyond Detention 2014-2019. Goal 1: Ending the detention of children, Options paper 1, p. 15.
97 Ibid.
98 For activities of European Return Fund in individual EU countries, see https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/return-fund/national-actions_en (accessed on 5th November 2018).

Belgium made a public announcement in October 2017 that due to a massive influx of migrants it was going to re-establish the detention of children. It made this step despite large protests of non-governmental organisations in the country. Following the announcement in 2017 Belgium started to build a new closed centre for families with children. It was finished in summer 2018 and since then it is used for detention of families with children.

Individual case management. The proper solution for families with children very often requires cooperation with organisations that provide applicants with various services. The social worker leads the family and is responsible for the chosen solutions. Together with the family members the social worker choses social services and counselling from the organisations and institutions which may help the family. Poland introduced a pilot project of a non-governmental organisation for vulnerable persons (especially families with children which were either released from detention or imposed alternatives to detention). The project offered services connected with the engagement of these individuals in immigrations procedures, including the return procedures.[99] The aim of the project was to give support to families and develop the trust procedures. The project also made accessible legal and psychological support.

5 CONCLUSIONS

The aim of this article was to analyse conditions which European states must fulfil so that the detention of a child would not be proclaimed unlawful and arbitrary. Even though the international community is in agreement that the detention of children both in asylum and return procedures should not be executed, European states still practice it. Some states even return to this practice.

The conditions include the obligation of states to have a clear legal basis for detention in their legal orders. Moreover, the detention must be based on the regulated grounds for detention that are rooted especially in EU law. Furthermore, the detention should be necessary and proportionate as is required by the EU law as well as the case-law of the ECtHR. Thus, European states are obliged to examine the possible alternative solutions to detention. They also have to respect procedural safeguards, including special procedural safeguards applicable in relation to children. These safeguards include a necessity of appropriate communication with a child and assignment of a guardian. Finally, states must secure dignified and human conditions in the detention centre.

Correspondingly, it is clear that European states are obliged to fulfil quite a high number of conditions in order to ensure that the detention of children would not be unlawful and arbitrary. In this regard it is surprising that European states are not eager to use more alternatives to detention even though their benefits are undisputable. While some progress can be seen in this respect, the discussion on alternatives to detention of children in asylum centres is topical and substantial. This discussion can influence especially the attitudes of states that still detain children (accompanied or unaccompanied) in asylum centres.

[99] Conference Report: Immigration Detention of Children: Coming to a Close?, p. 40–41.

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TAXATION OF ISLAMIC BANKING TRANSACTIONS

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Abstract: The paper examines the juridical character of eight common Islamic banking transactions: murabahah, tawarruq, ijarah, istisna, salam, musharakah or mudaraba, sukuk, and takaful. It then compares each Islamic banking product with an equivalent conventional banking product, examines their differences in terms of transaction design, and shows whether these contractual differences result in differential tax treatment.

Keywords: Islamic banking, murabahah, tawarruq, ijarah, istisna, salam, musharakah, mudaraba, sukuk, takaful

1 INTRODUCTION

One of the perceived reasons why Islamic finance is underdeveloped in the Philippines is the alleged tax inefficiency of Islamic banking products compared to conventional banking products. Underlying contractual arrangements needed to comply with the financial principles of shariah purportedly result in higher transaction costs under the existing tax regime. This paper investigates this claim by first examining the juridical character of eight common Islamic banking transactions: murabahah, tawarruq, ijarah, istisna, salam, musharakah or mudaraba, sukuk, and takaful. It then compares each Islamic banking product with an equivalent conventional banking product, examines their differences in terms of transaction design, and shows whether these contractual differences result in differential tax treatment.

The findings indicate that the tax inefficiency problem is more nuanced than what existing policy research provides. While the claim is true in the case of murabahah, tawarruq, istisna, salam, and sukuk, it is not so in the case of ijarah, musharakah or mudaraba, and takaful. This paper shows the remaining areas that must be addressed by the prospective Islamic banking regulatory framework in the Philippines to achieve tax neutrality, and ultimately transaction cost parity, in the choice between conventional banking and Islamic banking products.

2 THE ISLAMIC BANKING MARKET IN THE PHILIPPINES

The World Bank estimates that the global Islamic finance market is $3 trillion. The National Commission on Muslim Filipinos (NCMF) estimates the number of Muslims in the Philippines to be approximately 10.7 million (11% of the total population) as of 2012. However, Al-Amanah Islamic Investment Bank of the Philippines (AIIBP) is the only Islamic bank in the country. It is a government-owned and – controlled corporation (GOCC) created in 1973 by Presidential Decree (P. D.) No. 264 (repealed and strengthened by Republic Act [R.A.] No. 6848) to provide financial services

in Muslim areas, such as Basilan, Cotabato, Lanao del Norte, Lanao del Sur, Palawan, Sulu, Tawi-Tai, Zamboanga del Norte, and Zamboanga del Sur. It is a subsidiary of Development Bank of the Philippines (DBP), also another GOCC. To date, it has yet to operate as a full-fledged Islamic bank.

There is currently no legislative and regulatory framework for Islamic finance in the country. While the General Banking Law of 2000 includes Islamic bank as a distinct banking category, there is no Bangko Sentral ng Pilipinas (BSP) regulation providing for the creation of private Islamic banks or a system for the grant of Islamic banking licenses. As a result, foreign Islamic banks are also unable to establish offshore operations in the Philippines. The Philippines has also to establish a professionalized body of shariah experts who can review and provide advice on shariah-compliant banking products and investments.

One of the perceived reasons why Islamic finance is underdeveloped in the Philippines is the alleged tax inefficiency of Islamic banking products compared to conventional banking products. Underlying contractual arrangements needed to comply with the financial principles of shariah purportedly result in higher transaction costs under the existing tax regime. This paper investigates this claim by first examining the juridical character of eight common Islamic banking transactions: murabahah, tawarruq, ijarah, istisna, salam, musharakah or mudaraba, sukuk, and takaful. It then compares each Islamic banking product with an equivalent conventional banking product, examines their differences in terms of transaction design, and shows whether these contractual differences result in differential tax treatment.

3 ISLAMIC BANKING TRANSACTIONS

3.1 Murabahah

3.1.1 Nature of the Transaction

The murabahah is the economic equivalent of the conventional mortgage-backed loan, but it involves different contractual arrangements and different legal relations. The conventional mortgage-backed loan involves a lender-borrower relationship between bank and client, while a *mudarabah* involves a vendor-vendee relationship.

Under a conventional mortgage-backed loan, a client who wants to purchase an asset obtains a loan from the bank, and the proceeds are used to purchase the asset. To secure the loan obligation, the client and the bank enter into an ancillary contract of mortgage, with the client as mortgagor and the bank as mortgagee. The asset covered by the mortgage may or may not be the asset which is the subject of the purchase. If the client defaults, the bank forecloses the mortgage. The proceeds of the foreclosure sale are then applied to the satisfaction of the loan obligation. Hence, the mortgage-backed loan involves three contracts: (1) the contract of sale between the client and the vendor of the asset, (2) the contract of loan between the client and bank, and (3) the contract of mortgage, also between the client and bank.

Under *murabahah*, the bank purchases the asset and then sells the asset to the client at a profit. While the mortgage-backed loan involves three contracts (and only one sales contract), the *murabahah* involves two sales contracts: (1) the contract of sale between the bank and vendor, and (2) the contract of sale between the bank and the client. The first contract is a spot sale (i.e. the total price is immediately paid), while the second contract involves an installment sale.

In order to assure the bank that the client will purchase the asset, the client must sign a "purchase instruction with promise to purchase" or some other undertaking that will legally obligate him to enter into an installment sale after the execution of the first contract of sale. If the bank approves the transaction, the bank then appoints the client as an agent, under a special contract of agency (*wakalah*), to purchase the asset from the vendor. When the bank and client execute the installment sale, title is immediately transferred to the client.

The total price in the installment sale has two components: the total cost of the asset under the first contract of sale, and the profit component. The schedule of deferred payments in the installment sale is economically equivalent to the amortization schedule of the mortgage-backed loan, while the profit component in the installment sale is the economic equivalent of interest payment in the loan.

3.1.2 Differential Tax Treatment

Income Tax. Under a conventional mortgage-backed loan, the bank obtains income in the form of interest. This forms part of the bank's gross income, which for domestic banks is subject to the regular corporate income tax rate of 30%.

Under *mudarabah*, the bank obtains income in the form of gain from dealings in property. Accordingly, it is important to distinguish whether this gain is an ordinary gain or a capital gain. This distinction depends on whether the object of sale is an ordinary asset or a capital asset. Since the bank buys the asset for the purpose of selling it at profit, it constitutes "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." Hence, the object of sale from bank to client is an ordinary asset, and the gain from the sale is an ordinary gain. Being an ordinary gain, it forms part of the bank's gross income, also subject to the regular corporate income tax rate of 30%.

The similarity ends here. Since the *mudarabah* involves an installment sale, it is subject to the rule on deferred payments under Section 49(A) and (B) of the NIRC. If the object of the *mudarabah* is personal property, the proportion of the price constituting the gain is taxed in the year of actual receipt, whether the accounting method of the bank is cash basis or accrual basis. The same rule applies if the object is real property, and the initial payment does not exceed 25% of the total selling price. On the other hand, if the initial payment exceeds 25%, the gain is taxed based on the bank's accounting method — i.e., in the year of actual receipt if the bank employs cash basis, and in the year when the gain meets the All-Events Test if the bank employs accrual basis.

If the client fails to pay the bank, different tax implications also arise. Under the conventional mortgage-backed loan, the bank may apply for a judicial or extrajudicial foreclosure of property. The proceeds from the foreclosure sale result in bank income tax liability depending on whether the borrower avails of his right of redemption and whether the bank is the purchaser in the foreclosure sale. If the borrower redeems the property, then title to the property does not pass from the borrower to the purchaser, and therefore no capital gain is due on the proceeds of the foreclosure sale. However, if the borrower does not redeem the property, then title to the property passes from the borrower to the purchaser. If the bank is not the purchaser, no additional income tax liability is due from the bank other than the tax on the portion of the foreclosure proceeds representing interest payment under the loan. If the bank is purchaser, the property forms part of the bank's Real and Other Properties Owned or Acquired (ROPOA), which are in the nature of capital assets because they are not held primarily for sale in the ordinary course of business, nor are they real properties used in the business of banking. Consequently, when the bank subsequently sells the property un-

der ROPOA, the gain is in the nature of capital gain. If the property under ROPOA is real property, the capital gain is subject to final capital gains tax of 6% of fair market value or gross selling price, whichever is higher. However, if the property under ROPOA is personal property, the net capital gain forms part of the gross income and is taxable at the regular corporate income tax rate of 30% of taxable income.[1]

Under *murabahah*, the bank as seller may avail of the remedies of an unpaid seller. In case of rescission, no tax liability on the ordinary gain in the installment sale arises because the parties restore what they have given under the sale. Since the property is returned to the bank, it now forms part of ROPOA, and is therefore already in the nature of a capital asset because it is no longer "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." Hence, if the bank subsequently sells the property, the gain is in the nature of a capital gain. Again, if the property is real estate, it is subject to final capital gains tax of 6% of fair market value or gross selling price, whichever is higher, and if it is personal property, the net capital gain forms part of the gross income, taxable at the regular corporate income tax rate of 30% of taxable income.

Gross Receipts Tax. Gross receipts on banking services are exempt from Value-Added Tax (VAT), but are subject to Gross Receipts Tax (GRT) under Section 121 of the NIRC, as amended by R.A. No. 9337. Under the conventional mortgage-backed loan, the interest is subject to 5% of gross receipts if the maturity period is 5 years or less, and 1% if the maturity period is more than 5 years. On the other hand, under *murabahah*, the gain constitutes "profits from exchange", which are taxable at 7% of the gross receipts.

Documentary Stamps Tax. A conventional mortgage-backed loan is subject to the following: *(i)* DST on Loan Agreement under Section 179 of NIRC, at P1 per P200, and *(ii)* DST on Mortgage under Section 195, at P20 for P5,000 or less, and at P10 on each P5,000 in excess of P5,000.

On the other hand, the *murabahah* is subject to the following: *(i)* DST on Deeds of Sale and Conveyances of Real Property, from Vendor to Bank, under Section 196, at P15 if consideration is P1,000 or less, and P15 on each P1,000 in excess of P1,000; *(ii)* DST on Deeds of Sale and Conveyances of Real Property, from Bank to Client; and *(iii)* DST on Powers of Attorney under Section 193 of NIRC, in connection with the execution of *wakala*, at P5.

Local Taxation. Interest under the conventional mortgage-backed loan and gain from the murabahah are included in the gross receipts of banks for the purpose of imposing Local Business Tax under the Local Government Code. The tax rates may vary depending on the local tax ordinance, but the maximum imposable by municipalities is 50% of 1% of gross receipts for preceding calendar year, and the maximum imposable by cities and municipalities within Metro Manila is 75% of 1% of gross receipts for the preceding calendar year.

A conventional mortgage-backed loan does not involve transfer of title to and from the bank, except in case of foreclosure sale when the bank is the winning bidder. The *murabahah*, on the other hand, involves transfer of title from the vendor to the bank, and from the bank to the client. This results in two taxable transactions for the corresponding two instances of transfer of real property ownership under Section 135 of the Local Government Code, imposable by the province where the property is located, at maximum of 50% of 1% of the total consideration.

[1] *Supreme Transliner, Inc. vs. BPI Family Savings Bank, Inc.*, G.R. No. 165837, 25 February 2011.

3.2 Sukuk

3.2.1 Nature of the Transaction

Sukuk is the economic equivalent of a conventional corporate bond. Through a corporate bond, a corporation in need of long-term financing for a project requiring significant amounts of investment issues a bond to the public, subject to registration with the Securities and Exchange Commission. An investor subscribes to the bond issuance, and the proceeds are turned over to the corporation for use in funding the project. By holding the bond, the holder is entitled to periodic interest income, in the form of coupon payments. The bondholders have no claim in a specific asset of the corporation, even if the purpose of the issuance is to fund a specific project.

In contrast, a sukuk requires the setting up of a Special Purpose Vehicle (SPV) by the corporation in need of public financing. The SPV, in turn, raises cash for the corporation by issuing certificates or instruments to investors. The SPV then uses the proceeds to purchase the asset from the corporation, and then leases back the asset to the corporation. Each holder has a proportional interest in the asset owned by the SPV. The corporation, in leasing the asset, pays periodic rental payments to the SPV. The SPV then turns over the rent to the bondholders. This rent constitutes their profit (not interest) on the instrument.

In the conventional corporate bond, no SPV is required, and therefore no lease contract is created between the issuer corporation and the SPV. The corporate bond does not bestow beneficial ownership of the assets to the holder, while the sukuk provides pro-rata ownership of the asset to the holders.

3.2.2 Differential Tax Treatment

Income Tax.

(i) Equity or debt instrument.

The income tax treatment of sukuk depends on whether it is classified as equity or debt instrument. While a corporate bond is in the nature of a debt instrument, a sukuk is a form of hybrid security that exhibits qualities from both debt and equity instruments. However, the NIRC does not provide a unique tax treatment for hybrid securities, hence it is imperative that a financial instrument should have only one tax classification, depending on the dominant features of the instrument.

A sukuk is closer to being an equity instrument because the sukuk-holders have ownership interest in the asset held by the SPV. The profit on the instrument is based on the rental income from the asset. The returns on the instrument are not guaranteed, since the risk is shared between the corporate issuer and the sukuk-holder. The only factor that makes sukuks similar to bonds is the fact that it expires, but this is also true for some types of redeemable shares and preferred shares. Hence, a sukuk should be treated similar to a share of stock.

(ii) Income tax treatment of corporate bond.

A holder of a corporate bond has three possible sources of income: *(i)* interest on the bond, *(ii)* trading income before maturity, and *(iii)* amounts received by the holder upon the retirement of the bond. First, interest on the bond is not subject to the final withholding tax of 20% because the corporate bond does not constitute "currency bank deposit and yield or any other monetary benefit from deposit substitutes and from trust funds and similar arrangements." Instead, the interest is

included in the gross income of a taxpayer, subject to the regular income tax rate, which is 5-32% in the case of resident individuals and 30% in the case of domestic corporations.

Second, trading income before maturity is taxable depending on the bond's original tenor. If the maturity is more than 5 years, the trading income is excluded from gross income. Otherwise, the trading income is taxable. The bond is an ordinary asset if it is a "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business", such as in the case of a dealer in securities. The bond is a capital asset if otherwise. If it is an ordinary asset, the trading income constitutes ordinary gain, which forms part of the gross income, subject to the regular income tax rate. If the bond is a capital asset, the trading income constitutes capital gain, and the net capital again (i.e. capital gain less capital loss during the taxable year) forms part of the gross income, subject to the regular income tax rate.

Third, amounts received by the holder upon the retirement of the bond are considered amounts received in exchange of the bond. Hence, the tax treatment is the same as trading income on the bond, which is taxable depending on the bond's original tenor, same as in the previous paragraph.

(iii) Income tax treatment of sukuk.

A holder of sukuk has two possible sources of income: (i) periodic profit on the sukuk instrument, and (ii) trading income. We have classified sukuk as equity instruments. Therefore, the periodic profit is in the nature of dividends, while the trading income is in the nature of gains on sale of shares. Hence, the periodic profit on the sukuk instrument is subject to the final withholding tax of 10%. On the other hand, the tax on trading income depends on whether the sukuk is traded through the local exchange, and whether the sukuk constitutes an ordinary asset or capital asset in the hands of the holder. If the sukuk trades through the local exchange, the sale is subject to the Stock Transaction Tax (STT), which is ½ of 1% of the gross selling price. If the sukuk does not trade through the local exchange, and the sukuk is an ordinary asset in the hands of the holder, the gain from the sale constitutes an ordinary gain, which is taxable at the regular income tax rate. If it is a capital asset, the gain constitutes a capital gain, which is subject to a final capital gains tax of 5% of the first P100,000 of the net capital gains, and 10% in excess thereof.

The presence of the SPV provides an additional corporate layer that increases the transaction cost of the issuance of sukuk. Since the SPV purchases the asset and leases it back to the corporation in need of financing, the rental income obtained from the corporation is also subject to the regular income tax rate of 30%.

Documentary Stamps Tax. A corporate bond is subject to DST on debt instruments under Section 179 of the NIRC, which is at P1 per P200, or fraction thereof, of the issue price. On the other hand, a sukuk, being a hybrid security that is closer to being an equity than a debt instrument, is subject to the following: *(i)* DST on original issue of shares of stock under Section 174 of NIRC, which is at P1 per P200, or fraction thereof, of the par value, and *(ii)* DST on sale of shares under Section 175 of the NIRC, which is at P0.75 per P200, or fraction thereof, of the par value.

3.3 Takaful

3.3.1 Nature of the Transaction

Takaful is the economic equivalent of insurance. Through a conventional insurance product, a person who wants to insure life or property enters into a contract of indemnity with an insurer, whereby the

insured pays premiums to the insurer and the insurer indemnifies the insured or his beneficiary for any damage, loss or liability arising from an unknown or contingent event. The insurer pools the premiums from the insured, invests the premium income in various investment assets, and makes the fund self-sustaining and financially viable to pay out liabilities in the future. The contract of insurance does not obligate the insurer to distribute surplus profits from the investments, unless there is a stipulation to the contrary. The insured also has no automatic obligation to make additional premium contributions beyond the stipulated amounts when there is deficiency in the funds to satisfy the insurance claims.

A takaful is similar to conventional insurance products, but with five unique features. First, the insured are members of a pooled investment vehicle. Second, the pooled investment vehicle is operated by a fund manager, which receives commissions or fees for managing the funds of the members. Hence, the pooled investment vehicle is the real insurer, not the fund manager, and the vehicle is an association of all the insured. This setup is similar to mutual insurance schemes allowed in the Insurance Code, and said pooled investment vehicles are analogous to cooperatives. Third, the insured members have a right to surplus profits from the pooled investment vehicles. Fourth, in case of deficiency, the insured members have the obligation to make additional contributions to meet the insurance claims. Finally, the fund manager may only invest in shari'ah-compliant products.

In short, takaful is legally identical to cooperative insurance. There is no regulatory obstacle for the creation and offering of takaful, other than the prohibition for banks to directly engage in an insurance business under the General Banking Law. On this matter, the prospective Philippine Islamic banking regulatory framework has two options: *(i)* to allow cooperative banks with full Islamic banking license to engage in takaful, as an exception to the General Banking Law, or *(ii)* to restrict the offering of takaful to insurance cooperatives with limited Islamic banking functions. Under the Philippine Cooperative Code of 2008, cooperatives may engage in the business of insurance. This is reiterated in Section 190 of the Insurance Code.

3.3.2 Tax Parity Treatment

Takaful is one of two Islamic banking products that enjoy tax parity treatment, the other one being ijarah. This is because takaful has the same contractual arrangements as cooperative insurance, and this similarity in transaction design results in similar taxation.

Takaful has the same tax privileges as cooperative insurance under R.A. No. 9520, as follows: *(i)* exemption on income tax, *(ii)* exemption on VAT, *(iii)* exemption on other percentage taxes, *(iv)* exemption on donor's tax, *(v)* exemption on excise tax, *(vi)* exemption on DST, *(vii)* exemption from annual registration fee, and *(viii)* exemption from all taxes on transactions with insurance companies and banks.[2]

3.4 Musharakah or mudarba

3.4.1 Nature of the Transaction

A business proprietor who wants to set up a new venture, but without sufficient capital, can finance the venture either through equity investment by a capital partner. Banks are allowed to infuse equity in business ventures, and under proper conditions prescribed by law and regulation.

[2] https://businessmirror.com.ph/cooperative-insurance/ (accessed on 5th November 2018).

Through musharakah, the bank infuses money in the business venture, and participates in the risks and rewards of business ownership. The bank and the business proprietor execute a "Profit and Loss Sharing Agreement", with the bank as contributor of capital and the proprietor as the manager and operator of the enterprise. The bank is not entitled to a pre-determined and guaranteed rate of return, otherwise it is construed as interest. The profit to the bank is dependent on the performance of the enterprise. Over time, the proprietor gradually purchases the equity interest of the bank in the enterprise until the bank is fully divested of any share or participation in the business.

The musharakah is, in effect, a partnership agreement. Unlike an ordinary partnership contract, however, musharakah involves an agreement for the client to gradually buy out the equity interest of the bank in the partnership.

A mudaraba, on the other hand, is similar in every way to a conventional partnership agreement, whereby one partner provides capital and another provides expertise and services. The partners agree on a profit-sharing ratio at the onset, but losses are borne by the capital partner. The difference between a mudaraba and a musharakah is that the former does not involve an arrangement on the part of one partner to buy out the share of the other partner in the partnership.

3.4.2 Tax Parity Treatment

The musharakah and mudaraba are legally identical to taxable partnerships, and are therefore taxed in the same way. A taxable partnership under the NIRC is treated similarly as a taxable corporation, its income being subject to the regular income tax rate of 30%. The same treatment applies to musharakah and mudaraba.

The applicability of VAT and OPT depends on the type of business venture that the bank and the client will operate. Whether under a conventional partnership or under musharakah or mudaraba, the DST on certificates of profits under Section 177 of the NIRC applies, at P0.50 per P200, or fraction thereof, of the face value.

3.5 Tawarruq

3.5.1 Nature of the Transaction

A commodity trader who needs to finance the purchase of stock for his inventory normally resorts to a conventional line of credit, supported by trust receipts. Through a trust receipts transaction, the bank as trustor retains ownership or title over the commodity, while the client as trustee retains actual possession. The client has an obligation to sell the commodity to a vendee and turn over a portion of the proceeds of the sale to satisfy the loan taken out under the line of credit. If the commodity is not sold, the client has the obligation to place it in the possession of the bank. Failure to turn over the proceeds or the commodity is a criminal act punishable by law. This gives the bank an assurance that the loan taken out under the line of credit is repaid.

This conventional financing arrangement involves four parties: the commodity supplier, the commodity trader, the commodity buyer, and the bank. The supplier sells to the trader acting as a middleman, who in turn sells to the end-buyer. The trader finances the purchase of the commodity through a loan from the bank. Hence, four contracts are involved: (1) the contract of sale between the supplier and the trader, (2) the contract of sale between the trader and the end-buyer, (3) the

contract of loan between the trader and the bank, and (4) the trust receipts transaction as security for the loan.

The tawarruq is the economic equivalent of this conventional arrangement. Since the interest-bearing loan between the trader and the bank is prohibited by *Shari'ah*, the bank must purchase the commodity from the commodity supplier, just like in the *murabahah*. Subsequently, the bank sells the commodity to the trader at a profit and payable in the future. The trader then finally sells the commodity to the end-buyer. In contrast to the conventional line of credit supported by trust receipts, three contracts of sale are involved: (1) the sale from the supplier to the bank, (2) from the bank to the trader, and (3) from the trader to the end-buyer. The first and third contracts are spot sales, while the second contract is payable in the future to aid the financing needs of the trader.

The tawarruq is also called "reverse murabahah". This is because, under the murabahah, the sale between the vendor and the bank is a spot sale, and the subsequent sale between the bank and the vendee is an installment sale. On the other hand, in the tawarruq, the sale between the bank and the trader is payable in the future, while the subsequent sale between the trader and the end-buyer is a spot sale.

One important difference between murabahah and tawarruq is the contract of agency between the bank and client. Under murabahah, the bank appoints the client as an agent of the bank in purchasing the asset. Under tawarruq, the client appoints the bank as an agent in selling the asset to the end-buyer.

In the conventional line of credit supported by trust receipts, the trader in order to make profit must sell the commodity at a price higher than the cost of the commodity and the interest payable to the bank. In the tawarruq, the trader in order to make profit must sell the commodity at a price higher than the price payable to the bank, which has two components: the cost of purchase and the profit component. And the profit component, like in a murabahah, may be pegged at benchmark interest rates in conventional lines of credit.

3.5.2 Differential Tax Treatment

Due to the similarity of tawarruq and murabahah, tawarruq is taxed in the same manner as murabahah, and is therefore also differently taxed from conventional loan financing in the same manner as murabahah, as discussed in Section III.G.2.

3.6 Ijarah

3.6.1 Nature of the Transaction

A client who needs an asset for business use, such as machinery, equipment, computers, vehicles, appliances, fixtures, and other movable property, but does not have sufficient funds to purchase the asset, may enter into a lease. Under an ordinary contract of lease, the lessor binds himself to allow the lessee to use and enjoy a property owned by the lessor for a specified time period, subject to the payment by the lessee of rental payments.

Leasing corporations offer what is called a "financial lease" to such clients. A financial lease is a contract of lease where the lessor purchases the asset upon the request of the lessee. The lessor retains title over the property during the period of the lease, but the period should be sufficiently long to cover the useful life of the asset. While the payment of rent is periodic, the total rental

payment is almost equivalent to the capital outlay of the lessor in purchasing the asset, covering the lessor's cost of procuring the asset. The lease is also usually non-cancellable because it is the intention of the parties that the lessee will use the asset until it is fully depreciated. For these reasons, "substantially all the risks and rewards incidental to ownership of an asset are transferred to the lessee from the lessor."

The financial lease may be accompanied by an option in favor of the lessee to purchase the asset at the end of the period of the lease. The strike price of the option is just sufficient to cover the value of the asset after deducting depreciation. This is usually the case if the total rental payment is not sufficient to cover the capital outlay of the lessor in procuring the asset.

The ijarah is legally identical to a financial lease. It consists of the same contractual arrangement as the conventional financial lease offered by leasing corporations.

3.6.2 Tax Parity Treatment

The tax treatment of ijarah is the same as the treatment for financial lease. Financial lease yields rental income to the lessor bank or leasing corporation, subject to the regular income tax rate of 30%.

The applicable Gross Receipts Tax is 7% in the case of banks and non-bank financial intermediaries performing quasi-banking functions, under Section 121 of the NIRC, and 5% in the case of other non-bank financial intermediaries if the maturity of the lease does not exceed 5 years and 1% if otherwise, under Section 122 of the NIRC.

The DST on financial lease, on the other hand, treats financial lease as an obligation. Under Revenue Memorandum Circular (RMC) No. 46-2014, the BIR clarifies that financial leases are subject to the DST on debt instruments under Section 179 of the NIRC. The RMC provides:

"Although documents, transactions or arrangement under financial lease are not specifically mentioned under section 179 of the NIRC, as amended, it should be remembered that the imposition of the DST under such section of the NIRC, as amended covers all debt instruments. Therefore, being a nature of an obligation, financial lease is covered under such section of the NIRC, as amended."

Under Section 143 of the Local Government Code, municipalities may impose Local Business Tax on banks and other financial institutions, at a maximum of 50% of 1% of gross receipts from financial lease.

3.7 Istisna

3.7.1 Nature of the Transaction

A client who needs to finance an infrastructure or construction project, like a building or factory, may agree with the construction company to defer and schedule payments based on project milestones. The client may still not have enough funds to pay the company as payments become due in accordance with the contract. For this reason, it would still need additional financing from a bank through various modes of funding, including a simple contract of loan, or the issuance of debt instruments and corporate bonds. Whatever mode of conventional financing is available, any service involving an obligation to pay the principal amount with a fixed rate of interest to funder is prohibited under shar'iah. In conventional construction financing, the bank is not a party to the contract between the client and the construction company and has no equity interest in the asset being constructed.

Under istisna, however, the bank becomes a party and intermediary. The bank purchases the asset from the construction company and sells the asset to the client. The bank does not earn interest, but from the spread between the buying and selling price of the asset under construction. The total cost of construction is fixed at the beginning of the project, subject to amendments in case of contingencies. The construction company and the bank are principal parties to the construction contract, and the bank in turn has a separate contract with the client whereby the latter undertakes to purchase the asset from the bank.

3.7.2 Differential Tax Treatment

The istisna is differently taxed from a conventional construction loan, in the same manner that the murabahah is differently taxed from a conventional mortgage-backed loan. And since both istisna and murabahah involve two sales transactions, with the bank simultaneously acting as buyer and seller, they receive the same tax treatment. First, the income of the bank under istisna is in the form of ordinary gain from dealings in ordinary assets, subject to the regular corporate income tax rate of 30% and to the rule on deferred payments under Section 49(A) and (B) of the NIRC. Second, the gain constitutes "profits from exchange", which are taxable at 7% of the gross receipts under Section 121 of the NIRC.

3.8 Salam

3.8.1 Nature of the Transaction

Financing agricultural activities conventionally involve agricultural credit, which may be formal or informal. Formal agricultural credit involves private commercial banks, thrift banks, development banks, rural banks, and credit guarantee institutions as providers. Informal agricultural credit involves credit cooperatives, credit unions, *paluwagans*, and rotating savings and credit associations. Agricultural credit being in the form of a loan or an obligation with pre-determined interest, it is prohibited under shari'ah.

Salam, on the other hand, is a shari'ah-compliant form of agricultural financing whereby the client, who produces the agricultural commodity, sells the commodity to the bank before it is produced and delivered. The bank pays the client-seller outright for the commodity, and the client-seller undertakes to produce and deliver the commodity to the bank at a specified future date. Upon the arrival of that date, the client-seller delivers the commodity to the bank, and the bank sells the commodity to a third party in the market. Since the bank does not specialize in agricultural trading, it appoints the client-seller under a contract of agency to sell the commodity to a third party.

3.8.2 Differential Tax Treatment

Due to the similarity of salam and istisna, salam is taxed in the same manner as istisna, and is therefore also differently taxed from conventional loan financing as istisna, as discussed in Section III.G.2.

4 CONCLUSION

Our analysis shows that the perceived tax inefficiency of Islamic banking transactions in the Philippines is more nuanced than what existing tax scholarship provides. While the claim is true in the case of murabahah, tawarruq, istisna, salam, and sukuk, it is not so in the case of ijarah, musharakah or mudaraba, and takaful. A bank offering financial lease is taxed in the same manner as an Islamic bank offering ijarah. A bank engaged in a partnership or joint venture agreement has almost equal income tax consequences as an Islamic bank offering musharakah or mudaraba. An ordinary insurance cooperative is also taxed in the same manner as an Islamic bank offering takaful.

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EU AS A HUMAN RIGHTS ACTOR?[1]

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Abstract: The human rights are fundamental principle of the European Union law, which should be observed in adoption of legislative rules as well as in implementation practice. The EU had been initially founded as the economic cooperation project and an ambition to establish cooperation between its member states also in political agenda became more visible especially since the Lisbon Treaty, by which the position of EU in area of external relations was strengthened. The paper analyses position of the European Union when promoting and protecting human rights in external relations. As there exist several tools and mechanisms EU may use in implementation of human rights policy, we analyze the role of the EU in relation to the application of human rights in foreign policy as stated in Article 2 and Article 6 of the Treaty on European Union.

Keywords: human rights, European Union, external relations, Copenhagen criteria

1 INTRODUCTION

The European Union, that since the adoption of the Lisbon Treaty has acquired legal personality, has strengthened its position in the economic market, and has also outlined plans for a stronger position in international relations. During the development the EU has created an idea of a European identity based on civilian power,[2] normative power[3] or superpower.[4] However, the ontological debate on defining the EU can keep forever, so the researchers also took deontological position and looked rather what the EU does in order to allow a comparison of statements and actions – words and deeds.[5] In this respect, therefore, it is important to understand what the main principles of the EU are and how these are implemented by the EU not only in its internal policies but also in its external relations. On the basis of Art. 2 TEU, the EU is committed to the values of human dignity, freedom, democracy, the rule of law and respect for human rights, including minority rights. At the same time Art. 2 highlighted the key role of pluralism, the principle of non-discrimination, tolerance, justice, solidarity, and gender equality. The Union has thus gradually established its role in of the international scenario[6] whether planned (economic giant) or more

1 This work was supported by the Slovak Research and Development Agency under the contract No. APVV-16-0540.

2 DUCHÊNE, F.: The European Community and the Uncertainties of Interdependence. In: KOHNSTAMM, M. – HAGER, W.: A Nation Writ Large? Foreign-Policy Problems before the European Community. London: Macmillan, 1973, pp. 19-20; SMITH, K. E.: Still 'civilian power EU'? Working paper 1. Oslo: European Foreign Policy Unit, 2005. Available at: www.arena.uio.no/cidel/WorkshopOsloSecurity/ (accessed on 5th November 2018).

3 MANNERS, I.: Normative Power Europe: A Contradiction in Terms? In: Journal of Common Market Studies, 40, 2002, 2, pp. 235-58; MANNERS, I.: Normative Ethics of the European Union. In: International Affairs, 84, 2008, 1, pp. 45-60.

4 McCORMICK, J.: The European Superpower. Basingstoke: Palgrave Macmillan, 2007.

5 BINDI, F.: The Foreign Policy of the European Union. Washington: The Brookings Institution, 2010.

6 ELGSTRÖM, O. – SMITH, M.: The European Union's Role in International Politics. Concepts and Analysis. New York: Routledge, 2006; AGGESTAM, L.: A European Foreign Policy? Role Conceptions and the Politics of Identity in Britain,

or less randomly (human rights defenders, developer). These tasks (roles) are key to the research question in this article.

The EU as an actor in international relations[7] has observation status at the United Nations, a comprehensive external policies and institutions that are, however, often criticized for a lack of coherence and consistency. EU external action includes a number of specific policies (international trade, development and humanitarian aid, security and defense policy, energy policy, diplomacy, migration, etc.). The EU added especially in relation to efficiency of Lisbon Treaty to its agenda human rights as the one of the EU fundamental principle and try to actively contribute to support and promotion of human rights worldwide. While its particular focus is mainly connected with the economic and diplomatic relations, human rights remain one of the priorities in EU foreign policy.

As the EU itself declares, it has made a positive and constructive contribution to the international relations and development of the 2030 Agenda for Sustainable Development. The 2030 Agenda emphasizes also issues such as effective institutions, good governance, the rule of law and peaceful societies, including promotion and protection of human rights (which are also stated as principles in Article 2 of TEU).

In this sense, research regarding the EU in international regimes focuses often on the principle of "effective multilateralism",[8] which is one of the core principles in the EU external relations as a part of the desired comprehensive approach.[9] The further analysis focuses on the EU behavior in human rights regime. Despite the fact that the human rights regime can be defined as relatively powerful regime, the EU in this case has not downloaded the regime as such but created its own through Art. 2 and Art. 6 TEU.

According to this, we focus on research question, whether the EU may emerge as human rights actor in world politics? In this sense we analyze the position of the EU in human rights protection and promotion in its external relations, by establishing the legal framework and using its own system of instruments and implementation policies.

2 EU FOREIGN POLICY AND HUMAN RIGHTS

In order to grasp the EU action in its external relation related to human rights and to explore whether the EU is a significant actor, we use the concept of actorness, that allows us to identify the features and specialties of the EU as a human rights actor in international relations.

Concept of actorness has been subject to scholars mainly from the 70s, as the EU started to build its international position through the economic cooperation. Sjöstedt[10] raised the debate about actor

France and Germany. Doctoral dissertation. Stockholm: University of Stockholm, 2004; BREUNING, M.: Role theory research in international relations. State of art and blind spots. In: HARNISCH, C. F. S.: Role Theory in International Relations. Approaches and analyses. London and New York: Routledge, 2011, pp. 16-33.

7 BRETHERTON, C. V.: The European Union as a Global Actor. London: Routledge, 1999; GINSBERG, R. H.: The European Union in International Politics. Baptism by Fire. Boston, USA: Rowman & Littlefield Publishers, 2001.

8 E.g. ELGSTRÖM, O. – SMITH, M.: The European Union's Role in International Politics. Concepts and Analysis. New York: Routledge, 2006.

9 MOGHERINI, F.: Shared Vision, Common Action: A Stronger Europe. The Global Strategy for the European Union's Foreign and Security Policy, 2016. Available at: https://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf (accessed on 5th November 2018).

10 SJÖSTEDT, G.: The external role of the European Community. Hamshire: Saxon House, 1977.

capabilities that were determined by the autonomy in the decisions and available capabilities to act. The debate on actorness, however, boosted especially after the adoption of Maastricht treaty and creation of three pillar system.[11] The initial conceptualization involved several criteria the EU has to fulfill or reach in order to be considered an actor. These criteria evolved from cohesion, autonomy, authority and recognition,[12] to shared values and principles, domestic legitimacy, consistent and coherent policies and availability of and capacity to utilize policy instruments.[13] Later on, due to continual progress in EU integration, including enlargement and other areas of external relations, the conceptualization shifted to more constructivist, and thus identity oriented approaches arguing that the EU actorness is built on the self-perception of the EU, recognition of the EU by other actors, international presence, institutionalization and instruments and procedures that enable the conduct of external relations.[14] The constructivist approach was adopted also in the 2006 updated conceptualization by Bretherton and Vogler[15] based on three criteria – opportunity, presence and capability. For our interdisciplinary approach, however, Richard's and Van Hamme's approach served as an inspiration.[16] They selected three criteria that are extremely relevant for a geographical analysis – opportunity, consistency, and effectiveness.[17]

In our analysis, we apply their logic and selected criteria in order to conduct legal analysis of the EU actorness, where the effects of Article 2, Article 6 and Article 21 of the Treaty on European Union are explored. For the legal analysis, a) institutionalization, b) instruments and procedures enabling the conduct of external relations, and c) consistency and coherence are taken into account.

Under institutionalization, we understand the establishment of policy within the EU structures with clear decision-making procedures. In this respect the legal framework is established by Lisbon treaty and the Article 2, Article 6 and Article 21 of the Treaty on European Union as the fundamental basis for extended scope of the EU external action on human rights and democracy, upon which the EU can build its role as the human rights defender and human rights promoter beyond its borders. Especially the text of Article 21 of the Treaty on European Union has reaffirmed the EU's determination to promote human rights and democracy through all its external actions. The adopted Joint Communication of the European Commission and EU High Representative for Foreign Affairs and Security Policy 'Human Rights and democracy at the heart of EU external action – Towards

11 See JUPILLE, J. – CAPORASO, J.: States, Agency and Rules: the European Union in Global Environmental Politics. In: RHODES, C. (ed.): The European Union in the World Community. Boulder, CO: Lynne Rienner, 1998, pp. 213-229; BRETHERTON, CH. – VOGLER, J.: The European Union as Global Actor. London: Routledge, 1999; WUNDERLICH, U.: The EU – A post-Westphalian actor in a neo-Westphalian world? Paper for presentation at the UACES Annual/Research Conference University of Edinburgh, 1–3 September 2008.

12 JUPILLE, J. – CAPORASO, J.: States, Agency and Rules: the European Union in Global Environmental Politics, op. cit.

13 BRETHERTON, CH. – VOGLER, J.: The European Union as Global Actor, op. cit.

14 WUNDERLICH, U.: The EU – A post-Westphalian actor in a neo-Westphalian world?, op. cit.

15 BRETHERTON, CH. – VOGLER, J.: The European Union as Global Actor (2nd edition). London: Routledge, 2006.

16 ALLEN, D. – SMITH, M.: Western Europe's presence in the contemporary international arena. In: Review of International Studies, 16, 1990, 1, pp. 19-37.

NIEMANN, A. – BRETHERTON, Ch.: Introduction: EU external policy at the crossroads. In: International Relations, Vol. 27, 2013, No. 3, pp. 261-275. Available at: https://international.politics.uni-mainz.de/files/2012/10/Niemann-and-Bretherton_Special-edition_introduction_final.pdf (accessed on 5th November 2018).

17 RICHARD, Y. – VAN HAMME, G.: L'Union européenne, un acteur des relations internationales: Étude géographique de l'*actorness* européenne. In : L'Espace géographique, vol. 42, 2013, 1, pp. 15-30. Available at: https://www.cairn.info/revue-espace-geographique-2013-1-page-15.htm (accessed on 5th November 2018).

a more effective approach',[18] is the key contribution to the development of the EU position and EU strategy in area of human rights in external relations. This communication provides the framework to promote human rights in particular areas of EU external relations (e.g. in trade, democracy, international cooperation, neighborhood policy).

Under instruments and procedures, the paper focuses on the implementation of provision laid down in Article 2, Article 6 and Article 21 into concrete tools and mechanism the EU has developed over time, including the EU Special Representative for Human Rights (financial tools and competences) and EU Instrument for Democracy and Human Rights. Within these instruments and procedures that the EU possesses, we also look at different type of actions. There generally exist three types of actions the EU[19] applies in its human rights agenda:

a) support to achievement of human rights standards through financed programs,
b) asymmetrical interdependence (political conditionality),
c) using of sanctions, so called ethical dimension.

The first type of action refers to financial programs under the EU Special Representative for Human Rights and other instruments. The second one, political conditionality, is used as the part of the Copenhagen criteria in the enlargement process and as it is only one part of the three different areas of accession criteria (territorial criteria, democracy criteria – including human rights, economic criteria), we consider it too wide for the proper evaluation within our research focus. The third one – sanction mechanism the EU in relation to countries and partners in external relations has not yet been used, only in connection with economic sanctions. This interdependence may influence the proper evaluation of the EU role as the human rights actor.

As for consistency and coherence, we observe the changes in the proposed and adopted actions. This is analyzed in the EU Action Plans on Democracy and Human Rights, their reviews and subsequent Human Rights Report from 2015 to 2017 (as following actual EU Action Plan for 2015-2019). Consistency and coherence are understood in the sense that the EU is continually working with same priority agenda. These criteria have been studies and evaluated since the adoption of the Maastricht Treaty in 1993, when the foreign policy, mainly consisting of enlargement policy, became institutionalized.

2.1 Strategic framework on human rights and democracy

EU's Strategic Framework and Action Plan on Human Rights and Democracy was adopted by the Council on 25 June 2012[20] as the framework document setting priorities in area of human rights and democracy in internal and external policies of the EU. It is focused mainly on human rights, democracy and rule of law, as those are set also as common values and accession criteria for EU membership (so-called Copenhagen criteria).

18 Joint Communication of the European Commission and EU High Representative for Foreign Affairs and Security Policy 'Human Rights and democracy at the heart of EU external action – Towards a more effective approach', COM(2011) 886 final, 12. 12. 2011. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0886:FIN:EN:PDF (accessed on 5th November 2018).

19 According SEDELMEIER, U.: The EU's role as a promoter of human rights and democracy: enlargement policy practice and role formation. In: ELGSTROM, O. – SMITH, M. (eds.): The European Union's Role in International Politics: Concepts and Analysis. Routledge/ECPR studies in European political science. London: Routledge, 2006, pp. 118-135.

20 EU's Strategic Framework and Action Plan on Human Rights and Democracy. Available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf (accessed on 5th November 2018).

According to Strategic framework on human rights, human rights are universally applicable legal norms. The common values as sustainable peace, development and prosperity of people are possible to be achieved only when there are respected human rights, democracy and rule of law. As EU declared in the framework, "the EU is aware of these challenges and determined to strengthen its efforts to ensure that human rights are realized for all. The EU will continue to throw its full weight behind advocates of liberty, democracy and human rights throughout the world."[21] In several following provisions, the EU is to confirm its interest to contribute to promotion and protection of all human rights and also calls on its member states to implement human rights as set in the Universal Declaration of Human Rights and international human rights treaties. Particularly the Strategic framework was adopted to set priorities in area of external relations, reflecting this goal as set in article 21 of the Treaty on European Union.

Stated coherent objective of the EU in area of human rights, democracy and rule of law is to be applied in all aspects of external relations. "The EU will step up its efforts to promote human rights, democracy and the rule of law across all aspects of external action. It will strengthen its capability and mechanisms for early warning and prevention of crises liable to entail human rights violations. It will deepen its cooperation with partner countries, international organizations and civil society, and build new partnerships to adapt to changing circumstances. The EU will strengthen its work with partners worldwide to support democracy, notably the development of genuine and credible electoral processes and representative and transparent democratic institutions at the service of the citizen."[22]

As set in the Strategic framework on human rights and democracy, the EU institutions already play the leading role in the promotion of human rights. From the point of the actorness, the stated necessary cooperation between European Parliament, the Council, the Member States, the European Commission and the EEAS is condition sine qua non for implementation and improvement of the human rights in practice. The EU in this particular agenda want to cooperate with other international actors, as UN (United Nations General Assembly, the UN Human Rights Council and the International Labour Organisation, UN Office of the High Commissioner for Human Rights, as well as of the treaty monitoring bodies and UN Special Procedures and UN Human Rights Council), Council of Europe and OSCE, African Union, ASEAN, SAARC, the Organisation of American States, the Arab League, the Organisation of Islamic Cooperation and the Pacific Islands Forum. Once considering number of international stakeholders in area of human rights as mentioned, the EU position as not originally human rights organisation, face the different implementation challenges.

2.2 Action Plans on Human Rights and Democracy

Regarding to implementation of the EU Strategic Framework on Human Rights and Democracy and with the aim to effectively respond to new challenges, there are prepared Action plans. The first action plan was adopted together with the Strategic framework on human rights and democracy for period of one and a half year, by the end of 2014. The next action plan was adopted for the period 2015-2019. The latter builds on the results and achievements of the former and focuses mainly on issues that were not tackled sufficiently and left gap for further EU actions.

21 Ibid.
22 Ibid.

The Action Plan 2012-2014 consists of seven chapters, with 36 goals and 97 actions altogether, broadly focused on following areas: 1. Human rights and democracy throughout EU policy; 2. Promoting the universality of human rights; 3. Pursuing coherent policy objectives; 4. Human rights in all EU external policies; 5. Implementing EU priorities on human rights; 6. Working with bilateral partners; 7. Working through multilateral institutions.[23]

This action plan can be characterized as a starting point for the EU human rights and democracy external action. The goals include endurance of support, consolidation, intensification, promotion, development, establishment and inclusion of new tools, mechanisms and methods in the area of human rights and democracy. From the document it is clear that the EU addresses the lacking comprehensive human rights policy in its external action and realizes serious problems related to double standards and inconsistencies internally as well as externally. The broadest chapter, titled Implementing EU priorities on human rights consists of 15 goals including abolition of death penalty, support for Human Rights Defenders, protection of women's rights or compliance with international humanitarian law. The assessment of the results was stressing significant progress in several areas including the establishment of Brussels-based Council Working Group on Human Rights (COHOM); adoption of guidelines on various issues including LGBTI rights; basic methodology for rights-based-approach to development. One of the core successes was adoption on National Human Rights Strategies across the world. The action plan also established training programs for the EU staff in the field of human rights issues and gender equality. The European Commission, however, identified several areas where more needs to be done stressing especially Economic, Social and Cultural rights; respect and promotion of human rights and international humanitarian law in crises and conflicts; violation of non-discrimination, mainly against women, children, disabled persons and LGBTI and members of religious minorities; fight against torture and ill-treatment. Special attention was paid to increase the coherence of EU policies from a human rights point of view. These were later included in the Action Plan for period 2015-2019.

Action Plan on Human Rights and Democracy for period 2015-2019 titled "Keeping human rights at the heart of the EU agenda" consist of five broad areas: 1. Boosting the ownership of local actors; 2. Addressing key human rights challenges; 3. Ensuring a comprehensive HR approach to conflict and crises; 4. Fostering better coherence and consistency; and 5. Deepening the effectiveness and results culture in Human Rights and democracy. The areas include 34 goals and 113 actions.[24]

Despite the different chapter titles, both action plans share majority of goals; the actions differ, but mainly because something has been already done. The action plan for 2015-2019 then continues with what the previous one began, or, in areas where there has not been much progress set different starting activities. The goals and action from Chapter V of previous action plan are identical with those in 2015-2019 Action plan. This plan also requires systematic reporting on assessment of the applied and implemented tools and mechanisms through newly developed or improved methods of evaluation.

The plan made significant progress in identifying the root causes of current global phenomena, such as migration and it also includes clause on the coherence in application of human rights clauses that are included in the EU international agreements. On the other hand, in the area of HR approach

[23] EU Action Plan on Human Rights and Democracy 2012-2014. Available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf (accessed on 5th November 2018).

[24] EU Action Plan on Human Rights and Democracy 2015-2019. Available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/action-plan-on-human-rights-and-democracy-2015-2019_en.pdf (accessed on 5th November 2018).

to conflict and crisis, even more problems were detected, and more goals stated. This was identified also in the mid-term review of the action plan as Commission argues that "the Action Plan could be most effective if fewer actions and commitments were prioritized more selectively"[25] as well as that the "work on a comprehensive Human Rights approach to conflicts and crises (Chapter 3) will remain a priority until 2019."[26] This area lacks systematic reporting mechanism. The Commission again underlines that compliance with human rights standards and with international humanitarian documents still "remains priority."[27] In other areas, the mid-term review emphasizes the significant EU efforts in relation to support of local ownership through human rights dialogues, various projects and financial assistance; in Chapter II focused on human rights challenges, the review welcomes the update of Guidelines on the Promotion and Protection of the Rights of the Child, sees much more potential in using the adopted measures and tools including the National Human Rights Plans. Chapter IV is still one of those that opened a chapter in a much different context than was previously tackled (migration and refugees) and thus needs more time to implement the goals and deepen cooperation with other actors. Public diplomacy and better communication remain a challenge as well, despite several efforts of the EU, mainly through #EU4HumanRights campaign.

The Action Plan contributed to more comprehensive approach of the EU to the human rights in its external action. However, there are clear signs that the EU is still developing the most appropriate method of achieving the goals set in the plans. Even more problematic is that EU is finding more and more goals it wishes to achieve that may decrease the quality of implementation and achievement of these goals, as there are so many of them covering too many issues even for such a bureaucracy as the EU. Despite the international environment is providing the EU many opportunities to conduct actions, the EU should prioritize between them as too many of them are then executed in the form of oral support or small-session with no effects.

2.3 Human Rights Tools and Institutions

The EU had elaborated its own system of tools and institutions for active implementation of the human rights principle in EUFP. There are three of them institutionalized in the form of the personal capacity (EU Special Representative for Human Rights), financial capacity (European instrument for democracy and human rights) and of administrative capacity (in the form of periodical reviews – Human Rights reports).

2.3.1 EU Special Representative for Human Rights

The position of the EU special representatives is connected with the Lisbon Treaty itself and in the area of human rights it follows adoption of EU's Strategic Framework and Action Plan on Human Rights and Democracy.

The very first EU special representative was appointed for agenda of human rights in July 25, 2012, according to the Council decision.[28] The role of the special representative is to enhance the

[25] Council Conclusions on the mid-term review of the Action Plan on Human Rights and Democracy 2015-2019, p. 22. Available at: https://www.consilium.europa.eu/media/21512/st12815en17-cc.pdf (accessed on 5th November 2018).

[26] Ibid.

[27] Ibid., p. 23.

[28] Council Decision 2012/440/CFSP of 25 July 2012 appointing the European Union Special Representative for Human Rights, OJ L 200, 27. 7. 2012, p. 21-23. Available at: http://data.europa.eu/eli/dec/2012/440/oj (accessed on 5th November 2018).

effectiveness and visibility of EU human rights policy. He has a broad, flexible mandate, giving him the ability to adapt to circumstances, and he works closely with the European External Action Service, which provides him with full support. "The EU special representative for human rights should reflect EU human rights policy and cover areas that include strengthening democracy, international justice, humanitarian law, abolition of the death penalty, freedom of expression, gender issues and children and armed conflict. The EUSR for Human Rights will be expected to engage with the UN, chair high-level human rights dialogues and lead consultations with third countries on human rights issues."[29]

As stated in Article 2 of the Council decision, the objective of the work of the EUSR for Human Rights should follow the provisions of the Treaties, the Charter of Fundamental Rights of the European Union as well as the EU Strategic Framework on Human Rights and Democracy and the EU Action Plan on Human Rights and Democracy. The concrete objectives are then identified as:

"(a) enhancing the Union's effectiveness, presence and visibility in protecting and promoting human rights, notably by deepening Union cooperation and political dialogue with third countries, relevant partners, business, civil society and international and regional organisations and through action in relevant international fora;

(b) enhancing the Union's contribution to the strengthening of democracy and institution building, the rule of law, good governance, respect for human rights and fundamental freedoms worldwide;

(c) improving the coherence of Union action on human rights and the integration of human rights in all areas of the Union's external action."[30]

Such a mandate was extended by the Council decision 2014/385/CFSP of 23 June 2014.[31] However, the work of the EUSR for Human Rights had been exercised for two years by then; the Council Decision extended only the working period of EUSR, there was not involved matter-of-fact competence extension.

This pure formalistic approach without any change in competences, reflecting findings, evaluations and changes of the social environment, current challenges to human rights as stated in the particular Action plans are not reflected at all. Council decisions were later adopted in 2015,[32] 2016[33] and 2017,[34] each for period of 24 months. The legal development is not following the state of art and the general mandate of the EUSC for human rights is more or less copy-pasted in Council decisions.

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29 DEMPSEY, J.: Will an EU Special Representative for Human Rights Make a Difference? Available at: https://carnegieeurope.eu/strategiceurope/48818 (accessed on 5th November 2018).

30 Article 2, Council Decision 2012/440/CFSP of 25 July 2012 appointing the European Union Special Representative for Human Rights, OJ L 200, 27. 7. 2012, p. 21-23. Available at: http://data.europa.eu/eli/dec/2012/440/oj (accessed on 5th November 2018).

31 Council Decision 2014/385/CFSP extending the mandate of the European Union Special Representative for Human Rights, OJ L 183, 24. 6. 2014, p. 66-69. Available at: http://data.europa.eu/eli/dec/2014/385/oj (accessed on 5th November 2018).

32 Council Decision (CFSP) 2015/260 of 17 February 2015 extending the mandate of the European Union Special Representative for Human Rights. OJ L 43, 18. 2. 2015, p. 29-32.

33 Council Decision (CFSP) 2016/208 of 15 February 2016 amending Decision (CFSP) 2015/260 extending the mandate of the European Union Special Representative for Human Rights IO L 39, 16. 2. 2016, lch. 47-47. Available at: http://data.europa.eu/eli/dec/2016/208/oj (accessed on 5th November 2018).

34 Council Decision (CFSP) 2017/346 of 27 February 2017 extending the mandate of the European Union Special Representative for Human Rights. OJ L 50, 28. 2. 2017, p. 66-69. Available at: http://data.europa.eu/eli/dec/2017/346/oj (accessed on 5th November 2018).

There is only one exception, which may be interpreted as the interest of the EU to act as human rights actor in foreign policy. Such issue is allocation of financial support to the work of the EUSC for human rights, as follows:

Table No. 1: Financial allocation for work of EUSR for Human rights

Period of finances allocation	Allocated amount from EU budget
25 July 2012 to 30 June 2013 (mandate from 25 July 2012 – 30 June 2014)	712.500 EUR
1 July 2014 to 28 February 2015	550.000 EUR
1 March 2015 to 29 February 2016	788.000 EUR
1 March 2016 to 28 February 2017	825.000 EUR
1 March 2017 to 28 February 2018	860.000 EUR
1 March 2018 to 28 February 2019	894.178 EUR

Source: Council Decisions[35]

The amount is increased on the annual basis, and since 2015 it constantly rose. This on one side confirms EU intention to use the financial programs for promotion of human rights in the foreign policy, on the other side this information is not absolute, while not containing the budget of other EU special representatives, who are also operating in area of human rights as integral part of its territorial mandate (e.g. Georgia, Kosovo, Afghanistan etc.).

2.3.2 European instrument for democracy and human rights

The European instrument for democracy and human rights (hereinafter as EIDHR) was established on the basis of the European Parliament and the Council Regulation[36] in 2014, replacing the previous instruments (EIDHR 2007 – 2013 and the European Initiative for Democracy and Human Rights 2000 – 2006).

As such, it is a thematic funding instrument for EU external action aiming to support projects in the area of human rights, fundamental freedoms and democracy in non-EU countries. This instrument is designed to support civil society to become an effective force for political reform and defense of human rights. As stated in the Regulation, "within the framework of the principles and objectives of the Union's external action, the promotion of human rights, democracy, the rule of law and good governance, and of inclusive and sustainable growth, constitute two basic pillars of the Union's development policy. A commitment to respect, promote and protect human rights and democratic principles is an essential element of the Union's contractual relations with third countries."[37]

The human rights are in the center of the EIDHR, while reflecting connected strategic documents and mainly the initial one, Council Conclusions of 18 November 2009 on democracy support

35 Council Decisions: 2012/440, 2014/385, 2015/260, 2016/2018, 2017/346, 2018/225 as quoted above.

36 Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide. OJ L 77, 15. 3. 2014, p. 85-94.

37 Article 5, Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide. OJ L 77, 15. 3. 2014, p. 85-94.

in the EU's external relations.[38] In this one, there is framed the fundamental human rights approach of the EU in its external relations: "The fundamental freedoms of thought, conscience and religion or belief, expression, assembly and association are the preconditions for political pluralism, democratic process and an open society, whereas democratic control, domestic accountability and the separation of powers are essential to sustain an independent judiciary and the rule of law which in turn are required for effective protection of human rights."[39]

According to this, EIDHR is a specific tool within the EU toolbox, which provides possibility to cooperate directly with human rights experts and activists, civil society organisations and other non-state actors. It may then refer to human rights topic without necessary political or governmental background, such as death penalty, freedom of expression, protection of journalists, discrimination of vulnerable social and ethnical groups etc. For the period of 2014-2020 the EIDHR has set 5 specific objectives:

1. Objective 1 – Support to human rights and human rights defenders in situations where they are most at risk.
2. Objective 2 – Support to other priorities of the Union in the field of human rights
3. Objective 3 – Support to democracy.
4. Objective 4 – EU Election Observation Missions (EOMs)
5. Objective 5 – Support to targeted key actors and processes, including international and regional human rights instruments and mechanisms.[40]

As such, the EU supports different types of actions within EIDHR with financial support. The allocated budget for EIDHR in the period of 2014-2020 is 1.332.75 million EUR, representing almost 21% increase to previous multi-financial framework 2007-2013 budget.

2.3.3 Human Rights report

The evaluation of the Human Rights policy and the role and its exercise by the EU as one priority of the European Union's external action, is based on the annual report on human rights and democracy, issued by the Council. The reports assess progress in particular areas of the Action Plans and provide rich source of information on the EU actions in external relations connected with human rights.

The 2015 EU Annual Report on Human Rights and Democracy in the World was the first one in the newly reported period according to Action plan 2015 – 2019. The very first report was adopted in two steps – the thematic part was adopted on 20 June 2016, while country and regional issues part was adopted on 20 September 2016. As proclaimed, also within new operational period according to Action plan, the EU continued defending and promoting human rights, rule of law and human-rights based approach in the inclusive and democratic societies of the world. In 2015, the work of EU and its actions were especially challenged by number of instabilities in neighborhood and strategic regions and conflicts (e.g. Middle East, part of Asia, Africa) and also by serious human rights violations and attacks on civilians and vulnerable groups. The voice of the EU was presented mainly

[38] Council Conclusions of 18 November 2009 on democracy support in the EU's external relations. Available at: http://register.consilium.europa.eu/doc/srv?l=EN & f=ST%2016081%202009%20INIT (accessed on 5th November 2018).

[39] Ibid.

[40] Annex 1, Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide. OJ L 77, 15. 3. 2014, p. 93.

through adopted Joint Communication 'Keeping Human Rights at the heart of the EU Agenda".[41] One of the key tasks is the support of human rights defenders and civil society organizations. The EU through different tools used to raise "EU's effectiveness and visibility as a preeminent world actor on human rights and to advocate for key EU priorities, including freedom of expression and association, women's and children's rights, the fight against torture, non-discrimination, the abolition of the death penalty, economic, social and cultural rights, business and human rights and promoting accountability for human rights violations".[42]

The EU Annual Report on Human Rights and Democracy in the World in 2016 was adopted by Council on 16 October 2017. The EU itself considered year 2016 as the year important for human rights and democracy, when facing different humanitarian and political challenges. It was also important year when re-evaluating the importance of civil society in area of human rights protection. As Federica Mogherini said, "Civil society organizations and human rights defenders in general, are a pillar of every well-functioning state, and key players to improve the situation of human rights across the globe."[43] In 2016 also other strategic EU instruments were adopted, such as EU human rights guidelines – "11 sets of guidelines set out priority areas for external action. The guidelines are not legally binding, but because they have been adopted at ministerial level, they represent a strong political signal that they are priorities for the Union."[44] There had started also elaboration of Human Rights and Democracy Country Strategies, based on analysis of the human rights situation in the concrete countries. Strategies should cover period of 2016 – 2020 and should be annually updated. The multilateral ambition of the EU was accompanied by human rights dialogue with UN, Council of Europe and other international forums. In this context, the European Union presented leadership ambition and remained committed to protect human rights and democracy through its external actions in the world.

Based on the recent report of 2017 which was assessing the EU actions based on the current Action Plan for 2015-2019,[45] the EU is clearly more active in some of the areas than others. These include the equality and anti-discrimination area, in particular gender equality and fight against gender-based violence, protection of children and racism, racial discrimination, xenophobia and related intolerance. The report devoted detailed information on the EU actions related to freedom of expression and civil society, democracy and election, and human rights defenders. Last, but not least, mobility, migrants, refugees and asylum seekers were paid lot of attention from and efforts of the EU. In these areas, the EU invests millions of Euros in new programs and projects. It also publishes calls for proposals in order to involve partners from different sectors. Moreover, the EU works hard on promotion and sharing of best practices through different events. The report welcomes the update of Guidelines on the Rights of the Child, and continual implementation of the other guidelines that were adopted since 2008.[46] As the core mechanism, human rights dialogue is identified, through

41 Joint Communication 'Keeping Human Rights at the heart of the EU Agenda, JOIN (2015) 16 final. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015JC0016 & rid=2 (accessed on 5th November 2018).

42 Ibid., p. 4.

43 EU Annual Report on Human Rights and Demoracy in the World 2016, p. 4. Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/annual_report_on_human_rights_and_democracy_in_the_world_2016_.pdf (accessed on 5th November 2018).

44 Ibid., p. 7.

45 EU Annual Report on Human Rights and Democracy in the World 2017. Available at: https://www.consilium.europa.eu/en/press/press-releases/2018/05/28/human-rights-and-democracy-in-the-world-eu-annual-report-2017-adopted/ (accessed on 5th November 2018).

46 EU Guidelines on the Promotion and Protection of the Rights of the Child – Leave no Child Behind (2017); EU Human

which the EU consults and communicates. In other areas, there is significant lack of action by the EU, especially in the area of human rights approach to conflicts and crisis.

4 CONCLUSION

Is the EU's power perception more determined by what the EU does rather what the EU is or vice versa? If we consider the position of the EU in area of protecting and promoting human rights in external relations, the answer is quite complicated. The EU in its founding treaties set the human rights as fundamental principle and values common for all member states. In relation to external action, the EU has ambition to play important role in the international area. One of the possible ways to act as international actor are human rights. The agenda of human rights is in external relations present in legal terms since 2009, when the Council adopted Conclusions on democracy support in the EU's external relations. As such, it is interconnected with democracy: "Human rights and democracy are inextricably connected. Only in democracy can individuals fully realize their human rights; only when human rights are respected can democracy flourish."[47] For this purpose, the EU had adopted its own system of institutions and tools to protect and promote human rights in external relations.

Once evaluating this system, the existed documents as EU Strategic Framework and Action Plans on Human Rights and Democracy use to set the priorities of mid and long-term character. The applicable Action plans provide more space for the concrete actions and legislation. The institutionalization of the EU special representative for human rights had the ambition to provide "face" to EU human rights agenda. But to establish the system does not mean automatically the proper and effective implementation. As Mark Dawson said, "The new special representative's ability to make a difference will depend on going further: this representative should not be just an external voice for human rights but should be given internal powers too, for example the ability to scrutinize legislation or even recommend legal measures against states who persistently act in violation of the EU Charter. To be a credible "external" actor, the EU must also be credible in terms of its own human rights commitments."[48]

Our analysis looked at particular instruments and actions the EU uses and conducts in the human rights policy in external action. We observed three criteria that are most suitable for our analysis – institutionalization, instruments and procedures, and consistency and coherence in the policy. The analysis of the EU position in the area of human rights and external relations confirms that the

Rights Guidelines on Freedom of Expression Online and Offline (2014); EU Guidelines on the promotion and protection of freedom of religion or belief (2013); Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons (2013); EU Guidelines on Death Penalty: revised and updated version (2013); Guidelines to EU Policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment – an update of the guidelines (2012); EU Guidelines on promoting compliance with International Humanitarian Law (IHL) (2009); EU guidelines on human rights dialogues with third countries – update (2008); EU Guidelines on Children and Armed Conflict (2008); Ensuring protection – European Union Guidelines on Human Rights Defenders (2008); EU guidelines on violence against women and girls and combating all forms of discrimination against them (2008).

47 Council Conclusions of 18 November 2009 on democracy support in the EU's external relations, p. 6. Available at: http://register.consilium.europa.eu/doc/srv?l=EN & f=ST%2016081%202009%20INIT (accessed on 5th November 2018).

48 DEMPSEY, J.: Will an EU Special Representative for Human Rights Make a Difference? Available at: https://carnegieeurope.eu/strategiceurope/48818 (accessed on 5th November 2018).

EU by setting the institutional system and proper financial framework has the ambition to act as the human rights actor. On the other side, the implementation does not prove that the systematic approach based on financial support to achievement of human rights standards is an effective one. The EU solely by allocating more financial resources for human rights agenda in external relations proves rather to be defender and supporter of human rights, promoter of this fundamental principle, then to be human rights actor. Over time, the EU developed concrete mechanisms, especially the political and human rights dialogues that are used not only as a tool-kit, but also as a forum for presentation of the EU's vision of human rights and communication with third countries. The analysis of Action Plans shows that the EU is consistent and coherent only to certain extend, or only in certain areas. These areas refer to policies which have been developed internally, as they are also part of the EU internal functioning. However, when it comes to actions where the EU does not have its internal experience, i.e. human rights in conflict and crisis, the policy cannot be considered consistent or coherent, rather unfulfilled as the actions and tasks are continuously repeated. Nevertheless, the EU plan and vision is a stable basis for improvement in these areas. This includes better reflection of human rights reports and Council conclusion into the extension of competences of EU Special Representative for Human Rights. Human rights are a broad field and there are dozens of issues where the EU acts differently. However, applying comprehensive approach, there are clear shortages not only in planning, financing, but also in self-reflection of the EU itself. We therefore argue that the EU cannot be considered human rights actor, rather a supporter and promoter.

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EU Action Plan on Human Rights and Democracy 2012-2014. Available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf (accessed on 5th November 2018).

EU Action Plan on Human Rights and Democracy 2015-2019. Available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/action-plan-on-human-rights-and-democracy-2015-2019_en.pdf (accessed on 5th November 2018).

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CORPORATE CODES OF CONDUCT: ARE THREE GENERATIONS SUFFICIENT TO ENSURE THE EFFECTIVE ENFORCEMENT OF LABOUR RIGHTS?[1]

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Abstract: In the 1970s, the number of reports concerning unethical or illegal activities of multinational corporations increased and led to discussions within international organisations. In 1976, the OECD was first to adopt its Guidelines for Multinational Enterprises. The ILO adopted its Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in 1977, and UN issued the Global Compact in 2000. Subsequently, many codes of conduct have been established to provide a stable framework in which MNEs conduct their business. The purpose of this paper is to assess, through the prism of three generations of codes, if self-regulation is sufficient to ensure the effective enforcement of labour rights. I fill the gap in existing research by providing a comprehensive explanation for the shortcomings of this instrument. Research indicates that there is a lack of involvement of social partners in the decision-making process leading to the adoption of codes of conduct. Once adopted, they impose lower standards than the public regulatory frameworks. They are more selective in their choice of labour rights. There are also many difficulties in implementing, monitoring and enforcing a corporate code of conduct. These tools mainly address marketing aims and respond to the unfavourable publicity produced by the media about the inconsistency of certain corporate policies with international labour standards. I conclude by discussing how codes of conduct could be transformed to more effectively address workers' rights.

Keywords: labour law, codes of conduct, labour standards, multinational corporations

1 INTRODUCTION: DEFINITIONS AND HISTORICAL BACKGROUND

The purpose of this paper is to assess, through the prism of three generations of codes, if self-regulation is sufficient to ensure the effective enforcement of labour rights. The study aims at providing an overview of shortcomings of this tool and analysing ways in which codes could be transformed to more effectively address workers' rights.

The research method is based on the analysis and criticism of codes, case law and the relevant literature, e.g. books by Hepple (2005), Kaufmann (2007), Marassi (2015), article by Stohl et al. (Journal of Business Ethics 90(4), 2009), and by Herman (Virginia Journal of International Law 52(2), 2012), and other articles, e.g. published in Journal of Business Ethics or Business Ethics Quar-

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terly. The historical and comparative legal methods are also used, and a synthesis is an investigative technique for development of the accumulated literature.

Corporate codes of conduct can be defined as "unilateral recommendations through which the main decision-making bodies of companies set up rules of behaviour for managers and employees (sometimes also for suppliers and subcontractors) that reflect the principles and values of corporate social responsibility".[2] By contrast, corporate social responsibility (CSR) is "an umbrella term for a variety of theories and practices all of which recognize the following: (a) that companies have a responsibility for their impact on society and the natural environment, sometimes beyond legal compliance and the liability of individuals; (b) that companies have a responsibility for the behavior of others with whom they do business (e.g., within supply chains); and (c) that business needs to manage its relationship with wider society, whether for reasons of commercial viability or to add value to society".[3]

In the 1970s, the number of reports concerning unethical or illegal activities of multinational corporations increased and led to discussions within international organisations.[4] The UN Centre on Transnational Corporations (UNCTC) set up in 1974 developed the UN Draft Code of Conduct on TNCs.[5] In 1976, the OECD was first to adopt its Guidelines for Multinational Enterprises. The ILO adopted its Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in 1977.[6] Subsequently, many codes of conduct have been established to provide a stable framework in which MNEs conduct their business.[7] In 1977, the Sullivan Principles were launched. The Principles played a role of a code of conduct for companies with operations in apartheid South Africa. Their goal was to achieve equal opportunity for employees in a particular company. Instead of withdrawing their activities from a country, companies were to remain and act as drivers of change by committing themselves to a number of principles concerning non-discrimination.[8] However, the Sullivan Principles illustrates "how severely Western-written codes can miss the practicalities of local issues". Despite its objective, they "blur[red] definitions of race in measuring the racial composition of the workforce or racial patterns in hiring".[9]

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2 MARASSI, S.: Globalization and Transnational Collective Labour Relations. International and European Framework Agreements at Company Level. In: BLANPAIN, R. (general ed.): Bulletin for Comparative Labour Relations. Alphen aan den Rijn: Kluwer Law International, 2015, p. 21.

3 BLOWFIELD, B. – FRYNAS, J. G.: Editorial. Setting new agendas: Critical perspectives on corporate social responsibility in the developing world. In: International Affairs, Vol. 81, 2005, Issue 1, p. 503. I quote from: LUND-THOMSEN, P. – LINDGREEN, A.: Corporate Social Responsibility in Global Value Chains: Where Are We Now and Where Are We Going? In: Journal of Business Ethics, Vol. 123, 2014, Issue 1, p. 12, DOI: 10.1007/s10551-013-1796-x. For more definitions see: DAHLSRUD, A.: How Corporate Social Responsibility is Defined: an Analysis of 37 Definitions. In: Corporate Social Responsibility and Environmental Management, Vol. 15, 2008, Issue 1, pp. 1-13, DOI: 10.1002/csr.132.

4 KAUFMANN, C.: Globalisation and Labour Rights. The Conflict between Core Labour Rights and International Economic Law. Oxford-Portland, Oregon: Hart Publishing, 2007, p. 156.

5 JENKINS, R. – PEARSON, R. – SEYFANG, G.: Introduction. In: JENKINS, R. – PEARSON, R. – SEYFANG, G. (eds.): Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy. London, Sterling, VA: Earthscan Publishing Ltd., 2002, p. 2.

6 TERGEIST, P.: Multinational Enterprises and Codes of Conduct: The OECD Guidelines for MNEs in Perspective. In: BLANPAIN, R. (ed.): Comparative Labour Law and Industrial Relations in Industrialized Market Economies. Alphen aan den Rijn: Kluwer Law International, 2014, p. 213-214.

7 KAUFMANN, C.: Globalisation, op. cit., p. 156.

8 SEGERLUND, L.: Making Corporate Social Responsibility a Global Concern. Norm Construction in a Globalizing World. Farnham: Ashgate, 2010, p. 55.

9 HERMAN, A.: Reassessing the Role of Supplier Codes of Conduct: Closing the Gap Between Aspirations and Reality. In: Virginia Journal of International Law, Vol. 52, 2012, Issue 2, p. 463.

The second wave of codes appeared in the early 1990s and concentrated its attention on labour conditions.[10] In 1992, Levi Strauss adopted so-called "Global Sourcing and Operating Guidelines",[11] which were described as belonging to the second generation of codes.[12] This was the first supplier code of conduct for the apparel industry introduced by a MNC.[13] However, the document omitted reference to freedom of association and the right to collective bargaining.[14] Since the early 1990s, a considerable number of MNCs have adopted codes, most of which fully or partly address employment standards.[15]

In 1999, the Global Sullivan Principles were launched in the presence of Kofi Annan, the UN Secretary General. On that occasion he made a reference to the Global Sullivan Principles as important for the UN Global Compact (UN 2000). The Global Compact, named in the literature as a "Model Code",[16] includes references to freedom of association and the right to collective bargaining, and "symbolizes the evolution of the «international human rights regime» to incorporate what is described as the «third generation»".[17] In the area of labour, the Global Compact establishes the same principles as the ILO Declaration on Fundamental Principles and Rights at Work. However, the intended effect is to ensure that MNCs – rather than governments – comply with them.[18] Interestingly, it does not address issues of monitoring.[19] Moreover, the UN Global Compact Principles that developed not long after the launch of the UN Global Compact correspond to a significant degree with the Global Sullivan Principles.[20]

As rightly highlighted by Carby-Hall, in order to maintain the Global Compact partnership, companies have to meet some significant commitments. Firstly, they should integrate the Global Compact and its ten principles with the company's strategy, policy, organisational culture and daily operations. Secondly, they should disseminate the Global Compact concept to customers, clients,

10 JENKINS, R. – PEARSON, R. – SEYFANG, G.: Introduction, op. cit., p. 3.

11 KAUFMANN, C.: Globalisation, op. cit., p. 156. Also known as "Business Partner Terms of Engagement", JENKINS, R. – PEARSON, R. – SEYFANG, G.: Introduction, op. cit., p. 2.

12 STOHL, C. – STOHL, M. – POPOVA, L.: A New Generation of Corporate Codes of Ethics. In: Journal of Business Ethics, Vol. 90, 2009, No. 4, p. 614. DOI 10.1007/s10551-009-0064-6.

13 HERMAN, A.: Reassessing, op. cit., p. 449.

14 EGELS-ZANDÉN, N. – MERK, J.: Private Regulation and Trade Union Rights: Why Codes of Conduct Have Limited Impact on Trade Union Rights. In: Journal of Business Ethics, Vol. 123, 2014, No. 3, p. 463, DOI: 10.1007/s10551-013-1840-x.

15 ARTHURS, H.: Private Ordering and Workers` Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation. In: CONAGHAN, J. – FISCHL, R. M. – KLARE, K. (eds.): Labour Law in an Era of Globalization: Transformative Practices and Possibilities. Oxford: Oxford University Press, 2004, p. 474; see the cited literature. JENKINS, R. – PEARSON, R. – SEYFANG, G.: Introduction, op. cit., p. 1.

16 BRONSTEIN, A.: International and Comparative Labour Law. Current challenges. Geneva: Palgrave Macmillan, 2009, p. 112.

17 STOHL, C. – STOHL, M. – POPOVA, L.: A New…, op. cit., p. 612. "Third generation embodies the social and material conditions as well as the reflexivity associated with globalization, and ethical behavior grounded in the larger interconnected environment within which an organization functions", STOHL, C. – STOHL, M. – POPOVA, L.: A New…, op. cit., p. 612. "Third generation CSR focuses on the rights of a collective that only can be realized through global participation, cooperation, and agreement. Sections mentioning overall social good, such as peace, healthy environment, and the common heritage of mankind, were coded as third generation", STOHL, C. – STOHL, M. – POPOVA, L.: A New…, op. cit., p. 614.

18 LYUTOV, N.: Traditional International Labour Law and the New "Global" Kind: Is There a Way To Make Them Work Together? In: Zbornik Pravnog Fakulteta u Zagrebu, Vol. 67, 2017, Issue 1, p. 33. CARBY-HALL, J.: Labour Aspects of Corporate Social Responsibility Emanating from the United Nations Global Compact: the Global Case and that of the EU and the United Kingdom. In: E-Journal of International and Comparative Labour Studies, Vol. 5, 2016, No. 2, p. 15.

19 BRONSTEIN, A.: International…, op. cit., p. 114.

20 SEGERLUND, L.: Making…, op. cit., p. 56.

consumers, employees and general public. In the third place, they are required to incorporate the Global Compact and its ten principles at the highest level of the company. Fourthly, the method of implementing the Global Compact's principles should be characterised in the annual or sustainability reports. Lastly, companies are supposed to contribute to wider development goals, inter alia the Millennium Development Goals.[21]

2 THE MAIN SHORTCOMINGS OF CORPORATE CODES OF CONDUCT

The assurance of scientific integrity requires that there be an explanation of the fact that corporate social responsibility and codes of conduct tend to be viewed differently. It should be clearly stated that some authors prove that they exert some positive impact on the workers' situation (this will be explained later in the article). Besides, according to Toffel, Short and Ouellet, private codes of conduct that implement global labour standards accomplish an important objective consisting of the reinforcement of the norms promoted by the ILO and the provision of a source of enforcement pressure that the ILO lacks.[22] Harrington writes about "quite positive results" of codes of conduct, especially in developing countries.[23] Referring to corporate social responsibility policies, the author highlights that they can ensure that progressive labour standards are used even if they are not legally compulsory. She adds that in this manner, corporate social responsibility can eventually lead to the future revision of the domestic labour law.[24]

While it is admittedly true that some authors believe in the potential of codes of conduct, there are much more concerns about these instruments. One of the aims of this article is to provide an explanation for the shortcomings of codes of conduct.

Codes of conduct classified as falling under the first generation differ between companies and across industries. There is little uniformity in their content. Many of such tools use vague language, and for some rights, are limited to asking for compliance with the supplier countries' domestic laws. Codes of conduct often lack clear language on the freedom of association and wages, and make a "renvoi" to domestic law.[25] Their underlying values are perceived as obscure.[26] Codes of conduct mainly address marketing aims and respond to the unfavourable publicity produced by the media.[27] They are seen as a measure of propaganda and a means of improvement of MNC's reputation,[28] cor-

21 CARBY-HALL, J.: Labour…, op. cit., p. 17-18.

22 TOFFEL, M. W. – SHORT, J. L. – OUELLET, M.: Codes in context: How states, markets, and civil society shape adherence to global labor standards. In: Regulation & Governance, No. 9, 2015, Issue 3, p. 208. DOI: 10.1111/rego.12076.

23 HARRINGTON, A. R.: Corporate Social Responsibility, Globalization, the Multinational Corporation, and Labor: an Unlikely Alliance. In: Albany Law Review, Vol. 75, 2011/2012, No. 1, p. 493. See the cited literature.

24 Ibid., p. 508-509.

25 HERMAN, A.: Reassessing…, op. cit., p. 450-451. See the cited literature.

26 ARTHURS, H.: Private…, op. cit., p. 477.

27 MARASSI, S.: Globalization…, op. cit., p. 22.

28 DÄUBLER, W.: Corporate Social Responsibility: A Way to Make Deregulation More Acceptable? In: BLANPAIN, R. – HENDRICKX, F. (eds.): Bulletin for Comparative Labour Relations. Labour Law between Change and Tradition. Liber Amicorum Antoine Jacobs. Alphen aan den Rijn: Kluwer Law International, 2011, p. 49; LYUTOV, N.: Traditional…, op. cit., p. 45; WRATNY, J.: Kodeksy dobrych praktyk jako wyraz społecznej odpowiedzialności korporacji. In: HAJN, Z. – SKUPIEŃ, D. (eds.): Przyszłość prawa pracy. Liber Amicorum. W pięćdziesięciolecie pracy naukowej Profesora Michała Seweryńskiego. Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2015, p. 143; WRATNY, J.: Korporacyjne kodeksy dobrych praktyk z perspektywy prawa pracy. In: Praca i Zabezpieczenie Społeczne, No. 3, 2016, p. 4.

porate legitimacy, trust, image or brand.[29] Research indicates that there is a lack of involvement of social partners in the decision-making process leading to the adoption of codes of conduct.[30] Once adopted, they impose lower standards than the public regulatory frameworks. Besides, they are more selective in their choice of labour rights.[31]

When it comes to the second generation, as supplier codes of conduct enjoyed rising popularity in the 1990s, advocates began to focus less on code adoption and more on compliance verification.[32] The above-mentioned Sullivan Principles represent the first effort towards the implementation of codes of conduct with e.g., monitoring schemes, independent monitoring, in a multi-stakeholder forum.[33] Currently, there are always numerous problems with implementation, monitoring and enforcement of a corporate code of conduct.[34]

Monitoring may take different forms within which internal staffing, hiring an accounting firm and independent monitoring should be mentioned. Certain MNCs use their own internal compliance staff in order to monitor suppliers.[35] Lyutov rightly compare the situation to a "fox in the henhouse" scenario – the MNC in the role of the fox controls itself in the worker henhouse.[36] As it comes to accounting firms it turned out that they were not successful mainly due to the fact that in general accountants are not trained in monitoring labour conditions, and they are seldom specialists in labour issues. Third-party certification based on independent monitoring performs a little better. Herman points out that certification takes two forms: brand and factory certification. The mode of action of the first one lies in the fact that a brand's products are certified as being produced under acceptable conditions. The latter model assumes that individual supplier factories are certified. The supplier factories bear the responsibility for retaining a monitor, whilst the brand-name MNC commits to using certified factories. Herman enumerates obstacles that limit the effectiveness of monitoring. They include: monitors' conflict of interest, the limited resources available to monitor suppliers, the lack of uniformity in MNCs' codes of conduct, and the suppliers' ability to game monitoring efforts. MNCs benefit from poor labour conditions, so a "fox in the henhouse" scenario, i.e. monitoring to detect their own irregularities constitutes an obvious conflict of interest. Furthermore, sometimes the interest of NGO involved in voluntary labour rights monitoring initiatives is incompatible with the interest of the supplier's workers. After detection of infringements of labour rights, NGO talks about the "success" and publicizes the case. This may result in cancelling the supplier's contracts and workers losing jobs. Next, monitoring codes of conduct consumes significant resources. Then, as it has been highlighted, codes are vague and differ between companies. They not only vary on the relevant labour standards, but also conflict on some issues. This seriously hampers the monitoring.[37] However, there are worse problems in trying to game the monitoring system. There are some popular methods for hiding code violations from monitors. Under the first option,

29 EGELS-ZANDÉN, N. – MERK, J.: Private…, op. cit., p. 464.
30 MARASSI, S.: Globalization…, op. cit., p. 22.
31 HEPPLE, B.: Labour Laws and Global Trade. Oxford: Hart Publishing, 2005, p. 76.
32 HERMAN, A.: Reassessing…, op. cit., p. 455.
33 SEGERLUND, L.: Making…, op. cit., p. 56.
34 HEPPLE, B.: Labour…, op. cit., p. 76; SOBCZAK, A.: Are Codes of Conduct in Global Supply Chains Really Voluntary? From Soft Law Regulation of Labour Relations to Consumer Law. In: Business Ethics Quarterly, Vol. 16, 2006, Issue 2, p. 168.
35 HERMAN, A.: Reassessing…, op. cit., p. 456.
36 LYUTOV, N.: Traditional…, op. cit., p. 45.
37 HERMAN, A.: Reassessing…, op. cit., p. 456-458 and 460. However, the majority of codes of conduct at least address core labour issues like child labour, forced labour, discrimination, harassment, and health and safety in the workplace. HERMAN, A.: Reassessing…, op. cit., p. 450.

suppliers keep two sets of books, an impeccable set for the monitors and an actual set for business. In this way they manage to conceal actual hours and wages. Moreover, suppliers instruct workers on what to say. They even recourse to handing out scripts. Additionally, they use the services of consulting firms, which engage in cheating on the monitoring firms hired by MNCs. They also use a special software designed with the aim of creating fictitious employee work information. It is also common practice that suppliers share information with each other on how to pass monitoring inspections.[38]

During the period between 2000s and early 2010s, many impact assessment studies revealed that codes of conduct improved tangible work conditions (outcome standards), e.g. the reduction of overtime work, the payment of minimum wages, and occupational health and safety. According to the result of research conducted by X. Yu, the implementation of Reebok labour-related codes at the second largest footwear supplier factory in China during 1997–2005 caused that sweatshop labour abuses, e.g. using child labour, imposing corporal punishments to discipline workers, providing unsafe and unhealthy working conditions, forcing workers to take long overtime, after sharp criticism were purged away. Besides, labour practices grievously infringing Chinese labour law, e.g. not paying legal minimum wage or forcing workers to take overtime working hours longer than legal maximum workweek, were also curbed. A "race to ethical and legal minimum" effect, as the author calls it, not only saved Reebok from attacks, but also contributed to the company's long-term profitability. It did not, however, satisfy workers' expectations concerning labour practices improvement. Indeed, the situation had imposed contradictory impacts on other working conditions. The overwhelming majority of the factory production workers were supposed to work faster and harder for less pay, not sufficient to meet basic needs of workers and their families. What were the reasons for this? The author finds the cause in the fact that Reebok had committed to neither sharing cost for code implementation with the supplier factory nor amending its sourcing policy to make improvement labour standards more financially manageable to the factory management, although Reebok benefited from a significant increase in profitability.[39] The supplier factory was evaluated as Reebok's "best partner" and, as a "reward", received a relatively higher volume of forward orders. Workers were obliged to work in a more stressful environment in order to fulfill higher production tasks.[40] Ngai argues similarly that codes of conduct were intentionally implemented as a top-down regulatory process, replacing the role of the Chinese state in regulating labour standards in the workplace. This results in maintaining authoritarian factory regimes in which, *prima facie* MNCs play a paternalistic role in "protecting" workers from labour exploitation, meanwhile allowing the sweating to continue, in the form of, e.g. excessive overtime work or illegaly low wages per hour.[41]

On the other hand, what is probably beyond dispute, codes of conduct have limited impact on less tangible issues (process rights), such as freedom of association and the right to collective bargaining.[42] According to Egels-Zandén and Merk, codes exert little effect on trade union rights because of:

- buyers paying lip service to trade union rights;

[38] Ibidem, p. 461. See: LUND-THOMSEN, P. – LINDGREEN, A.: Corporate…, op. cit., p. 13; NGAI, P.: Global Production, Company Codes of Conduct, and Labor Conditions in China: a Case Study of Two Factories. In: The China Journal, No. 54, 2005, p. 107.

[39] YU, X.: Impacts of Corporate Code of Conduct on Labor Standards: A Case Study of Reebok's Athletic Footwear Supplier Factory in China. In: Journal of Business Ethics, Vol. 81, 2008, Issue 3, p. 523-525, DOI: 10.1007/s10551-007-9521-2.

[40] Ibid., p. 519-520.

[41] NGAI, P.: Global…, op. cit., p. 113.

[42] LUND-THOMSEN, P. – LINDGREEN, A.: Corporate…, op. cit., p. 13; EGELS-ZANDÉN, N. – MERK, J.: Private…, op. cit., p. 464; NGAI, P.: Global…, op. cit., p. 112.

- codes not being able to open up space for union organizing when leveraged in grassroots struggles (there is a lack of complaints or grievance mechanisms);
- codes introducing parallel means of organizing (instead of labour unions), which are not able to guarantee an independent workers' voice, including real worker representation and collective bargaining;
- workers lacking voice in the development of codes of conduct, knowledge of codes, and workers and unions being deprived of possibilities to participate in monitoring processes;
- monitoring being unable to reveal and remedy infringements of trade union rights and
- suppliers having limited encouragement for compliance. Comparing two alternatives with regard to costs (the higher cost of compliance and the lower cost of noncompliance), greater financial incentives from buyers would be necessary in order to persuade factory managers to comply with trade union rights.[43]

3 WAYS IN WHICH CODES COULD BE TRANSFORMED TO MORE EFFECTIVELY ADDRESS WORKERS' RIGHTS (DOCTRINAL PROPOSALS)

Codes of conduct seem "like a weak, uncertain method for improving world labor conditions".[44] Tough competition for just-in-time production and low-cost products in the world market is unfavourable to codes implementation,[45] and the implementation itself does not grant workers the right to demand that this code be applied.[46] Moreover, once implemented, codes of conduct have limited effectiveness — 58.5 percent of the variance in the perceived effectiveness of codes (effectiveness of codes measured by the opinion of the respondent),[47] and slightly above 50 percent compliance with the standards in corporate codes of conduct (as regards corporate audits).[48]

Given these facts, it is worth recalling some viewpoints articulated in the literature, on how codes of conduct could be transformed to more effectively address workers' rights.

Herman argues that a more practical approach to improving workers' labour conditions should be found and introduced in the new generation of codes of conduct. To this end, a better understanding of the role for different organizations (especially local NGOs that should be given a top priority role in monitoring) and of business strategies and the economic motivations of suppliers and MNCs should be adopted. Besides, such an attitude requires a thorough rethinking the types of labour standards that can effectively be improved through codes of conduct.[49] According to the author, adopting a narrower point of view and concentrating on a single "linchpin" labour condition,

43 EGELS-ZANDÉN, N. – MERK, J. Private…, op. cit., see the cited literature.

44 FLANAGAN, R. J.: Globalization and Labor Conditions. Working Conditions and Worker Rights In a Global Economy. Oxford: Oxford University Press, 2006, p. 141.

45 NGAI, P.: Global…, op. cit., p. 107.

46 MARTIN, I.: Corporate governance structures and practices: From ordeal to opportunities and challenges for transnational labour law. In: BLACKETT, A. – TREBILCOCK, A. (eds.): Research Handbook on Transnational Labour Law. Cheltenham-Northampton: Edward Elgar Publishing, 2015, p. 62-63.

47 SINGH, J. B.: Determinants of the Effectiveness of Corporate Codes of Ethics: An Empirical Study. In: Journal of Business Ethics, Vol. 101, 2011, Issue 3, p. 386, 389, 393. DOI 10.1007/s10551-010-0727-3.

48 KATZ, H. C. – KOCHAN, T. A. – COLVIN, A. J. S.: Labor Relations in a Globalizing World. Ithaca-London: Cornell University Press, 2015, p. 277.

49 HERMAN, A.: Reassessing…, op. cit., p. 471 and 481.

i.e. a sufficient hourly wage, would better align supplier codes with the objective of improving the labour conditions of supplier workers.[50]

According to Yu, fair distribution among crucial players in global supply chains of the cost of improving labour standards and transformation of codes into a supplement initiatives (not the alternatives) to international law and state legislation constitute important conditions for the creation of a new quality approach.[51] This is an interesting view, in particular because the research indicates that currently private and public regulation interact in diverse ways — one time as complements, another time as substitutes. It depends not only on the national contexts, but also on the specific matters being addressed.[52] In countries where labour regulations are weakly and irregularly enforced, private compliance initiatives frequently serve as substitutes for government enforcement or national laws and regulations, while in countries with more decisive government enforcement of labour regulations, private compliance efforts often complement stricter government regulation.[53] However, what refers to freedom of association, there is no substitute for effective government enforcement of national labour laws.[54]

Another important constant trend is a "soft law to hard law" trajectory, as codes of conduct are moving to legally-binding and legally-enforceable sphere.[55] For instance, in 1986, the Sullivan Principles became the basis of US sanctions legislation. This process still takes place until today.[56] Optional codes of conduct are more frequently becoming legally-binding through legislation, through contracts and possibly through litigation.[57]

García-Muñoz Alhambra *et al.* propose a transnational labour inspectorate system, i.e. a bow in the direction of publicly based monitoring, complementary to national labour inspectorates. Its premises are featured in the voluntary participation of the MNC (however, after the submission of the application the rules of the monitoring would be entirely binding) and a public root which upholds the independence of the monitoring system. According to this concept, the ILO should provide or control, supervise and/or coordinate the monitoring system, and would be responsible for providing a list of transnational labour inspectors who have been trained and accredited by the organization. The ILO should establish a special protocol introducing the basic rules and requirements for monitoring, with the aim of ensuring its independence and quality.[58]

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50 Ibid., p. 448.

51 YU, X.: Impacts…, op. cit., p. 526-527.

52 LOCKE, R. M. – RISSING, B.A. – PAL, T.: Complements or Substitutes? Private Codes, State Regulation and the Enforcement of Labour Standards in Global Supply Chains. In: British Journal of Industrial Relations, Vol. 51, 2013, No. 3. DOI: 10.1111/bjir.12003.

53 LOCKE, R. M. – RISSING, B.A. – PAL, T.: Complements…, op. cit., p. 543. See also: CAMPBELL, T.: A Human Rights Approach to Developing Voluntary Codes of Conduct for Multinational Corporations. In: Business Ethics Quarterly, Vol. 16, 2006, Issue 2, p. 257.

54 LOCKE, R. M. – RISSING, B.A. – PAL, T.: Complements…, op. cit., p. 544; LOCKE, R. – KOCHAN, T. – ROMIS, M. – QIN, F.: Beyond corporate codes of conduct: Work organization and labour standards at Nike's suppliers. In: International Labour Review, Vol. 146, 2007, No. 1-2, p. 24.

55 BLECHER, L.: Codes of Conduct: The Trojan Horse of International Human Rights Law? In: Comparative Labor Law & Policy Journal, Vol. 38, 2017, No. 3, p. 437.

56 Ibid., p. 438.

57 Ibid., p. 474.

58 GARCÍA-MUÑOZ ALHAMBRA, M.A. – TER HAAR, B. – KUN, A.: Independent Monitoring of Private Transnational Regulation of Labour Standards: a Proposal for a "Transnational Labour Inspectorate" System. In: ALES, E. – SENATORI, I. (eds.): The Transnational Dimension of Labour Relations: A new order in the making? Atti dell'XI Convegno internazionale in ricordo di Marco Biagi. Torino: G. Giappichelli Editore, 2013, p. 275-277.

In fact, some (e.g. the Worker Rights Consortium, WRC) argue that in order to be really effective, monitoring must be completely independent of brands and factories.[59] Others add that not only codes of conduct must be independently monitored, but also the trade unions representing the workers at the factories must be involved.[60] Recognising the differences between codes of conduct and international framework agreements (IFAs) in the monitoring process, Schömann *et al*. point out that a vast majority of codes are implemented, monitored and enforced only by management parties, sometimes with the help of external auditors, whereas IFAs often provide for a certain role for employees' organisations and[61] trade unions in this context. The authors indicate that this impacts on the effectiveness of labour rights. They give the case of IKEA as one of the exceptional examples where, on the one hand, management on its own undertakes extensive action to monitor implementation of the code of conduct, and on the other hand, supports the active involvement of trade unions in this process, including the establishment of a joint monitoring and implementation group with Building Workers International (BWI, formerly IFBWW – International Federation of Building and Wood Workers). An analogous shared monitoring process exists at Bosch and Securitas. According to Schömann *et al*., the potential added value of a cooperation between management and trade unions is underlined by the fact that at IKEA and Securitas, the IFAs were negotiated with the aim of improving the pre-existing code of conduct or the CSR practice.[62]

In order to avoid a "fox in the henhouse" scenario, some international organizations and many companies specialized in auditing adopt their own codes of conduct in order to make MNC subscribe. Such codes of conduct are known as "external" in opposition to "internal" ones adopted by companies themselves. However, while it is admittedly true that the majority of international employers subscribe to external codes, they keep their internal codes anyway.[63]

Däubler shows great scepticism about the whole CSR concept, even considering its abolition.[64] The author recognises the role of NGOs and public opinion as new agents in industrial relations, but only in a small field and with limited possibilities. He highlights that the profit does increase when bad conditions are offered to workers in developing countries, but it decreases even more due to the bad publicity in industrialized countries. Nobody would like to buy T-shirts produced by persons working like slaves and suffering from inhumane conditions or produced by children. At this point social sanctions are activated.[65]

Däubler proposes a "stakeholder model" under which an enterprise should balance different interests, give adequate instruments to each stakeholder with the aim of avoiding predominance of one of them (especially the shareholders), endow employees with a right to collective action which can question even management decisions, and consumers with a right to act collectively, mainly to boycott certain products.[66]

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59 LOCKE, R. – KOCHAN, T. – ROMIS, M. – QIN, F.: Beyond…, op. cit., p. 23.

60 EATON, J.: Comparative Employment Relations. An Introduction. Cambridge: Polity Press, 2000, p. 168.

61 SCHÖMANN, I. – SOBCZAK, A. – VOSS, E. – WILKE, P. Codes of conduct and international framework agreements: New forms of governance at company level. Dublin: European Foundation for the Improvement of Living and Working Conditions, 2008, p. 74.

62 SCHÖMANN, I. – SOBCZAK, A. – VOSS, E. – WILKE, P.: Codes…, op. cit., p. 75.

63 LYUTOV, N.: Traditional…, op. cit., p. 45-46.

64 DÄUBLER, W.: Corporate…, op. cit., p. 50 et seq.

65 Ibid., p. 54-55.

66 Ibid., p. 56-57.

4 CONCLUSION

The purpose of this paper was to explore the the main shortcomings of corporate codes of conduct and ways in which codes could be transformed to more effectively address workers' rights as existing generations of these instruments seem not to be sufficient enough to ensure the effective enforcement of labour rights. Starting with the positive, codes of conduct are at least able to eliminate the worst abuses, such as child labour or corporal punishments. Nevertheless, the analysis of the extant literature reveals that certain labour standards are not suitable for improvement through codes of conduct. It has been stated that there is no substitute for effective government enforcement of national labour laws when it comes to, e.g. freedom of association and the right to collective bargaining. But what if the national labour law does not guarantee any rights? Caution is also required if one, believing in the potential of codes of conduct, wants to treat them as effective supplement initiatives. It would be difficult to supplement effectively something that actually does not exist. In China, for instance, no separate unions are protected by law. The Trade Union Law (dating back to 1992 and amended in 2001) states that the All-China Federation of Trade Union (ACFTU) shall be established as the unified national organization (Article 10). Although Article 35 of the Constitution refers to the freedom of assembly and association, the concept does not establish pluralism in the trade union organization. In China, the terminology of collective bargaining is not used in legal acts. In contrast, the Trade Union Law introduces the practice of equal consultations and collective agreements. On the employees' side, the trade union, represented by the trade union chairman, or representatives, elected by the employees, where there is no trade union organized, will act for the employees to conduct collective consultations and conclude the collective agreement.[67] It goes without saying that, e.g. *ad hoc* representatives without any real voice cannot be treated as true partners. It seems that codes introducing, e.g. parallel means of organizing, can constitute neither effective complements nor substitutes for national law. However, the problem here goes far beyond corporate codes of conduct and calls for thorough reforms. Given this context, it should be mentioned that China has not even ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)[68] and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).[69]

It seems proved under several different circumstances that the role of NGOs cannot be underestimated. NGOs, indeed, engage in detecting infringements, enforcement practices, lobbying for better standards, representing workers and auditing labour conditions in supplier plants. The Worker Rights Consortium is one of the most active of these NGOs. It participated in activities for improving labour conditions at Foxconn, at apparel factories in Bangladesh, and at Nike.[70] However, when publicizing their "successes", NGOs should take the necessary measures to overcome the concerns relating to the above-mentioned conflict of interests between them and the supplier's workers. Moreover, the idea of publicly rooted monitors (e.g. transnational labour inspectors according to García-Muñoz Alhambra *et al.*) also seems interesting. Upon such a foundation a system that would enable employees to report violations of labour rights could be subsequently developed. Independ-

67 CHEN, K.: Labour Law in China. Alphen aan den Rijn: Kluwer Law International, 2011, p. 104, 114-115.

68 Available at: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0:NO:11310:P11310_INSTRUMENT_ID:312232:NO> (accessed on 5th November 2018).

69 Available at: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0:NO:11310:P11310_INSTRUMENT_ID:312243:NO> (accessed on 5th November 2018).

70 KATZ, H. C. – KOCHAN, T. A. – COLVIN, A. J. S.: Labor…, op. cit., p. 289.

ent international "observers" could promptly react and more effectively put pressure on corporations highlighting that the situation can result in the increased public awareness of infringements as a consequence of media coverage. Additionally, it is worth noting that periodic training and testing programs to ensure employee knowledge and comprehension of codes of conduct[71] could be a good idea, especially when employees have little understanding of the concept of rights.

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[71] BRASWELL, M. K. – FOSTER, C. M. – POE, S. L.: A New Generation of Corporate Codes of Ethics. In: Southern Business Review, Vol. 34, 2009, No. 2, p. 8.

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CONTRACTUAL TERMS AND CONDITIONS IN THE CONTEXT OF THE PUBLIC PROCUREMENT PRINCIPLES AND LEGAL COMPETENCE OF THE PUBLIC PROCUREMENT OFFICE IN SLOVAKIA[1]

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Abstract: This article focuses particularly on identifying the limits of the problematic aspects of the formulation of the contract proposal or contractual terms and conditions as a part of the tender documents in the context of compliance with the principles of non-discrimination, economy and efficiency in public procurement. The authors concentrate on assessing the possibility of carrying out the supervision activities of the Public Procurement Office in reviewing the above mentioned categories of tender documents in order to ensure the fulfilment of the basic principles of public procurement.

Keywords: public procurement, basic principles, contract, terms, conditions, public procurement office, legal competence, Slovakia

1 INTRODUCTION

The field of public procurement regulation and its consistent application are currently the key pillars of ensuring the efficient and cost-effective management of public funds. Although several systemic changes have been implemented in this area in the recent time in order to ensure that these objectives are effectively put into practice in the public procurement process – as set out in the recitals of the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, public procurement plays a key role in a strategy for smart, sustainable and inclusive growth, as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds, and for that purpose, the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council and Directive 2004/18/EC of the European Parliament and of the Council should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals[2] – this process is still considered (expressly by the general

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[2] Cf. Point 2 of Preamble of Directive 2014/24/EU.

public) to be a space where there is a presumption of increased risks for non-competitive behaviour and therefore the failure to respect the basic public procurement objective of saving resources from the public funds and avoiding unnecessary and excessive drawing and misuse.

On that ground, the authors of the text deal with the possibilities of the Public Procurement Office (PPO)[3] to carry out the supervision competency in the Slovak Republic conditions even in areas that are primarily determined by the regulation of private law (contract proposal, terms and conditions of contract), on the grounds that this can also be subject to an effective discrimination in the participation in public procurement of some potential candidates in such competitions which are not justified by a reasonable and acceptable interest of the contracting authority and which, in the light of their content, allow only a narrow range of tenderers to participate in the tendering procedure.

2 PRINCIPLE OF NON-DISCRIMINATION, TRANSPARENCY, ECONOMY AND EFFICIENCY IN PUBLIC PROCUREMENT

In order to achieve the objectives of the public procurement, a complex set of principles / fundamentals has been developed and the strict compliance with these objectives is to be ensured. In this sense, public procurement is to be carried out in accordance with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.[4] These fundamental principles follow the primary objective of opening up public procurement to competition in order to its development and protection.[5]

According to the decision of the Supreme Administrative Court of the Czech Republic No. 5 Afs 131/2007 – 131 of 12/05/2008, "the European Court of Justice (ECJ) has developed a set of basic public procurement principles derived from the rules and fundamental principles of the EC Treaty (e.g. the principle of equal treatment and non-discrimination). The main purpose of public procurement regulation is to ensure that public funds are consumed properly and efficiently, based on earnest assessments and without any kind of financial or political advantage or reward. The principle of equal treatment is of particular importance for the award of public contracts. This principle includes equality of opportunity for all tenderers and the contracting authority must adhere to it at every stage of the procurement process. Its objective is to promote the development of sound and effective competition between the entities involved in the procurement procedure and therefore requires that all tenderers have the same opportunities when formulating the text of their tenders. It is therefore assumed that all competitors' offers are subject to the same conditions. Nor can it, in assessing the legal issues raised above, take into account ECJ case law, which implies that the principle of equal treatment implies a duty of transparency in order to verify whether that principle is complied with. Its aim is, essentially, to exclude the risk of preference and arbitrariness of the contracting authority. It implies that all terms and conditions of the award procedure are clearly, precisely and unambigu-

[3] Pursuant to Section 140 (1) PPA, the Public Procurement Office is the central state administration authority for public procurement that pursuant to Section 147 (c) PPA oversees public procurement.

[4] Cf. Point 2 of Preamble of Directive 2014/24/EU.

[5] For more details see: Explanatory Report on Section 10 of Act no. 343/2015 Coll.

ously specified in the contract notice or in the tender documents. The principle of transparency also presupposes that all technical information relevant for the proper understanding of the contract notice or the contract documentation is as early as possible provided to all the entities involved in the procurement procedure in a way which enables all reasonably informed tenderers to understand the exact scope of tender documents and its interpretation in the same way and complementary to enable the contracting authority to verify whether tenders meet the criteria governing the contract. The procedure whereby the contracting authority has set additional criteria or qualification prerequisites for participation in a public contract shortly before submitting, possibly only after the offer has been submitted, is generally considered to be unlawful (e.g. case C-470/99 Universelle-Bau Ag [2000] I-11617, case ATI EAC Srl and Viaggi di Maio Snc, C-331/04, 2005 I-10109).".

In order to transpose the related provisions of the Directive and to preserve the importance of these principles, the legislator adopted their explicit regulation in sec. 10 (2) of Act no. 343/2015 Coll. on Public Procurement and on amendments to certain laws (hereinafter referred to as the "Public Procurement Act" or "PPA"), in such a way that the contracting authority must comply with the principle of equal treatment, the principle of non-discrimination of economic operators, the principle of proportionality and the principle of economy and efficiency.[6]

We agree with the opinion that: "*It is* (in relation to the basic principles of public procurement) *the basic ideas on which the whole public procurement process is built. At the same time, they serve as interpretative rules for the interpretation and application of individual provisions of the PPA not only by contracting authorities, contracting entities and subsidized contracting entities, but also by the PPO in the performance of supervision in public procurement.*"[7]

As we have already pointed out in the text above, the principles of public procurement mainly follow the application and interpretative function in relation to the entire procurement process.[8]

In this sense, the principle of non-discrimination can be regarded as one of the building blocks of the proper running of public procurement, the proper application of which is to ensure that the contracting authority, contracting entity does not favour certain suppliers or groups of suppliers at the expense of others without pre-set rules and without complying with the subject and the nature of the public contract and it is also not possible to favour a supplier on the basis of its seat.[9] It may be mentioned at this point that there is some controversy among public procurement professionals in the subject of defining the relationship between the principle of equal treatment and the principle of non-discrimination when the legislator in the Explanatory Report to Act No. 343/2015 Coll. states that "the principle of equal treatment is a particular specification of the more general principle of non-discrimination".

On the other hand, some authors see this relationship differently and are of the opinion that "The principle of non-discrimination of economic operators, as we have already outlined, is, in our opinion, a special principle in relation to the principle of equal treatment, not the way the legislator expressed in the Explanatory Report to Act (…) The specificity of the principle of non-discrimination lies most of all in the prohibition of discrimination on grounds of nationality, which the application

6 Legislator in the Czech Republic has adopted the similar approach to these principles. Cf. the wording of Section 6 of Act no. 137/2006 Coll. of the Public Procurement Act.

7 PÚČEK, Ľ. – ZAMIŠKOVÁ, A.: Verejné obstarávanie. Podlimitné zákazky v praxi. Bratislava: Wolters Kluwer, 2015, p. 13.

8 To the definition of the application and interpretative function of the public procurement principles, see: JURČÍK, R.: Zákon o veřejných zakázkach. Komentář. 4. vydání. Praha: C.H. Beck, 2015, p. 90-91.

9 KRUTÁK, T. – KRUTÁKOVÁ, L. – GERYCH, J.: Zákon o zadávaní veřejných zakázek s komentářem k 1. 10. 2016. Olomouc: ANAG, 2016, p. 51.

practice often neglected and misinterpreted the characteristics of the breach of the principle of equal treatment with the principle of non-discrimination, thus negating its specific nature."[10]

According to the decision of the Supreme Court of the Slovak Republic No. 3 Sžf 129/2013 on 25/11/2014, "*the principles of transparency and equal treatment are governed by all procurement procedures and, in that meaning, the substantive and procedural conditions for public procurement selection criteria must be clearly and previously defined and require to be made public, so the concerned subjects can know exactly the limitations of the procedure and the concerned subjects are certain the same restrictions apply to all competitors.*"

The definition of the principles of economy and efficiency in public procurement can be carried out through the purpose fulfilment of which the use is primarily intended to be implemented and which is not only for contracting authority / contracting entity to purchase only the cheapest goods, services or works but to obtain the best value generated in the competitive environment.[11]

We believe that the principle of economy and efficiency could also be applied to issues that arise only after the successful conclusion of public procurement, but these issues are closely related to the process due to its purpose and it includes particular situation the contract is found invalid, the consequence of which leads to the additional costs of the procurement of the goods.

3 LIMITS OF THE SUPERVISION COMPETENCY OF THE PUBLIC PROCUREMENT OFFICE IN PROPOSAL FOR A CONTRACT AND CONTRACTUAL TERMS AND CONDITIONS REVIEW

In accordance with sec. 42 (11) of the Public Procurement Act, proposal for a contract and contractual terms and conditions is an important part of the tender documents.[12] The importance of these must be particularly seen in the context of the fact that a contract resulting from a public procurement and concluded in a singular case, shall not be interfered with the tender documents, nor proposal for a contract and/or contractual terms and conditions as a part of tender documents. In this meaning, we as well recognise the main reason why, in our view, it is necessary to examine questions relating to this particular part of tender documents because it includes possibility based on a specific expression of some contractual terms and conditions to *de facto* discourage some of the tenderers from participating in a competition, who might otherwise contribute to the reach of the public procurement goals.

As an example, it is possible to set out in this context the provisions of the contractual terms which affect the way and variability of a contract assurance, which may be expressed in the range of the requested assurance in combination with facultative execution or in the instituting of so-called contract guarantee,[13] and so on. As another example may be stated the arrangement of payment for

10 TKÁČ, J. – GRIGA, M.: *Zákon o verejnom obstarávaní – veľký komentár.* Bratislava : Wolters Kluwer, 2016, p. 233.

11 Ibid p. 237-238.

12 Section 42 (1) of Act no. 343/2015 Coll. on Public Procurement and on the Amendment of Certain Acts as amended: *"tender documents contain documentation, plans, models or photographs if they are necessary to draw up a tender, criteria for the evaluation of tenders, rules of their application and instructions for drawing up and submitting tenders. The tender documents also* ***contain a draft contract or a draft framework agreement,*** *the content of which may be determined by reference to the* ***General Commercial Terms and Conditions…*** *".*

13 To the conditions for determining tender bond see: Analýza rozhodnutia Rady týkajúceho sa zmluvnej zábezpeky (Analysis of the Council of Office decision on contract guarantee). Available at the Public Procurement Office's website: https://www.uvo.gov.sk/vsetky-temy-4e3.html? id = 299 (accessed on 5th November 2018).

carrying out the contract (e.g. splitting the price-payment to successful tenderer for dozens of payments over a longer period of time[14]).

The above examples of contractual terms and conditions expressions (possibly related to other factors) may already discourage multiple tenderers from participating in a singular procurement procedure, although they would otherwise be suitable and capable suppliers of the performance that is the object of a public procurement procedure.

In this regard, we consider it necessary to present the PPO's approach to this issue, which to its scope of supervision competency in contractual terms and conditions review in relation to the previous Act on Public Procurement (Act No. 25/2006 Coll. on Public Procurement and on the amendment to some acts) stated:

"*The supervision competency of the Public Procurement Office is limited to examining the compliance with the Public Procurement Act, particularly its principles, but not for examining compliance with commercial, civil or other public laws. The tenderer is obliged to accept the expression of the proposal contractual terms and conditions, which are part of the tender documents.*"[15]

Similarly, the PPO also stated in its Explanatory Opinion on the present-day legislation (Act No. 343/2015 on Public Procurement and on the amendment of some laws):

"*The Public Procurement Office (hereinafter referred to as "the Office") does not examine the compliance of contractual terms and conditions with commercial, civil or other public law. In these cases, the supervision competency of the Office is limited to examining the compliance of the contractual terms and conditions with the Public Procurement Act, particularly with its principles, in view of whether the contracting authority / entity / person under sec. 8 of the Public Procurement Act has set the terms and conditions for all tenderers in compliance with the principle of transparency, non-discrimination and the principle of equal treatment. (…) Examination of the compliance of contractual terms and conditions with commercial, civil or other public laws falls under the protection of other specialized state bodies, therefore, the Office has limited access to contractual freedom and contracting liberty of the contracting authority / entity / person under sec. 8 of the Public Procurement Act only in the scope of examining the compliance of the contractual terms and conditions with the Public Procurement Act, particularly with its principles.*"[16]

In this meaning, the approach of the PPO appears to be consistent, but the authors consider it necessary in order to identify the limits of the Office's scope to focus on a more precise determination of the boundary determining whether the Office will or will not examine the components (parts) of the tender documents – contractual terms and conditions.

We believe that the examples above of contractual terms and conditions (even on the basis of significant decisions of the Office) may ultimately be considered as incompatible with the principles of procurement (in particular the principles of non-discrimination and proportionality) and, therefore, in complying with other legal conditions, also derive the supervision competency of the PPO.

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14 As an example of this contract condition, we mention "The parties have agreed that the total price of a work, including VAT, as provided for in Article 5, shall be paid by the buyer on the basis of an invoice pursuant to Article 6, in 120 regular monthly instalments…" For more details see the decision of the Public Procurement Office no. 5728-6000/2018-OD dated 15 June 2018 – decision of the Office in a similar case (decision no. 6335-6000/2018-OD dated 15 June 2018) is subject to second-instance proceedings before the Council of the Office, the legal opinion of the Office is hence, at the time of writing of this article, not yet confirmed by a second-instance decision.

15 Explanatory Opinion of the PPO no. 1/2013 from 2 January 2013.

16 Explanatory Opinion of the PPO no. 3/2016 from 15 April 2016.

On the other hand, we believe that the competency of the PPO does not need to end/stop at the reviewing the terms and conditions accordingly, but we also wish to dispute about its competence to review the contractual terms and conditions from the aspect of their compliance with the provisions of other legislation, e.g. Commercial Code, respectively Civil Code, in so far as it relates to such contractual requirements, the failure of which could lead to the invalidity of the contract resulting from the public procurement process, in order to achieve and develop the principle of economy and efficiency of public procurement.

In this regard, we agree with J. Duračinská, who states: "*It is clear from the law of the public procurement process and the principles applicable to public procurement that the procurement process does not end with the choice of a contractor from among the tenderers and the conclusion of the contract but it continues also with the impact on the content of the contract relationship and the possibility of its modification*." [17]

This leads us to a consequence that in case of the event that the successful conclusion of the public procurement process would result in the conclusion of the contract, the content of which would comply with the tender documents, but at the same time this would be contrary to the mandatory provisions of other relevant legislation, it would probably be necessary to eliminate unlawfulness. In this way, the whole process would probably be questioned and public procurement would probably have to be re-noticed.[18] We assume that the very principle of economy and efficiency of public procurement could be a clear justification for PPO to deal more closely with contractual terms and conditions in order to prevent situations which can significantly increase the costs accompanying the procurement process.

However, in this context, it is also essential to say that this competence could, under current legal circumstances, raise a number of questions, particularly whether or not the PPO has the competence to review the validity or invalidity of the proposed contract and whether or not only court of law has that competence. If such a question should be considered in the administrative proceedings before the PPO as a preliminary question under sec. 40 of Act no. 71/1967 Coll. (Code of Administrative Procedure), primarily it is necessary to correctly consider the applicability of that provision of the Code of Administrative Procedure in relation to the provisions of sec. 185 of the Public Procurement Act. Under Section 40 (1) of the Code of Administrative Procedure, there are three ways in which the administrative body can solve the preliminary question:

1. where a question has already been raised in the proceedings, which the competent body has already rightly decided, the administrative body shall be bound by such a decision;
2. otherwise, the administrative body is allowed to make a judgment on such a matter or
3. the administrative body gives the competent authority a call to initiate the procedure.

In the case of the application of the second method, "it is settled case-law that the administrative authority ruling the case is not only entitled but also obliged to deal with preliminary questions if

[17] DURAČINSKÁ, J.: Ingerencia procesu verejného obstarávania na zmluvy uzatvorené na základe tohto procesu. In: Acta Facultatis Iuridicae Universitatis Comenianae, Tomus XXXIII, 1/2014. Bratislava: Comenius University in Bratislava, Faculty of Law, 2014, p. 6.

[18] According to the first sentence of Point 110 of Preamble of Directive 2014/24/EU, in line with the principles of equal treatment and transparency, the successful tenderer should not, for instance where a contract is terminated because of deficiencies in the performance, be replaced by another economic operator without reopening the contract to competition. Similarly, pursuant to Article 72 (5) of Directive 2014/24 /EU, a new procurement procedure in accordance with this Directive shall be required for other modifications of the provisions of a public contract or a framework agreement during its term than those provided for under paragraphs 1 and 2.

they are present in the proceedings. According to the decision of the Supreme Administrative Court (A 3270/24), the administrative body cannot refuse to judge the merit of the case on the ground that the preliminary question has not yet been decided by the competent authority. Either the administrative body will answer the question itself (make a judgment on it) or it gives the competent authority a call to initiate the procedure and awaits with its own decision until the decision on the preliminary question is made. According to sec. 40 of the Code of Administrative Procedure, the administrative body has a fundamental discretion in considering which of these two options it will choose (this freedom could be limited by a specific law only). This means that the administrative body is never allowed to remain passive in relation to the preliminary question."[19]

However, this legal opinion is "relativized" by the decision of the Supreme Court of the Slovak Republic no. 6Sžo/229/2010 dated 20 July 2011, according to which if a dispute as to the validity of the repudiation of contract arises, in practice, particularly because of the fulfilment or non-fulfilment of the legal or contractual conditions for such a procedure, this constitutes a civil litigation, on which only a court of law is entitled to rule (sec. 7 (1) of the Code of Civil Procedure). Since, according to this decision of the Supreme Court, the administrative body (cadastral administrative body in this particular case) is not entitled to judge the validity of the repudiation of contract nor as a preliminary question (sec. 40 of the Code of Administrative Procedure), this must be reflected in the following procedure – if the validity of the repudiation of the contract is questioned by the other party, the administrative body should give a call to the other party to take an action of the legal procedure to competent court of law within the specified period of time (sec. 80 (c) of the Civil Procedure Code), stating that if it fails to do so, it will be considered as "acceptance" of validity of the repudiation of the contract.

4 CONCLUSION

The supervision competency of the Public Procurement Office shall be seen primarily through the purpose of public procurement and its principles, which should be protected by the Office. In this meaning, it is necessary to take into account the fact that, from the point of view of the conclusion of a contract resulting from a public procurement procedure, other than the normal business principles typical for the area governed by commercial law apply (e.g. freedom of contract, etc.) and these principles are undermined in the public procurement process by the fact that the legislator, within the framework of the rules governing this process, seeks to form a legal framework that will lead all stakeholders to handle public funds economically, efficiently and effectively. We assume, for that purpose, *de lege ferenda* it would be appropriate to consider a legislation that would undoubtedly enable the Public Procurement Office to review the content of the contractual terms and conditions not only to a limited extent, namely regarding the principles of public procurement, but also the compliance of contractual terms and conditions with mandatory provisions of other legal regulations, the failure of which can result in repeating of the procedure, which we consider undesirable in terms of cost efficiency. At the same time, we find it necessary to consider elaboration of sample contract terms and conditions that could be valuable to contracting authorities or entities and contribute to the elimination (reduction) of current application problems.

[19] KOŠIČIAROVÁ, S.: Správny poriadok – komentár s novelou účinnou od 1. januára 2004. Šamorín: Heuréka, 2004, p. 166.

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A STEP TOWARD IMPROVEMENT OF POLICE PERFORMANCE ASSESSMENT AS SUBJECTS OF COMBATING FINANCIAL AND ECONOMIC CRIMES: EXPERIENCE OF UKRAINE AND SLOVAKIA[1]

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Abstract: The article is devoted to the study of certain aspects of the police performance assessment in Ukraine and the Slovak Republic as subjects of combating financial and economic crimes. It is determined that the expediency of studying this issue is determined by the high level of financial and economic crimes in Ukraine and the Slovak Republic. It was insisted that the assessment of the police activity in Ukraine and the Slovak Republic is carried out mainly on the basis of quantitative criteria. In view of possible fraud with the statistical data that is the basis of the report of the police authorities of Ukraine and the Slovak Republic, it is proposed to consolidate such a criterion for assessing of the police activity as a level of latent crimes. Among the qualitative criteria for assessing the police activity in Ukraine and the Slovak Republic, public trust has been highlighted, but it was concluded that its definition should be carried out by an independent sociological service. It is grounded that the implementation of these proposals will have a positive impact on the police activity in Ukraine and the Slovak Republic in the area of combating financial and economic offenses.

Key words: police authorities, financial and economic crimes, assessment, quantitative criteria, latent crimes, qualitive criteria, public trust

1 INTRODUCTION

The economic and democratic development of Ukraine and the Slovak Republic poses a number of issues that need to be resolved for further gradual economic growth and the establishment of democracy in the states. The most urgent issues for both states are the increase of financial and economic crimes, which leads to the loss of state budget funds. Moreover, it clearly demonstrates the need to improve activity of police authorities, which counteract and fight against financial and economic crimes, in Ukraine and the Slovak Republic.

The above-mentioned causes the need for more detailed study of the police authorities performance in Ukraine and the Slovak Republic. At the same time, in the context of the establishment of democracy in both states, more important is the issue of qualitative assessment of police activity, the identification of existing problems and the reorientation of police activity in accordance with the needs of society.

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2 PECULIARITIES OF POLICE ACTIVITY IN UKRAINE AND THE SLOVAK REPUBLIC IN THE SPHERE OF COMBATING FINANCIAL AND ECONOMIC CRIMES

The mechanism of state is difficult to imagine without the existence and activity of the police, which is entrusted with performing a number of important tasks, including protecting the financial and economic interests of the individual, society and the state from a number of unlawful internal and external developments. In Ukraine and the Slovak Republic there are also police agencies, the organizational structure and activity of which as subjects of combating financial and economic crimes in the state have certain features.

The structure of the police in the Slovak Republic envisages the functioning of the National Criminal Agency, which was formed on December 1, 2012 as a result of the merger of the Anti-Corruption Department and the Police Department on Combating Organized Crime. In the structure of the National Criminal Agency, there are financial police units responsible for detecting and investigating the most serious forms of property and economic criminal offenses.[2] According to the Criminal Procedural Law of the Slovak Republic of May 24, 2005[3] almost all crimes are investigated by the police agencies. At the same time, the object of the Financial Police Units activity is to identify organized crime cases, tax evasion, financial fraud, illegal financial transactions, forgery and unauthorized production of bank notes and securities, etc.

It should be noted that according to the Strategy for Prevention of Crime and Other Antisocial Activities in the Slovak Republic for 2016–2020[4], reducing the level of criminal and other anti-social activities, including economic crimes is one of the priorities of the state. Accordingly, in order to achieve this goal, it is envisaged to create a system of analytical evaluation, monitoring and control mechanisms for the systematic assessment of the effectiveness of the activity carried out by the subjects which conduct preventive activity and increase their effectiveness. The indicated fact actually shows that before the Financial Police Units of the Slovak Republic today also stands one of the important issues regarding assessment of the effectiveness of its performance.

In Ukraine, according to the Law of Ukraine "On the National Police" of July 2, 2015,[5] there are no financial police units within the police structure. Accordingly, pre-trial investigation of financial and economic crimes, referred by Art. 216 of the Criminal Procedural Code of Ukraine[6] to the jurisdiction of the police, is carried out by the authorities of the pre-trial investigation of the police. The only exception is the functioning of the Department of Economic Protection as an interregional territorial agency of the National Police of Ukraine whose main purpose in accordance with the Regulation "On the Department of Economic Protection" approved by the Order of the National Police of Ukraine of November 7, 2015[7] is to carry out operative and investigative activities for the detection and suppression of economic crimes, as well as identifying and eliminating the causes and conditions that contributed to their commission.

2 Zákon Národnej rady Slovenskej republiky o Policajnom zbore 171/1993.
3 Zákon Národnej rady Slovenskej republiky o Trestný poriadok. 24 May 2005 No. 301/2005.
4 Stratégia prevencie kriminality a inej protispoločenskej činnosti v Slovenskej republike na roky 2016–2020.
5 Law of Ukraine On the National Police.2 July 2015 No 580-VIII, Kyiv.
6 Criminal Prosedure Code of Ukraine. 13 April 2012 No 4651-VI, Kyiv.
7 Regulation On the Department of Economic Protection approved by the Order of the National Police of Ukraine. 7 November 2015

Thus, the difference in the status of police authorities in Ukraine and the Slovak Republic is obvious. Nevertheless, these subjects are entrusted with the tasks of preventing, detecting, terminating, investigating and disclosing financial and economic crimes in both states.

3 PUBLIC TRUST AS A CRITERION FOR ASSESSING THE ACTIVITY OF POLICE AUTHORITIES IN UKRAINE AND THE SLOVAK REPUBLIC

Today, the category of "citizens' trust in the police" is the basis for the stable, coherent and effective operation of the police in many countries of the world. To date, there are two aspects of citizens' trust in the police agencies: instrumental-based and interpersonal-based.

Instrumental-based trust, as noted by Kristina Murphy, Lorraine Mazerolle and Sarah Bennett,[8] is a trust based on the connection with competence and individual beliefs about the likelihood of obtaining positive results from interaction with the authorities. In the policing context, for example, instrumental-based trust might be linked to judgements about the state of protection of the citizens' rights, freedoms and interests. Thus, interpersonal-based trust is trust based on social relations and fair treatment.

In view of the rather broad list of concepts of the activities of the police, it should be noted that both aspects of public trust are best disclosed within the concept of the "community policing." Today, this concept does not exist in all countries of the world, there is a clear tendency according to which the police of more democratically developed states generally prefer the principles of "community policing", whereas the states where democracy has only begun its formation (Eastern Europe, Central Asia) do the first steps towards the introduction of the above-mentioned concept.[9]

Given the relevance of the "community policing" concept it is appropriate to pay attention that in Ukraine the level of public trust in the police is defined as the main criterion for assessing the effectiveness of the police activity by the Law of Ukraine "On the National Police". At the same time, the practice of determining the level of citizens' confidence in the police, including the Financial Police Units, is also widespread in the Slovak Republic, although it is not enshrined at the legislative level.

The importance of the existence of such a criterion, in our opinion, is due to the general purpose of the police. Thus, the Law of Ukraine "On the National Police" dated July 2, 2015 confirmed that the police is the central executive body that serves society by protecting their rights and freedoms, maintaining public order and security. Although the Law of the Slovak Republic "On the Police" defines the status of the police as an armed security unit that performs tasks related to issues of national order, security, the fight against crime, including its organized and international forms, and tasks that the police face in connection with the list of international obligations undertaken by the Slovak Republic. Based on the above-mentioned, it is possible to draw attention to the different approach of the legislators of Ukraine and the Slovak Republic to determining the status of the police. Indication in the Law of Ukraine "On the National Police of Ukraine" on the level of citizens' trust

8 MURPHY, K. – MAZEROLLE, L. – BENNETT, S.: Promoting trust in police: Findings from a randomized experimental field trial of procedural justice policing. In: Policing and Society: An International Journal of Research and Policy, Vol. 24, 2014, Issue 4, pp. 405–424.

9 LUM, C.: Community Policing or Zero Tolerance? Preferences of Police Officers from 22 Countries in Transition. In: British Journal of Criminology, Issue 49, 2009, 6, pp. 788–809.

in the police is quite logical, since the activity of the police are aimed at meeting the needs of society, while the legislation of the Slovak Republic indicates a fundamentally different approach.

In general, the orientation of the police to meet the needs and interests of society has long been known to states of the world with a developed democracy. In particular, we are talking about already mentioned concept of «community policing». This concept has several advantages that significantly affect the activity of the police. According to Paul McCold and Ben Wachtel,[10] some of them are worth paying attention to, namely: 1) reducing crime rates; 2) increasing the level of transparency of the police; 3) increasing citizen satisfaction with police activity; 4) reduced complaints about police activity; 5) increase police job satisfaction; 6) public involvement in the activity of the police; 7) improving the effectiveness of the police and the quality of tasks assigned to police officers. Thus, it is obvious that introducing into the activity of the police the basic provisions of the "community policing" concept will have a positive impact on the effectiveness of the police activity and allow them to interact with the public in order to fulfill the tasks entrusted to them by national legislation and accordingly protect the rights and interests of society.

It should be noted that the presence of the police towards society has a positive effect on the level of public satisfaction with the activity of the police.

In order to determine the level of citizens' trust in the police in the Slovak Republic, their views on police activity in all major areas and to identify possible factors affecting the level of trust in the police, the Ministry of Interior Affairs of the Slovak Republic, together with the Institute of Public Opinion Research in the Statistical Office of the Slovak Republic have developed a questionnaire on the topic "Social status and the role of the police in the opinion of citizens of the Slovak Republic."[11]

According to a recent survey of the level of citizens' confidence in police authorities conducted by the Eurobarometer in 2017, the highest level of distrust of the police authorities among all EU member states is observed in the Slovak Republic, where 53% of citizens do not trust the police, while for the European Union as a whole this figure is on average 23%. For comparison, only about 13% of citizens do not believe in police in neighboring Austria.[12] According to survey conducted in 2017 by the Institute for Economic and Social Reforms, the majority of respondents surveyed assessed the quality of the courts, the police and prosecutor's offices on a scale from 1 to 7 to 6.04, which suggests that, according to the citizens of the Slovak Republic, these agencies in conditions of the democracy establishment do not function properly.[13]

Ukraine also conducts studies to determine the level of public confidence in the police. Thus, the Decree of the Cabinet of Ministers of Ukraine "On Approval of the Procedure for Assessing the Level of Public Confidence in the National Police" dated February 7, 2018[14] provides that the National Police of Ukraine independently determine the issues on which the level of public confidence in the police is investigated in accordance with the powers of the National Police defined by the Law of

[10] McCOLD, P. – WATCHEL, B.: Police officer orientation and resistance to implementation of community policing, 1996. Available at: https://www.ncjrs.gov/defiles1/Digitization/165617NCJRS.pdf (accessed on 5th November 2018).

[11] GASPIERIK, L.: Policing in the Slovak Republic. The organization and current problems of police work. In: Studia nad Autorytaryzmem i Totalitaryzmem, Issue 32, 2016, No. 1, pp. 39–60.

[12] Správa o slovenskej polícii. 2018. Available at: <https://dennikn.sk/blog/1082065/sprava-o-policii/> (accessed on 5th November 2018).

[13] GOLIAS, P. – HAJKO, J. – PISKO, M.: Threats to democracy in Slovakia, 2017. Available at: <https://www.cipe. org/resources/threats-democracy-slovakia/> (accessed on 5th November 2018).

[14] Resolution of the Cabinet of Ministers of Ukraine On approval of the Procedure for conducting an assessment of the level of public confidence in the National Police. 7 February, 2018.

Ukraine "On the National Police of Ukraine". Given the above-mentioned, this order is not perfect for several reasons. In particular, we consider it inappropriate to give the police authorities the right to independently determine issues of sociological research, since there is a possibility that certain important issues can be ignored by police. In this case, the experience of the Slovak Republic is quite positive, according to which we consider it necessary to provide at the sub-legal level that questions for a sociological research of the level of citizens' trust in the police are determined jointly by such entities as the police, the Ministry of Interior Affairs and independent sociological services. This will allow to take into account questions the answers to which are necessary for improving the police activity and the existing rules for conducting a sociological survey in order to obtain truthful data.

Quite interesting in terms of determining the level of citizens' confidence in the police is the experience of Ireland, where, as Robert C. Davis[15] points out, the Police Activities Council is an independent government agency that, with the aim of ensuring efficient and impartial police activity trusted by the entire population, monitors the effectiveness of the police activity in order to improve the interaction between the police and society. Accordingly, this agency twice a year conducts sociological research, the results of which are open to the public. In the UK (except for Scotland) there is also an independent state organization – the Constable Inspectors Service, whose main task is to independently assess the police activity and its interaction with society.[16]

It should be noted that the results of a study of the level of citizens' confidence in the police should not be merely a formal determination of the ratio of the number of people who trust the police to the number of people who do not trust such authorities. Since, as noted by Gary T. Mar,[17] the number of sociological researches of the level of citizens' trust in the police is significant, but mostly they are conducted on a non-permanent basis, that is, only when urgently needed, and their results are not considered by the police as important to draw conclusions about the results of their activity.

S. V. Egoryshev and N. V. Egorysheva[18] drew attention to the fact that sociological studies, including the level of citizens' confidence in law enforcement agencies, are important only when they are combined with the statistical indicators of the activities of these agencies. Accordingly, there is a need for the existence of such criteria for assessing the state law enforcement agencies activity as a "socially tolerant level of crime" and "a socially approved level of the rule of law". In our opinion, a questionnaire for a sociological research of the level of citizens' trust in the police should contain questions that would help to identify these indicators.

Thus, the mechanism for determining the level of citizens trust as a criterion for assessing the activities of police authorities in Ukraine and the Slovak Republic needs to be improved, in particular, an independent sociological service should be established; questions for research should be determined collectively; the level of citizens' trust in the police authorities in Ukraine and Slovak Republic should be determined on a permanent basis.

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15 DAVIS, R. S.: Selected International Best Practices in Police Performance Measurement, 2012. Available at: <https://www.rand.org/content/dam/rand/pubs/technical_repor ts/2012/RAND_TR1153.pdf> (accessed on 5th November 2018).

16 PEEL assessment, 2015. Available at: <https://www.justiceinspectorates.gov.uk/hmicfrs/peel-assessments/how-we-inspect/2015-peel-assessment/> (accessed on 5th November 2018).

17 MARX, G. T.: Alternative Measures of Police Performance. Criminal Justice Research, 1976. Available at: <http://web.mit.edu/gtmarx/www/alt.html> (accessed on 5th November 2018).

18 EGORYSHEV, S. – EGORYSHEVA, N.: Reflection of the state of crime on the indicators of the social efficiency of law enforcement (on the example of the Republic of Bashkortostan). In: Bulletin of the Perm National Research Polytechnic University, 2016, No. 2, p. 32.

4 QUANTITATIVE CRITERIA FOR ASSESSING THE POLICE AUTHORITIES ACTIVITY IN UKRAINE AND THE SLOVAK REPUBLIC

In addition to the level of citizens' trust, there are also other criteria for assessing the police activity, which can be called quantitative criteria.

Speaking about the quantitative criteria for evaluating the police activity in Ukraine and the Slovak Republic, attention should be paid to the opinion of Yu. V. Bykovska[19] who notes that, among the most important quantitative indicators reflecting the specificities of law enforcement agencies, their status and effectiveness, as the experience of the state in the world shows, are: 1) the number of law enforcement officers; 2) the number of registered, solved and unsolved crimes; 3) change in the number of crimes for a certain period of time; 4) the amount of funding for law enforcement agencies; 5) the share of expenditures on law enforcement agencies in the GDP.

The analysis of the reports of the National Police of Ukraine indicates their reporting almost on the same list of quantitative indicators, which includes: a) the number of registered criminal cases, b) the number of cases on which the pre-trial investigation has been completed; c) the number of closed procedures, etc. In particular, according to the official report on the activity of the National Police of Ukraine in 2017[20] in the sphere of protection of the economic interests of the state, prevention of the squandering of budget funds and their removal from the "shadow", more than 8.8 thousand criminal offenses have been exposed by the interregional units of the Department of Economic Protection. Meanwhile, among the above-mentioned number of offenses, 2511 were connected with illegal use of the budget funds, in particular, 1215 were made with the expenditures of the state budget funds, and 1264 with expenditures of local budgets funds. In addition, the report of the National Police of Ukraine in determining how effective is the police, compared the quantitative indicators in 2016 and 2017. In particular, attention was paid to the fact that in 2016, 2449 crimes related to the use of budget funds were disclosed, while in 2017 there were 3504 crimes disclosed, which is by 43% more than in the previous year.

The reports of the Financial Police Units of the Slovak Republic are no exception. In particular, according to the report of the police authorities, the results of the fight against economic crimes on the official website of the Ministry of Interior Affairs, as a whole, are highlighted by indicators such as the number of identified and the number of disclosed crimes, as well as the comparison of the data with the data for previous years.[21]

However, the use of quantitative criteria for measuring the police performance, including countering and combating financial and economic crimes is not supported by many scientists for a number of rational reasons. Edward R. Maguire[22] believes that the arguments against statistical data as a criterion for assessment the effectiveness of the police are: firstly, the presence of many factors

19 BIKOVSKA, YU. V.: Criteria for evaluating the effectiveness of the police of foreign countries. In: National interests: priorities and security, 2014, No 11, 218, pp. 51–64.

20 Report on the activities of the National Police of Ukraine for 2017. Available at: <https://www.npu.gov.ua/acti vity/zviti/richni-zviti/> (accessed on 5th November 2018).

21 Trestná činnosť v Slovenskej Republike. Available at: <https://www.minv.sk/?statistiky-dokumenty> (accessed on 5th November 2018).

22 MAGUIRE, E. R.: Measuring the Performance of Law Enforcement Agencies. In: CALEA Update Magazine, 2002, Issue 83. Available at: <http://www.calea.org/calea-update-magazine/issue-83/measuring-performance-law-en forcement-agencies-part-1of-2-oart-articl> (accessed on 5th November 2018).

affecting the crime rate, among which the police authorities activity is not the only one; secondly, the number of recorded crimes demonstrates not more than how well the police authorities process the information received; thirdly, the police officials' ability to manipulate statistical data is obvious. Malcolm K. Sparrow[23] notes that the most powerful argument against using statistics to determine the effectiveness of the police activity is that such information focuses solely on the number of reported crimes, while the number of unreported crimes remains unknown.

However, in order to avoid manipulations with statistical data that actually reflect the real state of crime in the state and the role of the police in fighting it, Anatolijs Kriviņš[24] proposes to provide as the main criterion of the effectiveness of police activity not a decrease in the crime rate, but a decrease in the share of latent crime. According to the scientist, this approach will allow the police to neutralize the desire to manipulate statistical data.

This position, in our opinion, is advisable to use for assessment of the police activity as a whole in each state, since, as has already been noted, the state of crime depends not only on the police activity, but also on a number of other socio-economic and political factors. At the same time, a significant role in determining the level of latent crime belongs to sociological studies of the level of citizens' confidence in the police. K. Bugaychuk[25] notes that the activities of police units in Scotland are estimated through public opinion research about their activity, and the purpose of this research is not only to determine how much citizens trust the police, but also to obtain information to supplement official statistics on the crimes that have become known or the victims of which they became aware during the reporting period. First of all, it allows to reveal information about crimes about which the police was not notified. That is, in fact, public confidence in the police is not only an indicator of public satisfaction with the work of the police in preventing, identifying, suppressing and solving crimes, but also a powerful tool for determining the level of latent crime.

Moreover, it should be noted that the orientation of police authorities on reducing the level of latent crimes, as V. Shikun[26] notes, will also provide a clear data about the dynamics of crime, determine the size of the damage caused to the state and citizens, identify the circumstances that generate crime and identify ways to eliminate them, predict and plan activity of police in the sphere of counteraction and combating crimes. The introduction of this criterion will undoubtedly help to reorient the police authorities' activity from the usual collection and recording of crime information to intensify their fight against crimes, including financial and economic crimes.

A slightly different criterion for evaluating the police activities is the number of law enforcement officers. Yu. V. Bykovskaya notes that this criterion is generally one of the key criteria when developing a mechanism to increase the effectiveness of the police. The number of law enforcement officers should be optimal, since, on the one hand, an excessive number of workers leads to an unjustified increase in budget expenditures, and on the other hand, an insufficient number of personnel contributes to an increase in the crime rate and worsens the criminal situation in the state. This should take into account the scale of the state, the population, the level of criminalization in the state, the

23 SPARROW, M. K.: Measuring in a Modern Police Organization. In: Psychosociological Issues in Human Resource Management, Vol. 3, 2015, Issue 2, pp. 17–52.

24 KRIVINS, A.: Towards acuity and safety: police efficiency across European countries. In: Journal of Security and Sustainability Issues, Vol. 5, 2015, No. 1, pp. 35–44.

25 BUGAYCHUK, K.: Criteria for evaluating the work of the police authorities of individual countries, 2015. Available at: <http://police-reform.org/articles/kriteriyiocinkirobotiorganivpoliciyiokremihkrayin> (accessed on 5th November 2018).

26 SHAKUN, V.: The limits of influence on crime. In: Yearbook of Ukrainian Law, 2000, No. 2, pp. 183–190.

state policy regarding the law enforcement agencies activity, the priorities and directions of their development, the successes and achievements of previous reforms.

It is worth noting that the question of establishing the relationship between the number of police officers and the level of crime has not lost its relevance over the years. In 2008, as a result of the study, it was stated that the number of police officers and the crime rate is partially interdependent. That is, the increase in the number of crimes leads to an increase in the number of police officers. However, there is no evidence that increasing the staff of the police reduces crime rates. At the same time, we do not believe that the number of police officers is the criterion by which we can determine how effectively the police carry out the tasks and functions assigned to them, including in the area of counteracting and combating financial and economic crimes.

Thus, the assessment of the police authorities activity as subjects which counteract and combat financial and economic crimes in Ukraine and the Slovak Republic by quantitative criteria is not feasible today due to a number of reasons. Due to this, it is necessary to fix at the legislative level such criterion as reduction of level of latent crimes. Therefore, the more police authorities will have information about the actual state of crime in the state, the better they will be able to organize their activity and within their authority to take appropriate measures to eliminate the causes and conditions conducive to the commission of such crimes, reimburse the damage inflicted to the state and bring the perpetrators to justice.

5 CONCLUSION

Nowadays, the increase of financial and economic crimes, as well as the democratization of many areas of public relations, makes it necessary to revise the criteria for assessing the police authorities' activity in Ukraine and the Slovak Republic, which counter and combat financial and economic crimes. The analysis of legislation of Ukraine and the Slovak Republic testifies to fundamentally different approaches of legislators to the definition of the status and structure of police authorities. In connection with this, the Slovak Republic has specially created Financial Police Units, whereas in Ukraine they are absent.

The experience of Ukraine and the Slovak Republic shows that one of the criteria for assessing the police authorities activity is the level of public trust. However, determining the level of citizens' trust in police in Ukraine and the Slovak Republic has a number of shortcomings. Therefore, in order to eliminate them, it is proposed: 1) to create an independent sociological service responsible for monitoring public opinion about the police activity, in this regard, the experience of Northern Ireland and Great Britain is rather positive; 2) provide for a systematic determination of the level of public trust in the police; 3) oblige police authorities to take into account the results of a sociological survey and take them into account when planning their activity for the next period. Taking into account that the police agencies in Ukraine and the Slovak Republic are oriented mainly on the quantitative indicators of their activity; it is reasonable to affirm at the legislative level also such a criterion of their activity as a decrease in the level of latent crimes. In this case, determining the level of public trust in the police and the level of latent crimes will be closely related categories, as conducting a sociological survey will enable not only to determine the number of people who trust the police, but also of latent crimes.

To summarize, the significant improvement of the mechanism for determining the level of public trust in the police authorities in Ukraine and the Slovak Republic, as well as the prediction of such a criterion as reducing the level of latent crimes, will help to reorient the police activity from quantitative to qualitative indicators, to involve public in the police assessment and overall improve the performance of the latter in the sphere of countering and combating financial and economic crimes.

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A COMMENTARY ON THE PROHIBITION OF ALCOHOL ADVERTISING IN LITHUANIA IN RELATION TO MINORS[1]

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Abstract: The Republic of Lithuania enacted new alcohol legislation, which includes many alcohol beverages control measures. One of the most controversial was the ban of alcohol advertising in mass media, which provoked negative reactions of alcohol market and foreign media. This rule triggered whole-society discussion about the positive impact on society, especially minors. The author analyses the enacted Lithuanian regulation and different opinions, as well as the comparison with the broadcasting regulation of alcohol advertising in the Slovak Republic which has similar world position in international drinking ratings.

Keywords: the ban on alcohol advertising, Lithuania alcohol regulation, minor's protection, broadcasting of advertising, Slovak alcohol regulation

1 INTRODUCTION

The Republic of Lithuania is a Baltic country situated in Eastern Europe. One of the most serious social problems is undue consumption of alcohol beverages. The Lithuanian Government decided to solve the alcohol problem through strict regulations. The aim of the article is an analysis one of the most controversial measure, which is the general ban on any alcohol advertising. The special restrictions are targeted on minors. I would like to introduce Lithuanian Law, problems connected with new regulation and offer my subjective view based on results of scientific researches and my own experience in Lithuania.

2 NEW ANTI-ALCOHOL LAW IN LITHUANIA

As of1 January 2018, new Lithuanian Law came into effect, with the main intention to reduce drinking of alcohol. The regulation is mainly focused on underaged people and protection of public health.

2.1 Social background of new Law

Eastern Europe was found to be one of the regions with globally the highest burden of alcohol-attributable diseases and mortality and for some indicators, such as alcohol-attributable mortality,

[1] The article was processed within the project: UK/325/2018 „Ochrana maloletých prostriedkami verejnoprávnej regulácie elektronických médií " funded by Comenius University in Bratislava.

it was the region with the highest burden.[2] According to the reports of the World Health Organization (WHO)[3], Lithuania has in the long term the highest level of alcohol consumption, but also the highest rate of alcohol-related mortality within the European Union.[4]

Lithuania is not the only Eastern-Europe country with alcoholism troubles. The alcohol consumption has rapidly increased in other Eastern European countries, e.g. the Czech Republic, which was in 2017 on second place behind Lithuania in OECD alcohol-drinking ranking,[5] or Moldova, Belarus, Romania, etc.[6] In contrast, the alcohol consumption in Slovakia, which is long-term in similar alcohol consumption ranking, is developing a totally opposite trend, and in 2017 reached a minimum since 2003.[7]

In the past decade, Lithuania decided to "declare war" on alcoholism and alcohol-attributable diseases and enacted concept "best buys" and step by step implemented anti-alcohol measures, recommended by WHO.[8] The Concept of "best buy", created by WHO, is defined as an intervention for which there is compelling evidence that it is not only highly cost-effective but it is also feasible, low in cost, and appropriate to implement within the constraints of the local health system.[9]

2.2 New anti-alcohol legislation in Lithuania

In 2017, the major changes in alcohol policy were implemented in the Lithuanian legislation, which is in effect since 1 January 2018:[10]

– The legal age to purchase or consume alcohol was increased from 18 years to 20 years.

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2 GBD 2016 Risk Factors Collaborators.
Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5614451> (accessed on 5th November 2018).

3 Who global status report on alcohol and health 2017. Available at: <http://www.who.int/substance_abuse/publications/global_alcohol_report/gsr_2018/en> (accessed on 5th November 2018);
Who global status report on alcohol and health 2014. Available at: <http://apps.who.int/iris/bitstream/handle/10665/112736/9789240692763_eng.pdf?sequence=1> (accessed on 5th November 2018).
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4 GRIGORIEV, P. – JASILIONIS, D. – STUMBRYS, D. – STANKŪNIENĖ, V. – SHKOLNIKOV, V. M.: Individual- and area-level characteristics associated with alcohol-related mortality among adult Lithuanian males: A multilevel analysis based on census-linked data. Available at <https://doi.org/10.1371/journal.pone.0181622> (accessed on 5th November 2018).

5 OECD Data. KUČEROVÁ, T.: V Česku roste spotřeba alkoholu. Více než Češi pijí jen Litevci. Available at: <https://ekonomika.idnes.cz/alkohol-cesi-piji-alkohol-oecd-dku-/ekonomika.aspx?c=A180720_150136_ekonomika_kuce> (accessed on 5th November 2018).

6 Map In What country drinks the most alcohol? Available at: https://vinepair.com/articles/map-countries-drink-most-alcohol/ (accessed on 5th November 2018).

7 Štatistická ročenka Slovenskej republiky 2017. Available at: https://slovak.statistics.sk/wps/portal/!ut/p/z1/tVFNb8IwDP01HEPcJm3SYxmolLFpsHXQXKY0TUYG_QA6GP9-7bTDPgTSDvPBsq1n6z0_LPASi1Ie7LNsbFXKTdunwn-asZgPBk4IwLwhxJNkOIvuAwco4MV3AL-djyB-CO-i-YS2AA-Ly_uPWGChyqZuVjitsr1cof0a1a9ZD9q0sWuprO7B4ZTtZKnR15khuaKSOwh8qRA1WqKAZAxpMIZ6MjDG-N31Wtkcp47WkhupEYPMIJozBwWe8hFIxjhX-Ofgs-KnmN91ODZyJsPuG-IBcReGYsikAn0YexOE4mQczQiAkn4ALN9KWAzvL4drFi4PVR5yU1a5oHbr_o8Qx-4AkWNiv6R1X0oe-4nPnUdSgPXNLWneX2ZbsVYetLVTb6rcHLfzCmLpKCkxNam5sRoSJ9BwP9bk8!/dz/d5/L2dBISEvZ0FBIS9nQSEh/ (accessed on 5th November 2018).

8 ALLAMANI, A. – BECCARIA, F. – EINSTEIN, S.: A Commentary on the Limits of Alcoholic Beverage Policies. In: Alcohol and Alcoholism, Volume 52, 2017, Issue 6, pp. 706–714.

9 REHM. J. – ŠTELEMĖKAS, M. – BADARAS, R.: Research Protocol to Evaluate the Effects of Alcohol Policy Changes in Lithuania, Alcohol and Alcoholism. Available at: https://academic.oup.com/alcalc/advance-article/doi/10.1093/alcalc/agy068/5107667 (accessed on 5th November 2018).

10 See: Act No I-857/ 1995 Coll. Law on alcohol control as last amended on 26 April 2018.

– The restriction of alcohol availability in shops was introduced (10 a.m-8p.m. on Mon-Sat., 10 a.m.-3 p. m. on Sunday)
– Ban on alcohol advertising (including the full ban on TV, radio, internet, print media)

The Law also stipulates the procedure of enforcement of new anti-alcohol legal measures. The main responsibility for tackling violations will rest with the new-established special administrative body – the Department for Drugs, Tobacco and Alcohol Control (Department), which is competent to execute control on compliance with Law.[11]

The Lithuanian media reports about escalating controversy around the new alcohol law. It is important to note that the struggle against the anti-alcohol measures was very intense – it involved a massive media information campaign involving celebrities and health professionals, the promotion of industry-sponsored research and surveys in the public sphere, accusations of fake alcohol consumption statistics and the slander of Lithuania's name and reputation, attempts to refocus discussion towards personal responsibility and freedom, as well as treatment of persons with alcohol dependence (who should solely be the target of alcohol control measures).[12] The new alcohol-control policy measures are inconvenient for the alcohol industry, which tried to influence the Government and Parliament members. The society seemingly embraced those changes without much fuss, with some complaints in social media. In the beginning, there were more conflicts, mostly related to briefer alcohol retailing time, especially on weekends.[13]

In 2017, it was not the first time, when Lithuania try to change Law and restrict availability and advertisement of alcohol. In 2011, the Lithuanian government was not able to uphold alcohol advertising ban legislation, despite compelling scientific evidence and successful policy experience in the past due to pressure and lobbying by the alcohol industry.[14] Before adopting new alcohol legislation, researchers in Lithuania made some scientific works and others are planned for the evaluation.[15]

2.3 The alcohol-advertising ban in Lithuania

The most radical change in the legislation is the newly instituted alcohol advertising ban.

This is a special measure of the youth protection state policy, focused mainly on minor's protection and healthy growth.[16] Article 29 (1) Act No I-857/ 1995 Coll. Law on alcohol control as last

[11] Department for Drugs, Tobacco and Alcohol Control is independent control central administrative body under directly Lithuanian Government, which main competences in the alcohol control are: supervision of the activities of the entities, prevention, harm reduction, etc. See: Official Website of the Department for Drugs, Tobacco and Alcohol Control. Available at: http://ntakd.lrv.lt/lt/veiklos-sritys (accessed on 5th November 2018).

[12] *GOSTAUTAITE MIDTTUN, N.: Alcohol advertising ban crowns comprehensive control measures adopted in Lithuania.* Available at: http://www.ias.org.uk/Blog/Alcohol-advertising-ban-crowns-comprehensive-control-measures-adopted-in-Lithuania.aspx (accessed on 5th November 2018).

[13] *GOSTAUTAITE MIDTTUN, N*: Commentary: Life after big alcohol policy changes in Lithuania. Available at: http://eucam.info/2018/09/19/commentary-life-after-big-alcohol-policy-changes-in-lithuania/ (accessed on 5th November 2018).

[14] PAUKŠTĖ, E. – LIUTKUTĖ, V. – ŠTELEMĖKAS, M. – GOŠTAUTAITĖ MIDTTUN, N. – VERYGA, A.: Overturn of the proposed alcohol advertising ban in Lithuania. Available at: https://publications.lsmuni.lt/object/elaba:5653940/index.html (accessed on 5th November 2018).

[15] REHM, J. – ŠTELEMĖKAS, M. – BADARAS, R.: Research Protocol to Evaluate the Effects of Alcohol Policy Changes in Lithuania, Alcohol and Alcoholism. [online]. Available at: <https://doi.org/10.1093/alcalc/agy068> (accessed on 5th November 2018).

[16] Lithuania. Available at: <http://eucam.info/regulations-on-alcohol-marketing/lithuania/> (accessed on 5th November 2018).

amended enacted the general ban on Alcohol advertising in the Republic of Lithuania, which prohibited every kind of alcohol advertising – on television, radio, internet, print media.

The Law lists exemptions that would not be considered advertising: brand names and logos at alcohol sales points, on equipment and supplies, company cars, etc., information for specialists, some packaging characteristics, as well as the accidental presentation of images during sports games and other events.[17]

The main intention of the alcohol advertising ban is to prevent alcohol attraction which could be caused by advertising. Department will be able to issue a mandatory decree for an immediate removal of any advertising material, by way of a court order.[18]

The new restrictions have brought new issues for magazines and newspapers. The owners and distributors of foreign magazines were confronted with the curious problem. The printers are forced to either tear out advertisements from foreign magazines or cover them up using stickers. In the practice, they cover up liquor advertisement on foreign magazines. If they fail to comply with new legislation, they can be fined by the Department.

On the other hand, Lithuania is not the only one country which enacted alcohol advertising ban. The EUCAM[19] expert network confirms that countries with very restrictive alcohol advertising policies (like France, Norway, Iceland, and Sweden) do not experience problems with alcohol advertising in foreign journals.[20] But some countries like Norway and Iceland, enacted an exception within the Law for foreign publications in foreign languages, unless the main purpose of these magazines is alcohol advertising.[21]

2.4 Alcohol, alcohol advertising and Minors Protection

The main aim of amendments in Lithuanian alcohol control was protecting public health, especially young people.[22] The alcohol consumption has a negative influence on health of underage people and thus on the development of future generations. Undoubtedly, the protection of young people shall be the primary interest of every country with undue consume of alcohol beverages.

Research data demonstrate the potential risk of alcohol consumption to the health of the young generation, connected with high mortality.[23]

17 Article 29 Act No I-857/ 1995 Coll. Law on alcohol control as amended.

18 GOSTAUTAITE MIDTTUN, N.: Alcohol advertising ban crowns comprehensive control measures adopted in Lithuania. Available at: <http://www.ias.org.uk/Blog/Alcohol-advertising-ban-crowns-comprehensive-control-measures-adopted-in-Lithuania.aspx> (accessed on 5th November 2018).

19 European center for monitoring alcohol market.

20 Organized panic in Lithuania after introduction of their new alcohol policy. Available at: <https://eucam.info/2018/01/23/organized-panic-in-lithuania-after-introduction-of-their-new-alcohol-policy/> (accessed on 5th November 2018).

21 Ibid.

22 Statement of the Ministry of Health of the Republic of Lithuania, Dr. Audrone Astrauskiene. Available at: <https://ec.europa.eu/health/sites/health/files/alcohol/docs/ev_20171107_co11b_en.pdf> (accessed on 5th November 2018).

23 See e.g.: FOLTRAN, F. – GREGORI, D. – FRANCHIN, L. – VERDUCI, E. – GIOVANNINI, M.: Effect of alcohol consumption in prenatal life, childhood, and adolescence on child development. In: Nutr. Rev., 2011, 69, pp. 642–659. Available at: <https://doi.org/10.1111/j.1753-4887.2011.00417.x> (accessed on 5th November 2018).

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Generally, alcohol advertising shows evidently greater appeal to adolescents, especially teenagers than adults. Younger people are more naive, easy to manipulate and accessible. Older viewers are more critical to advertising, their ranking is based on more criteria, and more complex.[24]

The special researchers' works indicate that exposure to alcohol advertising is associated with increased positive beliefs about alcohol, intentions to drink, a likelihood of underage drinking, and increased consumption by young people.[25]

Increasing identification with advertising produces changes in consumers' attitudes and behaviours.[26]Alcohol advertisements with greater youth appeal appear to have stronger influence on young peoples' drinking. [27]

3 THE REGULATION OF ALCOHOL ADVERTISING IN SLOVAKIA

The Slovak Republic has many similarities to Lithuania. Both post-soviet countries are situated in Eastern Europe which is in long-term the region with the highest burden of alcohol-attributable diseases,[28] as already mentioned.

In contrast to Lithuania, alcohol drinking in Slovakia has slowly declined. Since 2015, alcohol consumption in Slovakia decreased and in 2017 reached a minimum value,[29] unlike Lithuania and other countries.

In this place, I think, it is right to focus on the current Slovak regulation of alcohol advertising, because it is similar to previous Lithuanian legislation, which was enacted in 2007-2008 (ban on alcohol advertising during daytime in TV and radio).[30]

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24 MESÁROŠOVÁ, B.: Výsledky výskumu. Available at: http://www.rvr.sk/_cms/data/download/mesarosova.pdf> (accessed on 5th November 2018).

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26 KRUGMAN, H: The impact of television advertising: Learning without involvement. In: Public Opin Q. 1965, 29, 3, pp. 349–56. Available at: https://academic.oup.com/poq/article/29/3/349/1827420 (accessed on 5th November 2018).; SPIELMANNA, N. – RICHARD, M.: How captive is your audience? Defining overall advertising involvement. In: J Bus Res., 2013, 66, 4, pp. 499. Available at: https://www.sciencedirect.com/science/article/pii/S0148296311004097?via%3Dihub (accessed on 5th November 2018).

27 AIKEN, A. – LAM, T. – GILMORE, W. – BURNS, L. – CHIKRITZHS, T. – LENTON, S. – LLOYD, B. – LUBMAN, D. – OGEIL, R. – ALLSOP, S.: Youth perceptions of alcohol advertising: are current advertising regulations working? In: Australian and New Zealand Journal of Public Health, 2018, 42, pp. 234-239. Available at: https://onlinelibrary.wiley.com/action/showCitFormats?doi=10.1111%2F1753-6405.12792 (accessed on 5th November 2018).

28 REHM, J. – ŠTELEMĖKAS, M. – BADARAS, R.: Research protocol to evaluate the effects of alcohol policy changes in lithuania, alcohol and alcoholism. Available at: https://doi.org/10.1093/alcalc/agy068 (accessed on 5th November 2018).

29 Štatistická ročenka Slovenskej republiky 2017. Available at: https://slovak.statistics.sk/wps/portal/!ut/p/z1/tVFNb8IwDP01HEPcJm3SYxmolLFpsHXQXKY0TUYG_QA6GP9-7bTDPgTSDvPBsq1n6z0_LPASi1Ie7LNsbFXKTdunwn-asZgPBk4IwLwhxJNkOIvuAwco4MV3AL-djyB-CO-i-YS2AA-Ly_uPWGChyqZuVjitsr1cof0a1a9ZD9q0sWuprO7B4ZTtZKnR15khuaKSOwh8qRA1WqKAZAxpMIZ6MjDG-N31Wtkcp47WkhupEYPMIJozBwWe8hFIxjhX-Ofgs-KnmN91ODZyJsPuG-IBcReGYsikAn0YexOE4mQczQiAkn4ALN9KWAzvL4drFi4PVR5yU1a5oHbr_o8Qx-4AkWNiv6R1X0oe-4nPnUdSgPXNLWneX2ZbsVYetLVTb6rcHLfzCmLpKCkxNam5sRoSJ9BwP9bk8!/dz/d5/L2dBISEvZ0FBIS9nQSEh/ (accessed on 5th November 2018).

30 REHM, J. – ŠTELEMĖKAS, M. – BADARAS, R.: Research protocol to evaluate the effects of alcohol policy changes in lithuania, alcohol and alcoholism. Available at: https://doi.org/10.1093/alcalc/agy068 (accessed on 5th November 2018).

In contrast with Lithuanian Law, the alcohol advertising in print media is not regulated in Slovakia just like advertising on the internet. Broadcasting alcohol advertising is in Slovak Law restricted by Act No. 308/2000 Coll. on Broadcasting and Retransmission and on the amendment of Act No. 195/2000 Coll. on Telecommunications as amended (ABR) which regulates television and radio broadcasting and retransmission in the Slovak Republic.

The Slovak ABR restricts broadcasting of alcohol advertisement by time limits. The regulation by time limits is identical with minor protection time limits. The regulation takes to account the negative alcohol influence on human health, especially on young's growth and health. Television advertising and teleshopping for alcoholic beverages, excluding beer and wine, shall be prohibited from 06.00 a.m. to 10.00 p. m.[31] The Law divides regulation of "hard alcohol" and alcohol drinks with a lower content of alcohol. Television advertising and teleshopping for wine shall be prohibited from 06.00 a.m. to 8.00 p. m. The beer advertising as the exception of alcohol regulation shall be broadcasted without any restrictions.

The general provisions of Sec 31a (9) ABR states that advertising for alcoholic beverages must not be aimed at minors and must not encourage immoderate consumption of alcoholic beverages.

The permissible advertising and teleshopping for alcoholic beverages is subject to other restrictions. Broadcasting advertising shall not a) depict minors consuming these beverages, b) link consumption of alcoholic beverages to enhanced physical performance or to driving a motor vehicle, c) claim that alcoholic beverages have therapeutic qualities, or are a stimulant or sedative, or help in resolving personal problems, d) create the impression that consumption of alcohol contributes towards social and sexual success, e) encourage immoderate consumption of alcohol or depict abstinence or sobriety as a deficiency, f) emphasize a beverage's alcohol content as a mark of its quality.

The ban of minors acting in alcohol advertising corresponds with general prohibitions on the sale and delivery of alcoholic beverages to minors or otherwise allowing them to be used by persons under the age of 18.[32] The purpose of other restrictions is the ban of advertising positive alcohol effects, which could result in increased consumption.[33] The Council for broadcasting and retransmission (Council) as the regulation body, imposes sanctions on broadcasters. In recent years, decision-making activity of Council has not shown any serious problem with breaking alcohol-advertising regulation and imposed only a few punishments.[34]

It might be claimed that Slovak regulation of alcohol advertisement is effective and accepted by broadcasters and fulfils its main intention. The youths (especially children) should not be exposed by advertising, promoting "hard alcohol," during daily broadcasting. On the other side, alcohol marketers can promote their goods at night.

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31 § 33 ods. 1 ABR.

32 § 2 (1) (a) Act No. 219/1996 Coll. on protection against the abuse of alcoholic beverages and on the establishment and operation of alcoholic containment rooms as amended.

33 KUKLIŠ, Ľ. – TARABČÁK, I.: Act on Broadcasting and Retransmission. Commentary. Bratislava: Wolters Kluwer, 2016, s. 460.

34 E.g. in 2017, the council did not punish any subject for breaking § 33 (1), in 2016 only one subject and in 2015 only two subjects. See: Reports on the state of broadcasting and the activities of the Council for Broadcasting and Retransmission for years 2015_2017. Available at: http://www.rvr.sk/sk/spravy/index.php?kategorieId=205&rozbalitClanky=205#clanky_205 (accessed on 5th November 2018).

4 IS THE RADICAL BAN THE BEST WAY HOW TO RESTRICT ALCOHOL CONSUMPTION?

As mentioned, the Lithuanian Government decided for strict alcohol control regulation as a treatment of high consumption of alcoholic beverages. Many doubts and questions were raised by this measures.

Firstly, I am not sure whether "strict" legal restrictions are enough to change the minds of young people and make them avoid drinking of alcohol. The international studies indicate that general measures such as a ban on alcohol advertising have their limitation, and other social elements like family, school, and community, should be taken into account.[35] In my point of view, the young people, especially teenagers, are the most sensitive and open to trying and regularly use alcoholic drinks.

The youth is affected by the community of other underaged. In my opinion, if a minor enters the community of others, who consume alcoholic beverages, he will try it as a member of this group. On the other hand, parental control and family communication proved to play a protective role in the prevention of alcohol abuse.[36] The results of the Lithuanian study, published in 2017, demonstrate that family environment and parenting practices are critical components to be incorporated into prevention programmes on the prevention of alcohol use among the youth.

Another problem is the question of "ban effectivity." Lithuania is a member state of the European Union, where there is the free movement of persons, services, and goods. Young Lithuanians could cross Lithuanian borders without any problems and find alcohol advertised in media as well as buy alcoholic beverages. The second question of "ban effectivity" is the problem of the internet as an international network. It is hard to say, how the Department can possibly control ban of alcohol on an international website.

It is also possible to find many negative opinions, e.g. as follows: The idea of prohibition is a classic example of tail-chasing. It is a short-sighted idea which can only get rid of the symptoms, facilitate 'out of sight, out of mind', but can never truly manage to cure the disease.[37]

5 CONCLUSION

The way of alcohol regulation and measures for reducing consumption and alcohol drinking varies among countries and cultures. The Lithuanian Government decided to enacted strict prohibitions, like the general ban on alcohol advertising which was connected with negative reactions of the alcohol industry and media. The main intention of new prohibition is to protect public health, especially underaged people. Other countries, like Slovakia, restrict radio and television advertising by time limits and limits of a broadcasting content. Slovakian law regulates daily broadcasting

35 SCHOR, E. L.: Family pediatrics: Report of the Task Force on the Family. In: Pediatrics, 2003, 111, pp. 1541–1571. Available at: http://pediatrics.aappublications.org/content/111/Supplement_2/1541.long (accessed on 5th November 2018).

36 TODD, J. – SMITH, R. – LEVIN, K. – INCHLEY, J. – CURRIE, D. – CURRIE, C.: Family Structure and Relationships and Health among Schoolchildren. HBSC Briefing Paper 12. Available at: <https://research-repository.st-andrews.ac.uk/handle/10023/2052> (accessed on 5th November 2018).

37 SAAHIL, P.: Why alcohol bans don't work. Available at: https://www.business-standard.com/article/punditry/why-alcohol-ban-in-bihar-is-likely-to-fail-115122900192_1.html (accessed on 5th November 2018).

of alcohol beverages with the intention to protect underaged people but to allow alcohol market to use night broadcasting.

I think that ban-regulation is not an effective way of regulation. The effectiveness of the law depends on acceptance and respect of people. Alcohol legislation, like any other legislation needs to be accepted by the public. Otherwise, the main intention of regulation shall not have the desired effect and people (especially youth) will find new ways how to evade Law and still use alcoholic beverages. In other words: Forbidden fruit tastes the sweetest.

In my point of view, law changes must correlate with socio-economic and democratic factors. The problems with high-consumption of alcohol can be solved only by changes in public attitudes, especially among the new generation, in political, media, social climate and in lifestyle choices.

The researchers do not have the same opinions on the problem. Using cross-country panel data from 13 European countries – including states of Central Europe – to investigate the effect of alcoholic beverage advertising ban and other control policies on alcohol demand during 1975 – 2000, a study has indicated that advertising bans do not reduce consumption, which casts doubt on the existence of a market-wide advertising-sales response function.[38]

On the other hand, the new Lithuanian legislation is in force only a few months, so it is too early to evaluate the positive or negative influence on the high alcohol-attributable diseases, mortality and alcohol consumption, especially consumption by minors. The results will be shown in future years.

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[38] NELSON, J. P.: Alcohol advertising bans, consumption, and control policies in seventeen OECD countries, 1975–2000. In: Applied Economics, 2010, 42, 7, pp. 803-823. Available at: https://www.tandfonline.com/doi/citedby/10.1080/00036840701720952?scroll=top & needAccess=true (accessed on 5th November 2018).

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PERSPECTIVES OF USE OF A TRUST FUND AS A FORM OF INVESTMENT UNDER LEGAL AND ECONOMIC CONDITIONS OF THE FINANCIAL MARKET IN THE SLOVAK REPUBLIC[1]

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Abstract: An institute of a trust fund is not *de lege lata* in the legal conditions of the Slovak Republic regulated by law. This article focuses on the analysis of perspectives of use of the trust fund as a potential form of investment under specific legal and economic conditions of the financial market in the Slovak Republic in a context of prospected recodification of the Civil Code. The analysis is based on the comparative study of transformation of the traditional *common law* legal system institute of the trust fund into the legal order of the Czech Republic with particular focus on its use as a form of investment. The author identifies potentially problematic legal aspects of enactment of the pertinent institute to the legal order of the Slovak Republic and presents his views on potential of the trust fund to be used as a collective investment scheme.

Key words: trust fund, investment, investment trust fund, collective investment, alternative investment fund, investment company with variable capital

1 INTRODUCTION

A trust or a trust fund can be defined as property held and managed for benefit of the third parties.[2] The trust is generally perceived as a traditional institute of *common law* legal systems and it stands for a special form of management of the third parties property.[3] One of the key characteristics of the institute of trust is its general usage for different purposes.[4] The trust can be constituted in any form and for any purpose that is not contrary to law or the public order. One of these purposes can also be investment, i.e. use of the trust as a form of investment in the financial market.

The main purpose of this paper is not to cover all issues that are possibly connected with the institute of the trust fund but to present a perspective of its use as an investment tool in the conditions of the financial market of the Slovak Republic (in case such legal concept is transposed into the legal system of the Slovak Republic). The idea of introduction of the trust fund into the legal order of the Slovak Republic is not revolutionary since there existed some ideas that such institute should have been introduced into the legal system of the Slovak Republic. The process of intended

1 The paper was elaborated with the financial support and as an output in the framework of the project No. UK/354/2018 entitled "*Perspectives and legal risks of use of a trust fund as a form of investment under conditions of the financial market in the Slovak Republic*" realized at the Comenius University in Bratislava in 2018.

2 POPOVICI, A.: Trust québeckého a českého práva: autonomní vlastníctví? In: TICHÝ, L. (ed.): Svěrenský fond a trust – jejich fungování v mezinárodním srovnání. 1st edition. Prague: Centrum právní komparatistiky Právnické fakulty Univerzity Karlovy v Praze, 2016, p. 27.

3 JOSKOVÁ, L. – PĚSNA, L.: Správa cizího majetku. 1st edition. Prague: Wolters Kluwer, 2017, p. 109.

4 SVEJKOVSKÝ, J. – MAREK, R. et al.: Správa cizího majetku v novém občanském zákoníku. Komentář. 1st edition. Prague: C. H. Beck, 2015, p. 269.

recodification of the Slovak civil law and enactment of a brand new Civil Code has made actual the question whether the institute of the trust fund (in any form) should be introduced into the Slovak legal system based on principles of continental law.

In order to present a brief and comprehensive analysis of the topic we have decided to include into this paper a separate chapter dealing with the basic principles of the trust fund together with a succinct comparative analysis of reception of the institute of trust in several continental law legal systems. We are particularly focusing on the concept of the trust fund as it is regulated in the Czech Republic since we are assuming that due to similar legal foundations of the legal order of the Czech Republic and the Slovak Republic and former experience from recodification of criminal law or labour law, if the trust fund is introduced in the process of recodification of the Civil Code in the Slovak Republic there exists a high probability that the Slovak concept of the trust fund will be at least in principle similar to the Czech concept of the trust fund.

In the other part of this paper we are discussing the regulatory aspects of use of the trust fund as a form of investment in the legal conditions of the Czech Republic and the Slovak Republic since there will be a need to cope with legal consequences of possibility of use of the trust fund for investing purposes if such institute will be introduced into the legal system of the Slovak Republic.

Based on the abovementioned we have stipulated the following thesis that we will be addressing in this paper: "*If an institute of trust fund is introduced into the legal order of the Slovak Republic, it will not be very much used as a form of investment under legal and economic conditions of the financial market of the Slovak Republic.*"

2 BASIC CONCEPT OF A TRUST FUND

Generally speaking, there can be distinguished **three separate legal subjects** that are bearing rights and duties in a trust structure:

1. **Settlor** or **Trustor** (i.e. a person that creates the trust fund and vests his property into the trust structure)
2. **Trustee** (i.e. a person that is fully authorized and responsible for management and disposition with the property vested into the trust fund despite not being a rightful owner of the property)[5]
3. **Beneficiary** (i.e. a person that is entitled:
   a. to enjoy revenues of the property in the trust fund or
   b. to capital (property) in the trust in case the trust fund ceases to exist)[6]

The trust fund itself is not a subject of law, it does not hold a legal personality and it is an object of law.[7] In this sense the trust fund is a legal concept *sui generis*. However, some authors are claiming that the construction of the trust fund is at least nearing to be considered as if the trust fund pos-

[5] For better understanding of duties of a trustee see e.g.: SMITH, L.: Povinnosti správce – srovnávací analýza. In: TICHÝ, L. (ed.): Svěrenský fond a trust – jejich fungování v mezinárodním srovnání. 1st edition. Prague: Centrum právní komparatistiky Právnické fakulty Univerzity Karlovy v Praze, 2016, pp. 81-100; or JOSKOVÁ, L.: Postavení správce. Způsobilost, úprava ustanovení správce, způsobilost k funkci správce, ustanovení správce a správcova povinnost péče. In: TICHÝ, L. (ed.): Svěrenský fond a trust – jejich fungování v mezinárodním srovnání. 1st edition. Prague: Centrum právní komparatistiky Právnické fakulty Univerzity Karlovy v Praze, 2016, pp. 140-155.

[6] SVEJKOVSKÝ, J. – MAREK, R. et al.: Správa cizího majetku v novém občanském zákoníku. Komentář. 1st edition. Prague: C. H. Beck, 2015, pp. 340-349.

[7] ZVÁNOVEC, V.: Založení svěřenského fondu se zvláštním důrazem na oddělení majetku. In: TICHÝ, L. – RONOVS-

sesses a legal personality.[8] On the other hand the German or Luxembourg perception of the trust structure is more contractual, i.e. the trust fund is considered a contract between the contracting parties (a fiduciary agreement between settlor and trustee).[9]

Regardless the abovementioned, the basic legal concept of the trust fund can be characterized by the following features:

1. property vested into the trust fund is considered as **separate and independent ownership**. Nobody is an owner of such property but it cannot be considered as *res nullius* in the legal sense. The property vested into the trust fund by a settlor can be therefore considered as unique legal concept.
2. property is vested into the trust fund for **a specific purpose** (the purpose can be in public or private interest)
3. property in the trust fund is managed by **a trustee** (a trustee can be a professional asset manager or a non-professional person)
4. **wide autonomy of will of a settlor** (a settlor can set any organizational and functional features of the trust funds when respecting cogent limits stipulated by applicable laws)[10]

In the following subchapters of this paper we present forms of reception of the concept of the trust fund in the countries based on the continental legal system – Lichtenstein, Germany, Luxembourg and the Czech Republic, as well as definition of the trust fund as it is envisaged in the Hague Convention on the Law Applicable to Trusts and on their Recognition concluded on 1st of July 1985 (hereinafter also referred as the "**Hague Convention**").

2.1 Reception of the institute of trust by selected jurisdictions

In Lichtenstein there exists a concept of *Treuhand* and *Treuunternehmen* (a trust enterprise) representing fiduciary concepts fully inspired by *common law* trust.[11] *Treuunternehnem* is a special entity holding no legal personality. Both of these institutes were introduced into the Civil Code of Lichtenstein in 1926 and 1928 in order to make legal environment of Lichtenstein more attractive to foreign investors coming from *common law* countries that are familiar with the concept of trust.[12]

The German legal system does not recognize institute of the trust fund. However, there exist a fiduciary concept of *Treuhand* formulated only by the relevant case law.[13] A trustee as a legal owner

KÁ, K. – KOCÍ, M. (eds.): Trust a srovnatelné instituty v Evropě. 1st edition. Prague: Centrum právní komparatistiky Právnické fakulty Univerzity Karlovy v Praze, 2014, p. 128.

8 SCHMIDT, K.: Trust jako legislativní výzva: dvoustranný vztah nebo kvazikorporátní status? In: TICHÝ, L. (ed.): Svěrenský fond a trust – jejich fungování v mezinárodním srovnání. 1st edition. Prague: Centrum právní komparatistiky Právnické fakulty Univerzity Karlovy v Praze, 2016, p. 12.

9 KULMS, R.: Německo mezi trustem a treuhandem. In: TICHÝ, L. – RONOVSKÁ, K. – KOCÍ, M. (eds.): Trust a srovnatelné instituty v Evropě. 1st edition. Prague: Centrum právní komparatistiky Právnické fakulty Univerzity Karlovy v Praze, 2014, p. 9.

10 JOSKOVÁ, L. – PĚSNA, L.: Správa cizího majetku. 1st edition. Prague: Wolters Kluwer, 2017, p. 110.

11 SCHURR, F. A.: Lichtenštejnské Treuhänderschaft jako příklad fungujícího režimu trustu v oblasti občanského práva. In: TICHÝ, L. – RONOVSKÁ, K. – KOCÍ, M. (eds.): Trust a srovnatelné instituty v Evropě. 1st edition. Prague: Centrum právní komparatistiky Právnické fakulty Univerzity Karlovy v Praze, 2014, p. 177.

12 SVEJKOVSKÝ, J. – MAREK, R. et al.: Správa cizího majetku v novém občanském zákoníku. Komentář. 1st edition. Prague: C. H. Beck, 2015, p. 366-367.

13 KOCÍ, M. – TICHÝ L.: Trust – srovnávací studie. In: TICHÝ, L. – RONOVSKÁ, K. – KOCÍ, M. (eds.): Trust a srovnatelné instituty v Evropě. 1st edition. Prague: Centrum právní komparatistiky Právnické fakulty Univerzity Karlovy v Praze, 2014, p. 213.

of property vested into *Treuhand* is entitled to full disposition with the property.[14] The legal concept of *Treuhand* is used particularly in an area of laws of succession since it allows settlor to avoid strict rules stipulated for the mandatory share of the legal heir.[15]

The concept of trust in Luxembourg is also contractual, i.e. functioning of the Luxembourg type of trust is based on a fiduciary agreement.[16] A trustee becomes a legal owner of property vested into the trust structure by a settlor.[17] The pertinent fiduciary trust structure is in accordance with the standards stipulated in the Hague Convention and hence it is fully recognizable in all of countries that have ratified the Hague Convention.

The concept of the trust fund in the Czech Republic was introduced in its the legal order with effectiveness from 1st of January 2014 as a newly established institute in the process of recodification of the Civil Code.[18] As we have also mentioned in the beginning of this paper, we claim that if any concept of the trust fund is introduced into the legal system of the Slovak Republic, the trust fund as it is enshrined in the Czech Civil Code will probably be the most relevant inspiration for Slovak legislators and hence the concept of the trust fund in the Czech Republic and in the Slovak Republic will be probably very similar. The trust fund is systematically enshrined in the part of the Civil Code dealing with absolute property rights. The Czech concept of the trust fund is inspired by the Quebec (Canada) type of trust fund and it can be characterized as a brave attempt of transformation of the institute of *common law* trust into continental legal system.[19] The Czech Civil Code presents the following legal definition of the trust fund: "*Trust fund is created spin-off of property owned by the founder, so that administrators rely on the property for a particular purpose or acquisition contract for death and a trustee of the property shall undertake to hold and manage*".[20] The property vested into the trust fund is considered as separate and independent ownership. The property in the trust fund is neither the property of a trustee or the property of the settlor or the property of the beneficiary but it cannot be considered as *res nullius*.[21] Moreover, the Czech concept of the trust fund has also secured an absolute anonymity to settlors since until the end of 2017, there existed no obligation for any registration of settlement of a trust fund with any public register. However, this legal situation changed following adoption of the European Union's Fourth Anti-Money Laundering Directive that came into force on 26th of June 2017 (hereinafter referred to as "**AML IV Directive**").[22] Article 31 of the AML IV Directive requires from the European Union member states to adopt legislation increas-

14 SVEJKOVSKÝ, J. – MAREK, R. et al. : Správa cizího majetku v novém občanském zákoníku. Komentář. 1st edition. Prague: C. H. Beck, 2015, p. 370.

15 KOCÍ, M. – TICHÝ, L.: Trust – srovnávací studie. In: TICHÝ, L. – RONOVSKÁ, K. – KOCÍ, M. (eds.): Trust a srovnatelné instituty v Europě. 1st edition. Prague: Centrum právní komparatistiky Právnické fakulty Univerzity Karlovy v Praze, 2014, p. 214.

16 MALBERTI, C.: Fiduciární smlouvy v lucemburském právu. In: TICHÝ, L. – RONOVSKÁ, K. – KOCÍ, M. (eds.): Trust a srovnatelné instituty v Europě. 1st edition. Prague: Centrum právní komparatistiky Právnické fakulty Univerzity Karlovy v Praze, 2014, p. 109.

17 KOCÍ, M. – TICHÝ, L.: Trust – srovnávací studie. In: TICHÝ, L. – RONOVSKÁ, K. – KOCÍ, M. (eds.): Trust a srovnatelné instituty v Europě. 1st edition. Prague: Centrum právní komparatistiky Právnické fakulty Univerzity Karlovy v Praze, 2014, p. 212.

18 Act No. 89/2012 Coll. Civil Code (New), as amended, adopted on 3. 2. 2012, came into force on 1. 1. 2014.

19 POPOVICI, A.: Trust québeckého a českého práva: autonomní vlastnictví? In: TICHÝ, L. (ed.): Svěrenský fond a trust – jejich fungování v mezinárodním srovnání. 1st edition. Prague: Centrum právní komparatistiky Právnické fakulty Univerzity Karlovy v Praze, 2016, p. 26.

20 Section 1448 paragraph 1 of the Act No. 89/2012 Coll. Civil Code, as amended (the Czech Republic).

21 See: Section 1448 paragraph 2 and 3 of the Act No. 89/2012 Coll. Civil Code, as amended (the Czech Republic).

22 Directive 2015/849/EU of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012

ing transparency of the trust funds in a form of their mandatory registration with a public register of trust funds. The Czech Republic has reacted to trust funds registration obligation stipulated in the AML IV Directive by amending the relevant legislation of trust funds in the Civil Code resulting in constitution of a public register of trust funds. The registration requirement of a trust fund or a foreign trust fund (including its settlor, beneficiary and ultimate beneficiary and trustee) is in force since 1st of January 2018.[23] Register of trust funds is partially public.[24] The Czech Republic has even decided to go above the AML IV Directive's requirement for registration of trust funds and it has adopted a statutory rule that registration of a trust fund with the register of trust funds is connected with constituting effect (i.e. a trust fund is created at the moment of its registration with the register).[25]

2.2 Hague Convention on the Law Applicable to Trusts and on their Recognition

The Hague Convention was signed on 1st July 1985 and it was ratified by 14 countries[26] since 1st January of 1992. The main aim of the Hague Convention is to introduce internationally accepted definition of a trust and secure its international recognition in countries that ratified the Hague Convention.[27] For purposes of this paper we have decided to present a legal definition of a trust for the purposes of the Hague Convention. According to Article 2 of the Hague Convention a term "*trust*" "*refers to the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose*." The Hague Convention also explicitly stipulates the key characteristics of a trust as follows:

1. the assets constitute **a separate fund** and are not a part of the trustee's own estate;
2. **title to the trust assets stands in the name of the trustee** or in the name of another person on behalf of the trustee;
3. **the trustee has the power and the duty**, in respect of which he is accountable, **to manage, employ or dispose of the assets** in accordance with the terms of the trust and the special duties imposed upon him by law.

Even though the Hague Convention is not generally accepted (due to lack of ratification) a definition of a trust (including its characteristics) enshrined in Article 2 of the Hague Convention undoubtedly serves as a model definition accepted in legal theory and practise also in countries that have not ratified the Hague Convention yet (e.g. the Czech Republic).

Dutta claims that a possible explanation of unwillingness of traditionally continental legal systems countries as Austria, Belgium, France, Germany or Spain etc. to ratify the Hague Convention probably rests in many technical imperfections, ambiguity and redundancy that are included in the

of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (the AML IV Directive).

23 Trust funds that were settled before 1st of January 2018 were obliged to comply with the registration requirement till 31st of July 2018. Further see: VONDRÁČEK, O.: Skuteční majitelé a vlastnické struktury právnických osob a svěřenských fondů. 1st edition. Prague: C. H. Beck, 2018, p. 119.

24 PIHERA, V.: Krocení trustů. Svěřenské fondy v hledáčku první novely občanského zákoníku. In: Obchodněprávní revue, Vol. 8, 2016, No. 5, p. 131.

25 Section 1452 paragraph 2 of the Act No. 89/2012 Coll. Civil Code, as amended (the Czech Republic).

26 Australia, Canada, Cyprus, Hongkong, Italy, Lichtenstein, Luxembourg, Malta, Monaco, the Netherlands, Panama, San Marino, Switzerland, United Kingdom.

27 SVEJKOVSKÝ, J. – MAREK, R. et al.: Správa cizího majetku v novém občanském zákoníku. Komentář. 1st edition. Prague: C. H. Beck, 2015, p. 376.

Hague Convention.[28] Other possible explanation of hesitation of the European Union member states with ratification of the Hague Convention is that the European Union member states are currently waiting for the European Union to take a common approach towards regulation of trust fund structures in a form of adoption of a Directive or other legislative act with European Union relevance.

3 TRUST FUND AS A FORM OF INVESTMENT

If we analyse an institute of trust fund as a form of investment, we are inevitably dealing with collective investment structures and their regulation. **In this sense an investment trust fund is a specific collective investment structure which uses a trust fund as a vehicle for investing.**

Legal regulation of collective investment is harmonized by the European Union law, namely by the **UCITS Directive** – Undertaking for Collective Investments in Transferable Securities Directive (hereinafter as the "**UCITS Directive**")[29] and the **AIFM Directive** – Alternative Investment Fund Managers Directive (hereinafter as the "**AIFM Directive**").[30] The UCITS Directive regulates investment companies gathering assets from public. In case of trust funds settled for purpose of investing, the regulation stipulated in the AIFM Directive regulating all other investment companies and schemes that are not covered by the UCITS Directive is applicable and relevant.[31] Since both aforementioned legislative acts are Directives, the European Union member states were obliged to implement their content into their national legal systems.

In this chapter of the paper we analyse the applicable legislation of investment trust funds in the Czech Republic and also potential legal regulation of the investment trust fund in the Slovak Republic if an institute of trust fund is adopted.

3.1 Regulation of the investment trust fund in the Czech Republic

Trust fund can be used for investment purposes under the applicable laws of the Czech Republic. According to section 148 of Act. No. 240/2013 Coll. on Management Companies and Investment Funds, a trust fund can be an investment fund constituted by an agreement.

A trust fund will always be a professional investor fund,[32] i.e. alternative investment fund. The professional investor fund can be created apart from the form of a trust fund also in a legal form of joint stock company, *societas europaea*, limited liability company, limited partnership, cooperative or mutual fund. Based on the abovementioned it can be concluded that relevant laws regulat-

28 DUTTA, A.: Haagska úmluva o trustu z roku 1985 – klady a zápory. In: TICHÝ, L. (ed.): Svěrenský fond a trust – jejich fungování v mezinárodním srovnání. 1st edition. Prague: Centrum právní komparatistiky Právnické fakulty Univerzity Karlovy v Praze, 2016, p. 224.

29 Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as amended.

30 Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (AIFM).

31 PIHERA, V.: Investiční fond. Vyměřování teritoria. In: Obchodněprávní revue, Vol. 9, 2017, No. 9, p. 241.

32 This fact is explicitly expressed in section 101 paragraph 1 of Act. No. 240/2013 Coll. on Management Companies and Investment Funds. Also see: HOBZA, M. – SEJKORA, T.: Svěřenské fondy jako fondy investiční – Díl II. In: Daně a finance, No. 1, 2015, p. 20.

ing collective investment in the Czech Republic offer several organizational forms of professional investor funds.

The investment trust fund is functionally very similar to classic mutual fund.[33] The investment trust fund must be registered with a register of investment funds kept by the Czech National Bank (Česká národní banka) as an authority that is responsible for regulation and oversight of subjects operating in the financial market in area of collective investment.[34]

3.2 Perspectives of regulation of the investment trust fund in the Slovak Republic

In case an institute of trust fund is adopted in the Slovak Republic we claim that the legal regulation of the investment trust fund will be very similar to the existing regulation in the legal conditions of the Czech Republic. The area of collective investment is under legal conditions of the Slovak Republic regulated by Act No. 203/2011 Coll. on Collective Investment, as amended. The pertinent legal regulation is fully in compliance with the UCITS Directive and the AIFM Directive.

The investment trust fund could also be only a professional investor fund, i.e. alternative investment fund and it will be considered as another legal form of domestic collective investment undertakings with legal personality.[35] Act No. 203/2011 Coll. on Collective Investment, as amended, *de lege lata* recognizes the following domestic collective investment undertakings with legal personality:

1. **investment fund with variable capital** established in a legal form of simple joint stock company under the Commercial Code of the Slovak Republic[36]
2. **other domestic collective investment undertakings with legal personality** established in a legal form of any company[37] or cooperative under the Commercial Code of the Slovak Republic.

Alternative investment funds must be mandatorily registered with a register kept by the National Bank of Slovakia (*Národná banka Slovenska*). Therefore, we believe that also investment trust funds will be subject to this registration obligation. There are 4 self-governed alternative investment funds registered in the abovementioned register.[38]

4 CONCLUSION

Even though an institute of trust fund is not *de lege lata* regulated by law in the Slovak Republic this paper was dedicated to theoretical analysis of potential use of the trust fund as a form of investment, if such institute is introduced into the Slovak legal system. The trust fund or other form of fiduciary management of the third party assets is established in several traditional continental legal systems, including the Czech Republic.

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33 ŠOVAR, J. – KRÁLÍK, A. et al. : Zákon o investičních společnostech a investičních fondech. Komentář. 1st edition. Prague: Wolters Kluwer, 2015, p. 421.

34 Section 597 letter c) of Act. No. 240/2013 Coll. on Management Companies and Investment Funds.

35 If a concept of trust fund without legal personality will be adopted in the Slovak Republic (the same applies in the Czech Republic), the more accurate expression will be a domestic organizational form of collective investment not listed among other collective investment undertaking with legal personality.

36 Section 220h et seq. of Act No. 513/1991 Coll. Commercial Code, as amended (the Slovak Republic).

37 General commercial partnership, limited partnership, limited liability company, joint stock company.

38 Data valid as of the date 9. 11. 2018. There are 2 subjects with a legal form of simple joint stock, 1 subject with legal form of cooperative and 1 subject with legal form of limited liability company registered.

The trust fund as a form of investment could exist only as a collective management scheme in a form of professional investor fund, i.e. alternative investment fund covered by the AIFM Directive regulation. Based on the above stated legal analysis we conclude that if an institute of trust fund is introduced into the legal order of the Slovak Republic, it will not be very used as a form of investment under legal and economic conditions of the financial market of the Slovak Republic. We have come to the pertinent conclusion based on these assumptions:

1. introduction of a trust fund into the legal order of the Slovak Republic could be connected with **legal uncertainty** since it is an unknown *common law* legal institute that will be needed to be transposed into the legal order of the Slovak Republic;
2. **alternative investment funds almost do not exist in the Slovak Republic**, i.e. these investment funds are not very used and popular among investors when compared to other UCITS collective investment structures; and
3. even if alternative investment funds are more used in the Slovak Republic in the future, **there exist other organizational forms of alternative investment funds** (e.g. simple joint stock company or other domestic collective investment undertakings established in a legal form of company or cooperative) **with more thorough regulation and broader acceptance that we assume investors will prefer to the investment trust fund.**

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LEGAL STATUS AND PERSPECTIVES OF DEVELOPMENT FOR LAND ASSOCIATIONS IN SLOVAKIA[1]

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Abstract: The paper analyses land associations in Slovakia as specific subjects, which are subject to a distinct way of real estate disposal. They are currently regulated by Act No. 97/2013 Coll. on Land Associations as amended ("the Land Associations Act" or "the Act"). For understanding the institutes of this Act, it is necessary to point to the historical circumstances under which these entities emerged. In the first part of this paper, the paper points to this development and then analyses the current legal situation. In the next part, it describes current issues of land associations, focusing on practical circumstances. In the main part, the paper focuses on problems with their functions, their profitability and future development. Finally, in *de lege ferenda* part, the paper tries to find possible solutions to these problems and the future of land associations.

Key words: the land associations, protection of land, perspectives of development, transfer of ownership, e-agriculture

1 INTRODUCTION

Land associations are indisputably very specific land managers, as well as landlords of agricultural land, forest managers and they also perform many other tasks. Common properties and commonly cultivated properties as their underlying assets are the specific subject matter of the property right of their members and the way they are handled is very limited.

To be able to explain it sufficiently, we need to get closer to the historical development that has led to the formation of such a special kind of co-ownership and the way of dealing with this real estate. The land association is, by its very nature, the relationship of its members (individuals) to concrete land. Actual land associations in Slovakia are based on historic model of co-ownership, which was created because of the abolishment of feudalism in Hungary in our area. Formation of collective co-ownership on the principles of Roman law began.[2] Ownership management has developed in such a way that the management of co-ownership does not belong to the co-owner, but to the legal person created by a specific document – the statutes.[3] Later on, these legal entities were regulated by several legal rules. In general, land associations had been governed by these laws: the Article XIX/1898 on common management of forests and land, which are the undivided property

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[2] VRABKO, M. – MÁČAJ, Ľ.: Prevod vlastníckeho práva v pozemkových spoločenstvách. In: Agrarian law of the European Union 2017 [electronic media]: (land relations in agriculture, entrepreneurship in agriculture, EU common agricultural policy). Nitra: Slovenská poľnohospodárska univerzita v Nitre, 2018, p. 107.

[3] Ibid.

of private landowners and former *urbarium* members. It was about conditions of use of forest land. Furthermore, the Article X/1913 on undivided pasture lands, which required the establishment of a pasture community on an organized basis.[4] Finally, the Article XXXIII/1913 on the Sale of Certain State Real Estate or the replacement of these.

Social changes have come rapidly in the period of socialism. Although the owners of the shares did not lose their property, law abolished urbarium (land associations) as legal entities, and in the first case allowed for the transfer of land use rights to former Unified Collective Farms (JRD), in the latter case the regulation led to that forests commonly used by the abolished entities were transferred to the regional administration of forests or JRD.[5]

The restoration of the activities of land associations took place only in the 1990s by Act No. 229/1991 Coll. on the Adjustment of Ownership Relations to Land and Other Agricultural Property as amended (Restitution Act). For the existence of the land communities, there was significant Act No. 330/1991 Coll. on land adjustments, arrangement of land ownership, land authorities and land communities as amended, which restituted legal relations in accordance with the abovementioned Hungarian Urbarial Laws, and finally Act No. 181/1995 Coll. unambiguously declared all plots of land again as common venture ownership. This law meant a transitional period; one of its aims was to modify the existence of land associations uniformly. It partially succeeded in doing so, but some associations continued to operate based on Hungarian regulations, others as associations of citizens, and only a part within the meaning of this law. Some of them also existed as associations with legal personality, some without it. It was precisely because of this disunity that all existing associations had to become subject to a unified legal regime, and this was done only after the adoption of Act No. 97/2013 Coll. on Land Associations as amended.[6]

2 LAND ASSOCIATION AS A SUBJECT OF LAW

2.1 Current legal status of land associations due to the Land Associations Act

In valuation of importance of land associations, it is necessary to look at how much land they currently manage in Slovakia, and how important they are to Slovak agriculture as well as forestry.

Nowadays, land associations are obligatorily legal persons regulated by the Land Associations Act. A land association is a legal entity according to the law, and this term includes many entities, which were regulated by different legislation in history. Existence of new land association begins upon the day of registration. The Register of Associations is managed by the District Office, the Land and Forestry Department, the local authority in the district in which the common property, respectively commonly cultivated property is located, respectively its largest part.[7]

To understand the land association as a subject of law, it is appropriate to understand it as an entity that consists of three parts, namely the *personal, material* and *organisational substrate*. The

4 BUJŇÁK, J.: Spoločné nehnuteľnosti v horizonte zmien a zákonných obmedzení. In: Pozemkové spoločenstvá. História a súčasnosť. Bratislava: Slovenská spoločnosť geodetov a kartografov, 2014, p. 24.

5 VRABKO, M. – MÁČAJ, Ľ.: Prevod vlastníckeho práva v pozemkových spoločenstvách. In: Agrarian law of the European Union 2017 [electronic media]: (land relations in agriculture, entrepreneurship in agriculture, EU common agricultural policy). Nitra: Slovenská poľnohospodárska univerzita v Nitre, 2018, p. 108.

6 Ibid.

7 § 22 par. 2 of Act No. 97/2013 Coll.

association's *personal substrate* consists of owners of common property as well as owners of commonly cultivated properties. The association is based on the association agreement concluded by the owners of these properties. The members of the association are all owners of shares of common property or owners of commonly cultivated property. Membership is tied to the co-ownership of this property. This is a special kind of property co-ownership, whereby a potential acquirer of a share is obliged, within two months from the date of its acquisition, to accede to the association agreement. The extent of the rights and obligations of the members depends on the amount of their co-ownership; if that is not possible, it is based on the members' agreement.[8]

An indispensable condition of existence of these associations are common properties or commonly cultivated properties, i.e. *material (land) substrate*, which are under management of concrete land association. The owner of these properties is not an association as such, but mostly a very large number of co-owners. Common property consists of several pieces of land, which together form one immovable, indivisible and massive thing. It is a remnant of the feudal system and special type of co-ownership, which is difficult to leave. On the other hand, commonly cultivated property is owned by concrete owner (or couple of co-owners) and it comes under managing of the association only after free decision of its owner and his/her signature of the association agreement.

The association's *organisational substrate* is made up of its bodies. These are: the assembly, the committee, the supervisory board and other association bodies established by the association agreement.[9] The highest authority of the association is the Assembly, which is made up of all members of the association. The assembly has the widest powers, notably the approval of the association agreement, the statutes and their changes, the election and recall of the members of the committee and the supervisory board, and many others concerning actions of association.[10] The committee is a typical executive body and statutory body, and its role is, in particular, to direct association action and to rule in all cases where the law does not confer on other bodies. It should have at least five members and shall be governed by its President. Another body is the supervisory board, which controls the activities of the association. It has at least three members, and a minority of them does not have to be a member of the association.

2.2 Transfer of land title in land associations

When we talk about transfer of land, which is managed by land associations, we must divide it into two types of land: common properties and commonly managed properties.

By law, in the case of common property, it is real estate consisting of several separate lots.[11] It is, therefore, one thing that is made up because of evidence from several lots, each of which is made up of same shares. Common property thus creates a *special type of co-ownership*, which, in relation to the modification of joint estate in the Civil Code, has the status of *lex specialis*.[12] However, the

8 VRABKO, M. – MÁČAJ, Ľ.: Prevod vlastníckeho práva v pozemkových spoločenstvách. In: Agrarian law of the European Union 2017 [electronic media]: (land relations in agriculture, entrepreneurship in agriculture, EU common agricultural policy). Nitra: Slovenská poľnohospodárska univerzita v Nitre, 2018, p. 109.

9 § 13 par. 1 of Act No. 97/2013 Coll.

10 § 14 par. 7 of Act No. 97/2013 Coll.

11 § 8 par. 1 of Act No. 97/2013 Coll.

12 MOĽOVÁ, K.: Pozemkové spoločenstvá (4) – Predkupné právo v pozemkových spoločenstvách. In: Ulpianus.sk. Available at: <http://www.ulpianus.sk/blog/pozemkove-spolocenstva-4-predkupne-pravo-v-pozemkovych-spolocenstvach-/> (accessed on 5th November 2018).

Land Associations Act also provides that a common property is, in principle, indivisible, except the cases stated in the law.[13] As the Regional Court of Banská Bystrica stated in its judgment dated 13 December 2012, file no. **24Sp/31/2012**, "*The court is of the opinion that the transfer may include co-ownership shares (shares of both vendors), but only assuming* ***that the entire group of land constituting the common property would be transferred. Individual owners of shares cannot deal with their shares solely in respect of any allocated land*** *but must always treat all the land which forms the common property up to the amount of their co-ownership.*" Furthermore, if the owner of the share of the common property wants to sell his co-ownership share to another co-owner of the property, the other co-owners do not have a pre-emption right. Consequently, this situation does not logically apply to cases where ownership is transferred in relation to third parties (who are not co-owners of the property), in which case that pre-emptive right arises for other co-owners.

On the other hand, although from a quantitative point of view on a much smaller scale, land associations also manage commonly cultivated properties, for which there is a completely different, more flexible and more practical legal regime. While in the case of common property its legal regime is based on a historical arrangement of co-ownership relations to concrete plots, in this case it is a manifestation of the free will of the owner of the land to be managed by the association and its owner is to become a member. The commonly cultivated property is therefore not an institution expressing any kind of ownership but is a separate land use institution linked exclusively to the land community institute. These properties do not represent any special type of co-ownership and are subject to full owner's right of transfer.

3 ACTUAL PROBLEMS CONCERNING LAND ASSOCIATIONS AND POSSIBLE SOLUTIONS

As mentioned above, most of land managed by land associations is formed by common properties, which have special legal status and creates special type of co-ownership. Because of simple fact that most of co-owners acquired land ownership by succession, they have not been interested in activity of the association and exercise of their owner's rights for many years. As a result, too often there is a situation where such members are a large part, sometimes the overwhelming majority in the association. In this case, the activities of the association bodies are threatened, leading to their non-functioning, and the consequent suppression of the functioning of the association as well as of the pursuit of its business activities. This in turn leads to its worse economic outcomes or its economic collapse.

There are also other problems, which some land associations must deal with. They are linked to rights of the members (i.e. co-owners of common properties), who want to leave the association and separate their own lot from common property. This process is very difficult, not only because of legal regulation of termination of this special model of co-ownership, but also because of interest of the association.

Another task concerning land associations is use of modern information and communication technologies. The problem of the communities is that their activity is in many cases only aimed at redistributing profits from renting agricultural and forest land, approving the transfer of ownership of land and other matters. But to a much lesser extent they are dealing with the development of the

[13] § 8 par. 2 of Act No. 97/2013 Coll.

association, its possible business and management activities, which, in most cases cede to third parties in the form of a lease agreement. They are less concerned with how to make use of innovation to help them with these activities of the association.

There are many other tasks concerning existence and functions of land associations. In this section, we shall look at some areas, where the functioning of land associations could be improved.

3.1 Successful and unsuccessful associations

Nowadays, we can see in Slovakia some land associations as examples of prosperous business model, when they implement their own business policy focused on agricultural and forest management. It is their natural area of business because associations manage mostly these types of land.

The Land Associations Act in relation with the Act No. 326/2005 Coll. on forests as amended (Forests Act) predicts situation when land association (as a legal person) acts like forest manager. This role must be performed by natural person, who is a member or employee in an employment relationship agreed up on permanent time. This person has to be professionally competent to carry out the activities mentioned in Forests Act.[14] A condition for the performance of these activities is the entry in the register of professional forest managers, kept by the competent authority of the state administration of forestry.[15] For associations itself, it is a favourable way how to manage forests on its behalf.

On the other hand, management of agricultural land is much more difficult to achieve in areas which are common properties owned by members of an association. An association itself is in most cases economically not able to ensure agricultural production. Because of that, the most effective way how to manage agricultural land is to rent it to third parties. In this case, even though it is a property of association members, an association acts only as a manager of these lands, but only members are owners of these lands.

It is worth reflecting on how this business of associations could be supported. One of the most accessible routes will be the simplification of decision-making procedure of association bodies and its greater operability. In many cases, tax relief would also be helpful in activities closely related to the management of the assets of the members of the associations, i.e. the management of common properties and commonly cultivated properties.

3.2 Transfer of land in land associations

One of the main problems concerning actions in land associations is the possibility of transfer of land managed by land associations. In fact, this land, i.e. common properties and commonly cultivated properties are owned by members of concrete association, not by association itself (excluding shares owned by association). That is why association cannot transfer ownership to these properties, and it causes difficulty in these transfers.

Another problem arises from the fact that all land, consisting of lots forming a common property, is one independent thing. For this reason, individual lots (as parts of the earth's surface) are not able of being sold without any further process to a third subject since they form one coherent and economically well-utilized whole. In such cases, it is necessary to maintain the procedure ac-

[14] § 47 of Act No. 326/2005 Coll.

[15] § 47 par. 1 and 2 of Act No. 326/2005 Coll.

cording to the law, according to which it is necessary first to separate part of the common property, then to settle the ownership relations. For now, the Land Associations Act does not include exhaustive reasons for separation of part of common property. In moment, when this part is separated after approval of members of the association, it becomes commonly cultivated property.[16] However, the property transfer agreement must be concluded by the owners of shares of common property, each separately. Therefore, those shareholders who disagree with the transfer of ownership to this separate part, with its sale, exchange or donation and do not enter into such a contract, remain the co-owners of this separate part of land as a newly created commonly cultivated property, because when the vote was taken, they usually do not sign a contract for the transfer of ownership. Income from the sale of a separate part of the common property is the income of the owners of the common property who have entered into a transfer of association agreement; this also applies to the Slovak Land Fund ("SLF") as a manager of some shares.

A special feature of the common property, unlike other types of real estate, is, inter alia, the lawful exclusion of the cancellation and settlement of co-ownership of common property. The consequence is the permanent binding of co-owners of common property without the possibility of partial settlement and cancellation of co-ownership of only one or several co-owners and the creation of several common properties. The intention is to avoid further tumbling of the common property, which is already a major problem.[17] According to older legislation, even transfer of ownership to shares in the common property to the association itself was prohibited. Nowadays, the Land Associations Act provides that the transfer of ownership of a share of common property to the association is prohibited if the share in common property or commonly cultivated property exceeds 49 percent.[18] This change can contribute to greater flexibility, greater autonomy and economic success of the community, as this leaves it with greater decision-making autonomy by its bodies. There is no doubt that the transfer of ownership requires that the will of the co-owners be preserved, so we can fundamentally consider this adjustment to be correct although in practice it causes problems.

3.3 Possible changes of decision-making procedures of association bodies

The basis for the organization of relations among bodies of association is the precise definition of their powers in the first place in the Land Associations Act, as well as in the association agreement or, where appropriate, in statutes of the association. There must exist effective separation of powers among them.

The most important powers are those of the assembly, which consists of all members of the association. The Act provides a relatively detailed calculation of the tasks that fall within the competence of the assembly.[19] Even though it is a taxable calculation, the Act allows the Assembly to decide on other matters of the association if the decision is not entrusted to other association bodies. First, this includes the approval and possible amendment of the association agreement as well as the association statutes. Each member of the association has the ratio of votes at the Assembly equal to the proportion of the participation of a member of the association in the exercise of rights and obligations determined

16 § 8 par. 2 of Act No. 97/2013 Coll.

17 ILLÁŠ, M.: Spôsoby nakladania so spoločnou nehnuteľnosťou. In: Pozemkové spoločenstvá. História a súčasnosť. Bratislava: Slovenská spoločnosť geodetov a kartografov, 2014, p. 33.

18 § 9 par. 11 of Act No. 97/2013 Coll.

19 § 14 par. 7 of Act No. 97/2013 Coll.

by the size of their shares in the common property. If, due to the ownership of multiple common properties registered on multiple ownership certificate this proportion cannot be determined, it may be determined by agreement of the members of the community or by a decision of the assembly. The Act further specifies the cases in which it decides by an absolute majority of the votes of all the members of the association and in which it decides by an absolute majority of the votes of members of the association whose shares in common immovable property are not managed by the SLF or whose shares in the commonly cultivated property are not managed by the administrator.[20] While there is no doubt that in many matters concerning the legal status of the association itself (such as the adoption and amendment of the association agreement and the statutes) it is necessary to maintain this arrangement, it is worth considering whether in cases such as decision-making on profit sharing, and the conditions of entry of the association into a business organisation or cooperative society and the decision on other economic matters these could be left to the majority of the members of the association participating in the assembly. This would make the association more operational and based on decisions by active members, the association could start to engage in new business activities.

On the other hand, the committee is the most important body for the performance of several activities of the association. The Act defines it as an executive and statutory body of the association. It governs association actions and decides on all matters for which it is empowered by the Act, the association agreement, the statutes or other kind of decision of the assembly. *The committee shall have at least five members. The committee shall be organized and managed by the President of the association. The President of the association is elected by the committee from among its members unless otherwise provided in the association agreement or the statutes.*[21] The committee, personally represented by the President of the association, is therefore the body with the task of ensuring day-to-day activity and action of the association. If the legislature were to make associations' activities more effective, it would be worth considering whether it would not be possible to strengthen its powers by delegating certain tasks from the assembly to the committee, e.g. such as the business use of property managed by the association.

4 CONCLUSION

The aim of this paper was to focus more closely on the legal status of land associations in the Slovak legal order as well as on the perspectives of their further development. They, as legal units based in the legal history of our nation, are currently facing a challenge to cope with the challenges of modern times. These are facts such as the failure of the members of the association to exercise their rights and obligations arising from membership of the associations and the co-ownership of particular common property. Other problems exist due to the fact of failure to hear and determine several co-ownership shares in common property in the succession proceedings or a large number of shares of common properties whose ownership is unknown or unidentified and thus, according to the law, finds itself in the SLF management.

Addressing this situation is to adapt the work of the association bodies to the new situation to make their decision-making more appropriate and operational. Issues relating to routine manage-

[20] § 15 par. 2 of Act No. 97/2013 Coll.
[21] § 16 par. 3 of Act No. 97/2013 Coll.

ment and possible business would be appropriate to be delegated to a committee that acts as a permanent executive body of the association. On the other hand, even in cases where it seriously affects the legal status of a particular association, it would also be appropriate to use a different decision-making quorum, such as the decision by a simple majority of only the members of the association present at concrete assembly.

Despite everything, there is no doubt that due to the size of the territory in administration of land communities, these legal units continue to have meaning and need to exist in our legal order and some modernization measures could simplify their activities.

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Legislation:

Act No. 97/2013 Coll. on land associations as amended

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WITHER THE SOCIAL SECURITY AND THE WELFARE STATE IN THE 21ST CENTURY – A RELIC OR NECESSITY?

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Abstract: Article provides for an overview of core terms, definitions and recent developments in the area of social rights and social security in context of Central and Eastern Europe, with focus on Slovakia. It advocates for protection of social standards through the universalist, social-democratic model of welfare state, in order to uphold and enhance democracy and human rights in the region, with a view of their genuine, daily realisation and enjoyment by everyone and all.

Keywords: social security, social rights, social justice, models of welfare state, universal social protection

1 INTRODUCTION

The most recent depression that has hit us in 2008 with the financial collapse of the Lehman Brothers seriously challenged the neoliberal paradigm introduced in the late 1980-ties by the US and the UK governments led by the late R. Reagan and M. Thatcher, leading to development of the global financial markets, strengthening the influence of the corporations and the power domination of these over the national economies and the elected governments. The debt crisis spilled over to the crises of the political elites and the system as such.[1] In Europe, even the so-called Third way promoted by social democratic forces led by T. Blair and G. Schroeder as a combination of neoliberal economic and socially oriented social policies proved rather dysfunctional.[2]

Slovakia has been also a part of the abovementiond processes and developments. With the collapse of the centrally planned economy in 1989, the country entered the path of neoliberal reforms and process of transition to the free market, it opened its space to international and foreign capital, privatised its key industries and deregulated the labour market and weakened the system of labour and social protection in a historically unprecedented way. This included overal liberalisation of the labour relations, with only a fragment of labour contracts being for the undetermined period of time, while the majority of them became time-limited and therefore subject to regular revision; weakening of the trade unionship and reducing the power of trade unions in designing of reimbursement and other social policies, cutting the employees benefits, attracting the foreign investors by tax and social-benefit holidays etc. This came hand in hand with elimination of subventions, subsidies and other forms of aid to public services such as education, health-care and social services as well as introduction of more and more flexible and less protective, and even precarious, forms of labour. But most importantly, being

[1] ŠVIHLÍKOVÁ, I.: Globalizace a krize. Souvislosti a scénáře (Globalization and crisis: Interconnections and scenarios). Všeň: GRIMMUS, 2010, p. 56.

[2] MACKOVÁ, Z.: Princíp solidarity v práve sociálneho zabezpečenia Slovenskej republiky (The Principle of Solidarity in the Social Security Law of Slovak Republic). Bratislava: UK, 2001, p. 137.

a general feature of the present global system – vastly relying on financial capital, labour became of much less importance to wealth generation and social status, in comparison with the so-called speculative or „quick finance", taking over not only labour but also the „slow" – real investment finance.[3]

In order to respond to the above situation in a systemic and integrated manner, an active multilateral cooperation and interdisciplinarity of approaches are required. However, under the current domination of market and corresponding profit-orientation, even the university education became more of a practical means towards a well-rewarded job and career, than truly universal and human-oriented search for wisdom in an integrated way – both intellectual and moral advancement of a young person who would be driven to work for the public good. The value of human dignity, as elaborated and promoted in the works of Immanuel Kant, shall stand above any material and economic calculations, and grow from human reason and free, moral and responsible being. Each human shall be perceived, respected and treated as unique and immortal. Human dignity is a right, as much as it is value and ideal realised through an entire and constantly growing catalogue of human rights, nowadays enshrined in a number of national and international documents.[4] **To respect human dignity means respecting of liberty and equality of all human beings, as well as of their human needs and qualities.**

As a result, the prevailing reduction into *homo oeconomicus* – at one hand as economic input in the form of labour and on the other as a consumer, cannot stand the test of time neither create the basis for proper social cohesion. As has been recognised long time ago, by the United Nations Development Program, having introduced the Human Development Index[5] and other alternative ways of measuring progress, in addition to, if not in paradigmatic competition with the Gross Domestic or Gross National Product (GDP / GNP), the quality of life stems not only from the income levels and level of consumption, but is measured also by strength and coverage of the social security system, aspects of free time and leisure, social trust, feelings of joy and belonging, the quality of environment and possibilities for human development in the broadest possible sense. The bad economy turns the people subject to its profit-only, numerical demands, while the good economy serves the people to enhance their lives.[6] This certainly includes education, culture, health-care, equality of opportunity and social cohesion. And this is also the reason why **we need the state which is efficient, active, supportive and fair in the social sphere** – in social policies and welfare, that especially in European context, stem from the system of social security.

2 SOCIAL SECURITY

Historically, the roots of social security can be traced back to the ancient times, when it mostly represented charitable, philantropic protection of the most vulnerable – widows, orphans, the disabled and the foreigners. The philosophical or *quasi*-legal foundations of it were usually linked to religious

[3] KORTEN, D.: Keď korporácie vládnu svetu (When Corporations Rule the World). Košice: Paradigma SK, 2001, p. 12.

[4] See e.g. Constitution of the Slovak Republic, Chapter Two: Fundamental Rights and Freedoms (Articles 12 to 54) and JANKUV, J.: Medzinárodné a európske mechanizmy ochrany ľudských práv (International and European Mechanisms for Protection of Human Rights). Bratislava: Iura Edition, 2006.

[5] UNDP, Human Development Report, 2018. Available at: http://hdr.undp.org/en/2018-update (accessed on 5th November 2018).

[6] See SEDLÁČEK, T.: Ekonomie dobra a zla. Po stopách lidského tázaní od Gilgameše po finanční krizi (Economy of the Good and Evil: Following the Steps of Human Questionning from Gilgamesh to financial crisis). Praha: 65 Pole, 2009.

texts such The Old and New Testament. From the 17th century, with further division of labour and creation of the so-called fraternities linked to particular crafts and communities, the rudiments of solidarity funds and assistance in case of sickness or accident, appeared. The first compulsory insurance schemes, predominantly covering members of the state bureaucracy, were established during the rule of Otto von Bismarck in Germany in 1883 to 1889, since when we generally speak of social security as a system based on a set of legal rules. This includes various forms of insurance that – under specific, defined conditions – provide for various forms of benefits: typically benefits in sickness, accident, disability or unemployment; social security in old age (pension) and other situations of vulnerability, or social situations.[7] With more intensive industrial development and corresponding social changes brought by the Industrial Revolution, the vastly voluntary participation in the social security was replaced by an obligatory one. The charitable or passive nature of social support became more of a system of organised and predictable social assistance with a role and a view of uplifting of the needy from the unsatisfactory social situation.

The social security as we know it, came into existence only after the Second World War in democratic conditions of Western Europe, as a matter of realisation of human rights. The Eastern parts of Europe, including former Czechoslovakia, built system with specificities of a centrally planned economy and full employment, but also an obligation to work or participate in the labour market, with exceptions based on public service – such as obligatory military service, care for others – such as maternity leave, or other well-reasoned condition – such as disability or old age, that might have prevented one from work. As of 1989, our social security had to introduce new forms of protection related to new, market-based economic rules, and include a few social situations that were unknown before.

The terminology and system of social security is country-specific, and depends on approaches and ways of organising and financing the system, that can differ. The social security in Slovakia consists of system of social insurance, social support and social assistance.[8] The social insurance, which serves as the central pillar, covers pensions – which are mostly pensions in the old age or pensions in disability, and sickness benefits – out of which also maternity benefits, above the universal "flat-rate" amount, are paid. The two remaining pillars of social support and social assistance, often also termed as material assistance, are not linked to employment, but to social situation and the actual material need. Especially the system of social assistance, or material assistance, represents directs material provision to secure basic needs, or – as defined in the Article 39 of the Slovak Constitution "basic living conditions" such as food including one warm meal per day and shelter.

Despite the fact that according to Article 7 paragraph 5 of the Slovak Constitution "international treaties on human rights and fundamental freedoms, execution of which does not require the adoption of law, and international treaties which directly establish rights or obligations of physical or legal persons, and which were ratified and promulgated in a manner laid down by law, have supremacy over the national laws" – some of the most progressive provisions of the Revised European Charter, for instance, especially the right to protection against poverty and social exclusion codified in the Article 30, and the right to housing codified in the Article 31, have not yet been adopted.

On a global, world-wide level and more generally, the catalogue of areas and situations falling under the social security was best defined by the International Labour Organisation (ILO) in its

7 See MACKOVÁ, Z.: Právo sociálneho zabezpečenia. Všeobecná časť (The Social Security Law: General Part). Šamorín: Heuréka, 2009, p. 33-43.

8 GAJDOŠÍKOVÁ, Ľ.: Charakteristika súčasného systému práva sociálneho zabezpečenia (The Characteristics of the Present System of the Social Security). In: Právny obzor, vol. 80, 1997, No. 4, p. 453.

Convention No. 102 on the Minimum Norm of the Social Security, adopted in 1952. It listed: 1) medical care – including preventive and curative care as well as care during the birth and pregnancy; 2) protection in times or in cases of incapacity to work because of morbid condition – such as sickness or accident; 3) protection in case of unavailability of work, or lack of ability to find paid employment – i.e. unemployment benefits; 4) old age; 5) protection in pregnancy and maternity / parenthood – especially in the form of maternity beenfits; 6) family protection and maintenance of children – including child allowances; 6) disability or long-term sickness – i.e. inability to engage in gainful activity, which is likely to be permanent or persists after the exhaustion of the sickness benefit; 7) survivors' support of widows and orphans.[9] The conceptualisation of a subjective, individual right to social security, that has to be fulfilled by the state, together with other human rights, in order to secure human dignity and free development of every human being, has certainly been a great historical achievement.[10] The actual level of social protection is nowadays – at least in context of Europe, considered to be part of regular realisation of fundamental and constitutional rights.[11] However, as has been broadly recognised, **the system of social security represents only one, although, a crucial part of the system of social protection**. To genuinely secure human and societal well-being, it must be rooted in sustainable and fair economic system, system of protection and realisation of human rights in their integrity, and be complemented by broader social policies applied nation-wide, region-wide, and – with progressing globalization – one day even world-wide.

3 THE WELFARE STATE

Given that since the industrial revolution, and across the 20th century, it has been the state that represented the fundamental unit of greater societal organisation, it served as the very platform for conceptualisation and realisation of any social aims, including social protection and an array of policies and developments designed for and leading to various social models, including welfare state. **This is the state with the democratically organised power that through its social legislation and corresponding public institutions guarantees 1) the minimum agreed income for every individual and his or her family**, on the level of living or material subsistance; 2) **systemic provision of social security** in order to deal with, and overcome situations of social risk, with a view to secure the minimum social standard and individual social independence; 3) **an adequate standard of social services for all citizens regardless of their social status**.[12] This is in fact the realisation, implementation and institutional framework for the internationally and nationally codified social rights, established in the post-World War II era by the UN Covenant on Economic, Social and Cultural Rights and later on, regionally – by the European Social Charter, the Charter of Fundamental Rights of the EU and other documents.

The level and standard of protection, promotion and fulfilment of social rights – given their positive nature – requiring active and generous policies, depends however, on a particular social contract and a particular model of the state that is being shaped. The highest social value and priority of the

9 ILO Convention No. 102 on Minimum Norm of Social Security (1952).

10 TRŐSTER, P.: Právo sociálního zabezpečení (The Social Security Law). Praha: C. H. Beck, 2005, p. 39.

11 BARANCOVÁ, H.: Reforma sociálneho poistenia Slovenskej republiky v európskom kontexte (The Reform of Social Insurance of the Slovak Republic in the European context). Bratislava: SAV, 2004, p. 16 ff.

12 STANEK, V.: Sociálna politika (Social Policy). Bratislava: Vydavateľstvo EKONÓM, 2004, p. 30-31.

liberal model of welfare state is protection of individual liberty that relies on strict separation from the state influence both in the sphere of private life and economic competition. The most important social unit is represented by family. In case of its failure, in situations of social risk, the existing forms of social or state support are to guarantee basic survival. The scope of provision of public services is limited, as is social redistribution and the application of principle of solidarity. Protection of private property dominates the realm of economic rights, and social inequalities are accepted as natural result of competition. The liberal model, in its sharpest form, has been linked to the era of Margaret Thatcher as the Prime Minister of the United Kingdom from 1979 to 1990, encapsulated in her quote that "*there is no society; there are only individuals*", reducing each and every human to an individual as an isolated unit, that has to rely on him or herself.[13]

The **conservative model of the welfare state**, sometimes also called the Bismarck or continental, German model, is founded on a free-market economy that is being instrumentally combined with planning. It stems from the idea that social needs shall be primarily satisfied from employment and labour, and related to productivity, output and merit. It relies on system of social insurance that is obligatory and dualist – distinguishing between those who are economically active and those who are not. The acquired social standard is therefore directly dependent on economic, labour involvement and particular social contribution. The state generally compensates for the consequences of the social risks, but it does not directly eliminate their root causes.

The third model of the welfare state is the so called **social-democratic model**, known also as **the universal** or universalist one – as it **systemically covers and protects the entire population regardless of the social status and actual need for protection**. The main focus of the policies is on active support of high levels of employment, while the main criteria for the entitlement in relation to existing social benefits is the citizenship, or other legal relationship between an individual and the state (e.g. a refugee status). The financing of the system is provided from general (especially direct) taxation and the redistribution of resources is based on solidarity. The values this system protects are those of high standard of health, quality education for all and equality of opportunity, as well as guarantees of the minimum income for all in order to build a foundation for decent life and dignified standard of living, as basic precondition for people's participation in social and economic life, including labour market. This model is so far predominant across Europe, and to a great extent embraced by the deeper integration model of the European Union. Its actual realisation and future strength, however, will depend on multilateral commitment to social aspects of integration, and true, genuine devotion to the core values on which the Union was founded, especially equality and solidarity.

4 SITUATION IN SLOVAKIA

After its establishment in 1993, the Slovak Republic also in its new constitution, introduced "socially oriented free-market economy". In practical terms, this represents the medium, centrist position – also known as modern conservative or German model, which is neoliberal in its very foundation, yet with permitted level of regulation and state intervention that is to serve securing of basic social protection and keeping of corresponding social cohesion. The role of the social state

[13] PRUSÁK, J.: Teória práva (The Theory of Law). Bratislava: VO PraF UK, 1995, p. 43-44.

is enshrined in the **Article 55 paragraph 1 of the Slovak Constitution** stating that "**the economy of the Slovak Republic is based on socially and environmentally oriented market-economy**". In principal interpretation of the constitution this means that only the free-market activities that pay due attention to social and environmental needs, and respect social and environmental aspects of life, deserve state and social support. This broader social and public-interest role is, among other, mentioned also in relation to the right to property, codified in the article 20 paragraph 3 of the constitution, stating that "ownership of a private property is binding. It shall not be misused to the detriment of the rights of others, or in contravention to the public interest protected by law. The exercise of this right shall not be at detriment or harm to human health, nature, cultural monuments and the environment." Further constitutional guarantees of social, economic and cultural rights are listed as integral part of the catalogue of human rights, in articles 35 to 44 of the Slovak Constitution. Whether, and to what extent, it is such principled and enlighted interpretation and application of law, and part of our daily reality – that the free market and private corporate actors, keep social and public interest at the forefront, or at least in fair balance, with their profit-driven activities – remains an open question.

The Constitution, as much as a whole set of international documents, also entails the fundamental definition of Slovak Republic as the state based on the rule of law. This provision is in fact among primary ones, of article 1 paragraph 1 of our constitutional, codified form of social contract. The underpinning philosophical approach is therefore the one of **respecting the liberty and equality before law**, also known as formal equality, as primary and dominant values, that may be adjusted to social needs by adoption of secondary measures in the form of written laws. This has been in fact the main feature of the post-1989 developments, when most of the social legislation has been adopted to balance major inequalities and heal social disruptions often in a responsive, reactive manner. In addition, the law creation in modern societies is subject to various pressures, in which the economic interests of the most powerful corporate actors often play a decisive role. This has, among other, **weakened rather than strengthened the existing standard of labour rights and social protection**. A few examples include substantial shortening of period of extended social protection after the conclusion of employment relationship or end of labour contract – from previously codified 42 days to only 7 days of extended protection; the expiration of insurance (sickness benefit) entitlement after the 11th day of care for a family member or a close person such as minor of age, husband, wife or an elderly parent; the elimination of concept of equity in social security law and corresponding extraordinary mechanism of remedy, from the year of 2004 etc.[14]

The actual fulfilment of social rights and realisation of ideal of social justice therefore requires an active employment and balanced combination of various socio-economic means. Except the black-letter law, these include the system of progressive taxation and proportionate distribution of wealth, balance between private and public ownership and equality of opportunity in education, training and access to labour market. In Slovakia – vastly dependent on foreign investment, these systemic aspects and contextual dimensions have been also weakened rather than strengthened, and are likely to remain subject to continuing discussions, complex social struggles and periodically changing political preferences.

[14] See MACKOVÁ, Z.: Právo sociálneho zabezpečenia. Osobitná časť. Poistný systém v SR s príkladmi (The Social Security Law in Slovak Republic: Specialised Part – Social Insurance). Šamorín: Heuréka, 2012, p. 207.

5 CONCLUSION

The last three decades, from 1989 in Central and Eastern Europe including Slovakia, presented us with an opportunity to substantially improve our standard of human rights and the quality of life. However, rather than building an integrated, holistic system, we seem to have switched from formerly "politically prescribed social equality" to short-termism of unlimited – and often harmful freedom and over-consumption *of some*, in parallel to, or even at expense of social exclusion and marginalisation *of others*. And while the rule of law or German *Rechtstaat* is the core principle of modern democracy, it is the embodiment of liberty and formal equality – as equality before the law. **The welfare state or social state**, or state with social orientation, **shall reach beyond the ideal of equality before law and be seriously concerned with equality of opportunity and justice as fairness**.[15] In designing such state and negotiating such social contract, all members of society should be called and willing to participate in common dealing with life and social challenges, and enhancement of social justice. This includes and in fact also requires "adoption of legislation opposing extreme liberalism – often indifferent to extreme inequalities and social wrongs. **The idea of welfare state is to remind us that the state shall be the guardian of just and fair order, creating the foundation for belief and legitimate expectation that it will protect everyone from social harms and social wrongs**".[16] Even according to fathers of the liberal school of thought, such as John Stuart Mill – none of us created the Earth and therefore none of us may own it. In less symbolic and more practical, real terms – this means that most of the available resources belong to all of humanity. The state is to serve and promote the public good and protection to the most vulnerable.[17] Every human life depends on solidarity of the society as a shared, common unit.[18]

Europe, including former Czechoslovakia as one of the founding countries of the International Labour Organisation, has since its initial years enjoyed strong commitment to social protection, social justice and building of welfare state.[19] Even in comparative numerical terms, the EU state-level of social redistribution is around 20% of the GDP, which is almost tripple to the non-EU average of some 8%. No wonder this comes hand in hand with more than an extensive gap both in standard and quality of social protection, and the scope of coverage, or the proportion of the population with social protection. It is in fact **the principle of universality – reflected in universal social coverage and social inclusion of the entire population, characteristic for the European systems of social security, that embody and reinforce democracy also in economic and social terms**. Facing present challenges such as rising inequalities and social disruption, rise of nationalism and right-wing populism, we had better realise that rather than putting social rights at the altar of global profit-making, **Europe** may and **should preserve its strong social dimension and serve as living example of positive determination to high quality of life *for all*, achieved through protection and fulfilment of social rights and the ideal of social justice.**

15 See RAWLS, J.: A Theory of Justice (revised edition). Cambridge: Harvard University Press, 1990. 560 p.

16 DOMAŇSKÁ, A.: Pojem a normatívny význam ústavných zásad sociálnej spravodlivosti (The Term and Normative Meaning of Constitutional Principles of Social Justice). In: Právny obzor, 2004, No. 5, p. 415.

17 MILL, J. S.: Logika liberalizmu (The Logic of Liberalism). Bratislava: Kalligram, 2005, p. 510.

18 MACKOVÁ, Z.: Princíp solidarity v práve sociálneho zabezpečenia Slovenskej republiky (The Principle of Solidarity in the Social Security Law in the Slovak Republic). Bratislava: Univerzita Komenského, 2001, p. 27.

19 See e.g. the Act No. 221/1924 of the Collection of Laws of the Czechoslovak Republic – on Insurance of the Employees in case of Sickness, Disability and Old-Age.

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ALF ROSS AND HIS LEGAL PHILOSOPHY

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Abstract: The article has the ambition to present basic information of Alf Ross's legal philosophy, focusing on his understanding of validity of law, concept of rights, coercion in law, as well as the purpose of the legal science from his point of view as a representative of Scandinavian Legal Realism. In addition, within the article principal facts concerning life of Alf Ross and also list of his most important publications are presented.

Key words: Alf Ross, Scandinavian Legal Realism, concept of law, validity of law, legal science

1 INTRODUCTION

"In a way I am tempted by a subject in the philosophy of law because it is there that great thoughts, a philosophy of life, can be found and one does not just suffocate in details. But such a study has never been written in Denmark. It would, literally speaking, be a new passion here. Will anybody read it? It does not "lead" to anything either. Do I care? Can I? Am I strong?"

Alf Ross[1]

Scandinavian Legal Realism is specific legal-philosophical direction that seeks to discover the "real" nature of law, explores how the law (legal system) actually works and on what is based on. It is necessary to add that Czech and Slovak expert studies and papers usually refer to legal realism only to a very small extent, denoting it as non-normative, sociological or, in some specific cases, as an "exotic" or "mystical" approach to the law.[2] However, Scandinavian Legal Realism is becoming popular amongst current foreign scholars and we can mention many well-known Scandinavian great philosophers and philosophers of law such as Axel Hägerström, Anders Vilhelm Lundstedt or Karl Olivecrona that are recognized by contemporary legal philosophers. Nevertheless, it is Danish legal philosopher Alf (Niels Christian) Ross who is internationally recognized as the best-known representative of Scandinavian Legal Realism. In fact, we believe that very term "*Scandinavian*" Legal Realism was created to incorporate both Axel Hägerström's Uppsala School (and his disciples, like Olivecrona and Lundstedt) and Alf Ross legal philosophy. Otherwise, this direction could be labelled as Swedish Legal Realism or simply Legal Realism of Uppsala School. It was his contribution to Scandinavian Legal Realism that from our perspective made this direction internationally well-noted in the world of legal philosophy, particularly with his book *On Law and Justice* (1953), which is his masterpiece. So, let's find out more about this fellow…

[1] EVALD, J.: Alf Ross – a life. Copenhagen: DJØF Publishing, 2014, p. 14.

[2] For example see works: SOBEK, T.: Nemorální právo. Praha: Ústav státu a práva, 2010, p. 164 and the following; SOBEK, T.: Právní myšlení : Kritika moralismu. Praha: Ústav státu a práva, 2011, p. 319 and the following; COLOTKA, P. – KÁČER, M. – BERDISOVÁ, L.: Právna filozofia 20. storočia. Praha: Leges, 2016, p. 90 and the following; KUBŮ, L. a kol.: Dějiny právní filozofie. Olomouc: UPOL, 2002, p. 153 and the following; BRÖSTL, A.: Frontisterion. Bratislava: KALLIGRAM, 2009, p. 243 and the following.

2 CURRICULUM VITAE IN SUMMARY

Alf Ross was born on 10 June 1899 in Copenhagen, the son of a civil servant in a government department. He graduated from high school in 1917. His first choice was to study at the Technical University, but he left it after one term and turned to law. He finished his legal studies in the summer of 1922 with remarkable results, obtaining the rare distinction then called *laudabilis et qvidem egregie*.[3]

In 1923, Ross set out on a study tour which lasted two and a half years. In this same year he married Else-Merete Helweg-Larsen, a student at the Faculty of Humanities, who later became a high school teacher. She was a Member of Parliament in 1960–73, representing a small liberal party which held considerable influence over the formation of political majorities after general elections.

From information given by Ross himself, it seems his interest in the philosophy of law arose during mentioned trip, and he was particularly inspired by Professor Hans Kelsen in Vienna. The result of his studies abroad was the treatise *Theorie der Rechtsquellen* (A Theory of the Sources of Law).

Alf Ross wrote many diaries during periods of his life and also interesting source of his thoughts are letters to his wife or his colleagues and friends. This material makes it possible to give Alf Ross' perspective on his life, seen 'from below', or rather from 'within'.[4]

Until 1935 he had modest and, professionally, rather unrewarding jobs, such as assistant at the law library or secretary to the National Council of Child Welfare. He also received a scholarship granted by the Carlsberg Foundation to the University of Copenhagen. When Ross finally became a member of the Faculty of Law in Copenhagen in 1935, he was seen as a strange, but colourful bird in the quiet garden of legal science. At the same time, some must have known or felt that this was a scholar promising something new. In its report on the applicants, the faculty was wise enough not to depict Ross as a writer sending half intelligible messages from his ivory tower.

Ross became a professor of International Law in Copenhagen in 1938. In 1942 Ross published his *Lærebog i Folkeret* (Textbook on International Law). It appeared later in many editions and was translated into English and German. International Law was described by Ross as "*a conventional, non-coercive order with a secondary stamp of law.*"[5] He added that this applied to International law in its current shape. According to mentioned concept, International Law was an order between self-governing societies which might very well be equipped with organization, authorities and means of force. A development of this kind was highly desirable and became of renewed concern in the years after the Second World War.

Teaching International Law was, for nearly 14 years, Alf Ross' platform for dealing with general problems of legal theory and methodology. As an author he was free to write on whatever subject he wished. He thus produced a large amount of articles, which were later included in one

[3] WAABEN, K.: Alf Ross 1899-1979: A Biographical Sketch. In: EJIL, 2003, Vol. 14, No. 4, p. 661.

[4] It is also worth to mention diaries of Alf Ross's wife, Else-Merete Ross, who describes Alf Ross in some places in totally different perspective than it is used to by scholars. But her diaries should be taken with caution, because some letters were full of negative emotions. Alf and Else-Merete had temperamental and vivid marriage. See more in EVALD, J.: Alf Ross – a life. Copenhagen: DJØF Publishing, 2014, p. 15.

[5] WAABEN, K.: Alf Ross 1899-1979: A Biographical Sketch. In: EJIL, 2003, Vol. 14, No. 4, p. 666.

form or another in his main book on jurisprudence. In 1953 Ross published a book *Om Ret og Retfærdighed* (On Law and Justice), the opus magnum of Danish jurisprudence and his masterpiece. He wrote, appropriately so, that the discipline of jurisprudence or legal philosophy had long played a poor role in the teaching of law. This book was intended to be a textbook for law students, but proved to be far more than that. It became world-known and to these days it is used by legal philosophers.

Alf Ross served as a judge on the European Court of Human Rights from 1959 to 1972. These were not busy years in the Court, since very few cases were referred to it by the Commission of Human Rights. Ross was critical of this practice and wrote an article on it. However, a colleague on the Court persuaded him not to publish the article and it thus exists in a limited number of private reprints.

Ross believed in democracy and in a liberal economy. He never played an active part in political life. In 1945 he had proclaimed unreserved support for the Social Democrats and a belief in socialism without Marxism and communism. Twenty years later he declared himself unable to vote for that party because he feared it would enter a coalition with the smaller and more leftist Socialist Party.

In January 1979 Alf Ross had a surgery because of prostate cancer.[6] He regained his strength quickly and felt strong enough to write a comforting letter to the Swedish professor of law Ivar Strahl, who was in hospital, and he also wrote to his friend Richard M. Hare with professional advice. Nonetheless, Alf Ross suffered from cancer and in some letters he described the radiation therapy, pains and fatigue, his worries and his depression. Especially after the death of his wife Else-Merete Ross[7] he built a more intimate relationship with the Polish Ija Lazari-Pawlowska, professor of ethics at the Department of Philosophy in Lodz.

Alf Ross and Ija Lazari-Pawlowska corresponded frequently and Ross in many letters explained Ija Lazari-Pawlowska how serious his situation was. In a letter dated 30th August Ija Lazari-Pawlowska gave vent to her despair. "*I am aware of how serious the situation is. I am aware that one day I may really lose you and I cannot understand it. I am in despair. When you were well I always believed that we still have many years ahead of us… stay, Alf and have courage.*" [8] Alf Ross never read this letter because he died on 16th August 1979 at the age of eighty.

3 LIST OF PUBLICATIONS OF ALF ROSS

Alf Ross wrote a large amount of books, textbooks, articles etc., especially within his academic period of time. We can mention the most important ones:

- Kritik der sogenannten praktischen Erkenntnis: Zugleich Prolegomena zu einer Kritik der Rechtswissenschaft (Critique of the so-called practical knowledge: With prolegomena towards a critique of legal science) from the 1933,
- Concerning Reality and Validity in Legal Procedure: a Critique of the Fundamental Concepts of Theoretical Law (1934),

6 EVALD, J.: Alf Ross – a life. Copenhagen: DJØF Publishing, 2014, p. 353.
7 She died on the 1st March 1976.
8 EVALD, J.: Alf Ross – a life. Copenhagen: DJØF Publishing, 2014, p. 354.

- Towards a Realistic Jurisprudence: A Criticism of the Dualism in Law (1946),
- Why Democracy? (1946),
- Constitution of the United Nations (1950),
- On Law and Justice (1953, in English appeared in 1958),
- Tû-tû, Harvard Law Review vol. 70, Issue 5, March 1957,
- Danish Constitutional Law (1959-1960),
- The United Nations, Peace and Progress (1963, in English appeared in 1966),
- Directives and Norms (1968),
- Crime and Punishment (1974),
- On Guilt, Responsibility and Punishment (1970, in English appeared in 1975).

Additionally to mentioned publications, Ross published many articles in newspapers and journals, especially following his retirement from the faculty in 1969, on subjects as varied as euthanasia, pornography, domestic and world politics, war crimes, and the concepts of normality and disease in medical science. Some of these articles were collected in a small volume called *Demokrati, Magt og Ret* (Democracy, Power and Law) from 1974. Ross seemed to have enjoyed turning his hand to the brief and more relaxed style of commenting on current issues. These essays gave a more varied impression of what occupied Ross' mind as a private person, a citizen and an observer of the world around him.

4 ALF ROSS'S LEGAL PHILOSOPHY

4.1 Did Alf Ross see himself as a philosopher or a legal scholar?

Did Alf Ross consider himself a philosopher or a legal scholar? Occasional letters to and from colleagues and friends show that Alf Ross considered this himself and that depending on to whom he was writing he saw himself as either philosopher or legal scholar. In a letter dated 14th December 1932 to the German philosophy professor in Berlin Arthur Liebert, Alf Ross wrote that he could not understand why Liebert did not consider him to be a philosopher but instead one who prepares the road to philosophy. Alf Ross did not contest this statement, being of the opinion that he was closer to science than pure philosophy. Liebert had expressed the opinion that fundamentally philosophers were terribly rude and Alf Ross' comment on this was that he was not courageous enough to be rude. Later on in life Alf Ross considered himself to be both a philosopher and a legal scholar and he went as far as claiming that the foundation for any new advance in legal philosophy had to be made by people who had an academic background in both. Naturally he thought of himself.

„*I do not know of a philosophical fundamental position that I can adopt without having to admit to myself that the exact opposite position is also defensible. Therefore it is hopeless. I am lacking that ability to be one-sided that on its own can provide satisfaction and confidence.*"[9] His statement about the lack of one-sidedness is interesting because it is in such a pronounced contrast to the vigour with which he defended his own philosophical points of view.

[9] Ibid., p. 109-112.

His academic life was influenced especially by two philosophers – Hans Kelsen[10] and Axel Hägerström.[11]

After obtaining a law degree in Copenhagen (in 1922), Ross received a scholarship to study abroad and spent most of that period in France and England, and in particular in Austria in 1923. Here Ross was exposed both to Hans Kelsen's ideas and to the Viennese philosophical circle (though he did not come into contact with logical empiricism until around 1930). During his stay in Vienna, Ross completed a manuscript titled "*Theorie der Rechtsquellen*" (A Theory of the Sources of Law) which he submitted as a thesis for a doctor-of-law degree at the University of Copenhagen in 1926, only to be rejected. Ross thus decided to contact Hägerström and submit the manuscript as a thesis for a doctor-of-philosophy degree at the University of Uppsala.

Ross never disavowed his debt to Hägerström. To be sure, like many other Scandinavian legal realists, he wound up departing from Hägerström's teachings – he did so by addressing the concerns arising out of logical positivism (as by taking into account the central role of the philosopher in clarifying legal language) – and like those realists, he nonetheless continued to look up to Hägerström, the teacher "*who opened my eyes to the emptiness of metaphysical speculations in law and morality*."[12]

However, unlike Olivecrona and Lundstedt, Ross never followed Hägerström's teachings faithfully (nor did he claim to do so). Instead, he enriched the legal realist framework by incorporating into it insights coming from various philosophies and legal theories, primarily logical positivism and some aspects of Kelsenian legal theory and, to some extent, American legal realism.[13]

Despite this multiplicity of sources from which Ross proceeded, he is correctly considered a proponent of Scandinavian Legal Realism, this on account of the attention he devoted to the nature of legal science, focusing in particular on the question whether its status is cognitive or non-cognitive.

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10 He attended lectures by Professor Hans Kelsen on legal philosophy at the University of Vienna, during trip around Europe, including cities like Paris, Vienna, London and Berlin. The encounter with Hans Kelsen developed into a life-long friendship, which is not strange when one considers that their lives had several similarities. First of all, Kelsen had an interest in philosophy, mathematics and physics and had planned to study these subjects. Secondly, Kelsen was a public supporter of the Social Democrat party. Thirdly, Kelsen was concerned with the philosophy of law and constitutional law. Fourthly, Kelsen had been accused of stealing his ideas from others. Fifth, Kelsen was involved in a mighty personal feud that left deep wounds. Sixth, Kelsen was known to be charming, but cruel when defending his legal theory, which often expressed itself in attacks on his critics. These are the reasons that make it relevant and interesting to study Kelsen's often turbulent life in more detail. Ibid., p. 68.

11 He devoted his first academic works to both of them, specifically *Theorie der Rechtsquellen: Ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen (A theory of the sources of law. Contribution to the theory of positive law on the basis of historical-dogmatical investigations* was dedicated to Hans Kelsen and *Kritik der sogenannten praktischen Erkenntnis: Zugleich Prolegomena zu einer Kritik der Rechtswissenschaft (Critique of the so-called practical knowledge: With prolegomena towards a critique of legal science)* was dedicated to Axel Hägerström. See more in PATTARO, E. – ROVERSI, C.: Legal Philosophy in the Twentieth Century: The Civil Law World. Volume 12, Tome 2: Main Orientations and Topics. Berlin: Springer, 2016, p. 401-402.

12 ROSS, A.: On Law and Justice. London: Stevens & Sons, 1958. The Scandinavians have always explicitly recognized, some more than others (Lundstedt more than Ross, for example), that their philosophical foundation lies in the Uppsala School and in particular in Hägerström's inquiries in the world of legal and moral philosophy. See more in BJARUP, J.: Skandinavischer Realismus: Hägerström – Lundstedt – Olivecrona – Ross (Scandinavian realism: Hägerström, Lundstedt, Olivecrona, Ross). Freiburg i. B. and München: Alber, 1978, p. 23-38.

13 See, for example, HART, H. L. A.: Scandinavian Realism. In: Cambridge Law Journal, 1959, vol. 17, no. 2, p. 237, where Hart depicts Ross as "*an American realist in Scandinavia.*"

4.2 The Concept of Valid Law

According to Ross, law is valid when it has the property of binding a certain community or certain legal actors, such as judges, to certain modes of behaviour, whatever behaviour the law itself may prescribe. Validity is a content-neutral concept.[14] As legal realist, Ross believed that the source of validity needs to be sought outside the law, in the spatiotemporal coordinates of empirical reality. "*Our object in determining the concept of law is not to spirit away the normative ideas, but to put a different interpretation on them, reading them for what they are, the expression of certain peculiar psycho-physical experiences, which are a fundamental element in the legal phenomenon.*"[15] Simply: A legal norm is valid when is "*in force*". There are two empirical criteria that need to be met in order for a norm to be legally valid in the sense just specified:

- It must be recognized and followed by the majority of the community of addressees,[16] and
- it must be felt by this majority to be "socially binding," as against being morally binding, so this second criterion serves the purpose of distinguishing law from morals.[17]

According to Ross, the definition of valid law consists of these two criteria, that is, by predicating validity on *(i) efficacy* (the fact of a norm's being in force), and *(ii) a social feeling of being bound* by the norm.[18]

The first criterion, the efficacy criterion, is not something new in legal philosophy. It is also present in works of authors like Kelsen or Hart. By the contrast, much more debates and criticism raised to the second criterion – subjective or psychological criterion (feeling of being bound). The criticism was that this subjective factor makes it difficult to distinguish legal concepts from moral ones, since both are founded in the same feeling. Ross admitted that law and morals operate in the same way (on a psychological basis) and that to some extent they help each other in forcing people to act in certain ways. However, Ross emphasized that we have to differentiate between mode of operation and feelings behind the legal and the moral phenomenon. "*Whereas the addressees of legal provisions obey the law saying to themselves, "I ought to act thus" (that is, "I have to"), the addressees of moral prescriptions follow those rules saying, "I must act thus.*""[19] Later, Ross called former thinking as a *formal* legal consciousness, the later one called as *material* legal consciousness.[20]

To sum up, Ross understands law as "*whatever complex of norms and concepts happens to be binding in society, regardless of the ideologies espoused in society.*"[21] But the law is perceptive to its

[14] This can be linked to Kelsen's theory, see, for example, KELSEN, H.: General theory of law and state. Trans. Anders Wedberg. Cambridge: Harvard University Press, 1945, 516 p. But whereas Kelsen rested validity on the basic norm, Ross did not understand validity as a property of law and of legal concepts that can be derived from the legal system itself. More in PATTARO, E. – ROVERSI, C.: Legal Philosophy in the Twentieth Century: The Civil Law World. Volume 12, Tome 2: Main Orientations and Topics. Berlin: Springer, 2016, p. 403.

[15] ROSS, A.: Towards a Realistic Jurisprudence. Trans. A. I. Fausbøll. Copenhagen: Munksgaard, 1946, p. 48.

[16] In particular by the majority of the judicial body.

[17] ROSS, A.: On Law and Justice. London: Stevens & Sons, 1958, p. 18, 34-38.

[18] By this distinction, Ross believed that we can resolve one of the classical antinomies in legal philosophy, the antinomy between efficacy and obligatory force, in that the law is considered "*at the same time something factual in the world of reality [efficacy] and something valid in the world of ideas [obligatory force].*" Ibid., p. 38.

[19] PATTARO, E. – ROVERSI, C.: Legal Philosophy in the Twentieth Century: The Civil Law World. Volume 12, Tome 2: Main Orientations and Topics. Berlin: Springer, 2016, p. 404.

[20] ROSS, A.: On Law and Justice. London: Stevens & Sons, 1958, p. 55.

[21] See in PATTARO, E. – ROVERSI, C.: Legal Philosophy in the Twentieth Century: The Civil Law World. Volume 12, Tome 2: Main Orientations and Topics. Berlin: Springer, 2016, p. 405.

political and social environment. Therefore the validity of law is important. Validity of law means that the law is "*in force*", in that it is observed and it is felt to be binding by the majority of its qualified addressees, especially important are judges and other law enforcement authorities.

4.3 The Concept of Rights

Ross's legal theory rests on fact that central element of law lies in its language. Ross (like other Scandinavian legal realists[22]) begins his inquiry by directly focusing on the different concepts and categories that constitute the essence of legal language: duties, property, damages, and, more important, *rights*. The language is in his view the primary mean through which legal rules are produced by a legal order and addressed to the community. But legal language has also one specific feature. Its point is not to describe the world of the IS (Sein) or that of the OUGHT (Sollen),[23] nor does it describe an economically efficient reality or a relation of trust between the rulers and the ruled. Ross considers legal language as having a directive function. "*Legal language is an instrument of social control directed at shaping or creating a certain situation, especially through the influence it exerts on human behaviour.*"[24]

Through his investigations, Ross arrived at two concurrent ideas about the nature of law in general and of rights in particular. First, legal concepts, like that of rights, are in themselves detached from any system of moral, religious, or political values. The concept of rights is no more attached to moral or political values than is the expression ***tû-tû***. Ross even published an article so titled.[25] According to Ross, the legal concepts and categories constitutive of law do not even have an ontological dimension to begin with. "*"Ownership," "claim," and other words, when used in legal language, have the same function as the word "tû-tû"; they are words without meaning, without any semantic reference, and serve a purpose only as a technique of presentation.*"[26] The law is just a complex of linguistic signs or symbols, and some words (such as rights) are used for the purpose of leading its addresses to behave or not to behave in certain way. Ross calls them directives and they are "*utterances with no representative meaning, but with the intent to exert influence.*"[27] The law as such is a system based on the use of linguistic or symbolic signs. And words as *right* work as a stimulus designed to enforce response from the members of community, especially persons with the power to force some behaviour, namely judges.[28] According to Ross, the traditional constitutive concepts of legal language (concepts such as "rights" and "duties") are in themselves meaningless. Still, they acquire an authoritative status, that is, they become law, simply by virtue of their being set in a certain social

22 It is important to mention that the linguistic aspects of law are central to Lundstedt's and Olivecrona's inquiries too (due to the degree to which these two thinkers were influenced by Hägerström's historical analysis of the use of legal language and its fundamental role in explaining the binding nature of law). For instance see OLIVECRONA, K.: Becoming a king according to the old Swedish law: The rite of creating a king as a magic act. Lund: Lunds Universitets årsskrift, 1946. Ross was more influenced by other impacts, namely legal positivism, which shaped his legal thinking in significant ways. Example of the influence of logical positivism on Ross's work can be found in ROSS, A.: On Law and Justice. London: Stevens & Sons, 1958, p. 67.

23 Kelsen's view, see more, for example, in CHOVANCOVÁ, J. – VALENT, T.: Filozofia pre právnikov (filozoficko-právne aspekty). Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2012, p. 147-148.

24 ROSS, A.: On Law and Justice. London: Stevens & Sons, 1958, p. 8, 158-160.

25 ROSS, A.: Tû-Tû. In: Harvard Law Review, 1957, vol. 70, no. 5, p. 812-825.

26 Ibid., p. 819-821.

27 ROSS, A.: On Law and Justice. London: Stevens & Sons, 1958, p. 8.

28 Ibid., p. 32-33.

and political framework that, for example, makes words such as tû-tû meaningless, while making words like right or duty, by contrast, meaningful.[29]

Therefore, Ross believes that lawmaker has to enact the new law that lead to results. So, this new law has to be expressed in a legal language that in most cases shares the values of the majority of population. "*Only in this way can the law's stimulus-and-reaction mechanism work properly, bringing its addressees to actually consider the new law to be binding.*"[30] Summarizing, the concept of rights is a linguistic and socio-psychological tool used to influence human behaviour.

4.4 The Coercion in Law

There is one question that Ross tried to answer and it is: *how the rules that are perceived as binding law (and hence as valid law) can be distinguished from those that are not?* According to Ross the answer is coercion[31] (this is the basic criterion on which rest the binding nature of legal rules). "*By observing which rules come to bear in regulating social relations, we can single out the ones that actually affect or are likely to affect the way judges will decide a dispute.*"[32] According to Ross, to claim that a certain legal rule is valid means simply to claim that the rule will most likely be felt to be binding in future decision-making, in effect claiming that the rule will play a decisive role as a reason that courts in the future will invoke in deciding whether or not to apply a coercive measure.

Then coercion plays a central role in shaping the very nature of law. Ross views valid law as "*coercive system of rules regulating the institutional use of violence, especially and in the first place by the judiciary.*"[33] Reality of law lies in its coercive nature. Law enables certain persons (especially judges) to use violence, but in a way that its addressees feel to be legitimate.

But not every legal rule is backed up by the threat of sanction. In every legal system there exists a series of norms whose legal validity does not rest on their being guaranteed by coercion. There are norms, like those on jurisdiction or competence (especially at the higher levels of the legal system), whose validity stands independently of any coercive means of enforcement. "*These norms are valid (i.e. their addressees feel bound by them) not because force can be used to ensure compliance but precisely because, through a historical process of socio-psychological and linguistic reinforcement, these "rules without coercion" come to be viewed by those addressees, and in particular by the judges, as having cultural and political legitimacy*."[34]

4.5 Law, Politics and Purpose of Legal Science

In Ross's view, politics play essential role in its relation to the law.[35] But there is a distinction between law and politics, although they both function as mediums through which people can be forced or

29 ROSS, A.: Tû-Tû. In: Harvard Law Review, 1957, vol. 70, no. 5, p. 818.

30 More in PATTARO, E. – ROVERSI, C.: Legal Philosophy in the Twentieth Century: The Civil Law World. Volume 12, Tome 2: Main Orientations and Topics. Berlin: Springer, 2016, p. 407.

31 Especially as implemented by the judiciary.

32 Ibid., p. 408.

33 Ibid., p. 409.

34 ROSS, A.: On Law and Justice. London: Stevens & Sons, 1958, p. 78-80 or ROSS, A.: Towards a Realistic Jurisprudence. Trans. A. I. Fausbøll. Copenhagen: Munksgaard, 1946, p. 89-90, 108-112.

35 Actually, Ross devoted many pages of his most known book On Law and Justice on this topic. Particularly it is worth to mention chapters 13-17 of this book. See more in ROSS, A.: On Law and Justice. London: Stevens & Sons, 1958.

persuaded to behave in ways that they would not otherwise choose to behave in. Especially political order "*aims at bringing about practical agreement by influencing an opponent's viewpoint through argumentation and persuasion.*"[36] Lawmaking, contrary to political order, produces norms that are "*effectively complied with because they are felt to be socially binding.*"[37] In other words, "*over time the law has acquired a certain degree of independent legitimacy, that is, a legitimacy resting more on the specific ways a certain rule is enacted and implemented than on its content—more on its normative features than on its political goals.*" [38]

However, there is a special requirement to lawmaking in order to work as a system that produces valid law. New statutes and judicial decisions have to embody the sociological and political values dominant in the community, reproducing them as law. But which values can be picked out as the ones that prevail in the community? According to Ross we ought to recognize all those values traditionally embraced by the democratic political model, and he strongly criticizes Lundstedt's idea of "social welfare," stressing that the latter tends to bring together a mixed bag of interests and values that by their very nature are divergent.[39]

We can say in agreement with Ross that the law is open to the political ideologies and among other things it means that we have to broaden the range of traditional sources of legally relevant materials the judges have to look to in deciding a legal issue. Therefore, very important are authoritative sources of law and they are ranked high in the hierarchy of sources.

Emphasis should be also placed in the interpretation of law. Legal interpreters must bring mentioned influence of the political world into balance with their legal education and with the directions imposed by existing ways of legal reasoning. The law as such, is to some extent autonomous and this is appreciated by Ross in some of his books.[40] In Ross's view, "*political discourse always tends to take divergent interests and values into account at the same time, in such a way as to wind up reasoning from compromised concepts like that of social justice.*"[41] Political discussion does not lie on the plane of logic. It is argumentative, persuasive and its function is not to prove a truth, but to convince people that you are making right decisions in favour of community as such. By contrast, in legal reasoning there is no third solution between opposite values (e.g. it is valid or invalid law) and no compromise can be accepted (partial validity). The choice can only be between valid and invalid law, or, in Ross's terminology, between "*the law in force and the rules of law that are not in force and hence (on a realist perspective) are not valid.*"[42]

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36 Ibid., p. 326.

37 Especially by the judges. Ibid., p. 34.

38 PATTARO, E. – ROVERSI, C.: Legal Philosophy in the Twentieth Century: The Civil Law World. Volume 12, Tome 2: Main Orientations and Topics. Berlin: Springer, 2016, p. 410.

39 See more in ROSS, A.: On Law and Justice. London: Stevens & Sons, 1958, p. 289-296. Ross also notes that this sharing of values between legal and political orders is something that happens most of the time but not in all cases, recognizing that sometimes the law addresses technical issues that the majority of the population (or of the judges) have no knowledge of, and even if they did have some familiarity with such technicalities, they would not attach any value to them. Ibid., p. 372-377.

40 Ross's textbooks on constitutional law or in international law rarely make reference to political material as a source of law. When Ross takes up the reasoning developed within the political arena, he usually locates it under a specific and clearly separate heading dealing with the politics of law. In this sense, too, Ross's conception of legal science is influenced by Hans Kelsen. More in PATTARO, E. – ROVERSI, C.: Legal Philosophy in the Twentieth Century: The Civil Law World. Volume 12, Tome 2: Main Orientations and Topics. Berlin: Springer, 2016, p. 412.

41 Ibid., p. 412.

42 Ibid., p. 412.

Ross believes that law should be a scientific discipline. To this end, it was necessary for the end result of legal science to be open to testing. So, it is important to produce statements by the legal science that could be assessed as correct or incorrect "*in light of the empirical reality of the law in force, and in particular in light of judicial decisions*."[43] This should be main primary task of legal science.

A scientific investigation of the legal phenomenon is an investigation aimed at finding out what the law really is. Law is a powerful tool that the political institutions use to further their goals in society. Legal scholars therefore cannot disregard that development in the legal world, and in particular the making of new law. It would accordingly be self-limiting for the study of law to only rely on traditional analytical tools. Legal scholars must draw on history, political science, social science, psychology, sociolinguistics, and anthropology.[44] Legal science is necessary a mixed discipline because "*it is… impracticable to draw any sharp boundary line between cognitive pronouncements concerning valid law and legal political activity… Fundamentally, therefore, the cognitive study of law cannot be separated from legal politics.*"[45]

At the same time, however, Ross also promoted an idea of law as separate from politics. So, as much as he worked in the political order, he always did so as a lawyer and not as politician. According to Ross, "*the role of the lawyer as legal politician is to function as far as possible as rational technologist*," and legal scholars can intervene in the lawmaking process with mere "recommendations" offered to policy makers.[46] His work and positions were those traditionally entrusted to those with the technical expertise of a lawyer: He served as professor of law and as legal consultant in the legislative process.

5 CONCLUSION

At the beginning of this article a quote from Alf Ross made early in his academic career was used, when he was not sure about his strength to continue in the area of legal philosophy, especially in Denmark, where his thoughts were revolutionary to the classical and orthodox legal thinking focusing on legal positivism. Nowadays, we know that Alf Ross made good decision to carry on and published many great books and articles that enriched legal philosophy in many ways. He was remarkable, original, and influential, wrote the opus magnum of Danish jurisprudence (work *On Law and Justice*) and had life full of twists, both good and bad.

He even chose the time of his death. Ross had kept an ampoule of morphine at home for many years. He had been given this by his friend, doctor Erik Begtrup. On the day of his death, he said goodbye to his closest family and friends (via telephone or letter). During the day both Lone and Strange Ross (Alf's children) visited their father. On the same day Alf Ross recorded a tape and wrote on the box that it was of possible use for a memorial celebration.

43 ROSS, A.: On Law and Justice. London: Stevens & Sons, 1958, p. 38-50.

44 As Hilaire McCoubrey and Nigel D. White comment, "*it is not very surprising that Scandinavian realism originated at the beginning of the twentieth century at a time when the psychological theories of Sigmund Freud were very much in the public eye*." McCOUBREY, H. – WHITE, N. D.: Textbook on Jurisprudence. London: Blackstone Press Limited, 1999, p. 178. Similar influence of psychological studies was on representatives of American Legal Realism. See DUXBURY, N.: Patterns of American Jurisprudence. Oxford: Clarendon Press, 1995, p. 126-127.

45 ROSS, A.: Directives and Norms. London: Routledge & Kegan Paul, 1968, p. 48-49.

46 ROSS, A.: On Law and Justice. London: Stevens & Sons, 1958, p. 377.

In the evening of 16th August 1979 Alf Ross injected himself with the morphine. Just as he had soberly analysed his life, his illness and his death were carefully considered and his decision was made in accordance with his scientific, atheistic approach to life. On his bed there was a volume of selected works by Soya, which was opened at the short story '*Karneval i Aalsinge*'. On his night stand was a hymn book opened at B.S. Ingemann's '*Der står et slot i vesterled*'.[47]

Saturday 25th August 1979 the family celebrated a small memorial for Alf Ross and listened to the tape that he had recorded. Alf Ross read aloud two poems and having read the poems, short pause followed and after it Alf Ross said "*That was it. Thank you for your attention.*" [48]

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47 EVALD, J.: Alf Ross – a life. Copenhagen: DJØF Publishing, 2014, p. 356.

48 Ibid., p. 357.

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THE DIGITAL TAX SYSTEM IN THE LIGHT OF GDPR

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Abstract: The digital tax system is becoming extremely essential in the modern world. As we look at the system itself as a great benefit for its users and states as well, we tend to forget the role of personal data within it. Personal data play crucial role in the errorless digital tax system. The new regulation of EU, General Data Protection Regulation is addressing processing of personal data within the state administration of EU member states. The aim of this article is to examine the effect of GDPR on the digital tax system and encourage wide academic and public discussion in relation to processing of personal data in the digital tax system.

Keywords: data protection, GDPR, tax, digital tax system, public tax authorities.

1 INTRODUCTION

State tax administrations are embracing the advantages of digital age at a steady speed. While some countries, such as the UK, are introducing digital tax system in April 2019, others are at the stage of planning. The Slovak Republic is carefully approaching the digital world by the means of informatization and adjusting existing services to digital users. Taking into account the undeniable benefits of the digital tax system, there are also substantial data protection issues to be solved. Considering the character of digital tax system, the following analysis of potential amendments to the tax system in relation to data protection might be needed. The inspiration has been found in the UK, which presents the vanguard of digital tax system in Europe. Firstly, the article will analyse requirements posed by GDPR[1] in relation to the tax system of the Slovak Republic. Secondly, the UK's approach to chosen data subject's rights will be referred as an example of GDPR implementation. Thirdly, authors will suggest selected approaches to data protection issues involved in the future tax digital system of the Slovak Republic.

2 THE GDPR REQUIREMENTS FOR THE TAX SYSTEM OF THE SLOVAK REPUBLIC

Upon the qualification of public authorities and public tax authorities (further as "PTAs or PTA") as well[2] as controllers or processors,[3] in most cases GDPR burdens public authorities the same ob-

1 Regulation (EU) 2016/679 of the European Parliament and of the Council of 2burde7 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

2 We recognize tax public authorities a such Ministry of Finance of the SR, Financial Administration of the SR and many others which govern the tax system of the SR.

3 This article will not examine the roles of a recipient and third party due the complexity of the issue and will purely focus on the roles of a controller and processor.

ligations as private companies, but some exceptions can be found. These exceptions prescribed by GDPR are related to the special character of public authorities connected to their role within a state administration. Additionally, previous data protection legislation had profound effect on data protection measures implemented by public authorities, there had been considerable compliance with the data protection legislation. The Act No. 122/2013 on data protection and amendments to certain acts (further "Act No. 122/2013") was rigid in the sense of obligations of legal entities processing personal data, therefore all legal entities had to amend some of existing obligations and comply with various new obligations in accord with GDPR. Although private companies and public authorities had abided the Act. No. 122/2013 and implemented many obligations, GDPR confers quite high numbers of new obligations.[4] Authors will highlight all amended and new obligations of tax public authorities in following paragraphs.

2.1 The controller's obligation to inform the data subject

The controller's obligation to inform the data subject is governed by Article 12, 13 and 14 of GDPR. Article 12 of GDPR is regulating the obligations of controller (PTA) within providing any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 relating to processing to the data subject. This article replaced § 29 of Act No. 122/2013 and is more precise and detailed in comparison to previous legislation in terms of exercising the rights in art. 13, 14 and 15 to 22 and 34 of GDPR.

The right to information to be provided where personal data are collected from the data subject according to art. 13 of GDPR has to be exercised in accordance with art. 12 and also art. 13 of GDPR. Article 13 of GDPR prescribes the list of information provided to data subject at the time when personal data are obtained. The previous legislation was silent on the type of information provided to the data subject, therefore it is a partially new obligation for PTAs.

The only exception when the controller is not obliged to inform the data subject in accordance with article 13 is when the data subject already has the information.[5]

The controller's obligation to inform data subject where personal data have not been obtained from the data subject under art. 14 of GDPR is changed in the same fashion as the obligation under art. 13 of GDPR. The controller must provide the data subject with same information as information in article 13,[6] there is no obligation to inform about a processor and information has to be provided in accordance with art. 12 of GDPR, therefore in a concise, transparent, intelligible and easily accessible form, using clear and plain language. The instances for not informing the data subject where personal data have not been obtained from data subject are four under article 14 sec. 2 point 5 while under article 13 sec. 4 there is only one instance.

Some obligations have been updated, others have been added and certain obligations were abolished. The controller' obligation to inform data subject about a processor and the form of disclosure when personal data were to be disclosed is abolished by GDPR because it is replaced by providing

4 Transfer of personal data to third countries and international organisations, conditions applicable to child's consent in relation to information society services, a "purpose limitation" are not analysed in this article due to the complexity of these topic.

5 Art. 13 (4) of GDPR.

6 According to art. 14 sec. 2 point f) the controller has to provide information about the source from which the personal data originate, and if applicable, whether it came from publicly accessible sources. This information is not provided under art. 13.

aforementioned information within the execution of right under art. 13 of GDPR. Within functioning of PTAs, the aforementioned changes will probably result into updating exiting informative forms or creating new forms for data subject across the whole tax system. In the digital tax system, the update of digital forms for informing data subject might be easier, quicker and cheaper due the character of tools used to manage the tax digital system. The update of general informative forms might be executed through the whole tax system by amending those forms by a "click". Subsequently the updated forms might be published on the websites of all PTAs or in the data subject's personal tax account, and put within all tax forms at the moment of filling of tax forms by a tax subject.

2.2 The responsibility of controller and processor

GDPR brought very wide range of amendments related to responsibility of controllers and processors. Article 26 of GDPR brings a new type of a controller, a joint controller, which administratively burdens those public tax authorities which found themselves to be joint controllers. Another administrative burden brought by GDPR is the amendment of a contract with a processor under art. 28 of GDPR. PTAs using processor have to take into account these amendments, update existing contract and apply new requirements to future processors.

All PTAs have obligation of appointing a data protection officer under art. 37 sec. 1 point a). The effect of new role within data protection is far reaching, it might have financial, administrative and personal impact on PTAs. GDPR offers to public tax authorities the possibility of a single data protection officer designated for several such tax authorities, taking into account its organisational structure and size. A single data protection officer for a group of PTAs would significantly decrease the burdening effect of this new role.

2.3 The security of personal data

The general obligation for the controller to take appropriate security measures is based on Art. 24 of GDPR in connection with Art. 32 to 34. Article 24 generally defines that the controller is obliged to implement appropriate technical and organizational measures to ensure and be able to demonstrate that the processing is carried out in accordance with GDPR and, if necessary, to review and update those measures. The measures should be based on the nature, scope, context and purpose of the processing, as well as on the risks with different likelihood and severity for the rights and freedoms of natural persons. Where appropriate in the light of processing activities, these measures include the introduction of adequate data protection policies by the controller.

Security measures include the adoption of appropriate technical, organizational and personnel security measures and guarantees by both the controller and the processor, which take into account, in particular, the principles of processing personal data such as the nature, scope, context and purposes of processing; resilience and recovery of processing systems, instructions of authorized persons, the adoption of appropriate measures to identify without delay the personal data protection breach and to promptly inform the regulator and the data subject; the adoption of appropriate measures to ensure the correction or erasure of incorrect data or other exercise of the rights of the data subject; and risks of different likelihood and severity for the rights and freedoms of data subjects.

Implementing aforementioned measures means for public PTAs to re-evaluate existing security measure and implement new ones, such as pseudonymisation. All the measure are applicable within the digital tax system whereas the focus should be put on the digital security.

While security measures have been redesigned, the obligation of controller to develop a security project according to art. 20 of previous legislation, Act No. 122/2013, has been abolished by GDPR and replaced by the new obligation under art. 35 of GDPR. This new obligation of carrying out data protection impact assessment is binding for public tax authorities in three cases under art. 35 sec. 3, therefore the authorities need to evaluate if they satisfy conditions in art. 35 sec. 3 and if the answer is positive, those authorities are obliged to carry out data protection impact assessment.

When the public tax authority carries out data protection impact assessment which indicates that the processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk, the public tax authority shall consult the supervisory authority prior to processing. To comply with this obligation, PTA might implement an internal process involving and executed by the data protection officer to analyse intended or actual data processing in regard to posing a high risk for the rights and freedoms of data subjects. This process should be kept active for future different data processing operations which need to be included into data protection assessment as well.

Along with implementing security measures, PTAS are obliged to keep records of processing activities. This is a new obligation under Art. 30 of GDPR replacing the registration obligation under Art. 43 of Act No. 122/2013. The obligation applies to the controller and the processor while previous legislation only required the evidential records from the controller. Records are kept in written form, including electronic form. For the purpose of demonstrating compliance with the GDPR, both the controller and the processor should keep records of the processing activities for which they are responsible under Art. 30 of GDPR. This article also defines the exact contents of the records. Keeping records of processing activities seems inevitable for all PTAs because the exception from this obligation under art. 30 sec. 5 is not applicable to the most of PTAs. Also, the tax public authorities will have to amend the type of data contained in records because GPDR changed the data in records comparing to Act No. 122/2013.

Despite lawyers' perception of GDPR mostly as "added weight", the regulation abolished several obligations too. One of them is the notification obligation under articles 33 to 36 and registration obligation under articles 37 to 42 of Act No. 122/2013. PTAs are no longer obliged to notify and register information systems at the Office for Personal Data Protection of the Slovak Republic (further only "the Office").

Public tax authorities can abide all obligations posed by GDPR and the security of personal data can be breached despite all implemented measures. Under art. 33 of GDPR in the case of a personal data breach, the controller shall without undue delay and, where feasible, not later than 72 hours after having become aware of it, notify the personal data breach to the Office, unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons. Where the notification to the Office is not made within 72 hours, it shall be accompanied by reasons for the delay. The data subject is protected under art. 34 of GDPR. When the personal data breach is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall communicate the personal data breach to the data subject without undue delay. The articles yield several consequences for PTAs. Firstly, under art. 33 sec. 5 of GDPR PTAs have to keep documentation about all personal data breaches. Secondly, PTAs should invent a mechanism of monitoring and notifying

the data protection officer. The mechanism should be effective due to short time period of 72 hours. A supervising authority for all PTA is the Office based on article 55 sec. 2 of GDPR.

Absolutely new tools to the data protection are codes of conduct (art. 40 of GDPR) and certifications (art. 42 of GDPR) which can be used by PTAs for proving the compliance with GDPR. PTAs or other public authorities can also fulfil a role of the certification bodies for controllers.

2.4 Lawfulness of processing

GDPR redesigned lawfulness of processing in a great depth. Article 6 of GDPR contains some of the previous legal basis for lawful processing such as a consent of data subject under art. 6 sec. 1 point a), while introducing a new legal basis for lawful processing such as "legitimate interest" under art. 6 sec 1 point f) of GDPR. Certain previously binding legal basis were rescinded by GDPR such as legal basis under art. 10 sec. 3 point d) "direct marketing in postal services", art. 10 sec. 3 point e) "processing of previously published personal data", art. 15 sec. 4 "one time entry" and art. 15 sec. 7 "monitoring of areas accessible to the public" of Act No. 122/2013. The effects of those amendments for PTAs are that PTAs are obliged to replace rescinded legal basis by new ones under article 6 of GDPR assuming that PTAs are willing to continue in these types of data processing. Given the character of rescinded legal basis, it can be replaced by legal basis under art. 6 sec. 1 point c) "legal obligation" or under art. 6 sec. 1 point f) "legitimate interest". Updating legal basis according to art. 6 of GDPR also means for PTAs the update of privacy notice published in its official websites in order to fulfil the informative obligation against data subjects.

The consent of data subject has been also redesigned by article 7 of GDPR. The new legislation specifies the content and formalities of consent as a legal basis for the processing of personal data. Although PTAs might predominantly process personal data lawfully under art. 6 sec. 1 point e) of GDPR,[7] numerous instances of requiring the consent of data subject might occur within PTAs' wide area of activities. Given to the need of consent PTAs should send all eligible data subject a new redesigned consent and come up with a new update version of consent for future eligible data subject.

In connection to data of a deceased person, GDPR repeals the provision of § 12 par. 7 of Act No. 122/2013 "processing the personal data of a deceased person". In cases where PTAs processed data of a deceased person, PTAs should not continue in processing or replace the rescinded legal basis by suitable legal basis under art. 6 of GDPR.

A high number of public authorities, including PTAs, process special categories of personal data. GDPR brings in Art. 9 sec. 2 legal basis superseding the general prohibition on the processing of specific categories of personal data which means that PTAs are obliged to re-evaluate processing of special categories of personal data and update legal basis in accordance with GDPR.

The usefulness of automated processing for the digital tax system is undeniable, therefore, PTAs must consider new legislation under article 22 of GDPR. Although art. 22 present general prohibition of automating processing, including profiling, there are certain exemptions. One exemption is that automated processing including profiling is allowed by GDPR when it is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests. PTAs are allowed to

7 Processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.

conduct automated processing in the course of executing its legal obligations required by current legislation of the Slovak republic and EU, and PTAs also must implement safeguard measures for data subject's rights and freedoms and legitimate interests.

2.5 Rights of data subject

Rights of data subject have been significantly revamped by GDPR. The right to rectification under article of GDPR is more precise than the same right under art. 28 sec. 1 point e) of Act No. 122/2013. Without undue delay PTAs are obliged to provide data subject with the rectification of inaccurate personal data concerning him or her. Within this right PTAs are also obliged to replenish incomplete personal data, including by means of providing a supplementary statement.

Although GDPR brought a new right to erasure (right to be forgotten) under art. 17, PTAs are not burdened by the execution of this right mainly when its processing is necessary for compliance with a legal obligation which requires processing by Union or Member State law to which the PTA is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the PTA or for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes. Art. 17 sec. 3 offers additional conditions under which PTAs are not legally bound to exercise this right.

Another new right embedded in GDR is the right to restriction of processing under art. 18. When processing is restricted in accord with conditions lay down in art. 18 sec. 1, PTAs are allowed to process personal data only with the data subject's consent or for the establishment, exercise or defence of legal claims or for the protection of the rights of another natural or legal person or for reasons of important public interest of the Union or of a Member State. PTAs are obliged to inform the data subject when the restriction of processing is lifted.

Article 20 of GDPR introduced new right to portability. PTAs are not obliged to exercise this right when they perform or carry out tasks in the public interest or in the exercise of official authority vested in the PTAs.

Alongside the right to rectification, erasure and portability, GDPR serves the data subject with the right to object under art. 21, where data subjects can object processing of personal data concerning him or her which is necessary for the performance of a task carried out in the public interest or in the exercise of official authority, or necessary for the purposes of the legitimate interests pursued by the controller or by a third party. PTAs can carry out processing of personal data even after the objection of data subject when PTAs demonstrate compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.

An extremely heavy burden for PTAs might be the notification obligation under art. 19 of GDPR. PTAs shall communicate any rectification or erasure of personal data or restriction of processing carried out to each recipient to whom the personal data have been disclosed, unless this proves impossible or involves disproportionate effort. The PTA shall inform the data subject about those recipients only if the data subject requests it.

2.6 The approach of HMRC[8] to controller's obligation to inform data subject

Authors consider the HMRC approach to the digital tax system as the most progressive and suitable to inspire PTAs in the Slovak republic. Firstly, around 2015 HMRC launched a package of six consultations[9] which aim to design tax system around people it affects. These consultations are to discuss all the aspects of the tax system, including its digital character and therefore the use of personal data in digital era. Within consultations, citizens (data subjects) were able to input their suggestions in the process of creating digital tax system and became aware of data protection as well. Secondly, in the second stage of creating functioning digital tax system, HMRC introduced "Making Tax Digital". "Making Tax Digital is a key part of the government's plans to make it easier for individuals and businesses to get their tax right and keep on top of their affairs. HMRC's ambition is to become one of the most digitally advanced tax administrations in the world."[10] Making Tax Digital is focusing on VAT and incomes. Under this digital tax system, digital VAT returns will be required from 1 April 2019. It will be a pilot system opened to around half a million businesses. In connection to the controller's obligation to inform data subjects, authors would like to highlight "HMRC privacy notice"[11] which is a website dedicated to fulfilling all PTAs informative obligations under art. 12, 13 and 14 of GDPR and related articles. This privacy notice presents a practical way of accommodating the right to be informed and to access personal data. Authors highly recommend to all PTAs to go through the website and make good use of presented notice.

3 CONCLUSION

GDPR brought many amendments to the data protection in the hands of PTAs. Authors are of opinion that the digital tax system is better equipped to carry out obligations stemming from new legislation because the system can process an enormous extent of personal data need in taxation by using automated processing of personal data. Additionally, the tax digital system is able to publish all required forms online, such as consent, a form to object, a form for informing the data subject when the restriction of processing is lifted, a form to rectify or erase personal data and other forms required by GDPR. Online filling of these forms might speed up the process of taxation and minimise misuse of personal data. The possibility of unification of those forms for the PTAs conducting the same activity might also be easily implemented within the digital tax system. Issuing certifications under art. 42 might be executed only in a digital form from the point of filling the form to the final point of granting a digital certificate. The possibility of digital tax system in data protection field are endless, PTAs could invent a digital process of informing the Office about data breach under art. 33 of GDPR. This process seems to be effective due to the short reactive time of 72 hours.

8 HMRC stands for Her Majesty's Revenue and Customs. HMRC is responsible for the collection of taxes.

9 Available at: https://www.gov.uk/government/collections/making-tax-digital-consultations (accessed on 5th November 2018).

10 https://www.gov.uk/government/publications/making-tax-digital/overview-of-making-tax-digital#income-tax (accessed on 5th November 2018).

11 https://www.gov.uk/government/publications/data-protection-act-dpa-information-hm-revenue-and-customs-hold-about-you/data-protection-act-dpa-information-hm-revenue-and-customs-hold-about-you (accessed on 5th November 2018).

The biggest challenge for the digital tax system might be a security of personal data. PTAs must employ effective security measure, be it virtual such as firewall or physical such as securing hardware in special locations as well. A very important role plays the awareness of public towards data protection, where educating public about possible threats is a firm practice of HMRC.[12]

Authors are of opinion that thorough implementation of GDPR obligations tailored to need of PTAs, a healthy inspiration by HMRC's practice and education of tax payers is the best way of creating the secure and effective digital tax system in the Slovak Republic.

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[12] https://hmrcdigital.blog.gov.uk/2018/06/12/combating-scamming-the-latest-threat-to-hmrc-customers/ (accessed on 5th November 2018).

REVIEWS

XIX CZECH-POLISH-SLOVAK CONFERENCE ON ENVIRONMENTAL PROTECTION LAW – REPORT

Tomasz Bojar-Fijałkowski
Kazimierz Wielki University, Chamber of Administrative Law and Environmental Protection Law

For the 19th time international conference on environmental law has already taken place. This year's edition, after meeting in the area of Trnava in 2016 and Brno in 2017, has fallen to the Polish side. The organizer of it was the Chamber of Administrative Law and Environmental Protection Law of the Kazimierz Wielki University in Bydgoszcz. The theme of this year's conference was "Control of environmental regulation's compliance" and the proceedings were held on 19-21 September this year.

More than fifty participants from two Slovak[1], four Czech[2] and sixteen Polish[3] research units engaged in environmental protection law and representatives of environmental protection administration[4] and administrative judiciary authorities[5] held debates in Chełmno in the Kujawsko-Pomorska Province. The Scientific Committee of the Conference[6] was chaired by Dr. hab. Prof. UKW Zbigniew Bukowski, and Dr. Tomasz Bojar-Fijałkowski was chairing the Organizing Committee.[7]

The opening of the conference, in the historic Chełmno town hall, was done by the vice-rector of the University of Kazimierz Wielki in Bydgoszcz, prof. Zbigniew Bukowski and the mayor of Chełmno, Mr. Mariusz Kędzierski. In the same place, panel I of the conference took place. It was entitled "Theory of the control of environmental regulation's compliance" and chaired by prof. Zbigniew Bukowski. As the first one, a lecture entitled "An introduction to control mechanisms in environmental law" was given by doc. JUDr. Vojtěch Stejskal, Ph.D.[8] Next speaker was Dr. hab. Prof. INP PAN Adam Habuda[9] with an address "Poland's compliance to the provisions on environmental protection in reference to the jurisdiction of the Court of Justice of the European Union". JUDr. Mar-

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2 Charles University in Prague, Masaryk University in Brno, Palacký University in Olomouc, Tomas Bata University in Zlín.

3 Kazimierz Wielki University in Bydgoszcz, Nicolas Copernicus University in Toruń, University of Łódź, University of Silesia in Katowice, University of Szczecin, University of Gdańsk, University of Warmia and Mazury in Olsztyn, University of Białystok, Maria Curie Skłodowska University in Lublin, The John Paul II Catholic University in Lublin, Institute of Law Studies Polish Academy of Science, Academy of Fine Arts in Gdańsk, Jan Długosz University in Częstochowa, European School of Law and Administration in Warsaw, Gdańsk College, Bydgoszcz College.

4 General Inspectorate of Environmental Protection of Poland, regional directories of environmental protection in Poland.

5 Supreme Administrative Court of Poland, regional administrative courts in Poland.

6 List of members: dr hab. Prof. UKW Zbigniew Bukowski (Kazimierz Wielki University in Bydgoszcz), prof. zw. dr hab. Janina Ciechanowicz-McLean (University of Gdańsk), prof. zw. dr hab. Wojciech Radecki (Institute of Law Studies Polish Academy of Science), prof. JUDr. Milan Damohorský, DrSc. (Charles University in Prague), doc. JUDr. Vojtěch Stejskal, Ph.D. (Charles University in Prague), dr Tomasz Bojar-Fijałkowski (Kazimierz Wielki University in Bydgoszcz).

7 List of members: dr Tomasz Bojar-Fijałkowski, mgr Katarzyna Biskup, mgr Miłosz Chruściel – employees in Chamber of Administrative Law and Environmental Protection Law of the Kazimierz Wielki University in Bydgoszcz.

8 Charles University in Prague.

9 Institute of Law Studies Polish Academy of Science.

tina Franková, Ph.D.[10] gave a lecture on "Private law limits of control of environmental regulation". Another speaker, Dr. hab. Prof. UŚ Grzegorz Dobrowolski,[11] gave a lecture "On the necessity for the reform of institutional environmental protection in Poland". Prof. JUDr. Soňa Košičiarová, Ph.D.[12] delivered a lecture titled "The legal nature and types of inspection instruments in environmental protection in Slovakia". The panel ended by a lecture entitled "Control of the compliance in the Czech Nature Conservation Law" by prof. JUDr. Milan Damohorský, DrSc.[13] After the end of the first panel, the participants visited the Chełmno Land Museum, located in the town hall, along with a viewing terrace and a tower.

Continuation of the conference took place at Karczma Chełmińska Hotel. Here was also held the panel II of the conference entitled "Organs and institutions in control of environmental regulation's compliance part 1", chaired by prof. Soňa Košičiarová. The first speech, by Dr. Daria Danecka[14], was dedicated to the "Organization of environmental inspections in Poland, the Czech Republic and Slovakia". This thread was continued by prof. zw. dr hab. Wojciech Radecki[15] and his speech entitled "The role of the Environmental Inspectorate in prosecuting crimes, administrative offenses and torts in Poland, the Czech Republic and Slovakia". Mgr. Martin Dufala, Ph.D.[16] gave a lecture entitled "Status and Role of The Slovak Inspection of the Environment". Dr hab. Prof. UWM Elżbieta Zębek[17] presented the speech "The role and competences of the regional director of environmental protection in the field of nature protection on the example of the Warmia and Mazury Voivodeship". The panel was completed by Mgr. Katarzyna Zawada[18] with the report "Bodies for controlling compliance with environmental law in the Russian Federation".

Panel III entitled "Organs and institutions in control of environmental regulation's compliance part 2" was chaired by prof. Grzegorz Dobrowolski. Prof. zw. dr hab. Bartosz Rakoczy[19] delivered here his speech "State Water Farm "Wody Polskie" as a control body in the field of collective water supply and collective sewage collection". JUDr. Jiří Pokorný, Ph.D.[20] presented the speech entitled "The Role of the Czech Energy Regulation Office in the Area of the Environmental Protection". In turn, Dr. Tomasz Bojar-Fijałkowski[21] presented the paper "Environment as a subject of control for the Sanitary Inspection". JUDr. Tereza Snopková, Ph.D.[22] gave a lecture on "Municipalities and control of environmental regulation's compliance". Dr Joanna Sylwia Kierzkowska[23] gave a lecture "Implementation of a control function by communal (municipal) guards in the subject of waste management in the light of statistics of the Municipal Police in Bydgoszcz". Mgr. Filip Nawrot[24] gave a lecture on "Few remarks about the system position of Lasy Państwowe". The panel was finished

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11 University of Silesia in Katowice.
12 Trnava University in Trnava.
13 Charles University in Prague.
14 Institute of Law Studies Polish Academy of Science.
15 Institute of Law Studies Polish Academy of Science.
16 Comenius University in Bratislava.
17 University of Warmia and Mazury in Olsztyn.
18 University of Silesia in Katowice.
19 Nicolas Copernicus University in Toruń.
20 Charles University in Prague.
21 Kazimierz Wielki University in Bydgoszcz.
22 Charles University in Prague.
23 Gdańsk College, Bydgoszcz College.
24 University of Silesia in Katowice.

by Mgr. Wojciech Iskra[25] with the speech "Wody Polskie – structure and tasks". The first day of the conference, September 19, ended with visiting the monuments of Chełmno and a gala dinner.

On September 20 two panels were planned. Panel IV "Instruments and procedures of control of environmental regulation's compliance part 1" was led by prof. Milan Damohorský. During it, prof. zw. dr hab. Marek Górski[26] gave a lecture on "Water law assessment as a preliminary supervision formula". Dr hab. Prof. KUL Anna Haładyj[27] presented a paper entitled "Control powers in waste transport". Dr Diana Trzcińska[28] spoke about "Control of the economic exploitation of resources of nature". Dr Ewa Radecka[29] on "Control of compliance with prohibitions in the national park and nature reserve". Mgr. Jana Šmelková, Ph.D.[30] presented the paper "Violation of legal obligations in the area of nature and landscape protection in Slovak Republic conditions". Mgr. Natalia Kubacka-Burakiewicz[31] gave a lecture on the "Control rights of Straż Leśna". The panel ended JUDr. Jiří Zicha, Ph.D.[32] with a report "Enforcement of Environmental Standards by Criminal Law: Example of Wildlife Crime in Europe". After the panel IV, the participants of the conference went to Bory Tucholskie forests for a study visit devoted to nature conservation.

When the participants returned to Chełmno, a panel V entitled "Control of environmental regulation's compliance in administrative and administrative court's procedures" was held, chaired by doc. JUDr. Vojtěch Stejskal. Prof. zw. dr hab. Jerzy Stelmasiak[33] gave a lecture "Follow-up of post-control order of the voivodship environmental protection inspector in jurisdictions of administrative courts". Dr. Zygmunt Wiśniewski[34] presented a paper entitled "The role of administrative courts in controlling compliance with environmental protection regulations – selected issues". Dr. hab. Prof. UwB Ewa Katarzyna Czech[35] spoke about "Control of compliance with environmental protection regulations in the context of defining the date of performance of obligations imposed by the application of art. 362 of the Environmental Protection Law". Dr Karolina Szuma[36] delivered a paper on "Evidence for the fact of the violation of environmental law". Mgr. Michał Makuch[37] talked about "Judicial control of the creation and functioning of forms of nature protection in Poland". The panel was closed by Mgr. Eliza Jurkianiec[38] with the speech "Judicial and administrative control of imposing fees raised in environmental proceedings".

The last, third day of the conference, falling on September 21, opened panel VI entitled "Instruments and procedures of control of environmental regulation's compliance part 2", chaired by prof. Anna Haładyj. The opening speech "Effectiveness of the implementation of the legislation on the Common Agricultural Policy in the assessment of the European Court of Auditors" was given by

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26 University of Szczecin.
27 The John Paul II Catholic University in Lublin.
28 University of Gdańsk.
29 University of Silesia in Katowice.
30 Comenius University in Bratislava.
31 University of Warmia and Mazury in Olsztyn.
32 Tomas Bata University in Zlín.
33 Maria Curie Skłodowska University in Lublin.
34 Supreme Administrative Court of Poland.
35 University of Białystok.
36 European School of Law and Administration in Warsaw.
37 Jan Długosz University in Częstochowa.
38 Institute of Law Studies Polish Academy of Science.

Dr. hab. Monika A. Król.[39] JUDr. Vojtěch Vomáčka, Ph.D.[40] presented the paper "Waste Control Practices in the Czech Republic". JUDr. Michal Sobotka, Ph.D.[41] gave a lecture entitled "Control mechanisms of waste management". Dr. Michał Buliński[42] presented the paper "Natural inventory and the consequences in effective compliance with nature and environmental protection regulations". The panel was closed by Mgr. Katarzyna Biskup's[43] speech "Administrative fees in connection with the implementation of the investment in contravention of the conditions set out in the decision on environmental conditions".

The last, panel VII of the conference, entitled "Instruments and procedures of control of environmental regulation's compliance part 3", was led by Dr. hab. Monika Król. In this panel Mgr. Karel Huneš[44] gave a lecture on "Control in the area of artificial snow production". Mgr. Jan Hak[45] presented a paper entitled "The right to information as a tool of control of environmental regulation's compliance". Mgr Klaudia Cholewa[46] gave a lecture on "Cooperation in issuing decisions on environmental conditions". Mgr. Miłosz Chruściel[47] spoke about "The role of the Regional Directorate of Environmental Protection in the use of funds from the Natura 2000 program". Dr Małgorzata Szalewska[48] gave a lecture "Control of a water and sewage company as the competence of a mayor or city president". The panel was closed by Dr. hab. Prof. UKW Zbigniew Bukowski[49] with speech "Control of compliance with environmental protection regulations versus circular economy".

prof. Zbigniew Bukowski also summarized and closed the debates, thanking the participants for coming to Chełmno and active participation. Prof. Milan Damohorský invited the participants of the conference to the XX anniversary Czech-Polish-Slovak conference on environmental law, which is to take place in September 2019 in Prague. Its organizer will be the Charles University in Prague and the team of prof. Damohorský. The intention of organizing the XXI conference, in 2020, was declared by the representatives of the Comenius University in Bratislava.

When the participants submit the written versions of presentations, the organizers of the XIX Czech-Polish-Slovak conference on environmental protection law "Control of environmental regulation's compliance" plan to publish a monograph. Thanks to the courtesy and commitment of prof. Wojciech Radecki and prof. Milan Damohorský all the speeches during the conference in Chełmno were translated, so participants gave speeches in their first languages without worrying about their understanding by participants from other countries.

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40 Masaryk University in Brno.
41 Charles University in Prague.
42 Academy of Fine Arts in Gdańsk.
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