

### Dear Reader,

This issue of *Juridica International* is dedicated to the 15<sup>th</sup> anniversary of the Constitution of the Republic of Estonia, and it offers reading and thinking not only on the issues of constitutional law that are specific for Estonia, but also those with a broader meaning.

The Constitution of the Republic of Estonia has been in effect in the newly independent Estonia for 15 years, and has ensured the democratic development of the state. It may be said that during those 15 years, no serious political crises have occurred in Estonia, owing to the well-balanced Constitution. At the conference dedicated to the anniversary of the Constitution, entitled “Political Issues in Constitutional Review: Where is the Line between Political Interference and Regular Constitutional Review Proceedings?” President of the Republic of Estonia Toomas Hendrik Ilves said, strikingly: “When looking back at the 15 years of the Constitution, I believe that we can be satisfied, because the Constitution has served as a sound foundation for the pursuit of the goals that we set after the restoration of independence”.

The current Constitution of the Republic of Estonia was adopted at a referendum on 28 June 1992, with 91.1% of the attending voters in favour. The electoral committee’s decision on the results of the referendum was adopted on 2 June 1992, and the Constitution entered into force on 3 July 1992. Both historical experience and modern developments of constitutional law were taken into account in the drafting of the Constitution. There was much to learn from the previous Estonian Constitutions and the problems that occurred upon their implementation.

The first Estonian Constitution was adopted in 1920; it was one of the most democratic constitutions in Europe at the time. However, it had a major shortcoming as it lacked a system of checks and balances. Both this and the fragmentation of the Parliament led to a situation where Estonia had 20 governmental crises over a period of 13 years and six months (1920–1933), an average of one every eight months. This provided a basis for blaming the Constitution and parliamentarism for the lack of stable executive power. The result was a major constitutional amendment in 1933 that liquidated parliamentarism and replaced it with a special form of dualism. Considering the content of the amendments, it may be called a new Constitution. However, the amendments were never fully implemented. On 12 March 1934, the Prime Minister in the capacity of head of state, relying on the relevant provisions of the Constitution Amendment Act, declared a state of emergency that formally lasted till 12 September 1939. The Parliament was dissolved, the activities of political parties and associations were stopped, fundamental rights were restricted, etc. A new Constitution was adopted in 1937 and it entered into force on 1 January 1938. The Constitution provided for measures to balance the competences of the Parliament, government, and President; the President’s discretionary and suspensive vetos were restricted. The Government’s subordination to the President was maintained. The Constitution of 1938 did establish the presidential republic model of government. However, this Constitution was never implemented in practice because of Estonia’s occupation and annexation in 1940. With the current Constitution, the nation chose the form of a parliamentary republic, underpinned by a system of checks and balances. The 1992 Constitution has lasted longer than any of the previous Constitutions — for a period of 15 years; it has ensured the stable development of the state and survived with the changing times. Minor constitutional amendments have been made during this period. For example, the powers of local government councils were extended from three to four years. A major amendment that had an impact on the legal order was the adoption of the Constitution of the Republic of Estonia Amendment Act, via referendum in 2003, in connection with Estonia’s accession to the European Union.

In summary, the constitutional regulations have been drafted in such a flexible manner that they allow for developing public order and legal order following the developments on social and legal theoretical thought.

Pleasant reading and thinking along!

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# Contents:

<i>Heinrich Schneider</i>	Constitution in a Blast of Changes	4
<i>Raul Narits</i>	Principles of Law and Legal Dogmatics as Methods Used by Constitutional Courts	15
<i>Madis Ernits</i>	An Early Decision with Far-reaching Consequences	23
<i>Irene Kull</i>	Unfair Contracts of Suretyship — a Question about the Horizontal Effect of Fundamental Rights or about the Application of Contract Law Principles?	36
<i>Karin Sein</i>	Should Estonian Law Provide for an Award of Punitive Damages?	46
<i>Julia Laffranque</i>	A Glance at the Estonian Legal Landscape in View of the Constitution Amendment Act	55
<i>Carri Ginter</i>	Procedural Issues Relating to EU Law in the Estonian Supreme Court	67
<i>Jaanika Erne</i>	Discourse upon the Constituent Human Rights Developments in the European Union	80
<i>Hannes Veinla</i>	Precautionary Environmental Protection and Human Rights	91
<i>Norbert Reich</i>	Free Movement v. Social Rights in an Enlarged Union — the Laval and Viking Cases before the ECJ	100
<i>Bob Wessels</i>	The Changing Landscape of Cross-border Insolvency Law in Europe	116
<i>Andres Vutt, Margit Vutt</i>	Problems of Introduction of <i>Societas Europaea</i> in Estonian Law	125

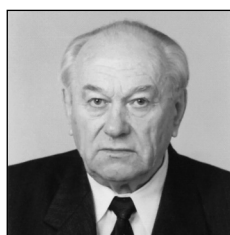
<i>Elo Tamm, Katri Paas</i>	The Concept of Dominance in Estonian Competition Law	134
<i>Kalev Saare, Karin Sein, Mari-Ann Simovart</i>	Differentiation of Mistake and Fraud as Grounds for Rescission of Transaction	142
<i>Janno Lahe</i>	Fault in the Three-stage Structure of the General Elements of Tort	152
<i>Heiki Pisuke, Aleksi Kelli</i>	Some Issues Regarding Entrepreneurial Universities and Intellectual Property	161
<i>Merike Ristikivi</i>	<i>Lexica iuridica</i> in <i>Juridica</i> : Latin Terms as a Reflection of Europeanisation of Estonian Legal Culture	173
<i>Hesi Siimets-Gross</i>	Roman Law in the Baltic Private Law Act — the Triumph of Roman Law in the Baltic Sea Provinces?	180
	Peter Schlechtriem (2.3.1933–23.4.2007)	190

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### Abbreviations

ALCSCd	decision of the Administrative Law Chamber of the Estonian Supreme Court
ALCSCr	ruling of the Administrative Law Chamber of the Estonian Supreme Court
BGB	<i>Bürgerliches Gesetzbuch</i> (German Civil Code)
CCSCd	decision of the Civil Chamber of the Estonian Supreme Court
CLCSCd	decision of the Criminal Law Chamber of the Estonian Supreme Court
CRCSd	decision of the Constitutional Review Chamber of the Estonian Supreme Court
ECR	European Court Reports
OJ	Official Journal of the European Union (formerly Official Journal of the European Communities)
RT	<i>Riigi Teataja</i> (State Gazette)
RTL	<i>Riigi Teataja Lisa</i> (Appendix to the State Gazette)
SCebd	decision of the Supreme Court <i>en banc</i>
SCebr	ruling of the Supreme Court <i>en banc</i>
UNIDROIT	International Institute for the Unification of the Private Law

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# Constitution in a Blast of Changes

## 1. Introduction: about the road travelled

Time flies. It seems to fly quicker and quicker, often without leaving a chance to ponder over memories. It was not long ago when the Constitutional Assembly held heated discussions over each provision and meaning of the draft Constitution of the Republic of Estonia. This year we are already celebrating the jubilee of Estonia's thus far longest lasting Constitution, as the Constitution, adopted by the referendum of 28 June 1992, is now 15 years old. Jubilees and other anniversaries, especially those ending with the figures 5 and 0, are self-reminding, help organise the memory, and draw attention to and direct our thoughts along the timeline of the past, the present, and the future.

### 1.1. The first jubilee

On its jubilee, the Constitution is posing the same challenge, a reminder and a call for attention. On previous anniversaries, celebration ceremonies, conferences or receptions were accompanied by symbolical celebration of explaining and interpreting the Constitution. On the fifth anniversary, the materials of the creation of the two Constitutions were published; the Estonian Academic Law Society initiated a publication on the pre-constitutional acts of the re-independent Estonia and the Ministry of Justice edited the materials of the Constitutional Assembly.\*<sup>2</sup> The long delay in the publication of the Assembly's materials was thus repaid.

If at first, the reality of life dictated the priority of establishing statehood and legal order based on the Constitution, and this left no time to assess what had been done, then later the corresponding conclusions have been made and errors have been corrected. A feedback mechanism was launched; the Constitution and its implementation results were observed and studied. This was greatly stimulated by Estonia's **main political objective of becoming a Member State of the EU**. This objective was formulated on 28 November 1995, in the Government of the Republic's official accession application, which the Estonian Prime Minister submitted to the European Commission.

The accession application and its acceptance implied the beginning of large-scale preparations, especially the harmonisation of Estonian law with EU law. As early as 30 January 1996, the Estonian government had drawn up the organisation of European integration — the necessary institutions and their functions.

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<sup>1</sup> The paper expresses the author's personal opinions.

<sup>2</sup> Taasvabanenud Eesti põhiseaduse eellugu (Prologue of the Constitution of the Re-independent Estonia). Tartu: Juura, Õigusteabe AS 1997 (in Estonian); Põhiseadus ja Põhiseaduse Assamblee. Koguteos (Constitution and Constitutional Assembly. Anthology). Tallinn: Juura, Õigusteabe AS 1997 (in Estonian).

The Constitutional Committee of the Riigikogu addressed the Government of the Republic with a proposal to set up a group of experts to analyse the Constitution and propose amendments. On 14 May 1996, the government set up a Constitutional **committee of legal experts**<sup>3</sup>, whose task was to study the compliance of the provisions of the Constitution with the requirements imposed by the EU for its Member States, to analyse the possibilities of delimiting the competence of constitutional institutions, and to draft proposals for eliminating any legal gaps, conflicts and inadequacies, as well as any circumstances that could prevent Estonia's EU aspirations.

The committee of legal experts worked for nearly two years and produced valuable results. The results of the analysis were summed up in an activity report<sup>4</sup>, which together with the proposals and other topical discussions comprised 504 typewritten pages. The report is lengthy because it contains not only examination results but also explanations of the provisions and meaning of the Constitution, theoretical commentaries, generalisations of practice, legal overviews and analyses of the Constitution, and comparison with the constitutions of other countries and EU law. All these different approaches and facets of research are interrelated and the results have been presented as a systematic whole. The Government of the Republic decided to acknowledge the report of the committee of experts and consider its work completed.<sup>5</sup> However, the committee of experts not only fulfilled its duties, but created added value with its report, as it helped lay the foundation for planning further studies into the Constitution of the Republic of Estonia.

This further discussion largely depended on what had been already done, because numerous proposals to amend the Constitution and, to some extent, the entire legal system were waiting to be implemented. A curious situation developed while resolving the situation. Although there were almost a hundred amendments and additions directly concerning the Constitution<sup>6</sup>, and they covered two-thirds of the sections of the Constitution, neither the experts themselves, the legislature, executive bodies nor representatives of the public ever seriously proposed the drafting of a new Constitution at once. Everyone hoped for "softer" and more flexible forms of implementation of the proposals. This was largely because the identified shortcomings were not so weighty as to hinder the development of the state and society. Implementation experience and theoretical focusing helped the problems of the Constitution to be understood more deeply upon the expert assessment than upon drafting the Constitution. Therefore, the proposals made in the course of the expert assessment cannot be viewed only as corrections of mistakes, but also as the programme for further development. This angle of departure was apparently also kept in mind in the grouping of the amendments.

## 1.2. The tenth anniversary reminds of itself

When planning the implementation of those proposals which look into the future, the idea arose to translate them into the language of commentaries to the Constitution. The idea grew and developed rapidly, because the hopes were for a broad-based interpretation of the Constitution, fed by the relatively high level of generalisation and the fundamental principles of the Constitution. The idea was also supported by the state. On 13 September 2000, the government committee set up to make preparations for celebrating the tenth anniversary of the Constitution decided to prepare a commented edition of the Constitution.

Two factors complicated the preparation of the edition: the **time factor** and **coordination of the content of the commentaries**. Hardly one and a half years were left for preparing the voluminous (757 pages) commented edition of the Constitution by the tenth anniversary of the Republic of Estonia. Publishing the commentaries in such a short period of time was possible mainly because of the availability of the expert assessment materials. As to the harmony of the content of the commentaries, it had to be taken into account that the purpose of the scientific commentaries to the Constitution was to create a single, coordinated and whole system of detailed study, generalisation, and interpretation of the substance and meaning of the Constitution.

Although more time would have been necessary for coordinating and organising the content of the commentaries, the commented edition<sup>7</sup> was published on time and without great loss of content. From the evaluative point of view, it is important that the commented edition, like the report of the committee of legal experts, became a **written landmark** of the tenth anniversary of the Constitution. A number of other jubilee writings were published, in which members of the Constitutional Assembly, researchers, former and current politicians,

<sup>3</sup> RT I 1996, 35, 725 (in Estonian).

<sup>4</sup> See Justiitsministeeriumi põhiseaduse juriidilise ekspertiisi komisjoni aruanne (Report of the Ministry of Justice Committee of Legal Experts for the Constitution). Tallinn 1998. Available at [www.just.ee/juridica2.html](http://www.just.ee/juridica2.html) (in Estonian).

<sup>5</sup> *Ibid.*, p. 1.

<sup>6</sup> *Ibid.*, III osa. Muudatusettepanekud (Part III. Amendment Proposals); U. Reinsalu. Kas vajame uut põhiseadust (Do We Need a New Constitution)? – *Juridica* 2005/3, p. 148 (in Estonian).

<sup>7</sup> Panel of editors led by E.-J. Truuvali. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia. Commented Edition). Tallinn: Juura, Õigusteabe AS 2002 (in Estonian).

statesmen and public figures recall the creation of the Constitution, the development of the legal system and state institutions in line with the Constitution.\*<sup>8</sup>

The tenth anniversary of the Constitution was marked not only by active publishing, but also increased satisfaction with the Constitution. The constitutional act as a whole has been praised much more than criticised, compared to earlier times. The functional procedure and method of election of the President of the Republic, and the organisation of national defence have been issues of deep-rooted criticism since the days of the Constitutional Assembly. In both cases, the main shortcoming is seen to lie in excessive adherence to the former Constitution of 1938.

This mainly positive picture of the Constitution, with a few darker shadows, has developed when viewing and regarding the Constitution as the highest act of Estonia's domestic legal system. The highest act, the research, commentaries, and interpretations of which by the Supreme Court have strengthened the basis of the country's legal order and paved the way for increasing entrenchment of the word and meaning of the Constitution in the legal system. This is why the Constitution survived its tenth jubilee without amendments, in the same form as it was when adopted by the referendum.

In terms of appearance, this was a period of peaceful functioning for the Constitution, but in actuality it was a period of active preparations for accession to the EU. The analysis by the committee of experts already covered potential accession to the EU and the legal implications of accession for Estonia's constitutional law. The fact that the European Commission recommended launching accession negotiations with Poland, Hungary, the Czech Republic, Slovenia, Estonia, and Cyprus on 16 July 1997 built up tension. Estonia agreed and presented its plans concerning European integration. However, in the meantime, the committee of experts had reached a view that caused certain puzzlement. Problematic issues of the Constitution were already raised during the expert assessment, but they became more acute as accession negotiations progressed, and it had to be admitted that accession would be impossible without amending or supplementing the Constitution.

Certain confusion was and is also still perceivable in the EU. The European Constitutional Treaty was to enter into force on 1 November 2006, provided that all Member States had ratified the Treaty by that date and handed over their instruments of ratification to the Republic of Italy. However, feared ratification problems thwarted this time schedule because the French and Dutch showed a red light to the Constitutional Treaty at the ratification referendum. This black scenario had been spoken about, but no one really believed it would come about.

The Member States, especially the EU founders, largely built their hopes on the Constitutional Treaty. More than two years of work drafting the European Constitutional Treaty at the European Convention and the failure of ratification made a serious dent not only in the activities of the EU, but also of the Member States, which were left without central guidelines for amending and improving their constitutions before accession to the EU.

### 1.3. The fifteenth anniversary with great changes

**Five-year development cycles, marked by the anniversaries of the Constitution**, can be distinguished in the history described above. On the fifth anniversary of the Constitution, the new constitutional act was noted to have rapidly taken root in the statehood structure and legal system of the re-independent Estonia. This meant moving in the right direction. By the tenth anniversary, the aforementioned two landmark studies had been completed concerning the Constitution and its implementation efficiency. This created an informative feedback mechanism and the relevant investigative bodies and state institutions took the implementation of the Constitution under their care and control. Now, on the fifteenth anniversary of the Constitution, it is much harder to assess the results. This is because there is no single positive line of development. There have been rises, falls, and standstills. Estonia's great goal of becoming a Member State of the EU has been achieved. But this had a price — it took a toll directly on the Constitution. When all crucial and constitutional issues were previously solved by interpretation, based on and within the framework of the applicable Constitution, then

<sup>8</sup> See, e.g., *Põhiseaduse tulek* (The Coming of the Constitution). Tallinn: SE&JS 2002 (in Estonian); *Presidendiraamat* (President's Book). R. Toomla (ed.). Tartu: Tartu Ülikooli Kirjastus 2002 (in Estonian); R. Ruutsoo. *Presidendi institutsiooni taustast ja kujundamisest 1992. aasta põhiseaduses: meenutusi ja arutlusi aastaist 1991–1992* (About the Background and Development of the President's Institution in the Constitution of 1992: Recollections and Discourse about the Years 1991–1992). – *Presidendiraamat* (President's Book). R. Toomla (ed.). Tartu: Tartu Ülikooli Kirjastus 2002 (in Estonian); L. Hänni. *Põhiseaduse mõju poliitilisele otsustusprotsessile* (The Effect of the Constitution on the Political Decision-making Process). – *Riigikogu Toimetised* 2002 (5) (in Estonian); R. Toomla. *Presidendivalimise kujunemislugu* (Development of Presidential Elections). – *Presidendiraamat* (President's Book). R. Toomla (ed.). Tartu: Tartu Ülikooli Kirjastus 2002 (in Estonian); J. Pöld. *Kas Eestis on vaja eraldiseisvat konstitutsioonikohut* (Does Estonia Need a Separate Constitutional Court)? – *Kohtute sõltumatus ja kohtusüsteemi toimimise efektiivsusest Eestis* (Independence of Courts and Efficiency of the Judicial System in Estonia). Tartu 2002 (in Estonian); W. Drechsler, T. Annus. *Die Verfassungsentwicklung in Estland von 1992 bis 2001*. – *Jahrbuch des öffentlichen Rechts der Gegenwart, Neue Folge* 2002 (50).

the conditions of accession to the EU and changes in the Member States' own status no longer fit into these frames. The course had to be taken to change and supplement the Constitution.

So, while the Constitution survived without amendment for slightly more than ten years, then the last five years may be called a **period of amendments and additions to the Constitution**. This period was full of searching and tension, because accession negotiations and the EU accession treaty had to be finalised on the one hand, while a rational solution was necessary for changing the substance and form of the Constitution, so as to allow the nation to decide on EU integration issues, on the other.

It is well known that in order to move forward, one should look at and analyse what has been done, and decide what to take and what to leave. **Considering that EU accession necessitated amendments and additions to the Constitution and that constitutional amendments had been relatively little studied and discussed, the amendment of the Constitution will be discussed in greater detail below.** There is another reason for focusing on the constitutional amendments. This mainly concerns the Constitution of the Republic of Estonia Amendment Act adopted by a referendum on 14 September 2003<sup>9</sup>, which was already criticised before its adoption, but its meaning and importance have grown in the course of practical application. Doubts and scruples die hard, as at the time of the constitutional amendments the focus was on provisions that would allow for the nation state's competence to be exercised by the European Union as a supranational organisation. As the Constitution has now arrived at a round of amendments and additions, greater attention should be paid to identifying the future potential of these amendments and additions.

## 2. Round of amendments to the Constitution

The current Constitution has been open for changes since its adoption. There are few among the members of the Constitutional Assembly and other persons concerned who expected the Constitution to last long for a long time. Half a century of developmental delay had done its job. When difficulties and gaps arose in developing the content of the Constitution at the Assembly, where the wishes of foreign experts did not coincide with our conditions and understandings, solving the problems that arose in practice by constitutional amendments was the last resort. Maybe the leniency to constitutional amendment was also increased by historical experience, because the 1938 Constitution was predicted to last a long time, but it was actually the shortest-lived Constitution. Although the reason for this did not lie in the Constitution itself, its short period of validity is still a fact.

### 2.1. Initiation of constitutional amendments

Although the authors of the Constitution quite clearly perceived the need for amendments and additions to the constitutional act being drafted, they followed the principle of stability and did not make the Constitution easily amendable. In the drafts presented to the Constitutional Assembly, a majority of the Riigikogu and the head of state may initiate amendments to the Constitution. According to experts, the requirement for the composition of the Riigikogu was exaggerated, because it may have been necessary in the early years of re-independence to make corrections to the constitutional regulation. However, the method of amendment and the requirements for it protect the Constitution from excessive and thoughtless amendments. During legislative proceeding of the draft Constitution, the right to initiate amendments was first limited to one-fourth, and after that at least one-fifth of the composition of the Riigikogu.

At first there was also opposition to giving the President of the Republic the right to initiate constitutional amendments, but the right was vested in him at the proposal of the editorial team. This means that the President can interfere where there is a need to adjust the balance between the executive, legislative and judicial powers or solve another constitutional issue. Therefore, according to § 161 of the Constitution, the right to initiate amendment of the Constitution rests with not less than one-fifth of the membership of the Riigikogu and with the President of the Republic. **Vesting the right to initiate constitutional amendments in the President** is a somewhat unusual solution, as the head of state has no right of legislative initiative according to the state structure model provided by the Constitution. Apparently the solution relied not only on the balance of powers, but also continuity with the Constitution of 1938.<sup>10</sup>

A greater problem than vesting the right to initiate constitutional amendments in the President is the **omission of public initiative** from the Constitution as regards legislative as well as constitutional amendments. This even conflicts with logic. The Constitution clearly provides that the supreme power of state is vested in the

<sup>9</sup> See Eesti Vabariigi põhiseaduse täiendamise seadus. – RT I 2003, 64, 429 (in Estonian).

<sup>10</sup> Constitution and Constitutional Assembly (Note 1), pp. 123–124, 531, 953, 1216, 1282; Report of the Ministry of Justice Committee of Legal Experts for the Constitution (Note 5), pp. 438–442; Republic of Estonia Constitution. Commented Edition (Note 8), pp. 672–672; A. Leps. Eesti põhiseaduse muutmisest (About Amendment of the Estonian Constitution). – Akadeemia 1999/3, p. 455 (in Estonian).

people, who also adopted the Constitution by a referendum. However, this supreme power of state has no right to initiate amendments and additions to the Constitution which the very people adopted.

The first Constitution of Estonia and its amendments did recognise public initiative. Public initiative was also exceptionally functional for a short time at the beginning years of the current Constitution. According to § 8 (2) of the Constitution of the Republic of Estonia Implementation Act<sup>\*11</sup> (CREIA) the right to initiate amendment of the Constitution during the three years following the adoption of the Constitution by a referendum also rests, by way of public initiative, with not less than ten thousand citizens with the right to vote. One public initiative was undertaken during that period. On 28 June 1994, 10,632 Estonian citizens with the right to vote initiated a draft amendment which contained a proposal to amend § 28 of the Constitution by bringing the guaranteed pension into correspondence with the work contribution of people, and to add to § 56 of the Constitution the provision that the President should be elected directly by the people. At the proposal of the Leading Committee (now the Constitutional Committee), the Riigikogu decided to exclude the bill from legislative proceedings without discussion on 20 October of the same year, with 32 votes in favour, three against, and four undecided.<sup>\*12</sup>

The possibility to amend the Constitution by public initiative ended on 28 June 1995. Therefore, nobody except for **a minimum of 21 members of the Riigikogu and the President of the Republic** can initiate constitutional amendments. “The people being left out of from constitutional amendment initiatives cannot be regarded as a good solution, since, firstly, supreme power is derived from the people, and secondly, this inhibits the development of participatory democracy and the people’s political activity, thus alienating the Constitution and power from the people.”<sup>\*13</sup> Those words, spoken ten years ago, have been prophetic.

**Ten initiatives** have been undertaken to amend the Constitution during the period following its adoption; draft amendments have been submitted to every composition of the Riigikogu, including the present 11<sup>th</sup> composition. Members of the Riigikogu have been behind most (eight) of these initiatives. In one case, as already mentioned, the initiative came from Estonian citizens with the right to vote. The President of the Republic also initiated a constitutional amendment in one case.

## 2.2. Failed amendment initiatives

**The first** initiative to amend the Constitution was made by 24 members of the Riigikogu on 28 January 1993, i.e., six months after the adoption of the Constitution by referendum, requesting that the President of the Republic be elected by the people at general, uniform and direct elections. The draft was first read on 11 March 1993, and rejected at the proposal of the Leading Committee with 41 votes in favour, 27 against and 4 undecided.<sup>\*14</sup>

**The second** draft to amend the Constitution was initiated by 27 members of the Riigikogu on 14 March 1994. The bill concerned amendment of the Constitution and direct presidential elections. The draft was read three times: on 19 April, 22 September and 9 November 1994. Since the initiators of the draft amendment did not supply the draft amendment with a draft decision to organise a referendum, the Riigikogu had to choose between the two methods of amendment laid down in clauses 2 and 3 of § 163 of the Constitution. The decision to treat the draft amendments as a matter of urgency was taken with 51 votes in favour and 17 against. The votes for adopting the constitutional amendments were 25 in favour, 39 against, and three undecided.<sup>\*15</sup> According to § 8 (1) of the CREIA, at least a majority of votes would have been required.

Neither was the **third** attempt to amend the Constitution successful. The public initiative was made on 28 June 1994, but the draft was left out of legislative proceeding, without discussion, on 20 October. **The fourth and fifth** draft amendments, initiated on 27 October 1994 and 16 November 1995 respectively, also ended in failure; the former amendment concerned § 147 of the Constitution, according to which judges are appointed for life, and the latter concerned public presidential elections. Both amendment proposals seem to be based on a misunderstanding of the nature of parliamentary democracy. The need for amending § 147 of the Constitution seems to lie in the argument that appointment of judges for life is unsuitable for a democracy, not having regard to the independence, stability, and also liability that the profession entails. General election of the president is often seen as the implementation of a presidential public order.<sup>\*16</sup>

<sup>11</sup> See Eesti Vabariigi põhiseaduse rakendamise seadus. – RT I 1992, 26, 350 (in Estonian).

<sup>12</sup> See Riigikogu stenogrammid 1994 (The shorthand notes of the Riigikogu 1994). Vol. IV. Tallinn 1995, p. 2178 and Vol. V. Tallinn 1995, pp. 551–552 (in Estonian); R. Maruste. Põhiseadus ja selle järelevalve. Võrdlevad selgitused. Kommentaarid. Tekstid (Constitution and Constitutional Review. Comparative Explanations. Commentaries. Texts). Tallinn: Juura, Õigusteabe AS 1997, p. 43 (in Estonian).

<sup>13</sup> See R. Maruste (Note 12), p. 43.

<sup>14</sup> For details see A. Leps (Note 10), pp. 460–461.

<sup>15</sup> See Riigikogu stenogrammid 1993 (The shorthand notes of the Riigikogu 1993). Vol. II. Tallinn 1994, pp. 198–201 (in Estonian).

<sup>16</sup> See Riigikogu stenogrammid 1994 (The shorthand notes of the Riigikogu 1994). Vol. V. Tallinn 1995, p. 639; and Vol. VI. Tallinn 1995, pp. 1057, 1057–1060, 1062–1063, 1064 (in Estonian).

Out of the ten constitutional amendment initiatives so far, three have found a final solution in the second half of the decade. The remaining drafts were either rejected at the first reading or discarded before the first reading.

## 2.3. The first amendment of the Constitution

The committee of legal experts for the Constitution already concluded in its 1998 report that Estonia cannot integrate into the EU without amending and supplementing its Constitution. This was confirmed by the EU accession negotiations that lasted for five intensive years. At the beginning phase of preparations for accession, the subject of constitutional amendments was treated cautiously, since the conditions and possibilities of accession had to be weighed and the compatibility of the Estonian Constitution and entire legal system with the applicable EU law had to be analysed along with the constitutional differences and the practice of overcoming these differences in the Constitutions of Germany, France, Italy, the Netherlands, Spain, Finland, Sweden, and other old EU Member States. An important issue upon EU accession, which also related to all the other issues, was the relation between Estonian law and Community law of direct application. The need to amend our Constitution mainly arose from the principle of supremacy of the law created in the sole competence of the European Community and the rigid constitutional regulation of Estonia's sovereignty.

It was therefore necessary and useful to join our knowledge of our Constitution and legal order with the practical experience of EU Member States. This was done **in two ways**: by conferences, seminars and consultations where foreign researchers and implementation specialists made their presentations and speeches, and by commissioning opinions, proposals and suggestions from those researchers and specialists. Most of these types of consultations and seminars on European integration were organised by the Ministry of Justice. The Supreme Court organised international seminars in this field in Tartu on three occasions: in 2000 with the Venice Commission and in 2001 and 2002 with the Supreme Administrative Court of Sweden. While the 2000 seminar discussed the new activities of constitutional courts in connection with the turn of the century and aspiration to the European structures, the seminars of 2001 and 2002 focused on an analysis of the experience of Sweden and Finland, which acceded to the EU in 1995. In addition, constitutional amendment issues were discussed in the autumn of 2001 during the discussion series "Does the current Constitution need amendments for accession to the European Union?" held by the EuroCollege of the University of Tartu and the Eurosceptics movement.

**Foreign experts** helped Estonia a great deal in analysing the mutual relations between the Constitution and EU law. Six foreign experts prepared a special written opinion on the conformity of the Constitution with EU law and proposals for overcoming the deviations. The work of foreign experts was somewhat facilitated and simplified by the fact that some of them had already participated in the Constitutional Assembly and in the earlier expert assessment, such as Guy Garcassonne from France, Matti Niemivuo and Antti Suviranta from Finland, Erik Harremoes from Denmark, Roman Herzog, Robert Alexy and Jochen Abr. Frowein from Germany, Eivind Smith from Norway, and many others.

Such an analysis of materials, which had been collected in various ways from various sources over quite a long time, gave increasingly more assurance that the **Constitution needed to be amended and what needed to be amended, but less help as to how it should be amended.**

The need to amend the Constitution was reasoned by the following circumstances. **Firstly**, because of the wish to build a common future with the European Union, which is why Estonia had to assign part of its competence to the EU for the pursuit of common goals, while the Estonian Constitution did not contain a provision allowing for international or supranational organisations to exercise the power of the state.

**Secondly**, Estonia was a typical unitary state by its Constitution, according to § 3 of which the state authority is to be exercised solely pursuant to the Constitution and laws which are in conformity therewith. As a Member State of the EU, state authority also has to act on the basis of and in conformity with European Union law. This results in a situation where the state has to exercise law that it has not created and cannot create, such as the provisions carrying the principles of direct application, supremacy, and subsidiarity.

**Thirdly**, § 111 of the Constitution provides for the sole right of the Bank of Estonia to issue Estonian currency. Considering the transfer to the single currency as stipulated in the Maastricht Treaty and the European Central Bank's right to issue the euro, the relevant right of the Bank of Estonia upon the introduction of the single currency has little hope of survival.

**Fourthly**, a frequent subject of discussion at the committees, conferences, seminars and consultations were the changes that accession to the EU will bring to the Member State's volume of work, composition and structure of institutions, the Member State's participation in the legislative drafting of the EU, separation of powers, legal regulation and the sovereignty theory, as well as terminology and interpretation issues.

**Fifthly**, all the aforementioned issues pertain to the state's sovereignty to a lesser or greater extent. It is therefore not incidental that the question of sovereignty was part and parcel of every discussion. All the more so

because interpretation of the idea of an independent nation state and democracy had already caused problems at the time of the drafting of the Constitution. Section 1 of the Constitution stipulates, quite categorically, that Estonia is an independent and sovereign democratic republic, while the independence and sovereignty of Estonia are timeless and inalienable. Namely because the Constitutional Assembly cemented Estonia's independence in timelessness and inalienability, Estonia's constitution stands out as one of Europe's most "sovereigntist" or closed Constitutions.<sup>\*17</sup>

The next question was how to amend and supplement the Constitution in order to get rid of these obstacles. Although diverse material — experience of the EU Member States in adapting to European integration, opinions of Estonia's own and foreign experts about the Estonian Constitution and potential amendments to its text, as well as conceptual disputes about the legal nature of the European Union, and post-enlargement development scenarios were available for the seeking of a solution, the question "how" proved to be **the most difficult**. This was because individual characteristics dominated. As every country has its own face, so is every country's Constitution unique. This rendered systematisation and use of the EU Member States' experience, opinions, and research results complicated.

Despite the difficulties, Anneli Albi synthesised three models for constitutional amendment. **In the first model**, based on an analogy of the French and Austrian models, the Constitution would be supplemented by a separate chapter about the European Union which would cover all EU issues and any future amendments. According to the **second model**, which was the choice of most foreign experts, amendments should be made to the problematic provisions, following the examples of Germany and Portugal. This model allows for a greater number of and more precise amendments. **The third model** is the minimal amendments model. If it is decided on the political level that the nation state's Constitutional principles and minimum harm to these principles are primary, the Constitution can be amended by introducing only one amendment section. This provision would cover two important issues: delegation of sovereignty and democratic legitimation via the national parliament. The remaining potential conflicts would be solved by the reference taken from Guy Carcassonne's amendment proposal to "conditions provided in the European Union treaties". This would make it possible to leave the other conflicting provisions of the Constitution unchanged.<sup>\*18</sup>

The idea of the minimal amendments model became more popular in the course of discussions between lawyers. Especially when the trains of thought were framed with border marks such as the following: (1) amendments concerning accession to the EU should be made separately without awaiting constitutional amendments concerning other issues; (2) the amendments should concern the European Union specifically and not international organisations in general; (3) the amendments must not involve re-writing of all the potentially conflicting provisions in the Constitution, but should rather constitute an application or interpretation of the Constitution in the light of integration.<sup>\*19</sup>

This opened an original way into the European Union for Estonia, namely via a so-called **third constitutional act**. The first of such acts is the Constitution, the second one is the CREIA, and the third is the Constitution of the Republic of Estonia Amendment Act. A referendum was necessary for adopting the amendments, as the amendments concerned provisions which can only be amended by a referendum. A legal basis had thus been created for the nation's legitimation of EU accession.<sup>\*20</sup>

By the decision of the Riigikogu of 18 December 2002, adopted with 88 votes in favour and one against, the following question was placed on the ballot:

Are you in favour of accession to the EU and adoption of the Constitution of the Republic of Estonia Amendment Act?

At the referendum held on 14 September 2003, the Estonian nation answered "yes" to the question and thus adopted the Constitution of the Republic of Estonia Amendment Act (CAA); 64.06% of voters participated

<sup>17</sup> About the needs for constitutional amendments see also the Report of the Ministry of Justice Committee of Legal Experts for the Constitution (Note 4), pp. 407–414; A. Albi. Põhiseaduse muutmise Euroopa Liitu astumiseks. Ekspertarvamused, teoreetiline ja võrdlevõiguslik perspektiiv ning protseduur (Amendment of the Constitution for Accession to the European Union: Expert Opinions, Theoretical and Comparative Law Perspectives and Procedure). – *Juridica* 2001/9, pp. 603–615 (in Estonian); R. Maruste, A. Albi. Eesti Vabariigi põhiseadus Euroopa Liidu õiguskorras (The Constitution of the Republic of Estonia in the Legal System of the European Union). – *Juridica* 2003/1, pp. 3–7 (in Estonian); J. Laffranque. Eesti põhiseaduse ja Euroopa õiguse kooselu (Coexistence of the Estonian Constitution and EC law). – *Juridica* 2003/3, pp. 180–190 (in Estonian); Eesti ühinemisleping Euroopa Liiduga, Seletuskiri (Accession Treaty between Estonia and the European Union, Explanatory Memorandum). Välisministeerium (Ministry of Foreign Affairs): Tallinn 2004, pp. 38–43 (in Estonian); T. Kerikmäe. Supranational Law as International Law and Vica Versa. – *Juridica International. Law Review* 1998 (3), pp. 43–47; T. Nymann. Euroopa Komisjoni delegeeritud õigusloome ja komiteede süsteem (Comitology of the European Commission). – *Juridica* 2003/6, pp. 383–390 (in Estonian).

<sup>18</sup> See A. Albi (Note 17), pp. 611–613.

<sup>19</sup> See K. Merusk, J. Põld, J. Laffranque, M. Rask, Ü. Madise. Põhiseaduse täiendamise seaduse eelnõust (Draft Act to Amend the Constitution). – *Juridica* 2002/8, especially p. 565 (in Estonian).

<sup>20</sup> See J. Laffranque. Euroopa Liidu õigussüsteemi ja Eesti õiguse koht selles (Legal System of the European Union and the Role of Estonian Law in It). Tallinn: Juura 2006, pp. 70–71 (in Estonian).

in the referendum and 66.83% of the participants were for the amendment. On 5 October 2003, the President of the Republic proclaimed the CAA and it entered into force on 6 January 2004.

The CAA consists of only four sections. Only the first two of them are substantive. The first section expressly confirms that Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia. This opened up the constitutional possibility for Estonia to enter into an accession treaty with the EU. The Riigikogu unanimously ratified the treaty on 21 January 2004 with 77 members of the Riigikogu present.<sup>\*21</sup> The European Union also acted efficiently: on 9 April 2004, the European Parliament ratified the accession treaty; 520 of the 556 MEPs present voted for the treaty. Upon entry into force of the accession treaty on 1 May 2004, Estonia became a full member of the European Union. It is important to note that the **EU recognised** the addition to the Estonian Constitution as a third constitutional act.

## 2.4. The CAA allows for broader implementation

The EU Member States' constitutions and their amendments may be divided into two categories: those which focus on the possibility to assign competence and access to the EU and those which also remain to regulate affairs after accession.<sup>\*22</sup> Our CAA belongs to the latter category, as it defines the relations between Estonia and the EU, the conditions of Estonia's membership in the EU — compliance with the Constitution and fundamental principles — and the supremacy of EU law and its direct applicability over Estonian law under certain conditions. The idea of the CAA was to amend the Constitution upon accession to the EU so that Estonia could delegate to EU institutions the exercise of the power of state arising from the Constitution insofar as this is necessary for implementation of the EU treaties and provided that this is not contrary to the fundamental principles of Estonia's statehood as laid down in the preamble and first chapter of the Constitution. The CAA is thus the **connecting link** between Estonian law and EU law.

If we regard the CAA as the connecting link between Estonian law and EU law, a number of questions arise: what does it link, how does it link, and why is it necessary?

The connection has the power of creating a whole. Both similar and different things, phenomena and ideas can be connected. The CAA is the connecting link between laws of differing weight, meaning, and importance. Although the law of the connected subjects is substantially different, they have two common features: the name (law) and the roots — the fundamental principles, i.e. the universal values. Fundamental principles are not a favourite topic of lawyers, but the development of not only the law of the EU and its Member States, but of law in general, is closely related to them. While thus far it was the Constitution that served as the yardstick of regular legislation and the **legitimacy of all legislative drafting**, the CAA introduced to the Estonian Constitution the concept of "fundamental principle", which the Constitution itself has to comply with if Estonia belongs to the EU. This is a new yardstick of legitimacy.

A certain compromise was reached on the fundamental principles quicker than usual. This was facilitated by the fact that all earlier Estonian Constitutions contained a preamble that reflected, in the most general and generalised way, the vital ideas, understandings, values, feelings and convictions of the nation, which were taken into account in drafting the Constitution. Other principles of a democratic state governed by the rule of law, derived from § 10, were added to these fundamental principles. The following principles can thus be regarded as fundamental principles: national sovereignty; the state's foundations of liberty, justice and law; protection of internal and external peace; preservation of the Estonian nation and culture through the ages; human dignity; social statehood and the rule of law; respect for fundamental rights and freedoms; balanced exercise of the authority of the state.<sup>\*23</sup>

These fundamental principles, with their degree of generalisation, cover all the provisions of the Constitution. The same may be said about the values laid down in Article I-2 of the European Constitutional Treaty, on which the European Union is based. Legal literature also points out tolerance, morality, solidarity, equality between men and women, proportionality, and many others as independent values. Considering that values are inseparably related to the needs of every person, collective, and society, which differ to a great extent, values also vary and have varying cognitive and applicable weight. In the Estonian Constitution, the issues of public morality, solidarity, tolerance, and the equality of men and women have been protected by the value of respect for human dignity, justice and democracy.

<sup>21</sup> See RT II 2004, 3, 8 (in Estonian).

<sup>22</sup> See and compare J. Laffranque (Note 20), pp. 72–82, 487–524.

<sup>23</sup> Compare with the positions of the constitutional analysis team for the European Constitutional Treaty on the issue of ratification of the Constitutional Treaty. Draft of 9.11.2005. Available at [http://www.riigikogu.ee/?id=?38141&parent\\_id=33404](http://www.riigikogu.ee/?id=?38141&parent_id=33404) (6.02.2006) (in Estonian); J. Laffranque (Note 20), p. 72; H. Schneider. Põhiseaduse aluspõhimõtete seonduvaid probleeme ja võimalikke lahendusi (Problems and Possible Solutions Relating to the Fundamental Principles of the Constitution). – Riigikohus 2005. Lahendid ja Kommentaarid (Supreme Court 2005. Judgments and Commentaries). Tallinn: Riigikohus (Supreme Court) 2005, pp. 1322–1332 (in Estonian).

It may be concluded from the above that the CAA, which has roots in both EU and Estonian law, is not only a connecting link between these laws, but in the event of enforcement of the fundamental principle of the Constitution also a **protective clause** with conditions that the EU itself has to meet. Estonia is a member of an EU that corresponds to the fundamental principles laid down in our Constitution. Of course, from a formal legal viewpoint, the EU is not tied to any conditions that the constitutions of its Member States may pose to it, but respects the principles of democracy and the rule of law based on the EU's own underlying treaties, but still proceeds from the constitutional principles and traditions of its Member States via this and the case-law of the European Court of Justice.

Estonia has been a Member State of the EU for three years now. These years have also been difficult for the EU, since the fate of the European Constitutional Treaty is still unresolved. Ignorance is a poor companion. Years pass, but it is still not clear whether the CAA is domestically applicable or not. Life continues to be controlled by the Constitution and not the fundamental principles of the Constitution. Neither has the CAA been able to seriously exercise its force when it comes to the conflict between EU law and Estonian law. Upon eliminating shortcomings, especially when exercising judicial constitutional review, account should be taken of both the need to ensure the unity of the Community's legal order and the need to protect the fundamental principles of the Member States' constitutions. This has proved to be a complicated task both in practice as well as theory.

But this complicity is not relevant to finishing the work, but rather serves as a notice to pay greater attention to continuing the work. This is especially true when one owes activities for a length of time. In many ways, the legal systems of the EU and Estonia need to be recreated from scratch. EU law is difficult to comprehend especially because its sources are not only the treaties, but also the acts of its institutions and the precedents of the European Court of Justice. Since the treaties of the European Community and European Union do not clearly provide for the sole competence of the EU, it is not always easy to draw the line between the competence of the EU and that of its Member States, and this sometimes causes tension between the EU and its Member States, especially the courts of the Member States.

The direct applicability of EU law is a phrase with a nice ring to it. In actuality, the principle of direct applicability has gone undergone development over the years. While it was at first applicable only to the negative obligations of the Member States, it was also later extended to positive obligations. The principle of direct applicability was also extended to other laws in addition to contractual provisions. However, not all contractual provisions of the Community are directly applicable: the Court has declared only a limited number of articles to be directly applicable.

Regulations are the EU legal acts with the most far-reaching power. They are adopted by the European Parliament together with the Council, or the Council or the Commission in their individual capacities. All regulations, as all other Community legal acts, are published in all official languages of the EU in the Official Journal of the European Union, which is accessible to everyone. When published this way, regulations become a part of the legal systems of the Member States without domestic harmonisation. As a general rule, Member States are prohibited from establishing domestic legislation in the areas governed by regulations. Regulations are characterised by two features which are generally unfamiliar to international law: (1) regulations are uniformly applicable throughout the Community's territory. As a rule, regulations are mandatory and directly applicable in their entirety; (2) regulations are directly applicable equivalently with the domestic laws of the Member States. Regulations establish direct rights and obligations for the Member States and their citizens.

The purpose of directives, on the other hand, is to harmonise the legislative drafting of the Member States. Directives are established by the Council alone or together with the European Parliament, or by the Commission on the basis of a mandate from the Council. As opposed to regulations, directives are usually not directly applicable but need to be transposed to domestic law. When a directive has not been transposed or properly transposed, the lack of direct applicability does not preclude a certain impact of a directive, namely that domestic legislation must be interpreted in conjunction with the wording and objectives of the directive.

All this EU law also needs to be screened through the principles of supremacy, direct applicability and hierarchy. Unwritten common law and the general principles of law, which are common to the legal orders of the Member States, are considered to be primary EU law. Primary law also covers agreements, such as agreements between the Community and third countries and international organisations, and agreements between Member States. Primary Community law is called constitutional law because in the legal hierarchy it may be equalised with the constitution in the domestic legal order.<sup>24</sup>

Although the EU sources of law generally move toward the legal orders of the Member States, common law and the fundamental principles of law move in the opposite direction. Considering that the impact of the EU legal order largely depends on how the Member States implement EU law, it is a good place for gaining practical experience and making generalisations, a powerful employer for the intellectual worker. Accession

<sup>24</sup> See U. Lõhmus. Euroopa Liidu õigussüsteem ja põhiseaduslikkuse kontroll pärast 1. maid 2004 (European Union Legal System and Constitutional Supervision After 1 May 2004). – *Juridica* 2006/1, pp. 3–16 (in Estonian); Eesti ühinemisleping Euroopa Liiduga. Seletuskiri (Accession Treaty between Estonia and the EU. Explanatory Memorandum) (Note 17), pp. 38–46 (in Estonian).

to the EU brought about changes in the work and requires interpretation of many concepts such as the separation and balance of powers, institutional balance, ascribed and derived competence, legal order, order of authority, legal system, system of provisions, hierarchy of law and of sources of law, primary and secondary law, the supremacy of validity and applicability of law, etc. The sovereignty theory and its status offer plenty of food for thought.

Thus, it needs to be stressed that the CAA is not simply permission for Estonia's accession to the EU. It is equally important that the Constitution be interpreted in the context of the EU membership based on the CAA and its ideas.<sup>\*25</sup>

## 2.5. The second amendment of the Constitution

The second constitutional amendment was the Act to Amend the Constitution of the Republic of Estonia for Election of Local Government Councils for Term of Four Years, which was adopted as a matter of urgency on 25 February 2003, and entered into force on 17 October 2005.<sup>\*26</sup> The amendment was justified by two facts. Firstly, the three-year term of authority of local councils was relatively short, especially when compared with most other European countries. The term was too short for keeping various labour-intensive promises. Secondly, because of the different terms of the Riigikogu and local councils, the election periods were running too close to each other. The terms of local councils were therefore equalised with those of the parliament so that the interval between elections would remain approximately two years.<sup>\*27</sup>

The initiators of the bill believed that the time was ripe in 2002 to allow local government councils to make plans with a somewhat longer perspective. A legal opinion on the bill was commissioned from the Faculty of Law of the University of Tartu, which also confirmed that the bill was justified.

The bill was read three times. After the last reading, the Constitutional Committee proposed to treat the bill as a matter of urgency, which meant that 91 votes in favour were required for adopting a decision. All 92 parliament members present were in favour of an urgent legislative proceeding. In the voting over the adoption of the Act, 91 members of the Riigikogu were in favour; there was nobody opposed or undecided. The Riigikogu had thus adopted the aforementioned constitutional amendment. Since the amendment entered into force only after a period of two and a half years, it is discussed here not in the first, but in the second order.

## 2.6. The third amendment of the Constitution

The third constitutional amendment entered into force on 21 July 2007.<sup>\*28</sup> It provides in the preamble of the Constitution for the preservation of the Estonian language through the ages. While the previous 10<sup>th</sup> composition of the Riigikogu adopted the Act on 20 February 2007, with 66 votes in favour, the new composition of the Riigikogu elected in 2007 supported the amendment on 12 April 2007, with 93 votes in favour. There are always those who doubt as to what one word in the Constitution can mean. However, where the word "language" has the status of a fundamental principle of the Constitution and is placed in the preamble of the Constitution side by side with the other fundamental principles, it is the projector of our culture.

All our constitutional amendments and additions so far have taken place in different ways. According to § 163 of the Constitution, the Constitution shall be amended by an Act which has been passed by: (1) a referendum; (2) two successive memberships of the Riigikogu; (3) the Riigikogu, as a matter of urgency. The CAA was adopted by a referendum; the terms of local government councils were extended by the Parliament as a matter of urgency, and the latest one-word "language" amendment was adopted by two successive memberships of the Riigikogu.

## 2.7. Amending continues

The tendency of amending and adding to the Constitution continues. In May 2007, the President of the Republic initiated draft amendments based on § 78 8), § 103 (1) 5), and § 161 (1) of the Constitution. According to the explanatory memorandum, the objective of the draft is to reorganise the management of national defence and

<sup>25</sup> See J. Laffranque. Eesti põhiseaduse ja Euroopa õiguse kooselu (Coexistence of the Estonian Constitution and EC law). – *Juridica* 2003/3, pp. 180–190 (in Estonian); K. Maimann. Integratsiooniõiguse põhiseaduslikkuse kohtulik järelevaade Eestis (Constitutional Court Review of Integration Law in Estonia). – *Juridica* 2006/6, pp. 423–435 (in Estonian).

<sup>26</sup> See RT I 2003, 29, 174 (in Estonian).

<sup>27</sup> Available at <http://web.rigikogu.ee/ems/saros-bin/mgetdoc?itemid=022810001&login=proov&password=&system=ems&server=ragne11> (21.07.2007) (in Estonian).

<sup>28</sup> Eesti Vabariigi põhiseaduse muutmise seadus. – RT I 2007, 33, 210 (in Estonian).

to specify the national defence competence of constitutional bodies.<sup>\*29</sup> The committee of legal experts for the Constitution was critical about the national defence chapter of the Constitution and considered the obscurity in the relations between the highest military command and highest political leadership to be one of the most serious shortcomings of the Constitution.

### 3. Conclusions

Five-year walks along the paths of the Estonian Constitution lead to many things which are familiar, but also to a larger dose of the unfamiliar and unknown. This may be called disorder or renewal, with diversity being the common motto. We have to experience and admit that where differences are great, success of synthesis is greater.

Even the CAA was at first seen as merely the opportunity to accede to the EU, while new visits show increasing development based on values.

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<sup>29</sup> Available at [http://www.riigikogu.ee/?page=pub\\_ooc\\_file&op=emsplain&content\\_type=text/html&file\\_id=93073](http://www.riigikogu.ee/?page=pub_ooc_file&op=emsplain&content_type=text/html&file_id=93073) (21.07.2007) (in Estonian).



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# Principles of Law and Legal Dogmatics as Methods Used by Constitutional Courts

I was inspired by several things in writing this article, at least two of which were a lucky coincidence. The first has to do with the 15<sup>th</sup> anniversary of the Constitution of the Republic of Estonia, and the second with several research papers on important problems concerning the working of constitutional courts and constitutional law which I came upon when studying literature on constitutional law and constitutional review for the above anniversary. But there is also a third factor, an international colloquium “The Future of the European Judicial System — The Constitutional Role of European Courts”<sup>1</sup> held in Berlin in 2005, where among many other questions the issue of constitutional courts in states with revolutionary changes in entire socio-political system was raised.

This issue undoubtedly holds significance because of where the Constitutional Review Chamber of the Constitutional Court of the Republic of Estonia is positioned in the legal system and due to the content of its work, especially some basic principles of the Chamber, two of which I have chosen for deliberation in this article. Those two are principles of law and legal dogmatics, which are significant methods (means) of formation of opinions, argumentation and of course also vocalising how the legal reality (in its broad sense) corresponds to the word and meaning of the constitution. The function of constitutional courts is not merely the traditional administration of justice. Work of constitutional courts has many contact points with legal policy. It is constitutional courts that are most influenced by legal policy, and yet it is constitutional courts who to some extent make legal policy. The author is of the opinion that principles of law and legal dogmatics are instruments that “work” for the benefit of implementation as well as formation of legal policy. Legal policy should be interpreted as shaping of social and political life by means of legislative provisions drafted and established by public authority.<sup>2</sup> Such a definition also includes implementation of justice. Also a jurist can be active in the formation of legal policy. He or she has two tasks: a reasonable reconstruction of the problem that needs regulation, and thereafter a quest for a better solution. If he or she also works with constitutional law, then he or she needs to understand political processes for better lawmaking.

Concerning dogmatics — when jurists talk about dogmatics much remains unclear, even the definition. Moreover, mentioning dogmatics sometimes even evokes negative emotions. The reason for this is that in many cases dogmatics — regardless of the area of application — is understood as something unchangeable, even petrified. Below I will deliberate over whether law and also jurisprudence should say farewell to dogmatics, and explain what dogmatics exactly stands for. Those issues need to be reviewed not only in the context of

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<sup>1</sup> On the initiative of the European Civil Liberties Network (ECLN) and in co-operation with the International Association of Constitutional Law (IACL) an international ECLN colloquium “The Future of the European Judicial System — The Constitutional Role of European Courts” was held on 2–4 November 2005 in Berlin.

<sup>2</sup> B. Rüthers. *Rechtstheorie*. 2. Aufl. München: Beck 2005, pp. 72, 91.

national legal orders but also in the European context. The question of boundaries of constitutional law was clearly raised at the above Berlin conference, where discussion was heated and a demand for the development of contemporary European constitutional law theory was voiced.<sup>\*3</sup>

Law is in fact a special instrument of power for the realisation of political will. In that way each legal provision embodies a piece of normatively secured policy. It is nevertheless a fact that courts do not base their judgments only on legislative provisions. For courts the regulatory basis for decisions is much wider. As I said, this article views principles of law and legal dogmatics as legal guidance for making relevant decisions, especially in constitutional courts, which have the most direct and open contact with law and legal policy.

## 1. Principles of law

Indeed, what are principles of law? One of the shortest definitions could be “very important general rules”. Yet, not everybody understands why that is the case. One explanation is that principles of law have to do with values.<sup>\*4</sup> Another opinion is that the importance of principles stems from their bond to the idea of law<sup>\*5</sup>, the most important component of which is justice. A reference is also made to the link between principles and the highest law.<sup>\*6</sup> The significance of principles is also associated with their sense of legal order as such.<sup>\*7</sup> The importance of principles is sometimes underlined in the context of the so-called metanormative function.<sup>\*8</sup> The study of principles has basically emerged in the context of globalisation.<sup>\*9</sup>

Contemporary literature in the field that has most contributed to the theory orientated discussion on principles in German language is “Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts”<sup>\*10</sup> by J. Esser published in 1956, and “Taking Rights Seriously”<sup>\*11</sup> by R. Dworkin published in 1977 regarding common law. The above authors agree on certain things, but have significant differences in others.<sup>\*12</sup> Both works underline that principles refer to the logical structure that derives from provisions, and not only in the sense of different gradation, but also definite differentiation. What are the differences in Esser’s and Dworkin’s positions on principles of law?

For Esser a principle always means a so-called larger leeway for the judge than offered by a provision in a legal source. The size of such a leeway depends on the fact that a judge must somehow form that principle. Dworkin is on an entirely contrary opinion that a principle narrows a judge’s decision-making space. For Esser a principle is needed to justify a judgment in the legal space, but for Dworkin it is a reference to something important. For Esser principles are separate from ethics. Dworkin on the other hand considers principles to be ethical, and the existence of principles disproves the positivist understanding of separation of right and moral; whereas according to Esser principle of law applies only when used in judgments. For Dworkin principles of law apply because they are just (provided that they are coherent with the legal order).<sup>\*13</sup>

The well-known legal theorist Robert Alexy finds, based on Dworkin and being familiar with Esser’s dogmatics, that principles are distinct optimisation orders, which need to be complied with at different levels. Whereas provisions are rules that either must be followed or need not be followed which makes them definitive.<sup>\*14</sup> Thus, implementation or formation of principles has nothing to do with deductive subsumation process. Another

<sup>3</sup> Tagungsberichte. The Future of the European Judicial System — The Constitutional Role of European Courts. – Juristen Zeitung 2006/5, p. 242.

<sup>4</sup> C.-W. Canaris. Systemdenken und Systembegriff in der Jurisprudenz. Berlin: Duncker und Humblot 1969, p. 50.

<sup>5</sup> K. Larenz. Methodenlehre der Rechtswissenschaft. Berlin: Springer 1979, pp. 207, 410.

<sup>6</sup> H. J. Wolff. Rechtsgrundsätze und verfassungsgestaltende Grundentscheidungen als Rechtsquellen. – Gedächtnisschrift für Walter Jellinek. O. Bachoff (Hrsg.). München: IsarVerl. 1955, p. 37 ff.

<sup>7</sup> A. Peczenik. Principles of Law. The Search for Legal Theorie. – Rechtstheorie 1971, p. 30.

<sup>8</sup> Two things are understood under metanormative function: first is the so-called programming function (*ex ante*), which is intended for example for legislation, and the motivation of provisions (*ex ante*). See J. Raz. Legal Principles and the Limits of Law. – The Yale Law Journal 1972, p. 839 ff.

<sup>9</sup> A. von Bogdandy. Europäische Prinzipienlehre. – A. Bogdandy (Hrsg.). Europäisches Verfassungsrecht, Berlin: Springer 2003.

<sup>10</sup> J. Esser. Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts. Tübingen: Mohr 1956.

<sup>11</sup> R. Dworkin. Taking Rights Seriously. Cambridge: Harvard University Press 1977.

<sup>12</sup> Several studies have analysed the arguments by those authors. E.g., see J. A. Pascua. Die Grundlage rechtlicher Geltung von Prinzipien – eine Gegenüberstellung von Dworkin und Esser. – G. Orsi (Hrsg.). Prinzipien des Rechts. Frankfurt am Main: Lang 1996; R. Alexy. Zur Struktur der Rechtsprinzipien. – B. Schiller, P. Koller, B.-Ch. Funk. Regeln, Prinzipien und Elemente im System des Rechts. Vienna: Verlag Österreich 2000; A. Jakab. Prinzipien. – Rechtstheorie 2006 (37), Duncker und Humblot, pp. 49–65.

<sup>13</sup> For an abstract of Esser’s and Dworkin’s arguments see A. Jakab (Note 12), p. 49 ff. The author thinks that those differences do not have much bearing, though. What is important is what unites Esser and Dworkin — the different logical structure of principles of law and legislative provisions.

<sup>14</sup> R. Alexy. Zum Begriff des Rechtsprinzips. – Rechtstheorie, Beiheft 1, 1979, p. 79 ff.

difference between principles and provisions is the fact that in case of conflicting provisions collision rules apply, whereas a conflict of principles is solved by “considering the circumstances of the case the preferential regulation is determined between both possible practicable principles”.<sup>\*15</sup> Here preferential means that what follows is the required legal consequence deriving from the principle. The third difference between principles and provisions, according to Alexy, is that the higher the level of non-compliance, the bigger must be the importance of complying with the second principle.<sup>\*16</sup>

How to recognise principles and find them? An argument can be made for the importance of principles and what differentiates them from provisions, but without recognising them, the above is practically useless.

In civil law the most natural and also logical place is to look for principles is the objective law itself. Text of a law may *expressis verbis* denote a certain part of a text as a principle, but a principle may be formally defined without being expressly named as a principle.<sup>\*17</sup> Another possibility to find principles is to analyse current law (laws, regulations and administrative provisions). Principles are established the same way both in civil law and common law legal cultures.<sup>\*18</sup> The underlying idea is that principles of law cannot be and are not something completely separate from objective law itself. Figuratively speaking, principles of law are similar to abstract provisions, but at a more general level. Nevertheless, two branches can be distinguished: the first is orientated to finding a traditional provision-based generalisation, and the other additionally includes study of the relevant political-moral context.<sup>\*19</sup> Principles of law are formed also in jurisprudence. What is especially important in this context is that court practices, especially that of constitutional courts, can significantly contribute to principle of law.<sup>\*20</sup> In rule of law the role that courts play in formation of principles is very natural and even necessary. It is courts in rule of law who are the last instance of judgment. Therefore one can even speak about the triumph of judge-made law.<sup>\*21</sup> In Germany, for example, first cases were filed already at the dawn of the 20<sup>th</sup> century. Legal theorist B. Rüthers even argues that the most important part of today’s law is no longer statutory law, but the judge-made law of the last instance.<sup>\*22</sup> Similar situation can be confirmed in all parts of today’s legal orders, but is especially recognisable where objective law has high level of abstraction (e.g., constitutional law) or where regulations have gaps.<sup>\*23</sup>

I would like to elaborate on the functions of principles now. To explain their purpose — why they are needed at all. Generally speaking, the function of principles may be reduced to the function of a legal provision.<sup>\*24</sup> We can thus speak about the regulative function of principles. Direct regulative influence cannot be excluded<sup>\*25</sup>, but in most cases the scheme operates through and by certain complete legislative provisions. This leads to but one logical conclusion: application of principles allows arranging the reality relevant to the law in accordance with the governing political will. Application of principle in civil law legal culture certainly requires some effort, since in most cases principles are not written down in legislation, but need to be formed and thereafter applied. Principles of law born out of analysis of positive law may often have a so-called heuristic function. Literature rightly notes that understanding and use of principle in the heuristic sense was first characteristic to germanists in the 19<sup>th</sup> century.<sup>\*26</sup> It had to do with the fact that putting the idea of general codification into practice made legal order codified in quite an incomprehensible way and contained many contradictory provisions. There was an attempt to reduce all that to essential principles only and give comprehensive structure to legal order.<sup>\*27</sup> The same function is also needed in today’s rule of law. Structure and comprehensibility of legal order are the key factors of legal certainty. It is legal certainty, being a component of the idea of law and at the same time an independent principle of law, which in many cases is the immanent condition of effective functioning of society. But principles have an important role in the application of law. This gives a reason to mention the practical legal function of principles. The practical legal function of principles means first of all

<sup>15</sup> R. Alexy (Note 12), p. 34.

<sup>16</sup> *Ibid.*, p. 36.

<sup>17</sup> O. Weinberger. Revision des traditionellen Rechtssatzkonzeptes, in B. Schiller. – P. Koller, B.-Ch. Funk. Regeln, Prinzipien und Elemente im System des Rechts. Vienna: Verlag Österreich 2000, p. 64.

<sup>18</sup> S. Vogenauer. Die Auslegung von Gesetzen in England und auf dem Kontinent. Tübingen: Mohr Siebeck 2001, p. 1257 ff., 1273.

<sup>19</sup> Literature suggests that Dworkin represents the latter branch. The so-called political moral has to be constantly kept in mind upon the right formation of a principle. A. Jakab (Note 12), p. 59; R. Dworkin (Note 11), pp. 66, 126.

<sup>20</sup> O. Weinberger (Note 17), p. 60.

<sup>21</sup> B. Rüthers. Rechtsdogmatik und Rechtspolitik – Eine verkannte Verknüpfung. – Zeitschrift für Rechtspolitik 2005, Heft 1, p. 6.

<sup>22</sup> B. Rüthers (Note 2), pp. 41, 235–258, 822, 865.

<sup>23</sup> What it actually upholds for legal dogmatics that statutory law is moving closer and closer to judge-made law elaborated in the legal dogmatics chapter of this article.

<sup>24</sup> Reference is made to the so-called complete legislative provisions, which are categorised into regulative and legal protection instruments according to their social content. See R. Narits. Õiguse entsüklopeedia (Encyclopaedia of Law). 2<sup>nd</sup> supplemented and amended edition. Tallinn: Juura 2002, pp. 104–106 (in Estonian).

<sup>25</sup> “Principles as grounds for particular exceptions to laws”. See J. Raz (Note 8), p. 840.

<sup>26</sup> A. Jakab (Note 12), p. 60.

<sup>27</sup> S. Jacoby. Allgemeine Rechtsgrundsätze. Berlin: Duncker und Humblot 1997, p. 139 ff.

that principles play an important role in argumentation. Literature denotes principles understood in that way to be rules of argumentation.<sup>\*28</sup> When talking about argumentation principles, it is only natural to speak about interpretation. Argumentation is after all the part of interpretation which, figuratively speaking, “meets the world”. It is therefore well justified to denote the practical legal function also as an interpretative function.<sup>\*29</sup> Of course, it does not make sense to use that method upon routine interpretation. But it is useful if two or more possible interpretations exist. Clear preference should be given to what is compatible with principle of law. Exemptions are possible, the most significant being perhaps a situation where a principle of law has definitive limits. Such situations should be solved restrictively.<sup>\*30</sup> Practical legal function also includes situations where principles are used in argumentation as a support method to reach the desired objective.<sup>\*31</sup> In practice principles can be used to reinforce legal power of a judgment. Here principles would be the so-called allowed arguments to help, alongside and with the obligatory arguments, to come to law abiding decisions.

I would like to point out a situation where principles obtain a very powerful meaning in legal practice. Namely, when a judgment is based solely on a principle of law. This is possible due to the fact that principle of law is — as mentioned above — with a very high level of abstraction. Moreover, such an option to use principles of law leads way to practice of avoiding formal reference to outdated provisions, which live on through the implementation of the principle of law. Use of principles of law in legal argumentation is a method how comparative law can influence national decisions. Use of principles of law allows referring to provisions of other legal orders and builds sort of a bridge between national and foreign law.<sup>\*32</sup> Literature in the field also underlines the connection between principles of law and moral. Interestingly, even celebrated legal positivists have done the same, not to speak about followers of natural law<sup>\*33</sup>, whereas for the latter principles are not an easy means to justify arbitrary moral but the embodiment of positivistic moral. And finally, I cannot help but note also the fact that the advancement of law by principles should also be treated as a practical legal function.<sup>\*34</sup> Be it added that one of the founders of the discussion on principles J. Esser was the legal scientist who, unlike earlier study of method, which argued that principles of law are established by a judge, highlighted the advancing role of principles of law themselves.<sup>\*35</sup> This function has always played a greater role at places where legal order is young, lacks or has contradicting doctrines and legal dogmatics.

To conclude the discussion on principles of law I would like to briefly rest on the argument that the validity of legal acts depends on their conformity to principles of law. Literature denotes this situation as the function of scales of principles of law.<sup>\*36</sup> For the sake of clarity it should be said here that traditionally legal orders have vertical structure, which means that provisions placed higher are *a priori* predominant over lower legislative provisions. The same applies to principles, which can also be found on different steps of the vertical legal order. We also mentioned the fact that courts can form principles (European Court of Justice), which are applied without a reference to a constitution or constitutional law (invisible constitution). There is nevertheless a situation where the formed principles have validity scale not because they are principles but because they are ranked higher in the legal order. It is possible that principles of law get incorporated in constitution but it does not have to be this way. Not all principles, and especially in private law, have made their way into constitutions. Thus, the function of scales is not specific to principles, but a hierarchical maxim intrinsic to legal orders.<sup>\*37</sup>

<sup>28</sup> N. MacCormick. *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*. Oxford, New York: Oxford University Press 1999, p. 113.

<sup>29</sup> T. Eckhoff. *Guiding Standards in Legal Reasoning. – Current Legal Problems*. Oxford 1976, pp. 205–219; J. A. Usher. *General Principles of EC Law*. London: Longman 1998, p. 122 ff.

<sup>30</sup> S. Vogenauer (Note 18), p. 1275.

<sup>31</sup> As an example Dworkin brings the case of *Riggs v. Palmer*, where in spite of a specific regulation the payment of inheritance was refused to the grandson who had killed his grandfather. Court ruled against the current regulation in the name of the principle that “one cannot benefit from one’s own wrongdoing”. See R. Dworkin (Note 11), p. 23.

<sup>32</sup> A chrestomatic example is France after the adoption of *Code civil*, where due to the *principes généraux* Roman law continued to apply. The “bridge function” is especially important where representatives from different legal cultures are together trying to find a lawful decision. A traditional example here is union law or international law, as well as the European Union law as a relatively independent legal order. European Court of Justice is active in giving contemporary content to many principles of law by trying to emanate from the idea of supranationality. Europe is in essence a melting pot of different legal cultures, families of law, all of which have their own rich history, traditions, doctrines, etc.

<sup>33</sup> H. Kelsen underlined for example that legal principles always leave room for deliberation. See H. Kelsen. *Allgemeine Theorie der Normen*. Vienna: Manz 1979, p. 97. The follower of natural law G. Del Vecchio argues that provision of principles in codes is as sign of legislator’s foresight of a code could not function without such moral rules. See G. Del Vecchio. *Les principes généraux du droit. Recueil d’études sur les sources du droit, en l’honneur de Francois Géný*. Paris 1934, p. 73 ff.

<sup>34</sup> J. Raz (Note 8), p. 841.

<sup>35</sup> J. Esser (Note 10), p. 83.

<sup>36</sup> J. A. Usher (Note 29), p. 123.

<sup>37</sup> A. Jakab (Note 12), p. 64.

## 2. Legal dogmatics

It was mentioned in the introduction that legal dogmatics cannot be univocally defined. Supporters of multi-level approach<sup>\*38</sup> denote legal dogmatics also as practical jurisprudence. The reason for that is because legal dogmatics stands the closest to legal practice in the context of multi level study of law and is most directly linked to reality in the cognitive sense. Dogmatics has traditionally two levels: first the general level, where dogmatics is understood as scientific processing of all legal material.<sup>\*39</sup> In a more specific sense dogmatics is understood as sentences that form a certain system, which enable to conceptually and systematically value the application of law.<sup>\*40</sup> This is the level where dogmatics differentiate according to their subject areas. Thus, area-specific dogmatics are “[...] ‘saved’ collections of right decisions, i.e., decisions that are reasonably grounded in the framework of the current legal order”.<sup>\*41</sup> Yet, there have always been critics of legal dogmatics. Reasons have been different, but one motif is that dogmatics cannot stand the test of time, because it should intrinsically depict something changeless, petrified. Giving such content to legal dogmatics would indeed confront it to the actual quality of life and the requirements that the ever-changing reality poses to and expects from law. Jurisprudence knows such a situation as a cyclically repeating argument over liberating the “current” dogmatics from its historic roots. That debate tends to surface especially when society is going through profound changes. It is thus an ancient topic for debate.<sup>\*42</sup> B. Rüthers writes: “Examples show that dogmatic arguments over principles are regular side products of actual or desired turning-points. [...] Those standpoints and discourses have lead to an expansive divorce between legal dogmatics and history of law. Today, these are two different disciplines in Germany in the sense of subject, methods and interest of study.”<sup>\*43</sup>

Legal dogmatics should nevertheless not be dreaded. One has to keep in mind that legal dogmatics is not a collection of dogmas as such, but a study of dogmas (regardless of how much those dogmas have to do with history). Dogmatics has different meaning and weight, even function, in different subject areas. What is common with all dogmas is probably the fact that dogmas represent binding, recognised and usable basic knowledge for a certain field, whereas the nature and the degree to which they are binding may differ greatly. Jurisprudence has already since its inception expressed a tendency (even need) to formulate rationally provable basic standpoints.<sup>\*44</sup> We can regard as an axiom of today’s jurisprudence of values the argument that a legal judgment is one based on values, and that the first source to look for values is the constitution with its binding catalogue of fundamental rights and liberties. In this context — i.e., applied to law — dogmatics means explanation of fundamental values, solutions to as well as reasons of problems. “Dogmatics must explain current law with rational persuasion power and in the light of generally accepted fundamental values (beliefs on values). It is the **intrinsic system** of legal order that has evolved over different stages of development, is non-compendious and often controversially transcribed.”<sup>\*45</sup>

He also deliberates whether the time has come to abandon dogmatics in Europe, or if it has already actually happened. B. Schlink writes that jurisprudence also has a different path. A glance on American-type perception on constitutional law reveals that it is not characterised by dogmatic systems, but by cases and chronologies of their judgments, with significant and binding notes appended. Chronologies do not form dogmatic systems, but they do give a co-ordinated complex picture. It is based on *stare decisis*, a principle that requires abiding by decisions that are once already made.<sup>\*46</sup> In case law the *stare decisis* principle is the functional equivalent to dogmatic creation of systems in a legislation or regulatory provision based legal culture. We cannot find the *stare decisis* principle written down in constitutions or other laws — it is an object of argument the subject

<sup>38</sup> On the second level it has to do with “legal dogmatics”, i.e., the practical (dogmatic) jurisprudence, that researches law and its interpretations in a “systematic form”. See W. Krawietz. Theorie und Forschungsprogramm menschlichen Rechtserfahrung – allgemeine Rechtslehre Otto Bruns. – Rechtstheorie 1991 (22), p. 17.

<sup>39</sup> Dogmatics as the synonym of the jurisprudence. See R. Alexy. Theorie der juristischen Argumentation. 2. Aufl. Frankfurt am Main: Suhrkamp 1991, p. 307.

<sup>40</sup> Fr. Müller, R. Christensen. Juristische Methodik. 8. Aufl. Berlin: Duncker und Humblot 2002, p. 403.

<sup>41</sup> U. Volkmann. Veränderungen der Grundrechtsdogmatik. – Juristen Zeitung 2005/6, p. 262.

<sup>42</sup> In many cases legal dogmatics generated and formed over times seems to be a network of principally outdated views, which contradict new perceptions of values, which should in fact be included in dogmatics. See C. Bergbohm. Jurisprudenz und Rechtsphilosophie. Abh. 1: Das Naturrecht der Gegenwart. Leipzig: Duncker und Humblot 1892, p. 531 ff.; H. Kantorowicz. Der Kampf um die Rechtswissenschaft. Heidelberg: Winter 1906, p. 104 ff.; H. Rottleuthner. Rechtswissenschaft als Sozialwissenschaft. Frankfurt am Main: Fischer-Taschenbuch Verl. 1973.

<sup>43</sup> B. Rüthers. Die neuen Herren – Rechtsdogmatik und Rechtspolitik unter dem Einfluss des Judge-made laws. – Zeitschrift für Rechtsphilosophie 2005/1, p. 2.

<sup>44</sup> Already ancient Roman jurists knew that laws are not ready-made solutions for solving legal issues. Jurist Pomponius has said: “[...] *quod sine scripto in sola prudentium interpretatione consistit*” (dogmatics, although not written down in law, is based on clever interpretation. – D. 1.2.2.12).

<sup>45</sup> B. Rüthers (Note 43), p. 3.

<sup>46</sup> B. Schlink. Abschied von Dogmatik. Verfassungsrechtsprechung und Verfassungsrechtswissenschaft im Wandel. – Juristen Zeitung 2007/4, p. 160.

matter of which is clear to everyone.<sup>\*47</sup> What makes one think is what B. Schlink writes in his analysis of German constitutional court practice: “The changes in the practice of administration of justice at the German Constitutional Court are neither inspired by dogmatic tuning nor do they allow to be interpreted by the *stare decisis* principle, which is doctrine that allows derogations from the basically agreed way of administration of law. These changes do not react to new practical needs, new facts or new legal bases [...]. German constitutional court says farewell to the tradition of dogmatic jurisprudence and replaces it with a causative tradition of administration of law. In the author’s opinion it is not a rational way, though. Letting dogmatics go does not automatically mean commitment to precedent. What rather happens is that commitment to dogmatics is replaced by non-commitment to precedence and commitment to nothing.”<sup>\*48</sup>

The above is indeed part of the reality of today’s administration of law. I consider it perfectly normal that in Europe, where statutory law and case law have existed side by side, those two legal cultures tend to somewhat approach. I am not, and I could not be, talking about substitution of those cultures — which B. Schlink seems to be most afraid of — but the convergence and entwining of relatively independent cognitive legal cultures. It is thus a process both historical and objectively grounded. B. Schlink has probably felt so as well, since he ends his article with a chapter titled “New Constitutional Jurisprudence”.<sup>\*49</sup> The need for qualitatively new theory of constitution was spoken about also at the forum on constitutional courts in 2005.<sup>\*50</sup>

Appeals to give up legal dogmatics should not be taken seriously. Legal dogmatics can contribute to legal practice. First I would remind the regulating role of legal dogmatics. It is legal dogmatics that helps to organise — or even systematise — the ever expanding legal massive of law. Without dogmatics the today’s practice of law would probably be incomprehensible. The certain order created by the legal dogmatics helps to cast a glance at the inner value system of a legal order. Legal dogmatics has always played the role of a stabilisation agent. The observations settled in legal dogmatics are applicable to regulated areas of different quality. Today legal dogmatics helps to bring two different legal cultures closer to each other. Without legal dogmatics tensions between legal cultures would persist and the approaching of those cultures could be taken as substitution. At least in the civil law legal culture it is the legal dogmatics that helps to ensure that disputes of the same quality would not be argued over and over again, but be based on the existing dogmatics that has valued certain solutions and offered a dogmatic pattern of solution. It must not be forgotten that legal dogmatics has been and will be born in situations of tension — through arguments and even confrontations. But once being established, it is difficult to withstand and argue with it. That should be the case at least in a rationally understood legal practice. However, legal dogmatics cannot be something petrified, and if legal practice ignores a dogma, then it must be motivated, i.e., grounded with valid arguments. The thing with law is that repeated regulation of similar situations may, for example, be motivated with different ends in the view. Lawyers solve yesterday’s cases on the basis of week-old laws. This means that the objective of legal dogmatics cannot in any way be eternalizing existing guidelines, but neither can it be effortless neglect of the existing. Literature in the field argues: “For the sake of legal certainty deviation from traditional dogmatics cannot be justified even if there are good arguments for the deviant solution. The motivation behind the deviation must, in addition to breaking the already appreciated doctrine, justify also the society’s loss of trust against the current and thus far recognised legal order.”<sup>\*51</sup> Thus, if a ruling is made against current dogmatics, it requires a substantial load of argumentation. For the applier of law legal dogmatics is a legally binding limit, or more precisely — legal dogmatics is a boundary stone for legal interpretation.<sup>\*52</sup> We can but agree with systems theorist N. Luhmann who is of the opinion that legal dogmatics binds applications of law with constitutionalism, principles of democracy and separation of powers in a rule of law. To a large extent it determines the mutual relations between the program (law, principles of law, dogmatic statements) and solutions. He defines the terms and boundaries of the leeway for the judge’s decision to limit the admissibility and pattern of argumentation of new constructions for solutions to legal problems.<sup>\*53</sup>

In this chapter I would like to underline also dogmatics’s connection to legal policy. In reality countries do not actualize timeless values or timeless justice, but orientate to values scales accepted in the society (the

<sup>47</sup> B. Schlink nevertheless brings one example in his article on how in 1992 the U.S. Supreme Court explained the content of a principle related to a case. Court emphasised that application of a principle means general adherence to a made decision, and the principle itself requires no exceptions. Exceptions are justified, if the prior decision is no longer practical, relevant facts have changed or the relevant law has evolved. But even then there are circumstances that do not support deviation: the parties have become to trust the decision made, or the society is tuned in such a way that the deviation would hurt its legitimate expectations or involve material social damage. Whereas the minority of the court would nobly like to allow deviances, give more weight to new legal arguments and beliefs. But the minority nevertheless remains loyal to principle. See 505 U.S.833 (1992, 854 ff.) — referred to by B. Schlink (Note 46), p. 161.

<sup>48</sup> B. Schlink (Note 46), p. 161.

<sup>49</sup> *Ibid.*, pp. 161–162.

<sup>50</sup> See Note 2.

<sup>51</sup> B. Rütters. Die Neuen Herren – Rechtsdogmatik und Rechtspolitik unter dem Einfluss des Judge-made laws. – Zeitschrift für Rechtsphilosophie 2005/1, p. 10.

<sup>52</sup> For the so-called unlimited interpretation see B. Rütters. Die unbegrenzte Auslegung. 5. Aufl. Heidelberg: Müller 1997.

<sup>53</sup> N. Luhmann. Rechtssystem und Rechtsdogmatik. Stuttgart: Kohlhammer 1974, p. 24.

today's globalised world). "It is in this "century of ideologies" [the 20<sup>th</sup> century — R.N.] [...] when the tense and often ignored issue of *law and metaphysics* or also *law and ideology* emerges."<sup>54</sup> This means that even within one state different understandings of "justice" often compete at the level of government, parliament and also administration of justice. The traditional standpoint worth supporting in application of law is that in a democratic state the source for the application of law is the written legislation. This is the only way to implement the legal policy objectives that the legislator has drafted. Here every absolute legal provision is a scale of behaviour for the applier of the provision. Any interpretation based on a provision must generally reveal the point or objective entered into that provision by the legislator. Thus, the applier of the law should above all find those values in the provision, which were considered as values by the legislator.<sup>55</sup> But since understanding of a text requires understanding of the reality which that provision attempts to regulate, then it may happen that the quality of the reality has since the adoption of the provision considerably changed. Tension arises between the historic reality and the present reality. The decision should obviously be made on the basis of current scales of values. In other words, the structure of facts and the perception of values are changing. A question arises whether and how can "old" legislative provisions be reduced to new factual circumstances and perceptions of values in order to be put into practice. Here the problem could probably be solved not by the traditional interpretation of law; instead legal dogmatics would be in the service of the applier of law in the meaning of judge-made law.<sup>56</sup> The situation has been critically assessed, and it is argued that in essence it is a question of power sharing between parliament and legal authorities.<sup>57</sup> Laws grow old and have in some sense gaps already at the moment of adoption, because life is dynamic and cannot be put on hold with an adoption of a law. That is why giving rational meaning to laws has always been and will always be legal authorities' long-term constitutional task, and legal dogmatics strongly supports the attainment of that task. In such a situation judges are on one hand of course bound to laws, objective law, but on the other hand they are engaged in the formation of legal order with the help of, inter alia, legal dogmatics. Upon the separation of powers in a rule of law it is thus not justified to strictly separate the application of law from any activities which help to develop judge-made law. Here I would not like to subscribe to the opinion that a judge must clearly recognise "[...] whether he or she is acting as a "servant of law" [...] or is a "builder of legal order" or a "legal piano payer" who forms law (judge-made law) on the basis of legislation".<sup>58</sup> Through judge-made law and legal dogmatics a judge inevitably takes hand in legal policy. It is clear that judge-made law has changed dogmatics. Jurisprudence has over times always with the help of "good interpretations" searched for some uniform internal system for legal order, whereas the central starting points have been goals of objective law. But we also need to see and admit that a dual nature of norm creating (or norm shaping) power is inevitable in a rule of law. Objectively and actually the responsibility lies with the legislator as well as the judicial power, especially higher judicial power. Guidelines of legal policy thus stem not only from objective law (legislation), but also to some extent from legal authorities.<sup>59</sup> What needs to be avoided is a parliamentary democracy becoming a state where instances of court create their own "free law".<sup>60</sup> Principles of law and legal dogmatics serve as a "compass" for judges, which, if used, help judges to come to a law-abiding decision.

### 3. In place of conclusions

It can be concluded from the above that the use of both principles of law and legal dogmatics includes a certain legal policy component. It is natural that this process will thrive, because courts, like any other governmental power centres, tend to take on more powers and tasks, not give away. In some ways it also concerns constitu-

<sup>54</sup> B. Rüthers. Methodenrealismus in Jurisprudenz und Justiz. – Zeitschrift für Rechtsphilosophie 2007/1, p. 46.

<sup>55</sup> Literature in the field pointed out already long ago that if, in the course of application of law, value scales agreed in legislation are either expanded or confined or even ignored, then we are not talking about interpretation any more. See K. Engisch. Die Einheit der Rechtsordnung. Heidelberg: Carl Winter Verl. 1935, p. 88.

<sup>56</sup> In Germany several parts of labour law, but also several important areas of civil law (e.g., family law) were born due to the realisation of the judge-made law principle. The dogmatics of fundamental rights emerged the same way, mainly due to the work of the German Constitutional Court.

<sup>57</sup> B. Rüthers asked already some years ago whether Germany is not on its way from a democratic rule of law to an oligarchic rule of judges. B. Rüthers. Demokratischer Rechtsstaat oder oligarchischer Richterstaat. – E. Picker, B. Rüthers (Hrsg.). Freiheit und Recht. Symposium zu Ehren von Prof. Dr. Reinhard Richardi. München: Beck 2003, pp. 111–136.

<sup>58</sup> B. Rüthers (Note 2), pp. 235–257, 279.

<sup>59</sup> Case law of German Constitutional Court shows that provisions are not checked only against the constitution, legal instructions are also prescribed to the parliament on how legislation in a certain area should be in order to hold up in court. Rüthers characterises the situation with the decisions of higher instances of court having law-like influences in legal practice. See B. Rüthers. Die neuen Herren – Rechtsdogmatik und Rechtspolitik unter dem Einfluss des Judge-made laws. – Zeitschrift für Rechtsphilosophie 2005/1, p. 7.

<sup>60</sup> "Due to the methods used by the higher instances of court, the Federal Republic of Germany is heading from parliamentary democracy toward an oligarchic rule of judges. Higher instances are creating their own "free law"". See B. Rüthers. Methodenrealismus in Jurisprudenz und Justiz. – Zeitschrift für Rechtsphilosophie 2007/1, p. 52.

tional jurisprudence. Its task is not to stop or reverse that process, but the process must change constitutional jurisprudence. It is also clear that it is more and more difficult to rationally form and systematise contemporary legislation and even more so constitutional review by means of dogmatic theories. In legal policy dispute it is correspondingly more and more difficult to forecast constitutional court judgments by the means of merely traditional legal rules. What position should constitutional judges take in that situation? They should probably engage actively in critical discourses with colleagues and also the public. Discourse with other colleagues in the same profession (the so-called judge dialogue) is especially needed. May it be noted here that in jurisprudence the most important cognitive method is the free discourse that gets inspiration namely from practice of law, especially from administration of justice. Yet, sitting judges are required to distance themselves from current political debate.<sup>\*61</sup> This is primarily necessary for the protection of the profession of judge as a politically neutral profession.<sup>\*62</sup> It definitely somewhat also depends on the personality of the judge. The Constitutional Court of Lithuania, which is mainly formed of university professors, has gained the reputation of a so-called liberal interpreter, by argumenting its judgments with principles hardly to be found in the constitution.<sup>\*63</sup> Lithuanian supreme judge E. Kuris deliberates on what exactly should be the legal basis for the development of a constitutional system, if speaking about non-elected and non-accountable constitutional courts (the so-called negative legislator). Is it even possible in a democratic system to control constitutional courts by limiting their role in constitutional policy? The author sees two solutions here: one is judicial self-restraint and the other free professional constitutional discourse. It is in any case clear that constitutional court rulings, containing official constitutional doctrine, are supplementary source to law.<sup>\*64</sup>

To encourage constitutional courts, may it be said that also many legal scientists do not have the patience to wait for legislator to come up with solutions, and they see jurisprudence as a value adding science<sup>\*65</sup>, being at the same time aware that rational legal policy has several obstacles and hindrances.<sup>\*66</sup>

The summarising word of advice to constitutional courts could be the traditional ending remark of Roman consuls: *feci, quod potui, faciant meliora potentes* — I have done what I could; those who can will do better.

<sup>61</sup> Tagungsberichte (Note 3), p. 241.

<sup>62</sup> One cannot agree with the radical argument that constitutional court has either become an instrument in the hands of bourgeoisie or it is not needed at all, as parliament could always make the needed amendments itself. Or that it should be deemed inappropriate that the same person is a judge and a creator of provisions (a constitutional judge). Constitutional review is inappropriate for parliamentary democracy like for any other democratic public order. See F. Gentile, P. G. Grasso (a cura di). *Costituzione criticata/ De "La Crisalide"*. Edizioni Scientifiche Italiane. Naples 1999, pp. 223–299; 300–349. The Chief Justice of the Supreme Court of Russia is most critical: "There is a danger of destroying international and national legitimacy as such. From the legal perspective we have indeed ended up in a chaotic world where everything is becoming unpredictable." See V. Zorkin. *Rol konstitutsionnogo suda v obespetchenii stabilnosti i razvitiia konstitutsii*. – *Sravnitelnoe konstitutsionnoe obozrenie* 2004/3, p. 84.

<sup>63</sup> E. Kuris. Judges as Guardians of the Constitution: "Strickt" or "Liberal" Interpretation? – *The Constitution as an Instrument of Change* 2003, p. 209.

<sup>64</sup> E. Kuris. *O stabilnosti konstitutsii, istotnikah konstitutsionnogo prava i mnimom vsemozestve konstitutsionnyh sudov* (On the Stability of Constitution, Sources of Constitutional Law, and the Seeming Omnipotence of Constitutional Courts). – *Sravnitelnoe konstitutsionnoe obozrenie* 2004/3, pp. 92–103.

<sup>65</sup> C. Engel. *Rationale Rechtspolitik und ihre Grenzen*. – *Juristen Zeitung* 2005/12, pp. 582–583. Indirectly every constitutional law theorist is a party of that process when he or she compares provisions of objective law to a constitution, asking for the legitimate objective of the provision.

<sup>66</sup> As difficulties Engel sees for example the complex nature of the subject area, boundaries of human cognition; the addressees of law not mechanically reacting to law; addressees being bound to a certain social reality; a reality where no provisional scales of good law exist; attitude of judicial politicians themselves to law, which should be respectful to law as such. See C. Engel (Note 65), pp. 583–590.



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# An Early Decision with Far-reaching Consequences

## How the Parliamentary Prerogative, the Right to Good Administration and Judicial Activism Entered into the Estonian Legal Order

### 1. Introduction

Adoption of the Constitution at referendum on 28 June 1992 and its entry into force on the following day started the process of the formation of constitutional institutions in the country. In autumn 1992, the Riigikogu and the President of the Republic were elected and the Government of the Republic assumed office. Constitutional review in the Supreme Court began in 1993. This is the first time in the history of the Republic of Estonia that the substantive constitutional review was implemented. In 2008, fifteen years shall pass thereof, which is a good impetus for a short mid-term review.

The object of this article is to analyse critically the relevance of one early decision of the Supreme Court on its subsequent practice and on the constitutional debate in Estonia. The selected decision is that of 12 January 1994, which could be called Operative Technical Measures I<sup>2</sup> and which is one of the most important and influential decisions in the practice of the Supreme Court. The case arose from typical tense relations in the beginning of the 1990s. On the one hand, the legislator and the government were obliged to solve quickly a number of different issues after the restoration of independence of the Republic of Estonia, which were the result of a new societal structure and economic relations. On the other hand, one of the most important messages of the new Constitution is that every individual has (fundamental) rights arising from the Constitution that are directed against the state and the state has corresponding obligations to every individual pursuant to the Constitution. The implementation of the Constitution was necessary in order for it not to become a still-born baby as was the case with the Constitution of the Estonian SSR. Thus, the sacrifice that had to be made in this case was the young state's practical and urgent need to more effectively fight against organised crime in order to follow something more abstract and distant, the rightfulness or wrongfulness of which will only be revealed in the long term.

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<sup>1</sup> The paper expresses the author's personal opinions.

<sup>2</sup> CRCSd 12.01.1994, III-4/1-1/94. The decision Operative Technical Measures II also originates from the same date. Cf. CRCSd 12.01.1994, III-4/1-2/94. All decisions of the Supreme Court referred to in the article are available at [www.nc.ee](http://www.nc.ee).

## 2. The decision of the Supreme Court and its relevance

On 21 April 1993, the Riigikogu adopted the Republic of Estonia Police Act Amendment Act.<sup>3</sup> Part 2 subsection 4 thereof laid down:

To establish that until the adoption of an act laying down operative surveillance activity, the security police officers may temporarily use operative technical measures to perform their duties only at the written consent of a member of the Supreme Court appointed by the Chief Justice of the Supreme Court.

The Chancellor of Justice, who has the sole right to initiate reactive abstract constitutional review of an act of parliament in Estonian legal order, disputed this act in the Supreme Court. On 12 January 2004, the Constitutional Review Chamber of the Supreme Court passed a decision by which the given rule was repealed as of the entry into force of the decision.

In the reasons to the decision, the Chamber first defines the term operative technical measure: “In forensic science, the term ‘operative technical measures’, or ‘operative surveillance measures’ in the meaning of technical measures and operations, which enable to covertly interfere in the use of an individual’s rights and freedoms, i.e., without the individual’s knowledge, for the purposes of information collection.”

The Chamber further admits that surveillance measures restrict several fundamental rights: “By allowing the security police officers to implement operative technical measures, the act provides the possibility to limit the rights and freedoms listed in the Constitution, including the rights laid down in §§ 26, 33 and 43 regarding the inviolability of private and family life, the inviolability of the home and confidentiality of messages sent or received by other commonly used means.” The Chamber thereafter declares the fundamental rights subject to restrictions as a point of principle, thereby paving the way to its later practice where the principle of proportionality is decisive: “The possibility to limit the aforementioned rights and freedoms is prescribed both by the Constitution and international instruments of law.” This is followed by the reasons, the most important part of which follows: “According to lawfulness as the generally accepted principle of (international) law and the principle laid down in § 3 of the Republic of Estonia Constitution, fundamental rights and freedoms may only be restricted pursuant to law. The procedure for restricting the rights and freedoms determined and published by law and publicity enable discretion and ensure the possibility to avoid abuse of power. However, lack and obscurity of a thorough legislative regulation leaves a person without a right to informative self-determination to choose a line of conduct and protect oneself. [...] [T]he valid standards for implementing operative technical measures are insufficient and deficient from the point of view of the protection of fundamental rights and freedoms which in such an important field encompasses a danger of arbitrariness and distortion of use of fundamental rights and freedoms and restrictions contrary to the Constitution. It has not been specified what operative technical measures specifically mean. [...] The circle of subjects entitled to implement operative technical measures, cases, conditions, procedure, guarantees, control and supervision and liability remains unspecified. [...] Therefore, in adopting subsection 4 in part II of the Police Act Amendment Act, the Riigikogu has disregarded § 3 of the Constitution according to which state power shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith and violated § 14, which obliges the legislative power to ensure everyone’s rights and freedoms. [...] The Riigikogu should have established the specific cases and detailed procedure for the implementation of operative technical measures and the related possible restrictions of rights itself instead of delegating the latter to security police officers and the justice of the Supreme Court. What the legislator is entitled or obliged to do according to the Constitution cannot be delegated to the executive power, not even temporarily or on the condition of a possible judicial review. Thus, subsection 4 of part II of the Police Act Amendment Act is also contrary to § 13 (2) of the Constitution as insufficient regulation in establishing restrictions to fundamental rights and freedoms shall not protect everyone against arbitrary action by state power.”

This decision is important for three reasons. Firstly, the Supreme Court hereby formulates the principle of parliamentary prerogative. Secondly, in this decision the Supreme Court implements the general right to organisation and procedure for the first time (§ 14 of the Constitution), although not yet explicitly stating this. Thirdly, the decision by the Supreme Court entails that in addition to a limitation too intense, the legislator can also violate the Constitution by omission, whereby the constitutionality of both can be reviewed by the Supreme Court.

<sup>3</sup> Eesti Vabariigi politseiseaduse muutmise ja täiendamise seadus. – RT I 1993, 20, 355 (in Estonian).

## 2.1. The principle of parliamentary prerogative

The principle of parliamentary prerogative is vested in the first sentence of § 3 (1) of the Constitution, according to which state power shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. The principle of parliamentary prerogative is also expressed by § 104 (2) of the Constitution, which lays down a list of laws that can be passed only by a majority of the membership of the Riigikogu. If a law can be passed only by a majority of the membership of the Riigikogu, it can therefore be only passed by the Riigikogu and thus the decision is reserved to the parliament.

In its decision of 14 January 1994, the Supreme Court formulates the principle of parliamentary prerogative: “What the legislator is [...] obliged to do according to the Constitution cannot be delegated to the executive power, not even temporarily or on the condition of a possible judicial review.” In 1998, the same idea is repeated: “The Riigikogu may not delegate solving a matter, which must be solved by law pursuant to the Constitution to the Government of the Republic.”<sup>4</sup> In its later decision, the Supreme Court first explains the principle of parliamentary prerogative by the principle of separation and balance of powers and thereafter by the principle of legal certainty.

In the practice of the Supreme Court in the field of fundamental rights, the principle of parliamentary prerogative has been expressed in three ways: declaring unconstitutional a law that delegates power to the executive but lacks the essential substance of a delegating norm<sup>5</sup>, a government regulation that restricts fundamental rights passed without legal basis<sup>6</sup> as well as a government regulation that restricts fundamental rights exceeding the parliamentary delegation of power.<sup>7</sup> It is true that the separation of the latter two cases may prove to be difficult in case of a generally formulated parliamentary delegation of power.

In order to analyse how the principle of parliamentary prerogative operates, an answer must first be sought to the question what should be reserved to the parliament. The simple answer is that the most important questions shall be reserved to the parliament. But what is important? The Supreme Court primarily places relevance on matters important from the point of view of fundamental rights, which include cases and grounds for restricting fundamental rights: “The legislator must itself decide on all matters important from the point of view of fundamental rights and may not delegate the regulation thereof to the executive power. The executive power may only specify restrictions established on fundamental rights and freedoms, and not establish further restrictions compared to what has been provided by the law.”<sup>8</sup>

A detailed procedure for restricting rights<sup>9</sup> or the designation of a competent administrative body<sup>10</sup> may be important from the viewpoint of fundamental rights and thus the object of an act of parliament. The law must establish disciplinary action against officials: it is unlawful to establish disciplinary offences, disciplinary punishments and disciplinary proceedings by a government regulation.<sup>11</sup> A regulation cannot establish customs duty or customs tariff<sup>12</sup>, tax interest or fine for delay<sup>13</sup>, a participation fee in the privatisation of land by auction<sup>14</sup> or the rate of a bailiff.<sup>15</sup> The law itself must prescribe the purpose, content and scope of the regulation: “[T]he government may issue regulations pursuant to law and subject to enforcement, i.e., based on the delegation standard included in the law. The delegation standard indicates the purpose, content and scope of a regulative authorisation, in the framework of which the government has the right to issue regulations. A regulation which exceeds the purpose, content and scope of an authorisation issued by a delegation norm is unconstitutional.”<sup>16</sup>

<sup>4</sup> CRCSd 23.03.1998, 3-4-1-2-98, part VIII.

<sup>5</sup> CRCSd 12.01.1994, III-4/1-1/94; 5.02.1998, 3-4-1-1-98, parts III and IV; 23.03.1998, 3-4-1-2-98; 4.11.1998, 3-4-1-7-98, part II; 5.11.2002, 3-4-1-8-02; 24.12.2002, 3-4-1-10-02, paragraph 25; 19.12.2003, 3-4-1-22-03.

<sup>6</sup> CRCSd 2.11.1994, III-4/1-8/94; 11.01.1995, III-4/A-12/94; 6.10.1997, 3-4-1-3-97; 17.06.1998, 3-4-1-5-98; 23.11.1998, 3-4-1-8-98; 9.02.2000, 3-4-1-2-00; 10.04.2002, 3-4-1-4-02.

<sup>7</sup> SCebd 22.12.2000, 3-4-1-10-00; CRCSd 20.12.1996, 3-4-1-3-96; 22.12.1998, 3-4-1-11-98; 17.03.1999, 3-4-1-1-99; 12.05.2000, 3-4-1-5-00, paragraph 42; 8.02.2001, 3-4-1-1-01; 22.03.2001, 3-4-1-5-01; 17.02.2003, 3-4-1-1-03; 18.11.2004, 3-4-1-14-04; 13.06.2005, 3-4-1-5-05; 13.02.2007, 3-4-1-16-06; 2.05.2007, 3-4-1-2-07.

<sup>8</sup> CRCSd 24.12.2002, 3-4-1-10-02, paragraph 24.

<sup>9</sup> CRCSd 12.01.1994, III-4/1-1/94. In case of an intensive limitation, which wire tapping and covert surveillance included under operative technical measures undoubtedly are, the Supreme Court considers the order or procedure so important that it must be established by law and not by an act subordinate to a law.

<sup>10</sup> ALCSCr 22.12.2003, 3-3-1-77-03, paragraph 24.

<sup>11</sup> CRCSd 11.06.1997, 3-4-1-1-97.

<sup>12</sup> CRCSd 23.03.98, 3-4-1-2-98.

<sup>13</sup> CRCSd 5.11.2002, 3-4-1-8-02.

<sup>14</sup> SCebd 22.12.2000, 3-4-1-10-00.

<sup>15</sup> CRCSd 19.12.2003, 3-4-1-22-03.

<sup>16</sup> CRCSd 8.02.2001, 3-4-1-1-01, paragraph 13. Cf. also CRCSd 20.12.1996, 3-4-1-3-96, part III; 5.02.1998, 3-4-1-1-98, part V; 13.02.2007, 3-4-1-16-06, paragraph 21; 2.05.2007, 3-4-1-2-07, paragraph 20.

The relationship between a law and a regulation is also specified by the so-called framework theory: “[T]he law need not [...] describe all restrictions in detail. The law must, however, establish the framework within which the executive power specifies the relevant provisions of the law.”<sup>17</sup> In this context, the Supreme Court further discusses the transfer of technical specification to the government.<sup>18</sup>

In defining borders between the powers of the legislator and the issuer of regulations it is unclear, where the line between sufficient and therefore constitutional delegation norm and unconstitutional delegation norm is. Namely, in 1998 the Supreme Court established that a generally formulated delegation is not unconstitutional due to its general formulation: “If the legislator’s authorisation is general but not directly unconstitutional, the assumption or possibility that the government’s activity may be unconstitutional following this authorisation does not in itself necessarily cause the unconstitutionality of the authorisation. In the course of delegated norm establishment the Government of the Republic must follow the Constitution and interpret the law as well as the delegation norm in compliance with the Constitution. Therefore, the fact that an indefinite delegation would for instance enable the government to establish requirements that are unnecessary in a democratic society does not render the delegation itself unconstitutional.”<sup>19</sup>

On the face of it, this seems to be contrary to the rest of the practice of the Supreme Court. For example, in its decision of 12 January 1994, the Supreme Court declared the authorisation norm unconstitutional, blaming the legislator, among other things, in the following: “The circle of subjects entitled to implement operative technical measures, cases, conditions, procedure, guarantees, control and supervision and liability remain unspecified.”<sup>20</sup>

It is also difficult to imagine how the purpose, content and scope of a regulation can simultaneously be laid down in a delegation norm when it is formulated ambiguously. The cited decision of 1998 must probably be interpreted as mitigating the requirements presented to the legislator that were caused by the necessity of the transitional period to quickly modernise the majority of the legal system. The Supreme Court might have feared that the consistent implementation of the principle of parliamentary prerogative in the transformation period may prove to be overly difficult.<sup>21</sup> Indeed, a number of delegation norms contradict the standards set in 1994 even today and the current legal order includes numerous government regulations issued pursuant to such delegation norms. These regulations regulate matters important from the viewpoint of fundamental rights, which should be in the exclusive competence of the legislator, for example: The traffic regulation<sup>22</sup> or the border regime rules<sup>23</sup> approved by the Government of the Republic or the internal rules of prisons<sup>24</sup> or regulation of an armed unit<sup>25</sup> approved by regulations of the Minister of Justice. Precisely the decision of 1994, in which the Supreme Court declared a delegation norm unconstitutional and invalid, which does not include a circle of subjects, cases, conditions, procedural rules, guarantees, control, supervision or liability, must be considered an important motivator of the legislator in increasing the quality of the laws of the transitional

<sup>17</sup> CRCSd 17.03.1999, 3-4-1-1-99, paragraph 14.

<sup>18</sup> CRCSd 20.12.1996, 3-4-1-3-96, part II.

<sup>19</sup> CRCSd 5.02.1998, 3-4-1-1-98, part V.

<sup>20</sup> The Supreme Court has declared in a later decision a delegation norm in a law in the sense of § 104 (2) of the Constitution unconstitutional for formal reasons (CRCSd 4.11.1998, 3-4-1-7-98, part II). Among other things, the object of this decision was the delegation given to the Government of the Republic by the legislator to establish the procedure for the level of Estonian language skills necessary for working in a local government council. The Supreme Court proceeded from § 104 (2) 4) of the Constitution, according to which the Local Government Council Election Act may only be adopted and amended by a majority of the membership of the Riigikogu (i.e., 51 votes of 101) although the delegation not declared unconstitutional and invalid was included in the Language Act.

<sup>21</sup> In the same decision, the Supreme Court declared the unconstitutionality of two delegation norms violating the principle of parliamentary prerogative. See CRCSd 5.02.1998, 3-4-1-1-98, parts III and IV.

<sup>22</sup> The regulation is called Traffic Code (Liikluseeskiri. – RT I 2001, 15, 66; 2003, 22, 131; 2005, 41, 336 (in Estonian)). English translation available at <http://www.legaltext.ee/text/en/X50043K1.htm>. The Traffic Code establishes important traffic and movement restrictions, the violations of which are subject to a punishment. However, the authorisation norm that the Traffic Code is based on, is rather brief. Subsection 3 (Determination of road traffic rules) (2) of the Traffic Act (RT I 2001, 3, 6; 2007, 4, 19; in Estonian) lays down: The Government of the Republic shall determine the road traffic rules with the Traffic Code.

<sup>23</sup> Piirirežiimi eeskiri. – RT I 1997, 69, 1126; 2004, 77, 529 (in Estonian). Subsection 8 (Border regime) (3) is a problematic authorisation norm: The rights, obligations and restrictions arising from the border regime, unless provided by law or international agreements, shall be established by the Government of the Republic or an agency authorised thereby, unless otherwise provided by law.

<sup>24</sup> Vangla sisekorraeeskiri. – RTL 2000, 134, 2139; 2007, 13, 192 (in Estonian). Among other things, the internal rules of prisons establish restrictions on the use of personal items, meetings and correspondence by imprisoned persons. Subsection 105 (Prison) (2) of the Imprisonment Act forms a problematic authorisation norm: “[...] the Minister of Justice shall establish internal rules of prisons.” (It is true that numerous other provisions of the Imprisonment Act also refer to internal rules in prisons, but this kind of “spreading” of authorisations across the law renders the regulation difficult to survey and in turn raises issues in connection with legal clarity.)

<sup>25</sup> Relvastatud üksuse tegevuse kord. – RTL 2002, 144, 2107 (in Estonian). An armed unit, i.e., the so-called prison commando organises searches in prisons among other things; its members have the right to carry weapons and use these against people. The legal regulation is limited by an authorisation norm in § 109 (Prison escort guards) (3) of the Imprisonment Act: If necessary, an armed unit may be formed for the performance of special duties at a prison. The duties and operating procedure of prison escort guards shall be provided for pursuant to the procedure established by the Minister of Justice.

period. Today, as the end of the transitional period is jointly recognised, the Supreme Court could even more clearly turn to the goal set in 1994 stating that the obligation of the legislator pursuant to the Constitution to regulate important matters by itself cannot be delegated to the executive. This back-to-the-roots tendency is confirmed by several decisions from 2002 and 2003.<sup>\*26</sup>

## 2.2. General fundamental right to organisation and procedure

The second development, to which the basis was laid by Operative Technical Measures I, is the procedural dimension of fundamental rights. The Supreme Court discusses the elements of the implementation procedure of special measures and the procedural order in the explanation of the decision and establishes that the law which does not regulate the mentioned elements violates § 14 of the Constitution. The Supreme Court adds: “The Riigikogu should have established the specific cases and **detailed procedure** for the implementation of operative technical measures and the related possible restrictions of rights.”<sup>\*27</sup> The Supreme Court shall later name § 14 of the Constitution the general fundamental right to organisation and procedure.<sup>\*28</sup>

In this context, there are two important developments. Firstly, the right to organisation and procedure has expanded into a comprehensive right to effective procedure in the practice of the Supreme Court. Secondly, the Supreme Court has also developed the specific direction of an administrative procedure by developing the general right to organisation and procedure into a right to good administration.

The first development is marked by an interpretation of § 14 of the Constitution: “According to § 14 of the Constitution, the state is obliged to guarantee the rights and freedoms of individuals. Guarantee of rights and freedoms does not mean that the state avoids interference with fundamental rights. According to § 14 of the Constitution, the state is obliged to establish appropriate procedures for protecting fundamental rights. Both judicial and administrative proceedings must be fair. This means, among other things, that the state must enforce a procedure that ensures effective protection of the rights of an individual.”<sup>\*29</sup> The sequence of thoughts continues: “[I]f the legislator has not established an effective mechanism without gaps for the protection of fundamental rights, the judicial power must ensure protection of fundamental rights pursuant to § 14 of the Constitution.”<sup>\*30</sup>

Since 2000, the Supreme Court has repeatedly derived the right to effective procedure from § 13, 14 and 15 of the Constitution and article 13 of the ECHR.<sup>\*31</sup> In order for the right to effective procedure to be implemented, it must be considered sufficient if a person complains that his rights have been violated. A person shall have a remedy before a national administrative authority as well as before a national court in order both to have his claim decided and, if appropriate, to obtain redress.<sup>\*32</sup> An effective remedy means a remedy that is as effective as can be.<sup>\*33</sup>

The second development appears in the good administration precedents. The Supreme Court names § 14 of the Constitution a fundamental right to good administration<sup>\*34</sup>, thereby emphasising that § 14 of the Constitution applies primarily to administrative proceedings regardless of its general character. § 14 of the Constitution, which among other things obliges the executive power and local governments to ensure fundamental rights, is a fundamental right to an effective administrative procedure.<sup>\*35</sup> A fundamental right to good administration or

<sup>\*26</sup> CRCSd 5.11.2002, 3-4-1-8-02; 24.12.2002, 3-4-1-10-02, paragraph 25; 19.12.2003, 3-4-1-22-03.

<sup>\*27</sup> Author's emphasis.

<sup>\*28</sup> SCebd 28.10.2002, 3-4-1-5-02, paragraph 30, 35; 12-04-2006, 3-1-63-05, paragraph 24; CRCSd 17.02.2003, 3-4-1-1-03, paragraph 12; 31.01.2007, 3-4-1-14-06, paragraph 22, 34.

<sup>\*29</sup> CRCSd 14.04.2003, 3-4-1-4-03, paragraph 16. The obligation to guarantee rights also expands to the rights arising from European Convention on Human Rights. See SCebd 6.01.2004, 3-1-3-13-03, paragraph 31: “The European Convention for the Protection of Human Rights and Fundamental Freedoms is [...] an inseparable part of the Estonian legal order and the guarantee of the rights and freedoms provided therein is also the obligation of the judicial power pursuant to § 14 of the Constitution.”

<sup>\*30</sup> SCebd 6.01.2004, 3-3-2-1-04, paragraph 27.

<sup>\*31</sup> SCebr 22.12.2000, 3-3-1-38-00, paragraph 19; 28.04.2004, 3-3-1-69-03, paragraph 24; SCebd 17.03.2003, 3-1-3-10-02, paragraph 17. Cf. CRCSd 22.02.2001, 3-4-1-4-01, paragraph 9–11; U. Lõhmus. Õigus õiglasele kohtulikele arutamisele (The Right to a Fair Court Hearing). – U. Lõhmus (comp.). Inimõigused ja nende kaitse Euroopas (Human Rights and their Protection in Europe). Tartu 2003, paragraph 152 ff. (in Estonian).

<sup>\*32</sup> European Court of Human Rights uses the concept “redress” in *Klass et c. v. Germany*, judgment of 6.09.1978, 5029/71, paragraph 64. In later cases it uses instead of redress the broader concept of ‘relief’ (*Kudla v. Poland*, 26.10.2000, 30210/96, No. 157; 26.10.2000, 30985/96, *Hasan and Chaush v. Bulgaria*, paragraph 96): “a remedy must allow the competent domestic authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.”

<sup>\*33</sup> SCebr 22.12.2000, 3-3-1-38-00, paragraph 19 with a reference to the European Court of Human Rights *Klass et c. v. Germany*, judgment of 6.09.1978, 5029/71, paragraphs 64, 69.

<sup>\*34</sup> CRCSd 17.02.2003, 3-4-1-1-03, paragraph 23.

<sup>\*35</sup> Naturally, § 14 of the Constitution as the general fundamental right to organisation and procedure also has other aspects, which are unrelated to administrative proceedings, e.g., the right to private law powers. Cf. R. Alexy. *A Theory of Constitutional Rights*. Oxford/New York 2002, pp. 324 ff.

the principle of good administration as the Administrative Law Chamber of the Supreme Court calls it, subjects the administrative procedure to heightened requirements: “The principles of good administration among other things also presume that a person must be provided information regarding the course of procedure of the case that concerns him within a reasonable amount of time and the administrative acts that influence solving the case and other relevant information. For this purpose, a person must first be included in a procedure to hear his viewpoint, he must have the opportunity to present objections, provide relevant explanations, circumstances must be examined, evidence must be collected, different options weighed etc.”<sup>\*36</sup> Shortly, the principle of good administration means that “an administrative procedure must also be fair”.<sup>\*37</sup>

### 2.2.1. So-called Traffic Act saga

If the practice of the Supreme Court in general complies with the requirements established by the committees and panels of the Supreme Court, four recent decisions regarding the assessment of the constitutionality of the suspension of the right to drive proceeding laid down in the Traffic Act deviate therefrom.<sup>\*38</sup> Namely, the administrative authority issuing the right to drive, which is the Estonian Motor Vehicle Registration Centre (MVRC), has the legal obligation to suspend the right to drive for a period of one to 24 months pursuant to § 41<sup>3</sup> (1)–(8) of the Traffic Act. The proceeding that led to the suspension of the right to drive is the following. A person driving a vehicle without a state registration plate, who caused a traffic accident causing damage to another person who was driving a motor vehicle while drunk or avoided the state of intoxication to be ascertained or used alcohol after the traffic accident, who exceeded the permitted speed limit, who ignored the stop signal for vehicle and failed to give notification of the traffic accident, was punished for the misdemeanour committed pursuant to the Traffic Act. If the decision on punishment entered into force, the body conducting misdemeanour proceedings who was not MVRC, sent it to MVRC. Since the acquisition of the enforced decision on punishment, the latter was obliged to make a decision pursuant to § 41<sup>3</sup> (10), i.e., to suspend the right to drive of the persons punished within three days. The only condition of suspension in various subsections was the enforced decision on punishment made in the misdemeanour procedure. In the selection of legal consequences, there was no right of discretion.

Several administrative courts<sup>\*39</sup> and the Administrative Law Chamber of the Supreme Court<sup>\*40</sup> expressed doubt about the constitutionality of § 41<sup>3</sup> (1)–(8) and (10) of the Traffic Act and initiated a concrete norm control in the Supreme Court for the review of constitutionality thereof. One of the main arguments was the non-existent procedure in making the decision to suspend the right to drive. However, the Supreme Court *en banc*<sup>\*41</sup> declared on three and the Constitutional Review Chamber<sup>\*42</sup> on one occasion the compliance of the Traffic Act with the Constitution. Nevertheless, the Estonian parliament Riigikogu declared § 41<sup>3</sup> of the Traffic Act invalid on 16 June 2005, i.e., eleven days before the announcement of two latest decisions by the Supreme Court *en banc*.<sup>\*43</sup> We are thus dealing with cases that conceal a certain element of drama as the divide between the two opposing viewpoints did not only permeate legal publicity, but also the judiciary and even the Supreme Court itself. It remains unclear why the legislator amended the law, the constitutionality of which the Supreme Court declared on several occasions. This justifies the more detailed critical analysis of the prevailing point of view in the Supreme Court.

The Supreme Court *en banc* admits that the regulation in the Traffic Act is a limitation of the scope of the right to organisation and procedure.<sup>\*44</sup> However, in the opinion of the majority of the Supreme Court judges the limitation is constitutional. The reasons of the court may be reconstructed as follows. First, the prior misdemeanour procedure outside MVRC and the procedure for suspension of a driving licence in MVRC constitute a single procedure in the opinion of the Court: “[A]lthough the misdemeanour procedure and suspension of the right to drive as an administrative procedure in MVRC constitute separate procedures, they can be regarded as

<sup>36</sup> ALCSCd 5.03.2007, 3-3-1-102-06, paragraph 21. Cf. also ALCSCd 27.03.2002, 3-3-1-17-02, paragraph 18; 20.06.2003, 3-3-1-49-03, paragraph 16; 25.10.2004, 3-3-1-47-04, paragraph 18; 18.11.2004, 3-3-1-33-04, paragraph 16; 23.02.2004, 3-3-1-1-04, paragraph 20; 9.05.2006, 3-3-1-6-06, paragraph 29; 11.12.2006, 3-3-1-61-06, paragraph 20; 19.12.2006, 3-3-1-80-06, paragraph 18–22; 10.01.2007, 3-3-1-85-06, paragraph 12; 10.05.2007, 3-3-1-100-06, 15; ALCSCr 8.10.2002, 3-3-1-56-02, paragraph 9; 20.05.2003, 3-3-1-37-03, paragraph 13; 3.03.2005, 3-3-1-1-05, paragraph 18–22; 27.09.2005, 3-3-1-47-05, paragraph 13; 22.12.2005, 3-3-1-73-05, paragraph 14.

<sup>37</sup> ALCSCd 11.12.2006, 3-3-1-61-06, paragraph 20.

<sup>38</sup> SCebd 25.10.2004, 3-4-1-10-04; 27.06.2005, 3-4-1-2-05; 27.06.2005, 3-3-1-1-05; CRCSd 10.12.2004, 3-4-1-24-04.

<sup>39</sup> Tallinn Administrative Court decision 5.03.2004, 3-799/2004; 19.05.2004, 3-1298/2004; 25.06.2004, 3-1473/2004; 1.09.2004, 3-1763/2004; 8.02.2005, 3-1368/2004; Tartu Administrative Court decision 22.12.2004, 3-480/04 and 3-509/04; 28.12.2004, 3-461/04; Jõhvi Administrative Court decision 28.12.2004, 3-249/2004; 30.12.2004, 3-254/2004 and 3-255/2004; 10.02.2005, 3-309/2004.

<sup>40</sup> ALCSCr 3.03.2005, 3-3-1-1-05, paragraph 18–22; cf. also ALCSCd 23.02.2004, 3-3-1-1-04, paragraph 20.

<sup>41</sup> SCebd 25.10.2004, 3-4-1-10-04; 27.06.2005, 3-4-1-2-05; 27.06.2005, 3-3-1-1-05.

<sup>42</sup> CRCSd 10.12.2004, 3-4-1-24-04.

<sup>43</sup> RT I 2005, 40, 311 (in Estonian).

<sup>44</sup> SCebd 27.06.2005, 3-4-1-2-05, paragraph 36: “[T]he right to a fair and effective procedure stemmed from § 14 of the Constitution has been restricted”. Cf. also SCebd 27.06.2005, 3-3-1-1-05, paragraph 20.

a single whole. Thus, whether a person is ensured a right to a procedure arising from § 14 of the Constitution must also be assessed in the light of the set of procedures.”<sup>45</sup>

Secondly, the Supreme Court *en banc* states that in this single procedure, the right to a hearing of the person whose right to drive is suspended is ensured in the misdemeanour procedure. In this procedure the law provides a basis for immediate withdrawal of a driving licence. In immediate withdrawal of a driving licence, the administrative body conducting extra-judicial proceedings is obliged to explain the reason for the withdrawal.<sup>46</sup> Based on this, the Supreme Court *en banc* concludes that a person knows what awaits him and can thus also protect himself.<sup>47</sup> In addition, the Supreme Court is of the opinion that the misdemeanour procedure includes a hearing in the matter whether a violation occurred and if the person is guilty of the violation.<sup>48</sup>

Thirdly, the Supreme Court is of the opinion that a hearing is ensured in MVRC in the following matters: whether a person holds a valid right to drive; whether the person has been subjected to an enforced decision on punishment in a misdemeanour matter that may form the basis for suspension of the right to drive pursuant to § 41<sup>3</sup> of the Traffic Act; whether there is a legal basis for the suspension of the right to drive; whether prior decisions on punishment that the person has been subjected to are applicable according to the punishment register; whether the person uses a vehicle in connection with disability; whether a prior decision on suspension of the right to drive that the person has been subjected to has been fulfilled.<sup>49</sup> The Supreme Court also states: “After the enforcement of the decision on punishment made in the misdemeanour procedure, a person has [...] the right to turn to the MVRC for presentation of circumstances which preclude suspension of the right to drive pursuant to the law.”<sup>50</sup>

Fourthly, according to the Supreme Court “pursuant to subsection 10 of § 41<sup>3</sup> of the Traffic Act, a person has the possibility to lodge a complaint against the suspension of the right to drive to a higher official or dispute it in the court, which also ensures his right to a hearing and at the same time enables to explain his views and submit applications and objections.”<sup>51</sup>

Fifthly, the Supreme Court is of the opinion that the limitation is not intensive<sup>52</sup>, and the result of the consideration thereof is that the general effectiveness of the proceedings weighs up the unfairness that may arise in single cases: “The Supreme Court *en banc* is of the opinion that this restriction is the result of a legitimate goal to economise on resources spent on the proceedings and ensure effective procedure of a large amount of similar cases [...]. The statistics show that the number of more serious traffic violations on which the prescribed punishment is the suspension of the right to drive is high. According to the Estonian Motor Vehicle Registration Centre (MVRC), the right to drive was suspended in 13,295 cases in total in 2004. It is obvious that hearing of persons in MVRC in all these cases would be resource-consuming. At the same time, the circumstances needed for the formalisation of suspension of the right to drive are generally correctly identifiable also without hearing the person (e.g., determination of applicable punishments must be based on the data in the punishment register) and failure to hear a person results in incorrect decisions in rare cases. There is no measure for the achievement of the goal that would interfere with the rights of the persons concerned less intensively. A limitation is proportional as the failure to hear does not necessarily bring about an incorrect decision.”<sup>53</sup>

In the end, the Supreme Court also refers to the fact that the European Court of Human Rights has also given its blessing to the suspension of the right to drive as an automatic consequence of conviction in a case *Malige v. France*.<sup>54</sup>

In this light, it seems paradoxical that the Supreme Court, on the other hand, does not deny the absence of the procedure: “In the suspension of the right to drive, no substantive proceedings are carried out in the MVRC upon suspension of the right to drive, but the role of the agency is only to formalise suspension of the right to drive.”<sup>55</sup>

<sup>45</sup> SCebd 27.06.2005, 3-3-1-1-05, paragraph 19. Cf. also SCebd 25.10.2004, 3-4-1-10-04, paragraph 23; 27.06.2005, 3-4-1-2-05, paragraph 28–29.

<sup>46</sup> SCebd 27.06.2005, 3-4-1-2-05, paragraph 32.

<sup>47</sup> SCebd 25.10.2004, 3-4-1-10-04, paragraph 24: “It is easy for a driver of a power-driven vehicle to foresee the consequences accompanied by his unlawful activity and protect himself therefrom in the course of the misdemeanour procedure.”

<sup>48</sup> SCebd 27.06.2005, 3-4-1-2-05, paragraph 34.

<sup>49</sup> *Ibid.*, paragraph 35.

<sup>50</sup> *Ibid.*, paragraph 36.

<sup>51</sup> *Ibid.*, paragraph 37.

<sup>52</sup> SCebd 27.06.2005, 3-3-1-1-05, paragraph 20; 27.06.2005, 3-4-1-2-05, paragraph 37.

<sup>53</sup> SCebd 27.06.2005, 3-4-1-2-05, paragraph 37. Cf. also SCebd 27.06.2005, 3-3-1-1-05, paragraph 20.

<sup>54</sup> SCebd 25.10.2004, 3-4-1-10-04, paragraph 19.

<sup>55</sup> *Ibid.*

## 2.2.2. Criticism

On a closer look it becomes clear that most of the prerequisites that the decisions of the Supreme Court are based on do not really match and the concluding value judgment is also questionable.

Firstly, it is impossible to agree with the statement that misdemeanour procedure followed by the procedure of suspension of the right to drive would constitute a single whole. The purpose of the misdemeanour procedure is to prove the guilt of the offender and to penalise the person who committed the offence. The presumption of innocence is in force here according to § 22 (1) of the Constitution. A misdemeanour procedure may either be conducted in court or by the administrative body conducting extra-judicial proceedings (MVRC is neither of them by law) and ends with the enforcement of a ruling on penalty or a ruling on the termination of a procedure. Once the procedure has ended, it cannot be continued any longer. An administrative procedure is conducted by the administrative authority and it ends with the delivery of an administrative act, administrative conduct or the conclusion of an administrative contract. Both the duty to cooperate and the right to a hearing remain in force. The proceedings of the suspension of right to drive taken in MVRC are administrative proceedings because the MVRC is an administrative body and the Traffic Act includes substantive administrative law, a reference to the Administrative Procedure Act<sup>\*56</sup> as well as special regulations of the administrative procedure (e.g., § 41<sup>3</sup> (10) of the Traffic Act). Two procedures, misdemeanour procedure and (administrative) procedure of the suspension of the right to drive follow to one another and in temporal order but they can and should nevertheless be differentiated. Two procedures existed instead of a single whole.<sup>\*57</sup>

In case of properly conducted proceedings, the administrative authority should indeed have notified the person that the committed offence may be accompanied with the suspension of the right to drive. However, even in case of a notification there were no remedies against the possible suspension. The allegation that beside the matter of fact and guilt of the misdemeanour, the person in the misdemeanour procedure was ensured with the right to be heard in the impending suspension of the right to drive, is misguided. The Traffic Act required the police to withdraw the driving licence and issue a temporary driving licence.<sup>\*58</sup> However, during the misdemeanour procedure conducted by the police or by the court, the suspension of the right to drive was not deliberated and was not allowed to be discussed. Suspension of the right to drive was neither a penalty for the misdemeanour nor a supplementary punishment. According to the first sentence of § 56 (1) of the Penal Code<sup>\*59</sup>, punishment shall be based on the guilt of the person. According to the second sentence of § 56 (1) of the Penal Code, in imposition of a punishment, a court or an extra-judicial body shall take into consideration the mitigating and aggravating circumstances, the possibility to influence the offender not to commit offences in the future, and the interests of the protection of public order. Other considerations, including the suspension of the right to drive following the penalty could and ought not to have been taken into consideration.<sup>\*60</sup>

It remains unclear what the Supreme Court *en banc* means with the questions regarding which the person can be heard in proceedings before the MVRC.<sup>\*61</sup> The person in this situation was mainly interested in whether and for how long his right to drive would be suspended. The questions like whether a person holds a valid right to drive or whether there is a legal basis for the suspension of the right to drive can be interesting too but only if and as much they concern the main question which remains unanswered by the Supreme Court *en banc*. The opinion of the Supreme Court that after the enforcement of the penalty of the misdemeanour procedure the person has the opportunity to address the MVRC to present statements concerning the circumstances that by law prevent the suspension of the right to drive, is inappropriate. Disability excluded<sup>\*62</sup>, the Traffic Act prescribed no single basis that would prevent the suspension of the right to drive. Moreover, the right to be heard during the administrative procedure following the decision in the misdemeanour proceedings could not be exercised solely for the lack of information the person received. "The person has no knowledge when

<sup>56</sup> Traffic Act § 1 (Scope of application of Act) (2): "The provisions of the Administrative Procedure Act [...] apply to administrative proceedings prescribed in this Act, taking account of the specifications provided for in this Act."

<sup>57</sup> Cf. ALCSCr 3.03.2005, 3-3-1-1-05, paragraph 18 ff.; dissenting opinion of judge Indrek Koolmeister, SCebd 25.10.2004, 4-1-10-04, paragraphs 1 and 3; dissenting opinion of judge Indrek Koolmeister, which is joined by judges Tõnu Anton, Julia Laffranque, Jüri Pöld and Harri Salmann, SCebd 25.10.2004, 3-3-1-29-04, paragraph 1.

<sup>58</sup> Traffic Act § 41<sup>1</sup> (Issue of temporary driving licences) (1): "Upon the commission of a misdemeanour for which suspension of the right to drive is prescribed pursuant to § 41<sup>3</sup> of this Act, the driving licence of the person shall be immediately withdrawn and a temporary driving licence shall be issued in place of the confiscated driving licence."

<sup>59</sup> RT I 2001, 61, 364; 2004, 88, 600 (in Estonian). English translation available at <http://www.legaltext.ee/text/en/X30068K7.htm>.

<sup>60</sup> Cf. ALCSCr 3.03.2005, 3-3-1-1-05, paragraph 20; dissenting opinion of judges Tõnu Anton, Indrek Koolmeister, Julia Laffranque, Jüri Pöld and Harri Salmann SCebd 27.06.2005, 3-4-1-2-05, paragraph 1.

<sup>61</sup> SCebd 27.06.2005, 3-4-1-2-05, paragraph 35 (see above).

<sup>62</sup> Traffic Act § 41 (Bases of and procedure for suspension of right to drive) (3) sentence 2: "Suspension of the right to drive shall not be applied in respect of a person who uses a power-driven vehicle due to disability, unless he or she drives the power-driven vehicle in a state of intoxication."

and where his documents are being sent, who and when the hearing regarding his matter on suspension of the right to drive takes place. The procedure pursuant to Traffic Act (incl. § 41<sup>3</sup> (10)) precludes the notification of a person even on the initiative of MVRC.<sup>\*\*63</sup> In addition, practical incompatibility of the legally set three days term for the suspension with the minimum standards of the administrative procedure excluded a hearing before the MVRC.<sup>\*\*64</sup> “Even as a formality, it must be considered that this kind of hearing would take place by violating either the term provided in § 41<sup>3</sup> (10) of the Traffic Act or the principles provided by the Administrative Procedure Act.”<sup>\*\*65</sup> The argument that the person could contest the suspension of the right to drive in court is unconvincing too. Taking into account the repeated confirmation of the Supreme Court, this case in court could only have resulted in a loss for the person.

It is hard to agree that the limitation of the scope of the right to organisation and procedure was not intensive. The total lack of the opportunity to be heard annuls the right to be heard in this instance. “By providing such a short term to make the ruling about the suspension of the right to drive, the legislator has substantively precluded the possibility to involve the person in the procedure and exercise his rights in procedural law, including the right to be heard.”<sup>\*\*66</sup> The right to be heard is an important part of the right to organisation and procedure (§ 14 of the Constitution) and therefore a fundamental right.<sup>\*\*67</sup> Total lack of the opportunity to be heard is therefore an intensive limitation of an important fundamental right.

Also, the value judgment that saving the resources justifies the failure in hearing is disputable. The Supreme Court *en banc* itself admits that its position may, in an individual case, result in a false ruling: “[C]ircumstances necessary to formalise the suspension of the right to drive can be in general correctly established also without hearing the person [...] and **failure to undertake a hearing leads in rare occasions to false rulings.** [...] A limitation is proportional, since **failure to hear a person does not in general bring about an erroneous decision.**”<sup>\*\*68</sup> In addition the Supreme Court *en banc* concedes that: “In suspending the right to drive **no substantive proceedings take place** but the sole role of the administrative body lies in formalising the suspension of the right to drive.”<sup>\*\*69</sup> Apart from that, the Supreme Court *en banc* disregards the opportunity to analyze alternative procedures that ensure better the rights in individual cases.<sup>\*\*70</sup> A suspicion arises whether the decision of the Supreme Court *en banc* is in accordance with the principle of human dignity. “[H]uman dignity is the basis of all fundamental rights and the aim of protecting fundamental rights and freedoms.”<sup>\*\*71</sup> According to the prevalent negative definition, human dignity means that a person ought not to be turned into an object of the state power, he shall always remain the subject thereof.<sup>\*\*72</sup> When the state knowingly waives from procedure, thereby withdrawing from the person the opportunity to be heard and at the same time concedes that saving money outweighs violations of rights of some people, this state denies the elementary requirements of the state based on the rule of law and fundamental rights and turns a person into a mere object of state authority. In essence, this means sacrificing an individual for the greater good. The theoretical basis

<sup>63</sup> Dissenting opinion of judges Tõnu Anton, Indrek Koolmeister, Julia Laffranque, Jüri Põld and Harri Salmann SCebd 27.06.2005, 3-4-1-2-05, paragraph 1 subitem 3. Cf. ALCSCd 23.02.2004, 3-3-1-1-04, paragraph 20: “[P]roceeding from the principles of good administration, the minimum requirement (is) notification of a person concerning the procedure he is subjected to and providing a person with the possibility present objections.”

<sup>64</sup> Administrative Procedure Act § 40 (Hearing of opinions and objections of participants in proceedings) (1): “An administrative authority shall, before issue of an administrative act, grant a participant in a proceeding a possibility to provide his or her opinion and objections in a written, oral or any other suitable form.” (2): “Before taking any measures which may damage the rights of a participant in a proceeding, he or she shall be granted a possibility to provide his or her opinion and objections.” The derogations regarding when the administrative procedure may be conducted without hearing the opinion and objections of the parties to a proceeding, are laid down in § 40 (3) of the Administrative Procedure Act. The Administrative Law Chamber of the Supreme Court adopted the position that no prerogative laid down in § 40 (3) of the Administrative Procedure Act is applicable in case of a suspension of the right to drive. See ALCSCr 3.03.2005, 3-3-1-1-05m, paragraph 21.

<sup>65</sup> Dissenting opinion of judges Tõnu Anton, Indrek Koolmeister, Julia Laffranque, Jüri Põld and Harri Salmann SCebd 27.06.2005, 3-4-1-2-05, paragraph 1 subitem 3.

<sup>66</sup> ALCSCr 3.03.2005, 3-3-1-1-05, paragraph 19.

<sup>67</sup> *Ibid.*

<sup>68</sup> SCebd 27.06.2005, 3-4-1-2-05, paragraph 37 (author’s emphasis).

<sup>69</sup> SCebd 25.10.2004, 3-4-1-10-04, paragraph 19 (author’s emphasis).

<sup>70</sup> Dissenting opinion of judges Tõnu Anton, Indrek Koolmeister, Julia Laffranque, Jüri Põld and Harri Salmann SCebd 27.06.2005, 3-4-1-2-05, paragraph 1 subitem 4: “One of the possibilities is informing the person of the procedure commenced regarding the suspension of the right to drive and the possibility to present written objections. It is also possible to prepare a conditional suspension notice, which acquires the force of a decision if the person does not present objections or apply for the case to be discussed. The use of all such possibilities ensures sufficient right to be heard in a relatively sustainable way. Making the decision on the suspension of the right to drive immediately after the entry into force of the misdemeanour decision is not necessary as the period of time between the commission of the latest offence and the suspension of the right to drive is usually long, during which a person practices the right to drive.”

<sup>71</sup> ALCSCd 22.03.2006, 3-3-1-2-06, paragraph 10.

<sup>72</sup> In Estonian literature R. Maruste. Põhiseadus ja selle järelevalve (Constitution and Its Review). Tallinn 1997, p. 113 (in Estonian). This object formula originates from a German state lawyer Günter Dürig: G. Dürig. – Maunz/Dürig et al. Grundgesetz – Kommentar. Vol. 1. München 1958, Art. 1 Abs. 1 marginal 28: “Die Menschenwürde ist getroffen, wenn der konkrete Mensch zum Objekt, zu einem bloßen Mittel, zur vertretbaren Größe herabgewürdigt wird.”

for this appears to be the utilitarianism of Jeremy Bentham<sup>\*73</sup> and John Stuart Mill.<sup>\*74</sup> The task of the Supreme Court is nevertheless to protect the fundamental rights, not to sacrifice them. The court admits itself recently: “The procedure must be aimed at the protection of rights of a person, otherwise it might be impossible for the person to exercise his rights.”<sup>\*75</sup> It is precisely the procedural dimension that serves human dignity<sup>\*76</sup> in the first order and a procedure that fails to consider this cannot be compatible with the constitution.

Finally, it is doubtful whether the Supreme Court accurately proceeded from the decision of the European Court of Human Rights in the case *Malige v. France*.<sup>\*77</sup> The object thereof was the French point system in which several recorded misdemeanours may have finally brought about the suspension of the right to drive. The account of a driving licence had twelve points on it and each violation provided burdened the account with a certain number of points that were once again added to the account after the expiry of the punishment. When the account reached zero points the competent authority suspended the right to drive.<sup>\*78</sup> Without scrutiny of the details of the French point system, it is important to mention its differences with the Estonian system pointed out by the European Court of Human Rights: “At the time when the details of an offence are recorded, the driver is informed by the administrative authority that he is liable to lose points on account of the offence he has committed and that there is an automatic system for the deduction and restoration of points [...]. He is thus given the opportunity to contest the constituent elements of the offence which might be used as the basis for a deduction of points.”<sup>\*79</sup> It was this type of obligation to notify and opportunity to contest that the Estonian system lacked.

### 2.2.3. Conclusions of the Traffic Act saga

Previous analysis only concerned one out of many complicated matters dealt within the Traffic Act cases. The answer to the question raised whether the addressee of the suspension of the right to drive was ensured with an effective and just procedure is, contrary to the majority of the Supreme Court *en banc* and like the Administrative Law Chamber of the Supreme Court, negative: “The Supreme Court *en banc* has found that the suspension of the right to drive pursuant to § 41<sup>3</sup> of the Traffic Act is constitutional, the right to a procedure arising from § 14 of the Constitution is ensured, and the principle of proportionality is not violated. We find that the abovementioned statements are misleading. In the opinion of the signatories, the procedure of the suspension of the right to drive provided by the Traffic Act does not conform with the right to a procedure arising from § 14 of the Constitution. In addition, the regulation in force fails to ensure the consideration of the principle of proportionality in applying the suspension of the right to drive.”<sup>\*80</sup>

It must be hoped that the result of the Traffic Act saga and the majority arguments of the Supreme Court *en banc* will not turn into the future case law and that the Supreme Court will find its way back to the developments started on 12 January in 1994. The fundamental right to organisation and procedure is of central importance for the principle of human dignity and for the rule of law. It is the procedural dimension that makes a state based on the rule of law what it is.

## 2.3. Judicial activism<sup>\*81</sup>

The third development based on the decision of Operative Technical Measures I, is supervision of the legislator’s omission by the Supreme Court. The Supreme Court conceded in this ruling: “[T]he valid standards for implementing operative technical measures are **insufficient** and **deficient** from the point of view of the protection of fundamental rights and freedoms. [...] **It has not been specified** what operative technical measures specifically mean [...] The circle of subjects entitled to implement operative technical measures, cases, conditions, procedure, guarantees, control and supervision and liability remains unspecified. [...] **The Riigikogu should have established** the specific cases and detailed procedure for the implementation of operative technical measures

<sup>73</sup> J. Bentham. *An Introduction to the Principles of Morals and Legislation*. J. H. Burns, H. L. A. Hart (eds.). London 1970.

<sup>74</sup> J. S. Mill. *Utilitarianism*. 7<sup>th</sup> ed. London 1879.

<sup>75</sup> CRCSd 31.01.07, 3-4-1-14-06, paragraph 28.

<sup>76</sup> The famous German state lawyer and the author of the object formula Günter Dürig even considers making a person an object of a national procedure an example of a violation of human dignity. G. Dürig (Note 73), Art. 1 Abs. 1 marginal 34: “Es verstößt gegen die Menschenwürde, wenn der Mensch zum Objekt eines staatlichen Verfahrens gemacht wird.”

<sup>77</sup> Cf. SCEbd 25.10.2004, 3-4-1-10-04, paragraph 19.

<sup>78</sup> European Court of Human Rights, *Malige v. France*, judgment of 23.09.1998, application No. 68/1997/852/1059, paragraphs 17–20.

<sup>79</sup> *Ibid.*, paragraph 47.

<sup>80</sup> Dissenting opinion of judges Tõnu Anton, Indrek Koolmeister, Julia Laffranque, Jüri Pöld and Harri Salmann SCEbd 27.06.2005, 3-3-1-1-05, paragraph 1.

<sup>81</sup> The meaning of the term “judicial activism” is anything but clear. Cf. K. Kmiec. The origin and current meanings of “judicial activism”. – *California Law Review* 2004 (92), pp. 1442 ff., 1463 ff. See also an excellent analytical approach in Estonian: B. Aaviksoo. Kohtulik aktivism põhiseaduslikkuse järelevalve funktsioonina (Judicial Activism as a Function of Constitutional Review). – *Juridica* 2005, pp. 295 ff. There seems to be consensus only regarding the fact that the term is related to the concept of constitutional review and its opposite is the term “judicial restraint”. In this article, the nature of the constitutional review is activist, which may declare the legislator’s omission unconstitutional.

and the related possible restrictions of rights **itself** instead of delegating the latter to security police officers and the justice of the Supreme Court. Thus, subsection 4 of part II of the Police Act Amendment Act is also contrary to § 13 (2) of the Constitution as **insufficient regulation** in establishing restrictions to fundamental rights and freedoms shall not protect everyone against arbitrary action by the state power.”<sup>82</sup>

The Supreme Court talks about insufficient and deficient standards or about things that the Riigikogu has left unspecified or which itself should have established. All this refers to the omission on the part of the legislator. In conclusion, in 1994 the Supreme Court declared the insufficient Act of Parliament invalid, thereby founding yet another important development in the constitutional review. There is a connection with the principle of parliamentary prerogative here. What the legislator is obliged to do by the Constitution may not be delegated to the executive power, but ought to be decided by the legislator itself. By not deciding on its own, the legislator fails to fulfil its constitutional obligations. Therefore, the delivery of an insufficient delegation norm is the legislator’s unconstitutional omission. The Supreme Court has later summarised the idea as follows: “The legislator’s failure to act or insufficient activity may be unconstitutional and the Supreme Court shall have the opportunity to also determine the unconstitutionality of the legislator’s omission in the constitutional review proceedings.”<sup>83</sup>

The cases regarding the constitutional review of legislator’s omission may be classified in several ways. Classification according to various procedural types is possible as well as material principles of the Constitution, from which the legislator’s positive obligations arise. The author hereby proceeds from the latter. In this context, it is still important to refer to the fact that to the unconstitutionality of the legislator’s omission corresponds the positive obligation to eliminate the unconstitutional situation.

### 2.3.1. Positive obligations proceeding from the underlying principle of the rule of law

In its decision Operative Technical Measures I, the Supreme Court declared the delegation norm invalid due to the violation of the principle of parliamentary prerogative.<sup>84</sup> The positive obligation that derives from the parliamentary prerogative is included under the obligations based on the underlying principle of the separation and balance of powers and thus, more broadly, the underlying principle of the rule of law. The Supreme Court has since declared insufficient delegation norms invalid on several occasions.<sup>85</sup>

The legislator’s positive obligation to establish effective procedure in order to ensure fundamental rights is also based on the underlying principle of the rule of law.<sup>86</sup> The Supreme Court specifies this obligation, for instance, in connection with the obligation to guarantee the rights of the European Convention on Human Rights: “The European Convention for the Protection of Human Rights and Fundamental Freedoms is [...] an inseparable part of the Estonian legal order and the guarantee of the rights and freedoms provided therein is also the obligation of the judicial power pursuant to § 14 of the Constitution. The Supreme Court *en banc* is of the opinion that the performance of this obligation in the best possible way would assume supplementation of the Court Procedure Act so that this would unambiguously indicate whether, in which cases and how the review of a criminal matter should take place after the decision of the European Court of Human Rights.”<sup>87</sup>

The Supreme Court has also declared the unconstitutionality of the provision of the Code of Misdemeanour Procedure that did not guarantee sufficient remedies: “The wording of the Code of Misdemeanour Procedure [...] did not guarantee judicial protection of rights, because it did not allow appeals against refusals to hear an appeal.”<sup>88</sup>

Also, due to the violation of the principle of proportionality proceeding from the underlying principle of the rule of law, the Supreme Court has repeatedly complained to the legislator about the establishment of administrative laws that have not provided the administrative body with the right of discretion.<sup>89</sup> The object of a decision from 2004 was a provision of the Aliens Act that did not enable to issue a residence permit to a person who submitted false data.<sup>90</sup> In a concrete norm control case discussed in the Supreme Court a complaint had been lodged to an administrative court by a person who had served in the armed forces of the USSR as a professional member in 1973–1988, but hidden this from the Citizenship and Migration Board. At the same time, the person was linked to Estonia by personal connections. The law did not enable to issue him a residence

<sup>82</sup> CRCSd 12.01.1994, III-4/1-1/94.

<sup>83</sup> CRCSd 2.12.2004, 3-4-1-20-04, paragraph 42.

<sup>84</sup> CRCSd 12.01.1994, III-4/1-1/94.

<sup>85</sup> CRCSd 5.02.1998, 3-4-1-1-98, parts III and IV; 23.03.1998, 3-4-1-2-98; 4.11.1998, 3-4-1-7-98, part II; 5.11.2002, 3-4-1-8-02; 24.12.2002, 3-4-1-10-02, paragraph 25; 19.12.2003, 3-4-1-22-03.

<sup>86</sup> See above CRCSd 14.04.2003, 3-4-1-4-03, paragraph 16.

<sup>87</sup> SCEbd 6.01.2004, 3-1-3-13-03, paragraph 31. To date, the indicated procedure for the review of a criminal matter has been adopted and enforced (RT I 2006, 48, 360.)

<sup>88</sup> CRCSd 25.03.2004, 3-4-1-1-04, paragraph 22, cf. also paragraph 17.

<sup>89</sup> SCEbd 11.10.2001, 3-4-1-7-01; CRCSd 28.04.2000, 3-4-1-6-2000; 5.03.2001, 3-4-1-2-01; 3.05.2001, 3-4-1-6-01; 21.06.2004, 3-4-1-9-04.

<sup>90</sup> CRCSd 21.06.2004, 3-4-1-9-04.

permit. The Supreme Court considered its traditional practice and specific circumstances and declared those provisions of the Aliens Act “unconstitutional with regard to the part that does not provide a competent state authority with a right of discretion in case of a refusal to issue a residence permit due to presentation of false data”. The unconstitutionality arose from the disproportion of the regulation as the court admitted in a similar case: “The Aliens Act is disproportionate with regard to not allowing the provider or extender of a residence permit to choose legal consequences against a person who has been or regarding whom there are legitimate grounds to speculate that he has been a member of an intelligence or security service of a foreign state. The provider or extender of a residence permit lacks the opportunity to consider whether the restriction of rights and freedoms in a specific case is necessary in a democratic society.”<sup>91</sup>

In the opinion of the Supreme Court, the positive obligation from the underlying principle of the rule of law was also violated by the legislator in the course of the reform of the penal law. Namely, the legislator did not sufficiently account for what is provided in the second sentence of § 23 (2) of the Constitution: if the law prescribes a lesser punishment after the commission of an offence, the lesser penalty has to be applied. For instance, the Penal Code significantly lessened the length of imprisonment for criminal offences against property. Thus, a person imprisoned for six years complained that according to the term of punishment laid down in the new Penal Code<sup>92</sup> he could only be imposed a punishment of up to five years. His complaint received the following reply from the Supreme Court: “The law is unconstitutional as it does not prescribe a decrease in the punishment of a person in imprisonment to the upper limit of imprisonment laid down in the relevant provision of the special part of the Penal Code.”<sup>93</sup>

Finally, the underlying principle of the rule of law may be associated with the principle of legal clarity, a violation for which occurred when, for instance, if the legislator did not determine the rights of persons in the implementation of the ownership reform clearly enough: “[T]he disputed provision is in conflict with the Constitution because the legislator failed to fulfil its duty to sufficiently comprehensibly establish the rights of persons who resettled and of the users of the property which had belonged to them.”<sup>94</sup>

### 2.3.2. Positive obligations proceeding from the underlying principle of democracy

In two cases, the Supreme Court had to review the conformity of the legislator’s omission with the underlying principle of democracy. The object of both decisions was the exclusion of election coalitions from the local government council elections. The legislator did not allow the election coalitions that had so far participated in local elections to register for the next elections. Here, the legislator did not explicitly forbid the participation of election coalitions but simply abolished the law that enabled this. The Supreme Court declared the legislator’s omission unconstitutional: “However, the Chamber deems the prohibition of citizens’ election coalitions unconstitutional [...]”<sup>95</sup> If the prohibition of election coalitions is unconstitutional, the underlying principle of democracy thus obliges the legislator to enact a law that also allows election coalitions to participate in local elections.

The Supreme Court deemed it necessary to add a specification: “The execution of the Supreme Court’s decision requires the amendment of a valid law in order to constitutionally hold local elections. Hereby, the legislator shall have the freedom to weigh different solutions.”<sup>96</sup>

### 2.3.3. Positive obligations proceeding from the underlying principle of the social state

The Supreme Court has given meaning to the underlying principle of the social state in its pioneering decision of 2004: “A social state and the protection of social rights incorporate the idea of aid and care for those who are unable to ensure themselves independently and sufficiently. The human dignity of these people would be degraded if they were left without aid that they need to satisfy their primary needs.”<sup>97</sup>

The object of this decision was the new wording of the Social Welfare Act, which did not enable students living in dormitories to receive housing allowance while students privately renting apartments were left with the opportunity to receive housing allowance. The Supreme Court established that the “Social Welfare Act [...] was unconstitutional to the extent that expenses connected with dwelling of needy people and families who were using dwellings not referred to in [...] Social Welfare Act were not taken into account [...]”

<sup>91</sup> CRCSd 5.03.2001, 3-4-1-2-01, paragraph 20. Cf. also CRCSd 28.04.2000, 3-4-1-6-2000, paragraph 17: “§ 19 (1) 2) of the Alcohol Act is disproportional regarding the inability of the issuer of the activity licence to choose legal consequences.”

<sup>92</sup> Karistusseadustik. Adopted 6.06.2001, entry into force 1.09.2002. – RT I 2001, 61, 364 (in Estonian). English translation available at <http://www.legaltext.ee/text/en/X30068K7.htm>.

<sup>93</sup> SCebd 17.03.2003, 3-1-3-10-02, paragraph 40.

<sup>94</sup> SCebd 28.10.2002, 3-4-1-5-02, paragraph 37. Cf. also SCebd 12.04.2006, 3-3-1-63-05; CRCSd 31.01.2007, 3-4-1-14-06.

<sup>95</sup> CRCSd 15.07.2002, 3-4-1-7-02, paragraph 15. Cf. also SCebd 19.04.2005, 3-4-1-1-05.

<sup>96</sup> CRCSd 15.07.2002, 3-4-1-7-02, paragraph 34.

<sup>97</sup> CRCSd 21.01.2004, 3-4-1-7-03, paragraph 33.

There was another case in which the criticism of the Supreme Court was based on the underlying principle of the social state, although this was not explicitly mentioned by the Supreme Court. This case started from a refund claim of overpaid pension filed by the state, which was contested by the person. Namely, it was laid down in the State Pension Insurance Act that an early-retirement pension shall not be paid if the person continues working, but failed to lay down that when a person reaches pensionable age, the person receiving early-retirement pension must be paid equally to the persons receiving “common” retirement pension, the reception of which is not directly related to working. The Supreme Court established that the “State Pension Insurance Act [...] was in conflict with § 12 of the Constitution”<sup>98</sup> to the extent that the provisions did not allow to pay early-retirement pension to those employed persons who had attained pensionable age.”<sup>99</sup>

### 2.3.4. Matters of procedural law

Contestation of the legislator’s omission by the Supreme Court is permitted in the form of a concrete norm control initiated by a court<sup>100</sup>, in the form of a proactive abstract norm control initiated by the President of the Republic<sup>101</sup>, in the form of a retrospective abstract norm control initiated by the Chancellor of Justice<sup>102</sup> as well as in the form of an individual constitutional complaint, which so far remains the only successful precedent.<sup>103</sup> The Supreme Court itself has discussed the different initiators at length in an *obiter dictum*.<sup>104</sup> Therein the Supreme Court recognises the competence of every court, the President of the Republic as well as the Chancellor of Justice to contest the legislator’s omission in the Supreme Court.<sup>105</sup>

Whenever the legislator’s omission is declared unconstitutional, also its consequences ought to be taken into account. The legal order should stay clear of unconstitutional, yet formally valid “ghost” norms.<sup>106</sup> In order to avoid such a situation, it might be reasonable, depending on the specific case, to formulate in the resolution of the court’s decision an explicit positive obligation of the legislator and/or set to the legislator a term for elimination of deficiencies.<sup>107</sup>

In view of the underlying principle of the social state, an activist court must also take into account the parliament’s financial prerogative: “The court of constitutional review must [...] avoid a situation in which the development of the budgetary policy is mostly the liability of the court.”<sup>108</sup>

## 3. Conclusions

This brief analysis has thus come to an end. The constitutional review in the Supreme Court has undergone an impressive development without however completely avoiding some peregrinations. It remains to be recognised that the choice made by the Supreme Court on 12 January 1994 to follow something more abstract and distant than the unambiguous pragmatic desire of those in the position of power to prosecute criminals was justified. Let us hope that the Supreme Court will continue to possess enough courage to pass forward-looking decisions in the future.

<sup>98</sup> The Supreme Court hereby indicates to the first sentence in § 12 (1) of the Constitution: Everyone is equal before the law.

<sup>99</sup> CRCSd 21.06.2005, 3-4-1-9-05, resolution, cf. also paragraph 24.

<sup>100</sup> SCEbd 11.10.2001, 3-4-1-7-01; 28.10.2002, 3-4-1-5-02; 12.04.2006, 3-3-1-63-05; CRCSd 4.11.1998, 3-4-1-7-98, part II; 28.04.2000, 3-4-1-6-2000; 5.03.2001, 3-4-1-2-01; 3.05.2001, 3-4-1-6-01; 5.11.2002, 3-4-1-8-02; 24.12.2002, 3-4-1-10-02, paragraph 25; 19.12.2003, 3-4-1-22-03; 25.03.2004, 3-4-1-1-04; 21.06.2004, 3-4-1-9-04; 21.06.2005, 3-4-1-9-05.

<sup>101</sup> CRCSd 5.02.1998, 3-4-1-1-98, parts III and IV; 31.01.2007, 3-4-1-14-06. Cf. CRCSd 2.12.2004, 3-4-1-20-04, paragraph 41–46.

<sup>102</sup> SCEbd 19.04.2005, 3-4-1-1-05; CRCSd 12.01.1994, III-4/1-1/94; 23.03.1998, 3-4-1-2-98; 15.07.2002, 3-4-1-7-02; 21.01.2004, 3-4-1-7-03.

<sup>103</sup> SCEbd 17.03.2003, 3-1-3-10-02.

<sup>104</sup> Cf. CRCSd 2.12.2004, 3-4-1-20-04, paragraph 41–46.

<sup>105</sup> The Supreme Court sets a supplementary procedural condition to the President of the Republic and the Chancellor of Justice and deems the contestation of the legislator’s failure to act by them permitted if “the unprovided norm would be included in the contested legislation or it is by nature related to the contested legislation.” (CRCSd 2.12.2004, No. 3-4-1-20-04, paragraph 45, cf. also paragraph 46; 31.01.2007, No. 3-4-1-14-06, paragraph 18.) Such norms include, for instance, procedural rules or transitional provisions. Cf. CRCSd 31.01.2007, No. 3-4-1-14-06, paragraph 21. One can hope that in the future, the Supreme Court shall explain this relatively new criterion in more detail.

<sup>106</sup> This happened as a consequence of a decision of the Supreme Court *en banc* from autumn 2002 (SCEbd 28.10.2002, 3-4-1-5-02), in the resolution of which the Supreme Court declared the unclear norm unconstitutional, yet not invalid. The result of this decision was in essence the continuance of lack of legal clarity. The Supreme Court *en banc* received the opportunity to correct the mistake only in spring 2006. Cf. SCEbd 12.04.2006, 3-3-1-63-05.

<sup>107</sup> The Supreme Court has also formulated this idea: “The Supreme Court *en banc* cannot assume the legislator’s role or make the parliament’s decision between possible solutions and develop relevant legal regulations. It is reasonable to give the legislator time to solve these matters.” (SCEbd 12.04.2006, 3-3-1-63-05, paragraph 31.)

<sup>108</sup> CRCSd 21.01.2004, 3-4-1-7-03, paragraph 16.



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# Unfair Contracts of Suretyship — a Question about the Horizontal Effect of Fundamental Rights or about the Application of Contract Law Principles?

The question about the horizontal effect of fundamental rights and freedoms and constitutional principles on private relationships has again become topical in connection with discussions over the objectives and methods of the harmonisation process of European contract law. Namely, consideration for the horizontal effect of constitutional rights and freedoms and principles is seen as a possible method of harmonisation of European private law and hence also contract law. Article 6 of the consolidated version of the Maastricht Treaty<sup>1</sup> sets out the underlying principles of the EU such as the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, i.e., the principles derived from the constitutional traditions of the Member States. Citizens of the EU Member States thus have a right to the protection of not only economic interests, but also their personal interests and fundamental rights. The activities of the EU Commission in harmonising European private law have been influenced by the need to ensure the efficient functioning of the common internal market, underpinned by harmonised private law<sup>2</sup>, the idea of harmonising private law based on legal principles recognised by all the Member States<sup>3</sup>, and the plan to draft a European Civil Code as an opt-in instrument.<sup>4</sup> The idea of finding common legal principles has by now been replaced with a search for

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<sup>1</sup> European Union — Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community (consolidated text). — OJ C 321E, 29.12.2006.

Article 6: “1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

Available at <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf> (25.07.2007).

<sup>2</sup> Communication from the Commission to the Council and the European Parliament on European Contract Law, COM (2001) 398 final (11 July 2001).

<sup>3</sup> Communication of the Commission to the European Parliament and European Council: A more coherent European Contract Law. An Action Plan, COM (2003) 68 final (15 March 2003).

<sup>4</sup> In recent years discussion over the necessity, methods of preparation, and instruments of the European Civil Code have mainly focused on seeking alternatives. Various solutions have been offered from harmonisation of private law to the specific solution of preparing only a Consumer Code. See, e.g., J. Smits. The Need for a European Contract Law. Empirical and Legal Perspectives. J. Smits (ed.). Groningen: Europa Law Publishing 2005; N. Reich. A European Contract Law, or an EU Contract Law Regulation for Consumers? — Journal of Consumer Policy, 28, 2005, pp. 383–407; S. Grundmann. European Law(s) of What Colour? — ERCL 2005/2, pp. 184–210. See also C. U. Schmid. The Instrumentalist Conception of the Acquis Communautaire in Consumer Law and Its Implications on a European Contract Law Code. — ERCL 2005/2, pp. 226–227.

“best solutions” from among the models of national legal systems.<sup>\*5</sup> The fact that issues of constitutionalisation of European private law have become topical refers to certain paradigm changes, which arise from reaching the stage of harmonisation where the harmonisation of private law, which is more than harmonisation of the rules but also the harmonised practice of application of the main principles of EU law, has given rise to the question of the horizontal effect on private law of fundamental rights and constitutional values.<sup>\*6</sup> This paper attempts to answer the questions of whether courts should use only private law instruments to protect private autonomy and freedom of contract in private law disputes or whether they should directly apply constitutional values and principles to protect these freedoms; which private law instruments in Estonian law allow for the protection of fundamental rights, whether they are sufficient, and whether Estonian private law could offer a “best solution” for harmonised European private law.

## 1. Constitutionalisation of private law

Although the Constitution was found for a long time not to have a direct effect on private law relationships, law literature has in recent years started to speak about the constitutionalisation of contract law.<sup>\*7</sup> In most EU Member States, the vertical effect of fundamental rights and freedoms on relations between individuals is recognised in addition to their horizontal effect on relations between the state and individuals.<sup>\*8</sup> On the domestic level the issue of constitutionalisation of private law largely reduces to how disputes in private law relationships should take account of fundamental rights and the needs to protect them, i.e., what role the constitutional system of values should have in the application of private law principles and instruments to the settlement of specific disputes.

Constitutional principles serve for the applier of law as a source material in the interpretation of provisions; they help provide content to the meaning of a provision and provide direction for interpretation purposes, which also delimits the space of interpretation.<sup>\*9</sup> However, fundamental rights do not settle a specific legal dispute, but open themselves via the legal provisions regulating the relevant area of law.<sup>\*10</sup> The direct horizontal impact of fundamental rights and constitutional principles implies the possibility to rely on them in private law claims. According to the theory of the indirect horizontal effect, a claim itself has to be based on a private law provision, which is interpreted and applied in the light of fundamental rights and freedoms and constitutional principles.<sup>\*11</sup> Both theories are actually applied in judicial practice, and as the judicial practice of applying fundamental rights and freedoms in private law relationships varies significantly by country, there is reason to be sceptical about arguments claiming that uniform practice in this area is a prerequisite for harmonising European private law.<sup>\*12</sup>

The process of harmonisation of European private law has been associated with the European Constitutional Treaty and the protection of fundamental rights and freedoms since the publication of the manifesto<sup>\*13</sup> which formulated the idea of social justice in European contract law. One of the areas of application of the idea of social justice is contracts of suretyship, in which the connection between the general principles and rules of contract law, on the one hand, and the need to protect fundamental rights, on the other, is especially vividly expressed.

<sup>5</sup> Communication from the Commission to the European Parliament and the Council – European Contract Law and the Revision of the Acquis: the Way Forward, COM (2004) 651 final (11 November 2004).

<sup>6</sup> A. Colombi Ciacchi. Non-legislative Harmonisation of Private Law under the European Constitution: The Case of Unfair Suretyships. – ERPL 2005/3, p. 291.

<sup>7</sup> O. Cherednychenko. The Constitutionalization of Contract Law; Something New under the Sun? – EJCL (Electronic Journal of Comparative Law) 2004/8. Available at <http://www.ejcl.org/81/art81-3.html> (25.07.2007).

<sup>8</sup> About the horizontal effect of fundamental rights and freedoms in the harmonisation of EU private law see U. Magnus. Towards European Civil Liability. – Towards a European Ius Commune in Legal Education and Research. M. Faure, J. Smits, H. Schneider (ed.). Gröningen: Intersentia 2002, pp. 209–212; B. Lurger. Political Issues in Property Law and European Unification Projects. – The Politics of a European Civil Code. M. W. Hesselink (ed.). Kluwer Law International 2006, pp. 39–40; T. Wilhelmsson. The Ethical Pluralism of Late Modern Europe and Codification of European Contract Law. – The Need for a European Contract Law. J. Smits (ed.). Groningen: Europa Law Publishing 2005, pp. 142–146.

<sup>9</sup> Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia. Commented Edition). Tallinn: Juura, Õigusteabe AS 2002, p. 46 (in Estonian).

<sup>10</sup> D. W. Belling. Põhiõiguste tähendus eraõigusele (The Implications of Fundamental Rights for Private Law). – Juridica 2004/1, p. 6 (in Estonian).

<sup>11</sup> A. Colombi Ciacchi (Note 6), p. 293.

<sup>12</sup> *Ibid.*, pp. 306–308.

<sup>13</sup> Study Group on Social Justice in European Private Law (Social Justice Group). Social Justice in European Contract Law. A Manifesto. – European Law Journal 2004/10, p. 653.

## 2. Unfair contracts of suretyship and fundamental rights

The constitutional courts of European countries' interference with private relationships is most frequent in the case-law concerning unfair contracts of suretyship. A typical case of an unfair contract of suretyship involves surety by a family member, which is excessively burdensome in view of the surety's ability to perform the obligor's obligation, the obvious disproportionality of the surety obligation, and the provision of surety under pressure from family members or other close persons. The German Constitutional Court has repeatedly found that courts have the duty to protect private autonomy as a fundamental right by interfering with private relationships on the basis of § 138 (1) and § 242 of the German Civil Code.<sup>\*14</sup> Recourse has been had to the argument of the inequality of the parties' structural bargaining ability, violation of the information duty in conditions of the unequal bargaining ability of the parties, as well as taking advantage of the inexperience of the other party and the disproportionality of the surety obligation compared to the surety's income or actual possibilities to cover the owed amount.<sup>\*15</sup> By weighing fundamental rights the Constitutional Court ascertained the desired end result or the objective which the court needs to protect by private law means. In the event of surety, the competing aspects have been both parties' right to private autonomy as a fundamental right, and the private law instrument of good morals. The latter has been used, as a rule, without reference to an established system, logic, or prerequisites of application of this instrument. If we compare, e.g., the application logic of the constitutional principles and the private law arguments published in the commentaries to the Estonian Constitution, the same results can be achieved.<sup>\*16</sup> It is questionable whether in private law a claim can be dismissed for the sake of protecting the legitimate interests of the parties with a reference to a constitutional principle or whether appropriate private law principles need to be found that serve the same goal.<sup>\*17</sup>

In the most frequently cited case of Lüth<sup>\*18</sup>, the German Constitutional Court finds that constitutional principles have only an indirect effect on private law via the interpretation of private law provisions; this was the foundation for H. C. Nipperdey's theory of indirect effect. According to the theory, disputes over the rights and obligations of parties to private law relationships must remain private law disputes in terms of their substance and procedurally, and must be settled according to private law principles. The later decisions of the German Constitutional Court have weighed, e.g., a party's constitutional right to private autonomy and the idea of a social state and the other party's right to private autonomy, and applied the good morals clause only formally. It has been concluded from German case-law that one can no longer speak about private law influenced by fundamental rights and the needs to protect them, but it is the Constitution that determines the results of a dispute between contracting parties, and the role of contract law has been restricted to providing the formal result and the appropriate instrument.<sup>\*19</sup>

Unfair suretyship cases are settled in various European legal orders also using civil law and contract law instruments, which is why it is questionable whether changing the role of the Constitution in settling private law disputes in German law is anything more than simply the transformation of contract law issues to fundamental rights issues. The case-law of the European Court of Justice refers to control exercised via limited constitutional principles, in which fundamental rights have rather the role of additional issues.<sup>\*20</sup>

Estonia's prospects of settling unfair suretyship disputes depend on whether interference with surety relations is deemed necessary on the level of fundamental rights, on the general attitude to the freedom of contract and unfairness in contractual relationships, and how effectively the existing contract law instruments can be used in removing unfairness from contractual relationships.

<sup>14</sup> BGB § 138 (1) provides for the voidness of contracts made against good morals and § 242 sets out the obligation to act mutually in good faith (*Treu und Glaube*). See, e.g., BVerfGE 89, 214, NJW 1994, 36.

<sup>15</sup> Well-known are also disputes over agency contracts, where the excessive burden imposed by competition restrictions has been judged to be contrary to good morals, and the so-called satellite dish case in which a tenant of Turkish roots was prohibited to install a dish aerial on the house in order to watch Turkish TV channels. The fundamental right whose violation the court established in the latter case was the freedom of information, which is guaranteed by the Constitution. See O. Cherednychenko (Note 7), p. 493.

<sup>16</sup> Põhiseadus. Kommenteeritud väljaanne (Constitution. Commented Edition) (Note 9). Section 31, commentary 18, p. 273 (in Estonian).

<sup>17</sup> According to this principle, e.g., an agent cannot be subjected to a competition restriction covering the entire territory of Estonia if under the agency contract the agent was obliged to enter into or intermediate contracts on behalf and for the account of the mandator only in Tallinn. The Estonian Supreme Court has found that a competition restriction touches on the agent's fundamental right arising from § 29 (1) of the Constitution and the restriction should be compensated as fairly as possible. See CCSCd 3-2-1-121-06.

<sup>18</sup> See O. Cherednychenko (Note 7), p. 494.

<sup>19</sup> *Ibid.*, p. 495.

<sup>20</sup> N. Reich. Understanding EU Law. Objectives, Principles and Methods of Community Law. Antwerpen, Oxford: Intersentia 2005, p. 214.

### 3. Civil law protection of the surety

#### 3.1. Surety as a personal guarantee

A study of the lending conditions of seven Estonian banks<sup>\*21</sup> shows that loans guaranteed by surety form only a marginal share of the total number of loans.<sup>\*22</sup> Savings and loan associations may also give loans<sup>\*23</sup>, but surety is not the most frequently used guarantee to their loans either. As a rule, surety is accepted as an additional security to long-term loan agreements and business loans, but there are lenders who are willing to lend against surety only.<sup>\*24</sup> As a rule, sureties are required to have a regular income.<sup>\*25</sup> Surety is also used as an additional security to housing loans<sup>\*26</sup> and as a security to study loans.<sup>\*27</sup> Estonia's experience thus shows that surety as a personal security is not massively used in conditions of a developing real estate market, low risk levels and legal freedom, which is why there is little case-law concerning unfair suretyship. When economic growth slows down, surety in Estonia may change from an instrument serving solely private interests into a means of strengthening the direct effect of constitutional principles in private law relationships.

Suretyship is a contract in which the surety undertakes to meet a third party's (obligor's) obligation to an obligee. Suretyship is accessory to the principal obligation and independent of the obligation relationship between the obligor and the surety.<sup>\*28</sup> According to the Law of Obligations Act<sup>\*29</sup> (LOA) a surety and an obligor are solidary obligors unless the contract provides otherwise.<sup>\*30</sup> A surety is subject to the privilege that Estonian law gives the weaker party: any agreements deviating from the provisions of law to the detriment of the surety are void unless otherwise provided by law. In addition to surety, the Estonian law is also familiar with the first claim guarantee (LOA § 155), which may be given only in economic or professional activities. As opposed to surety, a guarantee is abstract with respect to the underlying obligation and an obligation is created by the obligee's submission of a claim. The requirements for a surety do not apply to a guarantee.<sup>\*31</sup> A surety may be provided within or outside economic or professional activities, which is why problems may arise with determining the actual type of contract and the protective provisions that should be applied. A third party may join a contractual obligation for securing purposes, in which case the provisions regulating surety apply to the contract.<sup>\*32</sup>

In contracts of consumer surety, the surety is a consumer, defined in LOA § 34 as a natural person who performs a transaction not related to an independent economic or professional activity. The concept of a consumer is specified in § 2 (1) of the Consumer Protection Act.<sup>\*33</sup> The Supreme Court has found that a natural person, who, motivated by his or her own interest, gives a surety to the economic activities of a company which is an

<sup>\*21</sup> AS Eesti Krediidipank, AS SEB Eesti Ühispank, AS Hansapank, AS SBM Pank, AS Sampo Pank, Tallinna Äripanga AS and Balti Investeeringute Grupi Pank AS.

<sup>\*22</sup> About the share and total volume of loans against surety see the Bank of Estonia website [http://www.eestipank.info/pub/en/dokumendid/publikatsioonid/seeriad/finantsvahendus/\\_2006\\_1/\\_2.pdf](http://www.eestipank.info/pub/en/dokumendid/publikatsioonid/seeriad/finantsvahendus/_2006_1/_2.pdf) (25.07.2007), p. 42; [http://w.hansa.ee/eng/arikliendile\\_kaibekapitalijuhtimine\\_tagatised.html](http://w.hansa.ee/eng/arikliendile_kaibekapitalijuhtimine_tagatised.html) (25.07.2007) (in Estonian).

<sup>\*23</sup> Hoiu- ja laenuühistuste seadus (Savings and Loan Associations Act), entered into force on 1.07.1999. – RT I 1999, 24, 357; last amendments 5.06.2002. – RT I 2002, 53, 336 (in Estonian). English translation available at <http://www.legaltext.ee/et/andmebaas/ava.asp?m=022>. See also the 2006 report of SEB: Nordic Outlook. Global economy continuing to resist American deceleration Sweden: ketchup effect for jobs means higher key interest rate, November 2006, p. 20. Available at <https://www.seb.ee/cgi-bin/unet3.sh/un3.w?act=SENDFILE&fname=NOFeb2006eng.pdf> (25.07.2007).

<sup>\*24</sup> AS BIG is one of those who lends against surety only, see <http://www.big.ee/?nodeid=66&lang=en> (25.07.2007) (in Estonian).

<sup>\*25</sup> In different banks from EEK 5000 (€ 321) to EEK 10,000 (€ 641) a month over the past six months.

<sup>\*26</sup> See the SEB Bank website <http://www.seb.ee/index/1301> (25.07.2007) (in Estonian).

<sup>\*27</sup> Õppetootuste ja õppelaenu seadus (Study Allowances and Study Loans Act), entered into force on 1.09.2003. – RT I 2003, 58, 387 (in Estonian).

<sup>\*28</sup> See also S. van Erp. Surety Agreements and the Principle of Accessory – Personal Security in the Light of a European Property Law Principle. – European Review of Private Law 2005/3, p. 311.

<sup>\*29</sup> Võlaõigusseadus. Entered into force on 1.07.2002. – RT I 2001, 81, 487; 2005, 61, 473 (in Estonian). English translation available at <http://www.legaltext.ee/et/andmebaas/ava.asp?m=022>.

<sup>\*30</sup> LOA § 145 (1): In the case of non-performance, the principal obligor and the surety shall be solidarily liable to the creditor unless the contract of suretyship provides that the surety is liable only if the claim of the creditor against the principal obligor cannot be satisfied.

<sup>\*31</sup> Guarantee in Estonian law constitutes legal concept which is regulated under the model of ICC's Uniform Rules for Demand Guarantees. – ICC Publication No. 458, Paris: ICC Publishing S.A. 1992, p. 20. As a model also United Nations Convention on Independent Guarantees and Stand-by Letters of Credit was used. See UN General Assembly Resolution 50/48, 11.12.1995.

<sup>\*32</sup> If a person joins an obligation, i.e., enters an obligation relationship in addition to the obligor to provide a security, LOA §§ 145, 149 and 152 apply.

<sup>\*33</sup> According to the Consumer Protection Act, "consumer" means a natural person to whom goods or services are offered or who acquires or uses goods or services for purposes not related to his or her business or professional activities. See Tarbijakaitse seadus (Consumer Protection Act). Entered into force on 15.04.2004. – RT I 2004, 13, 86 (in Estonian). English translation available at <http://www.legaltext.ee/et/andmebaas/ava.asp?m=022> (25.07.2007).

obligor, cannot be treated as a consumer.<sup>\*34</sup> Therefore, we can speak about consumer surety only if the surety is not related to independent economic or professional activities, i.e., if there is a lack of any economic interest or other interest related to economic or professional activities. The fact that the surety is given by a consumer or a professional contracting party does not imply major differences in the scope of protective provisions, as the general clause limiting party autonomy (LOA § 142 (6)) applies to all contracts of suretyship. As a rule, the protective provisions themselves are wide enough to be furnished with a catalogue of interests and values that should be taken into account when assessing the validity of an obligation of a surety that has been agreed on, deviating from the law. In the event of consumer surety, the protective provision lies in the duty to inform the surety of the maximum amount covered by the liability (LOA § 143 (2)), the requirement to put the relevant undertaking in writing (LOA § 144 (2)), the breach of which is rectified by meeting the obligation to the obligor. A surety who is a consumer has the right to withdraw from a contract of suretyship concluded for the performance of future obligations for an indefinite period; in the event of a fixed-term contract the right of withdrawal is limited to five years from the conclusion of the contract. All other protective provisions extend equally to consumer surety and ordinary contracts of suretyship.

### 3.2. The argument of fairness in Estonian law

The unfairness of suretyship is practically an unknown issue in Estonian law today. Only one judgment of a court of first instance is known<sup>\*35</sup> in which the court declared a contract of suretyship to be unfair and contrary to good morals (GPCCA<sup>\*36</sup> § 97), because the contract was made on extremely unfair conditions, the loan that was secured was obviously disproportionate to the surety's income, the surety had no personal interest in the loan being secured, and the surety was an older family member who apparently did not understand the nature of the obligations or the consequences arising from the contract. The Estonian Constitution<sup>\*37</sup> has been described as an overwhelmingly individualistic and liberal law.<sup>\*38</sup> Supreme Court decisions are also dominated by the approach, according to which the individual economic interests of the parties deserve to be protected in the first order. For example, the Supreme Court has taken the view that a loan contract cannot be unfair and contrary to good morals just because the parties agreed on an extremely high interest rate and that a party was not aware of the financial risks assumed. A loan contract may be contrary to good morals because it has a high interest rate only if the contract was made under duress (GPCCA § 96) or under extremely unfavourable conditions (GPCCA § 97).<sup>\*39</sup> It should be mentioned that these grounds allow for extrajudicial cancellation of a contract, but only during a limited time frame. Therefore, certain contracts which are contrary to good morals may still be binding on the parties if a party does not cancel the contract. Case-law seems to refer to the state's unwillingness to interfere with the aforementioned contractual relations.

Unfairness in contractual relationships is not easy to define or determine. Many provisions of the LOA help answer the question of what is considered unfair in Estonian civil law. For example, LOA § 140 (1) provides that something which is not reasonably acceptable can be considered grossly unfair. The grounds for applying the principle of reasonableness are provided in LOA § 7. According to this provision, with regard to an obligation, reasonableness is to be judged by what persons acting in good faith would ordinarily consider to be reasonable in the same situation, taking into account the nature of the obligation, the purpose of the transaction, the usages and practices in the fields of activity or professions involved and other circumstances. The principle of reasonableness thus involves the principle of good faith, which allows for fair suretyship to be defined as a contract which is made in good faith, reasonable, and generally acceptable.

Fairness as a principle involves both substantive and procedural elements. Procedural fairness means that a contract of suretyship must be in line with the principle of good faith not only for its substance, but the principle has to be taken into account also when entering into the contract. The principle of good faith or the substantive element in the concept of fairness means that the parties' obligations must not result in a consequence which is contrary to the principle of good faith. Like the principle of good faith, the principle of reasonableness may also be analysed from the aspect of the procedural and substantive elements of fairness. However, if we introduce

<sup>\*34</sup> The court took the view that a management board member who entered into a sales contract in his capacity of a member of the company and secured the performance of an obligation arising from the same sales contract in his capacity as a natural person had an interest in the business of the company as a board member and therefore the surety was given in connection with economic or professional activities. CCSCd 23.03.2006, 3-2-1-8-06.

<sup>\*35</sup> Judgment of the Tallinn City Court 13.12.2004, 2/270-10222/03.

<sup>\*36</sup> Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act). Entered into force on 1.07.2002. – RT I 2002, 35, 216; 2007, 24, 128 (in Estonian). English translation available at <http://www.legaltext.ee/et/andmebaas/ava.asp?m=022>.

<sup>\*37</sup> Eesti Vabariigi Põhiseadus (The Constitution of the Republic of Estonia). Available at <http://www.legaltext.ee/et/andmebaas/ava.asp?m=022>. See also I. Kull, Principle of Good Faith and Constitutional Values in Contract Law. – *Juridica International* 2002, p. 142. Available at [http://www.juridica.ee/get\\_doc.php?id=434](http://www.juridica.ee/get_doc.php?id=434) (25.07.2007).

<sup>\*38</sup> K. Saaremäel-Stoilov, Liberal Communitarian Interpretation of Social and Equality Rights: A Balanced Approach? – *Juridica International* 2006, p. 90. Available at [http://www.juridica.ee/international\\_en.php?document=en/international/2006/1/113249.SUM.php](http://www.juridica.ee/international_en.php?document=en/international/2006/1/113249.SUM.php) (25.07.2007).

<sup>\*39</sup> Ruling of the Supreme Court from 16.10.2002, 3-2-1-80-02.

the attribute of general acceptance of a contractual agreement, this refers to good morals which must be taken into account when assessing the fairness or unfairness of a surety. As there is currently no case-law of the Supreme Court concerning assessment of the unfairness of surety and only a few judgments of lower courts are available, we can only guess what arguments courts could have when making such an assessment.

This leads us to the problem referred to at the beginning of this paper. Namely, fairness does not only lie in the texts of laws, but also their interpretation and practical implementation. An analysis of the elements of the legal system must have regard to its dynamics. Law goes through various stages — the chronological sequence of the preparation of a law, its adoption, interpretation and implementation.<sup>\*40</sup> Although there is a law regulating suretyship and the protection of the parties' interests, its interpretation and application in, e.g., Estonia is still insufficient for making solid conclusions or generalisations about the application of the provisions. The decisions of the Supreme Court made so far certainly do not lead to the conclusion that Estonian courts would not admit the unfairness of consumer surety as an argument.

### 3.3. Unfairness of surety provided by family members

If we analyse the individual elements of unfairness of contracts of suretyship in Estonian law, we will see that the question lies not only in admission of the argument of unfairness, but also in the context in which we handle a legal phenomenon. For example, in the case-law of European countries sureties given by children to secure their parents' obligations have been considered unfair. Estonian case-law is not yet familiar with these problems, which are known in many countries. The reason is very simple — Estonian lenders accept sureties only from adults.<sup>\*41</sup> Even if a lender is willing to lend against surety by a minor, this is prevented by the Family Law Act<sup>\*42</sup> and the GPCCA.<sup>\*43</sup>

Spouses may also be the family members whose sureties have been considered unfair in the case-law of European countries. The bases on which sureties given by spouses may be held void differ greatly from country to country. In the German Federal Republic, surety given by family members is held to be void if it is obviously disproportionate compared to the income and property of the family member; in the UK and the Netherlands sureties by family members are held to be void only if the surety was not adequately informed of the risks arising from the contract at the time of conclusion. In Italy there are no rules about the voidness of surety given by non-professionals.<sup>\*44</sup> The differences between legal orders are thus considered to be not formal, but substantive. The indirect rules and models which are considered to be encrypted models in comparative law and influence the solutions of specific situations in a specific legal order are not expressly stated by law. They are concealed by certain provisions of law and doctrines, which are applied to solve certain specific problems.<sup>\*45</sup> An assessment of the indirect rules and models developed by the Estonian case-law shows that transactions are held to be contrary to good morals if they ignore significantly other moral norms than those described in GCPA §§ 92, 94, 96 and 97.<sup>\*46</sup> Therefore, according to the Estonian encrypted legal rule, it would not be possible to declare void due to conflict with good morals an unfair surety, the unfairness of which arises from gross disparity, duress or fraud, other circumstances reducing a party's bargaining ability or the ability to understand the consequences of the contract.<sup>\*47</sup> For example, to declare a loan contract to be usurious and hence voidable, it is not enough that the contract was made under great disparity, but it is important to establish a party's difficult circumstances at the time of entry into the contract, and the usurious conduct of the other party.<sup>\*48</sup> The same model may be presumed to apply to an unfair contract of surety.

<sup>40</sup> R. Narits. General Objectives of Legal Theory and Significance of Values in the Context of Globalisation. – *Juridica International* 2006, p. 12. Available at [http://www.juridica.ee/get\\_doc.php?id=1005](http://www.juridica.ee/get_doc.php?id=1005) (25.07.2007).

<sup>41</sup> See P. Varul, A. Avi, T. Kivisild. Restrictions on Active Legal Capacity. – *Juridica International* 2004, p. 100. Available at [http://www.juridica.ee/get\\_doc.php?id=735](http://www.juridica.ee/get_doc.php?id=735) (25.07.2007).

<sup>42</sup> *Perekonnaseadus*. Entered into force on 1.01.1995. – RT I 1994, 75, 1326; 2006, 14, 111 (in Estonian). English translation available at <http://www.legaltext.ee/et/andmebaas/ava.asp?m=022>.

<sup>43</sup> Minors under the age of 7 may enter into transactions only with the consent of their parents or other legal representatives (GPCCA § 12 (2)). A minor who is 15 years old may acquire the right to enter into contracts, including contracts of suretyship, by a court decision. As a court decides on the active legal capacity of a minor who is 15 years old, it is highly doubtful that contracts of suretyship would be included in the allowed transactions (GCPA § 9). However, the Family Law Act does not prohibit a representative to enter into transactions, including contracts of suretyship, on behalf of the minor without the consent of a guardianship authority (FLA § 99). It may thus happen that a minor's parents enter into a contract of suretyship on behalf of the minor and the guardianship authority cannot check the transaction. Therefore the substantive and procedural fairness of these contracts needs to be checked by a court.

<sup>44</sup> A. Colombi Ciacchi (Note 6), p. 305.

<sup>45</sup> See R. Sacco. Legal Formants: A Dynamic Approach to Comparative Law. – *American J. Comp. L.*, 1991 (39), p. 384.

<sup>46</sup> The sections of the GPCCA concern, respectively, transactions entered into under the influence of a relevant mistake, fraud, threat, violence or gross disparity.

<sup>47</sup> See CCSCd 3-2-1-158-05.

<sup>48</sup> See CCSCd 3-2-1-108-02.

Sureties given by family members have also been held to be contrary to good morals on grounds that the obligations of the parties are disproportionate.<sup>\*49</sup> When considering the assessments of the substances and scope of the parties' obligations in various legal orders, the rules under which a contract has been concluded should also be taken into account. The above position of the German Constitutional Court was adopted in a situation where banks were under the obligation to secure loans by surety, which is why the bank clerk who signed the contract referred to the surety as a necessary formality that cannot have any detrimental consequences. However, if a bank is free to decide what type of surety it requires for a loan, the bank is obviously not interested in a formal security but a security that can be later used to cover the loan, if necessary.

If the borrower and surety are closely related persons, it is not easy to assess the unfairness of the suretyship. Close relations imply that assuming the obligor's obligation is the goal desired by the surety. Where the surety has personal economic interests, the person is presumed to exercise his or her private autonomy by assuming risks with the burdening surety obligation, hoping at the same time to have a gain.<sup>\*50</sup> However, if a contract is made because of personal relationships and the surety has no economic interests in the contract and the contract substantially damages the surety's economic interests or jeopardises his or her financial future<sup>\*51</sup>, a contract of suretyship must be held void because it is contrary to good morals. When justifying the disproportionality of obligations, the Supreme Court has referred to § 32 (2) of the Constitution, which provides for freedom of ownership, i.e., everyone's right to freely possess, use, and dispose of his or her property. Without references to principles of private law or legal provisions restricting the parties' lawful freedom of contract, the court has motivated a borrower's right to determine the rate of interest. The Supreme Court has taken the view that the court cannot interfere with the free economic activities of persons or check the amount of a price unless there the law provides a basis for this.<sup>\*52</sup> However, the Supreme Court's general approach to the contracts violating good morals allows for holding contracts of suretyship between family members to be unfair if such a contract materially restricts a party's personal or economic freedom or if one party has unfairly used his or her position when entering into the contract. Also, a transaction that places a party in a situation where the party cannot assess the scope of his or her future obligations can also be contrary to good morals.<sup>\*53</sup> Owing to an effective system of credit information databases, increased duties can be posed on professional lenders and thus they can be presumed to have the duty to inform the surety of the obligor's solvency and other obligations that may jeopardise the possibility of recourse. It is common practice to check the background of both debtors and sureties through public databases<sup>\*54</sup>, which are accessible to everyone, but professional lenders are more experienced and better equipped to use these databases. However, when dividing the risk between the parties, it could be presumed that a surety takes reasonable measures to study the financial situation of the obligor and his or her related companies.

### 3.4. Unfairness of suretyship arising from breach of the information duties

The Estonian law does not directly provide for the duty to give information about the potential risks of entering into a contract of suretyship. LOA § 14 (1) provides for the general obligation to protect persons participating in pre-contractual negotiations or other preparations for entering into a contract. Namely, negotiating parties must take reasonable account of each other's interests and rights. In addition to other things, the general protection obligation implies the duty to present accurate information upon entry into a contract (LOA § 14 (1) second sentence) and inform the other party of all circumstances with regard to which the other party has, based on the purpose of the contract, an identifiable essential interest (LOA § 14 (2) first sentence). However, there is no duty to inform the other party of such circumstances of which the other party could not reasonably

<sup>49</sup> See e.g., the decision of the German Constitutional Court BverfG 19 October 1993 (NJW 1994, p. 36); its description can be found in: O. Cherednychenko (Note 7).

<sup>50</sup> Structural un-equality is a very delicate question and any generalisation made by courts will be criticised. Personal interest of the surety in guaranteeing loan taken by close family member is in most cases a good evidence of fairness in contractual relations. See D. Schnabl. *Neue Entwicklungen der Rechtsprechung zu sittenwidrigen Bürgschaften* (Seminararbeit). Available at <http://www2.uni-leipzig.de/bankinstitut/dokumente/2002-12-07-06.pdf> (27.07.2007).

<sup>51</sup> The Estonian Supreme Court has taken the view that if a contract creates obligations for one party only, then only one party's immoral conduct upon entry into the contract is sufficient to declare the contract to be contrary to good morals. However, like in the event of a loan contract, surety cannot be held to be unfair and contrary to good morals merely by reason of the substantive burdensomeness of the contract and the disadvantage it brings to the surety, but the party's a difficult situation upon entry into the contract and the other party's usurious conduct also need to be ascertained. See CCSCd 3-2-1-108-02.

<sup>52</sup> See CCSCd 3-2-1-158-05.

<sup>53</sup> *Ibid.* The Estonian Supreme Court has repeatedly assured that a high interest rate alone is not sufficient for declaring a contract void on grounds of being contrary to good morals; see decisions 3-2-1-21-06, 3-2-1-29-04 and 3-2-1-41-04.

<sup>54</sup> The Estonian Credit Register was established by Estonian banks in 2001 and it is administered by Krediidinfo. See [http://www.krediidinfo.ee/index.php?ss\\_max=10&ss=&m=&otsi=1&lang=1](http://www.krediidinfo.ee/index.php?ss_max=10&ss=&m=&otsi=1&lang=1) (27.07.2007) (in Estonian).

expect to be informed (LOA § 14 (2) second sentence). In addition to the general duty to inform, the law thus also contains more specific obligations of presenting information that the other party may have expected under the circumstances because the party had to be interested in obtaining such information. In the event of a surety, the amount of the duty being secured is certainly such an interest, as it determines the scope of the surety's obligations and the risks that he or she takes. Whether a surety's interest in information about the obligor's financial situation or solvency is recognisable should be considered based on the meaning and purpose of law. The private autonomy of contracting parties as a protected fundamental right apparently does not allow answering this question. A surety may set up only those defences which could have been set up by the principal obligor (LOA § 149 (1)). This means that a surety cannot set up defences relying on an error concerning the obligor's solvency or the violated obligation to use the money only for its intended purpose. It must be presumed that when entering into a contract of suretyship, the surety should be informed of any circumstances increasing the risk that the obligation undertaken by the surety will have to be met in a situation where the possibilities of recourse have significantly worsened by the fact that the obligor has no means of fulfilling the claim. Therefore, when relying on the provisions of the LOA, a surety can be protected against unfair suretyship by considering the debtor to have violated his or her information duty and to submit a claim for compensation of damage in addition to relying on fraud or error. As the second sentence of LOA § 14 (2) limits the information duty to such circumstances of which the other party could reasonably expect to be informed, a bank, for example, cannot be blamed for failing to submit information, the interest in which the bank did not recognise and providing which would not have been reasonable under the circumstances.<sup>55</sup> The requirements for credit institutions' recognising an interest relevant to the objective of a contract are certainly higher than the requirements for a non-professional lender. Based on these premises, it is possible to deliberate whether the obligee recognised the other party's interest, e.g., in the surety's financial situation or other things that later became decisive in the surety's obligation. Therefore, the argument of protection of fundamental rights should remain the source from which a contracting party's protection need is derived, but the principle of the weaker party's protective or private autonomy should be furnished within the limits of private law's own principles and regulations. The state's interference with contractual relationships must be justified and such interference via direct application of constitutional values should be extremely exceptional, i.e., justified only if private law does not contain a relevant principle or if the existing institutional structure does not allow for the desired result.

If the obligee does not give information about the obligor's difficult financial situation or excessive loan burden or gives incorrect information, this constitutes a breach of the information duty. The obligation to procure the necessary information should lie with the transmitter of information, particularly a professional lender, since a professional lender has access to information about the borrower's financial situation. However, there are arguments that vest the risk of incorrect information or lack of information in the surety, who himself or herself should show interest in receiving the information about the obligor's financial situation. Rights protected by the Constitution, which ensure private autonomy and freedom to dispose of one's property, should be weighed against the principle of protecting the weaker party. The latter principle is contained in the very LOA and in the provisions governing suretyship it recognises the surety as the weaker party (LOA § 142 (6)).

## 4. Main principles of contract law in the protection of fundamental rights

The developments in Europe relating to the effect of fundamental rights on private law have been called a transfer from the commercialisation stage to the consumerisation stage, i.e., the principle that a contracting party is not only liable for himself or herself, but must take into account also the legitimate interests of the other party, thus having liability for the other party.<sup>56</sup> The information duty, which arises from the principle of good faith, and protection of the weaker party are those instruments of private law that motivate interference with contractual relationships; one of the forms of such interference is assessing the conformity of a contract with good morals. If there is an inequality of the structural ability to bargain, which renders a contract extraordinarily burdensome for one party, a court may interfere with the freedom of contract and, to protect the weaker party, dismiss a claim if fulfilment of the claim would have an unfair result.

At the same time, forced protection of constitutional rights in private relationships leads to a situation where a judge may easily be guided in his or her judgment by his or her subjective feelings and not take into account the solutions and principles provided by specific laws. Provisions of private law contain the values inherent of the entire legal order, which are guaranteed by protection of fundamental rights, but as opposed to the Consti-

<sup>55</sup> About the information duty of banks upon entry into a contract of suretyship see R. Parry. The Position of Family Sureties within the Framework of Protection for Consumer Obligors in European Union Member States. – *European Review of Private Law* 2005/3, p. 363.

<sup>56</sup> O. Cherednychenko (Note 7).

tution, they focus on the horizontal relationships between private law parties and not vertical relationships to which the state is a party. Fundamental rights do not give an answer that would clarify the behaviour expected of the parties. If a court assesses a situation to be contrary to good morals and blames the other party of violating the information duty, the next question that arises concerns the content of the information duty. Is a bank required to give information about the other party's financial situation, his or her ability to use money for the intended purpose, or to provide enough money to meet his or her obligations himself or herself? The principle of freedom of contract ensures the parties' freedom to enter into high-risk contracts and assume liability that may result in a significant deterioration of their financial status or bankruptcy, and in which the entire contract is based on the hope that the party will be able to meet his or her obligations if his or her circumstances are good. The abstract nature of fundamental rights and the different interpretations make it extremely difficult to find the balance when protecting various interests. For example, trying to reach socially just results may have the consequence of causing legal uncertainty and increasing the risk that the judgment will be motivated by the judge's "gut feeling" and not the principles of private law.

To sum up, the question of fairness or unfairness of suretyship can be reduced to the limits of application of the freedom of contract. To what extent should modern contract law, in which the principle of social justice as a principle having an impact on contract law in its entirety has risen next to the freedom of contract, take into account the need to protect the parties' right to enter into contracts whose content the parties themselves determine? Latest developments in EU law and in the harmonisation of European private law show that ordoliberalism, which is mainly the contract theory of the 20<sup>th</sup> century, is closely related to the market functionalism characteristic of EU law.<sup>\*57</sup>

Estonian private law, which was largely adopted from German private law that rests on the ideas of social state and protection of the weaker party, must be effective in a society based on liberal market economy, where the ideas of social state are still too distant in many cases. Court decisions also demonstrate the effect of private autonomy and freedom of contract rather than social justice arguments (justice does, however, appear as an argument in many Supreme Court decisions<sup>\*58</sup>). Neither have such general principles of contract law as fairness, consideration for the other party's interests or the principle of social justice been expressed very frequently in the court decisions of many European countries.<sup>\*59</sup> However, the suretyship rules provided by law do, rather, follow the ideas of social justice and the protection of the weaker party and not only in the case of consumer surety.<sup>\*60</sup> Estonian law has all the necessary instruments in the form of general provisions and special regulations for assessing the unfairness of contracts of suretyship. All the more so because it protects all non-professional sureties, not only consumers. The catalogue of fundamental rights that follows not only the principle of the freedom of contract, but also the principle of protecting the weaker party, binds the implementer of law and they are exercised via the indirect horizontal effect of fundamental rights with the help of private law principles (good faith, good morals, reasonableness, etc.). These principles guide judges in the interpretation of contract law provisions and in the elaboration of rules. Whether to be more inclined to follow the individualistic model of liberal contract law or the altruistic principle of social care and justice<sup>\*61</sup> is a question to be answered by case-law, while legal science also has a considerable role here.<sup>\*62</sup>

When studying the possibilities of applying the principle of social justice in judging the fairness of a contract of suretyship in the Estonian legal order, it may be said that a surety has, on grounds of the unfairness of suretyship, good enough defences against an obligee's claim. The pre-contractual information duty, the defences allowed to a surety, and other civil law instruments that apply together with the principle of freedom of contract give a surety a fairly good position to eliminate unfairness. Although fundamental rights are the first things to

<sup>57</sup> B. Lurger. *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union*. Vienna, New York 2002, p. 396.

<sup>58</sup> See, e.g., CCSCd 11.12.2006, 3-2-1-128-06, paragraphs 24, 28; 13.12.2005, 3-2-1-133-05, paragraph 12; 22.12.2005, 3-2-1-73-04, paragraph 32.

<sup>59</sup> B. Lurger. *The 'Social Side' of Contract Law and the New Principle of Regard and Fairness*. – A. Hartkamp, M. Hesselink et al (eds.). *Towards a European Civil Code*. 3rd ed. Nijmegen 2004, pp. 273, 286.

<sup>60</sup> I recall LOA § 142 (6), according to which agreements derogating from the provisions of law to the detriment of a surety shall be void.

<sup>61</sup> R. Sefton-Green. *Social Justice and European Identity in European Contract Law*. – ERCL 2006/2, p. 275. See also B. Lurger. *The Future of European Contract Law between Freedom of Contract, Social Justice and Market Rationality*. – ERCL 2005/1, p. 442, 453 ff.

<sup>62</sup> See I. Kull. *Hea usu põhimõte lepinguõiguses (Principle of good faith in contract law)*. – Eetika. Interdistsiplinaarsed lähenemised (Ethics. Interdisciplinary Approaches). M. Sutrop, K. Simm (eds.). Tallinn: Tartu Ülikooli eetikakeskus 2006, p. 186–207 (in Estonian); I. Kull. *Riigikohtu praktikat lepingulistes vaidlustes. Lepinguvabaduse piirangud ja nõrgema poole kaitse (Case-law of the Supreme Court in Contractual Disputes. Limits of Principle of Freedom of Contract and Protection of Weaker Party)*. – Riigikohus 2005. Lahendid ja Kommentaarid. Tallinn 2005, pp. 1310–1321 (in Estonian). In English: I. Kull. *Principle of Good Faith and Constitutional Values in Contract Law*. – *Juridica International*. Law Review University of Tartu 2002, pp. 42–149; I. Kull. *European and Estonian Law of Obligations – Transposition of Law or Mutual Influence?* – *Juridica International* 2004, pp. 32–44; I. Kull. *The Principle of Private Autonomy and Harmonization of Estonian Contract Law*. – F. J. Feldbrugge (ed.). *Law in Transition*. Netherland, Kluwer Law International 2002, pp. 55–80; I. Kull. *Legal Integration and Reform- Innovations and Traditions in the Estonian Law of Obligations*. – *Rechtstheorie* 2000/31, pp. 371–381. About general principles in Estonian commercial contract law see I. Kull. *Estonian Contract Law in Support of Foreign Investments*. – M. Boguslawskij, A. Trunk (Hrsg.). *Rechtslage von Auslandsinvestitionen in Transformationsstaaten/Legal Issues of Foreign Investment in Transition Countries*. Berlin: Berliner Wissenschafts-Verlag GmbH, Neuer Wissenschaftlicher Verlag GmbH 2006, pp. 427–443.

be taken into account when applying civil law principles, the very principles of civil law allow furnishing the fundamental rights with specific standards of conduct. Finally, the general principle applied in civil law is the principle of good faith<sup>\*63</sup>, which allows removing the gaps in the applicable law and blocking the exercise of rights if this would be contrary to the principle of good faith (*contra factum proprium*).<sup>\*64</sup>

In an ideal society, the dimensions of law are homogenous both in the quantitative and qualitative senses. Quantitative homogeneity means that people's ideas of justice coincide with the substance of law and that solutions to disputes are in line with the substance of law. Qualitative homogeneity means that the addressees of texts have a clear understanding of the substance of laws and this creates order and ensures certainty.<sup>\*65</sup> In Estonia, we cannot yet speak about excessive protection or lack of protection when it comes to sureties provided by non-professionals.<sup>\*66</sup> In private law, a court has to take into account the rules of private law, the intrinsic logic and purpose of the provisions and the underlying system of values, and on this basis weigh the need to protect the various interests under the specific circumstances of the case. Therefore, fundamental rights should not be directly applicable in private law, especially contract law, where private law itself contains the principles corresponding to the purposes and substance of these rights.

<sup>63</sup> Although the Estonian general provision setting out the mandatory nature of the principle of good faith is similar to German BGB § 242, the second part of the clause, or LOA § 6 (2), is based on the example provided by article 6:248 of the Civil Code of the Netherlands.

<sup>64</sup> The general clause derived from the principle of good faith, namely *exceptio doli*, i.e., the defence of the claimant's unclean hands, enacted in GPCCA § 138 (1). GPCCA § 138 (2) provides that a right shall not be exercised in an unlawful manner or with the objective to cause damage to another person. See also: M. Schmidt-Kessel. Rechtsmißbrauch im Gemeinschaftsprivatrecht – Folgerungen aus den Rechtssachen *Kefalas* und *Diamantis*. – Jahrbuch Junger Zivilrechtswissenschaftler 2000, pp. 61–83.

<sup>65</sup> R. Narits. General Objectives of Legal Theory and Significance of Values in the Context of Globalisation. – Juridica International 2006, p. 12. Available at [http://www.juridica.ee/get\\_doc.php?id=1005](http://www.juridica.ee/get_doc.php?id=1005) (25.07.2007).

<sup>66</sup> L. Kähler takes the view that in an overprotection situation preference is given to a broad interpretation of unfairness, as a result of which courts begin to claim sureties void in a greater number of cases. On the other hand, in an underprotection situation, declaring a surety void on grounds of being unfair is an exceptional phenomenon. In such case, the principle of freedom of contract may be a so-called covering principle of unfair contracts of suretyship, or a principle outside this. L. Kähler. Decision-making about Suretyships under Empirical Uncertainty – How Consequences of Decisions about Suretyships Might Influence the Law. – European Review of Private Law 2005/3, p. 348.



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# Should Estonian Law Provide for an Award of Punitive Damages?

Punitive damages are an institute of law practiced in the Anglo-American legal system. They are defined as damages awarded in addition to the actual material or non-material damages to punish the defendant and deter him or her from committing violations of law in the future. Estonian lawyers too have somewhat unexpectedly proposed to set forth in Estonian law the possibility of awarding punitive damages, especially for violations of personal rights (e.g., defamation). The reasoning behind the proposal is that today defamation is not punished as a criminal offence in Estonia, and injured parties allegedly remain without effective judicial protection.<sup>\*1</sup> The aim of this article is to analyse the nature of punitive damages, whether that institute could or should be applied to Estonian law, but also whether provision of punitive damages could be in conflict with the values stated in our Constitution. The central issue of this article is whether application of punitive damages is necessary for cases of defamation and violation of other personal rights.

## 1. Nature of the institute of punitive damages

As I said, Anglo-American law defines punitive damages (also known as exemplary damages) as damages that are in excess of the compensatory damages in order to punish the defendant and deter new violations of law. This is a conceptual difference from the Continental-European doctrine according to which the indemnification obligation of civil law damage primarily has a compensatory function, i.e., the purpose of the damages is to restore the former situation for the injured party. The same principle is provided in Estonian law in § 127 (1) of the Law of Obligations Act<sup>\*2</sup>, which sets forth that the purpose of compensation for damage is to place the aggrieved person in a situation as near as possible to that in which the person would have been if the circumstances which are the basis for the compensation obligation had not occurred. Continental-European law doesn't traditionally seek to punish the tortfeasor through damages, only to redeem or compensate the damage inflicted to the injured party.<sup>\*3</sup>

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<sup>1</sup> See interview with the Minister of Justice Rein Lang. – Postimees, 29 May 2007 (in Estonian).

<sup>2</sup> Võlaõigusseadus. – RT I 2001, 81, 487; 2005, 61, 473 (in Estonian). English translation available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X60032K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=v%F51a%F5igus> (21.06.2007).

<sup>3</sup> The Civil Chamber of the Supreme Court has underlined the same in case 3-2-1-137-05. – RT III 2006, 3, 26 (in Estonian). See also G. Wagner: Deutscher Juristentag. Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden. Verlag C. H. Beck 2006, p. 15.

Punitive damages are applied primarily in judicial practice in the United States<sup>\*4</sup>, but are known also in the United Kingdom, Canada, Australia, New Zealand and India.<sup>\*5</sup> The amount of a punitive damage is decided by the jury, but the judge has the right to later reduce the amount at the request of the defendant, which is often the case. It is generally possible to award punitive damages in all tort cases. Punitive damages are mainly awarded when the tortfeasor's behaviour is found to be especially harmful, i.e., intentional or gravely negligent. Punitive damages can exceptionally be awarded also in cases of breach of contract, especially in the case of contracts of employment and insurance contracts.<sup>\*6</sup> The actual amount of a punitive damage depends inter alia on the level of liability of the tortfeasor and his or her financial situation.<sup>\*7</sup>

Although the name might leave an impression that the purpose of punitive damages is only to punish the tortfeasor, it is not quite so. Although the main aims of punitive damages are indeed punishment and deterrence of new offences<sup>\*8</sup>, punitive damages do actually have several other functions. Those other functions are primarily profit-erasing of the tortfeasor (the violator of another person's right), compensation of the injured party's legal expenses, redemption of the offence<sup>\*9</sup>, but also compensation of the enforcement gap.<sup>\*10</sup>

Yet, the judicial practice of the U.S. juries in punitive damages cases has fallen under growing criticism and for some time now relevant literature calls for a tort reform.<sup>\*11</sup> The institute of punitive damages and the relevant U.S. judicial practice is blamed for primarily the following:

- the institute of punitive damages is problematic from the constitutional perspective<sup>\*12</sup>;
- there are no clear criteria for determining the amount of the damage, which means that a judgment is absolutely not predictable;
- juries act too emotionally<sup>\*13</sup>;
- sometimes the damage awarded is even more than the initial claim by the injured party<sup>\*14</sup>;
- enormous damages threaten to push producers to bankruptcy, which suppresses entrepreneurship and initiative<sup>\*15</sup>;
- boundaries between penal law and private law are blurring.

Measures have already been taken to restrain the awarding of uncurbed damages: eleven states have adopted a law on the maximum amount of a punitive damage, limiting it to just 1–5 times the compensatory (regular) damage; some states have laid down maximum levels of punitive damages (from 300,000 up to five million U.S. dollars); 13 states have adopted a regulation regarding transfer of a certain percentage of the awarded damage to the Treasury or the Alliance for Equal Justice.<sup>\*16</sup> Also, the U.S. Supreme Court has ruled in 2003 that as a rule punitive damages should not exceed the amount of the compensatory damage by more than nine-fold.<sup>\*17</sup>

<sup>4</sup> First rulings in the U.S. involving award of punitive damages are known to have been made in 1784 and 1794, and already in 1851 punitive damage can be referred to as an established and acknowledged institute in the whole country. See J. Mörsdorf-Schulte. *Funktion und Dogmatik US-amerikanischer punitive damages*. Tübingen 1999, p. 180.

<sup>5</sup> F. Dasser. *Punitive Damages: vom "fremden Fötzel" zum "Miteidgenoss"*. – *Schweizerische Juristenzeitung* 2000 (96), pp. 1 and 2. Available at <http://www.homburger.ch/fileadmin/publications/PUNDAM.pdf> (21.06.2007).

<sup>6</sup> P. Müller. *Punitive Damages und deutsches Schadensersatzrecht*. Walter De Gruyter 2000, p. 9; F. Dasser (Note 5), pp. 2–3.

<sup>7</sup> C. Post. *Yellow Press and Privacy: die Rechtsprechung des US Supreme Court*. – *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* 2006, Heft 4, pp. 284, 285.

<sup>8</sup> P. Müller (Note 6), p. 11.

<sup>9</sup> F. Dasser (Note 5), p. 3.

<sup>10</sup> This is a new argument that the best justification for punitive damages is the filling of gaps in the implementation of law. It is argued that since in reality the inflictor of damage often remains unpunished and the injured party without compensation, then just the award of punitive damages does not produce the desired deterrent effect: the inflictor of the damage can rely on the fact that most likely liability is not applied to him or her, and even if it is done, then it would probably not exceed the amount of the damage actually inflicted. This means that violation of law often actually pays. One solution could be the so-called multiplication of indemnity — i.e., the indemnity is multiplied by a certain indicator (such as two or three), which is determined on the basis of the probability that the inflictor of the damage gets away with his or her offence. See R. S. Avi-Yonah. *Developments — the Paths of Civil Litigation*. – *Harvard Law Review* 2000 (113), p. 1795.

<sup>11</sup> G. Wagner (Note 3), p. 68; C. Post (Note 7), p. 284; J. Mörsdorf-Schulte (Note 4), p. 182 ff.

<sup>12</sup> J. Mörsdorf-Schulte (Note 4), p. 184. For example the U.S. Supreme Court has found that extremely large punitive damages are in conflict with the Due Process Clause. See the U.S. Supreme Court ruling from 7.04.2003 in *State Farm Mutual Automobile Industries Comp v. Campbell*. Available at <http://www.horvitzlevy.com/Bulletins/campbe042304.htm> (21.06.2007).

<sup>13</sup> F. Dasser (Note 5), p. 4; G. Wagner (Note 3), p. 68.

<sup>14</sup> R. S. Avi-Yonah (Note 10), p. 1784.

<sup>15</sup> *Ibid.*, pp. 1784–1785.

<sup>16</sup> *Ibid.*, p. 1793.

<sup>17</sup> See the U.S. Supreme Court ruling from 7.04.2003 in *State Farm Mutual Automobile Industries Comp v. Campbell* (Note 12).

## 2. Punitive damages in Europe

The punitive aim of damages in its narrower sense (redemption, repentance and revenge) is not known at least in the Continental-European private law tradition.<sup>\*18</sup> Punitive aims derive from the tortfeasor, not the injured party, and are intrinsic to penal law. There is a predominate opinion that punitive damages are not part of Continental-European legal culture, and neither the European Principles of Tort Law (see article 10:101) nor the Study Group on a European Civil Code provide for punitive damages.

However, there is a noticeable tendency in Continental-European legal orders to take account of punitive elements upon awarding damages at least in some sectors. In German law, for example, the increasing importance of the deterrence factor in a compensatory obligation is more and more talked about, especially in connection with damage to a creditor's non-material rights.<sup>\*19</sup> If the violation concerns such benefits, then it can only formally be claimed that the purpose of the monetary compensation is to make up for the damage and restore the benefits. In those areas of activity German judicial practice has reached similar conclusions regarding amounts and bases for calculation of damages as the U.S. judicial practice on award of punitive damages. Damages awarded under German judicial practice are often more than compensational, and the argumentation used in motivation partly resembles the punitive damage approach.<sup>\*20</sup> Deterrent function exists for example in damages for wasted holiday time, which on one hand compensates the non-material damage inflicted on a passenger, and on the other hand should help to avoid bad business practice by package holiday travel agents.<sup>\*21</sup>

In several countries of the Continental-European legal system the deterrent function of damages plays an important role in the award of compensation for violation of personal rights: the purpose of the compensation for the loss inflicted by such violations is not only to compensate the loss to the injured party, but also the deterrence of such violations in the future.<sup>\*22</sup> The topic of punitive damages has found its way also to studies of Continental-European legal scholars. For example one of the main topics at the 66<sup>th</sup> Day of Jurists of the Federal Republic of Germany was whether it is necessary to amend the German indemnification regulation, especially whether it is necessary to establish institutes of punitive damages and collective action. However, it was admitted that punitive aims in their narrower sense are foreign to private law and should remain that way.<sup>\*23</sup>

At the European Union level the attitude toward punitive damages type compensation is unclear and non-consistent in different legal acts and decisions.<sup>\*24</sup> For example, according to the second sentence of article 29 of the Montreal Convention for the Unification of Certain Rules for International Carriage by Air<sup>\*25</sup> punitive, exemplary or any other non-compensatory damages are not recoverable. Also for the Rome II regulation<sup>\*26</sup> long debates were held over whether or not to provide in the regulation *expressis verbis* that punitive damages could be in conflict with a Member State's public order.

The European Court of Justice, on the other hand, has taken a stand in an antitrust case that if a national court awarded a punitive damage for an infringement of antitrust law, then the same should be done in cases of infringement of the European Union antitrust law provisions.<sup>\*27</sup> The European Court of Justice has at least in two instances ruled in equal treatment lawsuits that damages awarded for discrimination of workers must have a deterrent effect.<sup>\*28</sup> The European Union Court of Justice judicial practice shows that, for the effective protection of a worker, who is the weaker side, a damage awarded for job-related discrimination should in excess of the traditional compensatory nature also have deterrent influence.

<sup>18</sup> See G. Wagner (Note 3), pp. 14–15, 133.

<sup>19</sup> J. Rosengarten. Der Präventionsgedanke im deutschen Zivilrecht. – Neue Juristische Wochenschrift 1996/30, pp. 1935–1937.

<sup>20</sup> V. Behr. Myth and Reality of Punitive Damages in Germany. – Journal of Law and Commerce 2005 (24), p. 221.

<sup>21</sup> H. Lange, G. Schiemann. Schadensersatz. 3. Aufl. Tübingen: Mohr (Siebeck) 2003, p. 12. Similar provision is included also in § 887 (2) of the Estonian Law of Obligations Act.

<sup>22</sup> The German Federal Supreme Court first referred to the deterrence function of compensation in its 15.11.1994 so-called Monaco princess judgment. M. Körner. Zur Aufgabe des Haftungsrechts – Bedeutungsgewinn präventiver und punitiver Elemente. – Neue Juristische Wochenschrift 2000/4, p. 242. Similar trends can be noticed in, e.g., French, Greek and Italian law. See U. Drobnig, C. von Bar. Study on property law and non-contractual liability law as they relate to contract law, p. 130 ff. Available at [http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/study.pdf](http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/study.pdf) (21.06.2007).

<sup>23</sup> G. Wagner (Note 3), p. 133.

<sup>24</sup> *Ibid.*, p. 71.

<sup>25</sup> OJ L 194, 18.07.2001, p. 39.

<sup>26</sup> European Parliament and Council regulation of 21 February 2006 on the law applicable to non-contractual obligations ("Rome II") (COM (2006) 83). Now adopted: Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II").

<sup>27</sup> European Court of Justice judgment of 13.07.2006, joined cases C-295/04 – C-298/04. – OJ C 224, 16.09.2006, p. 3.

<sup>28</sup> European Court of Justice judgment of 10.04.1984, C-14/83 (Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen). – European Court reports 1984, p. 01891; European Court of Justice judgment 22.04.1997, C-180/95 (Draehmpaehl). – European Court reports 1997, p. I-02195.

Possible punitive damages are being deliberated also in the European Union in the context of infringements of antitrust law. The European Union green paper on antitrust law proposes automatic so-called double damages for the compensation of infringements of antitrust law.<sup>\*29</sup> Such a proposal is evidently inspired by the U.S. antitrust law, where the classical punitive damages institute has today been replaced by the so-called treble damages option provided by law.<sup>\*30</sup> The main aim of multifold damages is to prevent future infringements of antitrust law (the deterrent function). Other aims are to compensate the damage done to those who have suffered loss, profit erasing, and to encourage individuals claim damages in case of future similar infringements. In addition to the above a similarly important function is definitely filling of enforcement gaps, since damages inflicted by infringements of antitrust law are so small, that it does not motivate consumers to take action: the amount that a consumer pays extra to for example a petrol cartel is not large enough to make financial sense to sue.<sup>\*31</sup>

Thus, there is no consensus on the European Union level regarding the fact that punitive damages are *a priori* in conflict with the European Union law.

### 3. Punitive damages in the context of Estonian Constitution

One of the aims of this article is to analyse whether application of punitive damages would at all be permissible by the Estonian Constitution. A question might arise due to the nature and purpose of punitive damages, whether award of such damages under civil proceedings would be constitutional. The author thinks that application of punitive damages in Estonia is problematic from the constitutional perspective mainly due to the following reasons.

As indicated above, the main aim of a punitive damage is to punish the tortfeasor and deter new offences. Punishment as such should be the sole competence of the state and criminal law.<sup>\*32</sup> A punitive damage is by nature very similar to a fine under penal law or a fine to the extent of assets: the tortfeasor must pay money, and that obligation has two aims: to punish and deter. Award of punitive damages under civil proceedings would disturb the boundaries established between civil and penal law and transfer penal law functions into civil law.

This argument has been rightly contested by the argument that the deterrent effect as such would in any case not be confined only to criminal law, but goes with establishment and application of all liability, including civil liability. Therefore the deterrent and compensation functions cannot be clearly separated and limited.<sup>\*33</sup> Article 10:101 of the European Principles of Tort Law also underlines the deterrent function of compensation.<sup>\*34</sup> The author thinks that although it is true, that a compensation obligation under civil law also serves a deterrent function in addition to compensating of the inflicted damage, yet the aim to punish in its narrower sense cannot be deemed justified.

German legal literature has indicated that a situation where penalties can be inflicted without due constitutional guarantees, especially the guarantees provided in the criminal procedure code, is in conflict with the principle of rule of law.<sup>\*35</sup> The author is on the opinion that a similar conflict arises also in Estonian law. Section 23 of the Constitution<sup>\*36</sup> provides that no one shall be convicted of an act which did not constitute a criminal offence under the law in force at the time the act was committed. From this provision and the principle of rule of law it can be concluded that penalties can be inflicted only for a criminal offence and that can occur only pursuant to the procedure provided by criminal proceedings and according to the standards therein. Criminal proceedings have generally somewhat higher burden of proof and rules of proof than in civil law.<sup>\*37</sup> The criminal proceedings law also provides for specific principles and institutes for the protection of the accused, not known by civil proceedings: e.g., the *in dubio pro reo* principle (in doubt, on behalf of the alleged culprit), required presence of the criminal defence counsel at the criminal proceedings, the maxim banning mandatory

<sup>29</sup> Green paper: Damages actions for breach of the EC antitrust rules. COM (2005) 672. See question E, option 16.

<sup>30</sup> A similar proposal was made in 2005 to amend also the German Act against Restraints of Competition (ARC), but was later drawn back. See G. Wagner (Note 3), p. 105.

<sup>31</sup> G. Wagner (Note 3), pp. 104–105, 116–117.

<sup>32</sup> This position was taken by for example the German Federal Constitutional Court. See decision from 4.06.1992. – BGHZ 118, 312ff.

<sup>33</sup> G. Wagner (Note 3), p. 76.

<sup>34</sup> “Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he would have been in if the wrong complained of had not been committed. Damages also serve the aim of preventing harm.”

<sup>35</sup> See G. Wagner (Note 3), p. 76.

<sup>36</sup> Põhiseadus. – RT 1992, 26, 349; 2003, 64, 429 (in Estonian). English translation available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X0000&keel=en&pg=1&ptyyp=RT&tyyp=X&query=p%F5hiseadus> (21.06.2007).

<sup>37</sup> E. Kergandberg, M. Sillaots. *Kriminaalmenetlus* (Criminal Proceedings). Tallinn: AS Juura 2006, p. 33 (in Estonian).

self-incrimination (the *nemo tenetur se ipsum accusare* principle, § 22 (3) of the Constitution), direct and oral court hearing principle (in civil law default judgments and written proceedings are allowed). A conflict with an individual's right to be tried in his or her presence is plausible (§ 24 (2) of the Constitution). For example, if a tortfeasor is judged by default on a defamation published in media, and this default judgment awards a punitive damage, then this is a case of conflict with § 24 (2) of the Constitution.

A conflict with constitutional values may, in case of tort liability, arise also from the fact that Estonian tort law assumes that the tortfeasor is liable for the damage (§ 1050 (1) of the Law of Obligations Act). This would cause conflict with the presumption of innocence of § 22 (2) of the Constitution, which provides that no one has the duty to prove his or her innocence in a criminal procedure. True, according to the Constitution the presumption of innocence only applies to criminal proceedings. The author thinks that it should apply also in cases where punitive damages are awarded under civil proceedings. However, as a rule there would be no conflict, since pursuant to § 1050 (1) the Law of Obligations Act the liability of the tortfeasor is assumed, but the intention or gross negligence (which are usually prerequisites for award of punitive damages) must be proven by the plaintiff.<sup>38</sup> Conflict with the Constitution would arise only if punitive damages were allowed also for liability independent of guilt or just light negligence.

Conflict is in principle possible also with the double jeopardy (the so-called *ne bis in idem*) principle. Pursuant to § 23 (3) of the Constitution no one can be prosecuted or punished again for an act of which he or she has been finally convicted or acquitted pursuant to law. The fundamental right that derives from the above ban secures that it is possible for an individual to know what the enforcement implications are when the offence he or she has committed is detected; it secures legal peace, and rules out the possibility that after a binding punitive decision regarding an individual he or she might be surprised with an intention to inflict additional penalty for the same act.<sup>39</sup> Conflict with the said principle may arise in case the penal code provides criminal punishment for an act and civil law allows to award of an additional punitive damage (e.g., if Estonian law allowed award of punitive damages for infringements of antitrust law, liability of producer or in case of causing a bodily injury). In case an individual is first punished pursuant to criminal procedure and then a punitive damage is awarded pursuant to civil procedure, a question might arise here whether the punitive damage is actually a second punishment in the meaning of § 23 (3) of the Constitution. Regarding the issue whether and when means of enforcement by state can be treated as a punishment in the meaning of 23 (3) of the Constitution, the Supreme Court has taken a position that this cannot be solved merely on the grounds of penal code provisions. It must be checked whether some means of enforcement by a state, which in formal penal power is treated as a punishment, should nevertheless essentially or materially be treated as a punishment. The guarantee of fundamental rights must also exist upon the application of those means of enforcement by a state, which are not provided as punishments in formal penal power, but which can materially be treated as punishments. It must thus be evaluated whether that is a punishment in its material sense, i.e., a measure applied in case of an offence, which has the nature and objective of a punishment and is sufficiently severe to be comparable to a criminal punishment in its formal meaning.<sup>40</sup> Estonian legal literature has taken the position that the possibility to apply the prohibition on business provided in § 91 (3) of the Bankruptcy Act<sup>41</sup> is essentially a side punishment in the meaning of penal power, and the application thereof under a bankruptcy proceeding may create a conflict with the § 23 (3) of the Constitution.<sup>42</sup>

A similar problem has been noticed in the European Union antitrust law: as referred to above, the European Union green paper on antitrust law<sup>43</sup> allows deliberating a possibility to foresee the so called double damages for the compensation of violations of antitrust law. However, literature has rightly noted that such a regulation may be in conflict with the *ne bis in idem* principle.<sup>44</sup> However, it is possible to award damages to compensate for the actual loss, also non-material damages for emotional distress and suffering.<sup>45</sup>

Thus, a conflict may arise with the double jeopardy clause in § 23 (3) of the Constitution in cases where the aim of a punitive damage is only to punish the injured party or deterrence. However, in defamation cases

<sup>38</sup> P. Varul, I. Kull, V. Kõve, M. Käerdi (eds.). *Võlaõigusseadus I. Üldosa* (§§ 1–207). Kommenteeritud väljaanne (The Law of Obligations Act. I General Part (§§ 1–207). Commented Edition). Tallinn: Juura 2006, p. 334 (in Estonian).

<sup>39</sup> SCEbd 3-4-1-10-04. Available at <http://www.nc.ee/?id=399> (15.07.2007).

<sup>40</sup> SCEbd 3-4-1-10-04 (Note 39); CrCSC 3-1-1-21-06. – RT III 2006, 20, 182 (in Estonian).

<sup>41</sup> Pankrotiseadus. – RT I 2003, 17, 95; 2006, 61, 456 (in Estonian). English translation available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X70024K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=pankrotiseadus> (21.06.2007).

<sup>42</sup> S. Lind, R. Otsa, J. Sootak. Penalty and Other Punitive Sanctions in the Estonian and European Legal Order. – *Juridica International* 2005 (10), pp. 188–190.

<sup>43</sup> Green Paper: damages actions for breach of the EC antitrust rules. See question E, option 16. (COM (2005) 672, 19.12.2005).

<sup>44</sup> Reaction to the Green Paper on damages actions for breach of EC antitrust rules. Europe Institute, Leiden University. Available at [http://www.law.leidenuniv.nl/general/img/bvanbockel%20-%20reaction%20to%20green%20paper%20ec%20antitrust%20rules\\_tcm11-8695.pdf](http://www.law.leidenuniv.nl/general/img/bvanbockel%20-%20reaction%20to%20green%20paper%20ec%20antitrust%20rules_tcm11-8695.pdf) (21.06.2007).

<sup>45</sup> In principal the same by R. Maruste. *Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse* (Constitutionalism and Protection of Fundamental Rights and Freedoms). Tallinn: Juura 2004, p. 399 (in Estonian).

it should not be possible to cause such a conflict, since defamation or insinuation are today in Estonia not punishable under criminal procedure.

Neither can one justify the principle that instead of going to state budget a fine (which in essence the punitive damage is) goes to an injured party. Thus, the injured party profits from the infliction of the damage, i.e., is at the end in a better position due to the infliction of the damage than he or she would have been had the damage not been inflicted. In Estonian law such a result would as a rule be in conflict with the provision of § 127 (5) of the Law of Obligations Act. The said principle has been criticized also in the U.S., and as a result 13 states have adopted a regulation on the transfer of a certain percentage of the awarded damage to the Treasury or the Alliance for Equal Justice.<sup>\*46</sup> This percentage varies from state to state, reaching from 30% to 75%.<sup>\*47</sup> Such a regulation where a part of a punitive damage goes not to the injured party but the state budget, further blurs the boundaries between an indemnity under private law and a fine under penal power, and is therefore extremely problematic from the constitutional aspect.<sup>\*48</sup> This is in clear conflict with the double jeopardy principle, as it involves in essence two monetary penalties, both of which, if applied, go to the state and at least the partial aim of which is deterrence and punishment. Imposing punitive damages might also be in conflict with the principle of proportionality.<sup>\*49</sup> Pursuant to the second sentence of § 11 of the Constitution restrictions must be necessary in a democratic society and should not distort the nature of the rights and freedoms restricted. The principle of proportionality is binding also to the legislator, i.e., imposition of restrictions by law should see that the established restrictions were suitable/appropriate for the desired aim, necessary and proportionate in the narrower sense (moderate). A measure is necessary, if there is no other suitable and at least similarly effective measure, which is less restrictive to fundamental rights.<sup>\*50</sup> The author is on the opinion that disproportionately large damages of primarily punitive nature awarded for defamation may unfoundedly prejudice an individual's freedom of self-expression (§ 45 (1) of the Constitution). However, § 45 (2) of the Constitution provides a qualified reservation to that end by allowing restrictions to freedom of expression in order to protect others' honour and good name. To establish whether such a restriction is constitutional, it must be *inter alia* taken into account that every intervention with freedom of expression must be proportional with the desired lawful aim.<sup>\*51</sup> The European Court of Human Rights has taken the stand that in certain cases damages awarded under civil proceedings may prove to be too high, or in other words it may prejudice the principle of proportionality. In *Tolstoy Miloslavsky v. United Kingdom* the European Court of Human Rights considered the indemnity of 1.5 million pounds to be disproportionately high for defamation, and found that it compromises an individual's right of free expression. It is important to mention regarding that case that the awarded damage did not even have to do with a punitive damage, it was simply an indemnity for a non-material damage, but it was still considered to be disproportionately high compared to the caused loss.<sup>\*52</sup>

## 4. Need for punitive damages in Estonian law for cases of violation of personal rights

The U.S. courts often award punitive damages for violation of personal rights, especially defamation. For severe violation of personal rights European courts generally tend to revive civil penalty: it is found that ordering tabloids, who have published fictitious interviews with celebrities in order to increase their sales, to pay just the actual damage would in essence be useless, since the actual damage is significantly less than the profit earned.<sup>\*53</sup> For example, in German courts the arguments in deliberations over the amount of damage are essentially exactly the same as in the U.S. courts, and practically similar results are attained in the final instance.

This was finely demonstrated in the comparison of two cases: the *Cher v. Forum International Ltd.* in a U.S. court and *Caroline von Monaco* (*Caroline I* and *II*) debated at the German Federal Constitutional Court.<sup>\*54</sup> Both

<sup>46</sup> R. S. Avi-Yonah (Note 10), p. 1793.

<sup>47</sup> J. Mörsdorf-Schulte (Note 4), p. 222.

<sup>48</sup> For this reason the state of Colorado once again abolished its corresponding regulation. J. Mörsdorf-Schulte (Note 4), p. 224.

<sup>49</sup> The U.S. Supreme Court has seen the same problem and ruled that extremely large punitive damages are in contradiction with the Due Process Clause. See case *State Farm Mutual Automobile Industries Comp v. Campbell* (Note 12).

<sup>50</sup> Panel of editors led by E.-J. Truuvali. *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne* (The Constitution of the Republic of Estonia. Commented Edition). Tallinn: Juura 2002, p. 112 (in Estonian).

<sup>51</sup> *Ibid.*, p. 315.

<sup>52</sup> T. Annus. *Riigikõigus* (Constitutional Law). Tallinn: Juura 2006, p. 315 (in Estonian); *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, application No. 18139/91. Available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Miloslavsky&sessionid=978151&skin=hudoc-en> (21.06.2007).

<sup>53</sup> C. von Bar. *The Common European Law of Torts*. München: Verlag C.H.Beck 1998, p. 629.

<sup>54</sup> Judgment of the Federal Constitutional Court of the Federal Republic of Germany of 15 November 1994. – *Neue Juristische Wochenschrift* 1995, p. 861 ff (*Caroline I*); judgment of the Federal Constitutional Court of the Federal Republic of Germany of 5 December 1995. – *Neue*

cases involved a situation where press violated personal rights of a celebrity by publishing fictitious interviews or statements about their personal life. A 100,000 dollar damage was awarded to Cher in a U.S. court for the violation of her personal rights.<sup>\*55</sup> Although the German Federal Constitutional Court avoided using the term punitive damage, the reasoning about the amount of the damage clearly indicated punitive elements. The German Federal Constitutional Court underlined that what is important in such cases is usually giving moral satisfaction (*Genugtuung*) to the injured party and that the indemnity has a deterrent function.<sup>\*56</sup> In the second case (Caroline II) the Court underlined that in such cases of violation of personal rights the compensation idea must retreat in front of the deterrence purpose.<sup>\*57</sup> The Court also found that the actions of the magazine's publisher led to involuntary commercialisation of the plaintiff with the aim to foster the publisher's economic interests, and stressed the need to avoid such activities. For that end the indemnity must be such that it would avoid future violations of the injured party's rights by the tortfeasor.<sup>\*58</sup> One argument that the German Federal Constitutional Court also took into account in deciding the amount of the damage was that the tortfeasor should not make a fortune at the expense of violating the injured party's rights, and that the profit made should go to the injured party, and found that only then could the deterrent function actually work.<sup>\*59</sup> It is clear that such an argumentation is based not only on the compensatory function of the damage, but clearly underlines its deterrent function, and thereby at least partly overlaps with the idea of a punitive damage.<sup>\*60</sup>

The case was sent back to the court of appeal for the final decision, which awarded Princess Caroline damages of 180,000 German marks. Let us recall that in case *Cher v. Forum International Ltd.* a U.S. court awarded the injured party 100,000 dollars — hence, the awarded amounts are more or less similar, even if the U.S. court awarded a punitive damage and the German constitutional court a regular indemnity. There was a very similar case in France in 1988, where a magazine published a celebrity's nude photographs without the individual's consent. Court awarded damages of 250,000 francs. One argument the court considered in deciding the amount of the indemnity was the benefit earned by the tortfeasor. French legal literature notes that one of the purposes of such cases is deterrence, as well as to punish the tortfeasor.<sup>\*61</sup>

Our question is whether the same arguments — giving moral satisfaction to the injured party, deterrence and profit-erasing — can in cases of violation of personal rights be used also in Estonian law for the determination of the amount of the damage. If so, then punitive damages need not be transposed into Estonian law, since we would use slightly different methods and reach exactly the same results as German and the U.S. courts.

It must first be noted that the author is on the opinion that the last argument — i.e., profit-erasing — should not be considered in deciding the amount of the award. Section 1039 of the Law of Obligations Act provides that the entitled person may demand that a violator who is or should be aware of the lack of justification for the violation transfer any revenue received as a result of the violation in addition to the usual value of that which is received. It applies to situations provided in § 1037 (1) of the Law of Obligations Act, i.e., an instance when one person has violated a right of ownership, **another right** or the possession of an other person without the consent of the other person. The author is on the opinion that a violation of a personal right qualifies as another right in the meaning of §§ 1037 and 1039 of the Law of Obligations Act, and the injured party could, in case of a press delict, claim that the magazine rendered the revenue earned from the publishing of the falsified interview, as unjustified enrichment on the part of the tortfeasor. It is not allowed in German law<sup>\*62</sup>, but that practice has been criticised in German legal literature, since it is not possible without it the actual deterrent effect on defendants of press delicts. It is noted that a claim of such unjustified enrichment is allowed for example in English and Swiss laws and that also Germany should acknowledge it in the future.<sup>\*63</sup> Thus, in the author's estimation, § 1039 of the Law of Obligations Act allows to claim the revenue earned by defendants of press delicts or violators of other personal rights on the basis of the unjustified enrichment regulation, and therefore the amount of that revenue should not be taken into account in the award of non-material defamation damages (§ 1043 and § 134 (2) of the Law of Obligations Act).

Which circumstances should be considered in the deliberation of a non-material damage for violation of personal rights, and what is the purpose of that indemnity? Before the entry into force of the Law of Obligations Act, the Estonian Supreme Court has taken a stand that in case of defamation the obligation to compensate non-material damage is also an expression of society's disapproval of the violator's unlawful act and a relief to

Juristische Wochenschrift 1996, p. 984 (Caroline II).

<sup>\*55</sup> See V. Behr (Note 20), pp. 207–211.

<sup>\*56</sup> Case Caroline I (Note 54).

<sup>\*57</sup> Case Caroline II (Note 54).

<sup>\*58</sup> *Ibid.*

<sup>\*59</sup> Case Caroline I (Note 54); case Caroline II (Note 54).

<sup>\*60</sup> One of the presiding judges later said in a public interview that “the indemnity must be painful to the publisher of the magazine”. V. Behr (Note 20), p. 211.

<sup>\*61</sup> Similar arguments can be found in Swedish, Danish, Greek and Italian decisions. U. Drobnig, C. von Bar (Note 22), pp. 130–134.

<sup>\*62</sup> G. Wagner (Note 3), p. 89.

<sup>\*63</sup> *Ibid.*, p. 90.

the injured party for the injustice inflicted, and that upon determination of the monetary indemnity amount for moral damage court must evaluate the form, extent and nature of defamation, the violator's level of liability, behaviour and attitude toward the injured party after the violation, as well as amounts of indemnities in similar cases.<sup>\*64</sup> Thus, the Supreme Court univocally finds that punitive arguments should be considered in deciding an indemnity amount for a violation of a personal right. However, the Supreme Court has taken that stand only specifically regarding violation of personal rights, not indemnification of other non-material damage.

On the other hand the Supreme Court has also admitted that not every defamation case needs a monetary compensation. Court proceedings and a relevant decision could be sufficient to remove the negative consequences caused by defamation<sup>\*65</sup> and court may deem that the moral damage inflicted by defamation is redeemable by an apology by the tortfeasor.<sup>\*66</sup> Subsection 134 (2) of the Law of Obligations Act provides a similar principle that in the case of an obligation to compensate for the damage arising from deprivation of liberty or violation of a personality right, in particular from defamation, the obligated person must compensate the aggrieved person for non-material damage only if this is justified by the gravity of the violation, in particular by physical or emotional distress. This means that lighter cases of defamation or other cases of personal rights violations should not necessarily be followed by an award of a damage for a non-material loss, it is nevertheless necessary in graver cases, where also deterrence elements should be considered in line with the decision 3-2-1-105-01 of the Supreme Court (e.g., the fact that non-material damage should *inter alia* express social disapproval and offer mental relief to the injured party). The author is on the opinion that the mere fact that one of the functions of recovering the damage under civil law is deterrence gives no basis to argue that it is a U.S. punitive damage type indemnity. The author agrees with the view that any application of liability has *inter alia* also a deterrent effect, which makes deterrence characteristic not only to penal law.

The author is on the opinion that the current Law of Obligations Act offers sufficient protection to an injured party against a press delict, by giving him or her a right to claim recovery pursuant to § 1039 of the Law of Obligations Act for the profit earned by way of a violation and pursuant to § 1043 and § 134 (2) of the Law of Obligations Act a non-material damage inflicted by defamation, whereas in the latter case the argument that an indemnity must have a deterrent function can be considered in deciding the amount of the damage. Thus, there is no need in Estonian law to give an injured party an additional judicial remedy by imposing punitive damages for cases of violation of personal rights.

It should be mentioned here that there is one more specific area in Estonia and other Continental-European countries, which in essence departs from the principle that only the actual damage is to be indemnified. Namely, claims for damages deriving from a violation of intellectual property rights are no longer strictly based on the difference hypothesis and the principle that the purpose of compensation for damage is to place the aggrieved person in the same situation in which the person would have been had the event causing the damage not occurred. In accordance with law applicable in Estonia the injured party has, in the event of a violation of intellectual property rights, the option to choose from the following methods of calculation of damages.<sup>\*67</sup>

Firstly, an injured party can claim the actual damages suffered by him or her (§ 1043, § 127 (1) of the Law of Obligations Act).

The second option is to rest on the second sentence of § 127 (6) of the Law of Obligations Act, which provides: if damages are claimed for the violation of a copyright, neighbouring right or design right, court may, if it is reasonable, award damages as a fixed amount, basing its decision *inter alia* on the amount of the fee that the violator should have paid, had he or she obtained the licence for the use of the relevant right. Thus, the second option for the injured party is to claim from the tortfeasor the payment of a hypothetical licence fee.<sup>\*68</sup> The said method of calculation is no longer strictly based on the difference hypothesis: the injured party is entitled to an indemnity in the amount of the hypothetical licence fee also in case the injured party would have never given a licence to the tortfeasor or exercised his or her rights in the economic sense.

Third, the injured party may rely on § 1039 of the Law of Obligations Act, which provides that the entitled person may demand that a violator who is or should be aware of the lack of justification for the violation transfer any revenue received as a result of the violation in addition to the usual value of that which is received.<sup>\*69</sup> This means that if a violator earned revenue from the use on another person's trademark or property right, then the injured party could recover that revenue from him or her, also in cases where the injured party would not have earned the revenue him- or herself or would not have earned it in such an amount.

<sup>64</sup> CCSCd 3-2-1-105-01. – RT III 2001, 28, 105 (in Estonian).

<sup>65</sup> CCSCd 3-2-1-11-04. – RT III 2004, 6, 66 (in Estonian).

<sup>66</sup> CCSCd 3-2-1-17-05. – RT III 2005, 18, 189 (in Estonian).

<sup>67</sup> The same options are laid down also in article 13 (1) of the directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. – OJ L 195, 2.06.2004, pp. 16–25.

<sup>68</sup> The author is on the opinion that by analogy the same principle may be used in case of violation of a person's name and image, which are legal rights in the meaning of § 1046 (1) of the Law of Obligations Act.

<sup>69</sup> CCSCd 3-2-1-124-06. – RT III 2006, 47, 397 (in Estonian).

In case of a violation of an intellectual property right, under Estonian law an author has the right to claim, in the event of violation of his or her personal rights, also compensation for non-material damage (§ 81<sup>7</sup> (1) 1) of the Copyright Act<sup>70</sup>, § 1043, § 134 (2) of the Law of Obligations Act), which in certain cases can also lead to punishing the tortfeasor or at least allows to consider penal aspects in deciding the amount of an indemnity for a non-material damage.

## 5. Conclusions

The author is on the opinion that the institute of punitive damages should not be introduced to Estonian law due to the following reasons. First, it may be unconstitutional. Application of punitive damages would in essence mean that civil courts got a possibility to impose penalties without having to follow the relevant criminal proceedings standards or institutional guarantees. This, in the author's opinion, is in conflict with the Constitution. Second, there is no actual need for the imposition of punitive damages, since in many cases, primarily in cases of defamation or violation of other personal rights, the current Estonian law has provisions to come to essentially a similar or very near result in the protection of the injured party, as is done in by means of punitive damages in the U.S.

Finally, the issue of imposing punitive damages comes primarily down to the division of tasks in society, i.e., which tasks are foreseen for the state and which not. Thus, the decisive role in deciding over punitive damages is what role the state attributes to its administrative apparatus and operations of law enforcement authorities, their aims and possibilities in deterrence and punishing a certain violation of law. In the U.S. it is considered normal and acceptable to society that injured parties essentially play the role of a private attorney general in claiming their damages. Submitting those claims serves in addition to the compensation for the actual claim also a general deterrence purpose. An example is liability of producer, where one of the main aims of punitive damages is to make producers pay more attention to product safety. In Estonia such aims have traditionally been accomplished by public law regulations and law enforcement activities, and the author thinks it would not be right to make conceptual changes to that.

<sup>70</sup> Autoriõiguse seadus. – RT I 1992, 49, 615; 2007, 13, 69 (in Estonian). English translation available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X40022K7&keel=en&pg=1&ptyyp=RT&tyyp=X&query=autori%F5iguse> (21.06.2007).



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# A Glance at the Estonian Legal Landscape in View of the Constitution Amendment Act

The Estonian Constitution is 15 years old. The first Estonian Constitution was passed in 1920.<sup>\*1</sup> The amendments adopted by a referendum in 1933 were so essential and important that they are often called the 1933 Constitution.<sup>\*2</sup> In 1937, President Konstantin Päts submitted to the National Assembly a new draft Constitution, which entered into force on 1 January 1938.<sup>\*3</sup> The current Constitution of the Republic of Estonia is among the most stable ones in Estonian constitutional history. It was adopted by a referendum on 28 June 1992<sup>\*4</sup> and remained completely unaltered for more than ten years. On 25 February 2003, the Constitution of the Republic of Estonia Amendment Act was passed in the Riigikogu for the election of local government councils for a term of four years<sup>\*5</sup>; it entered into force on 17 October 2005. Another major amendment was made as a result of the referendum of 14 September 2003<sup>\*6</sup>, when it was decided to pass the Accession to the European Union (EU) and the Constitution Amendment Act (CAA). The next amendment took place in April 2007, and entered into force on 21 July 2007; the preamble of the Constitution was amended to include the state's objective of guaranteeing the preservation of the Estonian language through the ages.<sup>\*7</sup>

The CAA entered into force on 6 January 2004, three months after its proclamation, and its implementation has become increasingly topical after Estonia's accession to the EU on 1 May of the same year. After the first application and interpretation issues, which have reached the Supreme Court<sup>\*8</sup>, it is suitable to discuss whether the CAA has justified itself, what shortcomings it has, and what are the positive aspects of Estonia's chosen approach.

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<sup>1</sup> RT 1920, 113/114 (in Estonian).

<sup>2</sup> See R. Narits, H. Schneider, L. Madise. – Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented Edition). Panel of editors led by E.-J. Truuväli. Tallinn: Juura 2002, Sissejuhatus (Introduction), p. 21 (in Estonian).

<sup>3</sup> RT 1937, 71 (in Estonian).

<sup>4</sup> RT 1992, 26, 349 (in Estonian).

<sup>5</sup> Eesti Vabariigi põhiseaduse muutmise seadus kohaliku omavalitsuse volikogu valimiseks neljaks aastaks. – RT I 2003, 29, 174 (in Estonian).

<sup>6</sup> Eesti Vabariigi põhiseaduse täiendamise seadus. – RT I 2003, 64, 429 (in Estonian).

<sup>7</sup> Eesti Vabariigi põhiseaduse muutmise seadus. – RT I 2007, 33, 210 (in Estonian).

<sup>8</sup> The Supreme Court is the highest court in Estonia that functions as the cassation stage in the civil, criminal (incl. misdemeanour) and administrative matters. The Supreme Court is also the court of the constitutional review (see Constitution § 149). The Supreme Court has administrative, civil, and constitutional review chambers. Important constitutional questions are deliberated by Supreme Court *en banc* that comprises all 19 justices of the Supreme Court and has a quorum of 11 justices.

This paper observes the changes that have occurred on the Estonian legal landscape in connection with the CAA: how Estonia's EU membership and European law have affected our valid Constitution, its application and interpretation.<sup>9</sup> It begins with discussing the position and nature of the Constitution Amendment Act on the Estonian legal landscape, and related debates. The opinion of the Constitutional Review Chamber of the Supreme Court of 11 May 2006, on the interpretation of § 111 of the Constitution in conjunction with the Constitution Amendment Act and European Union Law may be considered to be a turning point in the interpretation of the CAA. This is why the paper first takes into consideration the discussions of the CAA that took place before the aforementioned opinion of the Supreme Court was adopted, and the earlier case-law of the Supreme Court. After that the paper analyses the attribution to the Supreme Court of the competence to provide opinions and the opinion of the Constitutional Review Chamber of the Supreme Court of 11 May 2006. Finally, the paper tries to assess the issues pertaining to this topic which have not yet been solved in Estonian law, especially in the judicial review process.

## 1. Position and nature of the Constitution Amendment Act on the Estonian legal landscape

Following is a discussion of, firstly, the reasons why a separate CAA was preferred to detailed amendments to the Constitution; secondly, the position and influence of the CAA in Estonian law, and the constitutional law discussions that have been raised by problems with interpreting the CAA.

### 1.1. Birth of the Constitution Amendment Act

Unfortunately, it must be admitted that the issue of amending the Constitution was avoided in the initial phase of preparations for Estonia's accession to the EU. Politicians saw the issue as too risky, and so the questions of whether and how the Constitution was to be amended were left to be answered at the last minute. The result was somewhat of a compromise. Although experts had already addressed the issue, to a greater or lesser extent since 1996, when the legal expertise committee was set up that analysed the Constitution as a whole<sup>10</sup>, the necessity of amending the Constitution became clear to everyone only in the second half of 2002, and lawyers and politicians reached, more or less, a consensus as to whether it was to be done.<sup>11</sup>

The next question was of how it was to be done. Various options were considered. The following aspects were decisive in the amendments to the Constitution: (1) amendments concerning EU accession had to be separate and not pending other amendments; (2) amendments had to concern the EU specifically and not international organisations in general; (3) it was not expedient to amend all provisions of the Constitution which could be contradictory, but an interpretation was to be preferred that facilitated integration.<sup>12</sup> With these considerations Estonia decided in favour of an original solution — a separate CAA, which had to be adopted by a referendum, because the amendments concerned sections of the Constitution which may be amended only by a referendum.<sup>13</sup> Lithuania is the only other EU Member State that did something similar: its Constitution was also amended by a separate constitutional act, which, however, is much more detailed in terms of its content than the Estonian CAA.<sup>14</sup> Typically, the Constitutions of EU Member States contain either very general provisions on delegating a partial exercise of certain powers to international organisations (the Netherlands, Denmark,

<sup>9</sup> This paper is an expansion of the author's presentation at the Estonian Judges Forum in Tartu on 15 June 2006.

<sup>10</sup> Võimalik liitumine EL-iga ja selle õiguslik tähendus Eesti riigiõiguse seisukohalt. PS juriidilise ekspertkomisjoni aruanne, 1998 (Potential Accession to the EU and Its Legal Implications in Terms of Estonian Constitutional Law. Report of the Expert Committee on the Constitution, 1988). Available at <http://www.just.ee/10746> (5.05.2007).

<sup>11</sup> Opinions differed only as to how the Constitution was to be amended, see: Ühispeetõrjumine seoses nn Põhiseaduse kolmanda akti riigiõiguslike probleemidega (Joint Address in connection with Constitutional Law Problems regarding the so-called Third Constitutional Act). – *Juridica* 2002/5, pp. 352–353 (in Estonian); A. Albi, R. Maruste. Eesti Vabariigi põhiseadus Euroopa Liidu õiguskorras (The Constitution of the Republic of Estonia in the Legal System of the European Union). – *Juridica* 2003/1, pp. 3–7 (in Estonian).

<sup>12</sup> See K. Merusk, J. Pöld, J. Laffranque, M. Rask, Ü. Madise. Põhiseaduse täiendamise seaduse eelnõust (Draft Act to Amend the Constitution). – *Juridica* 2002/8, especially p. 565 (in Estonian).

<sup>13</sup> According to the Republic of Estonia Constitution, Chapter I “General Provisions” and Chapter XV “Amendment of the Constitution” of the Constitution may be amended only by a referendum (see Constitution § 162). Chapter I “General Provisions”, which, inter alia, contains § 1 according to which Estonia is an independent and sovereign democratic republic wherein the supreme power of state is vested in the people. The independence and sovereignty of Estonia are timeless and inalienable; and § 3 of the Constitution according to which the state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith.

<sup>14</sup> See Constitutional Act No. IX-2343 of 13 June 2004 on Membership of the Republic of Lithuania in the European Union. The Act is based on the will of the Lithuanian nation as expressed in the results of the referendum held on 10–11 May 2003 and the EU accession treaty. Available at <http://www3.lrs.lt/c-bin/eng/preps2?Condition1=239806&Condition2=> (14.12.2005). See also I. Jarukaitis. Ratification of European

Luxembourg, Slovenia), separate provisions concerning the EU (Germany) or whole Chapters regulating EU membership (Austria, France).<sup>\*15</sup>

Therefore both those who find that the choice in favour of the CAA was pragmatically the best considering the political and legal environment, which naturally does not preclude a need for more thorough constitutional amendments in the future, and those who consider the chosen option a unique approach to regulating the relations between EU law and domestic law, are right.

## 1.2. Constitution Amendment Act and preamble to the Constitution

The CAA has only four sections, the meaning of which is far-reaching and builds a bridge between the Estonian legal order and EU law. The core of the Act consists of its first two sections, which provide for a “protective clause” stating that Estonia may belong to a European Union which respects the fundamental principles of the Estonian Constitution (§ 1), and stipulates that the Estonian Constitution shall be applied taking into account the applicable EU *acquis* transposed by the Accession Treaty, which essentially covers the principles of superiority and direct applicability of European law (§ 2).

The fundamental principles of the Constitution are the core values without which the Estonian state and Constitution lose its essence. They are universal in character and connected with the general principles of EU law.<sup>\*16</sup> Neither the Constitution nor the CAA defines the fundamental principles of the Constitution. As the protective clause is to be used if EU law is in conflict with the fundamental principles, the fundamental principles need to be defined. Theoretical approaches derive the fundamental principles of the Constitution from its preamble, Chapter I, “General Provisions” and §§ 10 and 11 of Chapter II, “Fundamental Rights, Freedoms and Duties”. Experts have concluded that the fundamental principles should be defined in the form of an open catalogue, which covers, above all, the following principles: national sovereignty; the state’s foundations of liberty, justice and law; protection of internal and external peace; preservation of the Estonian nation and culture through the ages; human dignity; social statehood; democracy; the rule of law; respect for fundamental rights and freedoms; proportionate exercise of the authority of the state.<sup>\*17</sup> Heinrich Schneider believes that, for its essence and functions, the CAA is in line with the preamble of the Constitution, as the CAA refers to fundamental principles, whose “real home” is in the preamble of the Constitution.<sup>\*18</sup> Schneider even argues that the CAA itself is among the fundamental principles of the Constitution.<sup>\*19</sup> Although certain fundamental principles of the Constitution, such as liberty, law and justice, internal and external peace and the preservation of the Estonian nation, language, and culture, can be found in the preamble of the Constitution, it is not advisable to place the entire CAA in the preamble of the Constitution, but rather a reference to the CAA in the preamble or general provisions of the Constitution should be considered. This would be important for a better understanding of the nature of the CAA and its linking to the Constitution.

## 1.3. Constitution Amendment Act as a “Third Act”

After amendments, the Estonian Constitution consists of three documents: The Constitution, the Constitution Implementation Act<sup>\*20</sup> and the Constitution Amendment Act, which is why the latter has been called a “Third Constitutional Act”. From the formal legal point of view, the Third Act as a constitutional document and not merely a constitutional law should be equal to the Constitution in its legal power and position. However, the CAA seems to be superior to the Constitution when it comes to EU related areas in the same way as EU law is superior to Estonian law. The exercise of superiority requires a conflict situation (conflict of laws) in both

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Constitution in Lithuania and its Impact on the National Constitutional System. – A. Albi, J. Ziller. The European Constitution and National Constitutions: Ratification and Beyond. Kluwer International Law 2007, pp. 17–24.

<sup>15</sup> See A. Albi. Põhiseaduse muutmise Euroopa Liitu astumiseks (Amendment of the Constitution for Accession to the European Union). – Juridica 2001/9, pp. 606–608 (in Estonian). See also J. Laffranque. Euroopa Liidu õigussüsteem ja Eesti õiguse koht selles (Legal System of the European Union and the Role of Estonian Law in It). Tallinn: Juura 2006, Annex I, pp. 487–524 (in Estonian).

<sup>16</sup> See J. Laffranque. Eesti põhiseaduse ja Euroopa õiguse koostelu (Coexistence of the Estonian Constitution and EC law). – Juridica 2003/3, pp. 182–183 (in Estonian).

<sup>17</sup> The positions of the constitutional law analysis working group for the Treaty establishing a Constitution for Europe on the issue of ratification of the Treaty, pp. 5 and 6. Available at [http://www.riigikogu.ee/public/Riigikogu/eps1\\_20051211\\_ee.pdf](http://www.riigikogu.ee/public/Riigikogu/eps1_20051211_ee.pdf) (6.05.2007).

<sup>18</sup> See H. Schneider. Põhiseaduse aluspõhimõtete seonduvaid probleeme ja võimalikke lahendusi. – Riigikohus. Lahendid ja kommentaarid 2005 (Issues and Possible Solutions relating to the Fundamental Principles of the Constitution. – Supreme Court. Decisions and Commentaries 2005). Tallinn: Juura 2005, p. 1326.

<sup>19</sup> *Ibid.*, p. 1332.

<sup>20</sup> Põhiseaduse rakendamise seadus. – RT I 2007, 43, 312 (in Estonian).

cases. The superiority of application can be avoided if we try to interpret the Constitution on the basis of the CAA in as much conformity with EU law as possible. Handling either of these constructions — superiority of application and the conforming interpretation of the CAA (i.e., naturally in conformity with European law) — and distinguishing between them is an extremely subtle exercise.

Based on the above it may be concluded that the pragmatic and unique CAA is a Third Constitutional Act and is certainly closely related to the preamble of the Constitution. Certainly the CAA itself does not merely imply permission for Estonia's accession to the EU. As important as allowing Estonia to lawfully accede to the EU, is that the Constitution be applied, in the context of EU membership, based on the CAA and thereby on European law.<sup>\*21</sup> This sounds simple and logical; at first glance it seems that the alleged difficulties in understanding the CAA are artificial problems. The CAA renders the Constitution much more flexible and adaptable. However, the shortness of the CAA opens the road for imagination. Innovation that strikes with simplicity, on the one hand, and is very open to interpretation, on the other, can cause various myths and criticism. This is the case with the CAA.

## 1.4. Problems with understanding the Constitution Amendment Act

Unfortunately, the essence of the CAA was unclear to many people for a long time. Misunderstandings were based on the fact that there are two different constitutional texts in Estonia: the Constitution and its Amendment Act, and that the two are not particularly related. Some authors believe that failure to amend the “principal” text has clouded the substance and meaning of the Constitution's provisions and resulted in a conflict with the principle of legal certainty.<sup>\*22</sup> Such misunderstanding was demonstrated in its most drastic form when questions arose regarding whether the introduction of the euro is in line with our Constitution or not (see below for more details). The difficulties in understanding the CAA and its essence also sprang from the insufficient answers to the questions of by whom, when, and how the CAA should be interpreted and explained. This task would probably be best suited to the constitutional institutions: the Riigikogu, Chancellor of Justice, and Supreme Court.

Rushing ahead, it should be stated that by now the Supreme Court has provided an explanatory interpretation of the CAA, which helps to better understand the essence of the CAA and precludes conflict with the principle of legal clarity. However, this does not mean that further discussion on corrections and amendments to the Constitution is not necessary.

The extremely rapid reforms in Estonian legal policy and legislative drafting, as well as the EU's own developments, have triggered many proposals concerning how to make more thorough amendments to the Constitution or even formulate an entirely new Constitution.<sup>\*23</sup>

## 2. Constitution Amendment Act before the Supreme Court's opinion of 11 May 2006

In general, two periods may be distinguished in the issue of application of the CAA and, in connection with this, the Constitution, based on Supreme Court case-law: the CAA issues before and after the opinion of the Constitutional Review Chamber of the Supreme Court (CRCSC) of 11 May 2006. As the most significant disputes concerning EU law, the first period covers the decision of the Supreme Court *en banc* (SCeb) of 19 April 2005, in matter 3-4-1-1-05, as well as some decisions of the Administrative Law Chamber of the Supreme Court (ALCSC) which have relevance to the application of the CAA. The opinion of the group of experts set up at the Constitutional Committee of the Riigikogu originates from outside case-law.

<sup>21</sup> See also J. Laffranque. Millist Põhiseadust vajab Eesti Euroopa kontekstis (What kind of a Constitution Estonia Needs in the European Context). – Sirp, 20 May 2005 (in Estonian).

<sup>22</sup> A. Tupits. Ühisraha euro kasutuselevõtu riigiõiguslikud aspektid (National Legal Aspects in Introducing the Common Currency, the Euro). – Juridica 2005/7, p. 459 (in Estonian).

<sup>23</sup> See U. Lõhmus. Mida teha põhiseadusega (What Should Be Done With the Constitution)? – Juridica 2005/2, p. 83 (in Estonian); R. Maruste. Käes on aeg uue põhiseaduse teksti koostamiseks (It's Time to Draft a New Constitution). – Postimees, 23 April 2005 (in Estonian); A. Jõks. Rahvahääletust ei ole vaja karta (The Referendum Need Not Be Feared). – Postimees, 28 April 2005 (in Estonian); U. Reinsalu. Kas vajame uut põhiseadust (Do We Need a New Constitution)? – Juridica 2005/3, p. 147 (in Estonian); A new Constitution was also discussed at the XXVIII Estonian Jurists' Days in Tartu on 21–22 October 2004.

## 2.1. Decision of the Supreme Court *en banc* in the so-called election coalitions II case

In the so-called election coalitions II case<sup>\*24</sup>, the Chancellor of Justice<sup>\*25</sup> raised the issue of the conformity of Estonian law with EU law in the course of an abstract review of provisions. Subsection 5 (1) of the Political Parties Act (PPA) allowed only Estonian citizens to belong to a political party and, according to the opinion of the Chancellor of Justice, restricted the rights of citizens of other EU Member States to set up their candidacies for municipal elections.<sup>\*26</sup> The Chancellor of Justice found this to be contrary to EU law and, via the CAA, with the Constitution. The SCeb decision of 19 April 2005 did not answer this question and did not analyse the CAA. A majority of the court took the view that neither the Chancellor of Justice Act nor the Constitutional Review Proceedings Act (CRPA) gives the Chancellor of Justice the authority to ask the Supreme Court to repeal an Act because it is contrary to EU law. There are many ways how to bring domestic law into conformity with EU law; neither the Constitution nor EU law requires a constitutional review process for this purpose.<sup>\*27</sup> The Supreme Court takes the view that it is up to the legislature to decide to allow for a review. Neither did a majority of the SCeb relate the issue of conformity with EU law with the CAA.

It may be asked whether such a position was adopted because of the limited competence of the Supreme Court, or rather the lack of competence of the Chancellor of Justice to initiate a review of the conformity of Estonian law with EU law, or the court's cautiousness in handling the CAA. Delving into EU law could have led to asking for a preliminary ruling from the European Court of Justice and, considering the short time left till the elections of local government councils, been unreasonable in the opinion of a majority.<sup>\*28</sup> The Supreme Court *en banc* did, however, briefly discuss the relations between Estonian law and EU law, noting as follows: "European Union law does indeed have supremacy over Estonian law, but taking into account the case-law of the European Court of Justice, this means supremacy upon application. [...] The national act, which is in conflict with European Union law, should be set aside in a specific dispute. [...] This does not mean that such an abstract review procedure over national law should exist on the national level."<sup>\*29</sup> The Supreme Court *en banc* did not say whether EU law can have supremacy over the Estonian Constitution.

In the dissenting opinion attached to the decision it was found that the Chancellor of Justice essentially also contested the conformity of the PPA to the Constitution, the substance of which had been renewed by the CAA, and the Supreme Court *en banc* should have answered this question in the framework of constitutional review, using the help of EU law for interpretation purposes and even asking the European Court of Justice for a preliminary ruling, if necessary.<sup>\*30</sup>

## 2.2. Application of the Constitution Amendment Act in decisions of the Administrative Law Chamber of the Supreme Court

The SCeb decision of 19 April 2005 was followed by ALCSC decisions in which the judicial panel was not able to ignore the CAA in specific issues.

In its ruling of 25 April 2006, in matter 3-4-1-74-05, the ALCSC mentioned that the CAA, which was adopted with the referendum of 14 September 2003, to amend the Estonian Constitution, defines the relations between Estonian law and EU law: the condition of Estonia's EU membership — adherence to the fundamental principles of the Constitution — on the one hand, and the supremacy and in certain cases direct applicability of EU law, on the other. According to CAA § 2, as of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies, taking account of the rights and obligations arising from the Accession Treaty. With the Accession Treaty, Estonia adopted the *acquis communautaire* under the conditions provided

<sup>24</sup> SCebd 19.04.2005, 3-4-1-1-05. – RT III 2005, 13, 128 (in Estonian). The English text of the decision is available at <http://www.nc.ee/?id=391>.

<sup>25</sup> The Chancellor of Justice is, in his or her activities, an independent official who reviews the legislation of the legislative and executive powers and of local governments for conformity with the Constitution and the laws and who also acts in the capacity of an ombudsman.

<sup>26</sup> The Political Parties Act has been amended by now and it does allow citizens of other EU Member States to belong to Estonian parties. See Erakonnaseaduse § 5 muutmise seadus. – RT I 2006, 52, 384 (in Estonian).

<sup>27</sup> See SCebd 3-4-1-1-05 (Note 24), p. 49.

<sup>28</sup> See critically C. Ginter. Constitutional Review and EC Law in Estonia. – European Law Review (E.L.Rev.) 2006 (31) 6, pp. 912–923.

<sup>29</sup> See SCebd 3-4-1-1-05 (Note 24), p. 49.

<sup>30</sup> See the dissenting opinion of Justice Julia Laffranque (the author of this paper acting in her judicial capacity) to SCebd of 19 April 2005 in matter 4-3-1-1-05, joined by justices Tõnu Anton, Peeter Jerofejev, Hannes Kiris, Indrek Koolmeister and Harri Salmann, in English available at <http://www.nc.ee/?id=391>. Concerning the dissenting opinion see also C. Ginter (Note 28), p. 912; U. Lõhmus. Euroopa Liidu õigussüsteem ja põhiseaduslikkuse kontroll pärast 1. maid 2004 (European Union Legal System and Constitutional Supervision After 1 May 2004). – Juridica 2006/1, pp. 4 and 5.

in the Accession Treaty. For these reasons, there can be no conflict between Estonia's amended Constitution and primary EU law (the EU Treaty and EC Treaty). The Estonian court cannot doubt in the validity of the treaties on which the EU is based nor the rest of primary EU law.<sup>\*31</sup>

In its decision of 10 May 2006, in matter 3-3-1-66-05, the ALCSC again settled the matter based on the fact that according to the CAA, as of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies, taking account of the rights and obligations arising from the Accession Treaty, and added that the principle also concerns application of § 113 (taxes) of the Constitution in the context of EU law.<sup>\*32</sup>

### 2.3. Analysis of the group of experts set up by the Constitutional Committee of the Riigikogu

Although in the above case of election coalitions both the Chancellor of Justice, Minister of Justice and the Constitutional Committee of the Riigikogu were ready to apply the Constitution on the basis of the CAA, there was no certainty as to their positions. Achieving such certainty was helped by the opinion of a group of recognised legal experts set up at the Constitutional Committee of the Riigikogu concerning the conformity of the Treaty establishing a Constitution for Europe with the Estonian Constitution, which also analysed the CAA.<sup>\*33</sup> The analysis provided a more thorough overview of the fundamental principles of the Constitution, the supremacy of EU law, etc. Members of the group of experts foresaw certain upcoming problems in connection with Estonia's EU membership in the situation where the CAA has distorted some of the provisions of the Constitution. Owing to the reduced legal clarity, the group of experts took the view that future amendments to the Constitution relating to Estonia's EU membership could ensure a better applicability of the Constitution. The group of experts therefore considered it necessary to analyse any problems that may arise in the future in the application of EU law and the Constitution, and in the interpretation of the text of the Constitution. After that, it should be clarified whether the CAA allows for the application of the Constitution in conjunction with EU law without problems, and whether it is reasonable to continue with the model created with the CAA or whether the text of the Constitution requires amendments arising from EU law, or whether a new Constitution should be drafted.<sup>\*34</sup>

The positions of the group of experts certainly serve as good source material for a better understanding of the relations between the Constitution and EU law, and are valuable commentaries to the CAA.

## 3. Supreme Court's new competence to give opinions

In addition to the aforementioned discussions and the opinion of the group of experts, there is now a legal basis that allows the Supreme Court to analyse, in the course of constitutional review proceedings, the conformity of the Estonian Constitution to EU law, as the constitutional courts of many other Member States do. Namely, the CRPA and the Riigikogu Rules of Procedure Act Amendment Act, which entered into force on 23 December 2005, provides for the preliminary review of Estonian draft laws that are required for meeting the commitments of an EU Member State, in the course of which the Supreme Court has to clarify how to interpret the Constitution in conjunction with EU law, if interpretation of the Constitution is decisive in passing the draft law.<sup>\*35</sup>

It seems, however, that insufficient forethought was given to the extension of the competence of the Supreme Court. It was not preceded by an analysis of, amongst other things, the question of whether and in what form a body that administers justice can simultaneously give opinions. Unfortunately, the decision was, once again, made in a rush. Without supplying the analysis that was lacking upon the adoption of the CRPA and the Riigikogu Rules of Procedure Act Amendment Act, below is an example of the case-law of the European Court of Human Rights. The European Court of Human Rights found in its judgment of 28 September 1995,

<sup>31</sup> ALCSCr 25.04.2006, 3-3-1-74-05, p. 12. Available at [www.riigikohus.ee](http://www.riigikohus.ee) (21.07.2007) (in Estonian). English summary available in the information system Jurifast on the homepage of the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, also on the homepage of the Supreme Court <http://www.riigikohus.ee/?id=719>.

<sup>32</sup> ALCSCd 10.05.2006, 3-3-1-66-05, p. 9. Available at [www.riigikohus.ee](http://www.riigikohus.ee) (21.07.2007) (in Estonian).

<sup>33</sup> The positions of the constitutional law analysis working group, which also included renowned Estonian lawyers, were issued at the end of 2005 and are available at [http://www.riigikogu.ee/public/Riigikogu/epsl\\_20051211\\_ee.pdf](http://www.riigikogu.ee/public/Riigikogu/epsl_20051211_ee.pdf) (7.05.2007) (in Estonian).

<sup>34</sup> See *ibid.*, p. 9.

<sup>35</sup> Põhiseaduslikkuse järelevalve kohtumenetluse seaduse ja Riigikogu kodukorra seaduse muutmise seadus. – RT I 2005, 68, 524 (in Estonian).

in the case *Procola versus Luxembourg*<sup>\*36</sup>, that when analysing whether the body in question complies with the principle of impartiality laid down in article 6 of the European Convention on Human Rights (ECHR), regard should be had to the fact that four of the five members sitting on the Judicial Committee of the Luxembourg *Conseil d'État* reviewing the lawfulness of the regulation had previously analysed the same regulation in their advisory capacity. This situation caused the appellant concern that the judges reviewing the case may feel bound by their earlier opinion. The European Court of Human Rights admitted that the concern was justified. Even if the concern was unjustified, it was enough to question the independence of the aforementioned body. The double function of members of the *Conseil d'État* as providers of opinions and administrators of justice touches on ECHR article 6 (1). Motivated by the judgment of the European Court of Human Rights, a separate higher administrative court was set up in Luxembourg in addition to the *Conseil d'État*, so that the former (*Conseil d'État*) could give opinions on the issue of compliance of draft regulations to the laws, and the latter (highest administrative court) would administer justice.<sup>\*37</sup> However, giving opinions is quite a common practice for international courts, including the European Court of Justice.<sup>\*38</sup>

## 4. Opinion of the Supreme Court of 11 May 2006

On 25 January 2006, soon after the Supreme Court's competence was extended, the Riigikogu adopted, with 72 votes in favour, the decision proposed by the Constitutional Committee and the EU Affairs Committee "Asking the opinion of the Supreme Court in matters of interpretation of § 111 of the Constitution in conjunction with the Constitution of the Republic of Estonia Amendment Act and EU law".<sup>\*39</sup> The Constitutional Review Chamber of the Supreme Court had to answer the Riigikogu's specific question of whether the Bank of Estonia could have the sole right to issue Estonian currency upon the introduction of the euro and how the provision of the Constitution setting out such a right should be interpreted in conjunction with the CAA and EU law. The decision of the Riigikogu seems to be motivated by the wish to receive an answer to an unsolved question, all the more so because the situation was aggravated by the European Commission's doubts about the conflict between § 111 of the Estonian Constitution and article 106 of the EC Treaty<sup>\*40</sup>, and this could have been an obstacle to the introduction of the euro in Estonia.<sup>\*41</sup> The direct link between the extension of the Supreme Court's competence and the Riigikogu's question of 25 January 2006 is evidenced by the quick adoption of the legal amendment barely a month before the first question, and the fact that it has so far remained the only request for the Supreme Court's opinion.

In order to answer the Riigikogu's question about the interpretation of § 111 of the Constitution in conjunction with the CAA and EU law, the Supreme Court had to first check if the Riigikogu's request conformed to requirements, and in which cases the Riigikogu can actually ask for the Supreme Court's opinion. In its response, the CRCSC gave further reaching guidance as to the situations in and conditions under which an opinion is justified. The CRCSC noted that in order for the interpretation of the Constitution in conjunction with EU law to be crucial for the adoption of a draft, the draft or its provision must be directly related to the provision or principle cited by the Riigikogu. The interpretation of such provision or principle must not be so blatantly obvious. An opinion is justified only if the meaning of a provision or principle of the Constitution, when interpreted in conjunction with the CAA and EU law, is unclear or arguable and makes the legislative proceeding in the Riigikogu difficult.<sup>\*42</sup> This helps avoid the Riigikogu's abuse of the right to ask for the Supreme Court's opinion.

<sup>\*36</sup> See European Court of Human Rights, *Procola v. Luxembourg*, judgment of 28 September 1995, No. 14570/89. Available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=1471248&skin=hudoc-en> (21.07.2007).

<sup>\*37</sup> For more details on this see also J. Laffranque, *Euroopa põhiseaduse lepingu peied Tallinnas (A Wake For the Treaty Establishing a Constitution For Europe In Tallinn. What Next?)* – *Juridica* 2006/1, pp. 21–23 (in Estonian).

<sup>\*38</sup> For example, article 300 (6) of the EC Treaty provides that the European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of the EU Treaties. Although the opinion of the Court of Justice is not in itself binding, if the opinion of the Court of Justice is adverse, the agreement may enter into force only after the EU Treaties have been amended.

<sup>\*39</sup> Riigikohtu seisukoha taotlemine Eesti Vabariigi põhiseaduse § 111 koostoimes Eesti Vabariigi põhiseaduse täiendamise seaduse ja Euroopa Liidu õigusega tõlgendamise asjus. – *RT I* 2006, 6, 33 (in Estonian).

<sup>\*40</sup> The opinion of the Commission of the European Communities was in 2005 available at [http://europa.eu.int/comm/economy\\_finance/publications/european\\_economy/convergencereports2004\\_en.htm](http://europa.eu.int/comm/economy_finance/publications/european_economy/convergencereports2004_en.htm) According to the Commission, § 111 of the Constitution is in conflict with EU law; the opinion does not mention the CAA. The European Central Bank (ECB), however, refers in its assessment to both the Constitution and the Third Act, but urges that § 111 should be amended with regard to legal certainty. The ECB's position is available at <http://www.ecb.int/pub/pdf/conrep/cr2004en.pdf> (21.07.2007).

<sup>\*41</sup> See also J. Laffranque, *Põhiseadus Euroopa Liidus ja meil (The Constitution in the European Union and Estonia)*. – *Eesti Majanduse Teataja* 2005/9, pp. 5–7 (in Estonian).

<sup>\*42</sup> See opinion of the CRCSC of 11.05.2006, 3-4-1-3-06 (request for the Supreme Court's opinion on interpreting § 111 of the Constitution of the Republic of Estonia in conjunction with the Constitution of the Republic of Estonia Amendment Act and EU law), p. 9. – *RT III* 2006, 19, 176 (in Estonian); the opinion is available in English at: <http://www.nc.ee/?id=377> (21.07.2007).

The Supreme Court's opinion, or the reasoning for the competence to give an opinion, does not clearly answer the question whether the Supreme Court may take a view on amendments to the EU Treaties in the future, should this become necessary. The Constitution and the CAA are not only legal, but also political, historical and cultural documents, which is why it cannot be precluded that as the EU develops, a question may arise about the possible conflict of EU law with the fundamental principles of the Estonian Constitution. To identify the latter, a control mechanism is needed, which an opinion of the Supreme Court might not ensure in full. For example, in France<sup>\*43</sup> and Spain<sup>\*44</sup>, the constitutional courts conducted a preliminary review in the form of an analysis of the conformity of the constitutions of their respective countries to the Treaty establishing a Constitution for Europe. The Supreme Court's opinion should have also been asked in Estonia; an opinion by the *ad hoc* group of experts in the Constitutional Committee of the Riigikogu cannot replace the position of a "constitutional court". However, the Riigikogu ratified the Treaty establishing a Constitution for Europe on 9 May 2006, without seeking the Supreme Court's opinion.

In response to the specific question about the euro, the CRCSC stated in its opinion of 11 May 2006, that under the conditions of full membership of the economic and monetary union the Bank of Estonia shall neither have the sole right to issue Estonian currency nor the right to issue the Estonian kroon.

#### 4.1. "Suspension" of the effect of the provisions of the Constitution which are contrary to EU law

Constitutional review institutions are seen as guardians of the state's sovereignty and protectors and developers of constitutional values. This role has become topical especially in the framework of EU integration. Although the European Court of Justice already expressed, quite clearly, its position on the supremacy of European law over national constitutions in the 1970s<sup>\*45</sup>, the constitutional courts and higher courts of the EU Member States have been rather modest in this issue. Even where they have principally accepted the supremacy of European law, they have not expressed this with regard to their national constitutions.<sup>\*46</sup> The courts of a majority of the Member States which acceded to the EU on 1 May 2004, have followed a similar approach to avoid conflicts. For example, instead of issues about the relations between domestic and EU law, they have analysed the compliance of domestic law with the Constitution (the Hungarian Constitutional Court).<sup>\*47</sup> Or, in order to avoid the supremacy of EU law over the constitution, they have proposed constitutional amendments (see, e.g., the Polish Constitutional Court and the Supreme Court of Cyprus in the matter of the European arrest warrant).<sup>\*48</sup> Nevertheless, the judgments of the competent courts of the new Member States are quite EU-friendly, in general.<sup>\*49</sup>

It should be noted that, for example, Lithuania has preferred to amend its Constitution to ensure clarity and avoid conflicts. In a similar issue to the one analysed in the Estonian Supreme Court's opinion of 11 May 2006, concerning the wish to become a full member of the monetary union and introduce the euro, Lithuania amended article 125 of its Constitution in April 2006, by deleting the sentence according to which the Bank of Lithuania had the sole right to issue Lithuanian currency and supplementing the paragraph about the legal

<sup>43</sup> Decision of the French Constitutional Council (*Conseil Constitutionnel*) of 19 November 2004, matter No. 2004-505. – DC, JO 24.11.2004, p. 19885. Available at <http://www.conseil-constitutionnel.fr/> (21.07.2007). In Estonian law literature see also R. Laffranque. *Küsimus Euroopa põhiseaduse lepingu kooskõlast Prantsuse põhiseadusega. Conseil constitutionnel'i 19. novembri 2004. a otsus* (The Issue of the Conformity of the Treaty Establishing a Constitution for Europe with the French Constitution. Decision by the *Conseil constitutionnel* on 19 November 2004). – *Juridica* 2005/1, pp. 13–27 (in Estonian).

<sup>44</sup> Declaration of the Spanish Constitutional Court of 13 December 2004 DTC 1/2004. Available at <http://www.tribunalconstitucional.es/Stc2004/DTC2004-001.htm> (26.09.2005).

<sup>45</sup> Judgment of the European Court of Justice of 17 December 1970, case 11/70 (Internationale Handelsgesellschaft). – Rec. 1970, p. 1125.

<sup>46</sup> About the details of case-law of EU Member States see J. Laffranque (Note 16), pp. 487–524.

<sup>47</sup> For example, as regards the issues of excess stocks the Hungarian Constitutional Court in its decision of 25 May 2004 No. 17/2004 found, unlike the Estonian CRCSC, that the issue lied neither about the conflict between relevant EU law and domestic law nor in the validity or interpretation of EU law, but the compliance of the domestic legislation that was adopted for the implementation of EU regulations to the national constitution (published in Vol 70 of the official publication *Magyar Közlöny* for 2004 and in the official publication of the Constitutional Court *AB Közlöny*: XIII year of issue, Vol 5).

<sup>48</sup> The Polish Constitutional Court found in its judgment of 27 April 2005 in the matter P1/05 that the European arrest warrant was contrary to the Polish Constitution and considered it necessary to apply a transitional period in Poland with respect to the arrest warrant so as to bring the Polish Constitution into conformity with EU law (the English summary of the judgment is available at the website of the Polish Constitutional Court at: [www.tribunal.gov.pl/eng/summaries/documents/P\\_1\\_05\\_GB.pdf](http://www.tribunal.gov.pl/eng/summaries/documents/P_1_05_GB.pdf)). The Polish Constitution was amended in the autumn of 2006.

The Supreme Court of Cyprus found in its judgment of 7 November 2005 No. 294/2005 that the domestic law ratifying the European arrest warrant was contrary to the Constitution (the Greek text with an English summary are available as the Council of the European Union document No. 14281/05 of 11 November 2005). Cyprus has also made relevant amendments to its Constitution.

<sup>49</sup> See, e.g., A. Lazowski. Conformity of the Accession Treaty with the Polish Constitution. Decision of 11 May 2005. – *European Constitutional Law Review* 2007/3, pp. 148–162, especially p. 150.

bases of the Bank of Lithuania.<sup>\*50</sup> Estonia chose a different path, as the potential conflict in a Supreme Court opinion was overcome with the CAA, and the Constitution was not amended.

Against the background of the above modestness in supremacy questions of constitutional/supreme courts of most Member States, it is remarkable that in its opinion of 11 May 2006, the Estonian CRCSC expressly admitted the supremacy of EU law over the Estonian Constitution. There are no counterparts to this bold expression of EU-fondness in other EU Member States. The behaviour of the CRCSC as the highest court of the Member State and, traditionally, the last resort of sovereignty, demonstrates the unprecedented submissiveness to the EU. For the sake of clarity it should be noted that the supremacy of EU law, as stated by the Supreme Court's opinion of 11 May 2006, is currently laid down only in the Treaty establishing a Constitution for Europe article I-6, which has not entered into force and most likely will not, as the so called Reform Treaty of the EU does not envisage similar statement about the primacy of EU law referring only in a declaration to the relevant case law of the European Court of Justice. As we know, the European Court of Justice has so far admitted the supremacy of EU law of the first pillar (the European Communities) and not EU law as a whole; it is, however, moving toward extending the supremacy to legal acts of the third pillar.<sup>\*51</sup> The Estonian Supreme Court's opinion is also remarkable for the fact that it has not attempted to overcome the conflicts by way of interpretation, not even by application of the Constitution via the CAA (as would have been suggested by the explanatory memorandum to the draft CAA<sup>\*52</sup>, the articles in legal journals which were published at the time of drafting it, the positions of the Chancellor of Justice, Minister of Justice, and the Riigikogu), but instead it "deactivated" the provisions of the Constitution that were contrary to the CAA and EU law. The Supreme Court's opinion does not specify how to ascertain in each separate instance which provisions of the Constitution are "dormant" and are not applicable, or if "sleeping beauty" should wake up (for example, if Estonia withdraws from the EU). The opinion of the CRCSC of 11 May 2006, states as follows: "Thus, the Constitution of the Republic of Estonia must be read together with the Constitution of the Republic of Estonia Amendment Act, applying only the part of the Constitution that is not amended by the CAA. [...] As such, only that part of the Constitution is applicable, which is in conformity with European Union law or which regulates the relationships that are not regulated by European Union law. The effect of those provisions of the Constitution that are not compatible with European Union law and thus inapplicable is suspended. This means that within the spheres, which are within the exclusive competence of the European Union or where there is a shared competence with the European Union, European Union law shall apply in the case of a conflict between Estonian legislation, including the Constitution, with European Union law."<sup>\*53</sup>

## 4.2. Failure to handle the protective clause and fundamental principles of the Constitution Amendment Act

Justices Eerik Kergandberg and Villu Kõve, who presented their dissenting opinions to the CSCRC opinion of 11 May 2006, believed that the CSC did not speak the whole truth, i.e., it spoke about the supremacy of EU law over the Estonian Constitution, but did not specify the limits of the supremacy and failed to interpret and open up the fundamental principles of the Constitution which are stated in the protective clause of the CAA.<sup>\*54</sup> Villu Kõve is of the opinion that the principle of supremacy of EU law over the Estonian legal order has been "overestimated".<sup>\*55</sup> It is difficult not to agree with the opinion of Justice Kõve when we consider the analysis above. However, it should be admitted that non-recognition of the supremacy of EU law over the Constitution is becoming a façade, while the influence of EU law is constantly growing (including via the case-law of the European Court of Justice). This does not preclude, but instead deepens the need for clarifying the conditions and limits of supremacy.

Villu Kõve fails to understand the significance and legal effect of the Supreme Court's opinion.<sup>\*56</sup> The explanatory memorandum to the draft law that expands the competence of the Supreme Court to give opinions states that it is not formally mandatory to the parliament to be guided by the Supreme Court's opinion and that giving

<sup>50</sup> See Valstybes žinos (Lithuanian State Gazette) 2006, No. 48-1701, published on 29 April 2006.

<sup>51</sup> See the judgment of the European Court of Justice of 16 June 2005, C-105/03 (Pupino), (not yet published in the ECR).

<sup>52</sup> The Constitution of the Republic of the Estonia Amendment Act. Explanatory Memorandum (1067 SE, 9th composition of the Riigikogu). Available at <http://web.riigikogu.ee/ems/saros-n/mgetdoc?itemid=021360008&login=proov&password=&system=ems&server=ragne11> (7.05.2007) (in Estonian).

<sup>53</sup> See the second paragraph of section 14 and sections 15–16 of the opinion.

<sup>54</sup> See the dissenting opinion of Eerik Kergandberg and the dissenting opinion of Villu Kõve to the Opinion of the Constitutional Review Chamber of the Supreme Court of 11 May 2006 in matter 3-4-1-3-06. – RT III 2006, 19, 176 (in Estonian). The English text of the dissenting opinions is available at <http://www.nc.ee/?id=663> (21.07.2007).

<sup>55</sup> The dissenting opinion of Villu Kõve (Note 54), p. 3.

<sup>56</sup> *Ibid.*, p. 1.

an opinion does not preclude constitutional review according to the general procedure, i.e., does not limit the competence of the President of the Republic or the Chancellor of Justice.<sup>\*57</sup>

### 4.3. Summarising remarks on the Supreme Court's opinion of 11 May 2006

To sum up the opinion of the Constitutional Review Chamber of the Supreme Court, it may be said that it was more than an answer to the specific question about the sole right to issue the euro. The opinion gave guidance as to when it is possible and necessary to ask for the Supreme Court's opinion, and it was also a 180 degree turn in the formerly modest position of the Supreme Court in issues regarding the relations between Estonian and EU law. Such a position, however, not binding legally, may lead to exaggerated consideration for the principle of supremacy of EU law in Estonian legislative drafting and case-law, since the opinion of the CRCSC did not define the limits of supremacy. However, the Supreme Court will certainly have more opportunities to express its position on EU law in its constitutional review proceedings in the future (including *en banc*).

## 5. Conclusions

Many conclusions may be drawn from the foregoing analysis of the impact of the CAA on the Estonian legal landscape. Firstly, it is salutary that Estonia acceded to the EU, having respect for the principles of the rule of law and democracy and approved the CAA at a referendum, which makes it possible to take into account important principles of EU law. Another positive aspect is that the CAA has found practical application and the Supreme Court has adopted a position, despite its initial cautiousness about the CAA. This practice of application and interpretation will surely be enriched with the opinions of *ad hoc* groups of experts of various constitutional institutions, including the Constitutional Committee of the Riigikogu, commentaries by jurists and dissenting opinions of justices. The group of experts should continue to meet in the future and the opinion of the Supreme Court should be sought in principal issues about the limits of supremacy of EU law over the Estonian Constitution.

Questions have arisen due to the wide degree of interpretation of the CAA, which may also lead to different interpretation of those aspects of the Constitution which do not concern the application of EU law (although the limits of domestic and EU law have become increasingly fuzzy in any case). It is interesting that the problems seem to be optional. For example, unlike many other EU Member States, there has been no dispute in Estonia concerning the compliance of the European arrest warrant with the Constitution.<sup>\*58</sup> Subsection 36 (2) of the Constitution stipulates that an Estonian citizen can be extradited to a foreign state only under the conditions prescribed by an international treaty and pursuant to procedure provided by such treaty. An EU framework agreement, however, cannot be regarded as an international treaty. In this case, the potential conflict was overcome without dispute and with the help of the CAA.<sup>\*59</sup> However, in its question about § 111 of the Constitution, the Riigikogu asked for the opinion of the Supreme Court, which also overcame the problem by interpreting the CAA. Where conflicts of law arise, they need to be solved and this requires mechanisms for their resolution.

The efficiency of constitutional review has already been improved with respect to certain issues. For example, the amendment to the State Liability Act<sup>\*60</sup> supplemented judicial constitutional review with the possibility to decide on the inactivity (failure to issue legislation of general application) of the legislature (see, e.g., CRPA § 2 (1) 1); § 9 (1); § 15 (1) 2')). This amendment was motivated by the concept that a Member State is liable for failure to transpose EU law correctly and in due course.<sup>\*61</sup> The competence of the Supreme Court

<sup>57</sup> 762 SE Põhiseaduslikkuse järelevalve kohtumenetluse seaduse ja Riigikogu kodukorra seaduse muutmise seadus. Seletuskiri (Constitutional Review Proceedings Act and Riigikogu Rules of Procedure Act Amendment Act. Explanatory Memorandum). Available at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=053000011&login=proov&password=&system=ems&server=ragne11> (11.01.2006) (in Estonian).

<sup>58</sup> For example Poland, Germany, Cyprus, where the issue was the subject of constitutional court/highest court judgments, and France, where the Constitution was amended. About the legitimacy of the European arrest warrant in EU law see the judgment of the European Court of Justice of 3 May 2007, C-303-05 (Advocaten voor de Wereld VZW / Leden van de Ministerraad). – OJ C 140, 23.06.2007, p. 3.

<sup>59</sup> See also V.-M. Rummo. Euroopa vahistamismäärus. Isikute loovutamise uus kord Euroopa Liidus (European Arrest Warrant. A New Procedure in the European Union for the Surrender of Persons). – Juridica 2004/8, especially p. 571 (in Estonian).

<sup>60</sup> Riigivastutuse seaduse ja põhiseaduslikkuse järelevalve kohtumenetluse seaduse muutmise seadus (State Liability Act and Constitutional Review Proceedings Act Amendment Act). Passed on 28 June 2004, entered into force on 25 July 2004. – RT I 2004, 56, 405 (in Estonian).

<sup>61</sup> See the explanatory memorandum to the draft State Liability Act and Constitutional Review Proceedings Act Amendment Act 357 SE. Available at <http://web.riigikogu.ee/ems/saros-in/mgetdoc?itemid=041130026&login=proov&password=&system=ems&server=ragne11> (10.05.2007) (in Estonian).

was also expanded by the function of giving opinions. Still, there are unsolved issues; the following three problems, above all, require answers: (1) the possibility and limits of review of compliance with EU law of Estonian legislative provisions within constitutional review proceedings (motivated by the so-called election coalitions II case — SCEbd of 19 April 2005, in matter 3-4-1-1-05, and the appended dissenting opinion); (2) problems arising from Estonian law that has not been applied, is contrary to EU law and remains in force (the lack of a repeal mechanism) (motivated by the so-called excess stocks charge case — ALCSCd of 5 October 2006, in matter 3-3-1-33-06, in which the legislature considered the position of the ALCSC and amended the Estonian law that was contrary to EU law<sup>62</sup>); (3) the possibility and limits of review of compliance of EU law with Estonian law: whether, by whom, how, and when a review can take place of the compliance of primary EU law and especially its (potential) amendments to the fundamental principles of the Estonian Constitution (motivated by opinion 3-4-1-3-06 of the CRCSC of 11 May 2006, and the appended dissenting opinions).

The first question is: where to draw the line between conflicts with the amended Constitution and EU law; when do they overlap and do they always overlap? For example, on 16 June 2006, the Hungarian Constitutional Court dismissed a request to declare domestic legislation to be in contravention of the Constitution (the legislation was also in contravention of EU law), in which the appellant claimed that the Hungarian legislature has been inactive and failed to remove provisions which were contrary to EU law.<sup>63</sup> According to the established practice of the German Constitutional Court, the “EU article” of the German Constitution allows only for the supremacy of European law over domestic law (delegation provision), but does not specify the substance of the supremacy, and the court does not admit (individual) constitutional claims relying on German law being contrary to EU law.<sup>64</sup>

It may also be said for Estonia that equalising a conflict with EU law with a conflict with the Constitution is not the best solution. It may be necessary only in very principal issues (such as the protection of fundamental rights and freedoms insofar as EU law covers this). However, the possibility to rely on a conflict with EU law in any proceedings, if this is relevant and necessary in order to ensure equal protection of the rights of persons in situations of contesting domestic law and EU law, should not be precluded. Otherwise, Estonia would not be complying with its loyalty and co-operation commitment to the EU under article 10 of the EC Treaty. Contesting a conflict with EU law would prevent Estonia from facing legal action in the European Court of Justice for not meeting its membership obligations. Another issue that needs to be solved in this context is the question of whether the Chancellor of Justice should be given the competence to contest Estonian legislation which is contrary to EU law.

A further important problem is that the supremacy of application of EU law may leave the fate of Estonian law, which has not been applied due to a conflict, unresolved, and this in turn may lead to problems of legal clarity and legal certainty. Which law is to be applied when Estonian law, which has already not been applied by, e.g., a court, continues to be formally in force? Specific cases may, of course, be solved based on the supremacy of application. Administrative acts (decisions) relying on domestic law that is contrary to EU law can be revoked by an administrative court.<sup>65</sup> As a minimum, the court should be allowed to declare Estonian law to be contrary to EU law in the decision in the framework of a specific review of provisions. However, it is currently impossible to request a court to repeal a law or regulation that is contrary to EU law. The only hope is that the legislature will make the necessary amendments based on the court’s decision. Unfortunately, experience shows that one cannot always rely on this.<sup>66</sup> Neither is it clear whether a complaint about the legislature’s inactivity is a feasible and efficient legal remedy in such cases. Although the case-law of the European Court of Justice is limited to the supremacy of EU law on application and does not consider a separate mechanism repealing a domestic law contrary to European law necessary<sup>67</sup>, and most Member States have taken the same path, the lack of a requirement in Estonian law under which a request could be submitted for

<sup>62</sup> Nevertheless it is still not certain whether the legislator in making the amendments gave sufficient consideration to EU law, therefore debates on surplus stock have made a reappearance in administrative courts, including the Administrative Law Chamber of the Supreme Court.

<sup>63</sup> Decision of the Hungarian Constitutional Court of 16 June 2006 in matter 1053/E/2005.

<sup>64</sup> For more details of case-law see T. Dünchheim. *Die Einwirkungen des Europarechts auf die verwaltungsprozessuale Normabwehr und Normergänzungsklage. Die Öffentliche Verwaltung*. Bd. 57. 2004, p. 138 ff.

<sup>65</sup> An example is ALCSCd of 5 October 2006 in matter 3-3-1-33-06, in which the Chamber found that the requirement to apply a coefficient of 1.2 when determining excessive stocks as provided in § 6 (1) of the Excessive Stocks Charge Act cannot be interpreted in line with EU law and did not apply the aforementioned provision of Estonian law due to its conflict with EU law; the court revoked the administrative legislation that had relied on that provision. See especially pp. 31–33 of the decision. – RT III 2006, 35, 301 (in Estonian).

<sup>66</sup> See, e.g., SCEbd of 12 April 2006 in matter 3-3-1-63-05, in which § 7 (3) of the Principles of Ownership Reform Act had to be repealed since the legislature had not done anything to bring the situation into compliance with the Constitution despite SCEbd of 28 October 2002 in matter 3-4-1-5-02, which declare the aforementioned provision to be contrary to the Constitution. – RT III 2006, 13, 123 (in Estonian). In English available at <http://www.nc.ee/?id=678>. About the same issue see the presentation of Märt Rask, Chief Justice of the Supreme Court, at the 2006 Spring Session of the Riigikogu: Ülevaade kohtukorralduse, õigusemõistmise ja seaduste ühetaolise kohaldamise kohta (Overview of Courts Administration, Administration of Justice, and the Uniform Application of Laws), pp. 18–21. Available at <http://www.nc.ee/?id=667> (10.05.2007) (in Estonian).

<sup>67</sup> See judgment of the European Court of Justice of 22 October 1998 in joined cases C-10/97 to C-22/97 (*Ministero delle Finanze v. IN.CO.GE.* 90). – ECR 1998 p. I-6307; judgment of 13 March 2007, case C-432 (*Unibet*) (not yet published in the ECR).

repealing a domestic legal provision which is contrary to EU law, in the same way as constitutional review proceedings can be initiated, may result in a weaker protection of persons' rights under EU law compared to the protection that people have of their rights under domestic law.<sup>\*68</sup>

The previous two questions concerned situations where Estonian law was allegedly contrary to EU law and hence, more or less, directly also to the Constitution. At the same time, our CAA contains a protective clause referring to the fundamental principles of the Constitution and the fact that a situation may arise where EU law is contrary to our legal principles. There is another supposable situation in which there is no conflict with EU law, but there is still a conflict with the Constitution since it may protect certain values more strongly than EU law does.<sup>\*69</sup> For example, regarding the question of whether in the case of a domestic provision which was in line with EU law, it was still possible, as a next step, for an administrative court to institute constitutional review in order to check the compliance of the same provision with the Constitution, the French *Conseil d'État* replied that insofar as the contested government regulation is based on a legitimate EU directive, the French regulation cannot be repealed, since this would essentially invalidate the EU directive, which is not in the competence of a court of a Member State (including the constitutional court).<sup>\*70</sup> As such a situation has not yet arisen in Estonian case-law, it is unclear, regardless of a few theoretical discussions, whether the Supreme Court can also exercise its constitutional review competence with respect to integration law.<sup>\*71</sup>

There is nothing bad or illogical if judicial review needs to be revised based on case-law arising from the CAA. Perhaps a new Constitution will be drafted in the future, but this should not be done before the procedural aspects discussed above have been solved and the possibilities of implementation of the CAA have been exhausted. All the more so because the Treaty establishing a Constitution for Europe in its original form will probably not enter into force<sup>\*72</sup> and calls for a new Estonian Constitution have also subsided in connection with this. In his speech to the Supreme Court, the Chief Justice of the Supreme Court commented on the opinion of the CRCSC of 11 May 2006, as follows: "[...] The Supreme Court did not say that Estonia needs a new Constitution, but drew attention to how complicated and multi-layered our constitutional law system has become. It is apparently a matter of perception when the text of our Constitution loses its simple regulative effect and becomes a record of legal history".<sup>\*73</sup> Writing a new Constitution may be necessary, first and almost only when the underlying values of the state have changed so much that the existing order of values no longer corresponds to reality.

<sup>68</sup> Uno Lõhmus believes that there is no situation less favourable and that a separate repeal procedure is not necessary. See U. Lõhmus. *Kuidas liikmesriigi kohtusüsteem tagab Euroopa Liidu õiguse tõhusa toime* (How Do the Court Systems of Member States Ensure the Efficient Functioning of European Union Law)? – *Juridica* 2007/3, p. 153 (in Estonian). The German jurists Eckhard Pache and Frank Burmeister have a different opinion — they believe that the principles of efficiency of equal treatment mean that a review of provisions should be initiated also where German law is contrary to EU law, and that disputes concerning EU law are not treated equally with domestic disputes if they do not allow for review proceedings. See E. Pache, F. Burmeister. *Gemeinschaftsrecht im verwaltungsgerichtlichen Normenkontrollverfahren*. – *NVwZ* 1996, pp. 979 and 981.

<sup>69</sup> See, e.g., the decision of the German Constitutional Court of 29 May 1974, case 2BvL52/71 (Solange I) (BVerfGE 37, p. 271), the positions of which were later reviewed by the court in its decisions such as 22 October 1986 in case 2BvR 197/83 (Solange II) (BVerfGE 73, p. 339) and 12 October 1993 in cases 2 BvR 2134/92 and 2 BvR 2159/92 (Vertrag von Maastricht) (BVerfGE 89, p. 155).

<sup>70</sup> *Conseil d'État*, 8 February 2007, case No. 287110 (Arcelor). Available at [http://www.conseil-etat.fr/ce/jurisprud/index\\_ac\\_ld0706.shtml](http://www.conseil-etat.fr/ce/jurisprud/index_ac_ld0706.shtml) (10.05.2007).

<sup>71</sup> K. Maimann. *Integatsioonioiguse põhiseaduslikkuse kohtulik järelevalve Eestis* (Constitutional Court Review of Integration Law in Estonia). – *Juridica* 2006/6, p. 425 (in Estonian).

<sup>72</sup> See, e.g., the letter of 17 April 2007 by Angela Merkel, Chancellor of Germany, to the 27 EU Member States, proposing to open discussions over the adoption of an amended Constitutional Treaty (however, with as little amendments as possible). Information about this is available at [http://www.europarl.europa.eu/paris/4/uploads/pdf%20notes/note\\_162.pdf](http://www.europarl.europa.eu/paris/4/uploads/pdf%20notes/note_162.pdf) (10.05.2007), and first and foremost, Brussels European Council Presidency Conclusions, 21-22 June 2007, available at [http://europa.eu/european\\_council/conclusions/index\\_en.htm](http://europa.eu/european_council/conclusions/index_en.htm) (17.09.2007).

<sup>73</sup> Speech by Chief Justice Märt Rask at the 2006 Spring Session of the Riigikogu: *Ülevaade kohtukorralduse, õigusemõistmise ja seaduste ühetaolise kohaldamise kohta* (Overview of Courts Administration, Administration of Justice, and the Uniform Application of Laws), p. 22. Available at <http://www.nc.ee/?id=667> (10.05.2007) (in Estonian).



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# Procedural Issues Relating to EU Law in the Estonian Supreme Court

## 1. Introduction

Estonia, being a small but very ‘pro-European-Union’ country with a liberal approach to economy<sup>\*1</sup> and law, has shown a remarkable willingness to adapt to European Community (EC) principles such as supremacy, direct effect, and consistent interpretation, led in this by its Supreme Court (Riigikohus). The Supreme Court has not hesitated to confirm unconditional supremacy of EC law (even over the Constitution) or apply directive consistent interpretation of national law. These questions have been addressed in other publications of this author.<sup>\*2</sup> This article seeks to address aspects of procedural law that have surfaced during the first three years of post-accession jurisprudence. Although the relevant case law in Estonia is not voluminous, there are important questions nonetheless, which deserve academic attention.

In the pre-accession period, Estonian legislation was significantly amended to implement the substantive law of the EC. Few or no amendments were made to the laws regulating court procedure. On the date of accession, the procedural laws even lacked provisions referring to the existence of the European Court<sup>\*3</sup> and the preliminary rulings procedure.<sup>\*4</sup> Equally, there was no regulation regarding other possible procedural nuances arising out of the need to apply EC law. As a result of this lack of regulation, internal courts were faced with challenging choices when interpreting and applying internal rules, which were not designed to work in ‘the new legal order’.

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<sup>1</sup> According to the 2007 assessment of the Heritage Foundation, Estonia is ranked 12<sup>th</sup> in the world and 5<sup>th</sup> in the region in the index of economic freedom. See <http://www.heritage.org/research/features/index/country.cfm?id=Estonia> (7.10.2007).

<sup>2</sup> See C. Ginter. Constitutional Review and EC Law in Estonia. – *European Law Review* 2006 (31) 6, pp. 912–923; C. Ginter. Effective Implementation of the Trade Mark Directive in Estonia. – *European Competition Law Review* 2007 (28) 6, pp. 337–345.

<sup>3</sup> The term European Court refers to both the Court of First Instance (CFI) and the Court of Justice of the European Communities (ECJ). See <http://curia.europa.eu/> (7.10.2007).

<sup>4</sup> A procedure arising out of article 234 EC, which allows internal courts to ask for interpretative guidance on questions of EC law from the ECJ before rendering a final decision on a particular case. Hereinafter all references to articles are to those of the Treaty Establishing the European Community (EC); Consolidated text published: Official Journal (OJ) C 321E, 29.12.2006.

Although there were no references for preliminary rulings until 2007 by Estonian courts<sup>5</sup>, this article still focuses on issues related to the preliminary rulings procedure. This includes discussing *acte clair* and *acte éclairé*<sup>6</sup> and questions regarding what effect arises from a pending challenge to secondary Community law in the European Court to internal proceedings that relate to the same issue or norm. In some contexts, alternative solutions to those used by the courts are proposed.

It was almost two years after Estonia's accession to the European Union (EU) when in late April of 2006 issues relating to preliminary rulings were first addressed by the Supreme Court.<sup>7</sup> An administrative court (*halduskohus*) had suspended a pending case regarding tax claims for surplus stock during accession.<sup>8</sup> The Supreme Court had to deal with the question of whether Poland having challenged the validity of the regulation under an action for annulment in the Court of First Instance<sup>9</sup> (CFI) would serve as sufficient grounds for suspending the administrative court case where the same regulation was of significance and of what would be the correct legal basis for such suspension.

In March 2006, the Civil Chamber of the Supreme Court decided not to ask for a preliminary ruling in a case demanding interpretation of national law in the light of the Trade Mark Directive.<sup>10</sup> In this case, the court for the first time relied on the concept of *acte éclairé* and elaborated on the grounds on which a national court against whose decisions there is no further recourse is permitted to refrain from making a reference to the Court of Justice of the European Communities (ECJ).

In October 2006, the Administrative Law Chamber of the Supreme Court decided not to ask for a preliminary ruling in a case relating to taxation of surplus stocks at the time of Estonia's accession to the EU.<sup>11</sup> This time, the court decided that it was relieved of the obligation to make a reference, on the basis of *acte clair*.

Three years after Estonia's accession in — mid-May 2007 — the first reference for a preliminary ruling was made by the Supreme Court, in a case concerning support for rural development.<sup>12</sup> This first reference serves as a potential demonstration of style for further references by the Estonian courts.

In June 2007, the Administrative Law Chamber of the Supreme Court applied EC law discussing agricultural supports.<sup>13</sup> Even though the Estonian Agricultural Registers and Information Board (ARIB) asked the court to make a reference for a preliminary ruling, the Supreme Court resolved the matter without asking the ECJ for its assistance. The Supreme Court annulled the administrative discretionary measure on the basis of lack of reasoning.

The few rulings and decisions referred to above serve as a basis for drawing preliminary conclusions regarding how the rules related to the system of preliminary rulings have been accepted and applied by the Supreme Court.

## 2. Challenging the validity of Community acts as a basis for suspending internal proceedings

It is a known fact that at times court cases are put on hold for compelling reasons. On the basis of the principle of procedural autonomy, the Member States of the EU are more or less at liberty to lay down their own rules regarding this issue, provided that the general principles of European law are abided by.<sup>14</sup> In Estonia, the

<sup>5</sup> See official statistics of the ECJ for 2006, available at [http://curia.europa.eu/en/instit/presentationfr/rapport/stat/06\\_cour\\_stat.pdf](http://curia.europa.eu/en/instit/presentationfr/rapport/stat/06_cour_stat.pdf) (7.10.2007). The statistics show that there were also no references from Latvia and only one reference from Lithuania. It is interesting to note that according to the same statistics Hungary has made nine new references.

<sup>6</sup> Substance of those terms is explained in detail in section 3 of this article.

<sup>7</sup> Ruling of the Administrative Law Chamber of the Supreme Court (ALCSCr) 25.04.2006, 3-3-1-74-05.

<sup>8</sup> Commission regulation (EC) No. 1972/2003 of 10 November 2003 on transitional measures to be adopted in respect of trade in agricultural products on account of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia. — OJ L 293, 11.11.2003, pp. 3–6

<sup>9</sup> T-257 & 258/04 (Poland v. Commission). Not yet decided.

<sup>10</sup> Decision of the Civil Law Chamber of the Supreme Court (CLCSCd) 30.03.2007, 3-2-1-4-06; First directive 89/104/EEC of the Council, of 21 December 1988, to approximate the laws of the Member States relating to trade marks. — OJ L 40, 11.2.1989, p. 1–7.

<sup>11</sup> Decision of the Administrative Law Chamber of the Supreme Court (ALCSCd) 5.10.2006, 3-3-1-33-06.

<sup>12</sup> ALCSCr 14.05.2007, 3-3-1-95-06; Council regulation (EC) No. 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain regulations. — OJ L 160, 26.6.1999, pp. 80–102

<sup>13</sup> ALCSCd 20.06.2007, 3-3-1-26-07.

<sup>14</sup> See case 33/76 (Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland). — ECR 1976, p. 1989.

suspension of proceedings in administrative court cases used to be covered by the Code of Administrative Court Procedure<sup>\*15</sup> (CACP).

The CACP provided for situations where the administrative court was required to suspend proceedings and where suspension of the proceedings was at the court's discretion. The administrative court was required to suspend proceedings when the party to the proceedings had died or the relevant legal person had been dissolved or when a person's legal capacity had been restricted.<sup>\*16</sup> The administrative court was required to suspend the proceedings also "if the hearing of a matter is not possible before the adjudication of another matter, until the entry into force of the decision".<sup>\*17</sup> The administrative court had the right to suspend proceedings upon certain conditions in cases of illness, in the event of long-term official business travel, and upon the request of the parties to a public-law contract. The administrative court also had the right to suspend the proceedings "during the time when the constitutional review matter is adjudicated in the proceedings of the Supreme Court, until entry into force of a judgement made in the matter, if this may affect the validity of legislation of general application subject to application in the administrative matter".

The CACP contained no explicit reference to proceedings taking place in the ECJ or CFI. The Code of Civil Procedure (CCP) contains from 1 September 2006 a clear obligation for the internal court to suspend proceedings where it has made a reference for a preliminary ruling.<sup>\*18</sup> The CCP does not address other potential types of litigation in Luxembourg. Therefore it was not, and still is not, obvious how a pending action for annulment in the CFI initiated by a third party or a preliminary rulings procedure in the ECJ commenced in a different case relates to the court's right or obligation to suspend the proceedings.

In the case analysed here<sup>\*19</sup>, the applicant challenged a directive of the Ministry of Agriculture determining the amount of surplus stocks of rice and a tax notice of the Estonian Tax and Customs Board, which ordered the applicant to pay approximately 25,000 EUR in additional tax on the surplus stock.

Regulation EC 1972/2003 (the Surplus Stock Regulation) places an obligation on Estonia to levy charges on holders of surplus stocks as of 1 May 2004, for products in free circulation.<sup>\*20</sup> On the basis of the Surplus Stock Regulation, Estonia adopted the Surplus Stock Fee Act<sup>\*21</sup> (SSFA), introducing rules on determination of surplus stocks. This legal framework will be of importance also for the discussion of the application of the *acte clair* exception, below.<sup>\*22</sup> For the case at hand, it is sufficient to note that the applicant did not want to pay the tax that was claimed from it on the basis of the SSFA (which, in turn, was related to the Surplus Stock Regulation). As mentioned above, the Surplus Stock Regulation was challenged by Poland in the CFI under article 230 EC proceedings.<sup>\*23</sup>

The applicant in the proceedings challenged provisions of the SSFA, arguing that they were contrary to the Estonian Constitution<sup>\*24</sup>; namely the principle of proportionality; the right to freely choose one's own area of activity, profession, and place of work; the right to engage in enterprise and to form commercial undertakings and unions; the right to property and principles of legal certainty; and others. The applicant also considered the *ex post* imposition of taxes to be retroactive punishment. The administrative court found that Poland's action for annulment of certain provisions of the Surplus Stock Regulation could in principle have an effect on the amount of tax to be imposed on the applicant and thus suspended the internal proceedings.<sup>\*25</sup> The administrative court held that, before ruling on a case, the court must ascertain whether the provisions of the SSFA are in accordance with European law and whether the provisions of the Surplus Stock Regulation are legally applicable. Should the Surplus Stock Regulation be partially annulled, the question arises of whether the SSFA can still be applied. Interestingly enough, the court pointed out that the court would have no doubts

<sup>15</sup> Halduskohtumenetluse seadustik. – RT I 1999, 31, 425; 2007, 12, 66 (in Estonian). Unofficial translation available at <http://www.legaltext.ee/text/en/X30054K8.htm> (7.10.2007). From 1 September 2007 the relevant section of the CACP (§ 22) refers to grounds listed in the Code of Civil Procedure (Tsiviilkohtumenetluse seadustik). – RT I 2005, 26, 197; 2007, 12, 66 (in Estonian). As the procedure in the case discussed in this article took place before the amendments, the references in this article are made to the CACP as of before the amendments.

<sup>16</sup> Section 22 of the CACP.

<sup>17</sup> *Ibid.* The current § 356 of the CCP gives the court a right, but not an obligation to suspend the proceedings.

<sup>18</sup> Subsection 356 (3) of the CCP.

<sup>19</sup> ALCSCr 25.04.2006, 3-3-1-74-05.

<sup>20</sup> See article 4 of the Surplus Stock Regulation.

<sup>21</sup> Üleliigse laovaru tasu seadus. – RT I 2004, 30, 203, substantially changed retroactively by RT I 2005, 38, 296 (in Estonian).

<sup>22</sup> See section 3.2 of this article.

<sup>23</sup> T-257 & 258/04 (Poland v. Commission). Not yet decided. Article 230 EC foresees bringing actions against acts of the Community institutions on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule of law relating to its application, or misuse of powers. The proceedings are to be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be. This author has discussed questions of standing of private applicants under article 230 EC in C. Ginter, Access to Justice in the European Court in Luxembourg. – European Journal of Law Reform 2002 (4) 3, p. 381.

<sup>24</sup> Põhiseadus. – RT I 2007, 43, 311; 2007, 33, 210 (in Estonian).

<sup>25</sup> The proceedings were suspended partially.

as to the validity of the regulation except for the fact of the existing challenge by Poland.<sup>\*26</sup> The court relied by analogy on the provision of the CACP that allowed suspension of the proceedings during the time when the constitutional review matter was being adjudicated in the Supreme Court.<sup>\*27</sup>

The ruling suspending the proceedings was appealed by the Estonian Tax and Customs Board. The appellant argued primarily that if the court had doubts as to the validity of the regulation, it should have expressed its views on the matter and made a reference for a preliminary ruling. The Tallinn Circuit Court (Tallinna Ringkonnakohtus) granted the appeal.<sup>\*28</sup> The Supreme Court, reviewing the case as the court of cassation, upheld the ruling of the circuit court — however, substantially amending its reasoning. The court elaborated on the duties of the administrative court in a situation where the validity of a European norm has already been challenged in the European Court.

In the case at hand, the SSFA had been adopted in order to allow performance of duties arising out of the Surplus Stock Regulation. Thus, the internal court may indeed have to check whether the SSFA is in harmony with the regulation. The Supreme Court pointed out that where the court has doubts about whether a secondary Community act is in conformity with primary Community law, it is under an obligation to make a reference for a preliminary ruling. However, it seems that the Supreme Court also conditionally accepted the possibility that the proceedings could be suspended without making such reference. According to the ruling:

If the same question has already been presented to the European Court in a reference for a preliminary ruling or if there are pending proceedings in the ECJ or CFI checking the validity of a EC norm, the Estonian court must decide whether to suspend the proceedings and, if necessary, ask the ECJ for a preliminary ruling on its own.<sup>\*29</sup>

This paragraph clearly refers to two possible alternatives, with the possibility of (a) suspending the proceedings and making a reference for a preliminary ruling or (b) suspending the proceedings without making such a reference. It is not clear in which circumstances choosing the second option would be justified or necessary.

As was pointed out above, the CACP contained two possible alternatives for suspending proceedings, one being existing constitutional review proceedings in the Supreme Court and the other being a more general reference to impossibility of resolving the case before another case has been adjudicated. The same alternatives currently exist in the CCP.<sup>\*30</sup>

Given that the CACP was adopted in 1999, approximately five years before Estonia's accession to the EU, it is understandable that the legislator did not intend to provide for a solution in a situation where the validity of secondary Community law has been challenged in the European Court. Accordingly, the Supreme Court argued that the legislator could not have foreseen that a reference to constitutional review would implicitly include proceedings conducted by the European Court. On the basis of this, the Supreme Court found that an analogy to constitutional review does not serve as appropriate grounds for suspending the proceedings.

It is certainly true that there is no evidence of the original legislative intent behind the CACP being directed at regulating questions of European law. Also, the wording of the relevant section of the CACP clearly referred to constitutional review only. Therefore, it is difficult to challenge this conclusion of the court. On the other hand, a focus on the original legislative intent may not be the most appropriate approach for a test, given the changes in the Estonian and European legal environment. Teleological interpretation does not have to be limited by the factual circumstances surrounding the legislator at the time of passing of the particular norm concerned. The term 'teleology' comes from the Greek word 'telos', which is interpreted as 'end', 'purpose', or 'goal'. Teleology can be described as the study of purposiveness, or the study of objects with a view to their aims, purposes, or intentions.<sup>\*31</sup> When using the teleological method for interpretation, we need to determine the purpose of the law and to choose from among the possible interpretations the one that makes the greatest contribution to the achieving of this goal. It is not imperative that this be related to the original circumstances in which the legislator acted; rather, it may also relate to what the legislator attempted to achieve in general. Changed circumstances do not have to render the ultimate aim of the legislator inapplicable or unachievable. Therefore, a teleological interpretation should focus on the goal that the particular norm was intended to achieve, in view of the fact that the same goal may require extending the applicability of the particular norm to new situations. Also the European Court of Human Rights has opted for a dynamic interpretation of the convention.<sup>\*32</sup> Authors referring to the interpretative methods of the European Court of Human Rights have described them as follows: The court determines the content of [the rights] [...] always in the light of today's

<sup>26</sup> Paragraph 5 of the discussed ruling.

<sup>27</sup> *Ibid.*

<sup>28</sup> Ruling of the Tallinn Circuit Court 26.08.2005, 2-3/753/05.

<sup>29</sup> Paragraph 14 of the discussed ruling.

<sup>30</sup> Section 356 of the CCP.

<sup>31</sup> See Wikipedia at [http://en.wikipedia.org/wiki/Telos\\_\(philosophy\)](http://en.wikipedia.org/wiki/Telos_(philosophy)) (7.10.2007).

<sup>32</sup> See L. Wildhaber, O. Diggelmann. Euroopa inimõiguste konventsioon ja eraelu kaitse. Uuemad arengusuunad (European Convention on Human Rights and the Protection of Private Life. The Latest Trends). – *Juridica* 2007/1, p. 3 (in Estonian).

circumstances and takes into account important social, legal and technological changes.”<sup>33</sup> This evolving approach to interpretation allows taking into account the possibility that the original directive of the legislator may over time have become unreliable. The deciding judge may take into account the changed political, social, and legal considerations. It may even be argued that evolving interpretation follows the hypothetical legislative intent had the legislator been deciding under the changed circumstances.<sup>34</sup> Therefore, basing the reasoning on the original legislative intent does not have to be an imperative.

When interpreting the law, one must always be able to perceive the values behind the letter of the law and be mindful of the fact that these values are themselves in constant change.<sup>35</sup> Why then would the legislator provide for the possibility to suspend proceedings during constitutional review? The obvious explanation would be that there may simply be no point in continuing to handle cases on the basis of a law that may very well prove to be inapplicable. Allowing the judge to wait until the shadow cast over the existing rule has dissipated provides for greater legal certainty.

Dynamic interpretation would force us to consider what has changed since the adoption of the CACP. Definitely one of the most significant changes has been the accession of Estonia to the EU. This, in turn, led to a significant change in the legal environment, with EU law becoming part of our legal heritage and concepts of primacy and direct effect finding their way into our legal system and courts. With the national judge entrusted with the task of applying the *acquis communautaire*, a suspicion of potential contradiction with EC law may arise similarly to a suspicion of potential contradiction with the Constitution. Unconstitutionality of an internal law will lead to its inapplicability. Contradiction of a secondary Community norm with primary Community law will equally render the norm inapplicable. Where unconstitutionality is to be established by the Supreme Court, the finding of a contradiction with primary EC law is solely within the competence of the European Court.<sup>36</sup>

The above would lead to a parallel allowing for extensive interpretation. Where an internal court needs to either apply EC law or check the validity of an internal norm vis-à-vis EC law that has been challenged in the ECJ or the CFI, it is in a very similar situation to that in which it would need to apply national law that has been challenged in constitutional review proceedings. Either of the proceedings could potentially lead to the inability to apply a particular law. Therefore, an expansive interpretation of the grounds for suspending proceedings by referring to pending constitutional review proceedings covering challenges to the validity of the *acquis communautaire* in the ECJ or CFI or its application by analogy should have been acceptable.

However, as noted above, the ruling of the Supreme Court does not support this line of argumentation. The Supreme Court did not deny the right of an internal court to suspend the proceedings. It, however, decided that the appropriate legal foundation for such suspension would be the other alternative in the CACP, that of “if the hearing of a matter is not possible before the adjudication of another matter, until the entry into force of the decision”.<sup>37</sup> Thus, if the validity of a secondary Community act has been challenged in the ECJ or the CFI, the internal court has the right in principle to suspend the proceedings.

It would be quite dangerous if a case pending in the European Court were to lead to a more or less automatic suspension of the internal proceedings. It is well known that not all challenges are successful, and at times, to be frank, they may be frivolous to begin with. This risk is addressed by the Supreme Court in criticising the ruling of the administrative court for its lack of reasoning. There was insufficient description of the motives for the judge questioning the validity of the Surplus Stock Regulation. The fact that a third party has begun article 230 EC proceedings against a particular Community norm does not serve per se as grounds for suspending the proceedings. Instead, the court must establish whether in its view there are grounds for questioning the validity of the European norm.<sup>38</sup>

An additional condition for suspending the proceedings arising from the prior case law of the Supreme Court is that the delay caused must be proportionate to the reason for suspending the case.<sup>39</sup> The Supreme Court pointed out that the arguments of parties in the case at hand are different to some extent from those that Poland presented to the CFI. The Supreme Court referred to the Gaston Schul case, pointing out that potentially different factual circumstances may lead to different judicial outcomes.<sup>40</sup> In addition, the decision of the CFI may be appealed to the ECJ. Therefore, the Supreme Court concluded that, in order to be in keeping with the condition of not causing unnecessary delay, the administrative court should have made a reference for

<sup>33</sup> *Ibid.*, p. 3.

<sup>34</sup> For a discussion on dynamic interpretation in U.S.A. see, e.g., Ross F. Stephen. The Location and Limits of Dynamic Statutory Interpretation in Modern Judicial Reasoning. – The Journals of Legal Scholarship, article 6, 2002 Berkeley Electronic Press.

<sup>35</sup> See R. Narits. The Republic of Estonia Constitution on the Concept and Value of Law. – *Juridica International* 2002 (7), p. 13.

<sup>36</sup> As was uniformly established in case 314/85 (Firma Foto-Frost). – ECR 1987, p. 4199.

<sup>37</sup> See § 22 of the CACP. The same ground is now reflected in CCP § 356 (1), which gives the court a right to suspend proceedings if the decision depends on the existence or absence of a legal relationship which is the object of a court proceedings conducted in another matter or the existence of which must be established by administrative proceeding or other court proceedings.

<sup>38</sup> See paragraphs 21–22 of the discussed ruling.

<sup>39</sup> See, e.g., ALCSCr 16.01.2003, 3-3-1-2-03.

<sup>40</sup> Case C-461/03 (Gaston Schul Douane-expéditeur). – ECR 2005, I-10513.

a preliminary ruling to the ECJ. If the internal court has doubts as to the validity of secondary EC law, it is under an obligation to make a reference.

It is argued here that in most cases where validity of European law is questioned a logical step for the internal court would be to suspend the proceedings and to make a reference for a preliminary ruling instead of waiting for the final outcome of independent challenges. The Supreme Court case analysed here illustrates that a reference should preferably be made, but the ruling does not speak of this in imperative terms. It would be difficult to see good reasons for an internal court to suspend its proceedings with reference to a pending action for annulment at the CFI by a third party, and not to make a reference for a preliminary ruling of its own. The problems of such an approach begin precisely with the risk of different factual circumstances. The wording of a long-awaited decision of the European Court may be such as to leave aside factors whose consideration is crucial for resolving the suspended case. In addition, the European proceedings in the 'original challenge' may take longer than it would take to address the new reference. A new reference would also permit the parties to present additional arguments to the ECJ, allowing for a broader basis for review of the validity of the secondary Community norm. These are just a few arguments in favour of preferring an independent reference. Should the parallel case ultimately provide for a good solution before the new reference has been handled, there are options for closing the preliminary rulings procedure without making a final decision.<sup>\*41</sup>

### 3. Refraining from making references for preliminary rulings

According to article 234 EC, where a question of the interpretation of the EC Treaty, the validity and interpretation of acts of the institutions of the Community and of the European Central Bank, or the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide, "is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."<sup>\*42</sup> The ECJ has emphasised the central importance of this procedure by stating that it seeks "to prevent a body of national case-law not in accord with the rules of community law from coming into existence in any Member State".<sup>\*43</sup> Article 234 EC provides for a tool of co-operation between the ECJ and the national judiciary in order to permit uniform development and application of EC law throughout the Community. The obligation of the court of last instance to make a reference provides a certain assurance for the parties that they will have an opportunity to present their arguments before the appropriate forum.

The obligation for courts of last instance to refer cases to the ECJ did not remain unconditional for long. In the 1963 *Da Costa* decision, the ECJ had to take a practical approach in order to resolve a situation where article 234 EC could have led to 'automatic' references where the very same question had already been answered by the ECJ.<sup>\*44</sup> In this famous decision, the ECJ introduced a substantial limitation stating that

Although the third paragraph of [article 234] unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law [...] to refer to the Court every question of interpretation raised before them, the authority of an interpretation under [article 234] already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the **question raised is materially identical** with a question which has already been the subject of a preliminary ruling in a similar case. [emphasis added]

This doctrine, known as *acte éclairé*, relieved the courts of last instance from the duty to refer questions to the ECJ that have already been answered.

<sup>41</sup> See, e.g., article 104 (3) of the Rules of Procedure of the Court of Justice.

<sup>42</sup> In the official Estonian text only the term *kohus* (court) is used in the last two sections of article 234 EC. In the English version the term "court or tribunal" and in the French text the term *une juridiction* is used. Looking at the French and English texts, as well as the decisions of the ECJ it is clear that the provision is intended to apply to a much larger variety of dispute settlement bodies than courts *stricto sensu*. Thus, the Estonian translation is problematic as it does not represent the true extent of the provision regarding the bodies that are entitled to or obligated to ask for a preliminary ruling. For the interpretation of the term "court or tribunal" see, e.g., C-54/96 (*Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*) (ECR 1997, p. I-4983) paragraph 23: "In order to determine whether a body making a reference is a court or tribunal for the purposes of Article [234] of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent." [references omitted]

<sup>43</sup> See case 107-76 (*Hoffmann-La Roche AG v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH*). – ECR 1977, p. 957.

<sup>44</sup> Case 28 to 30–62 (*Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v. Netherlands Inland Revenue Administration*). – ECR 1963, p. 31.

The obligation to make a reference was further limited by the 1982 CILFIT decision.<sup>\*45</sup> In this case, the ECJ was asked to provide guidance to the national courts regarding what to do in cases where the question is not identical to one already answered by the ECJ but the correct answer to it clearly arises out of the practice of the ECJ. Once again a practical approach was adopted by the ECJ, and the courts of last instance were permitted to refrain from making references for a preliminary ruling in cases where “the correct application of Community law is so obvious as to leave no scope for reasonable doubt as to the manner in which the question raised is to be resolved”.<sup>\*46</sup> In order to avoid abuse, the possibility of relying on this exception was tied to strict conditions. According to the ECJ:

[T]he national court or tribunal must be convinced that the matter is **equally obvious** to the courts of the other Member States **and** to the Court of Justice. **Only if those conditions are satisfied**, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it. [emphasis added]

This doctrine is known as *acte clair*. The above two case-law-based exceptions to the EC Treaty have had a significant effect on the preliminary rulings system. Whereas it is difficult to deny that at times, considering the prior case law of the ECJ, a reference would simply cause delay, it is equally difficult to deny that the exceptions have at times led cases being decided on the national level that would have needed interpretative guidance from the ECJ. The well-publicised Köbler case is just one example where resolving the case without a preliminary ruling led to an incorrect interpretation of Community law and ended up with the applicant being denied compensation to which he was rightfully entitled.<sup>\*47</sup> The relative importance of the two exceptions is further illustrated by the fact that the Supreme Court had an opportunity to rely on both of them before a single reference for a preliminary ruling had been made by Estonian courts.<sup>\*48</sup> This is certainly a significant shift of balance when compared to the original mandatory nature of the obligation arising from article 234 EC.

### 3.1. Applying *acte éclairé*

In its 30 March 2007 decision, the Civil Chamber of Supreme Court was faced with a problem of the Estonian Trade Mark Act<sup>\*49</sup> (TMA) not being in conformity with the Trade Mark Directive (TMD).<sup>\*50</sup> Subsection 16 (3) of the TMA set out the rules on exhaustion as follows:

The proprietor of a trade mark is not entitled to prohibit further commercial exploitation of goods that have been marked with the trade mark by the proprietor or with the proprietor’s consent and that have been put on the market in Estonia or in a state party to the Agreement of the European Economic Area under that trade mark, **unless the condition of the goods has changed** after they have been put into circulation. [emphasis added]

The TMD, on the other hand, in its articles 7 (1) and (2), states:

The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.

Paragraph 1 shall not apply **where there exist legitimate reasons** for the proprietor to oppose further commercialisation of the goods, **especially where** the condition of the goods is changed or impaired after they have been put on the market. [emphasis added]

Thus, one can see that where the TMD refers to the condition of the goods being changed as an example of legitimate reasons for opposing further commercialisation of the trademarked goods, the TMA indicates this as the only existing foundation for doing so. In view of the present publication’s focus on procedural law considerations, a thorough analysis of the referred case would be out of place.<sup>\*51</sup> Accordingly, the discussion will focus on the applicant’s request for a preliminary ruling. In the particular case considered here, the defendant (a parallel importer) was using the applicant’s trade mark in a manner going against good business practices in that it created an impression of it being commercially tied to the trade mark proprietor or even being the trade mark proprietor. The trade mark was a central element in the design of the commercial premises, homepage, company name, vehicles, etc. In the referred case, the applicant had argued in both the first- and

<sup>45</sup> Case 283/81 (Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health). – ECR 1982, p. 3415.

<sup>46</sup> *Ibid.*, paragraph 16.

<sup>47</sup> Case C-224/01 (Gerhard Köbler v. Republik Österreich). – ECR 2003, p. I-10239; The author has further discussed the Köbler case in C. Ginter. Riigi vastutus õigusemõistmisel tekitatud kahju eest (The State’s Liability for Damages Incurred by Administration of Justice). – Juridica 2004/8, pp. 520–525 (in Estonian).

<sup>48</sup> In CLCSCd 30.03.2007, 3-2-1-4-06 the court relied on *acte éclairé* and in ALCSCd 5.10.2006, 3-3-1-33-06 the court relied on *acte clair*. The first reference was made in ALCSCr 14.05.2007, 3-3-1-95-06.

<sup>49</sup> Kaubamärgiseadus. – RT I 2002, 49, 308; 2006, 7, 42 (in Estonian).

<sup>50</sup> CLCSCd 30.03.2007, 3-2-1-4-06. Trade Mark Directive (Note 10).

<sup>51</sup> For a discussion on the substantive law issues of the case see C. Ginter. Effective Implementation of the Trade Mark Directive in Estonia (Note 2), pp. 337–345.

second-instance courts that the case law of the European Court must be taken into account in interpretation of the extent of protection granted to the trade mark proprietor. At the level of the Supreme Court, as the court of last instance, the applicant filed a petition asking the court to make a reference for a preliminary ruling to the ECJ. The main argument of the applicant was that the law must be interpreted in accordance with the case law of the ECJ interpreting the TMD. Such an interpretation would give the applicant a right to oppose the use of the trade mark in more cases than just those where the condition of the goods had changed.

In discussion of the applicant's petition for making a reference for a preliminary ruling, two procedural questions arose. Firstly, the implications of the fact that the request was filed after the cassation deadline were discussed. The CCP contains no reference to when such a petition should be made. Indeed the applicant argued that a need for a reference for a preliminary ruling may arise at any time during the proceedings. The Supreme Court considered it necessary to analyse the procedural nature of the applicant's petition in light of the CCP. The court concluded that, since the right to make a reference for a preliminary ruling rests with the court, a petition to the court asking for the court to make a reference cannot be considered a formal 'petition or application' within the meaning of the CCP. Instead, the Supreme Court found that such a petition must be classified as a petition to interpret and apply the law, by which the court is not bound.<sup>\*52</sup> The law permits presenting arguments regarding interpretation and application of law also after filing of the cassation claim.<sup>\*53</sup>

The reasoning of the Supreme Court in this respect may be agreed with. Making of a reference for a preliminary ruling is in the hands of the court, and the court is not bound by such a request. Indeed a reference may arise *ex officio* and at any time during the proceedings.<sup>\*54</sup> It is questionable whether it is necessary to qualify a petition of the party as a proposal or request to interpret the law in a certain way using terminology of internal procedural laws. However, as long as this does not entail unreasonable limitations to raising questions regarding a potential need for a preliminary ruling, it should be acceptable.

The second question to be addressed was whether or not the court should indeed make a reference for a preliminary ruling. The Supreme Court considered that the questions proposed in the applicant's petition had already been answered by the ECJ. It did, however, point out that the lower courts maintained the right to make such a reference should doing so be necessary in further proceedings. The Supreme Court concluded that the nonconformity could be overcome via interpretation of internal law, referring to the cases of Parfums Christian Dior, Bayerische Motorenwerke AG, Silhouette, Medion, and Gillette.<sup>\*55</sup> The court confirmed that the rights of the trade mark proprietor are indeed broader than those listed expressly in the TMA.

The decision analysed here is of central importance in introducing the position of substantive and procedural European law in Estonia. The decision of the Supreme Court was motivated extensively regarding proper interpretation of Estonian law in light of the practice of the ECJ. This sent a clear message that the Supreme Court accepts that, where refraining from making a reference for a preliminary ruling on the basis of *acte éclairé*, it must specify clear motives and references to the relevant case law of the ECJ. Although the applicant argued that a reference is necessary, the court dismissed these arguments with clear reasoning relying on the practice of the ECJ. The court's decision contains extensive analysis of the European case law, which gives credibility to its conclusion that the questions posed had already been answered. Refraining from making of a reference for a preliminary ruling in this case must be considered to be justified.

### 3.2. Applying *acte clair*

The case where the Supreme Court first relied on *acte clair* brings us back to the Surplus Stock Regulation and the SSFA. In the 6 October 2006 decision, the Administrative Law Chamber of the Supreme Court discussed whether the method of calculating surplus stock as laid down in the SSFA was in accordance with the requirements of the Surplus Stock Regulation.<sup>\*56</sup> The reasoning of the decision relies heavily on the general principle of proportionality; however, the resolution was to declare particular provisions of the SSFA contrary to the Surplus Stock Regulation. The court considered the contradiction with European law so clear as to permit it to overcome its obligation arising out of article 234 EC on the basis of *acte clair*.

The court's reasoning seems to focus mainly on questions of proportionality and legitimate expectations, pointing out that, while falling under the obligation to collect fees for excessive stock from undertakings, internal laws may not be disproportionate or run counter to legitimate expectations.<sup>\*57</sup> Due to the fact that the

<sup>52</sup> Paragraph 56 of the discussed decision.

<sup>53</sup> *Ibid.*

<sup>54</sup> See, e.g., C-312/93 (Peterbroeck). – ECR 1995, p. I-4599 paragraphs 20–21; C-72/95 (Kraajeveld). – ECR 1996, p. I-5403 paragraph 60.

<sup>55</sup> See cases C-337/95 (Parfums Christian Dior v. Evora). – ECR 1997, p. I-6013; C-63/97 (BMW). – ECR 1999, p. I-905; C-355/96 (Silhouette International Schmied v. Hartlauer Handelsgesellschaft). – ECR 1998, p. I-4799; C-120/04 (Medion). – ECR 2005, p. I-8551; C-228/03 (Gillette Company and Gillette Group Finland). – ECR 2005, p. I-2337.

<sup>56</sup> ALCSCd 5.10.2006, 3-3-1-33-06.

<sup>57</sup> See paragraph 27 of the discussed decision.

present article focuses on issues of procedural law, the discussion of substantive law will be limited, and no final solution is presented. It is argued that the decision did not contain sufficient reasoning to justify reliance on *acte clair* and that without an interpretation from the ECJ it is not possible to determine whether the final decision as to the SSFA being contrary to EC law was correct.

As for the facts, once again a company had challenged the determined amount of surplus stock and the imposition of a corresponding fee.<sup>\*58</sup> The applicant raised issues of unconstitutionality, retroactive effect of the law, etc and argued for direct application of the Surplus Stock Regulation or, failing that, for the SSFA to be interpreted in the light and purpose of the referred regulation.<sup>\*59</sup> One of the central arguments was related to the fact that the SSFA foresaw mathematical calculation of the normal stock by multiplying the average stock of four years, counting back from 2004 (1 May), by a coefficient of 1.2. The applicant argued that such a calculation violated the principle of proportionality. Although the SSFA contained a method of adjusting the result to take into account certain circumstances, the applicant argued that the options listed did not adequately consider the position of sellers and exporters.

The Supreme Court focused in its reasoning on the question of whether the system established is in conformity with EC law and “helps to achieve its goals as fairly, legally, effectively, and proportionally as possible”.<sup>\*60</sup> The statement of reasons begins by pointing out that similar rules had been adopted by the EC before previous rounds of enlargement. These rules have been subject to interpretation by the ECJ, which had considered them to be proportionate and had confirmed the European Commission’s competence to adopt the regulation on surplus stock.<sup>\*61</sup> The court referred to the William Hinton case<sup>\*62</sup>, wherein the ECJ stated:

However, collection of such a charge must also observe the principle of proportionality which the Court has consistently held to be one of the general principles of Community law. By virtue of that principle, measures imposing financial charges on traders are lawful provided that the measures are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question, it being understood that, when there is a choice between several appropriate measures, the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued.<sup>\*63</sup>

The above section confirms in essence that, as is the case with any area relating to the Single Market, principles of proportionality must be observed. The Supreme Court pointed out that the Surplus Stock Regulation leaves a wide margin of discretion to the Member State concerning how exactly to determine surplus stocks.<sup>\*64</sup> The Supreme Court concluded that European law does not foresee the use of a mathematical coefficient of 1.2 and that the coefficient does not sufficiently enable taking into account circumstances under which the stock was accrued. The decision concludes that “[t]he Chamber finds that the Surplus Stock Fee Act does not enable determining of surplus stock in a manner that is fair and in accordance with EU law”.<sup>\*65</sup> The court found that the mathematical coefficient does not enable taking into account the particular circumstances of the undertaking, which according to the decision is required by article 4 (2) (c) of the Surplus Stock Regulation.<sup>\*66</sup>

When deciding to refrain from making a reference for a preliminary ruling, the Supreme Court repeated the well-known preconditions, stating that “[a]ccording to the principle of *acte clair*, the highest court of a Member State is relieved of the duty to request a preliminary ruling if the answer to the question is obvious to the courts of other Member States as well as the European Court despite the fact that the question has not yet been answered. The court of the Member State must be convinced of the obviousness of the answer.”<sup>\*67</sup>

Although the questioned provisions of the SSFA may have been contrary to European law, it is possible to challenge the conclusion that there was no need to make a reference for a preliminary ruling. In the case currently under consideration, many factors had to be balanced, and the reasoning of the European Court may or may not have been different from that applied in the decision analysed. It cannot be ruled out that, in the proceedings of the ECJ, a solution could have been found allowing for the principle of proportionality to be observed via conforming interpretation.

<sup>58</sup> Maltrodexin and Maltrodexin syrup.

<sup>59</sup> Due to a focus on procedural law issues, the discussion will not cover all legal aspects of the case.

<sup>60</sup> See paragraph 10 of the decision.

<sup>61</sup> Referring to cases C-30/00 (William Hinton). – ECR 2001, p. I-7511; C-179/00 (Gerald Weidacher). – ECR 2002, p. I-501. The Supreme Court also pointed out that since the parties had not challenged the validity of the regulation, it had no need to make a reference for a preliminary ruling on that basis. As the administrative court undoubtedly has a right to raise questions of law *ex officio*, this may refer that the justices do not consider the existing information sufficient to raise doubts as to the validity of the regulation.

<sup>62</sup> C-30/00 (Order William Hinton & Sons). – ECR 2001, p. I-7511.

<sup>63</sup> Paragraph 59 of the decision. The ECJ referred to Case 265/87 (Schröder v. Hauptzollamt Gronau). – ECR 1989, p. 2237 paragraph 21, and Case C-295/94 (Hüpeden). – ECR 1996, p. I-3375, paragraph 14.

<sup>64</sup> Article 4 (2).

<sup>65</sup> Paragraph 27 of the decision.

<sup>66</sup> Paragraph 29 of the decision.

<sup>67</sup> *Ibid.*

The *acquis communautaire* imposes a clear requirement for the Member States to collect fees for surplus stocks from undertakings. Therefore, there is indisputably a Community goal to be achieved. Due to the commitment of loyalty and sincere co-operation that arises out of article 10 EC, a Member State has the duty to contribute to achieving this goal effectively and without undue delay. Therefore, *a priori* one would have to be careful before adopting any actions that could postpone the fulfilment of this obligation. Even in Simmenthal the right of the internal court to set aside provisions of internal law was declared by the ECJ in reference to those provisions of internal law that “might impair the effectiveness of Community law”.<sup>\*68</sup>

On the other hand, there was the question of whether the method of calculating surplus stock under the SSFA was in concordance with the principle of proportionality. One must agree that the principle of proportionality forms an integral part of Community law. However, before finding a certain provision contrary to Community law on the basis of proportionality, one would need a thorough analysis of the internal law in order to determine whether there are other provisions that could provide for sufficient protection of the rights of the particular individual or company. One tool for overcoming a collision between EC law and internal law is the principle of conforming interpretation. It can be argued that in this case conforming interpretation could have provided a solution.

The main problems from the point of view of the applicants seemed to be that (a) the method of calculation seemed mathematically oriented without taking into account their particular circumstances and (b) the right to be heard and to participate in administrative proceedings was not adequately guaranteed because the law did not make it clear what kind of evidence they should have provided and to what extent they would need to be heard during the proceedings after having filed the documents with the authorities.

It seems undisputed that European law does not exclude the possibility of using coefficients per se, as long as there remains a possibility for the person to provide evidence and prove that the factual circumstances point to a different conclusion. One must therefore consider whether Estonian law contains a basis for such a possibility. For example, subsection 10 (2) of the SSFA allows for deviation from applying solely the mathematical coefficient and includes for this purpose a list of exceptions, which ends with the words “or other circumstances not dependent on the handler”. This phrase could be interpreted as a gate to a rule of reason test, to see whether there are other logical explanations for the surplus stock besides that of wishing to make speculative profits from accession. It is true that a grammatically based interpretation of subsection 10 (2) of the SSFA would inevitably lead to the need to check whether the factors were outside the handler’s control (referring to “dependent on the handler”). However, it could be argued that such a narrow interpretation would not be in conformity with the legislative goal, which was to determine surplus stock as referred to in article 4 (2) c) of the Surplus Stock Regulation. Therefore, one could advocate an expansive interpretation of subsection 10 (2) of the SSFA and derive from it a right for persons to provide additional evidence regarding the circumstances of how the stock had been compiled. In the *Pupino* case, the ECJ repeated the limits of conforming interpretation, stating that “[t]he principle that national law must be given a conforming interpretation cannot lead to an interpretation that is *contra legem*, or to a worsening of the position of an individual in criminal proceedings”.<sup>\*69</sup> Interpretation as proposed in this article would not go against a clear limitation of law or against clear legislative intent, nor would it negatively affect the rights of the person subject to the proceedings. In conclusion it is argued that the SSFA could have been interpreted to take into account objectively justified explanations for an increase in stock for sellers or exporters.

Even if the SSFA would not have provided for sufficient interpretative material, one could conclude from the above-mentioned March 2006 decision of the Supreme Court regarding directive conforming interpretation of the TMA that conforming interpretation does not have to be limited to the provisions of the particular act of *lex specialis*.<sup>\*70</sup> One could argue that the general principles of administrative law, such as proportionality and the right to be heard and to participate in the administrative procedure, must be observed even without codification. In Estonia, the rules of administrative procedure are indeed at least partially codified in the Administrative Procedure Act<sup>\*71</sup> (APA).<sup>\*72</sup> The APA sets forth a requirement of proportionality for administrative acts<sup>\*73</sup> and clearly includes a duty to exercise the right of discretion “in accordance with the limits of authorisation, the

<sup>68</sup> Case 106/77, case 106/77 (Amministrazione delle Finanze dello Stato v. Simmenthal SpA). – ECR 1978, p. 629 paragraph 22.

<sup>69</sup> C-105/03 (Pupino). – ECR 2005, p. I-5285 paragraph 24. Although this decision was made with a reference to a framework decision, its wording refers to a clear parallel with that used by the ECJ describing the indirect effect of European law in C-106/89 (Marleasing SA). – ECR 1990, p. I-4135 paragraph 7.

<sup>70</sup> See section 3.1. of this article.

<sup>71</sup> Haldusmenetluse seadus. – RT I 2001, 58, 354; 2007, 15, 76 (in Estonian).

<sup>72</sup> See K. Merusk. Presumptions of Law for Ensuring Fundamental Rights in Administrative Proceeding. – Juridica International 2002 (7), p. 76. Professor Merusk makes an express reference to the fact that the APA was introduced in a situation where the existing specific laws failed to secure the procedural rights of participants. Although the SSFA did not exist at that time, it may well be argued that the APA is still fit to serve as a sufficient instrument to protect parties to the administrative proceedings also under the SSFA. For a discussion on the rights of the participants in administrative proceedings in Estonia see the same article and also K. Merusk. Administrative Law Reform in Estonia: Legal Policy Choices and Their Interpretation. – Juridica International 2004 (9), pp. 57–59.

<sup>73</sup> APA, § 3 (2).

purpose of discretion, and the general principles of law, taking into account important circumstances and considering legitimate interests".<sup>\*74</sup> As stated by Professor K. Merusk, "For a long time now, the courts' practice in democratic states has accepted the principle according to which officials are not only servants of the state but also helpers of citizens".<sup>\*75</sup> The APA imposes a clear obligation on the administrative body to explain to the participant in the proceedings which applications, evidence, and other documents must be submitted.<sup>\*76</sup> It also imposes a clear and uniform duty on the administrative authority to "grant a participant in proceedings a possibility of providing his or her opinion and objections in written, oral, or any other suitable form" before an act is adopted and to grant "a possibility to provide his or her opinion and objections" before adopting a decision that may damage the rights of the participant in the proceedings.<sup>\*77</sup> The possibility of adopting acts without hearing out the participant in the proceedings has been limited to very exceptional circumstances.<sup>\*78</sup>

Reference is made to the ruling of the Supreme Court of May 2005<sup>\*79</sup> and April 2003,<sup>\*80</sup> in which the court stated that the APA is applicable even in areas where the field-specific law does not make express reference to it. In order to exclude the applicability of the APA, the "specific regulation must be of such volume, density, and detail as is comparable to that of the APA and guarantee to the person procedural legal protection comparable to that under the APA".<sup>\*81</sup> According to the Supreme Court, "Through not applying the APA in proceedings that are not sufficiently regulated by specific laws, the person's rights and obligations may be endangered".<sup>\*82</sup> In the case at hand, the SSFA expressly states that the whole procedure in question is subject to the rules of the APA, taking into account the particularities of the SSFA.<sup>\*83</sup> The above analysis leads to a conclusion that the rules of the APA are applicable as long as clear provisions of the SSFA do not exclude their applicability. Therefore, it is difficult to comprehend how the authorities could have conducted the administrative proceedings under the SSFA without applying to the full extent the procedural guarantees included in the APA. This, in turn, makes it difficult to see why the SSFA was checked against the principle of proportionality or compatibility with European law without regard having been given to the additional guarantees arising from the APA. It is argued here that the internal law included possibilities for guaranteeing the rights of applicants in administrative proceedings. Any violations of persons' right to be heard or to file documents, or of the principle of proportionality, could have been dealt with in the process of individual applications. In each case, the administrative courts could have checked whether the individuals' rights had been taken into sufficient consideration, and if the rights had been violated the court could have annulled the particular decision determining the surplus stock, without necessarily having to set aside the provisions of the SSFA.

The above discussion does not aim at, and is not intended to provide, a final answer to the question of whether or not the Supreme Court was right in declaring the particular provisions of the SSFA at issue to be contrary to the Surplus Stock Regulation. The reasoning is presented in order to demonstrate that there are several counter-arguments to the solution adopted by the Supreme Court. In such a case, the rule on *acte clair* demands that the court relying on it provide reasoning as to why this approach would be equally obvious to the courts of other Member States and to the ECJ.

The fact that reliance on *acte clair* was not sufficiently well motivated is further illustrated by the structure of the decision under discussion. The part of the decision introducing the test for *acte clair* is not followed with reasoning showing the clarity of the situation for the ECJ and the courts of other Member States. The reasoning of the decision reads as follows:

The **Administrative Law Chamber of the Supreme Court is convinced** that article 4, subsection 2, and its points a–c, of European Commission Regulation No. 1972/2003/EC must be considered together and that Member States cannot exclude the application of some subsection of article 4, section 2. In this case, **the chamber considers it obvious** that the SSFA does not guarantee the taking into account of circumstances laid down by article 4, subsection 2, point c of European Commission Regulation 1972/2003/EC.<sup>\*84</sup> [emphasis added]

The above statements solely reflect the internal conviction of the Administrative Law Chamber of the Supreme Court. They are not followed by clear references to the hypothetical position of the courts of other Member

<sup>74</sup> *Ibid.*, § 4 (2).

<sup>75</sup> See K. Merusk, Presumptions of Law for Ensuring Fundamental Rights in Administrative Proceeding (Note 72), p. 83.

<sup>76</sup> APA, § 36.

<sup>77</sup> *Ibid.*, § 40.

<sup>78</sup> *Ibid.*

<sup>79</sup> ALCSCr 5.05.2005, 3-3-1-12-05, paragraph 11.

<sup>80</sup> ALCSCr 4.04.2003, 3-3-1-32-03, paragraphs 12–14.

<sup>81</sup> *Ibid.*

<sup>82</sup> ALCSCr 5.05.2005, 3-3-1-12-05, paragraph 11. The court made a reference to the 17.02.2003 decision of the Constitutional Review Chamber of the Supreme Court in case 3-4-1-1-03 where the Supreme Court stated that the APA is a specific expression of the general principle of good administration. Paragraphs 17–18.

<sup>83</sup> SSFA, § 1 (2).

<sup>84</sup> Paragraph 29 of the discussed decision.

States or the ECJ. This again supports the conclusion that the decision does not set forth sufficient reasoning to justify relying on *acte clair*. Although the ECJ might have come to the same conclusion, it is not obvious from the reasoning of the decision discussed that this would necessarily have been the case.<sup>\*85</sup> Arguments contained in a recent publication of Judge Uno Lõhmus support the same conclusion. After a brief introduction of the reasoning supporting the decision of the Supreme Court, the following is stated in the article referenced: “Were the arguments to the contrary less significant? What should have been done in such a case? Such a situation justifies — and in the case of the Supreme Court obliges — asking for a preliminary ruling. The response of the European Court could have influenced the decision in this complicated yet fundamental court case.”<sup>\*86</sup>

Before concluding the present discussion, it is important to clarify the legal force of a decision of a chamber of the Supreme Court. Legally, the positions set out in a decision of the Supreme Court on the interpretation and application of the law are mandatory for the court conducting a new hearing of a matter.<sup>\*87</sup> Therefore, the effects of the decision should in principle be limited to being *inter partes*. However, in practice the decision was taken as a basis for partial annulment of the SSFA and had the effect of closing most of the pending cases. It is common practice for Estonian courts to take interpretative guidance from the decisions of the Supreme Court. If the law had not been changed after the decision considered here, due to the *inter partes* nature of the judgement, it may in theory have happened that other chambers of the Supreme Court could have decided differently. The legal nature of the position of different chambers of the Supreme Court is further illustrated by analogy with the position taken by the Administrative Law Chamber in another ruling, where it is expressly stated that “[t]he decision of a court of any instance, including the Administrative Law Chamber of the Supreme Court, cannot be a guarantee that the law applied by the court is considered in accordance with the Constitution in constitutional review proceedings as well”.<sup>\*88</sup> Thus, there exists no guarantee that the position adopted by the Administrative Law Chamber would have been upheld by other chambers, lower courts, or the European Court.

## 4. Conclusions

The above discussion illustrates the questions the Supreme Court has been faced with in its practice, when deciding on procedural issues related to effects of EC law. It demonstrates that the parallel existence of European and national law and of the European and national judiciary is a good foundation for addressing substantial questions regarding court procedure. The internal procedural rules do not yet take into account the changed legal circumstances. Internal courts are left with the hurdle of solving the riddle.

The Supreme Court in May 2007 made its first reference for a preliminary ruling.<sup>\*89</sup> The ECJ was asked for guidance regarding the proper interpretation of Regulation (EC) 1257/1999. As for the style of the reference, the court presented extensive reasoning as to why it considered the internal rules to be potentially in violation of EC law and pointed out that the proper solution to the questions is not clear and that there is no consistent practice of the ECJ.

It is also pointed out here that in June 2007 the Supreme Court again saw no need to make a preliminary reference.<sup>\*90</sup> This time, the court pointed to a European Commission working document as a source for interpretation of Community law.

It may be concluded that the Supreme Court has had the possibility to address all major issues related to the preliminary rulings procedure. Despite the minimal quantity of actual references, the decisions and ruling discussed here do send out a clear signal that the Estonian courts are expected to take into account the existence of Community law and the preliminary rulings procedure. As discussed in this article, the Supreme Court has confirmed the right of the internal court to suspend proceedings where the validity of a Community act has been placed under question in the European Court. The Supreme Court decided that the proper legal basis for suspending the proceedings would be a reference to the impossibility of resolving the case before another case is resolved. The national court must provide reasoning that specifies why it believes that there are grounds to doubt the validity of the Community norm. The Supreme Court also pointed out that, preferably, the internal court should make a reference for a preliminary ruling of its own. It has been argued in this article that potentially a better basis for suspending the proceedings would have been to apply by analogy the

<sup>\*85</sup> For example the Supreme Court rightly pointed out that the European Commission had not challenged the SSFA. This may (or may not) refer to the Commission considering the methods introduced in the SSFA to be in conformity with EC law.

<sup>\*86</sup> U. Lõhmus. Kuidas liikmesriigi kohtusüsteem tagab Euroopa Liidu õiguse tõhusa toime (How Does the Court System of a Member State Ensure Effective Functioning of EU Law)? – *Juridica* 2007/3, p. 151 (in Estonian).

<sup>\*87</sup> CACP, § 74.

<sup>\*88</sup> ALCSCr 19.06.2007, 3-3-2-1-07 paragraph 14.3.

<sup>\*89</sup> ALCSCr 14.05.2007, 3-3-1-95-06.

<sup>\*90</sup> ALCSCd 20.06.2007, 3-3-1-26-07.

provision referring to parallel proceedings for constitutional review. It was also argued that the courts should make a reference for a preliminary ruling on their own instead of simply suspending the proceedings with a reference to a parallel case, over the processing of which one has no control.

The discussion showed that the Supreme Court has applied both *acte éclairé* and *acte clair* when refraining from making a reference for a preliminary ruling. In the case related to *acte éclairé*, the Supreme Court also gave an internal-law meaning to the parties' request that the court make a reference and drew a parallel between such requests and a party's proposal to interpret the law in a certain way. When focusing on *acte éclairé*, the court provided for an extensive analysis of the case law of the European Court before coming to a conclusion that the questions presented had been answered. In the case of *acte clair*, the situation was not so clear and this article submits that there is at least some interpretative doubt as to whether the court offered sufficient motivation for its decision to refrain from making a reference. The final outcome of the saga of collection of the fees, which are considered to be state aid incompatible with the Single Market, is yet to be seen. It seems clear from the recent *Lucchini* decision of the ECJ that the national laws and practices, including the potential argument of *res judicata*, which has arisen due to ignoring Community laws and procedure, cannot be applied if they would prevent the recovery of state aid granted in breach of Community law.<sup>91</sup> Therefore, interesting litigation in the internal courts and the European Court can be predicted, and complex questions regarding the relationship between EC and internal law are bound to arise.

<sup>91</sup> C-119/05 (*Lucchini Siderurgia*). – Decided in 2007, not yet published in the ECR.



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# Discourse upon the Constituent Human Rights Developments in the European Union

The aim of this article is to answer questions of the theoretical and practical meaning of the legal developments in the European Union concerning protection of human rights — what are the reasons and possible consequences of such developments for the European Union and its member states?

To begin with, on 22 June 2007, the leaders of the European Union reached an agreement in Brussels on an outline of new rules with the aim to replace the failed Treaty establishing the Constitution for Europe, which was rejected by certain voters in the year of 2005. The Intergovernmental Conference has now been delegated the task of drafting a reformulated treaty by the end of the year 2007. The Reform Treaty is intended to be ratified by the Member States of the European Union, but, as the majority of the above-mentioned developments have not taken place yet and the reformulated Treaty is supposed to preserve many of the key features of the Constitutional Treaty, this article begins with reflection on some earlier relevant legal developments in the European Union: On 9 May 2006, the Republic of Estonia ratified the Treaty establishing the Constitution for Europe. By that act, Estonia demonstrated her approval of the developments in the Constitutional Treaty, including the recognition by the Union of the rights, freedoms, and principles set out in the Charter of Fundamental Rights, and the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms. On 14 December 2005, Estonia ratified Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms Amending the Control System of the Convention, from 13 May 2004.<sup>1</sup> By that ratification, the Republic of Estonia demonstrated her willingness to support the developments concerning human rights in Europe. Estonia has made clear that the accession of the European Union to the Convention on Human Rights would improve the image of the European Union, because such development prevents the creation of a Union's exclusive human rights protection system.<sup>2</sup>

In order to answer the main questions posed at the beginning of this article, the paper has been structured as follows: The first section outlines the historical development of human rights and their protection under European Union law. The second section asks whether human rights are protected effectively in the European Union and tries to establish general criteria for effectiveness of protection of human rights in the European Union. Next, the third section discusses the possible accession of the European Union to the European Convention on Human Rights and the status of the Charter of Fundamental Rights of the European Union.

<sup>1</sup> The Ratification Act of the Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms Amending the Control System of the Convention. – RT II 2006, 1, 2.

<sup>2</sup> The Explanatory Letter to the Draft Ratification Act of the Treaty Establishing a Constitution for Europe. Available at [\(http://web-static.vim.ee/static/failid/370/PSL\\_Seletuskiri21.10.2004/\(16.05.2006\)\)](http://web-static.vim.ee/static/failid/370/PSL_Seletuskiri21.10.2004/(16.05.2006)) (in Estonian).

# 1. Current system for protection of human rights under European Union law

The progress seen thus far is that the European Court of Justice (also referred to as the Court of Justice) has elaborated a unwritten quasi-charter of fundamental rights for the European Union<sup>3</sup>, because at the time of composition and conclusion of the establishing treaties of the European Communities, the parties to those treaties were most interested in economic integration, and they probably hoped that the treaties would apply in areas or by methods not likely to violate human rights.<sup>4</sup>

In addition, formally European Union law does not yet contain a legally binding human rights codification, although the EC Treaty refers to the principle of democracy and other values and today has embraced the four fundamental freedoms, some citizens' rights, and certain economic and social rights; the preamble of the Single European Act affirms the respect of the Member States toward the promotion of "democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter".<sup>5</sup> Article 6 of the Treaty on EU states that "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] and as they result from the constitutional traditions common to the Member States, as general principles of Community law".<sup>6</sup> The respect for fundamental rights was further strengthened in the Treaty of Amsterdam, by extending the jurisdiction of the Court of Justice to actions of the Community institutions.<sup>7</sup> The Treaty of Amsterdam introduced a suspension clause to the Treaty on EU, determining which action should be taken in cases where a Member State seriously and persistently breaches the principles on which the Union is founded.<sup>8</sup> For a considerable time, those have remained the only written references to rights in primary European Union law.

The absence of a legally binding codification of human rights from European Union law could not have meant that the Member States or institutions of the European Union might violate the human rights of the citizens of the European Union by taking or failing to take action. As stated above, for a long time the task of constitutionalisation for the European Community of human rights belonged to the Court of Justice. The Court of Justice perhaps started to assume this role in the year 1969, in the case of *Erich Stauder v. City of Ulm*, pronouncing that it would protect "the fundamental rights enshrined in the general principles of Community laws".<sup>9</sup> The pronouncement of the Court of Justice was developed further in dialogue with the constitutional courts of the Member States, and here is essential the famous case of *Handelsgesellschaft*.<sup>10</sup> The Court of Justice developed its pronouncements about human rights inter alia in the cases of *Nold*<sup>11</sup>, *Prais*<sup>12</sup>, *National Panasonic*<sup>13</sup>, *Pecastaing*<sup>14</sup>, *Hauer*<sup>15</sup>, and *Familienpress*.<sup>16</sup> These cases recognise the fundamental rights as part of the principles of Community law but do not solve the problem of identification of such rights. In these cases, the Court of Justice referred to the human rights in the Convention on Human Rights and the constitutions and legal acts of the Member States as part of the principles of Community law. The Court of Justice and the basic treaties of the European Union refer to the Convention on Human Rights, because some Member States of the European Communities had acceded to the Convention on Human Rights before the entrance into force of the treaties establishing the European Communities, and consequently the aim of the establishing

<sup>3</sup> See D. S. Binder. *The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Action*. – Harvard Jean Monnet Working Paper Series 4/95.

<sup>4</sup> See G. More. *The Principle of Equal Treatment: From Market Unifier to Fundamental Right?* – P. Craig, G. De Búrca (Eds.). *The Evolution of EU Law*. Oxford: Oxford University Press 1999, pp. 518–519.

<sup>5</sup> Preamble. Single European Act.

<sup>6</sup> Article 6 EU.

<sup>7</sup> Article 46 EU. See also article 177 EC: Community policy in the area of development co-operation "shall contribute to the general objective of [...] respecting human rights and fundamental freedoms".

<sup>8</sup> According to the suspension clause, some of a Member State's rights (e.g., the voting rights in the Council) may be suspended if the Member State seriously and persistently breaches the principles on which the Union is founded (liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law).

<sup>9</sup> Case C-29/69, *Erich Stauder v. City of Ulm*. – ECR 1969, p. 419.

<sup>10</sup> Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (ECR 1970, p. 1125), where the Court of Justice made clear the supremacy of Community law over internal constitutional law.

<sup>11</sup> Case 4/73, *J. Nold, Kohlen- und Baustoffgrosshandlung v. Commission*. – ECR 1974, p. 491.

<sup>12</sup> Case 130/75, *Vivien Prais v. Council*. – ECR 1976, p. 1589.

<sup>13</sup> Case 136/79, *National Panasonic (UK) Limited v. Commission*. – ECR 1980, p. 2033.

<sup>14</sup> Case 98/79, *Josette Pecastaing v. Belgian State*. – ECR 1980, p. 691.

<sup>15</sup> Case 44/79, *Liselotte Hauer v. Land Rheinland Pfalz*. – ECR 1979, p. 3727.

<sup>16</sup> Case C-368/95, *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*. – ECR 1997, p. I-3689.

treaties could not have been to help the Member States escape from their obligations under international law, including their obligations under the Convention on Human Rights. Since the Member States are responsible for European Community law, this law cannot violate the Convention on Human Rights.

The constitutionalisation of human rights by the Court of Justice has left unsolved the problem of certainty concerning such rights. That the Single European Act and the establishing treaties refer to the rights specified in the Convention on Human Rights and other human rights acts not in terms of rights but as to principles means that those rights do not have direct effect in the European Union. A brief explanation of the foregoing — in the case of *Handelsgesellschaft*, the Court of Justice stressed the supremacy of European Community law over the constitutional laws of the Member States<sup>17</sup>; consequently, there might exist the possibility that the Court of Justice considers Community law to take precedence also where the Convention on Human Rights should be concerned. Therefore, the author of this article supports the view that today the rights protected in the Convention on Human Rights have in the European Community the status of customary law only.

In addition to the problems in the European Union resulting from non-codification of human rights that undermine the principle of legal certainty, there exist jurisdictional problems: the internal courts and the European Court of Human Rights (referred to in this paper also as the Court of Human Rights) supervise the correspondence to the Convention on Human Rights of the internal laws of the Member States and the law under the intergovernmental co-operation, whereas the Court of Justice oversees the Community law arena. At the same time, one cannot submit a complaint against the judgments of the Court of Justice to the Court of Human Rights, because the European Community is not a party to the Convention on Human Rights. Although it is not excluded that a question discussed in the judgment of the Court of Justice might arise indirectly in the Court of Human Rights, the latter court has for political reasons not been willing to review the judgments of the Court of Justice as of a court of an independent international organisation. One may say that double supervision is exercised over human rights under European Union law — by the Court of Justice and the Court of Human Rights. Such a double review system has been found problematic because of the possible divergences in the interpretation of the Convention on Human Rights by those courts that may result in different degree of protection of fundamental rights.

As for a long while the fundamental rights remained undetermined, unwritten concepts, fixed mainly by the Court of Justice, in the year 1989 the European Parliament passed a Declaration on Fundamental Rights and Freedoms, the first provision of a catalogue of fundamental rights. In December 1998, at the Vienna European Council, was composed the Vienna Declaration, which indicated the need for visible rights. At Cologne, the European Council decided to create the project for the Charter of Fundamental Rights of the European Union, with the aim of consolidating the rights on European level into a charter, in order to make the rights more visible. In the year 2000, the Charter of Fundamental Rights of the European Union was adopted as a declaration. Later, this Charter was included in Part II of the Treaty Establishing a Constitution for Europe.

## 2. Are human rights effectively protected in the European Union?

### 2.1. What is effective protection?

The rights to a fair trial and an effective remedy are expressly absent from the written text of the valid constituent treaties of the European Union. Indirectly, the principles of a fair trial and an effective remedy can be derived from article 10 of the EC Treaty, meaning that the internal courts have to guarantee individuals the rights that are created to them under Community law<sup>18</sup>, or meaning that the Member States are obliged to provide sufficient judicial means to ensure effective protection of rights.<sup>19</sup> The principles can be derived also from the Treaty on EU, where fundamental rights and the principle of separation of powers are unified in the statement that the signatories of “this Treaty follow human rights, fundamental freedoms and guarantees deriving from separation of powers”.<sup>20</sup>

Articles 6 and 13 of the European Convention on Human Rights, what is legally binding to the Member States of the European Union and what the Treaty on EU refers to, specify the rights to a fair trial and an effective remedy. The right to court is set forth in article 6 of the Convention on Human Rights, with the meaning

<sup>17</sup> Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*. – ECR 1970, p. 1125.

<sup>18</sup> Article 10 EC directly reads: “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community”.

<sup>19</sup> M. Brearley, M. Hoskins. *Remedies in EC Law*. London: Longman 1994, p. 53.

<sup>20</sup> C. Harlow. *Access to Justice as a Human Right: The European Convention and the European Union*. – P. Alston et al (eds.). *The EU and Human Rights*. Oxford: Oxford University Press 1999, p. 188.

of entitlement to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law. The right to court involves two types of elements or conditions, which must be guaranteed in all Member States adhering to the Convention whenever they apply article 6: firstly, the conditions that are expressly mentioned in article 6 and, secondly, the elements that are not expressly mentioned in article 6.<sup>\*21</sup> An example of the expressly mentioned conditions is the right to court itself. The conditions that are not mentioned explicitly have been developed by the Court of Human Rights. An example of the latter category of conditions is the principle that access to courts should be effective.

Despite the importance of the fair trial and effective remedy, the Court of Justice has not defined these principles for the Community, although the Court of Justice considers the principle of effective access to justice to be a fundamental principle of the Community. In its case law, the Court of Justice has interpreted that principle. The Court of Justice first recognised the principle of effective access to justice in the case of *Simmenthal*.<sup>\*22</sup> The Court of Justice developed that principle further, mainly in the years 1980 and 1990. In the case of *SPA Salgoil*, the latter court explained that the internal courts must effectively protect the interests if these are abridged by infringement of the EC Treaty<sup>\*23</sup>, and in the case of *Bozzetti* it explained that the rights granted by Community law to an individual must be effectively guaranteed in every case.<sup>\*24</sup> In the cases referred to, the main problem was caused by infringement of fundamental rights during the implementation of a Community act, which the Court did not consider justified.<sup>\*25</sup> In the case of *Johnston*, the Court of Justice confirmed that the principle of effective access to justice comes to the Community legal order from the common constitutional traditions of the Member States, and from articles 6 and 13 of the European Convention on Human Rights, which is legally binding for the Member States.<sup>\*26</sup> The Court of Justice has recognised this principle *inter alia* in the cases of *Heylens*<sup>\*27</sup>, *Vlassopoulou*<sup>\*28</sup>, *Borelli*<sup>\*29</sup>, *Dieter Kraus*<sup>\*30</sup>, and others.<sup>\*31</sup> Such extensive case law of the Court of Justice again demonstrates the important role of this Court in constitutionalisation of European Union law. However, since the Court of Justice is not formally bound by the Convention on Human Rights, the Court at least theoretically may interpret article 6 of the Convention on Human Rights restrictively.

One may conclude that in the case law of the Court of Justice the principle of effective access to justice means the obligation to guarantee to individuals all rights conferred on them by Community law. As such, the principle has been included in the Charter of Fundamental Rights, worded as the right to an effective remedy and to a fair trial, meaning the obligation of the Community institutions, as well as the Member States, to guarantee effective access to justice.<sup>\*32</sup>

## 2.2. The right to an effective remedy and to a fair trial in European Union law

Article 47 of the Charter of Fundamental Rights, headed 'Right to an effective remedy and to a fair trial', reads:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

<sup>21</sup> U. Lõhmus (koost.). *Inimõigused ja nende kaitse Euroopas* (Human Rights and their Protection in Europe). Tartu: Sihtasutus Juridicum 2003, p. 147 (in Estonian).

<sup>22</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*. – ECR 1978, p. 629.

<sup>23</sup> Case 13/68, *SPA Salgoil v. Italian Ministry for Foreign Trade*. – ECR 1969, p. 453.

<sup>24</sup> Case 179/84, *Bozzetti v. Invernizzi SpA and Ministero del Tesoro*. – ECR 1985, p. 2301. See also: Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*. – ECR 1978, p. 629.

<sup>25</sup> R. C. Smith. *Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection*. – P. Craig, G. De Búrca (Eds.). *The Evolution of EU Law*. Oxford: Oxford University Press, 1999, p. 308.

<sup>26</sup> Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*. – ECR 1986, p. 1651.

<sup>27</sup> Case 222/86, *Union nationale des entraineurs et Cadres techniques professionnels du football (UNECTEF) v. Georges Heylens and others*. – ECR 1987, p. 4097.

<sup>28</sup> Case C-340/89, *Vlassopoulou*. – ECR 1991, p. I-2357.

<sup>29</sup> Case C-97/91, *Oleificio Borelli*. – ECR 1992, p. I-6313.

<sup>30</sup> Case C-19/92, *Dieter Kraus v. Land Baden-Württemberg*. – ECR 1993, p. I-01663.

<sup>31</sup> See M. Brearley, M. Hoskins (Note 19), p. 54.

<sup>32</sup> Article 47 Charter of Fundamental Rights.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.<sup>\*33</sup>

The Charter of Fundamental Rights is not the only source that reflects the legal development of the right to an effective remedy and to a fair trial in the European Union. Also the work of the Convention that drafted the Treaty establishing a Constitution for Europe based on the real life developments in European Union law and on the needs of the citizens of the European Union. Although the Constitutional Treaty has failed by today, some developments in it and especially the explanations of such developments still remain important for the European Union and are worth quoting, especially during the time preceding the Reform Treaty.

With the aim of making the principle of access to justice visible for the European Union, this principle was included in article I-29 of the Constitutional Treaty, together with the institutional provisions concerning the Court of Justice. The first part of section 1 of article I-29 read:

The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Constitution the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.<sup>\*34</sup>

From this wording one may see that the principle of access to justice has two sides: from one angle the institutions of the Community are obliged to enforce the rights of individuals, and from the other side the internal courts must meet the obligations imposed on them by the constituent treaties, and the emphasis seems to have been put on the national courts.

## 2.3. Evaluation of protection of human rights under European Union law

### 2.3.1. Visibility of rights

As can be seen from the above, the majority of human rights have not been directly and visibly fixed in the legally binding acts of the European Union. This means that people cannot be exactly aware of what rights they actually have. People also remain unaware of how the Court of Justice interprets the rights that are indirectly derivable from different legal acts or conventions. Even if one assumes that the Court of Justice interprets a certain right in a certain way as it has done before, it still is difficult to predict the behaviour of the Court of Justice, as the Court is not formally bound by its previous decisions. What are the exact sources employed by the Court of Justice? What is the status of the judgments of the Court of Human Rights in the legal space of the European Union? One could also discuss whether it is correct that the Court of Justice creates new rights, as at least formally the aim of the courts in a *Rechtsunion* based on the democratic rule of law should not be the fulfilment of the functions of legislator. Set against the principle of legal certainty, such indeterminacy of rights does not conform with the principle of effective access to justice. From another perspective, a legislator cannot act comprehensively as regulator without the fear of being overregulative. If the legislator has not filled a legislative gap, the courts must fill the gap in order to avoid denial of justice. After the Court of Justice has filled the gap, the legislator is free to regulate the area, even if differently from said Court. If, by contrast, the legislator does not regulate the area, the interpretation of the court is valid until the court itself chooses to change its interpretation.

Leaving the question concerning the division of powers between the courts and the legislature aside, one could conclude here that invisibility of human rights in the European Community has had effects acting against the principle of legal certainty and cannot serve the purpose of effective access to justice.

### 2.3.2. Divergences in interpretation of human rights by the Court of Justice and the Court of Human Rights

This article has mentioned already that there are areas in European Union law where double judicial review is exercised over human rights — by the Court of Justice and by the Court of Human Rights. Such a double review system has been considered problematic, because divergences in interpretation of the Convention on Human Rights by these two courts may result in a different degree of protection of fundamental rights for the citizens of the European Union. It is questionable whether such problems can be overcome by human rights codification in a constituent treaty of the European Union, because this does not exclude the possibility that the Court of Justice may interpret the fundamental rights according to the special needs of the European Community. The latter is proved by the divergences that already exist in the judgments of the two different

<sup>33</sup> Article 47 Charter of Fundamental Rights. Compare with article 6 ECHR.

<sup>34</sup> Article I-29 TEC.

courts concerning these self-same issues.<sup>\*35</sup> Some such divergences may be caused by the fact that the Court of Justice derives its solutions from Community interest when interpreting human rights while the Court of Human Rights proceeds from concern for individual interest. The divergences should be avoided, because if different courts resolve identical issues differently, they may create double minimum standards, which may harm the universal meaning of human rights. For example, the judges of the Member States of the European Union who in parallel belong under the review system of the Court of Justice and of the Court of Human Rights may find it confusing to determine which court's interpretation they should follow. To avoid acting against the universal nature of human rights, attempts to make uniform the human rights legislation, as well as the case law, have been made in the European Union. As a consequence of such attempts at unification, it has been decided that the European Union adhere to the European Convention on Human Rights. It has been hoped that, were there one supreme court of ultimate human rights review in Europe, it would be easier to avoid divergence between the interpretations of the Court of Justice and the Court of Human Rights. The problem of divergent interpretation cannot be solved by the Charter of Fundamental Rights of the European Union, because the Charter does not foresee universal scope of protection.

### 2.3.3. Problems concerning the scope of judicial review

In addition to the problems concerning the invisibility of rights, double supervision, and the consequent possible double minimum standards, there exists another problem. Over the area of European Union law falling outside the scope of the first pillar, supervision can be exercised by national courts and the Court of Human Rights but not by the Court of Justice. At the same time, the acts taken under the second and third pillar affect the rights of the citizens of the European Union in the same way as do the acts taken under the first pillar. One may even assume that the acts taken under all three pillars affect the rights of individuals as acts of a single organisation, because the pillar areas are growing increasingly interrelated. Although the Court of Justice does not have jurisdiction over the acts taken under the second and third pillars, this cannot mean that basic rights may be violated by such acts. Therefore, at present, the Court of Human Rights has direct jurisdiction over the second and third pillars. If the Court of Justice and the Court of Human Rights now interpret rights differently, this may mean double human rights standards within the same organisation — the European Union. This problem could be overcome, one hopes, by the merger of the three pillars, which *inter alia* means wider jurisdiction of the Court of Justice.

### 2.3.4. Problems under the first pillar concerning the *locus standi* of an individual

After the merger of the three European Union pillars, one will still face the problems that today characterise the first pillar area. All these problems affect protection of human rights, because a separate human rights action is absent in the European Community and, consequently, a human rights question may arise in each set of proceedings. Therefore, this article further investigates the general system of judicial remedies of the Community.

Today, individuals have more than one possibility in terms of ways to approach the Court of Justice if their rights seem to be violated by a Community act. Generally, such possibilities are foreseen in articles 230, 241, and 234 of the EC Treaty. If one examines these possibilities more closely, one finds the opportunities to be quite constrained. Firstly, article 230 (4) contains limits concerning the name of a contested act, as, according to the literal interpretation of the text of article 230 (4), an individual may initiate proceedings against a decision addressed to that person or against a decision that, though in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.<sup>\*36</sup> Secondly, if the act is not addressed to the concrete person, it must be of direct and individual concern to said person.<sup>\*37</sup> Thirdly, article 230 (5) foresees the time limit for bringing the action: an affected individual may approach the Court of Justice only within two months of the publication of the measure, or of the plaintiff's notification of it, or, in the absence thereof, of the day on which it came to the knowledge of the latter.<sup>\*38</sup> Section 5 of article 230 means that, even if an implementing measure will be taken on the basis of an allegedly invalid act, an individual has no right to plead for annulment of the basic act after the deadline foreseen in article 230 (5). From one

<sup>35</sup> For example, the Court of Justice has constrained the rights written in the ECHR more than the Court of Human Rights. For example, in the Case *Hoechst* the Court of Justice stated that the written in section 1 of article 8 ECHR inviolability of private rights does not embrace the territories and buildings of the commercial actors. In the Case *Niemietz*, the Court of Human Rights stated that this right embraces the territories and buildings of the commercial actors. See *Niemietz v. Germany*, Judgment of 16.12.1992, application No. 13710/88. – ECHR Series A (1992) No. 251-B; Case 46/87, *Hoechst v. Commission*. – ECR 1989, p. 2859. There have also existed other divergent cases. See comparatively: *Funke v. France*, Judgment of 25.02.1993, application No. 10828/84. – ECHR Series A (1993) No. A256-A; Case C-374/87, *Orkem*. – ECR 1989, p. 3283, etc. Referred to in U. Löhms (Note 21).

<sup>36</sup> Article 230 (4) EC.

<sup>37</sup> Article 230 (4) EC.

<sup>38</sup> Article 230 (5) EC.

standpoint, the time limit protects legal certainty; from the other side, not all possible effects of all acts can always be foreseen.

Although the Court of Justice has interpreted the literal text of article 230 liberally and has, for example, stated that, while it is making its determination concerning the act challenged, it does not derive its determination from the name of that act but considers the actual nature and aims of the act, and although in the cases of UPA<sup>\*39</sup> and Jégo-Quéré<sup>\*40</sup> broader interpretation of direct and individual concern was attempted, the Court of Justice has returned to the Plaumann formula, according to which the measure in question should affect specific natural or legal persons by reason of certain attributes peculiar to them, or by reason of a factual situation that differentiates them from all other persons and distinguishes them individually in the same way as the addressee.<sup>\*41</sup> Consequently, the individuals' opportunities still remain constrained under article 230. Concerning the suggested amendments in the Constitutional Treaty, in article III-365 of that Treaty the word 'decision' was in cases of an 'act addressed to that person' replaced with 'act'. Still, the requirement for direct and individual concern and the time limit remained. Where regulatory acts are involved, any natural or legal person was allowed under the Constitutional Treaty to institute proceedings against a regulatory act that was of direct concern to him or her and did not entail implementing measures.<sup>\*42</sup> Therefore, one may conclude that the possibilities for individuals still remained constrained under article 230.

The judges and legal theorists have confirmed that the European Community has entrusted the effective protection of Community rights to internal courts as to Community courts.<sup>\*43</sup> At the same time, the internal courts cannot decide upon the validity of a Community act but have to refer questions concerning the validity of a Community act to the Court of Justice under article 234 of the EC Treaty. Such reference is broadly in the discretion of the internal courts that may not be bound by the request of the parties to the case being referred.<sup>\*44</sup> At the same time, the Court of Human Rights has avoided deciding upon those cases that are under the jurisdiction of the Court of Justice — therefore, the possibilities of individuals are quite constrained also under article 234.

Concerning the possibility of contesting matters before the Court of Justice, the applicability of a regulation under article 241 of the EC Treaty, although here does not exist such a time limit as foreseen in article 230 (5), involves an application under article 241 being incidental by nature, which means that such a plea can be made not separately but only under the framework of the main proceedings.<sup>\*45</sup>

Because of such problems as those referred to above, the Court in the case of Jégo-Quéré indicated that, in the circumstances, there was no right of action before the national courts and that, when the plaintiff's action for annulment before the Court of First Instance would be dismissed as inadmissible, because the contested Community provisions were of general application, any legal remedy enabling it to challenge the legality of the contested Community provisions would be denied. That way, the applicant would have been deprived of the right to an effective remedy, of the kind guaranteed by the legal order based on the EC Treaty, and in particular under articles 6 and 13 of the Convention on Human Rights.<sup>\*46</sup>

If a Community institution fails to act, an individual may bring an action under article 232 of the EC Treaty. Article 232 states that any natural or legal person may complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion. The Court of Justice has applied to this article the conditions that it has applied concerning article 230, which means that the possibilities afforded to an individual are quite constrained also under article 232.

If a Community institution or its servants have caused damage, the Community shall, in accordance with article 288 of the EC Treaty and the general principles common to the laws of the Member States, make good any damage caused in the performance of their duties. As the action for damages is a separate action, it helps to complement the possibilities provided to individuals.

<sup>39</sup> See order in Case T-173/98, *Unión de Pequeños Agricultores v. Council*. – ECR 1999, p. II-3357; Case C-50/00, *Unión de Pequeños Agricultores v. Council*. – ECR 2002, p. I-6677; Opinion of the Advocate General Jacobs in Case C-50/00, *Unión de Pequeños Agricultores v. Council*.

<sup>40</sup> See judgments in Cases T-177/01, *Jégo-Quéré v. Commission*. – ECR 2002, p. II-2365, and C-263/02 *Commission v. Jégo-Quéré*. – ECR 2004, p. I-3425; Opinion of the Advocate General Jacobs in Case C-263/02 P, *Commission v. Jégo-Quéré*. – ECR 2004, p. I-3425.

<sup>41</sup> Case 25/62, *Plaumann v. Commission*. – ECR 1963, p. 95.

<sup>42</sup> Article III-365 TEC.

<sup>43</sup> See for example: Case C-188/92 *TWD, Textilwerke Deggendorf GmbH. v. Germany*. – ECR 1994, p. I-833.

<sup>44</sup> Article 234 EC.

<sup>45</sup> Article 241 EC.

<sup>46</sup> Cases T-177/01, *Jégo-Quéré v. Commission*. – ECR 2002, p. II-2365, and C-263/02 *Commission v. Jégo-Quéré*. – ECR 2004, p. I-3425.

### 2.3.5. Problems concerning responsibility

All Member States of the European Union are bound by the European Convention on Human Rights. At the same time, neither the European Union nor the European Community is member to the Convention on Human Rights. This means that if an action or inaction of the European Union or European Community violates human rights, the responsibility for such action (or inaction) rests with those Member States that participate in the decision-making procedures of the European Union. Since the institutions of the European Union are acquiring ever more supranational powers, such allocation of responsibility may not be justified.

In addition to the problems indicated above, effective access to justice is constrained by such general 'side factors' as the personality of the deciding judge, which indicates that there can never exist absolutely effective protection of rights, which in itself is a quite undetermined legal concept. The analysis of all such factors is beyond the scope of this article, which only indicates the major legal problems concerning the protection of human rights in the European Union.

## 2.4. The measure for the European Union

In order to move to something more effective, one should, besides measuring the effectiveness generally, and the effectiveness of a concrete 'something', also establish criteria for effectiveness for that concrete 'something'. Therefore, the article now draws attention to some general conditions that should be fulfilled as a prerequisite for being able to talk about the effectiveness of the system for protection of human rights in the European Union, which could serve as the basis for the constitutional developments. The author of this article supports the following recommendations. In order to guarantee effective protection of human rights in the European Union, first, all of the changes should take into account the universal nature of human rights<sup>47</sup> and the need to guarantee principles characteristic to a democratic society. Secondly, deriving from the need to guarantee the principle of legal certainty, human rights should be more or less comprehensively<sup>48</sup> visibly codified. Thirdly, in order to guarantee human rights universally, they should be codified uniformly for the whole of Europe. Fourthly, with the aim of avoiding divergent interpretation of human rights by the Court of Human Rights and the Court of Justice, the jurisdiction of the Court of Justice should in addition to the first pillar embrace the second and third pillars of the European Union — and should be controlled ultimately by the Court of Human Rights.<sup>49</sup> Fifthly, in order for human rights to be applied systematically, they should be guaranteed in the constituent act of the European Union that binds the institutions as well as Member States of the European Union. Sixthly, the enforcement system for guaranteeing human rights should be effective, because without effective enforcement even universally and comprehensively visible human rights cannot be guaranteed. Effective enforcement starts with effective access to court both on internal and on European Union level.

This means that the European Union needs a clear legal basis in order to better guarantee human rights. Such codification should be based on careful scientific research that is grounded foremost in the universal nature of human rights and the historical developments in Europe. The suggestions that were set forth in the Constitutional Treaty are as follows: article I-9 (2)'s "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms" and article I-9 (1)'s "The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights [...]". Both of these developments are still actual in the European Union and will take place despite the failure of the Constitutional Treaty. Below, the article makes a brief attempt to assess whether the accession of the European Union to the European Convention on Human Rights and the legal bindingness of the Charter of Fundamental Rights could guarantee effective protection of fundamental rights in the European Union.

<sup>47</sup> M. Piechowiak. What are Human Rights? The Concept of Human Rights and Their Extra-Legal Justification. – R. Hanski, M. Suksi (Eds.). An Introduction to the International Protection of Human Rights. A Textbook. Turku/Åbo: Institute for Human Rights, Åbo Academy University 1999, pp. 3–13.

<sup>48</sup> "More or less comprehensively" because it is allegedly technically impossible to codify all human rights, since it is impossible to exactly define all human rights. See A. O'Neill. The Protection of Fundamental Rights in Scotland as a General Principle of Community Law – the case of Booker Aquaculture. – European Human Rights Law Review 2000/1, p. 24.

<sup>49</sup> See A. von Bogdandy. The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union. – Common Market Law Review 2000/6, pp. 1307–1338.

### 3. The developments toward more effective human rights protection for the European Union

#### 3.1. Should the European Union accede to the Convention on Human Rights?

The accession of the European Union to the Convention on Human Rights would make human rights more visible for individuals. Such accession would eliminate discrepancies from interpretations of human rights by the Court of Human Rights and the Court of Justice, and by so doing guarantees the principle of legal certainty, more systematic application of human rights, and gives the citizens the same degree of protection of their fundamental rights at the European Union level as they enjoy in their home states. It would enable direct control by the Court of Human Rights over the compatibility of European Union institutions' acts with the Convention on Human Rights, and it would enable responsibility of the European Union for human rights violations.

Accession of the European Union to the Convention on Human Rights required an amendment to the Convention on Human Rights, as only a state could become a party to the Convention on Human Rights, not an international organisation. Such amendment was made with Protocol 14 to the Convention on Human Rights, which needs to be accepted by all States Parties to the convention. According to the Court of Justice, an amendment to the basic treaties of the European Community was necessary as well, because accession to the Convention on Human Rights means, in addition to integration of all of the provisions of that Convention into the European Community legal order, entry into a distinct international system.<sup>\*50</sup>

Other practical and technical problems that accompany the accession of the European Union to the Convention on Human Rights will be addressed in regulation in the accession treaty to the Convention on Human Rights. At the same time, accession does not solve all of the problems concerning protection of human rights in the European Union. First, if the European Union accedes to the Convention on Human Rights, the rights accompanying technical and scientific developments, as well as many economic, social, and cultural rights that the Convention on Human Rights does not include, would still remain uncoded. Secondly, accession to the Convention on Human Rights means joining a supervisory system, which places the European Union institutions under the jurisdiction of the Court of Human Rights, thus altering the position of the Court of Justice as that of the highest court of the European Union. Consequently, some related questions discussed by the European (Future) Convention are whether the Convention on Human Rights would, besides decisional supremacy, have normative supremacy — a hierarchically higher position over the European Union *acquis*, making the politics of the European Union perhaps determined too much by the Court of Human Rights.<sup>\*51</sup> Because the judicial interpretation gives content to laws, the ultimate authority to interpret laws has been regarded as that of the law-giver, not the person who first wrote or spoke such laws.<sup>\*52</sup> The European (Future) Convention still came to the conclusion that the Court of Justice abandons only part of its human rights independence.<sup>\*53</sup> There still remain some other questions, such as whether the accession can absolutely abolish the possibility of the Court of Justice and the Court of Human Rights coming to different conclusions regarding the interpretation and application of the Convention on Human Rights, which are difficult to answer.

#### 3.2. The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union, worked out by the first convention method in the Union<sup>\*54</sup>, was adopted at the Nice Summit in the year 2000 in the form of a legally non-binding declaration.<sup>\*55</sup> One purpose of this Charter — as emphasised in the Preamble of the Charter — is to strengthen the protection of fundamental rights in the European Union by making them more visible for the citizens; therefore, the Charter can be seen as a way to bring the European Union closer to the citizens. The persons given obligations by the Charter are the institutions, bodies, offices, and agencies of the European Union, and the Member States

<sup>50</sup> Opinion 2/94. – ECR 1996, p. I-1759. See also P. Alston et al (Eds.). The EU and Human Rights. Oxford: Oxford University Press 1999.

<sup>51</sup> European Convention. Report of Working Group II "Incorporation of the Charter / Accession to the ECHR". Brussels, 22 October 2002, CONV 354/02, WG II 16.

<sup>52</sup> H. L. A. Hart. The Concept of Law. Oxford: Clarendon Press 1997, p. 141.

<sup>53</sup> European Convention. Report of Working Group II "Incorporation of the Charter / Accession to the ECHR" (Note 51).

<sup>54</sup> Document CHARTE 4487/00 (CONVENT 50), 28 September 2000.

<sup>55</sup> European Council Conclusions from Nice, 7–10 December 2000. See also J. B. Liisberg. Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a Fountain of Law or Just an Inkblot? – Common Market Law Review 2001/28, pp. 1171–1199.

when they are implementing Union law, in the exercise of their respective powers.<sup>\*56</sup> The Charter is expected to become legally binding.

The Charter has taken up almost all fundamental rights that have been written down in the Convention on Human Rights; therefore, it can be deduced that the Charter confirms the role of the Convention on Human Rights in the legal order of the European Union. In addition, the Charter includes — besides the civil and political rights of the Convention on Human Rights — economic and social rights, which are not addressed in said Convention.<sup>\*57</sup> This means that, compared to the Convention on Human Rights, the Charter makes visible also economic, social, and cultural rights for the European Union. Such development enables more systematic interpretation of human rights. Although the Charter is already binding in the legal space of the European Union through the interpretations of the Court of Justice, other Union institutions, the Court of Human Rights, and applications of the citizens of Europe, the formal bindingness of the Charter would guarantee better realisation of the principle of legal certainty. Important is that the Charter includes also ‘new’ human rights that have been born in the course of later scientific and technical developments.<sup>\*58</sup>

In addition to the positive aspects, one may see some problems concerning the Charter, such as unclear meaning of rights, unclear systematic limitation of rights, and unclear scope of application of the horizontal articles of the Charter. Under criticism has also been the choice of rights in the Charter.

The Charter of Fundamental Rights cannot in itself guarantee uniform application of human rights by the Court of Justice and the Court of Human Rights; it could even widen the discrepancies between these courts. As seen from the discussion above, the divergences in the case law of the Court of Justice and the Court of Human Rights could be reduced when the Court of Human Rights has the status of directly controlling court over the Court of Justice. Therefore, the author of this article supports both developments: the accession of the European Union to the Convention on Human Rights and the Charter of Fundamental Rights.

## 4. Conclusions

This article first concluded that the judicial protection of human rights has not been effective in the European Union; therefore, questions concerning the accession of the European Union to the Convention on Human Rights and the status of the Charter of Fundamental Rights of the European Union were discussed. In addition, the article tried to establish criteria that should generally help to guarantee effective protection of human rights in the European Union. With regard thereto, the article concluded that, in order to guarantee effective protection of human rights in the European Union, at least the following conditions should be met:

- human rights should be changed such that they are more visible by their uniform codification for the whole of Europe;
- (at least human-rights-related) jurisdiction of the Court of Justice should, in addition to the first pillar of the European Union, embrace the second and third pillars;
- the human rights protection system should ultimately be controlled by one court;
- human rights should be guaranteed in a constituent act for the European Union; and
- the enforcement system for protection of human rights should be effective.

The author is of the opinion that the accession of the European Union to the Convention on Human Rights would guarantee human rights more universally in Europe and that such accession takes into account European historical traditions and values. The accession to the Convention on Human Rights would make human rights more visible for individuals. Such accession would to a certain extent eliminate differences from interpretations of human rights by the Court of Human Rights and the Court of Justice, thus guaranteeing the principle of legal certainty, and systematic application of human rights. Such accession would give the citizens the same degree of protection of their fundamental rights at the European Union level as they enjoy in their home states; it would enable direct control by the Court of Human Rights over the compatibility of European Union institutions’ acts with the Convention on Human Rights; and it would enable the responsibility of the European Union for human rights violations.

<sup>56</sup> Article II-112 TEC.

<sup>57</sup> About the sources of the Charter see *supra*, European Convention. Report of Working Group II “Incorporation of the Charter / Accession to the ECHR” (Note 51). See also A. W. Heringa. Towards an EU Charter of Fundamental Rights? – *Maastricht Journal of European Comparative Law* 2000/2, p. 14; M. Gijzen. The Charter: A Milestone for Social Protection in Europe? – *Maastricht Journal of European Comparative Law* 2000, No. 2, pp. 33–48; K. Lenaerts, E. De Smijter. A “Bill of Rights” for the European Union. – *Common Market Law Review* 2001/38, p. 299; T. Eicke. The European Charter of Fundamental Rights — unique opportunity or unwelcome distraction. – *European Human Rights Law Review* 2000/3, pp. 280–296.

<sup>58</sup> European Convention. Report of Working Group II “Incorporation of the Charter / Accession to the ECHR” (Note 51).

The Charter of Fundamental Rights would guarantee protection of human rights on a wider level than citizenship; it clearly codifies fundamental rights, including rights not set forth in the Convention on Human Rights, and some 'new' rights. The Charter helps to approximate the application of human rights by the European Union and internal institutions, as it states that it would be binding upon European Union institutions, and upon the Member States to the extent that they implement Union law.

Therefore, the accession of the European Union to the Convention on Human Rights and the Charter of Fundamental Rights imply more effective protection of human rights. At the same time, the accession to the Convention on Human Rights and the Charter of Fundamental Rights do not eliminate all problems with application of human rights, because, for example, there still remain three systems of controlling bodies where human rights are concerned in the European Union — the internal courts, the Court of Justice, and the Court of Human Rights. When the European Union accedes to the Convention on Human Rights and the majority of human rights in the European Union are applied under the supervision, and consequently in the light of the interpretations of, the Court of Human Rights, which serves the aim of uniform application of human rights, such development in itself cannot reduce the problems concerning individual standing.



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# Precautionary Environmental Protection and Human Rights<sup>\*1</sup>

## 1. Introduction

The precautionary principle and the fundamental right to a clean environment can be considered the two ‘rising stars’ of contemporary environmental law.

Implementation of a precautionary principle was induced by the need to define the foundation for formation of environmental policy in a situation of predominant scientific uncertainty regarding the possible negative impact of human activities on the environment. Though scientific methods have undergone rapid development in the last few years, human ability to interpret complicated processes related to the environment has not increased remarkably. The reliability of the methods in use is clearly insufficient for giving political decision-makers trustworthy information enabling them to foresee the consequences.

Elements of the relationship between environmental protection and human rights have become the core of lively debate in recent years.

Recognition of the connection between environmental protection and human rights derives from the principle according to which human rights are inseparable from each other and directly dependent upon each other.<sup>\*2</sup> On account of this, full realisation of civil and political rights is impossible when economic, social, and cultural rights are not guaranteed. Therefore, continuous success in guaranteeing human rights depends upon the degree of success of national and international policy in economic and social spheres. It is impossible to distinguish the requirement to guarantee the right to life, respect to private and family life, health protection, and other human rights from the requirement to guarantee a normal living environment to everyone. The present article aims to shed some light on the interrelations between the precautionary principle and classical human rights, with examination also aimed at addressing a key question: Is it enough to proceed from an existing list of human rights, or is it necessary instead to recognise new, specific environment-related fundamental rights?

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<sup>2</sup> K. Reid, *A Practitioner's Guide to the European Convention on Human Rights*. London: Sweet & Maxwell 1998, p. 212.

## 2. Civil and political rights and the quality of the environment

The European Convention on Human Rights<sup>\*3</sup> provides us with several human rights — the right to respect for private and family life, the right to peaceful enjoyment of possessions (article 1 of the First Protocol), and the right to life<sup>\*4</sup> — which can be connected with the quality of our environment. In addition to these main articles, connections between protection of the environment and human rights can be found also in article 10 of the convention, which asserts the right to access and to spread information.<sup>\*5</sup> Several economic, social, and cultural rights are related to the environment also; these rights are subject to discussion in the sections of the paper that follow.

### 2.1. The right to respect for private and family life

Starting with the Lopez Ostra case<sup>\*6</sup>, the right to respect for private and family life has been the principal factor that plaintiffs, as well as the European Court of Human Rights (ECHR), have connected with the pollution of the environment. In the Lopez Ostra case, the ECHR admitted that “severe environment pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely”.<sup>\*7</sup> In this case, the complaint was made against the omission of a state (more precisely, of the local municipality), which tolerated continuation of activities of an enterprise in grave violation of waste management rules, thus hindering the private life of Lopez Ostra and her family near the enterprise. The Lopez Ostra case created a precedent, which served as a basis for cases to follow.

The second case worthy of mention in this category is that of Guerra.<sup>\*8</sup> In this case as well, a complaint was made against an omission of the state, which did not inform (as addressed in article 10) the plaintiffs about the dangers threatening their private and family life.<sup>\*9</sup> The ECHR did not apply article 10, finding instead that violation of article 8 had taken place.<sup>\*10</sup> Thus, it appears that, according to the ECHR, every person has a right to a certain ‘private space’, intruding into which in different ways (including via pollution of it) is potentially a violation of human rights.

### 2.2. The right to life

No uniform opinion on the content of the right to life exists. Classical opinion equates the right solely with the right to ‘physical life’, whereas other qualitative aspects of life usually are connected with economic, social, and cultural rights. According to another school of thought, the right to life includes also minimal elements of quality of life.<sup>\*11</sup> Differences of interpretation are conspicuous also as regards the ECHR and the UN Commission on Human Rights (UNCHR). The UNCHR has interpreted the right to life in a quite broad way, declaring that the “state cannot perform its obligation to protect life without taking measures to decrease mortality of infants, to antedate industrial accidents, and to protect environment”.<sup>\*12</sup> The ECHR approaches the right to life from a significantly narrower perspective, treating it as the above-mentioned right to ‘physical life’. As it is unlikely for any European country at the present time to permit any such activities as directly threaten the physical existence of humans, it is understandable why the ECHR has not seen a connection between polluting environment and the right to life. However, at the same time some judges have expressed an opinion

<sup>3</sup> Available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (15.07.2007).

<sup>4</sup> More or less similar connections can be found also from the International Covenant on Civil and Political Rights (available at <http://www.ohchr.org/english/law/ccpr.htm>) and from regional human right instruments.

<sup>5</sup> See P. Sands. Human Rights, Environment and the Lopez-Ostra case: Context and Consequences. — European Human Rights Law Review 1996/6, pp. 597–618.

<sup>6</sup> Lopez Ostra v. Spain, judgment of 9 December 1994, application No. 16798/90. — A303-C. Also available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=1367215&skin=hudoc-en> (15.07.2007).

<sup>7</sup> *Ibid.*, paragraph 51.

<sup>8</sup> Guerra and others v. Italy, judgment of 19 February 1998, application No. 14967/89. — Reports 1998-I. Also available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=1367215&skin=hudoc-en> (15.07.2007).

<sup>9</sup> See C. Miller. The European Convention on Human Rights: Another Weapon in the Environmentalist’s Armoury. — Oxford Journal of Environmental Law 1999 (11), pp. 158–176.

<sup>10</sup> The violation was too evident in both cases for the question of taking into account risks covered by uncertainty to arise.

<sup>11</sup> See R. Desgagne. Integrating Environmental Values into the European Convention on Human Rights. — American Journal of International Law 1995 (89) 2, p. 267.

<sup>12</sup> UN Doc CCPR/C/SR.222, paragraph 59.

according to which pollution of the environment is connected with the right to life at least to the same extent as to the right of peaceful enjoyment of private and family life.<sup>\*13</sup>

### 2.3. The right to peaceful enjoyment of possessions

*Arrondelle v. the United Kingdom*<sup>\*14</sup> was one of the first cases indicating connection between environment and ownership. The plaintiff asserted that the high noise level of an airport had reduced the value of his immovable at a fundamental level. Though the case did not reach a resolution later, it is essential to note that the ECHR declared the case admissible, basing this decision on article 8 of the European Convention on Human Rights, as well as on article 1 of the First Protocol. Yet the standpoints of the ECHR and of the Commission, regarding the content of the right in question and readiness to apply it in cases related to the environment, are not consistent at all. Thus, in the case *Rayner v. the United Kingdom*, the Commission indirectly pointed out that this article (i.e., article 1 of the First Protocol) is meant mainly to protect against arbitrary confiscation of possession and does not guarantee in principle free enjoyment of property in pleasant environment.<sup>\*15</sup> A standpoint of this nature does not favour applying this provision in an environmental context and allows applying the provision only in cases where the environmental impact is of an extent with a substantial influence on the market value of the immovable concerned. The ECHR yet has favoured broader interpretation and has found that article 1 of the First Protocol is applicable also in cases dealing with substantial influencing of “the content of the right to possession”.<sup>\*16</sup>

On the basis of the practice of the ECHR up to now, one can draw the conclusion that human rights and quality of environment, in the context of civil and political rights, are connected mainly in relation to the right to enjoy private and family life.<sup>\*17</sup> Such a choice on the part of the court is, in addition to the reasons mentioned above, probably caused by the opportunities to prove the evidence of damage and therefore the existence of a victim. Therefore, the practice of the ECHR has to be researched from the standpoint of the precautionary principle.

## 3. The precautionary principle in the context of civil and political rights

Human rights monitoring bodies have often faced a situation where decisions have to be made under conditions of too little information and uncertainty of what information is available — in spite of the fact that the ECHR does not lay the burden of proof strictly on the plaintiff and that states have to co-operate with the ECHR and to present additional data (e.g., the results of environmental inspection or monitoring), with the ECHR itself entitled to gather additional data, according to article 38, section 1 (a) of the European Convention on Human Rights). Where environmental matters are concerned, a situation where a violation of environmental quality requirements is not sufficiently obvious appears quite often; thus, additional research and proof are required. The fact that environmental quality standards in Europe are quite high and established with a certain caution and that violation of them need not necessarily involve damage has to be taken into account too. Summarising the above, one finds it obvious that, as a rule, in environment-related cases we are dealing with not direct damages but supposed damages. Therefore, the main question is this: Does the risk of damage alone constitute sufficient grounds for recognising the person as a ‘victim’ that he has the protection of the ECHR also? The court has usually required the presence of damage and proving it according to the standard ‘beyond reasonable doubt’. M. Kamminga has found that this is caused by the fact that the ECHR, unlike other regional human rights protection systems, has not often encountered outrageous and systematic violations of human rights accompanied by the state’s refusal of its co-operation in providing evidence.<sup>\*18</sup> In a situation like this, providing proof of a high standard is considered to be justified. The author of the present article admits that

<sup>13</sup> See Dissenting opinion of Judge Jambre in *Guerra* case (cited from: A. Andruskevych. *Environmental Human Rights Protection in the European Court of Human Rights*. – Access to Justice Handbook 2000, p 18.).

<sup>14</sup> Cited from M. Kamminga. *The Precautionary Approach in International Human Rights Law*. – D. Freestone, E. Hey (eds.). *The Precautionary Principle and International Law. The Challenge of Implementation*. Kluwer Law International 1996, pp. 174–175.

<sup>15</sup> Commission decision, *Powell and Rayner v. the United Kingdom*, application No. 9310/81, p. 14. Available at <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=2190959&skin=hudoc-en&action=request> (17.09.2007).

<sup>16</sup> See R. Desgagne. *Integrating Environmental Values into the European Convention on Human Rights*. – *American Journal of International Law* 1995 (89) 2, p. 278.

<sup>17</sup> See M. Acevedo. *The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights*. – *New York University Environmental Law Journal* 2000 (8), pp. 438–496.

<sup>18</sup> See M. Kamminga (Note 14), p. 177.

this kind of argument may be justified in other areas but not in the environment-related sphere, where even obvious readiness of a state for co-operation will not necessarily reduce scientific uncertainty. An innovative approach to standards of proof can be found in the ECHR case *Fadeyeva v. Russia*.<sup>\*19</sup> In 1990, the Government of the Russian Federation adopted a programme 'On Improving the Environmental Situation in Cherepovets'. The programme stated that "the concentration of toxic substances in the town's air exceeds the acceptable norms many times" and that the mortality rate of Cherepovets residents was higher than average. It was noted that many people still lived within the steel plant's 'sanitary security zone'. Under the programme, the steel plant was required to reduce its toxic emissions to safe levels by 1998. In 1995, the applicant (*Fadeyeva*), with her family and various other residents of the block of flats where she lived, filed a court action seeking resettlement outside the buffer zone. The applicant claimed that the concentration of toxic substances and the noise levels in the sanitary security zone exceeded the maximum permissible limits established by Russian legislation. The court observed that, according to the applicant's submission, her health had deteriorated as a result of her living near the steel plant. The only medical document produced by the applicant in support of this claim is a report drawn up by a clinic in St Petersburg (see paragraph 45 of the judgment). The court found that this report did not establish any causal link between environmental pollution and the applicant's diseases. The applicant presented no other medical evidence that would clearly connect her state of health to high pollution levels at her place of residence. The court recalled at the outset that, in assessing evidence, the general principle has been to apply the standard of proof 'beyond reasonable doubt'. Such proof may follow from the co-existence of sufficiently strong, clear, and concordant inferences or of similar, unrebutted presumptions of fact. It should be noted also that it has been the court's practice to allow flexibility in this respect, taking into consideration the nature of the substantive right at stake and any evidentiary difficulties involved. In certain instances, solely the respondent government has access to information capable of corroborating or refuting the applicant's allegations; consequently, a rigorous application of the principle *affirmanti, non neganti, incumbit probatio* is impossible.

In addition to a high standard of proof, the problem consists also, as is stated above, in the fact that as a general rule the ECHR requires the presence of damage, the fact that a person has been transformed into a victim of a violation that already has taken place. This principle does not enable protection of persons who endure risk of possible violation. The Commission and the ECHR have taken a similar approach in other cases also, such as the cases *L, M, and R v. Switzerland*<sup>\*20</sup> and *Balmer-Schafroth and others v. Switzerland*.<sup>\*21</sup>

As regards the standard of proof and presence of damage, a significantly milder position can be observed in cases of other human rights protection bodies — e.g., the American Human Rights Commission in the case of the Yanoman Indians. The Yanoman claimed that their right to life was violated by the fact that building a speedway on their lands might bring with it migration of strangers, who might, in turn, bring infectious diseases thus far unknown to the Yanoman. The court upheld the complaint, finding that danger of emerging damage constitutes sufficient grounds for presence of violation.<sup>\*22</sup> M. Kamminga argues that the American Human Rights Commission is softer, too, regarding the standard of proof and does not require application of the standard 'beyond reasonable doubt', instead applying assessment of the balance of probability.<sup>\*23</sup>

To return to the practice of the ECHR, it has to be noted that, regardless of general requirement of the existence of damage and favouring *ex post* defence, hints to application of precaution do exist in the practice of the ECHR also. In several cases, regarding homosexuals and single mothers, the court has not required proof of the complainants already having become victims of violation of the rights protected by the European Convention on Human Rights. It was enough for the plaintiffs if they were able to prove that a 'risk' of such a violation existed.<sup>\*24</sup>

From the standpoint of application of the precautionary principle in the context of civil and political rights, the above-mentioned case of *Balmer-Schafroth and others v. Switzerland* is remarkable. Plaintiffs who lived in close proximity to the Mühleberg nuclear power station (in the first emergency zone) asserted that the power station did not conform to safety requirements and that, because of the mistakes made in constructing the station, the risk of accidents at this station was higher than usual. On the basis of articles 6 and 13 of the European Convention on Human Rights, the plaintiffs required necessary safety measures to be applied as a preliminary measure. The court found that the complaint was not justified, as the plaintiffs had failed to prove direct connection between the operation of the nuclear power station and alleged violation of their rights. The

<sup>19</sup> *Fadeyeva v. Russia*, judgment of 9 June 2005, application No. 55723/00. — Reports of Judgments and Decisions 2005-IV. Also available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=1367215&skin=hudoc-en> (15.07.2007).

<sup>20</sup> *L, M and R v. Switzerland*, decision of 1 July 1996, application No. 30003/96. Available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=1367215&skin=hudoc-en> (15.07.2007).

<sup>21</sup> *Balmer-Schafroth and others v. Switzerland*, judgment of 26 August 1997, application No. 67/1996/686/876. — Reports of Judgments and Decisions 2000-IV. Also available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=1367215&skin=hudoc-en> (15.07.2007).

<sup>22</sup> See R. Desgagne, Integrating Environmental Values into the European Convention on Human Rights. — *American Journal of International Law* 1995 (89) 2, pp. 266–267.

<sup>23</sup> See M. Kamminga (Note 14), pp. 177–178.

<sup>24</sup> See *Ibid.*, pp. 180–183.

plaintiffs were unable to prove that they were personally placed in ‘specific, grave, and imminent danger’. In this case, the court followed the routine practice. The case is important from quite a different standpoint. That is, seven judges issued a joint dissenting opinion, based *expressis verbis* on the precautionary principle, in which they deemed it necessary to guarantee human rights also in cases involving not only dangers but possible dangers and risks also.<sup>\*25</sup>

The ECHR has demonstrated its predisposition to use ‘language’ characteristic to a precautionary principle in the *Hatton and others v. the United Kingdom* case.<sup>\*26</sup> Ruth Hatton, who lived near Heathrow Airport and suffered from sleep disturbances caused by night flights, claimed that article 8 had been violated in her regard. One of the main problems the court had to deal with was the question of to what extent night flights disturb sleep and, deriving from this, whether Hatton and the others were victims of violation or not. Research carried out by the UK government in 1992 did not confirm dangerous influence of the flights. The court admitted that, as the influence of night-time flights on sleep had not been thoroughly investigated<sup>\*27</sup>, scientific uncertainty remains. Notwithstanding the uncertainty regarding damage, the court ruled that a violation of article 8 of the European Convention on Human Rights had taken place.<sup>\*28</sup> However, no far-reaching conclusions can be drawn yet from the *Hatton* case because the case was appealed and not decided in favour of the applicants. Elements of precautionary language can be found also in ECHR case *Öneryıldız v. Turkey*<sup>\*29</sup>, wherein the applicant was suffering from environmental pollution that was partly covered by scientific uncertainty.

From the above, it is possible to draw the following conclusions. Amongst civil and political rights, the right to peaceful enjoyment of private and family life can be connected with environmental protection most closely. Obviously, this is caused by the stringent requirements of the ECHR. Concerning rights protecting life and property, the requirement of existence of damage (or, at least, a sufficient probability and imminence of danger) obstructs satisfaction of environment-related complaints. In cases dealing with protection of private and family life, the standards applied by the court can be fulfilled more easily. The court indicated, in the cases of *Lopez-Ostra*, *Guerra and Hatton* as well as in the *Öneryıldız v. Turkey* case that the constant fear of possible future damage (odours, noise, etc.) forms sufficient grounds to take this as a violation of private and family life. Such a position on the court’s part may be suited quite well to environmental protection based on the precautionary principle.

## 4. Quality of the environment — economic, social, and cultural rights

The right to health protection is, amongst economic, social, and cultural rights, connected with environmental protection and application of the precautionary principle most closely.<sup>\*30</sup>

Arising from a relatively new field of international law, international sustainable development law is a phenomenon of recent years. International health law is considered to be one component of international sustainable development law. The foundation of the latter rests on three pillars — the precautionary principle, intergenerational equity, and the right to health protection.<sup>\*31</sup> All three of these components are connected with environmental protection. Hence, international health law recognises environmental pollution as one of the most important dangers to health. At the same time, in addition to such traditional environment-related health risks, like lack of safe and potable water and adequate sanitation, the so-called ‘modern’ risks, such as pollution originating from industry, transportation, and agriculture and genetic pollution, are also taken into account. Scientific uncertainty and, deriving from this, the need for application of the precautionary principle arise often just with regard to the last risks mentioned.

<sup>25</sup> *Balmer-Schafroth and others v. Switzerland*, dissenting opinion of Judge Pettiti, joined by Judges Gölcüklü, Walsh, Russo, Valticos, Lopes Rocha and Jambrek. – Reports of Judgments and Decisions 2000-IV. Also available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=1367215&skin=hudoc-en> (15.07.2007).

<sup>26</sup> *Hatton and others v. the United Kingdom*, judgment of 8 July 2003, application No. 36022/97. Available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=1367215&skin=hudoc-en> (15.07.2007).

<sup>27</sup> *Ibid.*, paragraph 103.

<sup>28</sup> *Ibid.*, paragraph 97.

<sup>29</sup> *Öneryıldız v. Turkey*, judgment of 30 November 2004, application No. 48939/99. – Reports of Judgments and Decisions 2004-XII. Also available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=1367215&skin=hudoc-en> (15.07.2007).

<sup>30</sup> More direct connections with environmental protection can be found also in the right to healthy and safe work conditions and in the right to housing.

<sup>31</sup> See M. Segger, A. Khalfan, S. Nakhjavani (eds.). *Weaving the Rules for Our Common Future: Principle, Practice and Prospects for International Sustainable Development Law*. Montreal: Centre for International Sustainable Development Law 2002, pp. 125–128.

In the Preamble to the Constitution of the World Health Organization<sup>\*32</sup> (WHO), health is defined as follows: “health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” Environmental conditions are indeed one of the most important factors directly affecting this kind of well-being. The European Committee of Social Rights in supervising the fulfilment of the European Social Charter<sup>\*33</sup> (ESC) has repeatedly drawn attention to ambient air pollution, for example, as a causal factor where health risks are concerned.<sup>\*34</sup>

The right to health protection as a fundamental right (the first paragraph of § 28 of the Republic of Estonia Constitution) is part of the tradition of a state with its underpinnings in social welfare and the rule of law.<sup>\*35</sup> The right to health protection functions in the system of fundamental rights as an independent fundamental right, and yet as a value that is applied in limiting other fundamental rights.<sup>\*36</sup> In addition to many national constitutions, rights related to health protection are enshrined also in article 25 (1) of the Universal Declaration on Human Rights<sup>\*37</sup>; in article 12 (1) of the International Covenant on Economic, Social and Cultural Rights<sup>\*38</sup>; in article 11 (1) of the ESC<sup>\*39</sup>, and in article 35 of the Charter of Fundamental Rights of the European Union (CESCR).<sup>\*40</sup> The right to health protection is set forth also in several special human rights treaties.<sup>\*41</sup>

The content of the right to health protection has to be disclosed before one can commence discussion related to application of the precautionary principle in guaranteeing this right. As regards the right to health protection, authors have pointed out two important elements: the right to be free from invasion of health and the right to underlying determinants of health.<sup>\*42</sup> Accordingly, the character and the amount of state obligation is the main question. The question of what may constitute violations by the state is of essential importance also.

The above question is explained in article 12 of the CESCR General Comment 14 (2000) — the right to the highest attainable standard of health.<sup>\*43</sup> The following principles of the comment should be underscored. The history of the preparation of the covenant demonstrates that the law stated in article 12 is not connected with functioning of a health care system only but imposes on the state an obligation to generate such conditions as guarantee the existence of conditions forming the basis of health. These conditions include also safe and potable water, safe working conditions and good general condition of the environment.<sup>\*44</sup> The notion of ‘the highest attainable standard of health’ takes into account both the individual’s biological and socio-economic preconditions and the state’s available resources.<sup>\*45</sup> Besides this, states are subject to various obligations that are of immediate effect.<sup>\*46</sup> The right to health, like all human rights, generally imposes three types or levels of obligations: to prevent invasions of one’s health (to respect), to prevent interference from third parties (to protect), and to adopt appropriate measures aimed at full realisation of the right to health of individuals (to fulfil).<sup>\*47</sup> All of these obligations may, under certain conditions, assume taking measures in the situation of scientifically uncertain health risks also.

<sup>32</sup> Available at [http://www.who.int/governance/eb/who\\_constitution\\_en.pdf](http://www.who.int/governance/eb/who_constitution_en.pdf) (17.09.2007).

<sup>33</sup> Available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/163.htm> (15.07.2007).

<sup>34</sup> See for example the Conclusion of the European Committee of Social Rights XVII – 2. Available at <http://hudoc.esc.coe.int/esc/search/default.asp?mode=esc&language=en&source=co> (17.09.2007).

<sup>35</sup> R. Alexy. Põhiõigused Eesti põhiseaduses (Fundamental Rights in Estonian Constitution). – Juridica eriväljaanne (Juridica special issue) 2001, p. 75 (in Estonian).

<sup>36</sup> Panel of editors led by E.-J. Truuväli. Eesti Vabariigi põhiseadus: kommenteeritud väljaanne (Constitution of the Republic of Estonia: Commented Edition). Tallinn: Juura, Õigusteabe AS 2002, p. 253 (in Estonian).

<sup>37</sup> “Everyone has the right to a standard of living adequate for the health and well-being of himself and his family [...]”.

<sup>38</sup> Member States of the Covenant recognise “the right of everyone to the enjoyment of the highest attainable standard on physical and mental health”.

<sup>39</sup> “With a view to ensuring the effect in exercise of the right to protection of health, the contracting parties undertake, either directly or in co-operation with public and private organisations, to take appropriate measures designed *inter alia* [...] to remove as far as possible the causes of ill-health [...]”.

<sup>40</sup> Charter of Fundamental Rights of the European Union. Available at [http://www.europarl.europa.eu/charter/default\\_en.htm](http://www.europarl.europa.eu/charter/default_en.htm) (15.07.2007). Article 35: “Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.”

<sup>41</sup> E.g., United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979). Available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (15.07.2007); United Nations Convention on the Rights of the Child (1989). Available at <http://www.unhcr.ch/html/menu3/b/k2crc.htm> (15.07.2007); and Council of Europe Convention on Human Rights and Biomedicine (1997). Available at <http://conventions.coe.int/Treaty/en/Treaties/Word/164.doc> (15.07.2007).

<sup>42</sup> See T. Annus, A. Nõmper. The Rights to Health Protection in the Estonian Constitution. – Juridica International 2002 (7), pp. 121–122.

<sup>43</sup> E/C.12/2000/4, CESCR comment 14, 11 August 2000.

<sup>44</sup> *Ibid.*, paragraph 4.

<sup>45</sup> *Ibid.*, paragraph 9.

<sup>46</sup> *Ibid.*, paragraph 30.

<sup>47</sup> *Ibid.*, paragraph 33.

Core obligations related to the right to health protection in the context of the ESC are to take measures to avoid pollution of water and ambient air and to avoid dangers and risks originating from radioactive materials and noise.<sup>\*48</sup> Protection of the health of those people living close to nuclear power stations has been given special attention also.<sup>\*49</sup> Hence, it can be said that such minimum core obligations include implementation of basic requirements of environmental quality.<sup>\*50</sup>

No mechanism for individual complaints exists in Europe as regards economic, social, and cultural rights. Therefore, it is impossible to analyse in this case the practice of the supervisory bodies regarding the question — is it considered to be a violation when a person's right to protection of health is violated directly, or does the mere presence of the risk of damage to the health suffice? Fortunately, there have been quite a few cases in the European Court of Justice (ECJ) dealing with human health protection amid conditions of uncertain risks. Similar cases have been dealt with in the framework of the World Trade Organization also.

The ECJ and the Court of First Instance (CFI) have had to control the lawfulness and justification of application of the precautionary principle in many cases. Though the EC Treaty specifies the precautionary principle as a principle of environmental policy and law, it has been used in fact in other areas too — e.g., as regards food safety.<sup>\*51</sup> To be precise, protection of health cannot yet be treated separately from environmental protection, because, according to article 174 of the EC Treaty, protection of human health is one of the main objectives of European Union (EU) environmental policy.<sup>\*52</sup> Application of the precautionary principle in health protection and management of uncertain risks in the framework of the EU is therefore also a prescription directly proceeding from the EC Treaty, not a manifestation of common sense that is applied *ad hoc*.

The first case related to health protection and the precautionary principle that came before the ECJ was the British BSE case.<sup>\*53</sup> The Commission banned export of British beef because of the opinion of the scientific committee advising the Commission, according to which it could not be excluded that BSE could have been a cause of the outbreak of Creutzfeldt-Jakob disease in the United Kingdom, which took place at the same time. But the United Kingdom considered assumptions made on the basis of such incomplete information, and decisions based thereon, to be groundless, not proportional, and denying of legal certainty. The ECJ rejected all of the UK's allegations and admitted in its judgment that "where there is uncertainty as to the existence or extent of risks to human health, the institutions could take protective measures without having to wait until the reality and seriousness of those risks become fully apparent".<sup>\*54</sup> Though the ECJ did not apply the precautionary principle in this case *expressis verbis*, the principle was applied, no doubt, in substance. The ECJ admitted that a possible connection between the BSE and Creutzfeldt-Jakob diseases already constituted sufficient grounds to take precautionary measures, and that the seriousness of human health risks excludes in this case the controversy surrounding principles of proportionality and legal certainty.

Since the 1990s, different antibiotics have been used in cattle breeding. There is a risk that eating the meat of animals treated with antibiotics may have a negative impact on human health; namely, a resistance to antibiotics may develop, which fact could present serious danger to human health. The Council prohibition of use of certain antibiotics as additives in foodstuffs in 1998<sup>\*55</sup> was a typical precautionary measure. It was stated that the existence or absence of the risk is not proven but the appearance of such a risk may be assumed. The measure set forth in the regulation reads as "an interim protective measure taken as a precaution". Naturally, a solution of this kind did not satisfy the manufacturers of antibiotics. Toolex Alfarma, Inc., one of the largest manufacturers of antibiotics, pleaded that the CFI repeal the regulation mentioned, finding that in this instance the precautionary principle was misapplied, as objective risk assessment was absent. The CFI did not honour the complaint in this case. The CFI agreed with the Council, according to the statement of which measures may be taken in cases of existence of a fundamental health hazard, without the necessity of waiting for final proof to be presented. Yet more important is the standpoint of the CFI, according to which "the protection of human health, may justify adverse consequences, and even substantial adverse consequences, for certain traders [...]. The protection of public health, which the contested regulation is intended to guarantee, must

<sup>48</sup> See Conclusions of the European Committee of Social Rights XVII – 2. Available at <http://hudoc.esc.coe.int/esc/search/default.asp?mode=esc&language=en&source=co> (17.09.2007).

<sup>49</sup> See Conclusions of the European Committee of Social Rights XVIII – 1. Available at <http://hudoc.esc.coe.int/esc/search/default.asp?mode=esc&language=en&source=co> (17.09.2007).

<sup>50</sup> See S. Leckie. Another Step Towards Invisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights. – Human Rights Quarterly 1998 (20), p. 101.

<sup>51</sup> See Commission White Paper on Food Safety, COM (1999) 719 (Final).

<sup>52</sup> See in addition J. Jans. European Environmental Law. Gröningen: Europe Law Publishing 2000, pp. 26–27.

<sup>53</sup> UK v. Commission, case C-180/96. Available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (15.07.2007). The abbreviation 'BSE' stands for Bovine Spongiform Encephalopathy, colloquially known as the 'mad cow disease'.

<sup>54</sup> *Ibid.*, paragraph 4.

<sup>55</sup> Council regulation 2821/98 of 17 December 1998 amending, as regards withdrawal of the authorisation of certain antibiotics, Directive 70/524/EEC concerning additives in feedingstuffs. – OJ L 351, 29.12.1998, pp. 4–8.

take precedence over economic considerations".<sup>56</sup> From the standpoint of environmental protection and the precautionary principle, such a prioritisation of health protection is a very important sign, as the majority of cases of environmental pollution have a negative impact on human health. Developers and manufacturers of certain substances cannot dispute prohibition of these substances on the basis of the great expenses they have accrued. At the same time, one cannot draw overly general conclusions from such a standpoint of the court and claim that health protection always outweighs economic considerations. In certain cases, application of the proportionality principle may yield a different solution.

An attempt to require repeal of the above-mentioned regulation was made also by another manufacturer of antibiotics, Pfizer. This complaint was rejected as well. But Pfizer appealed further. The appeal was grounded in the assumption that precautionary prohibitions may be applied only when sufficiently persuasive proof exists that the product poses a danger in itself, either really or assumedly.<sup>57</sup> The ECJ did not overturn the ruling and agreed with the CFI, according to which assumed existence of risk is, in itself, sufficient argument for applying measures and economic considerations do not outweigh interests connected with protection of health.

The precautionary principle has also been applied by the ECJ and the CFI, directly or indirectly, in several other health-related cases.<sup>58</sup>

Application of the precautionary principle in the context of health protection has also been discussed repeatedly in the framework of the WTO. The application of the precautionary principle in the context of health protection was dealt most thoroughly in the Beef Hormones Case. This concerned the regulation of imports of hormone-treated beef by the EU. The Dispute Settlement Body of the WTO started to examine the complaint of the United States<sup>59</sup> and Canada<sup>60</sup> against the EU prohibition of imports of meat and meat products derived from cattle to which either certain natural hormones or synthetic hormones had been administered for growth promotion purposes, in 1996. The complaint was related in particular to Council Directive 96/22/EC<sup>61</sup>, of 29 April 1996, which established the above-mentioned prohibition and listed six prohibited hormones.<sup>62</sup> The directive was grounded on the assumption that hormone-treated meat may pose an essential threat to human health and on the fact that members of the WTO are entitled to apply trade restriction measures to eliminate this kind of danger. As a result of research into the effects of five growth hormones that was carried out in Europe in the mid-1980s, it was found that three of the five hormones are harmful to human health. As regards two other hormones — zeranol and trenbolone — no direct essential dangers to health were found.<sup>63</sup> This notwithstanding, use of meat treated with any of these growth hormones (including the 'harmless' zeranol and trenbolone) was banned. Acting EU agricultural commissioner F. Andriessen explained that "scientific opinion on the case was essential, but not determinative".<sup>64</sup> The prohibition was repeated in a new directive in 1998.

To prove the inconsistency of the risk assessment carried out in Europe, the United States and Canada stressed that the research had not provided persuasive proof of the risks originating from growth hormones, and that the research had not been scientific enough, with plenty of unscientific assumptions being added. The EU stressed continuously that the results of the scientific research that was carried out demonstrate quite clearly that the concept of danger to human health deriving from growth hormones is adequately sound.

The WTO Appellate Body did not accept the application of the precautionary principle. The Appellate Body had a good opportunity to express its point of view as regards the status of the precautionary principle in international law. Unfortunately, the opportunity was not taken. The Appellate Body declined a direct answer and pointed at the existing uncertainty regarding the content and status of the precautionary principle.

The hormones case is significant particularly for demonstrating once again the solid stance of the EU as regards the application of the precautionary principle, but it proved at the same time also that there are plenty of aspects of the principle on which different opinions exist.

<sup>56</sup> *Alpharma Inc. v. Council*, judgment of 11 September 2002, case T-70/99, paragraph 356. – OJ C 289, 23.11.2002, p. 21.

<sup>57</sup> *Pfizer v. Council*, order of 18 November 1999, case 329/99, paragraph 47. Available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (15.07.2007).

<sup>58</sup> *Association Greenpeace France and Others v. Ministère de l'Agriculture et de la Pêche and Others*, Case C-6/99; *Kemikalieinspektionen v. Toolex Alpha AB*, Case C-473/98; *Commission of the European Communities v. Portuguese Republic*, Case C-392/99. Available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (15.07.2007).

<sup>59</sup> Complaint by the US — document WT/DS26/R/USA. Available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm) (12.12.2006).

<sup>60</sup> Complaint by the US — document WT/DS48/R/CAN. Available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm) (12.12.2002).

<sup>61</sup> OJ L 125, 29.05.1996, pp. 3–9.

<sup>62</sup> Exemption was made to use of hormones for medical purposes.

<sup>63</sup> D. Vogel. *Barriers or Benefits: Regulation in Transatlantic Trade*. Washington DC: Brookings Institute Press 1997, p. 15.

<sup>64</sup> *Ibid.*, p. 16.

One can draw a conclusion from the above that, unlike civil and political rights, with the exception of the right to enjoy private and family life, the right to human health protection, a component of economic, social, and cultural rights, is generally suitable in assuring precautionary environmental protection. The position according to which measures have to be taken to manage health risks covered by uncertainty has quite clear support in the framework of the EU. Yet problems arise in applying the precautionary principle in the framework of the WTO, dispute settlement bodies of which thus far have not accepted radical application of the precautionary principle as a basis for trade restrictions prompted by health risks.

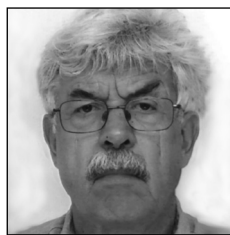
## 5. Conclusions

Contemporary environmental law proceeds from the principle that it is better to avoid environmental damage than to try to compensate for or mitigate its consequences *ex post*. The precautionary principle adds to this principle a dimension of managing environmental and health risks covered by scientific uncertainty. Thus, environmental law presumes taking immediate measures to control both proven dangers and risks not yet proved.

The European system of civil and political rights protection requires at the same time being a victim of an actual violation and the existence of damage or at least proof that this imminent damage exists. Therefore, as a rule, toleration of possible risk is not grounds for a political rights protection mechanism to start functioning. Only single exemptions from this general rule exist. For example, in some discrimination-related cases the ECHR has deemed mere risk of damage to be sufficient. In cases related to the right to enjoy private and family life, the court has presented milder requirements as regards proof of the violation and has deemed sufficient the fact of living in fear of possible future violation and being worried about this, as argument that a violation of the convention on human rights exists. Regardless of these specific exceptions, the main demand of the ECHR has involved the requirement of being a victim of a violation that has already taken place. This requirement indeed is not in concordance with the precautionary principle. Civil and political rights are therefore applicable in environmental protection only to a limited extent. More possibilities for this are offered only by the right to enjoy private and family life, in connection with which the court has expressed its readiness to apply indirectly language appropriate to the precautionary principle.

Amongst economic, social, and cultural rights, the right to health protection is the one most closely connected with environmental quality. Health protection not only presumes avoiding health violations but also requires the state to guarantee that the actions of third parties do not violate the right to health protection. The latter obligation finds its expression, for example, in granting of environmental permits and in control systems over chemicals and application of the precautionary principle therein. The negative aspect of the right to health protection from the standpoint of environmental protection is that environmental protection cannot be reduced solely to anthropocentric and instrumental environmental values. Consequently rights to health protection, like civil and political rights, are applicable in environmental protection only to a limited extent.

Summarising the above argumentation, the author of this article finds that making use of classical human rights (civil and political rights, as well as economic, social, and cultural rights) is not enough to imply the entry of environmental protection into the sphere of human rights. These rights afford certain possibilities for protecting the environment, but at the same time these possibilities are clearly limited, in two main respects — firstly, by the fact that protection is granted, as a rule, only in cases of violations that already have taken place and, secondly, in that human-centred classical human rights leave out a considerable portion of environmental protection based on indirect values related to the environment.



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# Free Movement v. Social Rights in an Enlarged Union – the Laval and Viking Cases before the ECJ<sup>\*1</sup>

## 1. The Swedish Laval case and the English/Finnish Viking case as starting points

The two reference cases considered here concern the compatibility with EU law of industrial disputes and collective actions against EU companies exercising their free movement rights. The Swedish case, under a reference of the *Arbetsdomstolen* (Swedish Labour Court) of 15 September 2005 in litigation between Laval un Partneri Ltd (hereafter 'Laval') v. Svenska Byggnadsarbetareförbundet, Avdelning 1 of the Svenska Byggnadsarbetareförbundet, Svenska Elektrikerförbundet (in the material that follows, 'Byggnads')<sup>2</sup> concerns the question of whether industrial action of Swedish labour unions against a Latvian company that wanted to perform a work contract under Swedish procurement rules through the use of posted Latvian workers falls under the 'freedom to provide service' rules of article 49 EC and, if this is the case, whether this action can be justified either under the posted workers directive, 96/71/EEC<sup>3</sup>, or under a specific Swedish law exempting labour unions from liability in taking action against foreign-based companies (the so-called *Lex Britannia*; see section 5.1 below).

<sup>1</sup> The author was involved for the Latvian government in preparing the Laval litigation. His doctoral students Carri Ginter and Marek Sepp (Tartu) helped with research on the Viking case. Obviously, the opinions expressed in this paper are only my own.

<sup>2</sup> Case C-341/05; the order for reference was published in OJ C 281/10 of 12.11.2005; the author could make use of a provisional English translation of 18.10.2005. The order is based on a prior judgment 49/05 case A 268/04 of 29 April 2005. For earlier discussions of the litigation see N. Reich, *Diskriminierungsverbote im Gemeinschaftsprivatrecht*. – Jb.J.ZivRWiss. 2005, p. 9 ff.; Chr. Barnard, *EC Employment Law*. 3rd. ed. 2006, p. 283; Ö. Edström, *The Free Movement of Services in Conflict with the Swedish Industrial Relations Model — or was it the Other Way Around?* – Ch. Wahl, J. W. Cramér, *Swedish Studies in European Law* 2006, 129; Woolfson/Summer, *Labour Mobility in Construction: European Implications of the Laval Dispute with Swedish Labour*. – EJIR 2006, p. 49; V. Hatzopoulos, T. U. Do, *The case law of the ECJ concerning the free provision of services*. – CMLRev 2006, p. 978.

<sup>3</sup> Directive 96/71/EC of the EP and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. – OJ L 18, 21.01.1997, p. 1.

The reference from the English Court of Appeal of 23 November 2005 in the litigation between (1) the International Transport Workers' Federation (ITWF) and (2) the Finnish Seamen's Union (FSU) versus (1) Viking Line ABP and (2) OÜ Viking Line Eesti (referred to below as the Viking case<sup>4</sup>) concerns the question of how far labour unions can take social action against a reflagging of a shipping company from a 'high-wage' country (Finland) to a 'low-wage country' (Estonia); the ECJ was asked to decide also on the applicability of article 43 EC as well as Regulation 4055/86<sup>5</sup> in the litigation, including possible justifications. In more general terms, the case concerns the so-called FOC (flag of convenience) policy of the ITWF aimed at eliminating FOCs by establishing a genuine link between the flag of the ship and the nationality of the owner, and by protecting and enhancing the conditions of seafarers serving on FOC ships.

Both reference cases concern delicate matters of how to balance social policy objectives with economic freedoms that became apparent in the EU following the accession of ten (and now 12) new member countries. Most of these new member countries still have much lower wages, which give them a competitive advantage in the internal market but may easily be challenged (and indeed have been challenged by social action in the host countries) as provoking 'social dumping' on the more elaborate wage policies of old — in particular, Nordic — member countries. Both the Laval and (perhaps to a somewhat lesser extent) the Viking case have aroused strong political reactions in the Member States concerned, although these will not be addressed here. The aim of this article is more modest: it is intended to offer a legal analysis under existing EU law concerning how to solve these conflicts. It takes, as a starting point, the existing case law of the ECJ, which, however, has not yet really resolved the new types of conflict that arose in the Laval and Viking cases. Therefore, in deciding on the references, the Court must provide a truly constitutional answer concerning how to settle the existing — and possible future — conflicts between social structures in Member States that still remain within their own area of competence and the dynamics of EC law seemingly favouring the liberal spirit of free movement to the detriment of the social arrangements of Nordic countries with a strong welfarist tradition in particular, based upon the central role played by autonomous labour unions enjoying far-reaching action rights.

The analysis starts from the premise that the particular type of conflict that is before the ECJ in the Laval and Viking cases has not been regulated by the rather elaborate transition arrangements in the accession treaties. It must be remembered also that the actions are directed not against a Member State, as is the usual setting in free movement cases, but against labour unions, which are governed by private, not public law, and which enjoy, in the traditions of all Member States — whether old or new — a substantial amount of autonomy guaranteed by national and European constitutional provisions. Therefore, it must be analysed first how far this constitutional autonomy extends within the system of the EC free movement rules (see section 2). Only then should the question be answered of whether the relevant free movement provisions — namely, those concerning services (article 49 EC), regarding Laval, and on establishment (article 43/48 EC) in the Viking case — can be applied to social action by labour unions restricting free movement of posted workers with respect to reflagging by shipping companies (see sections 3 and 4). Should the answer be positive, one has to look for possible justifications, which will be different for Laval on account of the existence of the posted workers directive, 96/71 (see section 5), which is not applicable in the Viking case (see section 6). Finally, the recent opinions of Advocate General Mengozzi and Pólares Maduro of 23 May 2007 will be mentioned (in section 7).

## 2. Social rights as fundamental rights exempted from EC free movement rules?

### 2.1. Possible exemptions of labour unions from article 49/43 EC

#### 2.1.1. Possible application of article 137 (5) EC

It could be — and has been — argued that labour unions taking social action in industrial disputes are exempted from the application of Community law in general and particularly from article 49/43 EC, which is directed against States only. Collective action by labour unions is, according to such an opinion, meant not to restrict freedom to provide services but to ensure adequate conditions of work and pay. Under article 137 (5) EC, the EU does not have jurisdiction in matters of strike, lock-out, and pay. In more general terms, it could be

<sup>4</sup> Case C-438/05. — OJ C 60, 11.03.2006, p. 16. The High Court established jurisdiction because the headquarters of ITWF were London and therefore jurisdiction was conferred to the English Court under article 2 Reg. 44/2001, without being able to raise the "forum non convenience" objections. See ECJ case C-281/02 (Andrew Owusu v. N. B. Jackson et al.). — ECR 2005, p. I-1383. The High Court granted an injunction against ITWF and FSU which was squashed by the Court of Appeal in its judgment to refer the case to the ECJ, [2005] EWCA 1299, per Waller LJ. See also Chr. Barnard (Note 2), p. 272.

<sup>5</sup> Council Regulation (EEC) No. 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries. — OJ L 378, 31.12.1986.

(and, again, has been) argued that Title XI on social policy leaves this area to Member States and allows only very limited intervention on the part of the EU. This seems to imply the non-applicability of the fundamental freedoms to industrial actions, arguments put forward in particular by the labour unions in both cases and by the supporting Swedish and Finnish governments, as well as, indeed, by most governments from ‘old member countries’ that had submitted observations to the Court.

In the face of such an argument, it should be clarified that the exclusion of Community legislation in the field of industrial action, on the other hand, does not preclude the presumption that the general principles of Community law always must be respected, as the Court has frequently held with reference to other prerogatives of Member States — e.g., with regard to direct taxation<sup>6</sup>, health provisions<sup>7</sup>, social security<sup>8</sup>, higher education stipends and loans<sup>9</sup>, war pensions<sup>10</sup>, or the property regime.<sup>11</sup> There is no reason to exclude *a priori* social policy matters from the application of free movement principles. Article 137 (5) only excludes Community legislation in the area of strikes and lock-outs, not the effects of primary law on industrial action.

### 2.1.2. ‘Non-statutory-exemption’ for trade unions derived from competition law?

One could refer also to the limited application of Community competition rules to collective bargaining and industrial action, which should be taken over by analogy to the EU freedoms. With regard to competition law, it is a matter of debate, under the influence of US/American antitrust law, whether there is an inherent ‘non-statutory exemption’ for collective action in industrial relations.<sup>12</sup> The ECJ, in its Albany judgment, took a somewhat more restrictive view:

Under an interpretation of the Treaty as a whole which is both effective and consistent [...] agreements concluded in the context of collective negotiation between management and labour in pursuit of such [social policy] objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Art. 81.<sup>13</sup>

This argument must, however, be limited to competition law where business and labour organisations are negotiating for a pension fund for the employees of a particular sector, as in the Albany case. The case did not concern industrial action as such and therefore is not a precedent for the limitation of actions by labour unions with regard to fundamental freedoms. Where collective action by labour unions confronts individual businesses from other member countries by rendering their market access or business restructuring impossible or more difficult, there is no ‘non-statutory exemption’ from the application of the EU free movement rules.

## 2.2. The importance of the Gustavsson and Rasmussen judgments of the ECtHR

An important argument in proposing to exempt collective action by labour unions from the applicability of the fundamental freedoms could be based on article 11 of the European Human Rights Convention (EHRC). Since the EU, according to its article 6 (2), has to ‘respect’ fundamental rights, and since the ECJ, in its case law concerning fundamental freedoms, refers to judgments of the European Court of Human Rights (ECtHR)<sup>14</sup>, it is helpful for the Laval and Viking cases to look at precedents from the Strasbourg Court. The ECJ is, of course, not formally bound by the case law of the ECtHR, but it will usually pay tribute to it if questions of fundamental rights in the sphere of application of EU law — in particular, with regard to the exercise of fundamental freedoms — are at stake. This is all the more true in areas where no consistent case law of the ECJ exists, as with regard to the conflict between industrial action and fundamental freedoms.

Article 11 (1) ECHR guarantees the freedom of association, subject to limitations spelt out in paragraph 2. This right can be invoked by labour unions in collective bargaining and action. It encompasses a positive element allowing social action including strikes for the improvement of working conditions, and therefore it may conflict with the fundamental freedoms of the EC if such actions necessarily restrict free movement of goods or services.

<sup>6</sup> Case C-544 + 545/03 (Mobistar & Belgacom). – ECR 2005, p. I-(8.9.2005).

<sup>7</sup> Case C-372/04 (Yvonne Watts v. Bedford Primary Care Trust et al). – ECR 2006, p. I-4325, paragraph 92.

<sup>8</sup> Case C-158/96 (Kohll v. Union des Caisses de Maladie). – ECR 1998, p. I-1931, paragraph 20.

<sup>9</sup> Case C-209/03 (The Queen (on application of Dany Bider) v. London Borough of Ealing). – ECR 2005, p. I- 2119, paragraph 42.

<sup>10</sup> Case C-192/05 (K. Tas Hagen, R. A. Tas v. Raadskamer WUBO). – ECR 2006, p. I-(26.10.2006).

<sup>11</sup> Case C-350/92 (Spain v. Council). – ECR 1995, p. I-1985.

<sup>12</sup> See the detailed comparative discussion of AG Jacobs in his opinion of 9.1.1999 in case C-67/96 (Albany International v. Stichting Bedrijfspensioenfondstextielindustrie) (ECR 1999, p. I-5751), paragraphs 98–107 with regard to US law.

<sup>13</sup> Note 12, paragraph 60.

<sup>14</sup> See case C-112/00 (Eugen Schmidberger v. Austria). – ECR 2003, p. I-5659, paragraph 79.

On the other hand, this ‘positive right of association’ that can be invoked by Byggnads in the Laval case and by ITWF / the Finnish Seamen’s Union in Viking is not without limits. It must respect the rights of other individuals to freely associate or **not to associate**. This problem was raised before the European Court of Human Rights in the case *Gustavsson v. Sweden*. In its judgment of 25 April 1996<sup>15</sup>, the Court faced the question of the extent to which industrial action against an entrepreneur who did not want to join a collective bargaining agreement was permitted or, conversely, limited by article 11 of the EHRC.

This judgment recognised that ‘freedom of association’ also has a ‘negative side’, which Sudre calls *droit d’association négatif*<sup>16</sup> — namely, the right of an employer not to be forced into a collective bargaining agreement if he does not belong to the relevant trade association. This right is enjoyed also by Laval and Viking in offering services in Sweden respectively Finland/Estonia. Its exercise is made impossible or severely restricted by the industrial action of labour unions. Article 11 of the ECHR therefore does not exclude the application of 49 EC; rather, on the contrary, it must be read alongside article 11, with the aim of protecting both the free movement and the negative aspect of the right to association.

This case law was confirmed by the recent *Sorensen v. Rasmussen* judgment handed down against Denmark<sup>17</sup>, where it was clearly stated that the requirement to join a certain trade union violates article 11 ECHR, as such a requirement has an effect on the very freedom of assembly and association. Therefore, the state must avoid measures violating this ‘negative right of association’, even though it enjoys a certain margin of appreciation. Obviously, the primary addressees of such an obligation are the unions themselves, which must avoid infringement of the ‘negative right to association’. Their actions will have to be balanced against the two components of article 11 ECHR: their ‘positive right’ to association and the ‘negative right’ of social partners who do not want to adhere to a system of collective bargaining. In the EC context, this balance must be accomplished within the ambit of the free movement provisions of the treaty, which will be analysed in sections 3 and 4, subject to justification under the proportionality principle outlined in sections 5 and 6.

### 2.3. The Werhof judgment of the ECJ

In its Werhof judgment<sup>18</sup>, the Court derived from article 11 of the EHRC as interpreted by the ECtHR the principle that “[f]reedom of association [...] includes the right not to join an association or union”. This ‘negative right to association’ must be respected in interpreting secondary Community law, e.g., in the case here before it: the directives on transfer of undertakings. The Court expressly referred to the *Gustavsson* judgment of the ECtHR, thus indicating that it takes the same view on the limitations of the right to collective action. This demonstrates clearly the concerns of the ECJ that social action rights of labour unions are not ‘outside’ EC law (whether primary or — as in the Werhof case — secondary law) but must be balanced, in particular, against existing free movement rights. This will be analysed in later sections of the paper with regard to the freedom to provide services (section 3) and the right to establishment (section 4).

### 2.4. Constitutional traditions of Member States concerning social action

According to article 6 (2) EU, the Union will also respect fundamental rights, as they are common to the constitutional traditions of the Member States. There is agreement that one of these traditions concerns the rights of social partners — labour unions and business organisations — to take social action to defend their legitimate interests in industrial disputes, but this right is not without limits. The right has been recognised in the Charter of Fundamental Rights in the EU — namely, in its article 28 with the following words (emphasis added):

Workers and employers, or their representative organisations, have, **in accordance with Community law and national laws and practices**, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflict of interest, to take collective action to defend their interests, including strike actions.

<sup>15</sup> Recueil 1996-II, 637 paragraphs 44–45.

<sup>16</sup> Sudre et al. *Les grands arrêts de la Cour Européenne des droits de l’homme*. 2003, p. 482.

<sup>17</sup> Judgment of 11 January 2006, applications No. 52656 + 52620/99, paragraph 58. Available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (21.07.2007).

<sup>18</sup> Case C-499/04. – ECR 2006, p. I-2397 paragraph 33.

In particular, the Nordic states defend their specific social model, which is based on considerable autonomy granted to social partners by their constitutions without the state necessarily interfering in social action.<sup>\*19</sup> It is feared that this autonomy of the ‘Scandinavian social model’ may be endangered if EC law interferes in its workings by imposing its specific rules on free movement or — as had been discussed in Albany<sup>\*20</sup> — on imposing competition law on social action.

In the context of this discussion, it suffices to remember that even in the Scandinavian model of industrial relations there are certain inherent limits to social action, which are spelt out by law. The most important and common one is the so-called ‘peace obligation’ (or *Friedenspflicht*), which forbids industrial actions once a valid collective agreement has been concluded between social partners. Of course, the extent of this *Friedenspflicht* and the consequences of its breach may be very different, but they are in any case determined by law, not by the social partners themselves, as can be shown very clearly in examination of the Swedish case of the *Lex Britannia*, which will be discussed below (in section 5.1). In Finland, article 13 of the Constitution protects freedom of association of social partners, including the right to strike, which is subject to three limitations, namely where the right to strike is outlawed by a Finnish statute, where the strike is contra *bonos mores*, or where the strike is in breach of EC law directly applicable between the parties.<sup>\*21</sup>

This is exactly what is stated in article 28 of the Charter of Fundamental Rights, whose indirect legal importance recently was recognised by the Court.<sup>\*22</sup>

The text of article 28 makes it very clear that the right to industrial actions exists only within the limits of the law, including EC law. Of course, these limitations must respect the principle of proportionality, as is spelt out in article 52 (1) of the Charter. But it cannot be said that industrial action as recognised by Member State law is completely outside the scope of Community law. This has also indirectly been recognised by the Court in Albany, where it defined, on the one hand, the existence of an exemption of social partners from the competition rules in order to attain legitimate social policy objectives but implicitly rejected any extension of this exemption beyond matters of social policy, on the other. It is therefore a matter of balancing the different objectives of the EC Treaty — free movement — against social action (namely, adequate social protection of workers as mentioned in article 136 EC). Exactly this balancing is now before the Court in the Laval and Viking cases. Any one-sided approach to resolving this question must be rejected — either by giving absolute precedence to social rights or by formally insisting on the supremacy of free movement without taking account of legitimate social policy objectives pursued by the Member States, even when delegated to social partners as in Sweden and Finland. The following sections attempt such a balancing approach.

### 3. The applicability of article 49 EC to social actions against the posting of workers in Laval

#### 3.1. Posting of workers by Laval in Sweden as exercise of the freedom to provide services

With regard to applicable Community law ever since *Rush Portuguesa*<sup>\*23</sup>, it is without doubt that the posting of workers of a company established in one EU country is a (cross-border) service to which article 49 EC is applicable. The workers employed by Laval are not seeking access to the Swedish labour market but will be removed once the construction work as contracted is finished.<sup>\*24</sup> In principle, they remain under Latvian jurisdiction. Therefore, the provisions concerning free movement of workers (article 39) and non-discrimination (article 12 EC) can be disregarded in this context.

It should be mentioned also that Sweden did not make use of the possibility of invoking a transitory regime against the posting of workers, as had been conceded to Germany and Austria during the accession negotiations with the new member countries, including Latvia.<sup>\*25</sup>

<sup>19</sup> For a discussion see N. Bruun et al. *The Nordic Labour Relations Model*. 1994, pp. 250–252; R. Fahlbeck, *Labour and Employment Law in Sweden*. 1999, pp. 26–33; K. Ahlberg, N. Bruun. – *Bulletin of Comparative Labour Relations*. (Blanpain (ed.)), 2005 (56), pp. 117–124.

<sup>20</sup> See *supra* Note 12.

<sup>21</sup> See the Court of Appeal *supra* Note 4 at par 26 citing the judgment of the Finnish Supreme Court in *Rakvere* (KKO:2000:94).

<sup>22</sup> Case C-540/03 (*EP v. Council*). – ECR 2006, p. I-(13.7.2006), paragraph 38.

<sup>23</sup> Case C-113/89 (*Rush Portuguesa v. Office National d’immigration*). – ECR 1990, p. I-1417; C-369 + 376/98 (*Criminal proceedings against Arblade*). – ECR 1999, p. I-8454.

<sup>24</sup> Case C-445/03 (*Commission v. Luxembourg*). – ECR 2004, p. I-10191, paragraph 38.

<sup>25</sup> N. Reich. *Understanding EU Law*. 2<sup>nd</sup> ed. 2005, pp. 84–85.

### 3.2. Restriction of the provision of services

As the case shows, the boycott by Byggnads is the strongest form of restriction; indeed, it made impossible the rendering of services by Laval in Sweden and caused great harm both to Laval and to the Latvian workers it had posted while relying on its freedom to provide services. Article 49 EC is directed both against ‘discriminations’ and against ‘restrictions’.<sup>\*26</sup> For a preliminary examination of the legality of the boycott under EU law, it is sufficient that there exist a restriction that is forbidden unless it can be justified. The question of discrimination will be discussed in considering the possible justifications (in section 5.1.3).

Under EU law, this action constitutes the very negation of the freedom to provide services. In its effects, the restriction forced upon Laval by the action of Byggnads is to some extent similar to the re-incorporation requirement imposed by German law on foreign companies. In its *Überseering* judgment<sup>\*27</sup>, the Court wrote with regard to establishment, an argument that can be employed also with regard to freedom to provide services: “The requirement of re-incorporation of the same company is therefore tantamount to outright negation of the freedom of establishment.” This restriction can lead to a double set of consequences under the case law of the Court: an obligation of the (Swedish) state under article 10 EC to ensure that freedom to provide services is guaranteed, not to be discussed here, and an effect against the Swedish labour unions themselves under the ‘horizontal direct effect’ theory of article 49 EC.

The main legal question of the case concerns the effects of article 49 EC against the action of Swedish labour unions. Case law of the ECJ is evolving; the answer is not yet clear with regard to the position of labour unions in industrial action infringing free movement.

The traditional approach to the freedoms enshrined in the EC Treaty has been concerned exclusively with regard to **state action**. This seems to be suggested by their very place within the EC Treaty, in article 3 (1) c) and 14 (2), concerning the establishment of an internal market without frontiers among the Member States. Restrictions of market access by private persons usually fall within the net of the provisions on competition, per article 81/82 EC. This seems to exclude the applicability of article 49 and the other Community freedoms to privately imposed restrictions.

Such a narrow interpretation, however, is not required, from the very wording and system of the treaty.<sup>\*28</sup> Article 49 (1) EC itself takes a somewhat broader view, as it aims at abolition of restrictions on the freedom to provide services, whatever their origin. The Court, in a series of cases, therefore extended the applicability of article 49 (and other freedoms — namely, those addressed in article 39 and article 43) to privately imposed restrictions. This case law started with *Walrave*<sup>\*29</sup> already in 1974, concerning restrictions on free movement imposed by bylaws of sporting associations. This case law, which takes a functional rather than formal approach to interpreting the fundamental freedoms, has been continued in the well-known *Bosman* case.<sup>\*30</sup> This case was concerned with free movement of workers, even though the Court also referred to services. This precedent was confirmed and justified in *Angonese*.<sup>\*31</sup> In the later *Wouters* case<sup>\*32</sup>, the Court summarised and confirmed its practice law with regard to collective regulation by private entities.

In the case at hand, the boycott of Byggnads imposed on Laval was intended to achieve a ‘regulation’, the conclusion of a collective bargaining agreement or a supplement according to Swedish law. This would have resulted in Laval having to pay Swedish wages and benefits, thereby losing the competitive advantage that allowed it in the first instance to win the Vaxholm contract. At the same time, it would have set aside the agreement that Laval had concluded with Latvian Construction Workers’ Association (CWA) in summer 2004.

### 3.3. Preliminary results of the discussion

As a preliminary result of this discussion, it can be clearly stated that the boycott by Byggnads violated Laval’s right to freely provide services. Labour union actions are not exempted from *prima facie* application of the free movement rules. Since article 49 EC is applicable in this context, other EC provisions need not be discussed in detail. Byggnads may be liable for breach of Community law if its action cannot be justified, but this will not be discussed here.

<sup>\*26</sup> Case C-76/90 (*Säger*). – ECR 1991, p. I-4221, paragraph 12 and later cases.

<sup>\*27</sup> Case C-208/00. – ECR 2002, p. I-9919, paragraph 81.

<sup>\*28</sup> P.-Chr. Müller-Graff – Streinz. EUV/EGV. Kommentar. 2003, article 49 paragraphs 65–69.

<sup>\*29</sup> Case 36/74 (*Walrave v. Union Cycliste internationale*). – ECR 1974, p. 1405 paragraphs 15–19.

<sup>\*30</sup> C-415/93 (*ASBL v. Bosman*). – ECR 1995, p. I-4921 paragraphs 83–85.

<sup>\*31</sup> C-281/98 (*R. Angonese v. Casa di Risparmio di Bolzano*). – ECR 2000, p. I-4139, paragraphs 31–36.

<sup>\*32</sup> C-309/99 (*J. C. J. Wouters et al/Algemene Raad van de Nederlandse Orde van Advocaten*). – ECR 2002, p. I-1577 paragraph 120; for a discussion see N. Reich (Note 25), pp. 18–19.

## 4. Article 43 and social action against free movement of companies in the Viking case

The right of establishment set forth in article 43/48 EC can also be invoked horizontally against collective actions as defined above. The arguments presented there need not be repeated insofar as the Laval and Viking cases concern similar legal questions.<sup>33</sup>

The origin of the social conflict, however, is somewhat different because it concerns the general FOC policy of the ITWF (see section 1 above). When in 2003 the FSU was confronted with the request of Viking Finland to reflag its ferry *Rosella*, which serves the Helsinki–Tallinn line, in order to avoid losses due to higher wages paid under Finnish law and be allowed to pay wages according to lower (Estonian) standards, it contacted the ITWF, which sent a circular to all affiliated organisations asking them to refrain from negotiating with Viking. Since the collective bargaining agreement with Viking concerning the manning of *Rosella* ended in November 2003, the FSU threatened social action against the intended reflagging. Viking asked for an injunction in the Finnish labour court, which was refused. The mediation under Finnish law ended with Viking giving in to the demands of the FSU. It concluded a new collective agreement ending on 28 February 2005, which renewed the old agreement; it had to give up its plans to reflag the ship. Since the *Rosella* continued to make a loss and since the ITWF circular remained in force, Viking decided to bring proceedings before the English High Court in August 2004 seeking declaratory and injunctive relief, which required withdrawal of the ITWF circular and requiring the FSU not to interfere with Viking's free movement rights in relation to reflagging of the *Rosella*. The High Court granted the injunction in favour of Viking in June 2005. This judgment was appealed by ITWF before the Court of Appeal, which quashed the judgment for an injunction and decided to make the above-mentioned reference.

The specific problem caused by the threatened social action in the Viking case concerned restrictions on a company wanting to partly move from one jurisdiction to another via the intended reflagging. According to question 6 of the referring Court of Appeal, this is done by the

parent company established in Member State A (Finland) [...] intend[ing] to undertake an act of establishment by reflagging a vessel to Member State B (Estonia) to be operated by an existing wholly owned subsidiary in Member State B which is subject to the direction and control of the parent company.

In my opinion, it must be argued that the social action taken against the reflagging by Viking must be regarded as a restriction of its freedom of establishment, which would be illegal unless it can be justified by — proportionate — social policy reasons (see section 6).

## 5. Justifications I: Laval

The main problems of the case concern with the question of justification, as the Swedish Labour Court seems to imply itself. The examination must involve certain steps that are suggested by the questions of the referring court, namely:

- the Swedish *Lex Britannia* (1)
- the importance of directive 96/71 (2)
- general principles of Community law (3)

### 5.1. The *Lex Britannia*

The Swedish *Lex Britannia* amended the *Medbestämmandelagen* (or MBL, law on workers' participation in decisions) in 1991<sup>34</sup> and allows Swedish labour unions to commence industrial action against an undertaking that has not (yet) concluded a bargaining agreement with a representative labour union of its employees. At the same time, there is a *Friedenspflicht* — that is, a duty to abstain from industrial action — only in those cases where a binding collective agreement already exists. The 1991 amendment limited this *Friedenspflicht* to those agreements to which Swedish law 'directly' applies, thus excluding collective bargaining agreements concluded with non-Swedish labour unions. Industrial action therefore is not prohibited when a foreign employer carries out temporary activities in Sweden and an overall assessment of the situation leads to the conclusion that the connection to Sweden is so weak that the MBL cannot directly apply to industrial relations. The 1991 amendment was designed to combat 'wage dumping' by foreign service providers made possible by

<sup>33</sup> See V. Hatzopoulos, T. U. Do (Note 2), p. 978.

<sup>34</sup> For detailed description see the reference order of the Arbetsdomstolen of 15.09.2005, p. 4 of the provisional English translation.

the prior case law of the *Arbetsdomstolen*, whereby Swedish labour unions had to recognise foreign collective bargaining agreements in the sense of the *Friedenspflicht* even if the wages negotiated were below Swedish standards. According to the *travaux préparatoires*, the *Lex Britannia* is intended to allow trade unions to act to ensure that all employers active in the Swedish market pay salaries, and grant other conditions of employment, in line with those usual in Sweden and that they create conditions of fair competition on an equal basis between Swedish undertakings and entrepreneurs from other countries. However, its potential discriminatory effects against undertakings established in other EU Member States that want to post workers in Sweden must be examined.

### 5.1.1. Industrial action against an undertaking established in the EU

The *Lex Britannia* does not contain a specific exemption concerning industrial action against undertakings established in an EU Member State. This ‘omission’ by the Swedish legislators was criticised by several Swedish experts when Sweden acceded to the EU<sup>35</sup>, but it has not been taken up by the Swedish legislators in the ratification proceedings of the treaties with the new Member States. There is no exclusion in Swedish law concerning the continued application of the *Lex Britannia* vis-à-vis undertakings from new member countries. The Swedish legislative system wants to apply the *Lex Britannia* also against service providers established in the EU. Simultaneously, the general provisions of the freedom to provide services apply in full, as has been demonstrated above (see section 3) against industrial action. Only when there is specific justification for a restriction to provision of services may the enabling provisions of the *Lex Britannia* continue to be applicable and be invoked to justify industrial action on the part of Byggnads.

The case law of the ECJ with regard to the restrictions allowed to article 49 EC is relatively well developed and quite clear in its main principles:

- restrictions may be justified to protect posted workers;
- even if allowed, these restrictions must be proportionate and non-discriminatory;
- restrictions are not allowed to close the national construction market and to shield national businesses from competition by service providers established in the EU.

Already in the case *Rush Portuguesa*<sup>36</sup> the Court said (paragraph 18):

Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, with their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means.

Obviously, this exemption does not apply in the *Laval* case. The *Lex Britannia* is, as I have argued, enabling legislation, not protective legislation as in the *Rush Portuguesa* case.

Later cases impose certain limits on legislation protective of workers. In *Finalarte et al v. Urlaubs- und Lohnausgleichskasse der Bauwirtschaft*<sup>37</sup>, the Court insisted that it may serve the protection of workers but “cannot be justified by economic aims, such as the protection of national businesses”. The yardstick for legitimate restrictions of the freedom to provide services is always the protection of posted workers, not the prevention of competition in the construction market.<sup>38</sup>

The neutrality of the Swedish state is in reality a delegation of power to labour unions to restrict the EU freedoms, if the undertaking providing services from another EU country has not complied with Swedish labour standards. Labour unions, of course, are not forced to take such action; they are only enabled to do so by the privilege of being exempted from civil liability. But, as practice shows, they usually take action if a home business (as in the *Gustavsson* case) or an EU undertaking (as in *Laval*) does not comply with Swedish labour standards. Since the Swedish state has given them power to restrict the fundamental freedoms, they can therefore be held liable for violations of Community law and cannot escape their responsibility by relying on the *Lex Britannia*, which by its very wording allows them to impose such restrictions (in its sub. 3).

### 5.1.2. The discriminatory element of action inherent in the *Lex Britannia*

Since the *Lex Britannia* is an enabling law, its discriminatory elements can be seen only once it is put into action. The *Laval* case gives striking evidence in this direction. Byggnads used the exemption from *Friedenspflicht* allowed by the *Lex Britannia* to initiate industrial actions against *Laval* that in the end made impossible the

<sup>35</sup> Supra Note 19.

<sup>36</sup> See Note 24.

<sup>37</sup> Joined cases C-49/98 et al. – ECR 2001, p. I-7831, paragraph 39.

<sup>38</sup> Case C-164/99 (*Portugaia Construcoes*). – ECR 2002, p. I-787, confirmed by case C-445/00 (*Commission v. Luxembourg*). – ECR 2004, p. I-10191, paragraphs 38–39.

rendering of cross-border services in Sweden. Laval sought an injunction against this action in order to be able to continue providing its services as agreed under the construction contract with the city of Vaxholm, which was refused by the first judgment of the *Arbetsdomstolen*. The combined functioning of the *Lex Britannia* as an enabling law for Byggnads and as an exemption from liability prevented the provision of services. The *Lex Britannia* therefore is the relevant and decisive cause for an unjustified restriction of article 49 EC.

Compared to the situation of a Swedish undertaking, that of Laval clearly involved being treated in a discriminatory way. Under the existing practice of the *Lex Britannia*, it could not invoke its collective bargaining agreement with LACW as an element of the *Friedenspflicht* that would not allow industrial action by Byggnads and could therefore be prevented by an injunction before the Swedish labour court.

It cannot be argued that Byggnads merely wanted Laval to offer its services on the same terms as Swedish construction companies, and that they therefore were treated on equal terms. Such an argument disregards the difference between Swedish and Latvian undertakings in providing services. By forcing upon them 'equal conditions', in reality existing differences are levelled out, downward. This is the opposite of non-discriminatory treatment: Laval is deprived of its competitive advantage and to that extent discriminated against. Byggnads is using the instruments of the *Lex Britannia* to impose restrictions on the freedom to provide services on economic grounds, which cannot be justified. Since the *Lex Britannia* does not prohibit such industrial action, this omission by the Swedish legislature clearly violated Community law; such violations cannot justify action by Byggnads.

## 5.2. Directive 96/71

### 5.2.1. Objectives of the directive

Directive 96/71 was adopted under internal market jurisdiction concerning provision of (cross-border) services. It therefore is an attempt to implement the basic principle of article 49 EC as it had been developed by the case law of the ECJ, particularly since *Rush Portuguesa*. This starting point must be kept in mind in interpreting it. Therefore, the directive should not be applied in such a way as to make cross-border provision of services via posted workers impossible or unreasonably risky or costly. The host Member State must guarantee that posting remains possible within the framework of the directive. It should not be used on mere economic grounds in order to protect national businesses or close markets to competition.

At the same time, the directive, according to recital 5, is aimed at promoting a "climate of fair competition and measures guaranteeing respect for the rights of workers".<sup>39</sup> Therefore, a "'hard core' of clearly defined protective rules should be observed by the provider of services notwithstanding the duration of the worker's posting", according to recital 14. The second objective of the directive is the protection of posted workers, not of workers of the host country.<sup>40</sup> These rules are contained in article 3. They imply also a conflict rule — namely, that not only the law of the home country of the service provider but also in certain respects the law of the host country is applicable (that is, the law of the country where the posted workers perform the work according to the service contract that the provider has concluded in the host country). To this extent and aim, it amends the rules of applicable law under article 6 of the Rome Convention to protect posted workers and to make possible their equal protection under the law of the host Member State.<sup>41</sup>

### 5.2.2. Article 3 (1) of directive 96/71

As far as the Laval case is concerned, it seems to me that only the question of '**minimum rates of pay**' in the sense of paragraph 1, second indent, lit. c) is controversial.<sup>42</sup>

The directive sets out a number of requirements that must be observed in order to 'overrule' the rates of pay that have been agreed upon by the provider with 'his' workers, or that are applicable according to a collective agreement concluded in the home country, as in the Laval case. The conditions that are listed in the two indented portions of paragraph 1 of article 3 — namely, minimum wages imposed either by law (or regulation) or by collective agreements and arbitration awards declared universally applicable — are not relevant here. Sweden does not have a system of state minimum pay (as in France), nor one of declaring collective

<sup>39</sup> Chr. Langenfeld. – E. Grabitz, M. Hilf. Das Recht der EU – Kommentar. Art. 137 EGV para. 52: „Vermeidung von sog. ‚Sozialdumping‘ – avoidance of social dumping“; G. Davies. Posted Workers: Single Market or Protection of National Labour Law Systems? – CMLRev 1997 (34), pp. 572–575, referring to the ambiguities of the directive; somewhat broader W. Däubler. Die Entsenderichtlinie und ihre Umsetzung ins deutsche Recht. – EuZW 1997, p. 615: „zwingende Gründe lägen in der Vermeidung der Arbeitslosigkeit, in der Erhaltung der Tarifautonomie in den betroffenen Branchen sowie in deren Schutz gegen Wettbewerbsverfälschung.“

<sup>40</sup> There had been some critique, in particular in German legal literature, whether the directive could be based on the internal market jurisdiction of the EC, a critique however not taken up by the ECJ; W. Däubler (Note 39), pp. 614–615.

<sup>41</sup> Chr. Barnard (Note 2), pp. 284–285; F. Franzen. Die EG-Entsenderichtlinie. – ZEuP 1997, pp. 1064–1070.

<sup>42</sup> For a recent clarification see case C-341/02 (Commission v. Germany). – ECR 2005, p. I-2733, paragraph 24.

agreements universally applicable within the meaning of paragraph 8 (as in Germany). Sweden deliberately refrained from implementing lit. c) because of its ‘social model’, which means that the state takes a neutral position with regard to industrial relations and leaves it to the social partners to find adequate pay rates in collective bargaining proceedings, which are enforced by the mechanisms available under the *Medbestämmandelagen*, as amended by the *Lex Britannia*.

### 5.2.3. The option for collective agreements under article 3 (8)

Paragraph 8 of article 3 extends the effects of collective agreements with regard to pay rates that may also be imposed on posted workers under certain conditions, which so far have not yet been interpreted by the ECJ. They therefore need careful scrutiny.

(1) The first condition requires a decision of the host Member State; namely (emphasis added)

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application [...], Member States, may, **if they so decide**, base themselves on [...]

As has been correctly observed by Davies<sup>\*43</sup>, “in determining whether collectively agreed standards apply for the purposes of the directive, Member States may substitute for the test of obligation the test of applicability in fact”.

The *Arbetsdomstolen*, in its order for reference, explains that “the responsibility for deciding what is an acceptable standard for terms and conditions of employment has thus been transferred to the organisations in the Swedish employment market”.<sup>\*44</sup> It is not clear how this has been accomplished, particularly vis-à-vis foreign service providers who may not know the specifics of the Swedish labour market. The directive is silent as to the form and requirements of such a decision. By *argumentum e contrario*, it need not be a legally binding instrument. On the other hand, from the very purpose of the directive — namely, not to serve as a basis for preventing competition and at the same time to protect posted workers — it must be required that such a decision be expressly taken and be rendered transparent for the industries listed in the annex, which is applicable to the Laval case, concerned with construction work. Both the foreign service provider and the posted workers must know under what conditions they perform work in the host state, as expressly spelt out in article 4 (3) of directive 96/71. It should be remembered that a similar **requirement of transparency** has been developed by the ECJ in public procurement as well as with respect to state aid matters if Member States want to enforce certain justified protective objectives.<sup>\*45</sup> It is not known whether Sweden has taken such an express decision, and whether it was transparent to Laval during the tender process for the construction contract in Vaxholm.

(2) Even if there is no doubt concerning the (express and transparent) ‘decision’ of the Swedish state, as a second requirement the collective agreement must either “be applicable to all similar undertakings in the geographical area and in the profession or industry concerned” or have been “concluded by the most representative employer’s and labour organisations at national level and that apply throughout the national territory”. According to the EC-Commission, this means that the Member States can include agreements or awards that are complied with by the great majority of ‘national-level undertakings’. The key factor is the extent to which the national-level undertakings are real or potential competitors to the service provider.<sup>\*46</sup> Obviously, this is a question of fact that cannot be answered by the ECJ. However, serious doubts exist that these requirements have been fulfilled in the Laval case:

- it is not clear that the wage level agreed to in a collective agreement in the construction business in the Vaxholm (Stockholm) area amounts to the originally required 145 SEK per hour;
- even if Byggnads has concluded a collective agreement with the relevant Swedish employers’ association as the most representative organisation, it is not evident that this agreement is applied ‘throughout the national territory’ rather than only regionally.

Byggnads seems to take the view that article 3 (8) must be understood in such a way that it also allows taking industrial action to **extend** the application of collective agreements to foreign service providers. It refers to recital 12 of the directive, which reads:

Whereas Community law does not preclude Member States from applying their legislation or collective agreements entered into by employers and labour, to any person who is employed, even temporarily, within their territory, although his employer is established in another Member State; whereas Community law does not forbid Member States to guarantee the observance of those rules by the appropriate means [...]

<sup>43</sup> Note 39, p. 580.

<sup>44</sup> Note 34, p. 10.

<sup>45</sup> Cf. case C 513/99 (Concordia Bus Finland Oy AB v. Helsingin jaupunki). – ECR 2002, p. I-7213, paragraphs 62, 67 for environmental standards; C-280/00 (Altmark Trans et al v. Nahverkehrsgesellschaft Altmark). – ECR 2003, p. I-7747 paragraph 90 for public transportation.

<sup>46</sup> Cited by Chr. Barnard (Note 2), p. 282 footnote 271.

As can be seen from the very wording of the recital, it only reiterates what has been said already in paragraphs 1 and 8 of article 3 of directive 96/71. It says nothing about corresponding rights of trade unions but speaks only of Member States. The argument that in the case of Sweden the state, by virtue of the *Lex Britannia*, has delegated this power to trade unions is irrelevant because the *Lex Britannia* itself violates Community law (see section 5.1.3 above) and therefore cannot serve to justify the action of Byggnads to extend its collective agreements to EU service providers.

The same is true of recital 22 of the directive, to which the order for reference of the *Arbetsdomstolen* refers. It states that the directive is without prejudice to Member States' legislation governing the right to take industrial action. It does not say anything — and cannot do so — about the limits of industrial action under **primary Community law**, as has been set out above.

(3) It should be remembered that paragraph 8 of article 3 refers to paragraph 1, including lit. c), which discusses only '**minimum rates of pay**', not 'normal pay' as agreed in collective bargaining. There is some doubt that the Swedish system allows such a distinction to be made between 'minimum' and 'normal' rates of pay. Such a distinction is, however, necessary in order not to take away from foreign service providers the competitive advantage that they may possess by paying lower wages to their workforce under the jurisdiction of their home country, while they may still incur higher costs because of offering work in a different country, where they may need to compensate for costs of transportation, shelter, and living of the posted workers. Application of the normal wage rates in the host country may be disproportionate in special circumstances, as the Court spelt out in *Portugaia Construções*.<sup>\*47</sup>

(4) Finally, a fourth and decisive requirement, that of 'equality of treatment', must be guaranteed. This 'equality' principle is violated when the collective agreement allows or at least tolerates an undercutting of the agreed pay rates while such practice is not tolerated vis-à-vis foreign service providers. This principle had been developed by the ECJ in *Portugaia Construções* with regard to collective agreements that have been declared universally applicable, as in Germany.<sup>\*48</sup> *A fortiori* it must also be applied to collective agreements that are *de facto* universally applicable.<sup>\*49</sup>

#### 5.2.4. Enforcement of eventual minimum pay obligations?

Even if one takes the view (which I do not share) that the requirements of article 3 (8) are met in the Laval case, and that therefore the posted Latvian workers should have been paid at hourly wage rates of around 145 SEK, a refusal to do so by Laval does not automatically mean that industrial action by Byggnads would be justified for imposing a collective bargaining agreement upon Laval. Article 5 (2) of the directive requires that Member States "in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under the Directive". Article 6 makes it possible to institute proceedings in the courts of the host Member State, even if this would not have been possible under the then applicable rules of article 5 (1) of the Brussels Convention.<sup>\*50</sup>

In the Laval case, the protective ambit of article 5/6 is turned upside down by the boycott of Byggnads. The posted Latvian workers have not been allowed to enter the building site and complete the contract. They were sent home and laid off from employment. A claim against their employer is theoretically possible but frustrated in fact by the industrial action of Byggnads. Instead of the article protecting posted workers, exactly the opposite occurs: application of the article deprives them of their chance to work and eventually to claim Swedish wages (should they be applicable under article 3 (8) of directive 96/71) by using the mechanisms of article 5/6. This is in clear violation of the Wolff judgment of the ECJ<sup>\*51</sup> wherein the Court insisted that "Member States must ensure, in particular, that workers have available to them adequate procedures in order actually to obtain minimum rates of pay".

The boycott is made possible by the *Lex Britannia*, which, as has been stated above, in itself violates EU law insofar as it allows discriminatory and selective action against service providers from EU countries and deprives posted workers of the rights to which they are entitled under directive 96/71. In reality, the boycott aims at closing the Swedish construction market to EU service providers and their posted workers. This is not justified under Community law.

<sup>47</sup> C-164/99 (*Portugaia Construções*). – ECR 2002, p. I-787 paragraph 30; see V. Hatzopoulos, T. U. Do (Note 2), pp. 974–975.

<sup>48</sup> *Ibid.*, paragraph 34.

<sup>49</sup> G. Davies (Note 39), p. 581.

<sup>50</sup> *Ibid.*, p. 578; Chr. Barnard (Note 2), pp. 286–287; F. Franzen (Note 41), p. 1071.

<sup>51</sup> Case C-60/03 (*Wolff & Müller GmbH v. Jose Filipe Pereira Félix*). – ECR 2004, p. I-9553, paragraph 29.

### 5.3. Public policy exceptions under article 3 (10) in conjunction with constitutional law

As a subsidiary argument, Byggnads may want to rely on article 3 (10) of directive 96/71, which allows the host Member State to apply to posted workers provisions of its laws, regulations, and administrative provisions governing matters additional to those set out in article 3 (1), provided that these additional rules fall within the category of ‘public policy provisions’.<sup>\*52</sup> Byggnads and the Swedish government argue that the *Medbestämmandelagen* with the special rules of the *Lex Britannia* must be characterised as such public policy provisions because they enshrine the Swedish ‘social model’ in order to avoid social dumping.

Such an interpretation could possibly be based also on constitutional considerations as discussed above (see section 2.4). In *Omega*<sup>\*53</sup>, the Court linked the ‘public policy’ concept to protection of fundamental rights — in this case, the right to human dignity. The same should be true with respect to the relevance for public policy of the defence of social rights by collective action of trade unions, which are, as I have shown, guaranteed under article 28 of the Charter of Fundamental Rights and indirectly in article 136 (1) EC / article 11 ECHR.

But even under such an interpretation of the public policy provisions, it must be in conformity with the requirements of equal treatment and in compliance with the treaty.<sup>\*54</sup> This is not the case with the *Lex Britannia*, because of its discriminatory effect on EU-based enterprises in discarding the collective bargaining agreements concluded with the home trade unions. Second, public policy provisions must be construed strictly as an exception to the freedom to provide services under primary Community law, to which, as is shown by the legal basis of the directive, namely, the internal market provisions, it should contribute by improving competitive conditions, as opposed to creating new obstacles; therefore, national provisions invoking public policy rationale may not serve merely to protect economic goals (in this case, the national construction market’s action against alleged social dumping).

Third, in my opinion, paragraph 10 of article 3 of directive 96/71 only concerns provisions beyond the list of article 3 (1) — that is, other matters than minimum rates of pay. Insofar as the *Lex Britannia* enables Swedish labour unions to impose their national standards of wage bargaining on EU-based service providers, this is possible only under the criteria of article 3 (1) lit. c) respecting paragraph 8, which have already been discarded. The ‘public policy provision’ is not meant to give additional rights to Member States or their trade unions concerning pay rates beyond those of paragraphs 1 and 8 of article 3.

## 6. Justifications II: Viking

The Viking case is different from *Laval* insofar as directive 96/71 is not applicable here according to its Article 1 (2). Finland had not adopted specific legislation similar to the Swedish *Lex Britannia* as could be invoked to justify or condemn industrial action. Finnish law does not seem to contain any discriminatory element but protects the right to strike under non-discriminatory conditions and limitations, including respect for directly applicable EC provisions (see section 4 above).

With regard to justification for the social action by the ITWF and FSU against Viking, some support can be found in the *Überseering* judgment.<sup>\*55</sup> Here, the ECJ allowed certain restrictions against companies moving into one jurisdiction, for social policy reasons. The case concerned a somewhat surprising consequence of the German seat theory. Here, a company formed according to the law of one state (the Netherlands) and whose ownership was transferred to another (Germany) had to be re-established in the country of residence of its owners in order to have standing in civil litigation matters. It was a debated question under German law whether this consequence of the seat theory is really imposed by German law or not.<sup>\*56</sup> In a carefully worded decision, the ECJ repeated its insistence on the country-of-origin principle, whereby the company did not cease to be validly incorporated under Dutch law. On the other hand, it allowed certain limits under public policy criteria. Therefore, the Court aptly stated:

It is not inconceivable that overriding requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even the taxation authorities may,

<sup>\*52</sup> G. Davies (Note 39), p. 582.

<sup>\*53</sup> Case C-3602 (*Omega Spielhallen und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Stadt Bonn*). – ECR 2004, p. I-9609, paragraph 35.

<sup>\*54</sup> *Ibid.*, paragraph 36.

<sup>\*55</sup> Case C-208/00 (*Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*). – ECR 2002, p. I-9919.

<sup>\*56</sup> W.-H. Roth, ICLQ 2003 at 198, 207 concerning *Statutenwechsel*. The Bundesgerichtshof has meanwhile modified its restrictive case law by judgment of 13 March 2003.

in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment (paragraph 93).

The crucial question here lies in how far “overriding requirements [...] such as the protection of employees” justified the social action taken by the ITWF and the Finnish Seamen’s Union, and whether their action was proportionate. In its reference, the English Court of Appeal wants to know whether the public policy proviso of article 46 EC can be applied in this case.

It should not be forgotten that the strike originated from the FOC policy of the ITWF, which includes a social objective in protecting seafarers against the practice of flags of convenience, which may lead — as the Viking case clearly shows — to an eventual ‘negative competition about wages’. The reference of EC law to several documents protecting social rights of workers included in article 136 (1) EC suggests that this is a legitimate objective that can — and eventually must — be enforced via social action, including strikes, in order to be effective. Whether this action violates the principle of proportionality should be answered by reference to the balancing test spelt out in *Schmidberger*.<sup>\*57</sup>

In the latter judgment, the Court weighed the right to free movement on the Austrian Brenner Autobahn of the transportation company against the right of environmental organisations to peaceful demonstrations by blocking the Autobahn for a limited time. Fundamental rights as enshrined in articles 10 and 11 ECHR — e.g., freedom of expression and assembly — may justify restrictions of free movement, being “fundamental pillars of a democratic society” to which the EC and Member States adhere (see article 6 (2) EU). Fundamental rights may be limited for public policy reasons and must be viewed in relation to their ‘social purpose’, but these limitations in themselves must be proportionate. The ECJ applied a balancing test in the case before it: the demonstration was limited in time, scope, and intensity — it cannot be compared to the situation in the case *Commission v. France*<sup>\*58</sup>, where violence was used by wildcat demonstrators against Spanish fruit shipments that was even to some extent supported by the inaction of the French authorities. In *Schmidberger*, the demonstration was authorised by the regional government; the impediment to the business of the transportation company was not serious enough to give rise to state liability.

In the Viking case, the social action of the Finnish Seamen’s Union was in conformity with EU and Finnish law, as the Finnish labour court in the first litigation implicitly held by refusing an injunction against the FSU. This is in contrast to *Laval*, where the boycott was not in conformity with primary or secondary EC law and could not be justified by the Swedish *Lex Britannia*, which itself violated EC law. The action of the FSU and the boycott on the part of the ITWF was directed against only one part of the business of Viking — the reflagging of the *Rosella* — while the action against *Laval* made the provision of services by posted workers impossible. The Finnish action was covered by legitimate social policy goals as recognised in article 136 (1) EC and in conformity with the wide discretion allowed to Member States under the case law of the ECtHR in relation to article 11 ECHR.<sup>\*59</sup> The policy of the ITWF as mentioned in question 8 of the referring court

that vessels should be flagged in the registry of the country in which the beneficial ownership and control of the vessel is situated so that the trade union of the country of beneficial ownership of a vessel have the right to conclude collective bargaining agreements in respect of that vessel

therefore seems to be justified by social objectives and by the right to collective action as recognised in article 28 of the Charter. It does not carry any discriminatory element but applies to all vessels under a FOC. Strike action as such cannot be regarded as not being proportionate for attaining these legitimate objectives even if it may provoke losses of a company that is hit by such action — otherwise, labour unions would not have an efficient instrument to fight for their legitimate aims, such as social protection of workers. The ITWF and FSU therefore are allowed to use the threat, and eventual action, of a strike to implement their FOC policy. This must be true even if the strike prevents reflagging of the *Rosella* in the Viking case, which might eventually lead to substantial losses for the company, forcing it to abandon this part of the business. But this is the consequence of any social action and nothing particular to Viking. The proportionality criterion cannot be used to undermine the very substance of the right to strike. EC law is not qualified to solve this conflict by referring to a somewhat vague ‘proportionality’ proviso, unless the social action is directed against the ‘nationality’ of the ship-owner or serves merely to protect workers with Finnish citizenship, which, as the English Court of Appeal correctly held<sup>\*60</sup>, cannot be said to be the case here.

<sup>57</sup> Supra Note 14, paragraph 79.

<sup>58</sup> Case C-265/95. – ECR 1997, p. I-6959.

<sup>59</sup> See the *Sorensen/Rasmussen* judgment (Note 17).

<sup>60</sup> Supra Note 4, paragraphs 47–50.

## 7. Annex: Opinions of 23 May 2007 by Advocates General Mengozzi in Laval and Poiares Maduro in Viking

### 7.1. Opinion of Mengozzi of 23 May 2007

The opinion of Advocate General Mengozzi covers 42 pages, with 107 footnotes, and gives a very detailed overview of Swedish and Community legislation and social practice with regard to the conflict that arose in Laval. The AG takes as a starting point — just as this author does — the direct effect of article 49 EC on social action by labour unions (see paragraphs 155–161) and rejects the argument of the Swedish and Danish governments that the — admittedly fundamental — right to strike is “beyond the reach” of EC Law (paragraphs 233–236). A strike or boycott as in the Laval case must therefore be regarded as a “restriction on the freedom to provide services” (paragraph 233) that can, however, be justified by action to protect workers and to fight social dumping (paragraph 249), provided that it is in line with the proportionality criteria (discussed in paragraphs 245 et seq.).

The methodological starting point, however, of the AG differs from mine insofar as he interprets in great detail article 3 (1) and (8) of directive 96/71 and their *de facto* implementation via the Swedish system of collective bargaining. The *Lex Britannia* is therefore for him without problems, as it ensures the effectiveness of the Swedish system (paragraph 185), without being measured under article 49 and the mutual recognition principle. The core of the analysis is in paragraph 8, which enables Swedish trade unions not only to set minimum rates of pay as prescribed in paragraph 1 but to insist on full compliance with Swedish wage levels, perhaps under a somewhat lighter regime of tie-in conditions, without the target entity becoming a member of a trade association. This is, in his opinion, also justified under the minimum protection clause of article 3 (7). A conflict with directive 96/71 and later article 49 EC arises only where the wage rates as enforced by the Swedish trade unions also include certain contribution fees, supervision charges, insurance premiums, and the like that cannot be subsumed under the concept of pay or that are already covered by the home country jurisdiction (paragraph 281).

In my opinion, such an argument — which is radically abbreviated here — is not in compliance with the directive itself or with article 49 EC. A complete levelling of ‘minimum rates of pay’ to the ‘normal rates’ paid in Sweden even if the provider is already bound by a collective agreement of his home country — as asserted without argument in paragraphs 194 to 202 of the opinion — means *de facto* that the competitive advantage of the Latvian service provider is completely eliminated and therefore the very basis of the directive — which is, according to its preamble, to remove obstacles to the freedom to provide services while guaranteeing to posted workers certain social standards and avoiding, as AG Mengozzi insists (in paragraphs 249–307), social dumping — is circumvented and effectively frustrated. This seems to be implicitly recognised by the AG himself in paragraph 206, although he does not, however, draw forth the necessary legal consequences from this statement:

By imposing strict equality of treatment between foreign service providers and those domestic undertakings, the Swedish system appears in fact to disregard the very characteristics of the freedom to provide services by fully assimilating the temporary posting of workers by a service provider of a Member State to Sweden to a permanent activity carried on by undertakings that are established in Swedish territory.

The Swedish system, in imposing **equal rates of pay in unequal economic conditions** — namely, on the one hand, permanent work performed in Sweden on a regular basis and, on the other, temporary work done by posted workers under a service provider established in another EU country — amounts to indirect discrimination that should not be allowed under either article 49 or directive 96/71, which is a mere concretisation. The minimum protection clause should, as is the usual case in EC law, be interpreted strictly in the light of the fundamental freedoms of Laval to offer its services EC-wide and not serve as a basis for effectively sealing off the Swedish labour market.

The opinion furthermore does not invoke the transparency argument written into article 4, which is important for the foreign service provider in considering whether to take on the considerable costs and risks of entering a foreign market. Finally, the AG leaves outside the scope of his opinion the position of Latvian workers — those seemingly to be protected — which is expressly foreseen in article 5/6 (for a differing view, see paragraph 176, relating it to Swedish conditions, not to the protection of posted workers!).

The analysis of article 49 and especially the proportionality argument is more critical to the practice of the Swedish labour unions and shows more ‘sympathy’ with the situation of Laval.

In that connection, it seems to me that the fact of making the very possibility of applying a given rate of pay conditional upon prior signing up to all of the conditions of a collective agreement that apply in practice to

undertakings established in Sweden in the same sector and in a similar situation goes beyond what is necessary to ensure the protection of workers and to prevent social dumping (paragraph 280).

As a result, the opinion gives a somewhat blurred picture: by generously interpreting article 3 (1), (7), and (8) of directive 96/71 in the sense of Swedish wage conditions, the competitive effect of the wage advantage of Laval by posting its workers who are under Latvian jurisdiction and bargaining agreements is neutralised. However, the way collective bargaining was imposed on Laval, on the one hand, and the excessive charges added to the wage package, on the other, as allowed by Swedish practice, seem to be in contradiction with the proportionality principle as enshrined in article 49 and therefore make the boycott illegal. One will have to wait to see how the Court finally decides.

## 7.2. Opinion of AG Poiares Maduro

The starting point of the opinion of AG Poiares Maduro is similar to that of AG Mengozzi as far as the relationship between the fundamental right to social action and the free movement rules, on the one hand, and the horizontal direct effect of article 49 respecting article 43 EC, on the other, is concerned. However, there are interesting nuances in their reasoning. AG Poiares Maduro argues mostly from a model of allocative efficiency (paragraph 33). Community law is aimed at “bringing these policies [e.g., social protection of workers via collective action rights of trade unions v. free movement rights in the area of establishment and provision of services] together”:

Therefore, the fact that a restriction on freedom of movement arises out of the exercise of a fundamental right or of conduct falling within the ambit of the social policy provisions does not render the provisions on freedom of movement inapplicable (paragraph 23).

The horizontal application of the fundamental freedoms of articles 43 and 49 is justified by a theory of *mittelbare Drittwirkung* (indirect effect on third parties of fundamental rights) as developed in German and other Member States’ constitutional law, and as implicit in the ECJ *Commission v. France*<sup>61</sup> and *Schmidberger*<sup>62</sup> cases. However, this argument is not quite correct, because the theory of *mittelbare Drittwirkung* is based on an obligation of the state (and its courts of law) to protect fundamental rights also in private law relations where no party autonomy exists, while the theory of horizontal effect as developed in this paper allows direct action of injured parties against collective regulations without any interference by the state; the judge hearing the case has no discretion but to enforce the free movement rights against violations by a sporting association or by trade unions. But the end results of both arguments are not dissimilar.

Since directive 96/71 is not applicable in the Viking case, and, since Finnish law does not contain legislation similar to the Swedish *Lex Britannia*, the case must be resolved according to a balancing test, which the AG set out in great clarity and brilliance (paragraphs 57–72). The question is how far trade unions can take social action against acts of relocation by undertakings that are protected by the free movement rules. On the one hand, workers (and their unions) must accept the

recurring negative consequences that are inherent to the common market’s creation of increasing prosperity, in exchange for which society must commit itself to the general improvement of their living and working conditions, and to the provision of economic support to those workers who, as a consequence of market forces, come into difficulties (paragraph 59).

This balancing, contrary to the reasoning set forth by AG Mengozzi and much of the case law of the ECJ that has been referred to by this author (in section 6 above), is performed not by applying a proportionality test but via the classical argument of market segregation:

A coordinated policy of collective action among unions normally constitutes a legitimate means to protect the wages and working conditions of seafarers. Yet, collective action that has the effect of partitioning the labour market and that impedes the hiring of seafarers from certain Member States in order to protect the jobs of seafarers in other Member States would strike at the heart of the principle of non-discrimination on which the common market is founded (paragraph 62).

This seemingly simple test has a number of drawbacks, as the Viking case clearly shows. The collective actions of the ITF and FSU seemingly partition the labour market in attacking the reflagging and thereby preventing the hiring of (cheaper) Estonian seafarers. But, on the other hand, this is, in the eyes of labour unions acting in solidarity, justified by a general policy against flags of convenience, not against Estonian workers in particular. Who is to judge the legitimacy of this social policy even if it may have a detrimental effect on free movement? These effects may also be purely accidental and an unavoidable consequence of a social action if there is desire for it to be effective. The AG also seems to exaggerate the parallels between social actions in *Commission v. France* and Viking (paragraph 68): While the first made free movement impossible by wild-

<sup>61</sup> Case C-265/95 (Note 58), p. I-6959.

<sup>62</sup> Supra Note 14.

cat actions blocking roads in France against Spanish fruit exporters, Viking can always run its *Rosella* (as it indeed has done for more than four years following protracted negotiations with the FSU, though perhaps without making the expected profit — not that making a profit is protected under the free movement rules!); these economic disadvantages of social action may also materialise in any other conflict concerning relocation of business within the EU. In my opinion, Viking cannot expect special protection against social actions established to impede reflagging, unless this action is in itself disproportionate (as in *Commission v. France*), which, in my personal opinion, it is not.



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# The Changing Landscape of Cross-border Insolvency Law in Europe

## 1. Introduction

The 21<sup>st</sup> century has started with several legislative measures of importance for insolvencies with a cross-border effect. In 2000, birth was given to the EU Insolvency Regulation (No. 1346/2000), which entered into force on 31 May 2002 (InsReg). For several financial institutions falling outside the regulation's scope, 2001 produced Directive 2001/17 and Directive 2001/24, on the reorganisation and winding up of insurance undertakings and of credit institutions. Where a 'Regulation' is a European Community legislative measure that is fully binding for the EU Member States (except for Denmark), both directives have to go through a legislative implementation process in each individual EEA (European Economic Area) member state. The implementation date for Directive 2001/24 was 20 April 2003 and for Directive 2001/17 — 5 May 2004, and the drafting process in all countries is nearing its final phase.

In this article, I would like to describe where Europe stands (as of May 2006). On the European level a regulation has been introduced that is based on well-known theories of private international law for dealing with cross-border insolvencies (see section 2 of the paper). This regulation is referred to as the EU Insolvency Regulation (see section 3), and the basis it provides for a court to exercise international jurisdiction to initiate insolvency proceedings ('centre of main interests') is discussed in section 4, with an examination of two cases of the European Court of Justice (of 17 January 2006 and 2 May 2006) in sections 5 and 6. The EU Insolvency Regulation carries its own legal concept (addressed in section 7). The regulation should be seen in its procedural context, as it fills the gap that had been left open by the introduction of the 1968 Brussels Convention, dealing with the international jurisdiction and recognition of judgments in civil and commercial matters. In the context of legal proceedings, the latter (known as the Brussels Regulation 2000 in its current form) constitutes the general rule, while the regulation (for insolvency judgments) itself forms the special rule. As 'financial institutions' are not covered by the Insolvency Regulation, the latter serves in its turn as a general rule with regard to credit institutions and insurance undertakings, for which the entities directives 2001/17 and 2001/24 have been issued (see section 8). The article ends with a short conclusion.

## 2. Co-ordinated universality as basic model

“The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor’s assets”, according to Recital 3 of the Insolvency Regulation. So, what is the chosen approach to achieve proper functioning of the internal EU market when confronted with cross-border insolvency cases? These cases include instances where the insolvent debtor has assets in more than one member state or where some of the creditors of the debtor are not from the state in which the insolvency proceedings are taking place. These instances give rise to a great number of sometimes rather complex legal questions, such as that of the international jurisdiction of the court that is authorised to commence insolvency proceedings; the law applicable to the insolvency proceedings; the substantive and procedural effects of these proceedings, e.g., on the legal position of creditors from abroad and their rights to set-off or the termination of employment contracts; the issue of recognition of proceedings that have been initiated abroad; and the powers of a liquidator or administrator who has been appointed abroad. To strike at their heart, the issues to be resolved concerning cross-border insolvencies are being approached from two points of departure: ‘universality’ and ‘territoriality’.

In the universality model, insolvency proceedings are seen as unique proceedings reflecting the unity of the estate of the debtor. The proceedings should involve all of the debtor’s assets, wherever in the world these assets are located. Under this approach, the whole estate will be administered and reorganised or liquidated on the basis of the rules established in the law of the country where the debtor has his domicile (or registered office or similar reference location) and in which country the proceedings have been opened. The applicable law for the proceedings and its legal and procedural consequences is the law of the state in which the insolvency measures have been undertaken. This law is referred to as *lex concursus* or *lex forum concursus* (‘forum law’), being the law (*lex*) of the country where a court (*forum*) has opened insolvency proceeding (dealing with concurrent claims of creditors: *concursus*) and which court is (or has been) charged with hearing, conduct, and closure of the proceedings. The liquidator (or administrator) in this approach is charged with the liquidation (or reorganisation) of the debtor’s assets anywhere in the world of which the debtor himself (partly) has been divested; respectively, he is charged with the supervision of the administration of the debtor’s affairs. The *lex concursus* determines all consequences of these proceedings, e.g., with regard to current contracts, the powers of an administrator, and the bases and system for distributing dividends to creditors.

The territoriality model, on the other hand, takes as a basic idea that the insolvency measure under consideration will have legal effects only within the jurisdiction of the state within the territory of which a court has opened said insolvency proceedings. The legal effects of these proceedings therefore will stop abruptly at this state’s borders. The limitations these proceedings will bring to a debtor’s legal authority to administer his assets are not applicable abroad. Assets in other countries are not affected by these proceedings, and the administrator who is appointed will not have any powers abroad.

These points of departure form both endpoints of a continuum and are discussed extensively and sometimes sharply in the literature.<sup>\*1</sup> In practice, most countries modify or limit the sharp edges of these theories and have introduced modified or mixed models, mostly referred to as ‘modified’, ‘limited’, or ‘mitigated’ universalism, as most of them at their core have a universality element. The EU Insolvency Regulation is based on a mixed model, referred to by me as ‘co-ordinated’ universality.<sup>\*2</sup>

<sup>1</sup> See B. Wessels. *International Insolvency Law*. Deventer: Kluwer 2006. See also, e.g., S. Kolmann. *Kooperationsmodelle im Internationalen Insolvenzrecht. Empfiehlt sich für das Deutsche internationale Insolvenzrecht eine Neuorientierung (Models of Cooperation in International Insolvency Law; Is a New Orientation to be Recommended for German International Insolvency Law)?* Schriften zum Deutschen und Europäischen Zivil-, Handels- und Prozessrecht. Bielefeld: Verlag Ernst und Werner Gieseking 2001; J. Westbrook. *The Control of Wealth in Bankruptcy*. – *Texas Law Review* 2004 (82) 4, p. 795; J. Pottow. *Procedural Incrementalism. A Model For International Bankruptcy*. January 2005, Paper#05-001. Available at [www.law.umich.edu](http://www.law.umich.edu).

<sup>2</sup> Co-ordination is to be found especially in the mutual duties for liquidators in insolvency proceedings, pending in different EU Member States, to communicate information and to co-operate, see article 31 InsReg. See my editorial ‘It’s Time to Cooperate’. – *International Corporate Rescue* 2005/2, pp. 291ff.

### 3. The EU Insolvency Regulation

On 31 May 2002, Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings entered into force. The regulation applied entirely and directly to the ten Member States that joined the EU as of 1 May 2004.<sup>3</sup> A regulation is a European Community measure of law that is binding and directly applicable in Member States.<sup>4</sup> The regulation does not apply to Denmark, as it opted out in accordance with the Treaty of Amsterdam.

In the light of the introduction above, it should be mentioned that the regulation acknowledges the fact that, as a result of widely differing substantive laws in the Member States, “it is not practical to introduce insolvency proceedings with universal scope in the entire Community” (Recital 11). The differences mainly lie in the widely differing laws on security interests to be found in the Community and the very different preferential rights enjoyed by some creditors in the insolvency proceedings.

The goals of the regulation, with 47 articles, are to enable cross-border insolvency proceedings to operate efficiently and effectively, to provide for co-ordination of the measures to be taken with regard to the debtor’s assets, and to avoid ‘forum shopping’. The regulation, therefore, provides rules for the international jurisdiction of courts in a Member State for the opening of insolvency proceedings, the (automatic) recognition of these proceedings in other Member States, and the powers of the ‘liquidator’ in the other Member States. The regulation also deals with important choice of law (or private international law) provisions. These contain special rules on applicable law in the case of particularly significant rights and legal relationships (e.g., rights *in rem* and contracts of employment). On the other hand, national proceedings covering only assets situated in the state of opening are allowed alongside ‘main’ insolvency proceedings with universal scope. The material that follows provides a quick summary of the contents of the Insolvency Regulation.

The general provisions establish the area of application of the regulation. It is confined to “proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator” (see article 1 (1) InsReg). Annex A addresses all insolvency proceedings of the Member States; Annex C mentions all names of the officeholders (‘liquidators’). As far as the courts’ jurisdiction is concerned, the regulation is based on the general principle that “the courts of the Member State within the territory of which the centre of the debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings” (see article 3 (1)). For a company or legal person, the presumption is that the centre of the debtor’s main interests is the place of his registered office, but this presumption may be rebutted (article 3 (1), final line). Debate as to whether a debtor (natural persons and legal persons, except financial institutions) indeed has his centre of main interests (in Estonian: *võlgniku põhiuvide kese*; in international jargon: COMI) in a certain jurisdiction has been heard in some 70 courts in 10-odd countries since May 2002.

The insolvency proceedings opened are referred to as ‘main’ proceedings. Their most important consequence is that the law applicable to insolvency proceedings under the regulation is that “of the Member State within the territory of which such proceedings are opened” (see article 4 (1)), thus *lex concursus*, and that the proceedings opened shall be recognised automatically in all other Member States (article 16). In addition, the court of another Member State than the State of opening of main proceedings shall have jurisdiction only if “the debtor possesses an establishment within the territory of that other Member State” (article 3 (2)).<sup>5</sup> The effects of the latter proceedings — referred to as secondary proceedings — are, however, restricted to the assets of the debtor situated in the territory of the other Member State (article 3 (2), last line) and the latter proceedings may consist of winding-up proceedings only. In the framework of main proceedings and secondary proceedings one notes a combination of universality and territoriality, as referred to above.

The centre of main interests should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties, as Recital 13 provides. In some 80 per cent of all court cases published mid-2002<sup>6</sup>, the determination of COMI is the principle point of legal conflict, with highly contested cases like those of *Daisytek* (involving 16 subsidiaries, in the UK, Germany, and France)<sup>7</sup> and *Parmalat* (involving Italy, Ireland, the Netherlands, and Luxembourg). The resolution of the

<sup>3</sup> Some smaller changes have been made, based on the accession of ten States to the EU, based on article 20 of the Act of Accession (OJ L 236, 23.09.2003, Annex II, paragraph 18, A(1)), and after the accession of Bulgaria and Romania as per 1 January 2007 (OJ L 363, 20.12.2006). In the consolidated version of the Insolvency Regulation also amendments to the Annexes (April 2005, May 2006 and December 2007) have been inserted. For the most recent version visit my weblog (2007-01-doc16) at [www.bobwessels.nl](http://www.bobwessels.nl).

<sup>4</sup> A Regulation does not allow ‘implementation’ as it binds Member States directly. In several countries though, national legislation is (or should be) adopted in order to make the Insolvency Regulation compatible with national procedural law, see for Germany, France and the Netherlands: B. Wessels. Realisation of the EU Insolvency Regulation in Germany, France and the Netherlands. – Current Topics of International Insolvency Law, Kluwer, 2004, p. 229.

<sup>5</sup> Article 2 (h) provides that for the purposes of the EU Insolvency Regulation an ‘establishment’ (in Estonian: *tegevuskoht*) shall mean ‘any place of operations where the debtor carries out a non-transitory economic activity with human means and goods’.

<sup>6</sup> Sources or extracts of nearly 200 court cases (as per August 2007) can be found at [www.eir-database.com](http://www.eir-database.com).

<sup>7</sup> These European subsidiaries were left out of a filing of a Chapter 11 case in the USA (Dallas, Texas) for the overall holding of *Daisytek International, Inc.*

question ‘where is the centre of main interests?’ in these decisions is based on many facts and circumstances. Amongst (very many) others, facts deemed relevant in one or another case include that:

- (i) the day to day administration was conducted in the forum state (Ireland)<sup>\*8</sup>;
- (ii) the directors possessed the forum’s state’s nationality (Italy)<sup>\*9</sup>;
- (iii) the (Delaware-incorporated) company had represented itself to its most substantial creditor as having its principle executive offices in the forum state (England)<sup>\*10</sup>;
- (iv) the debtor (a natural person) maintained, with regard to the substantial interests in a large number of companies established in the forum state, that he administered these commercial interests in the forum state (the Netherlands)<sup>\*11</sup>;
- (v) the director (of an Irish-incorporated company that was a wholly owned subsidiary of a UK company) was based in the UK and was solely responsible for the company’s business<sup>\*12</sup>;
- (vi) some remaining contractual work (conducted by a company incorporated in Finland) was still in progress in the forum state (Sweden)<sup>\*13</sup>;
- (vii) the parent company (of an Austrian company with its domicile in Innsbruck) was located in the forum state (Germany)<sup>\*14</sup>;
- (viii) the company (registered in the UK, with a postal address in Spain) was a partner in a Swedish limited partnership (*kommanditbolag*) (Sweden)<sup>\*15</sup>; and even
- (ix) the source code of the computer programs of the debtor company (registered in the UK, postal address in the UK, premises in Sweden) was stored in the forum State (Sweden).<sup>\*16</sup>

The regulation provides for several exceptions to application of the *lex concursus* (see articles 5–15, InsReg). These exceptions include third parties’ rights *in rem* and reservation of title (articles 5 and 7) and set-off rights (article 6). These rights (under certain conditions) are not affected by the legal consequences (*lex concursus*) of the commencement of main proceedings. In other instances, an exclusion is applied in that another choice of law (instead of the *lex concursus*) is made. Important examples are contracts relating to immovable property (article 8: effects of insolvency proceedings shall be governed by the law of the Member State within the territory of which the immovable property is situated) and contracts of employment (article 10 states that this is governed by the law of the Member State applicable with respect to the contract of employment).

Insolvency proceedings begun in the opening state where the debtor has his centre of main interests will be (automatically, per article 16) recognised in all other Member States. Nevertheless, such recognition does not prohibit the undertaking of secondary proceedings in a state where the debtor owns an establishment (article 16 (2)). Furthermore, the regulation describes, amongst other elements, the powers of a liquidator and the publication of the opening judgment in another Member State or in public registers. Any creditor has the right to lodge claims in writing if his residence is located in a Member State other than the state of the opening of proceedings. This provision is meant also to concern the tax authorities and social security authorities (article 39).<sup>\*17</sup> The regulation further provides for a duty to inform known creditors in the other Member State and the language to be used in the specific notice.

In general, the EU Insolvency Regulation applies only to intra-Community relations; in cross-border insolvency cases relating to non-EU states, the rules of general private international law or specific legislation of a particular country in this field apply.<sup>\*18</sup>

<sup>8</sup> Court of Dublin, 23 March 2004 (Re Eurofood IFSC Limited) (Irish company, part of the Parmalat group).

<sup>9</sup> Court of Parma, 19 February 2004 (Re Eurofood IFSC Limited).

<sup>10</sup> Court of Leeds (Ch. D), 20 May 2004 (Re Ci4net.com Inc and Re DBP Holdings Limited).

<sup>11</sup> Netherlands Supreme Court, 9 January 2004. – JOR 2004/87, which includes my commentary.

<sup>12</sup> High Court London (Ch. D), 2 July 2004 (Re Aim Underwriting Agencies (Ireland) Ltd).

<sup>13</sup> Svea Court of Appeal, 30 May 2003, No. Ö 4105-03 (on file with author).

<sup>14</sup> Court of Munich, 4 May 2004 (Re Hettlage KgaA).

<sup>15</sup> Court of Appeal Skåne and Blekinge, 3 February 2005, Ö 21-05.

<sup>16</sup> Court of Stockholm, 21 January 2005, K 17664-04.

<sup>17</sup> High Court of Ireland, 8 March 2005 (Re Cedarlease Ltd) considers that the Insolvency Regulation does not expressly provide that a creditor located in another Member State (i.e., the Commissioners of Customs & Excise for the UK) shall have the right to initiate insolvency proceedings, but in the court’s view, it would defeat the purpose of the Insolvency Regulation if that were not the case.

<sup>18</sup> See V. Marquette, C. Barbé. Council Regulation (EC) No. 1346/2000. Insolvency Proceedings In Europe and Third Countries. Status and Prospects. – A. Nuyts, N. Watté (eds.). International Civil Litigation in Europe and Relations with Third States. Bruxelles: Bruylant 2005, p.419.

## 4. How to determine COMI

It may follow from the above that courts make their determination on COMI following the interpretation of a superabundance of facts.<sup>\*19</sup> In general, I would submit, in these court cases one sees the clash of two concepts. The first is a 'contact with creditors' (sometimes: 'business activity') approach: a debtor's COMI has to be determined through the eyes of creditors. After all, Recital 13 provides that COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis "**and is therefore ascertainable by third parties**" (my emphasis).

A simple example is the case decided by the District Court Dordrecht (in the Netherlands) on 23 November 2005 (LJN: AU7353). A creditor filed for insolvency proceedings concerning a debtor on 13 September 2005. The request was dealt with by the court on 23 November 2005. The debtor, though appropriately summoned, did not appear. The court based its international jurisdiction on article 3 (1) in the light of Recital 13. Public municipal records indicate that the debtor — prior to the date of filing, 4 May 2005 — had left for Belgium. Therefore, according to the court, Belgium is the debtor's COMI unless it is proved that his COMI is in the Netherlands. It is not enough that the debtor's small business registration in the Trade Register was cancelled on 11 October 2005, *ex officio* by the keeper of the register. It has not been proved that the debtor still continues to display activities, and the fact that he still has several debts to the filing creditor is insufficient for assuming that his COMI is in the Netherlands. Therefore, the Dutch courts do not have jurisdiction to open main insolvency proceedings.

The other view is the 'mind of management' approach (sometimes called the 'headquarters', 'head office functions', or 'parental control' approach). An example can be found in a case of the UK High Court of Justice (Chancery Division Companies Court) ruling of 15 July 2005 (Collins & Aikman Europe SA).<sup>\*20</sup> In the UK, an application for administration orders was made concerning 24 companies in the Collins & Aikman Corporation Group, of which one was incorporated in Luxembourg, six in England, one in Spain, one in Austria, four in Germany, two in Sweden, three in Italy, one in Belgium, four in the Netherlands, and one in the Czech Republic. The Collins & Aikman Group had its headquarters in Michigan, USA. A leading global supplier of automotive component systems and modules to the world's largest vehicle manufacturers, including Daimler, Ford, General Motors, Honda, Nissan, Porsche, Renault, Toyota, and Volkswagen, it had a combined workforce of approximately 23,000 employees and a network of more than 100 technical centres, sales offices, and manufacturing sites, in 17 countries throughout the world. In Europe its 24 facilities spanned ten countries, with 4500 staff. Its largest customers were Daimler, Daimler Chrysler, General Motors, and Ford, with Ford accounting for approximately 60% of the business of the European operations. The group had grown considerably in the previous few years, primarily on account of acquisitions, but it had got into financial difficulties by virtue of its liquidity position. As a result, the US operations of the group were subjected to Chapter 11 proceedings in the United States in May 2005. The High Court paid attention to Recital 13 and several English court decisions in ascertaining the centre of main interests.<sup>\*21</sup> The norm 'the place where the debtor conducts the administration of his interests on a regular basis and is ascertainable by third parties' has to be applied, and the court found its guidance in the literature (Dicey & Morris, *Conflict of Laws* supplement 30, paragraph 158), according to which, in order to refute the presumption that the relevant place is the place of incorporation, it is necessary to show that the 'head office functions' are carried out in a Member State other than that in which the registered office is situated. The court assessed the evidence from the companies and considered the main administrative functions relating to the European operations to have been carried out from England since 17<sup>th</sup> May 2005: cash co-ordination, pooling of bank accounts for the European operations, co-ordination of human resources, and operation of the IT system, as well as the majority of the sales functions in relation to the European operations being dealt with from England — in particular, all sales to the principal customer in Europe, Ford (again, accounting for approximately 60% of revenue), being handled by the Ford Business Unit in England. The court, finally, was satisfied by the evidence that the centre of main interests of each of the non-English companies was not related to the location of its respective registered office.

Of the questions this judgment raises I mention now only the nature of the approach. With due respect it is submitted that neither from the history nor from the recitals or body of the regulation does it follow that the carrying out of headquarters functions has weight and meaning in the context of deciding upon the issue of international jurisdiction of a court. It functions only as an explanation for said presumption. Whether this should be the most desirable approach is another matter, but, to follow it, the text of the regulation should be changed or the European Court of Justice (ECJ) may provide such an interpretation. In my book I articulate doubts that this will be the case.<sup>\*22</sup>

<sup>19</sup> For an overview, see the article: A. Õunpuu. Problems of Opening Main Insolvency Proceedings. – *Juridica* 2005/7, pp. 475–487 (in Estonian, with English summary).

<sup>20</sup> High Court of Justice (Chancery Division Companies Court), 15 July 2005 (Collins & Aikman Europe SA). – EWHC 2005, 1754 (Ch).

<sup>21</sup> Including BRAC Rent-A-Car International Inc [2003] 1 WLR 40 1421, and Re DaisYTEK-ISA Ltd [2004] BPIR 30.

<sup>22</sup> See Note 1. See also my article International Jurisdiction To Open Insolvency Proceedings In Europe, In Particular Against (Groups Of) Companies. – B. Wessels. *Current Topic of International Insolvency Law*. Kluwer 2004, p. 155; U. Huber, *Inländische Insolvenzverfahren über*

## 5. European Court of Justice, 2 May 2006 (Eurofood)

On 2 May 2006, the European Court of Justice published a long-awaited judgment that is important in the interpretation of COMI. Eurofood IFSC Ltd. was registered in Ireland in 1997 as a 'company limited by shares' with its registered office in the International Financial Services Centre in Dublin. It was a wholly owned subsidiary of Parmalat SpA, a company incorporated in Italy, whose principal objective was the provision of financing facilities for companies in the whole Parmalat Group. On 24 December 2003, in accordance with Decree-Law 347 of 23 December 2003 (*Amministrazione straordinaria delle grandi imprese in stato di insolvenza*, or 'extraordinary administration for large insolvent undertakings'; GURI No. 298 of 24 December 2003, p. 4), Parmalat SpA was admitted to extraordinary administration proceedings by the Italian Ministry of Production Activities, which appointed Mr Enrico Bondi as the extraordinary administrator of Parmalat. On 27 January 2004, the Bank of America applied to the High Court of Ireland for compulsory winding-up proceedings to be commenced against Eurofood and for the nomination of a provisional liquidator. That application was based on the contention that Eurofood was insolvent. The Irish High Court appointed on the same day Mr Pearse Farrell as the provisional liquidator, with powers to take possession of all of the company's assets, manage its affairs, open a bank account in its name, and instruct lawyers on its behalf. Two weeks later, on 9 February 2004, the Italian minister for production activities admitted Eurofood to the extraordinary administration procedure and appointed Mr Bondi as the extraordinary administrator. This was followed a day later by an application filed before the Tribunale Civile e Penale di Parma (the District Court of Parma, Italy) for a declaration that Eurofood was insolvent. The hearing was fixed for 17 February 2004, Mr Farrell being informed of that date on 13 February. On 20 February 2004, the District Court of Parma, taking the view that Eurofood's COMI was in Italy, held that it had international jurisdiction in the meaning of article 3 (1) of the Insolvency Regulation to determine whether Eurofood was in a state of insolvency.

Back in Ireland, by 23 March 2004 the High Court had decided that, according to Irish law, the insolvency proceedings in respect of Eurofood had been opened in Ireland on the date on which the application was submitted by the Bank of America — namely, 27 January 2004. Taking the view that the COMI of Eurofood was in Ireland, it held that the proceedings opened in Ireland were the main proceedings. It also held that the circumstances in which the proceedings were conducted before the District Court of Parma were such as to justify, pursuant to article 26 of the regulation, refusal of the Irish courts to recognise the decision of that court. Finding that Eurofood was insolvent, the High Court issued an order for winding up and appointed Mr Farrell as the liquidator. Mr Bondi appealed against that judgment, and the Irish Supreme Court considered it necessary, before ruling on the dispute before it, to stay the proceedings and to refer the question regarding COMI to the Court of Justice for a preliminary ruling.

On this topic the European Court of Justice (Grand Chamber) on 2 May 2006 (Case C-341/04) ruled as follows:

Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of article 3 (1) of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation.

The other important decision is that the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening state.

Another judgment of the ECJ is that a decision to commence insolvency proceedings for the purposes of article 16's rules of automatic recognition is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator as referred to in Annex C to the regulation. Such divestment implies that

Auslandsgesellschaften nach der Europäischen Insolvenzverordnung (Domestic Insolvency Proceedings concerning non-German companies according to the European Insolvency Regulation). – E. Schilken et al (ed.). Festschrift für Walter Gerhardt. RWS Verlag Kommunikationsforum 2004, p. 397.

the debtor loses the powers of management that he has over his assets. All of this means that the judgment based on the application on 27 January 2004 before the High Court (Ireland) must be recognised.

As an adherent to the ‘contact with creditors’ approach, I approve of the decision with regard to COMI. For a company or legal person, the presumption is that the centre of the debtor’s main interests is the place of his registered office, but this presumption may be rebutted (see article 3 (1), final line). This presumption should be taken seriously. It may be rebutted only if ‘factors which are both objective and ascertainable by third parties’ enable it to be established that reality differs from legal form (the formal location at that registered office). The ECJ provides two examples: (i) when the company is not carrying out any business in the territory of the Member State in which its registered office is situated and (ii) where the company carries on its business in the territory of the Member State where its registered office is situated. In the first example (PO boxes; sham companies), the presumption may be rebutted with ease. In the second example, COMI might be in the other Member State but “the mere fact that its economic choices are or can be controlled by a parent company in another Member State” is not enough to rebut the presumption. Internal ‘invisible’ (potential) control by the parent will be barely ascertainable, if detectable at all. Rebutting the presumption on the basis of these facts does not work. That is possible only if factors that are both objective and ascertainable by third parties would lead to that consequence.

## 6. European Court of Justice, 17 January 2006 (Susanne Staubitz-Schreiber)

At the beginning of 2006, the first full case ruling concerning the application of the Insolvency Regulation was issued by the European Court of Justice, on 17 January 2006 (Case C-01/04). This decision as well concerns COMI, but for a natural person. The applicant for initiation of insolvency proceedings was Susanne Staubitz-Schreiber, a resident of Germany, where she operated a telecommunications equipment and accessories business as a sole trader. She ceased to operate that business in 2001 and requested, on 6 December 2001, the opening of main insolvency proceedings regarding her assets before the court in Wuppertal. On 1 April 2002, she moved to Spain in order to live and work there. In its judgment of 10 April 2002, the Wuppertal court refused to open the insolvency proceedings applied for, on the grounds that there were no assets. The appeal brought by the applicant in the main proceedings against that order was dismissed in appeal, on grounds that the German courts did not have jurisdiction to open insolvency proceedings in accordance with article 3 (1) of the regulation, since the centre of the main interests of the applicant in the main proceedings was situated in Spain. Staubitz-Schreiber brought an appeal before the German Supreme Court (*Bundesgerichtshof*) in order to have the latter order set aside and the case referred back to the court in Wuppertal. She submitted that the question of jurisdiction should be examined in the light of the situation at the time when the request to open insolvency proceedings was lodged, or, in this case, by taking account of her domicile in Germany in December 2001. The German Supreme Court referred the following question to the ECJ for a preliminary ruling: “Does the court of the Member State which receives a request for the opening of insolvency proceedings still have jurisdiction to open insolvency proceedings if the debtor moves the centre of his or her main interests to the territory of another Member State after filing the request but before the proceedings are opened, or does the court of that other Member State acquire jurisdiction?”<sup>23</sup>

Where is Staubitz-Schreiber’s COMI? It follows that, in the case of the main proceedings, the national court must determine whether it has jurisdiction in the light of article 3 (1) of the regulation. The ECJ indicates that that provision does not specify whether the court originally seised retains jurisdiction if the debtor moves the centre of his main interests after submitting the request to commence proceedings but before the judgment is delivered. The ECJ considers a transfer of jurisdiction from the court originally seised to a court of another Member State on that basis to be contrary to the objectives pursued by the regulation. The ECJ submitted that the preambles to the regulation express the intention to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position: “That objective would not be achieved if the debtor could move the centre of his main interests to another Member State between the time when the request to open insolvency proceedings was lodged and the time when the judgment opening the proceedings was delivered and thus determine the court having jurisdiction and the applicable law.” Transfer of jurisdiction would also be contrary to the objective of efficient and effective cross-border proceedings, and retaining the jurisdiction of the first court seised ensures greater judicial certainty for creditors who have assessed the risks to be assumed in the event of the debtor’s insolvency with

<sup>23</sup> The European Court of Justice first has to deal with the transitional provision of article 43 of the Regulation laying down the principle governing the temporal conditions for application of that regulation: “That provision must be interpreted as applying if no judgment opening insolvency proceedings has been delivered before its entry into force on 31 May 2002, even if the request to open proceedings was lodged prior to that date. That is in fact the case here, since the request by the applicant in the main proceedings was lodged on 6 December 2001 and no judgment opening insolvency proceedings was delivered before 31 May 2002.”

regard to the place where the centre of his main interests was situated upon entry into a legal relationship with him. “The answer to be given to the national court must therefore be that article 3 (1) of the Regulation must be interpreted as meaning that the court of the Member State within the territory of which the centre of the debtor’s main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened.” It is interesting to note that in the ECJ’s approach to the legal issue at hand, the aims and objectives of the Insolvency Regulation are pivotal. Furthermore, emphasis is placed on the interests and the protection of creditors, which seems to function as a forerunner of the ECJ decision in the Eurofood case.<sup>\*24</sup> On 9 February 2006, the German Supreme Court decided that the judgment of the Wuppertal court of 10 April 2002 should be overturned, and the Supreme Court referred the matter for a new decision to the same court.<sup>\*25</sup>

## 7. Co-ordination of proceedings

As noted above, secondary proceedings may have a winding-up character only (article 27). The model of main proceedings and concurrent secondary proceedings, having this nature, has been criticised. It is submitted, however, that this limitation flows from the clear desire “to achieve a system of international cooperation that is simple and easy to understand”<sup>\*26</sup> At the same time, during the preparation of (what now is) the regulation, the predominating thought was that “the rules of mandatory coordination and the influence rights given to the main trustee would provide enough means to protect the rescue efforts in the main forum. This line of reasoning explains the rule adopted: secondary proceedings are possible, provided they are of the winding-up type, but they are subject to the [...] main-secondary scheme of coordination”.<sup>\*27</sup> It is mainly within the power of the liquidator in the main insolvency proceedings to exercise measures for co-ordination; e.g., he may request institution of secondary proceedings in other Member States (article 29), participate in secondary proceedings (article 32 (3)), request a stay of the process of liquidation in secondary proceedings (article 33 (1)), request termination of this stay (article 33 (2)), propose a rescue plan in the context of these secondary proceedings, or disagree with the finalising of liquidation in secondary proceedings (article 34 (2)). He shall, furthermore, lodge all claims in the secondary proceedings as have been lodged in the main proceedings (article 32 (2)), and he is duty bound to communicate relevant information (article 31 (1)) and to co-operate (article 31 (2)). Both of the latter obligations are incumbent on liquidators in secondary proceedings too. The mutual duty between liquidators to communicate and to co-operate symbolises the bridging of the still existing deficit of uniform law. Fulfilment of the obligations to communicate and to co-operate is necessary in order to allow for action, with regard to all claims, in accordance with the principle of equal treatment of *pari-passu*-ranked creditors.

In a dozen or so separate provisions, the Insolvency Regulation gives shape to the idea of ‘unity of estate’ (there is, after all, only one debtor), with regard to which he who has the most dominant role (the main liquidator) in principle directs the completion of the insolvency process, under the supervision of a national court. In this process, the main liquidator has, with regard to the secondary proceedings, a set of controlling or co-ordinating (procedural and substantive) powers that he may exert. It is for this reason that for the model of international insolvency law in the system of the EU I apply the description ‘co-ordinated universalism’.

## 8. The procedural context

The formal insolvency proceedings form the point of view of the Community’s approach in tackling certain problems in cross-border insolvencies, while the Insolvency Regulation is part of a more comprehensive framework with regard to cross-border effects of legal proceedings. The general rule here was laid down already in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Insolvency proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions, and analogous proceedings are excluded from the scope of the 1968 Brussels Convention, which itself has been transformed into a regulation too, as of 1 March 2002.<sup>\*28</sup> The EU Insolvency Regulation aims to fill this gap.

<sup>24</sup> See further my comments, together with the ECJ decision of 17 January 2006. – JOR 2006/59.

<sup>25</sup> German Supreme Court, 9 February 2006. – ZIP 2006, p. 529; NZI 2006, p. 297.

<sup>26</sup> See M. Virgós. The 1995 European Community Convention on Insolvency Proceedings: an Insider’s View. – Forum Internationale 1998/25, p. 11.

<sup>27</sup> *Ibid.*

<sup>28</sup> Council regulation No. 44/2001 of 22 December 2000. – OJ L 12, 22.12.2001.

Not all debtors, however, are covered by the Insolvency Regulation. Insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings, holding funds or securities for third parties, and collective investment undertakings are excluded from the scope of the Insolvency Regulation (see article 1 (2) InsReg). The entities and undertakings that fall under the definitions given by the relevant Community regulations and directives are excluded from the scope of the Insolvency Regulation since they are subject to special arrangements and, to some degree, national supervisory authorities have extremely broad powers of intervention (see Recital 9, InsReg). Both for insurance undertakings and for credit institutions, directives have been specified, with final implementation dates in 2003 and 2004, because, unlike a regulation, a directive must undergo a legislative implementation process in each individual Member State.<sup>\*29</sup>

## 9. Conclusions

The model of the Insolvency Regulation consists of four building blocks: (i) main proceedings, the law of which (*lex concursus*) has universal effect (within the EU); (ii) special rules on applicable law (in contrast to choice of law for *lex concursus*) in the case of particularly significant rights and legal relationships (such as rights *in rem* and contracts of employment); (iii) special 'territorial' proceedings (covering only assets situated in the state of commencement of proceedings) to run alongside 'main' insolvency proceedings with universal scope; and (iv) co-ordination between these proceedings by liquidators. The model, as indicated and as expressed in Recital 12, acknowledges the existence of widely differing substantive laws, mainly (but not exclusively) the widely differing laws on security interests and the preferential rights enjoyed by some creditors in the insolvency proceedings to be found in the Community. The interpretation of the Insolvency Regulation will be a prime topic in the years to come. The Insolvency Regulation, however, may be seen as a major step in addressing the lacuna of cross-border insolvency within the majority of Europe.

<sup>29</sup> See directive 2001/17 of the European Parliament and the Council of 19 March 2001 on the reorganization and winding-up of insurance undertakings (OJ L 110, 20.04.2001) and directive 2001/24 of the European Parliament and the Council of 4 April 2001 on the reorganization and winding-up of credit institutions (OJ L 125, 5.05.2001). Implementation dates: 20 April 2003 and 5 May 2004 respectively. See G. Moss, B. Wessels (eds.), *EU Banking and Insurance Insolvency*, Oxford University Press 2006.



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# Problems of Introduction of *Societas Europaea* in Estonian Law

## 1. Historical and legal background of creating SE as type of company

The inauguration speech, delivered by Professor Piet Sanders at the University of Rotterdam in 1959 may be regarded as the moment of the first announcement of the idea to establish a pan-European type of company. Six years later, the European Commission established a working group to develop the standards required for introducing a relevant legal body.<sup>\*1</sup> At that time, a European company<sup>\*2</sup> (*Societas Europaea* or SE) as a transnational type of company was called the “flagship of European company law” in literature, and in 1970, when the European Commission submitted its proposal on the basis of the developed project<sup>\*3</sup>, the related ambitions did indeed soar. The initially planned provisions governing the SE, in principle, served as a code for European company law. The hope was to develop the SE into a legal body that was completely detached from national legal systems and based solely on European corporate law, independent of the legal systems of the Member States.<sup>\*4</sup> At the same time, it was forgotten to what extent company law and especially the corporate governance in each Member State was intertwined with the economic, political and cultural history of the relevant state.<sup>\*5</sup>

The draft statute of the SE consisted of 284 articles and contained provisions that determined its smooth enforcement to fail from the start. Namely, the draft provided for a mandatory two-tier management structure with the employee involvement obligation characteristic of the German model.<sup>\*6</sup> A more important reason why the draft failed at that time was the principally different approach of the Member States to the management

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<sup>1</sup> V. Edwards. The European Company — Essential Tool or Eviscerated Dream? – Common Market Law Review 2003 (40) 2, pp. 443–444.

<sup>2</sup> Although the name of the legal form contains the common notion ‘company’, in essence, it is still a form of public limited-liability company.

<sup>3</sup> COM (70) 600 final, 24.07.1970. OJ C124.

<sup>4</sup> C. Teichmann. The European Company: A Challenge to Academics, Legislatures and Practitioners. – German Law Journal. Private Law. 2003 (4), 4, p. 309.

<sup>5</sup> P. Zumbansen. Spaces and Places: A System Theory Approach to Regulatory Competition in European Company Law. – Law Research Institute Research Paper Series. CLPE Research Paper/2006, Vol. 02 No. 02, p. 21. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=902695](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902695).

<sup>6</sup> V. Edwards (Note 1), pp. 444–445.

structure — opposition to the requirement of two-tier management and employee involvement obligation was so great in some Member States that it took nearly 25 years before the SE was finally supplied with a legal framework.<sup>\*7</sup>

The Member States have acted in accordance with the specific trends in company law of the relevant state upon implementing the SE-Statute. According to the press release of 8 October 2004, only Belgium, Austria, Denmark, Sweden and Finland had introduced the necessary changes to their national law by that time.<sup>\*8</sup> The relevant Act (*Gesetz zur Einführung der Europäischen Gesellschaft, SEEG*<sup>\*9</sup>) entered into force in Germany at the end of 2004 and rules concerning the SE were also enforced in Great Britain at about the same time.<sup>\*10</sup> In order to implement the SE-Statute, Estonia adopted on 10 November 2004 the Council Regulation (EC) No. 2157/2001 on the Statute for a European Company Implementation Act<sup>\*11</sup>, whose objective was to regulate the legal status of the SE registered in Estonia, insofar as it is not governed by the Regulation.

It has been opined in legal literature that the main output of the SE regarding implementation should be to facilitate cross-border mergers<sup>\*12</sup>; however, the effects resulting from the creation of the SE have also been labelled as merely psychological.<sup>\*13</sup> Although it is true, to a certain extent, that the SE enables companies operating in different Member States to act as a single company under uniform rules, the SE as a special and uniform type of company is largely imaginary because, for example, the SE registered in Germany cannot be identical to its equivalent registered in England, since pursuant to the 8 October 2001 (SE-Statute) Council Regulation No. 2157/2001 on the Statute for a European Company<sup>\*14</sup>, a company is unavoidably, to a certain extent, subject to the national law of the state in which the SE has been registered.<sup>\*15</sup>

It has been the primary task of the Member States to ensure that the SE is not discriminated against, compared to similar national public limited-liability companies, and to avoid the unequal treatment of the SE and disproportionate restrictions upon the establishment of the SE or the transfer of its registered office from one Member State to another. As a result, the general principle is that the SE must be treated equally with a public limited-liability company of the Member State in which the registered office of the SE is located.<sup>\*16</sup> A number of provisions of various levels apply to each SE depending on the nature of the relevant company. Firstly, the Regulation itself contains mandatory provisions; secondly, the Regulation entitles the SE to make certain choices (e.g., the choice between one-tier and two-tier management); thirdly, the Regulation also contains a number of non-mandatory provisions. The right to regulate particular issues has been given to the Member States, an entry into a relevant agreement governed by a separate directive has been stipulated in case of employee involvement<sup>\*17</sup>, and standard rules are applied when negotiations fail. In issues not governed by the Regulation, the Member States may impose mandatory rules by their national law (including applying general company law provisions); in addition, the SE has the right to use its statute to establish rules in cases where issues are not governed by law and, provided that this has not been done, the non-mandatory provisions of the Member State shall apply.<sup>\*18</sup> Although such a multi-level legal regulation involving many provisions may leave an impression that all issues should be covered by provisions, the result may be quite the contrary, and due to the number of regulation levels and different provisions, gaps are unavoidable. Paradoxically, the creation of a large number of norms for regulating social relations also produces gaps. Any strategy for reforming law generally also means that additional provisions are created, and as law is used to try to solve all problems found in a society, each gap requires the creation of a new provision. However, society develops faster than law and consequently there are more and more situations that need to be regulated.<sup>\*19</sup>

<sup>7</sup> C. Teichmann (Note 4), p. 310.

<sup>8</sup> Company law: European Company Statute in force, but national delays stop companies using it. IP/04/1195. Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/1195&format=HTML&aged=0>.

<sup>9</sup> Gesetz zur Einführung der Europäischen Gesellschaft. – Bundesgesetzblatt. Jahrgang 2004, Teil I, Nr. 73, ausgegeben zu Bonn am 28. Dezember 2004.

<sup>10</sup> P. Mäntysaari. Comparative Corporate Governance. Berlin, Heidelberg 2005, p. 59.

<sup>11</sup> RT I 2004, 81, 543; 2005, 57, 451 (in Estonian). Hereinafter: SECIA.

<sup>12</sup> P. Mäntysaari (Note 10), p. 59.

<sup>13</sup> P. L. Davies. Gower and Davies' Principles of Modern Company Law. Seventh edition. Tallinn 2003, pp. 24–25.

<sup>14</sup> OJ L 294, 10.11.2001, pp. 0001–0021.

<sup>15</sup> P. Davies (Note 8), p. 26.

<sup>16</sup> E. Werlauff. The SE Company — A New Common European Company from 8 October 2004. – International Themes in Business Law, London 2007, Vol. 1, p. 297.

<sup>17</sup> Council directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees. – OJ L 294, 10.11.2001, pp. 22–32.

<sup>18</sup> F. Kübler. The Societas Europaea — Implementation and Perspectives. – Die Europäische Aktiengesellschaft. Umsetzungsfragen und Perspektiven. T. Baums, A. Cahn (Hrsg.). Berlin: De Gruyter Recht 2004, pp. 3–4.

<sup>19</sup> S. Kaugia. Õigusnormide kohast eri kultuuriruumides (About the Position of Legal Norms in Different Cultural Spaces). – Riigikogu Toimetised 2002, No. 6, p. 75 (in Estonian).

The objective of this article is to examine how the Member States have introduced the regulation governing the SE to their national law and whether the declarative options of choice have been in fact realised as SE provisions. As differences of opinion concerning the management model have constituted one of the most problematic areas in the past, an important question discussed is how the legal system representing the classical two-tier management system has created a one-tier system for the SE and vice versa.<sup>\*20</sup> In addition to that, some other problems highlighted in the theory have been analysed, such as how the potential supplementation of the powers of the general meeting has been regulated in one-tier management, how the issue of independent supervision has been addressed, as well as how, in case of different establishment options of the SE, to solve certain situations not regulated by national law. The issues to be discussed have been selected based on some problems also found in Estonian law, focussing, above all, on finding solutions that are important with regard to complementing Estonian law.

## 2. Limits of developing the structure of SE's management organs

E. Werlauff notes when analysing various models of the SE that the monistic or one-tier management structure encompasses the origins of company law disputes that are simply suppressed in the dualist or two-tier structure so that the supervisory body (supervisory board) has a possibility to relatively easily recall the inconvenient members of the management board and compel such persons to leave the company. In the one-tier structure, the non-executive members of the management board have no right to exclude executive members from the administrative organ because only shareholders are competent to do that.<sup>\*21</sup> Although the monistic system may seem more democratic from the point of view of a member of the management organ, we cannot forget that the relationship between the management organ and the company can be defined as a special trust relationship because of its mandatory nature, so it should be possible to terminate the relationship promptly if needed. In that sense, the dualist system may be considered more efficient since lack of trust and long-lasting disputes about whether a member of the management organ has performed his or her duties or not should not impede the further normal functioning of the company. However, instead of opposing various management structures to each other, they have recently been implied to also converge.<sup>\*22</sup>

According to article 38 of the SE-Statute, the SE shall comprise firstly a general meeting of shareholders and secondly either a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier system) depending on the form adopted in the statute. Thus, any public limited-liability company operating in the form of the SE has been declared to have an option to use either a one-tier or two-tier management structure. The dualist model considerably resembles the management structure of a German public limited-liability company, whereas it is somewhat more difficult to draw exact parallels for a one-tier model, but the British system may generally be considered as an example.

According to article 43 (1) of the Regulation, the administrative organ shall manage the SE in the case of one-tier management structure. The Member States may provide that a managing director or managing directors shall be responsible for the day-to-day management under the same conditions as for public limited-liability companies that have registered offices within that Member State's territory. According to subsection 2 of the same article, the number of members of the administrative organ or the rules for determining it shall be laid down in the SE's statutes, but a Member State may, however, set a minimum and, where necessary, a maximum number of members.<sup>\*23</sup> The member or members of the administrative organ shall be appointed by the general meeting (article 43 (3) of the Regulation). The administrative organ shall elect a chairman from among its members. Thus, when examining the provisions applied to one-tier management of the SE, only article 44 indirectly refers to the model containing the origins of supervision or the internally structured monistic model; according to subsection 1, the administrative organ shall meet at least once every three months, at intervals laid down by the statutes, to discuss the progress and foreseeable development of the SE's business. The provision implies that the duties of the administrative organ or the management board in a wider sense include control,

<sup>20</sup> The United States of America and the United Kingdom above all have been referred to as the representatives of the monistic model in literature, whereas Germany is pointed out as the representative of the dualist model. See Grossfeld, B. Management and Control of Marketable Share Companies. – International Encyclopedia of Comparative Law. Volume XIII. Business and Private Organizations. *Sine anno*. Chapter 4, p. 7.

<sup>21</sup> E. Werlauff. EC Company Law. The common denominator for business undertakings in 12 states. Copenhagen 1993, p. 85.

<sup>22</sup> See, for example, H. M. Ringleb, T. Kremer et al. Kommentar zum Deutschen Corporate Governance Kodex. 2. Auflage. Munich, 2005, Präambel, Rn. 111.

<sup>23</sup> Germany, for example, has used such a possibility in SEEG § 23.

supervision and the setting of more general goals. The Regulation does not provide for special competence for the chairman of the administrative organ.<sup>\*24</sup>

Proceeding from the formulation of article 43 (4) of the SE-Statute, one may ask whether it obliges the Member State to create the necessary alternative management rules (provided that it differs from that of a national public limited-liability company) or only recommends this be done. Namely, the provision referred to provides that where no provision is made for a one-tier system in relation to public limited-liability companies with registered offices within its territory, a Member State may adopt the appropriate measures in relation to SEs. It may probably be claimed, based on grammatical interpretation, that it is a recommended provision; yet it is questionable whether the conceptual objective of the SE supports such an interpretation. The interpretation problem mainly concerns the countries in which national law provides only one possible management model (e.g., Germany and Great Britain, but also Estonia). Before enforcing the SEEG, C. Teichmann expressed the opinion that the interpretation should not proceed from the outcome of the academic discussion but from pragmatic considerations and in making the German legal environment attractive for potential SEs, it would be reasonable to provide for a one-tier model. At the same time, Teichmann rightly concluded that it required resolution of several complicated problems, such as the creation of a special employee involvement model for the one-tier structure, adaptation of group rules, etc.<sup>\*25</sup>

Nevertheless, when analysing how the German legislator has approached the task of creating a one-tier management model, it appears that the system developed is far from what could be considered to be a one-tier management structure, for example, in the context of company management in Great Britain.

According to SEEG § 20, the SE that has chosen a one-tier management structure is subject to the special provisions contained in this Act instead of §§ 76–116 of *Aktiengesetz*.<sup>\*26</sup> Pursuant to § 22 (1) of the same Act, a company is managed by the administrative council (*Verwaltungsrat*) that, inter alia, specifies the main directions of the activities of the company and exercises supervision of adherence thereto. Subsections 2 and 5 of this section provide that the administrative council also has the right and duty to call a general meeting, subsection 4 grants the administrative council, similarly to the council of the two-tier model, the right to inspect all the documents and assets of the company. According to SEEG § 40 (1), the administrative council shall appoint one or several managing directors (*geschäftsführende Direktor*), who may simultaneously belong to the administrative council but may not form the majority. At the same time, it is allowed to appoint a third party as the managing director. SEEG § 40 (2) sets out that it is the task of the managing directors to carry out the daily management of the company and also, according to § 41 (1), its representation. There are several provisions in the Act, which indicate that managing directors actually serve analogous to the management as an organ (for example, §§ 40 (7), 45, 46 (3), etc. directly point out that the provisions of the AktG governing the activities of the management board are applicable to managing directors). Thus, the administrative council does not represent a single management organ in the meaning of the monistic model, but rather an analogue to the supervisory board where some admissions have been made regarding the separation of powers.<sup>\*27</sup> When comparing the above-described one-tier management structure with the monistic management rules contained in the Cadbury Report<sup>\*28</sup> that is recommendable for British listed companies, it appears that the SEEG has indeed created an alternative model but it resembles more of the GmbH structure transformed into a two-tier one than the actual alternative to the dualist model.<sup>\*29</sup>

Naturally, it may be asked why British law should be taken as an example when creating a one-tier management structure and why the German one-tier management model could not represent anything new compared to what is meant by the classical one-tier model. On the European scale, the question could be answered by referring to the need to increase the flexibility of the provisions concerning the SE as well as the objective to eliminate unjustified differences. The model proposed in the SEEG currently fails to achieve the goal since it

<sup>24</sup> The potential supervision problems related to listed SEs have been solved, since the majority of countries demand the introduction of a supervision system functioning within the framework of the management organs via the codifications of company management practices. The regulatory nature of such practice may be disputed but European listed companies follow them quite closely according to literature. See E. Wymeersch, Implementation of the Corporate Governance Codes. – Financial Law Institute Working Paper Series. WP 2004-08. Available at <http://www.law.ugent.be/fli/WP/WP2004-pdf/WP2004-8.pdf>.

<sup>25</sup> C. Teichmann (Note 4), pp. 323–325.

<sup>26</sup> Aktiengesetz vom 6. September 1965 (BGBl. I S. 1089), zuletzt geändert durch Artikel 3 des Gesetzes vom 19. April 2007 (BGBl. I S. 542). Available at <http://www.gesetze-im-internet.de/bundesrecht/aktg/gesamt.pdf>. Hereinafter: AktG.

<sup>27</sup> Comment on § 43 of the SE-Statute also indicates that when interpreting the SE-Statute, German authors had considered the administrative council not as an organ engaging in daily management but in long-term planning and supervision. See J. Reichert, S. Brandes, Münchener Kommentar zum Aktiengesetz. 2. Auflage 2006. Band 9/2. Europäisches Aktienrecht. A. Die Europäische Aktienrecht. II. Die Verordnung (EG) Nr. 2157/2001 des Rates über das Statut der Europäischen Gesellschaft (SE) – SE-VO vom 8. Oktober 2001 (ABl. EG Nr. L 294, S. 1), geändert durch Verordnung (EG) Nr. 885/2004 vom 26. April 2004 (ABl. EG Nr. L 168/1) Art. 43, Rn. 80.

<sup>28</sup> Report of the Committee on the Financial Aspects of Corporate Governance. 1.12.1992. Available at <http://www.ecgi.org/codes/documents/cadbury.pdf>.

<sup>29</sup> It should be specified that the authors of the article have considered it necessary to refer to the principles expressed in the Cadbury Report because it is the codification that most clearly conveys the nature of the balanced monistic model.

is obviously a derivative of the two-tier model, which may continue to remain strange and hard to understand for people familiar with the one-tier management structure. On the world scale, the creation of a one-tier structure similar to the British model would perhaps be even more justified since it is the British model that is also more easily understandable for investors coming from elsewhere in the world (USA, for example). Such an opinion has, among other things, also been expressed in the legal literature discussing the relevant topics.<sup>\*30</sup> The simple structure of the British company management model has been highlighted compared to the heavy German rules and it has been indicated that the management model of large British companies now already contain features characteristic of the supervision theory.<sup>\*31</sup>

When examining, in turn, how British law has developed a two-tier system of management rules for the SE, a similar problem appears. The legislative Act governing the SE (The European Public Limited-Liability Company Regulations 2004<sup>\*32</sup>) has, in creating the management provisions, mostly focussed on the major debatable issue of the past — the problem of employee involvement. The Act does not contain the specific and detailed rules of the two-tier management structure; it confines itself to a reference to the general principle, according to which the provisions applicable to the board of directors in other Acts also apply to the members of the management and supervisory organs (article 78 (3)), and to a few individual special provisions (for instance, articles 60 and 61 provide the minimum number of members for the management and supervisory organs and article 63 sets out the right of the council to receive from the management board information about the management of the company). Hence, it may be claimed that British legislation has, by default, attempted to retain its customary model with a single management organ.<sup>\*33</sup>

Returning to Estonian law, we must note that due to the SE-Statute, the SE may also choose between a one-tier and two-tier management structure in Estonia. When analysing the provisions of the SECIA, it is clear that the regulation is very general as far as the one-tier management structure is concerned, and its application regarding the legal environment, aimed at the two-tier management structure of the Estonian public limited company, is apparently problematic, and thus, it may be easier here to choose the two-tier management structure for the SE to be registered here. However, this gives rise to the question of whether the provisions enforcing one-tier management constitute efficient and applicable provisions.<sup>\*34</sup> SECIA § 18 (1) directly provides that if the SE is managed through a one-tier administrative council, the relevant provisions of the SECIA shall apply instead of §§ 306–327 of the Commercial Code.<sup>\*35</sup> The problem is that the provisions of Estonian company law governing the structure of the management organs proceed from the theory of independent supervision that serves as the basis for all the rules on the management of a public limited company operating in the jurisdiction of Estonian law.<sup>\*36</sup> When the SE chooses the monistic model that is an option for national private limited companies, according to the Commercial Code, the entire legal background shifts. Thus, on the basis of the current regulation, it may be said that the Estonian solution regarding the rules of the one-tier management structure is not sufficient. However, the authors are of the opinion that instead of German law described above, we might consider the development of a simpler solution that focuses more on the idea of a single organ, taking into account the fact that such a model would firstly be simpler and secondly easier to understand for the Anglo-American legal system.

<sup>30</sup> See N. Tollet. The Societas Europea: Europeanization via Americanization of Corporate Law. *Corporate Governance: Only One Model? – Global Jurist Topics* 2005 (5) 2, article 3. Available at <http://www.bepress.com/gj/topics/vol5/iss2/art3>.

<sup>31</sup> P. Davies. Board Structure in the UK and Germany: Convergence or Continuing Divergence? – London School of Economics and Political Science. Department of Law. Working Paper Series. Available at SSRN <http://ssrn.com/abstract=262959>.

<sup>32</sup> The European Public Limited-Liability Company Regulations 2004 No. 2326. European Communities. 8.10.2004. Available at [http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/legis/num\\_reg/2004/20042326.html&query=societas+and+europaea&method=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/legis/num_reg/2004/20042326.html&query=societas+and+europaea&method=boolean).

<sup>33</sup> The most detailed link between the special Act governing the SE and national company law has most likely been developed in the relevant Swedish Act: its § 16 provides a list of the provisions of Aktiebolagslag directly applicable to the council of the two-tier model. See Lag (2004:575) om Europabolag. Available at <http://www.notisum.se/RNP/SLS/lag/20040575.htm>, Aktiebolagslag (2005:551). Available at <http://www.notisum.se/index2.asp?iParentMenuID=236&iMenuID=314&iMiddleID=285&top=2&sTemplate=/template/sok.asp?DokTyp=1>.

<sup>34</sup> A question about the efficiency of a provision relates to whether the relevant provision or system of provisions in reality regulates those social relationships that it was originally intended to regulate. When formal validity implies the relations within the legal system, then the efficiency is indicative of the actual impact of the provisions on society. See A. Aarnio. *Õiguse tõlgendamise teooria* (The Theory of Interpretation of Law). Tallinn, 1996, pp. 71–78 (in Estonian).

<sup>35</sup> *Äriseadustik*. – RT I 1995, 26–28, 355; 2006, 61, 456 (in Estonian).

<sup>36</sup> For the theory of independent supervision, see A. F. Conard. The Supervision of Corporate Management: A Comparison of Developments in European Community and United States Law. – *Michigan Law Review* 1984 (82), pp. 1459–1488.

### 3. Corporate Governance Recommendations as a regulator of the management of SE

The potential collision of the Corporate Governance Recommendations<sup>\*37</sup> and the SECIA may be pinpointed as a further problem. Based on law, the SE registered in Estonia must have the possibility to create a one-tier management structure if it so wishes. Hence, in that case, national provisions should apply to the administrative organ in the one-tier structure (article 18 (2) of SECIA); in addition, a company registered in Estonia, operating in the form of the SE and listed on the Tallinn Stock Exchange, that has chosen the monistic management model, must generally also proceed from the CGR. The problem is, however, that the regulation of the CGR is based on the two-tier management structure prescribed in the Commercial Code. Consequently, there is no mechanism compelling the SE that has decided to organise its management through an administrative council to distinguish between the executive and non-executive members within the administrative council in Estonia and ensure the balance of powers in the form it is provided for in the one-tier management structure of British public limited-liability companies in the Cadbury Report and later codifications of corporate governance recommendations.<sup>\*38</sup> A listed company operating in the form of the SE may naturally deviate from the CGR, explaining the reasons for choosing a one-tier management structure; yet it would be correct if the CGR took direct account of the possibility that a listed company may have a one-tier management structure in certain cases, and could also provide clearer instructions for ensuring the separation of management and supervision in a situation in which the law fails to do so. As an example, we could use Dutch law, where the relevant circle of issues is clearer because the Netherlands have, for a long time, used in parallel several different structural models.<sup>\*39</sup> Clause 10 of the preamble to the Dutch Corporate Governance Code<sup>\*40</sup> notes that there are real and operative listed companies having one-tier management, so the Corporate Governance Code has been developed in line with the relevant particularities.<sup>\*41</sup>

### 4. Determination of the powers of SE general meeting

According to § 298 of the Commercial Code, the powers of a general meeting are limited by the matters provided by law. Clauses 1–9 of the relevant clauses lists the areas of competence of the general meeting; pursuant to clause 10 of the same subsection, the powers of the general meeting may also include other matters prescribed by law (several decisions related to equity capital, such as use of the legal reserve, but also other matters clearly placed in the competence of the general meeting by the Commercial Code or any other Act). According to § 298 (2) of the Commercial Code, a general meeting may adopt resolutions on other matters related to the activities of the public limited company only on the demand of the management board or supervisory board. This means that in a situation where there is no supervisory board in the management structure of the public limited company, the management board is, in principle, free to decide on everything related to the activities of the company. In the management model comprising two organs, the supervisory board shall exercise supervision of the activities of the management board as the result of several mechanisms separately provided therefore. When the SE, however, is managed by a one-tier structure, this gives rise to the question of how the supervision of the activities of the management board is ensured. It must be noted that in some issues, the legislator has also prescribed for the SE using a one-tier management structure more specific provisions ensuring the separation of powers; for example, deciding on the entry into a transaction with a member of the administrative council and holding a legal dispute have been placed in the competence of the general meeting (SECIA § 26) along with the provision of consent to the competing activities to a member of the administrative council (SECIA § 27).<sup>\*42</sup> Yet the solutions offered by the SECIA are partially also questionable. It is not clear, for instance, whether and how it would be possible to transfer deciding on certain transactions to the general meeting without a conflict with the above-mentioned provisions of the Commercial Code. According to § 18 (2) of the SECIA, the provisions relating to the management board and supervisory board of the public limited company shall be applied to the administrative council insofar as it is possible in the case of a company hav-

<sup>37</sup> Available at [http://www.ecgi.org/codes/documents/cg\\_recommendations\\_2005\\_ee.pdf](http://www.ecgi.org/codes/documents/cg_recommendations_2005_ee.pdf). Hereinafter: CGR.

<sup>38</sup> The Combined Code on Corporate Governance. Financial Reporting Council. 23.07.2003. Available at [http://www.ecgi.org/codes/documents/combined\\_code\\_final.pdf](http://www.ecgi.org/codes/documents/combined_code_final.pdf), Corporate Governance: A Practical Guide. London Stock Exchange, 24.08.2004. Available at [http://www.ecgi.org/codes/documents/rsmi\\_lse\\_guide2004.pdf](http://www.ecgi.org/codes/documents/rsmi_lse_guide2004.pdf).

<sup>39</sup> A. Dorresteyn, I. Kuiper, G. Morse. European Corporate Law. Stockholm, 1995, p. 125.

<sup>40</sup> The Dutch Corporate Governance Code. Principles of Good Corporate Governance and Best Practice. Corporate Governance Committee 09.12.2003. Available at [http://www.ecgi.org/codes/documents/cg\\_code\\_nl\\_en.pdf](http://www.ecgi.org/codes/documents/cg_code_nl_en.pdf).

<sup>41</sup> According to clause III.8 of the Dutch Corporate Governance Code, the model observes “the principle of a single organ”.

<sup>42</sup> The provision concerns a matter placed in the competence of the general meeting by law for the purposes of § 298 (1) 10) of the Commercial Code.

ing one management body. According to § 20 (2) of the SECIA, the members of the administrative council shall observe the limitations prescribed by the statute or imposed by the general meeting or administrative council when entering into transactions on behalf of the SE, yet it remains unclear how the general meeting can expand its competence compared to the provisions of the Commercial Code.

When turning to German law to resolve the above-mentioned problem, it appears, after comparing the provisions of the SEEG and AktG, that of the rules directly concerning the general meeting, the SEEG only contains provisions regarding the submission of the annual report to the regular annual meeting, calling a general meeting on demand of the minority, and amendment of the statute (SEEG §§ 48, 51 and 52). Hence, national law, i.e., AktG is applicable under those circumstances. AktG § 119 (1) provides that the general meeting is competent to make decisions in matters clearly prescribed by law and the statute, and adds a sample list of the matters. Pursuant to the second subsection of the same section, a general meeting may adopt decisions concerning everyday economic activities only at the request of the management board. It derives, from the above, that the solutions of German law would not help fill the gaps caused by the particularities of Estonian law since the competence of the general meeting of an Estonian public limited company cannot be expanded by the statute. When the SE registered in Germany wishes to transfer the supervision of certain acts to be carried out by the administrative council in the future to the powers of the general meeting, it may set out the relevant provisions in the statute. But this is not possible according to the Commercial Code. The authors of the article thus opine that one should consider adding a provision allowing to supplement the powers of the general meeting of the SE in the SECIA.

## 5. Foundation of SE

The provisions governing the foundation procedure of the SE seem to have gaps in them in certain matters; thus, we must investigate how to bridge these gaps. Problems related to the general meeting deciding on the approval of the memorandum of association of a holding SE may be brought as examples. According to article 32 (6) of the SE-Statute, the general meeting of each company participating in the foundation of the SE must approve the memorandum of association of the holding SE. As said, the Regulation does not regulate in detail issues related to the procedure of the general meeting, and the SECIA does not prescribe any special provisions either. There are no provisions in national law governing that type of merger. Thus, regardless of the opportunity to establish SE rules on very different levels, the issue remains unregulated.

This gives rise to a number of questions — it is unclear how the shareholders' right to receive information has been ensured, what documents must be submitted to the general meeting and what documents sent to shareholders for advance notice. When a special general meeting decides on the approval of the memorandum of association of the holding SE, shall the general rules of the Commercial Code apply and a one-week advance notice is enough, or must the period of advance notice be longer? What is the quorum and majority required for deciding on the approval of the holding SE? Or to sum it up: if and how are the protection of minority shareholders and the shareholders' right to receive information in general ensured? It is hard to say whether it is a purposeful non-regulation of the legal relationship or a gap that needs to be bridged, and if it is a gap, then whether the relevant provisions governing the decision on a merger should be analogously applied? One of the solutions offered is interpretation of the relevant provisions pursuant to the objective of the Third Council Directive<sup>\*43</sup>, which would probably allow to apply the rules on mergers to the foundation of holding SEs.<sup>\*44</sup> Such a proposal was made at the time that the Directive on cross-border mergers<sup>\*45</sup> had not been adopted yet; nevertheless, we must agree with the principle and thus the Directive on cross-border mergers should be applied to the above-mentioned issues (particularly articles 7–9). As special rules have been prescribed concerning the foundation of the SE and the foundation of the SE is not a cross-border merger<sup>\*46</sup>, the provisions of the Directive on cross-border mergers could only be applied based on analogy. At the same time, such a solution may bring about new problems since the simultaneous application of two different sets of rules may give rise to the question on the basis of which set the transactions are made and this results in new complicated legal problems related, above all, to employee involvement.<sup>\*47</sup>

<sup>43</sup> Third Council Directive 78/855/EEC of 9 October 1978 based on article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies. – OJ L 295, 20.10.1978, pp. 36–43.

<sup>44</sup> C. Teichmann (Note 4), p. 329.

<sup>45</sup> Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. – OJ L 310, 25.11.2005, pp. 1–9.

<sup>46</sup> According to article 10 of the SE-Statute, the SE has the same rights as companies founded on the basis of national law, and consequently, they can participate in cross-border mergers, but the merger cannot result in the foundation of the SE.

<sup>47</sup> J. Rickford. The Proposed Tenth Company Law Directive on Cross Border Mergers and its Impact in the UK. – European Business Law Review 2005 (16), footnote 58.

## 6. Limitations arising from national law

As noted above, national law applicable to the SE is not limited solely to company law. As the SE is registered in the register of the country of its seat and on the basis of law applicable there, problems may also arise from differences in the registration procedure and the accompanying areas of law. One such issue is the business name, in the selection of which the SE is subjected to the national law of the Member States and the potential problems arising from which are revealed by the foundation of the, thus far, only Estonian SE (SE Sampo Life Insurance Baltic).<sup>\*48</sup>

Since it was an insurance company, it was also subject to the specific laws of the relevant area. Subsection 6 (1) of the Insurance Activities Act<sup>\*49</sup> provides that the business name of an insurance undertaking or insurance agent which is a company shall include the word *kindlustus* [insurance]. Insurance activities here are one of the potential fields in which the establishment of the SE is more likely than in many other areas. The problem is that the Act unambiguously prescribes the compulsory part of the business name and it should be in Estonian according to the Act. This definitely gives rise to the question of whether the provision allows for any interpretations concerning the choice of language, i.e., whether the use of an equivalent word in some other language would be in compliance with the Act. If people wish to found the SE specifically in Estonia, the one-on-one application of the Act to the SE would clearly be unreasonable because it is very difficult to imagine why a pan-European public limited-liability company should wish to use an Estonian complement in its business name. It should also be taken into account that so far, practice in Estonia and the planned foundation of SEs shows that one of the goals why they are founded here is to consolidate into a single company activities for which separate group companies have been maintained in Estonia, Lithuania and Latvia.<sup>\*50</sup> Hence, it may be assumed that the SE registered in Estonia typically operates in at least three countries. When there is a demand, in such a situation, to use Estonian in the business name, it clearly has negative consequences. The provision of the Insurance Activities Act has a single objective — it must be possible to identify the company by its business name as an insurance company. The registrar obviously proceeded from that when making the decision and accepted that English was used. An approach like this must certainly be approved because such a situation hardly damages anyone's interests and such an interpretation of law precludes the possibility that the SE loses ground in competition because of regulatory limitations. Another problem with Estonia is that, unlike in the Nordic Countries, the use of a business name in several different languages or a secondary business name is not allowed<sup>\*51</sup>, and taking into account of the cross-border nature of the SE, if problems arise in Estonia, we could not avoid the possibility that the SE will be in that case registered in a country allowing the use of the desired business name.

## 7. Conclusions — development of SE as special type of company and trends in Estonian company law

Already Teichmann has indicated that the extensive application of national law to the SE may, in practice, cause gaps in the legal regulation of the relevant type of company.<sup>\*52</sup> Even if we assume that the type of company will really be operative, the SE will never be likely to become a very broadly used form already because of the objective and peculiarities of its form. Opinions have still been expressed that when more account is taken of the legal environments of the Member States compared to the legislative framework superseding that of the Member States and created for the European Economic Interest Grouping (EEIG)<sup>\*53</sup>, this gives a reason to hope that the SE form will be actively used in reality.<sup>\*54</sup> Literature has also taken the position that, in reality, the introduction of the SE has not resulted in a single pan-European form of company but there are as many of them as there are Member States or even more, considering that the SE can choose between one-tier and two-tier management structures in each Member State. One may, of course, object to such a position that the

<sup>48</sup> As of 1 May 2007.

<sup>49</sup> Kindlustustegevuse seadus. – RT I 2004, 90, 616; 2007, 4, 20 (in Estonian).

<sup>50</sup> SE Sampo Life Insurance Baltic was founded by the merger of the public limited companies founded in these three countries. On 29.01.2007, a notice concerning the entry into a merger agreement for founding Seesam Life Insurance SE was published, and here too, the SE is formed on the basis of companies located in the same countries.

<sup>51</sup> E.g., in Sweden Aktiebolagslag (2005:551) 28:3, Förmålag (1974:156) § 11, in Finland Osakeyhtiölaki (21.7.2006/624) 2:3, Toiminimilaki (128/1979) § 11.

<sup>52</sup> C. Teichmann (Note 4), p. 328.

<sup>53</sup> Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG). – OJ L 199, 31.7.1985, pp. 0001–0009.

<sup>54</sup> S. Mock. Harmonization, Regulation and Legislative Competition in European Corporate Law. – German Law Journal. European and International Law. 01. 12. 2002, Vol. 3, No. 12. Available at <http://www.germanlawjournal.com/article.php?id=216>.

company law of the Member States is largely based on the relevant directives and is thus relatively similar.<sup>\*55</sup> Yet there are also areas in company law in which the harmonisation of the law of the Member States has not been a success or it has not been regarded as necessary (for example, the management structure, issues related to organising a general meeting). Thus, it is formally correct to state that the use of the SE model means that a limited-liability legal person (public limited-liability company) that has registered as the SE may operate everywhere in the European Union, being subject only to European Union law in certain important issues<sup>\*56</sup>, but the substantive analysis of the actual situation and nearly any contact with national law shows that national law is important and this results in implementation problems. Hence, instead of a pan-European single company model, there are actually many different types of SEs and each Member State, including Estonia, has its own problems with legal regulation stemming from gaps between national law and European Union law.

The SE has typically been viewed as an option that gives an entrepreneur greater freedom, since the abolition of the limitations regarding the cross-border change of location compels the Member States to reduce the limitations imposed by their national law, as a result of which the company law environment in Europe, as a whole, should become considerably more liberal.<sup>\*57</sup> At the same time, the SE has actually lost its proclaimed advantages because the cross-border change of location has been, on the one hand, recognised by the decisions of the European Court of Justice<sup>\*58</sup> and, on the other hand, a directive governing cross-border mergers has been adopted. Since the entry into force of the SE-Statute, one has not noticed a particularly wide use of the relevant advantages and thus, it is impossible to say that the supranational legal form of the SE has facilitated, in any manner, the cross-border movement of companies. The reason why the hoped effects have not been achieved may also be the fact that the overall number of the SEs is relatively small<sup>\*59</sup>, which in turn confirms the opinion that there has actually been no need for the advantages of the cross-border movement of the SE. The situation described may have been caused by the fact that the opportunities of cross-border movement are necessary for companies for which the SE is too costly and burdensome. The latter hypothesis cannot be verified today, but it may be confirmed in the course of cross-border mergers that are likely to be carried out as the result of the Directive in the nearest future.

However, we must admit that the SE, as a supranational legal form, is certainly one of the phenomena that serves as a challenge for the Member States to liberalise their legal environments. The foundation practice of SEs has pinpointed details that have gone unnoticed to date but which reveal bottlenecks in national law systems. It is not known on how wide a scale the form will be used in Europe; yet in a sense, the SE obviously serves as a catalyst for the convergence of company law (for instance, German company law has developed an alternative management model to the SE, which, however, cannot be viewed as classically monistic). Changes are not rapid but they do occur. Based on the above, the next step may well be that the management rules of national companies are made more flexible.

The SE as a supranational legal form poses the question to the Member States of what means should be used in the current situation in which company law is characterised by 'forum shopping'. One of the possibilities is to establish rules that prevent companies from leaving, another (and more efficient) possibility is to abolish unreasonable limitations from law and establish rules that are in compliance with market requirements.<sup>\*60</sup> Estonia should also take account of the trend when moving forward. One of the areas in which national law would benefit from improvement, based on the above analysis, is certainly the provisions concerning the structure of the SE management organs. With due regard to both flexibility and competitiveness, a more frequent use of the British model should be considered when improving the provisions concerning the one-tier management structure.

<sup>\*55</sup> C. Teichmann (Note 4), p. 310.

<sup>\*56</sup> I. Ulst. Euroopa äriühingu mudel ja selle rakendamise finantssektori äriühingute poolt (Model of *Societas Europaea* and Its Implementation by Financial Sector Companies). – *Juridica* 2005/7, p. 467 (in Estonian).

<sup>\*57</sup> See, e.g., L. Enriques. Silence is Golden: The European Company Statute As a Catalyst for Company Law Arbitrage. – *Journal of Corporate Law Studies* 2004 (4), pp. 77–95.

<sup>\*58</sup> Particularly *Centros* (judgment of the Court of 9 March 1999 in case C-212/97: *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*. [1999] ECR I-01459), *Überseering* (judgment of the Court of 5 November 2002 in case C-208/00. Reference for a preliminary ruling from the Bundesgerichtshof: *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919.), *Inspire Art* (judgment of the Court of 30 September 2003 in case C-167/01: *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.* [2003] OJ C275, 10) and *Sevic* (Judgment of the Court of 13 December 2005 in case C411/03: Reference for a Preliminary ruling from the Landgericht Koblenz in proceedings against *SEVIC Systems AG* [2006] OJ C36, 5).

<sup>\*59</sup> As of 18 February 2007, all in all 65 SEs have been founded, one of them in Estonia. See <http://www.seeurope-network.org/homepages/seeurope/secompanies.html>.

<sup>\*60</sup> See F. Kübler. *The Societas Europaea – Implementation and Perspectives*. – *Die Europäische Aktiengesellschaft. Umsetzungsfragen und Perspektiven*. T. Baums, A. Cahn (Hrsg.). Berlin: De Gruyter Recht 2004, pp. 5–7.



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# The Concept of Dominance in Estonian Competition Law

One of the aims of competition law is to set out rules for ensuring that companies holding a position of strength in the market would not take adverse advantage of such a position to the detriment of customers, suppliers, or competitors. By controlling mergers, competition law aims to prevent the emergence of dominant companies in order to prevent possible restriction of competition in the future. Therefore, the concept of dominance or dominant position appears as one of the central concepts of competition law. Additionally, in order to determine whether the ban against abuse of dominance set out in § 16 of the Estonian Competition Act<sup>1</sup> applies to a certain company or whether a merger may be prohibited due to the creation or strengthening of dominant position, it is vital to define and understand the concept of dominance first.

The aim of this article is to provide an in-depth analysis of how the approach to the concept of dominance has evolved in the Estonian Competition Board's practice since the adoption of the current Competition Act in October 2001. It is important to note that the definition of dominant position in the Competition Act has changed over the years. Therefore, we first give an overview of the changes in the legal definition of dominance and, thereafter, inspect the relevant practice of the Competition Board.

The analysis takes notice of the use of the concept of dominance both in decisions relating to possible abuse of dominant position under § 16 of the Competition Act and in merger control decisions. It will be interesting to explore whether the evolution of the approach to the concept of dominance has been uniform in abuse and merger cases. We analyse cases wherein the Competition Board established the existence of dominance, as well as cases in which no dominance was determined to exist, since the latter also provide valuable insight into the Competition Board's reasoning concerning dominance.

## 1. Definition of dominance under the Competition Act

### 1.1. The definition of dominant position until 1 August 2004

It is important to note that two somewhat distinct definitions of dominant position have been laid down, in different versions of the most recent legislation referred to as the Competition Act. Until 1 August 2004, the definition of dominant position was set out in § 13 as follows:

For the purposes of this act, an undertaking in a dominant position is an undertaking holding at least 40 per cent of the turnover in the market or whose position enables it to operate in the market to an appreciable extent independently of competitors, suppliers, and buyers.

<sup>1</sup> Konkurentsiseadus. – RT I 2001, 56, 332; 2007, 13, 69 (in Estonian). English translation available at <http://www.legaltext.ee/> (1.10.2007).

The explanatory memorandum to the draft Competition Act<sup>2</sup> noted that the definition of dominant position in such a wording corresponded to the relevant EU laws, and particularly to the principles established in the Michelin case.<sup>3</sup> It must be noted, however, that the wording of the above § 13 of the Competition Act does not fully support such correspondence. It appears from the previous text of the definition that dominant position was deemed to exist whenever an undertaking held at least 40 per cent of the turnover in the relevant market, and there was no need for further analysis of market power. At the same time, if less than 40 per cent of the turnover in the market could be attributed to the undertaking, then it might have been seen as dominant if its position enabled it to act to an appreciable extent independently of its competitors, suppliers, and buyers.

This definition recognised only single firms' dominance, since it referred to one undertaking only, not several undertakings, in its wording.<sup>4</sup> At the same time, it has been established in EU competition law that in certain cases companies may be deemed to be collectively dominant. Generally, collective dominance may arise in an oligopolistic market, where the market is highly concentrated — i.e., where there are relatively few market players and where the market shares of the market players are comparatively high. In such a market, it might be that none of the undertakings is dominant on its own, but the high concentration of the market increases the likelihood that the undertakings are able to co-ordinate their behaviour and thus collectively hold a dominant position. However, as is stated already above, the previous definition did not enable taking into account potential concerns that might have arisen out of collective dominance.

## 1.2. The definition of dominant position since 1 August 2004

As of 1 August 2004, the emphasis of the definition is no longer placed on a purely market-share-oriented criterion; instead, a dominant position is established foremost on the basis of the market power of an undertaking. The 'market share of 40 per cent' condition serves as a rebuttable presumption of dominant position. As another significant amendment, the existence of collective dominant position was recognised after the above-referenced changes to the Competition Act entered into force.

The current definition of dominant position set out in § 13 of the Competition Act is the following:

For the purposes of this act, an undertaking in a dominant position is an undertaking or several undertakings operating in the same market whose position enables it/them to operate in the market to an appreciable extent independently of competitors, suppliers, and buyers. Dominant position is presumed if an undertaking or several undertakings operating in the same market account for at least 40 per cent of the turnover in the market.

This definition of dominance is more similar to that applied in EU competition law. However, the current wording still seems to have shortcomings. In careful reading of the second sentence of the above definition, one can notice certain controversy. It appears from that sentence that if several undertakings together hold a market share of 40 per cent, they are presumed to be collectively dominant. Pursuant to such regulation, all undertakings should be presumed to be constantly dominant, because no matter how many competing undertakings there are in the market, their combined market share is always 100 per cent — i.e., more than 40 per cent. Therefore, the current wording of the definition of dominant position, especially insofar as it concerns collective dominance, is not really logical and might, in our opinion, give rise to problems of interpretation.

## 2. Cases proceeding on the basis of the previous definition of dominant position

### 2.1. Abuse of dominance

From the practice of the Competition Board in abuse-of-dominance cases, it may be concluded that in the time of validity of the earlier definition of dominant position (from 1 October 2001 until 1 August 2004) the Competition Board supported the purely textually based interpretation of § 13 of the Competition Act and held there to be a dominant position when an undertaking had a market share of at least 40 per cent in the relevant market.

<sup>2</sup> The explanatory memorandum is available at <http://web.riigikogu.ee/ems/plsql/motions.show?assembly=9&id=710&t=E> (17.09.2007) (in Estonian).

<sup>3</sup> European Court of Justice 9.11.1983, 322/8 (Michelin v. Commission). – ECR 1983, p. 3461.

<sup>4</sup> The text of § 13, *inter alia*, states the following: "[...] an undertaking in a dominant position is an undertaking [...]".

This can be seen from the STV<sup>5</sup> and Telset<sup>6</sup> cases, ruled upon by the Competition Board just two days prior to the entry into force of amendments to the Competition Act in relation to the definition of dominant position. Namely, the Competition Board held that both STV and Telset held a dominant position in the cable network services market in Maardu. The companies STV and Telset were the only providers of cable network services in Maardu, and the Competition Board found that the situation of both corresponded to the definition of a dominant undertaking since STV and Telset each accounted for more than 40 per cent of the relevant market in Maardu.

It is interesting that, even though the Competition Board found both undertakings to be dominant, it went further and carried out an analysis of the market power of STV and Telset. The Competition Board noted that STV had entered the cable network services market in Maardu in 2002 and quickly increased its market share to more than 40 per cent. At the same time, the market share of Telset decreased. The Competition Board remarked that a previous competitor, AS Nom, had sold its network to STV due to the aggressive entry to the market by STV and their below-cost price levels.

The Competition Board noted that, due to the limited number of customers in the cable network services market in Maardu, increase in the market share of one undertaking can take place only at the expense of its competitors. The Competition Board analysed the increase of turnover and customers of STV and the corresponding decrease in the customers and turnover of Telset and noted that a status of economic power and market power in neighbouring areas enabled STV to maintain an unreasonably low price level, the purpose of which could be the exclusion of competition from the relevant market.

One could argue that, as a result of such a market power analysis, the Competition Board should have concluded that STV had a dominant position in the market and Telset did not, since Telset was not in a position to act to an appreciable extent independently in the market.

The Competition Board did not examine whether STV and Telset held a collective dominant position. This is understandable since the Competition Act as in force at the time of the infringements and the date of the Competition Board decision did not support the possibility of a ruling of collective dominant position. One might argue that the Competition Board could have overcome this obstacle by taking the decision on 1 August 2004 instead of 30 July 2004, since the new amendments to the Competition Act supported the possibility of collective dominant position.

However, we are of the opinion that in this case STV and Telset were not collectively dominant. It is true that Telset applied below-cost prices to its services because similar prices were set by STV; however, Telset did not establish such below-cost prices because of co-ordination of behaviour with STV but since it was forced by economic pressures to do so.<sup>7</sup>

## 2.2. Merger control

Similarly to its approach in abuse cases, the Competition Board applied a mainly textual interpretation of § 13 of the Competition Act in merger cases. Thus, where the merging parties' market share collectively exceeded 40 per cent, they always were deemed to have a dominant position. In such cases, the Competition Board could establish that such dominance would not significantly impede competition or, alternatively, prohibit the merger or apply remedies to eliminate competition problems.<sup>8</sup>

When the combined market share of the parties was less than 40 per cent, the Competition Board did not deem the companies to be gaining dominance post-merger. The reasoning applied in establishing absence of dominance was based primarily on low market share, but the Competition Board in some cases provided additional arguments such as the existence of competitors and their economic and financial strength, lack of entry barriers, and the structure of the market.<sup>9</sup>

If the parties' market share exceeded 40 per cent, the Competition Board appeared to substantiate the absence of significant impediment to competition with arguments that, as will be evident below, are being used to

<sup>5</sup> Competition Board 30.07.2004, No. 20 (AS STV). This and all other referred Competition Board cases are available on the Internet on page <http://www.konkurentsiamet.ee/?id=10322> (17.09.2007) (in Estonian). This case concerned the below cost prices of cable network services. Since STV did not fulfil the Competition Board precept and did not raise the prices to an acceptable level, a further decision was taken by Competition Board to prohibit below cost prices (Note 13).

<sup>6</sup> Competition Board 30.07.2004, No. 19 (AS Telset).

<sup>7</sup> We believe that in accordance with the EU practice in the field of collective dominant position, Telset and STV would not have been found collectively dominant. See Commission guidelines in "DG Competition discussion paper on the application of article 82 of the Treaty to exclusionary abuses", pp. 43–50. Available at <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf> (17.09.2007).

<sup>8</sup> It should be noted that the Competition Board has not prohibited any mergers so far, but has applied remedies in several cases.

<sup>9</sup> See, e.g., Competition Board 2.11.2005, No. 50-KO (Rakentajain Konevuokraamo/Cramo Holding B.V); Competition Board 12.05.2004, No. 15-KO (Baltic Tele AB/ AS Eesti Telekom); Competition Board 30.01.2004, No. 2-KO (Lemmikäinen Oyj/AS Talter).

substantiate a finding of absence of dominance. For instance, in Tallinna Piimatööstus/Meierei Tootmise AS<sup>10</sup>, which concerned the market for the city's milk products, the merging parties' market share came to 48 per cent. The Competition Board noted that, since the large retail chains, which enjoy substantial purchasing power, affect demand greatly, the merging parties could not unreasonably affect retail prices, and all market participants were found to have equal opportunities for marketing their products.

In some cases, the Competition Board did not state any conclusion concerning dominance. In Interinfo Baltic/Eniro Eesti<sup>11</sup>, which concerned the market for directory media advertising, the Competition Board referred to the combined market shares<sup>12</sup>, analysed the position of the merging parties' main competitor, and mentioned low entry barriers. In conclusion, the Competition Board noted that the relevant circumstances did not allow the presumption that the position of the merging parties would enable them to act independently of competitors in the market and, therefore, their post-merger combined market share would not significantly impede competition. While the decision contains parts of the wording of the statutory definition of dominance, the Competition Board did not state whether it deemed the merging parties to be in or achieve dominant position or not. Another interesting aspect of this decision is that, even though the decision was taken at a time when the old definition of dominant position was still in force (on 20 June 2005), it already referred to today's definition.

### 3. Cases proceeding from the current definition of dominant position

#### 3.1. Abuse of dominance

Further to the adoption of the current legal definition of dominant position, the range of market characteristics that the Competition Board analyses in its decisions seems to have broadened. Below we will consider various elements that the Competition Board in practice has considered to be indicators of dominant position or of absence of the same.

##### 3.1.1. Existence of economic power

Analysis of the existence of economic power of the undertaking concerned appears to be one of the most commonly scrutinised considerations in the Competition Board's abuse-of-dominance cases. This is illustrated by the STV case.<sup>13</sup> In that case, the Competition Board argued that STV had a position of economic strength as compared to the only other operator in the market (the net turnover realised by STV in 2003 was more than five times larger than that of Telset, and the net profit of STV in financial year 2003 was nearly equal the net turnover realised by Telset). This argument, together with the fact that STV held a market share exceeding 40 per cent, was among the main indicators considered by the Competition Board to be sufficient for establishing the existence of dominant position.

In the Neste case<sup>14</sup>, the Competition Board analysed the economic power of Neste in relation to other wholesale and retail distributors of motor fuels. The Competition Board noted that several indicators evidenced a considerably strong economic position on the part of Neste: amount of equity capital, low debt coefficient, large network of petrol stations, and high turnover in the retail sale of motor fuels (which enabled better conditions for purchasing fuels). At the same time, the Competition Board held that such a strong economic position did not on its own mean that Neste would have had a dominant position.

In the Inforing case<sup>15</sup>, the Competition Board found that Inforing had greater economic strength than its competitors; however, in this case the Competition Board did not analyse the profit and turnover of the undertaking. Inforing is a publisher of media prints; accordingly, the Competition Board analysed its economic strength on the basis of various items published by Inforing. The Competition Board stated that Inforing was one of the largest publishers of publications in the Russian language and it operated in various geographic and product markets. The board enumerated the publications published by Inforing and maintained that, on account of its activities in various neighbouring markets, it had stronger market power than its competitors. Nevertheless,

<sup>10</sup> Competition Board 6.09.2002, No. 55-KO (Tallinna Piimatööstuse AS/Meierei Tootmise AS).

<sup>11</sup> Competition Board 20.06.2005, No. 35-KO (Interinfo Baltic OÜ/Eniro Eesti AS).

<sup>12</sup> The market shares were not disclosed in the publicly available version of the decision.

<sup>13</sup> Competition Board 22.06.2005, No. 3 (AS STV).

<sup>14</sup> Competition Board 27.07.2005, No. 39-L (AS Neste Eesti).

<sup>15</sup> Competition Board 28.06.2006, No. 30-L (AS Inforing).

the Competition Board indicated that the competitors of Inforing as well had significant market power. Ultimately, the Competition Board found that Inforing did not have a dominant position.

### 3.1.2. Very high market shares

Regardless of the trend that purely market-share-based analysis tends not to be accorded as much weight in the Competition Board's abuse-of-dominance decisions adopted on the basis of current definition of dominance as compared to the decisions adopted on the basis of the previous definition, very high market shares still appear to be one of the most significant elements evidencing the existence of dominance.

In the case of Elion<sup>\*16</sup>, the Competition Board made reference to an EC Competition law textbook<sup>\*17</sup>, stating that a high market share (75 per cent or greater) that has been maintained over a considerable time has been considered such strong evidence of dominant position that there is no need for further analysis. In this case, the market share of Elion in the telephone services market was 83–87 per cent and in the leased-line services market 76.2 per cent. In its finding of dominance, the Competition Board also referred to the fact that Elion possessed a fixed telephone network covering the entire territory of Estonia, which was considered to constitute an essential facility. On the basis of these market share figures and due to the undertaking's possession of essential facilities, the Competition Board concluded that Elion was a dominant undertaking. Regrettably, the Competition Board did not specify the relevant markets, where Elion had such dominant position; however, it can be presumed that the Competition Board had in mind the telephone services market and leased-line services market. Besides these markets, the interconnection services market was considered in this decision in brief (it was stated that Elion had a market share of 34 per cent in said market in 2003); however, no further conclusions as to whether Elion was dominant in this market were stated.

In the next case concerning Elion<sup>\*18</sup>, the Competition Board again cited Elion's high market shares and considered such high market shares together with the possession of an essential part of the infrastructure to be indicators of dominant position. However, in addition to these factors, the Competition Board noted in this case that the fact that Elion's market share had remained high even after the termination of the concession agreement between the Republic of Estonia and AS Eesti Telefon (now Elion) was a further feature supporting the finding of dominance.

### 3.1.3. Inability to increase prices

The Competition Board appears to accept evidence of inability to increase prices on the part of the undertaking concerned as an argument in favour of a finding of absence of dominance — in particular, where the ability of the undertaking concerned to act independently of its buyers or suppliers has been undermined by the countervailing power of such parties. This was the situation in the Tallinna Piimatööstus case<sup>\*19</sup>, wherein the Competition Board considered the inability of Tallinna Piimatööstus to increase its prices to be an indicator of lack of dominant position. The board found that Tallinna Piimatööstus increased the sale prices of its products in November 2004 and as a result of such an increase lost its rights as the main milk product supplier to one supermarket chain and was also unable to sell city milk products in the previous quantities to its other purchasers. As a result, Tallinna Piimatööstus reduced the prices of milk and other city milk products in order to stay in competition with other milk handlers.

The Competition Board referred also to countervailing power from the supply side. In particular, the Competition Board noted that there was intense competition in the market for purchasing raw milk in Estonia. Tallinna Piimatööstus bought only 18 per cent of the Estonian raw milk production volume in 2004, and its closest competitor bought ten per cent. The Competition Board concluded that Tallinna Piimatööstus could not act independently of competitors and the producers of raw milk in the market for purchasing raw milk, as most of the suppliers of raw milk were not bound by any permanent contracts and any attempt to decrease the purchase prices or otherwise worsen the purchase terms would result in a change of co-operation partner. Moreover, the accession of the sellers of raw milk to associations had enabled them to impose more burdensome terms for raw milk supplies on purchasers (the producers of city milk products) in the event of large supplies.

In the Neste case<sup>\*20</sup> the Competition Board noted that in the event of a considerable increase in prices Neste would have lost clients to competitors and in the event of an excessive decrease in price, by contrast, Neste's economic indicators would have deteriorated. The inability on Neste's part to increase the prices was considered by the Competition Board to be one of the major indicators demonstrating lack of dominant position in this case.

<sup>16</sup> Competition Board 17.03.2005, No. 14-L (Elion Ettevõtte AS).

<sup>17</sup> L. Ritter, F. Rawilson, W. D. Braun. EEC Competition Law. Boston 1991.

<sup>18</sup> Competition Board, 04.04.2005, No. 16-L (Elion Ettevõtte AS).

<sup>19</sup> Competition Board 15.05.2006, No. 21-L (Tallinna Piimatööstuse AS).

<sup>20</sup> See Note 14.

### 3.1.4. Lack of entry barriers, and evidence of entry

A further argument applied for judging there to be absence of dominance in the event of market shares exceeding 40 per cent has been lack of entry barriers — in particular, if supported by evidence of entry of viable competitors in recent years. The Kristin case<sup>\*21</sup> serves as an example in this respect. In this case, funeral bureau Kristin held a market share exceeding 40 per cent; however, the Competition Board did not find this undertaking dominant.

The Competition Board defined the relevant market to be the funeral services market and found that Kristin had three competitors in this market in Tallinn and its vicinity in Harjumaa. The Competition Board noted that Kristin had a market share of 41.4 per cent in 2004 and 43.6 per cent in 2003 and that Kristin had seen the most significant decrease in market share (2.2 per cent) when judged alongside its competitors. At the same time, the market share of the latest entrant to the market, Forsius Holding OÜ, had increased 2.2 per cent in the same span of time. The Competition Board considered such changes in the market shares of the relevant undertakings to be an indicator that there were no significant barriers to entry in the funeral services market and that new undertakings could enter this market.

### 3.1.5. Market structure

The above Kristin case<sup>\*22</sup> is noteworthy for also containing an analysis of market structure that the Competition Board considered to support a finding of absence of dominance. The Competition Board noted in this case that, even though Kristin's market share exceeded 40 per cent and was higher than the market shares of the two closest competitors, the difference in market shares was not so large that it would have enabled Kristin to act independently of its competitors. Furthermore, the Competition Board pointed out that none of the companies could increase the prices of the services independently from their competitors without losing the buyers of their services; thus, none of the companies could act independently of the buyers.

### 3.1.6. Presumption of dominance, and burden of proof

As noted above, the Competition Act sets out the presumption of dominance in cases where an undertaking has a market share of at least 40 per cent. The text of the law implies that this is a rebuttable presumption — in cases of a market share of at least 40 per cent, further evidence can be provided to show that the undertaking in fact does not have a dominant position.

An interesting question is whether an undertaking with a market share of at least 40 per cent must prove a lack of dominant position or it is the Competition Board who must carry out further analysis to identify whether the undertaking has a dominant position. The Competition Act does not provide sufficient guidelines concerning the matter; however, the answer to this question can be found in the case law of the Competition Board.

In the Kristin<sup>\*23</sup> case, it does not appear that Kristin would have been called upon to provide any specific proof and reasoning in evidence of lack of dominant position even though it had a market share exceeding 40 per cent. Notwithstanding this, the Competition Board analysed the market on its own initiative and found that Kristin was not a dominant undertaking.

Thus, the Competition Board's current practice seems to suggest that the board is likely not to presume existence of a dominant position on the basis of market share only but is likely instead to carry out a market analysis before concluding that dominance exists.

At the same time, this position may be questioned in the light of the Neste case<sup>\*24</sup>, wherein the Competition Board noted that a market share of at least 40 per cent is one criterion in determining the existence of dominant position. Reference to the 40-per-cent market share as a criterion in determination of dominant position as opposed to considering this as a rebuttable presumption may be a matter of careless wording. At the same time, it may also highlight the difficulties of the Competition Board in moving away from a percentage-based approach in judging of dominant position. Since later cases have not repeated such wording and have truly referred to 40-per-cent market share as a presumption and not a set criterion among those for determining there to be dominant position, it may be appropriate not to assign too much importance to this case.

<sup>21</sup> Competition Board 18.09.2006, No. 43-L (Matusebüroo Kristin OÜ).

<sup>22</sup> *Ibid.*

<sup>23</sup> See Note 21.

<sup>24</sup> See Note 14.

## 3.2. Merger control

Under the current market definition, market shares of merging parties still constitute the starting point for determination of the presence or absence of a dominant position. However, the Competition Board's merger control decisions appear to devote substantial attention to a broader range of additional aspects than addressed under the earlier definitions. It is important to note, of course, that the range of such elements always depends on the specific circumstances of the case at hand. Therefore, also the growing variety of factors taken into consideration by the Competition Board should be attributed in part to the growing body of case law.

Below, we outline some of the most typical, as well as some perhaps more market-specific, additional features that have had impact on the Competition Board's finding of existence or absence of dominance in particular cases.

### 3.2.1. Economic and financial power

The economic and financial power of the merging parties or of their competitors appears to be an element that often is taken into account in merger cases as a feature supporting finding of either existence of dominance or the absence thereof.<sup>\*25</sup> Koduapteek/Nõmme Linnaapteek and others<sup>\*26</sup> provides an interesting example in this respect. A competitor of the merging parties had raised an argument against the merger stating that, since one of the merging parties belonged to an international business group (Tamro), it had strong economic and financial power, which, *inter alia*, enabled it to impede competition significantly. The Competition Board noted that a number of smaller competitors belonged to international groups and, furthermore, that the claimant itself had expanded its activities to Latvia and Finland, which allowed assuming that the claimant itself also had sufficient economic strength.

At the same time, it should be noted that the economic and financial power of the merging parties themselves can be an argument in support of the finding of their dominance. This was the case in Philip Morris/Amer-Tupakka<sup>\*27</sup>, which concerned the acquisition of Amer by a previously dominant industrial cigarette producer, Philip Morris.

### 3.2.2. Entry barriers and access to essential infrastructure

The existence or absence of entry barriers is another rather common factor to be taken into account by the Competition Board in its merger control decisions. In the above-mentioned Philip Morris/Amer-Tupakka case<sup>\*28</sup>, the Competition Board determined that there were several barriers to entering the market for industrially produced cigarettes, namely i) a need for substantial investment in order to achieve distribution of goods among retailers and to launch new products in a situation wherein the advertisement of tobacco products is forbidden, ii) sophisticated procedures related to tax stamps and excise warehouses, iii) high import taxes (57 per cent) on products from outside the EU, and iv) a need to prove the successfulness of new products and to carry out market research to determine the potential customer base for the products that would be included at the outlets of retailers. This concern, together with other arguments, such as the high market shares of the merging parties, their economic strength, and the substantially lower market shares of competitors, constituted grounds for the finding of dominance of the merging parties.

Possession of essential facilities (a network, infrastructure, etc.) that competitors cannot duplicate or that it is economically inexpedient to duplicate but without access to which it is impossible to operate in the relevant market may also constitute an indication of dominance. This was the case in Elion/MicroLink<sup>\*29</sup>, where the Competition Board held that the merged entity would have been dominant in the wholesale broadband access market, since after the acquisition of MicroLink Elion had access to MicroLink's infrastructure, on which the merging parties' competitors in downstream markets were dependent.

### 3.2.3. Influence of statutory regulations and other market-specific policies

In a number of cases, the Competition Board has considered statutory price regulations or other market-specific policies as arguments supporting a conclusion of absence of dominance.

In Olympic/Kristiine Kasiino<sup>\*30</sup>, the Competition Board noted that the casino sector differs from other sectors because, in this sector, the casinos of the same undertaking compete with each other, which is why not only

<sup>25</sup> Competition Board 21.11.2006, No. 49-KO (Elion Ettevõtte AS/ Norby Telecom).

<sup>26</sup> Competition Board 23.11.2005, No. 54-KO (OÜ Koduapteek/Nõmme Linnaapteek OÜ and others).

<sup>27</sup> Competition Board 25.08.2004, No. 28-KO (Philip Morris Products S.A./Amer-Tupakka Oy, Amer-Yhtymä Oy and Amernet B.V.).

<sup>28</sup> *Ibid.*

<sup>29</sup> Competition Board 21.20.2005, No. 47-KO (Elion Ettevõtte AS/ MicroLink AS).

<sup>30</sup> Competition Board 22.03.2007, No. 13-KO (Olympic Entertainment Group AS/AS Kristiine Kasiino).

new casino operators but also existing operators constitute a source of potential competition to newly opening casinos. The Competition Board went on to refer to public policy concerns expressed with a goal of decreasing the number of casino operators as well as regulating payouts such that they have a fixed minimum and establishing other regulation applicable to all casino operators. On the basis of these arguments, the Competition Board came to the conclusion that the merger would not lead to creation or strengthening of a dominant position for the merging parties, even though their combined market share was likely to exceed 40 per cent.<sup>\*31</sup>

Furthermore, in Koduapteek/Nõmme Linnaapteek and others<sup>\*32</sup>, statutory price regulation appeared to be an argument against conclusion that an oligopolistic market existed. The Competition Board noted that, since the resale margins of pharmaceuticals have been set forth by law and the competition between wholesalers of pharmaceuticals is tense, no collusion between the wholesalers could be proved. Therefore, the merger was not found to create or strengthen the features of an oligopolistic market.<sup>\*33</sup>

## 4. Conclusions

In conclusion, it can be said that the change in the legal definition of dominance has had an impact on the practice of the Competition Board. A shift from mainly market-share-based analysis in the Competition Board's practice to assessment of a broader range of (more elaborate) considerations appears to be noticeable in both abuse and merger control cases.

Broadly, the evolution of the Competition Board's approach toward understanding of the concept of dominant position appears to be coherent in abuse and merger control cases. Perhaps merger control cases tend to pay more attention to arguments concerning the economic and financial strength of the market players, while such considerations are not so widespread in abuse cases. Moreover, one perhaps can notice more market-specific considerations in merger control decisions; however, this may be attributable to the greater number of cases involving a wider spectrum of sectors that have been subject to scrutiny in merger control cases as compared to abuse cases.

In general, besides market shares and the arguments related to the economic and financial strength of the market players, several other considerations — such as the existence or absence of entry barriers, inability to raise prices, and countervailing power of buyers and suppliers, as well as observations concerning the market structure — appear relevant in the Competition Board's analyses concerning the presence or absence of dominant position.

<sup>31</sup> The market shares were not disclosed in the publicly available version of the decision, but other publicly available sources indicate to market share exceeding 40 per cent.

<sup>32</sup> See Note 26.

<sup>33</sup> Such reasoning leaves room for discussion whether the Competition Board has knowingly avoided using the concept of collective dominance here and what the reasons for this are.



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# Differentiation of Mistake and Fraud as Grounds for Rescission of Transaction

## 1. Introduction

The General Part of the Civil Code Act<sup>1</sup> (GPCCA) that entered into force in Estonia on 1 July 2002 reflects positions of modern European contract theory. Inter alia, the regulation of transactions as provided in the GPCCA contains the main sets of substantive elements for rescission of transactions, including rescission on the grounds of mistake (§ 92) and fraud (§ 94). The Principles of International Commercial Contracts<sup>2</sup> (PICC), prepared by the UNIDROIT Institute, the Principles of European Contract Law<sup>3</sup> (PECL), prepared by the Commission on European Contract Law acting under the leadership of Professor Ole Lando of the Copenhagen Business School, and the Dutch Civil Code (*Burgerlijk Wetboek*<sup>4</sup>, NBW) may be cited as the sources of the respective provisions.<sup>5</sup>

The general elements of mistake and fraud in the GPCCA are highly similar — both mistake and fraud defined in the GPCCA may consist in the disclosure of inaccurate circumstances or the non-disclosure of circumstances which should have been disclosed according to the principle of good faith by one party to the transaction to the other. The notion of fraud is defined through the notion of mistake, to which intent adds as the component describing the state of mind of the deceiving person. This gives rise to the issue of finding more specific criteria for differentiating these two institutes both on practical and theoretical grounds. Mistake and fraud are undoubtedly among the most common grounds for cancelling a transaction in legal practice because they relate to the discrepancy between the actual intent of a party to the transaction and the legal consequences brought about by the transaction.<sup>6</sup>

<sup>1</sup> Tsiviilseadustiku üldosa seadus. – RT I 2002, 35, 216, 2007, 24, 128 (in Estonian). English translation available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30082K2&keel=en&pg=1&ptyyp=RT&tyyp=X&query=%FCldosa+seadus> (21.06.2007).

<sup>2</sup> Available at <http://www.unidroit.org/english/principles/contracts/main.htm> (21.06.2007).

<sup>3</sup> O. Lando, H. Beale. Principles of European Contract Law, Parts I and II. Kluwer Law International 2000.

<sup>4</sup> Entered into force on 1 January 1992. Available at <http://www.civil-code.nl/index.htm> (15.07.2007).

<sup>5</sup> Explanatory memorandum to the proposal of the GPCCA. Available at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=991600043&login=proov&password=&system=ems&server=ragne11> (21.06.2007) (in Estonian).

<sup>6</sup> See also M. Käerdi. Eksimuse käsitus tsiviilõiguses. Magistritöö (Treatment of Mistake in Civil Law. Master's Thesis). Tallinn 2002, p. 7 (in Estonian).

The issue of substantive identification of the sets of elements of mistake and/or fraud is topical and problematic in contemporary European legal order on a wider scale.<sup>\*7</sup> It appears from the published studies that in an identical factual situation some legal orders would allow rescission of a transaction based on either mistake or fraud only, others on both mistake and fraud. Furthermore, even within the same legal order, the practice need not always be uniformly clear as to whether a case involves a mistake or a fraud.

The main aim of this article is to analyse issues related to differentiation of the two institutes for cancelling transactions, and to pinpoint the main differences of these institutions. The article does not aim at describing all the substantive elements of mistake and fraud and the legal meaning of such components, but only at focussing on the elements that both allow for and complicate the distinction-making between those institutes. The limited scope of the article does not allow for a discussion on relationships of mistake and fraud with other institutes of civil law, above all with the violation of obligations arising from pre-contractual negotiations (*culpa in contrahendo*, see Law of Obligations Act (LOA) § 14) and failure to perform a prestation that entails liability (LOA Chapter 5) foreseen by the (LOA).<sup>\*8</sup>

## 2. Substantive elements of mistake and fraud

Modern contract theory on which both the PECL and PICC can be considered to be founded, and which has been taken as the basis for the provisions of the NBW (article 6:228) and GPCCA (§ 92), proceeds from the principles of protection of trust and distribution of risks (see PECL article 4:103 and PICC article 3.5).<sup>\*9</sup> Contrary to this, the classical transaction studies used as a guide by the compilers of the German Civil Code<sup>\*10</sup> (BGB), for example, have in its treatment of mistake, mostly proceeded from the theory of intent (above all, BGB § 119 (1)), according to which mistake can be interpreted as a discrepancy between the actual intent of a person and the objective declaration of intent. A situation in which legal consequences, which the person did not in fact desire, follow for a person declaring his or her intentions, is not in conformity with the right of self-determination of a person (principle of autonomy of will).<sup>\*11</sup> Such a subjective approach to mistake obviously does not take into account the need to protect the trust of third parties and the practice of legal transactions. Critical approaches towards the BGB have referred to the legal consequences of a unilateral subjective mistake arising regardless of its objective recognisability or outward expression.<sup>\*12</sup>

Along the lines of modern legal theory, provisions of the GPCCA do not foresee mistake as nonconformity of the intent with the declaration of intent but rather as the development of intent — based on false circumstances. According to GPCCA § 92 (1), mistake is an erroneous assumption relating to existing facts. One cannot speak of a legally relevant mistake in a case where the risk of proceeding from the correct circumstances rests with the person who declared his or her intent (see GPCCA § 92 (5)). Thus, it may be presumed that modern contract theory proceeds from the principle that each person bears the risk of his or her intent having evolved from correct presumptions and having taken into account all circumstances relevant for the particular transaction. The mistake that entitles the person making a declaration of intent to cancel the transaction entered into, serves as an exception, and with the view to the protection of legal usage and trust presumes a situation in which the partner of the mistaken person does not have confidence in the other party making a declaration of intent that lacks mistakes. Such a situation may arise, above all, when the other party to the transaction acts in bad faith or is also mistaken about the relevant circumstances related to the transaction.

Proceeding from the above, three main sets of elements are identified in the PECL, PICC, NBW as well as GPCCA: (1) a mistake caused by the other party (GPCCA § 92 (3) 1)); (2) a mistake that was known/should have been known to the other party (GPCCA § 92 (3) 2)); (3) a common mistake of the parties (GPCCA § 92 (3) 3)). In the case of both a caused and a known mistake, the mistaken party is given the opportunity to cancel the transaction on the grounds that the other party to the transaction is related to circumstances or acts in bad faith concerning the circumstances about which the mistaken party erred, and consequently his or her confidence in maintaining the validity of the transaction does not deserve to be protected. In the case of a caused mistake, erroneous assumptions are directly caused by the other party, whereas in the case of the recognised (recognisable) mistake, the other party is blamed because he or she knew or should have known about the mistake, and proceeding from the principle of good faith, was obliged to inform the mistaken party thereof. In order to cancel a transaction due to a mistake, it must always be a relevant mistake, i.e., a mistake

<sup>7</sup> See, e.g., R. Sefton-Green. *Mistake, Fraud and Duties to Inform in European Contract Law*. Cambridge University Press 2005.

<sup>8</sup> *Võlaõigusseadus*. – RT I 2001, 81, 487; 2005, 61, 473 (in Estonian). English translation available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X60032K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=v%F5la%F5igus> (21.06.2007).

<sup>9</sup> K. Larenz, M. Wolf. *Allgemeiner Teil des bürgerlichen Rechts*. München: Verlag C. H. Beck 2004, p. 642.

<sup>10</sup> *Bürgerliches Gesetzbuch* (Civil Code of Federal Republic of Germany), adopted on 18 August 1896. – RGBL, p. 195.

<sup>11</sup> H. Köhler. *Tsiviilseadustik. Üldosa* (Civil Code. General Part). Tallinn 1998, p. 108 (in Estonian).

<sup>12</sup> M. Käerdi (Note 6), p. 39.

concerning a circumstance of sufficient importance to influence a reasonable person, similar to the person who entered into the transaction, to enter into the particular transaction under the particular circumstances (GPCCA § 92 (2)).

Similarly, fraud also involves a mistake, while the liability for the mistake arising rests with the other party to the transaction. Thus, fraud is associated with the two main sets of elements of the mistake, i.e., the mistake caused by the other party to the transaction and the recognised mistake. Fraud presumes that the other party to the transaction is led into or left in error either by disclosing false information or by failing to disclose such circumstances that are subject to the duty to disclose under the principle of good faith (see GPCCA § 94 (1) and (2)). A case of disclosing some information as correct without actually verifying its correctness is deemed to be equal to disclosure of false circumstances (GPCCA § 94 (2)) if subsequently such information proves to be false. It is important that, unlike a mistake, only intentional leading into or leaving in error can be regarded as a fraud.

In the situation where the notion of fraud is described through the notion of mistake and the sets of elements of both may be related to the disclosure or non-disclosure of circumstances by one party of the transaction to the other, a more precise delimitation of the sets of elements of mistake and fraud is vital. While in the case of mistake, the right to cancel the transaction, *inter alia*, procedurally presumes proving that the mistake by the mistaken person was relevant, in the case of fraud, the relevance of the mistake is of no significance. In case of fraud, it is necessary to establish the deceiving person's intent in leading into or leaving the other party in error, with the purpose of inducing the other person to enter into the transaction. Thus, the circumstances that need to be established and proved differ in the case of mistake and fraud.

### 3. Intent to deceive

In order to distinguish between fraud and mistake, the main criterion is the deceiving party to lead into or leave the other party in error and thereby induce the latter to enter into the transaction. Intent to deceive has been established as the main component of the concept of fraud.<sup>\*13</sup> According to GPCCA § 94 (1), the intent of the deceiving party must be aimed at leading into or leaving the person in error and the deceiving party must have the purpose of inducing the other person to enter into the transaction thereby. Intent may be either direct or indirect; yet in the case of negligence, fraud is excluded under Estonian civil law. The comments on article 3.8 of the PICC also require the existence of a special intent to deceive<sup>\*14</sup>, but it is noteworthy that, according to both the comments on the PECL<sup>\*15</sup> and the Dutch legal theory<sup>\*16</sup>, negligence may suffice to detect fraud — regardless of the fact that in the texts of both PECL article 4:107 (2) and NBW article 3:44 (3) intent is required for fraud.

The analysis of intent gives rise to the question of whether only a particular person can be intentionally induced to enter into a transaction or is fraud also possible in a situation in which the other party to the transaction is not known. Entry into a contract at auction could serve as an example here, in which case the deceptive information has initially been intentionally disclosed to all participants, although pursuant to GPCCA § 94 it has legal significance as fraud only in respect of the person with whom the contract is entered into. The question has been also raised in literature concerning possible fraud in issue of securities — if an issuer of securities prepares and publishes a misleading prospectus, would it be necessary to prove the issuer's acknowledged purpose to lead a **particular person** into error in order to establish presence of intent to deceive?<sup>\*17</sup> The authors believe that it is possible to assume the position that neither mistake nor fraud requires that at the moment when the other party to the transaction discloses false information (including as defined in GPCCA § 94 (2)), he or she must know the particular person that will enter into legal relationship with him or her in the future, but the intent to deceive may be aimed at the "wider public". If a party to a future transaction calls upon the public to make declarations of intent, by presenting for this purpose false (including unverified) information, intent to deceive may be established regardless of the fact that the intent was not aimed at a specifically identified person, but rather at unidentified persons as potential parties to the contract.

It is not relevant if the defrauding party intends to profit on account of or cause damage to the defrauded party.<sup>\*18</sup> The mere wish to induce the other party to enter into a transaction is sufficient. There is no intent to deceive

<sup>13</sup> See, e.g., R. Sefton-Green (Note 7), p. 24.

<sup>14</sup> UNIDROIT Principles and official comments. Available at <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637&x=1> (18.02.2007).

<sup>15</sup> O. Lando, H. Beale (Note 3), p. 252.

<sup>16</sup> See D. Busch, E. Hondius, H. J. Van Kooten, H. Schelhaas, W. M. Schrama. *The Principles of European Contract Law and Dutch Law*. The Hague: Kluwer Law International 2002, p. 208.

<sup>17</sup> M. Hint. *Avalikustamiskohustuse rikkumine Eesti väärtpapieriturüõiguses* (Violation of Notification in Estonian Security Market Law). – *Juridica* 2003/6, pp. 408–415 (in Estonian).

<sup>18</sup> O. Palandt. *Kommentar zum Bürgerlichen Gesetzbuch*. 65. Aufl. München: Verlag C. H. Beck 2006, § 123, paragraph 2. Commentator: H. Heinrichs. The comments on the PICC, on the contrary, require such goal: "[...] conduct is fraudulent if it is intended to lead the other party into error and thereby to gain an advantage to the detriment of the other party." See UNIDROIT Principles and official comments (Note 14).

if the allegedly defrauding party presumed and could presume that the other party was sufficiently informed about the circumstances (e.g., through a third party whose knowledge can be ascribed to the defrauded party or for whom the defrauded party is liable).<sup>\*19</sup>

Next we will proceed to separately analyse the intent to deceive in comparison to the mistake caused separately (GPCCA § 92 (3) 1)) and recognised mistake (GPCCA § 92 (3) 2)).

### 3.1. Intent to deceive and a caused mistake

Differentiating a case of a mistake caused by the other party to the transaction (GPCCA § 92 (3) 1)) from that of a fraud is one of the most problematic issues in legal practice.

Prior to the entry into a transaction, parties to a transaction are required to submit to each other only accurate information; the prohibition on disclosing inaccurate information derives from the obligations borne by the parties during pre-contractual negotiations (LOA § 14 (1)). As a general rule, the prohibition to disclose inaccurate information relates to the disclosure of factual data, not of subjective opinions or values.<sup>\*20</sup> However, any objectively substantiated position of a professional must be regarded as data subject to the prohibition. The substance of such false information may vary and may related to, for instance, the object of the transaction (its properties) as well as to any other circumstances that have an effect on the entry into the transaction by the other party. The party cancelling the contract must prove that the defrauding party was aware of the circumstances at the moment of entering into the contract.<sup>\*21</sup>

In addition to the disclosure of false information, both mistake and fraud may be established when a party to the transaction has a good faith duty to inform the other party of circumstances relevant to the entry into the transaction which the party fails to disclose, creating an incorrect perception of the actual circumstances for the other party. The notification obligation will be reviewed in greater detail in part 4 of this article.

In the case of both disclosure of false information and non-disclosure of relevant information, the question arises: when can such activities be considered as intentional with regard to the other party? Establishing intent is further complicated by the rule that disclosure of unverified circumstances as correct is deemed to be equal to disclosure of false circumstances if the unverified circumstances subsequently prove to be false (GPCCA § 94 (2)). Thus, a case may involve fraud when the person disclosing the circumstances does not know that he or she is disclosing false information, but he or she does not apply the care required for verification of their authenticity. Based on the above, we may assume the position that according to the regulation of fraud under Estonian law, a case cannot involve fraud when the alleged defrauding party lacks any information about the incorrectness of the disclosed information and he or she has with due care conducted verification of the information. It is disputable of course at what point it is possible to assume that the person has verified the disclosed circumstances sufficiently and when not. For example, when a person buys a used vehicle and, upon a further transfer of the vehicle relies on the confirmation initially given by the former owner or independent expert that the vehicle had been in no accidents, the case does not constitute fraud even if such confirmation proves incorrect later on (although it may involve a relevant mistake). However, when for example, a seller of a used vehicle does not rely on any confirmation of the former owner but claims, without verifying the facts first, that the vehicle has been in no accidents, the case involves disclosure of false circumstances as defined in GPCCA § 94 (2).

Here, it is important to emphasise the difference between German and Estonian law as regards to proving intent to deceive under GPCCA § 94 (2). In Estonian law, disclosure of unverified circumstances that subsequently turn out to be false, is deemed to be equal to disclosure of false circumstances, but intent to deceive must be proven in addition (GPCCA § 94 (1)). At the same time, according to German law, disclosure of unverified information is considered in itself evidence of intent to deceive, although the person disclosing it had to consider it possible that the information was incorrect.<sup>\*22</sup> German courts have developed a rule that *bedingter Vorsatz* or conditional intent is sufficient to identify fraud. Thus, disclosures made without definitive certainty that the facts are as claimed, and on the contrary, when it is known that the disclosure may be incorrect (*Angaben ins Blaue hinein*) are qualified as fraud.<sup>\*23</sup> The above position is illustrated, e.g., by German court decisions that impose on a professional trader in used vehicles the notification obligation in a situation where the trader has or should have reasonable doubt about the vehicle's involvement in an accident. When the seller does not check upon such doubts, a fraud is involved and there is no need for a separate establishment of intent to deceive. The reason is that in the case of a professional trader in used vehicles, clients presume that the seller has care-

<sup>19</sup> Decision of the Supreme Court of the Federal Republic of Germany of 26.01.1996. – Neue Juristische Wochenschrift Rechtschprechung Report (NJW-RR) 1996, pp. 690 ff.

<sup>20</sup> PICC (Note 14); O. Lando, H. Beale (Note 3), pp. 252–253.

<sup>21</sup> O. Palandt, H. Heinrichs (Note 18), § 123, paragraph 30.

<sup>22</sup> H. Köhler (Note 11), p. 124.

<sup>23</sup> O. Palandt, H. Heinrichs (Note 18), § 123, paragraph 11; see also K. Larenz, M. Wolf (Note 9), p. 686.

fully inspected the vehicle for possible previous accidents and other deficiencies, and are consequently willing to pay a higher price as a rule. The particular case concerned the sale of a five-year-old Mercedes that had been restored after a major crash. It could only be proven that the seller was aware that the vehicle had in a large part been repainted (*nachlackiert*). The court established that since the seller had already been aware of such a fact, they at least had to suspect that the repainting was undertaken to repair the damage caused as a result of a crash. As the vehicle was of an appreciated make and without any damage from corrosion, the seller had no reason to assume that a five-year-old Mercedes would be repainted for no particular reason. For a professional, it should have been much more obvious that the vehicle was repainted because of the damage caused by an accident.<sup>\*24</sup>

If adjudicating the same case according to Estonian law, based on applicable law and legal literature, the court would also have had to establish the existence of separate intent to deceive in order to qualify the seller's behaviour as fraud. Yet such a solution does not seem to be justified. The authors of the article are of the opinion that, as in German law, it should suffice to prove an intent to deceive if the defrauding party has disclosed information the correctness of which he or she has not verified, although he or she should have done so, and which later proves to be false.

### 3.2. Intent to deceive and a recognised mistake

Compared to the mistake caused by the other party, differentiating the case of a mistake recognised by the other party from that of a fraud has a little less significance in practice, but is no less problematic.

In the case of a mistake recognised by the other party, the latter knew or should have known that the party making a declaration of intent had an incorrect perception of the actual circumstances when making the declaration of intent (see GPCCA § 92 (3) 2); PECL article 4:103 a ii; PICC article 3.5 a; NBW article 6:228 b). In the case of recognisable mistake, the problem can be solved through the interpretation of the declaration of intent made (see GPCCA § 75) — in the case of a mistake about a circumstance serving as substance of the declaration of intent, which the other party knows or should have known, the transaction is considered entered into on the conditions that conform to the actual intent of the person making the declaration of intent.<sup>\*25</sup> If there is a mistake recognised by the other party in the circumstance that cannot be solved through interpretation of the declaration of intent, a question arises what is the difference between situations in which (a) the addressee of the declaration of intent knows about the mistake of the person making the declaration of intent (GPCCA § 92 (3) 2)) and (b) the other party intentionally leaves the person making the declaration of intent in error (i.e., it is fraud), e.g., by non-disclosure of information that should have been disclosed according to the principle of good faith. The legal standard for distinguishing between the described situations can obviously be the establishment of the subjective intent to deceive by a person (or non-establishment thereof in the case of a mistake), which is aimed at influencing the development of the intent of the other person.<sup>\*26</sup>

The Civil Chamber of the Supreme Court of the Republic of Estonia has in its decision in civil matter 3-2-1-5-99<sup>\*27</sup> noted that “in fraud, the intent may lie in the knowledge of the allegedly defrauding party that he or she tells a lie or withholds the truth in order to induce the other person to enter into a transaction”. The recognised mistake, however, can also be perceived when the attitude of the person recognising the mistake is neutral.<sup>\*28</sup> In such a situation, different legal orders solve the issue of delimiting mistake from fraud differently. An example could be a situation in which a person offers for sale a painting that he or she considers to be a copy of little value, but which, in actuality, is an expensive original work by a famous artist. The buyer actually gets the idea that the painting is valuable and buys it, without disclosing his or her idea to the seller. Is it a mistake or a fraud? Judging from legal literature, the buyer's behaviour must be qualified by the set of elements of fraud pursuant to the laws of some countries (e.g., France, Belgium, Greece, Austria and Portugal), under some other jurisdictions (e.g., English) it should not.<sup>\*29</sup> As in German law<sup>\*30</sup>, the assessment of the notification obligation provided in GPCCA § 95 is of critical importance for adjudicating the case based on Estonian law. Pursuant to this section, in order to identify whether the party has the notification obligation, it must, above all, be taken into account whether the circumstance is obviously important for the other party, what specific expertise the parties have, what the reasonable options of the other party are to obtain the necessary data, and how large the costs are that the person needs to incur to obtain the data. Thus, the solution may depend on the individuals, their specific expertise and other circumstances specific to the case.

<sup>24</sup> Decision of the Supreme Court of the Frankfurt Land of 19.02.1999. – NJW-RR 1999, 1064.

<sup>25</sup> See also M. Käerdi (Note 6), p. 55.

<sup>26</sup> W. Erman, Begr. Handkommentar zum Bürgerlichen Gesetzbuch, herausgegeben von Harm-Peter Westermann und Klaus Küchenhoff. Bd. 1. 9 Aufl. Münster 1993. H. Brox, paragraph 29 concerning § 123. See M. Käerdi (Note 6), p. 67.

<sup>27</sup> Available at <http://www.riigikohus.ee/?id=11&indeks=0,2,197,440&tekst=RK/3-2-1-5-99> (15.07.2007) (in Estonian).

<sup>28</sup> M. Käerdi (Note 6), p. 67.

<sup>29</sup> R. Sefton-Green (Note 7), pp. 131–160.

<sup>30</sup> O. Palandt, H. Heinrichs (Note 18), § 123, paragraphs 5a–5c; M. Käerdi (Note 6), p. 67.

It is less problematic to distinguish between the above-described situation and a situation in which the other party did not know about the mistake of the person making the declaration of intent, but should have known about it, and leaving the mistaken party in error was in conflict with the principle of good faith. A situation in which a person should have been aware is related to gross negligence according to modern transaction studies. Pursuant to LOA § 15 (4), if a person was unaware of circumstances with legal effect due to gross negligence, it is deemed that the person should have been aware of the circumstances. Gross negligence is failure to exercise necessary care to a material extent (LOA § 104 (4)). Consequently, if a person fails to exercise necessary care to a material extent, is therefore unaware that the person making a declaration of intent is in error (and thus naturally fails to inform the person making the declaration of intent about his or her mistake), it cannot constitute an intentional leaving of a person in error. In the latter case, we can only speak about the right to cancel the transaction due to a (recognisable) mistake (GPCCA § 92 (3) 2)).

In case a person wishes to ground a legal claim on fraud, he or she must prove the relevant circumstances, inter alia, the substantive elements of fraud. Upon cancelling a transaction on the grounds that a person was intentionally left in error, to prove the other person's intent may present to be problematic. According to legal literature, in order to establish intent to deceive, the **subjective** perception of the defrauding party must be taken as the basis — unlike for establishing negligence when the perception of a reasonable person is taken as the basis.<sup>\*31</sup> Nevertheless (as it is naturally impossible to submit proof as to the thoughts of a person), evidence of intent to deceive in practice actually amounts to adherence to certain objective criteria.<sup>\*32</sup>

If a person wishes to be released from the transaction due to circumstances that provide grounds to believe that the case involves mistake and/or fraud, the transaction can be cancelled by making a unilateral declaration of rescission pursuant to GPCCA §§ 90 and 98. When making such a declaration, the transaction becomes void from the start. The above delimitation problem, however, implies that upon making a declaration for cancelling the transaction, it may be difficult for the party making the declaration of rescission to adequately assess whether the other party caused the mistake by his or her neutral attitude to the violation of the notification obligation or by the intent to induce entering into the transaction. As the existence or lack of intent to deceive can be established, above all, after learning about the explanation or position of the other party and obtaining an overview of all the circumstances related to the entry into the particular transaction, it would in practice be advisable to rely upon making the declaration of rescission besides fraud, alternatively also on mistake, in order to avoid a situation in which it may be later established that the elements of cancelling a transaction due to fraud (e.g., because of lack of intent to deceive) were missing and thus the declaration cancelling the transaction due to fraud is void.

## 4. Duties related to disclosure of information

Both sets of elements of mistake and fraud discussed herein involve the fact that one party's mistake is brought about by the other party to the transaction either by disclosing false circumstances or failing to disclose circumstances that should be disclosed according to the principle of good faith. Therefore, it is necessary to analyse under what circumstances a party to the transaction has a duty related to the provision of information to the other party.

Whether and to what extent the existence of a pre-contractual duty to disclose should be recognised largely depends on how the legal order perceives the nature of the process of entry into a contract, and how high ethical standards are imposed on the participants in the procedure. The existence and extent of the duty to disclose is a field in the contract theory where considerable differences exist between common law and continental European legal doctrines.<sup>\*33</sup> E.g., English law takes the general position that both parties must have the right to use the existing information for their personal benefit and, consequently, the duty to disclose is recognised minimally.<sup>\*34</sup> Knowing provision of false information to the other party is prohibited according to their judicial practice; however, the party is not required to direct the attention of the other party to circumstances that are important for the other party or to the fact that the other party proceeds from some incorrect assumption when entering into a transaction. Continental Europe values the transparency of the negotiations, trust between the parties, their solidarity and acting in good faith. That is why extensive duties to disclose are derived from the principle of good faith both in French and German law.<sup>\*35</sup>

<sup>31</sup> P. Varul, I. Kull, V. Kõve, M. Käerdi (compilers). *Võlaõigusseadus I. Üldosa* (§§ 1–207). Kommenteeritud väljaanne (Law of Obligations Act I. General Part (§§ 1–207). Commented Edition). Tallinn 2006, p. 332 (in Estonian).

<sup>32</sup> For relating intent to the standard of reason see also PICC article 3.8 (Note 14).

<sup>33</sup> P. Gilikier. *Regulating Contracting Behaviour: The Duty to Disclose in English and French Law*. – *European Review of Private Law* 2005/5, p. 623.

<sup>34</sup> B. Markesinis, H. Unberath, A. Johnston. *The German Law of Contract*. Oxford and Portland, Oregon 2006, pp. 305–308.

<sup>35</sup> P. Gilikier (Note 33), pp. 624, 631. There are exceptions to this principle in contracts where a trust relationship exists between the parties: e.g., in the case of insurance contract, the policyholder must inform the insurer about all circumstances that a reasonable insurer would consider important. *Ibid.*, pp. 625–626. See also O. Palandt, H. Heinrichs (Note 18), § 123, paragraphs 5a–5c.

Violations of the duty to disclose may, under certain conditions, constitute as fraud. Namely, fraud can be committed both by action (i.e., disclosure of false circumstances) and by silence (i.e., by non-disclosure of circumstances that should have been disclosed to the other party according to the principle of good faith). For example, fraud by silence is most common in German judicial practice<sup>\*36</sup>, while French legal theory is of the opinion that fraud (*dol*) may consist of silence, i.e., when the defrauding party is silent about a circumstance, knowing which the other party would not have entered into such a transaction.<sup>\*37</sup> The Civil Chamber of the Supreme Court has in its decision in matter 3-2-1-93-05<sup>\*38</sup> also noted that in order to establish the right to cancel a contract due to mistake, on the basis of GPCCA § 92 (3), it must be identified whether the other party to the transaction was subject to the objective duty to disclose arising from the principle of good faith.

For establishing the duty to disclose under the principle of good faith (LOA § 6), regard shall be had, above all, for the following circumstances according to GPCCA § 95<sup>\*39</sup>: (1) whether the circumstance is clearly important to the other party, (2) to the specific expertise of the parties, (3) the reasonable opportunities of the other party to obtain the necessary information, and (4) the extent of the necessary expenses to be made by the other party in order to obtain such information. The list is not exhaustive.

#### 4.1. Dependence of duty to disclose on the relevance of information

A party must provide information without request only if the decisive relevance of the information for the other party is recognisable to him or her.<sup>\*40</sup> This is definitely the case when a circumstance is of such relevance that otherwise there would be no point in entering into the transaction. E.g., when a real estate is bought for development, but the seller knows that it will actually be a Nature 2000 area and thus any construction on the plot will be ruled out in the future. Recognisable deficiencies also include relevant deficiencies in the sold object, i.e., when a house is for sale and the seller knows that the walls have been affected by dry rot or a major damage by moisture.<sup>\*41</sup> In German judicial practice, a catastrophic financial situation has been regarded as such circumstance upon the sale of shares of an enterprise or a private limited company.<sup>\*42</sup>

German judicial practice, which imposes very extensive duties to disclose upon the obligor, has also been criticised for creating legal uncertainty and making it difficult to predict the outcome of any court case. The criteria used to decide upon the existence of the duty to disclose are allegedly also too vague.<sup>\*43</sup> At the same time, Dutch law is of the position that if fraud has been proven, the existence of the duty to disclose is not subject to especially high standards: the acts committed by the defrauding party in bad faith constitute such a substantial argument that extremely substantial reasons would be required to overthrow the duty to disclose information.<sup>\*44</sup> We rather agree with the position — a similar approach under Estonian law is supported by the fact that the relevance of the mistake is not important in fraud, unlike in mistake.

#### 4.2. Dependence of duty to disclose on specific expertise of parties

The duty to disclose should also be recognised in cases when one party to the transaction has considerably more expertise in the field (is a professional) than the other party. This is caused by the fact that with the increasingly complicated transactions of the present time, and ever-increasing specialisation, there is often nothing else to do for a person than to trust the opinion of the other party as a professional. The very unequal access of the parties to the specific information gives rise to the duty to disclose upon the better-informed party.<sup>\*45</sup> E.g., a professional seller of used vehicles has a duty to disclose information regarding the accidents in which

<sup>36</sup> Münchener Kommentar zum Bürgerlichen Gesetzbuch. Bd. 1: Allgemeiner Teil. 5. Aufl. München: Verlag C.H. Beck 2006, § 123, paragraph 16. Commentator: Kramer.

<sup>37</sup> M. Fabre-Magnan, R. Sefton-Green. Defects of Consent in Contract Law. — Towards a European Civil Code. 3<sup>rd</sup> ed. 2004, p. 403.

<sup>38</sup> RT III 2005, 35, 343 (in Estonian).

<sup>39</sup> The circumstances provided in GPCCA § 95 verbatim coincide with those provided in PECL article 4:107 (3).

<sup>40</sup> See Supreme Court decision 3-2-1-93-05 (Note 38).

<sup>41</sup> A case obviously involves fraud when the seller has, e.g., the walls repainted to cover up the damage from moisture before the sale. See O. Lando, H. Beale (Note 3), p. 253.

<sup>42</sup> A decision of the Supreme Court of the Federal Republic of Germany of 4.04.2001. — NJW 2001, p. 2163.

<sup>43</sup> B. Markesinis et al (Note 34), p. 309.

<sup>44</sup> See D. Busch et al (Note 16), p. 208.

<sup>45</sup> See I. Parrest. Teavitamiskohustus lepingueelsetes suhetes (Notification Obligation in Precontractual Relations). — Juridica 2001/5, p. 321 (in Estonian).

the vehicle may have been.<sup>\*46</sup> In French law, such transactions include, e.g., the sale of software, but also an investment contract between a bank and an investor who is a student; in the latter case, it was established that the bank also had to point out the risks and circumstances detrimental to the other party.<sup>\*47</sup> The obligation to provide information also applies to cases where a trust relationship exists between the individuals entering into a contract or if such a relationship is created by entry into the contract.<sup>\*48</sup>

If a buyer discloses to the seller the purpose for which he or she wishes to use the thing and is incompetent in technical matters himself or herself or has no previous experience in the relevant area of business, then proceeding from the principle of good faith the buyer may presume that the seller would provide the relevant information. Such a presumption applies as long as the seller knows about the incompetence of the buyer and realises the possible dangers and risks that may result when the buyer uses the thing for the specified purpose.<sup>\*49</sup> On the contrary, in case the seller is not a professional, such duty to disclose cannot be presumed.<sup>\*50</sup>

### 4.3. Dependence of duty to disclose on possibility of other party to obtain information

According to GPCCA § 95, the notification obligation depends, inter alia, on the reasonable opportunities of the other party to obtain the necessary information and the extent of the necessary expenses to be made. Once again, the obligation is tied to the professionalism of the parties: when one of the parties is a professional and the other a consumer, the latter usually has considerably worse opportunities to obtain the necessary information. Thus, it is usually much easier for providers of goods or services in the field of their economic and professional activity to obtain information about the services or goods offered by them, than it is for consumers.

It has been emphasised in German judicial practice that, for instance, when selling the shares of an enterprise or a private limited company, the buyer can obtain information about the actual economic situation of the company primarily and solely based on the balance sheet, other accounting records of the company and economic estimations, as well as information provided by the owners or managers of the company. Consequently, it is relatively difficult for a third party to obtain truthful information about the object of purchase and he or she is largely dependent on the accuracy of the information given by the owners and managers when assessing the economic situation of the company. This also justifies the imposition of obligation to disclose information upon the seller of an enterprise or shares.<sup>\*51</sup> The duty to disclose has also been associated with the extent of the expenses to be made by the person to obtain relevant information. There is often no duty to disclose relevant information if a party has incurred considerable expenses obtaining the same. The right to cancel the contract is, in such a case, precluded by an economic consideration, according to which there would otherwise be no stimulus to invest in procuring the information, resulting in loss for both parties.<sup>\*52</sup> The investment criterion should carry greater weight for persons who are assumed to be of an equal standing, whereas the criterion should be left in the background in relations between a professional and non-professional, and the obvious relevance of the circumstance for the non-professional should prevail.<sup>\*53</sup>

It is reasonable to impose the duty to disclose upon the obligor if the latter already has the information relevant for the obligee without the need to incur separate expenses for that purpose (e.g., the seller of a real estate is aware of relevant circumstances concerning the estate). The notification obligation also applies to cases where so-called asymmetry of information is created, i.e., if to obtain particular kind of information would be considerably more expensive for one party than for the other (e.g., upon the sale of used vehicles, the buyer is willing to rather pay the seller a separate fee for information than to go and seek it himself or herself, which would be ultimately more costly). In such cases, it is justified to subject the seller to an enhanced duty to disclose.<sup>\*54</sup>

<sup>46</sup> A decision of the Supreme Court of the Federal Republic of Germany of 3.03.82. – NJW 1982, p. 1386.

<sup>47</sup> P. Gilikier (Note 33), p. 631.

<sup>48</sup> A decision of the Supreme Court of the Federal Republic of Germany of 7.10.91. – NJW 1992, p. 300.

<sup>49</sup> I. Kull, I. Parrest. Teatamiskohustus võlaõigusseaduse kontekstis (Notification Obligation in the Context of the Law of Obligations Act). – Juridica 2003/4, p. 216 (in Estonian).

<sup>50</sup> O. Lando, H. Beale (Note 3), p. 254.

<sup>51</sup> See decision of the Supreme Court of the Federal Republic of Germany of 4.04.2001. – NJW 2001, p. 2163.

<sup>52</sup> O. Lando, H. Beale (Note 3), p. 232.

<sup>53</sup> I. Parrest (Note 45), p. 326.

<sup>54</sup> B. Markesinis et al (Note 34), p. 309.

## 4.4. Prohibition to lie

As indicated above, a distinction must be made between the duty to notify, i.e., the duty to inform the other party about certain circumstances without the other party asking about it, and the duty to tell the truth. The parties are always obliged to tell the truth, they are prohibited from lying, regardless of the duty to disclose.<sup>\*55</sup> LOA § 14 (1) provides that information exchanged by the persons in the course of preparation for entering into the contract shall be accurate. Thus, when one person asks another whether the vehicle has been in an accident, the other person must answer truthfully, and if they have any doubts about it, they must express them.<sup>\*56</sup>

Only on a few exceptions may it be considered lawful to also disclose untruthful information — this concerns information in respect of which the other party has no right to ask, i.e., the information obtained by unauthorised inquiry.<sup>\*57</sup> German courts have accepted exceptions when lying in the process of entry into a contract is permitted. For example, prevailing judicial practice confirms that questions put to a person during a job interview must be reasonable, otherwise the future employee is entitled to lie.<sup>\*58</sup> Estonian legal literature has also assumed a position that it may be considered justified to present false information during pre-contractual negotiations concerning questions that have been asked about a person's state of health if this does not relate to the performance of the particular contract; neither is it necessary to answer truthfully to inquiries about pregnancy or the intention to marry.<sup>\*59</sup>

## 5. Causation

As discussed in this article, the right to rescind a transaction on the grounds of mistake and fraud presumes a causal link between the disclosure or non-disclosure of circumstances by a party and the creation of an incorrect perception of the actual circumstances by the other party.

Pursuant to GPCCA § 94 (3), a person who entered into a transaction **due to fraud** may cancel the transaction. Thus, rescission of a transaction due to fraud based on GPCCA § 94 presumes the existence of causation (*conditio sine qua non*) between the fraud (i.e., leading the defrauded party into or leaving in error) and entry into the transaction. This means that disclosure of mistaken circumstances or non-disclosure of some relevant circumstances must lead the other party into error (or leave in error) and thereby induce that party to enter into such a transaction. Such causation need not be there, e.g., in case the defrauded party actually took into account the possibility of fraud and nevertheless entered into the transaction.<sup>\*60</sup> Thus, the Tallinn Circuit Court has established that signing a contract without reading it through does not constitute either mistake or fraud as the defendant did not exercise sufficient care when signing the contract and did not act as a reasonable person.<sup>\*61</sup> Naturally, there is no causation also if when the defrauded party had a truthful overview of the actual state of circumstances from the very beginning (e.g., knew about the deficiency of the object of sale from the beginning).

Yet, according to German law, the right of rescission is not ruled out by the mere fact that the defrauded party was unaware of the fraud through his or her negligence or gross negligence.<sup>\*62</sup> The activities of the deceiving party need not be the only reason behind the fraud, but it suffices when it is one of the reasons that brought about the mistake for the other party.<sup>\*63</sup> The defrauded party must prove the existence of causation; however, it is found in some legal orders that if the intentional provision of wrong information by the deceiving party has been proven, it is presumed to have also affected the defrauded party into making the transaction.<sup>\*64</sup>

<sup>55</sup> P. Varul et al (Note 31), p. 59.

<sup>56</sup> O. Palandt, H. Heinrichs (Note 18), § 123, paragraph 5a.

<sup>57</sup> K. Larenz (Note 9), p. 684.

<sup>58</sup> B. Markesinis et al (Note 34), pp. 303–304.

<sup>59</sup> P. Varul et al (Note 31), p. 60.

<sup>60</sup> MüKo/Kramer (Note 36), § 123, paragraph 12.

<sup>61</sup> Civil matter 2-2/901/04 of the Tallinn Circuit Court, available at [http://kola.just.ee/docs/public/dokument\\_180443.pdf](http://kola.just.ee/docs/public/dokument_180443.pdf) (21.06.2007) (in Estonian).

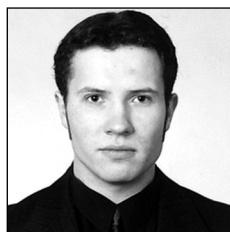
<sup>62</sup> MüKo/Kramer (Note 36), § 123, paragraph 12.

<sup>63</sup> *Ibid.*, § 123, paragraph 12.

<sup>64</sup> O. Lando, H. Beale (Note 3), p. 255.

## 6. Conclusions

In order to distinguish between the so-called caused mistake or recognised/recognisable mistake and the set of elements of fraud, according to law applicable in Estonia and modern legal theory, attention must be paid to the following circumstances: (1) in the case of fraud, it is necessary to identify the intent to deceive, i.e., a direct or indirect intent to induce the other party to enter into the transaction; (2) fraud may be either active — submission of false information for the purpose of deception — or passive — failure to follow the duty to disclose or leaving the other party in recognisable mistake; (3) the existence and extent of the duty to disclose must be determined on a case by case basis, taking into account GPCCA § 95, while the prohibition to disclose false information applies at all times; (4) unlike rescission based on mistake, fraud does not require relevancy of the mistake although the false information must impose a significant effect on entering into the transaction on the specific terms; (5) a causal link must be identified between intentional deceit and entry into the contract. A case does not constitute fraud when an intentional deceit took place but did not bring about the fact of entry into the contract. As criticism of law in force at present, the authors point out the need to simplify proving intent to deceive in case a party has disclosed unverified false information despite of being obliged to verify it under the circumstances. The authors of the article are of the opinion that similarly to German law, the fact that the defrauding party has disclosed unverified information which should have been verified and which proves incorrect later, should serve as sufficient evidence as to the intent to deceive of the same party. Neither is it possible to demand that the establishment of intent to deceive in other cases of fraud involve the definite demonstration of knowledge by the defrauding party.



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# Fault in the Three-stage Structure of the General Elements of Tort

The three-stage structure of the general elements of tort distinguishes between the objective elements of the act, unlawfulness and fault. The objective composition is composed of three elements: a general distinction can be drawn between the tortfeasor's act, the damage suffered by the victim, and the causal relationship between the tortfeasor's act and the damage suffered by the victim. The general elements of tort require all these elements to be present in order for liability to be created. It is not always an easy task to draw a line between the elements of tort, but it is necessary, because even, e.g., the burden of proof may be distributed differently depending on the prerequisites for liability. Distinguishing fault from the other elements of tort may cause the greatest problem. Besides distinguishing between the prerequisites for general delictual liability, the mutual relations between the relevant prerequisites need to be understood for a better comprehension of the structure of delictual liability.

The main objective of this paper is to analyse the differences of fault as a prerequisite for general delictual liability as well as its points of contact with the other elements of tort. For example, an interesting issue concerns the distinction between fault and an act relevant to tort law, as well as the links and differences between causality and fault. An analysis of these points should be of interest to jurists of all countries. More than others, though, the discourse concerns those countries where the general elements of tort are structured similarly to Estonian law (especially countries belonging to the Germanic legal family).<sup>\*1</sup>

The author stresses that this paper does not discuss issues of unlawfulness as one of the general elements of tort; neither does it discuss the distinction between unlawfulness and fault. The reason for drawing this line is the broadness of the topics, on the one hand, and the fact that the author has already written about these issues, on the other.<sup>\*2</sup>

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<sup>1</sup> For example, the structure of delictual liability recognised in countries of the Roman legal family and in common law countries has major differences from the German and Estonian model, and many of the issues discussed in this paper do not arise from the same aspect outside the Germanic legal family.

<sup>2</sup> See J. Lahe. The Concept of General Duties of Care in the Law of Delict. – *Juridica International* 2004, pp. 108–115. It should be noted that telling between unlawfulness and faulty is not, as a rule, complicated if unlawfulness is induced from damaging an absolutely protected legal benefit (e.g., life, health, ownership) (the so-called theory of wrongful consequence). Distinction is difficult especially where the tortfeasor's act requires additional assessment for establishing unlawfulness (the so-called theory of wrongful act). The issues of distinguishing unlawfulness from fault rise especially seriously where unlawfulness arises from violating general duties. About distinguishing between unlawfulness and fault see, e.g., E. Deutsch. *Fahrlässigkeit und erforderliche Sorgfalt. Eine privatrechtliche Untersuchung*. Zweite Auflage. Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG 1995, p. 478; F. G. v. Westphalen, etc. *Produkthaftungshandbuch: Vertragliche und deliktische Haftung, Strafrecht und Produkt-Haftpflichtversicherung*. München: C.H. Beck'sche Verlagsbuchhandlung 1989, p. 482; D. Howarth. *Textbook on Tort*. Bittenworths, London, Dublin, Edinburgh 1995, p. 267.

This paper has four parts. The first part analyses the concept, elements, and general structure of the elements of tort. The second part discusses the act as an objective element of tort and its relations with fault. The third part analyses the concept of damage and its relations to fault. The fourth part of the paper studies the concept of causality and the differences and points of contact between causality and fault.

## 1. Concept and structure of the general elements of tort

Unlawful behaviour that causes damage to another person (tort) is governed by legislation and results, if the relevant prerequisites for liability are present, in the tortfeasor's obligation to compensate for the damage. According to the generally accepted classification, such as the Law of Obligations Act<sup>3</sup> (LOA), the institute of compensation for unlawfully caused damage is classified under non-contractual obligations (LOA Chapter 53).<sup>4</sup> LOA Chapter 53 distinguishes between the general elements of tort (Division 1), strict liability (Division 2) and liability for defective products (Division 3). The general elements of tort can be defined as a set of certain prerequisites for liability, in which case the tortfeasor has the obligation to compensate the victim for the damage. The tortfeasor's fault is one of these prerequisites.<sup>5</sup> In the event of delictual strict liability attention is paid not to the fault of the tortfeasor, instead it is checked whether the harmful consequence was caused by the realisation of an elevated risk characteristic of things or activities. In the event of a producer's delictual liability, the element of fault has not been completely discarded, but limits have been established to prove the lack of fault.

According to the Civil Code of the Estonian Soviet Socialist Republic<sup>6</sup> (CC), which was in force until 1 July 2002, four prerequisites were required, as a rule, for creating an obligation arising from the causing of unlawful damage: (1) the victim must have suffered damage, (2) the tortfeasor's act was unlawful, (3) there was a causal relationship between the damage and the tortfeasor's act, and (4) the tortfeasor was at fault for causing the damage.<sup>7</sup> The first three prerequisites were elements of the objective aspect of the offence, while fault characterised the subjective aspect.<sup>8</sup>

The existence of tort and the claim for compensation from damages arising from it is verified in German law on three different levels of the elements of a civil offence: the levels of the objective elements of tort (three conditions are checked: (1) act, (2) damage, and (3) a causal relationship between the act and the damage), of unlawfulness, and of fault. To "reach" each succeeding level, previous levels must be completed and all their conditions met because moving to the next level would otherwise be pointless, as no delictual liability would be created in the final stage.<sup>9</sup>

German tort law differs from that of many other continental European countries, particularly in the lack of one specific general clause or the general elements of tort.<sup>10</sup> The latter claim can be justified with certain reservations, as e.g., the elements (intentional damage against good morals) provided in § 826 of the German Civil Code<sup>11</sup> (BGB) can still be regarded as a "small general tort".<sup>12</sup>

<sup>3</sup> Völaõigusseadus. Passed 26.09.2001, entered into force 1.07.2002. – RT I 2001, 81, 487; 2005, 61, 473 (in Estonian).

<sup>4</sup> Besides unlawful causing of damage, we may speak about non-contractual obligations if the case concerns a public promise to pay (LOA Chapter 49), presentation of a thing (LOA Chapter 50), *negotiorum gestio* (LOA Chapter 51), or unjustified enrichment (LOA Chapter 52).

<sup>5</sup> Highlighted among the functions of fault should be, firstly, the liability generating function of fault (the legal dogmatic aspect), and secondly, fault is the dominant underlying principle of liability (legal policy aspect). See C. Oswald. *Analyse der Sorgfaltspflichtverletzung im vertraglichen wie ausservertraglichen Bereich*. Dissertation. Zürich: Schulthess Polygraphischer Verlag AG 1988, p. 37.

<sup>6</sup> Eesti NSV tsiviilkoodeks. Passed 12.06.1964, entered into force 1.01.1965. – Ülemnõukogu Teataja (The Supreme Council Gazette) 1964, 25, 115; RT I 1997, 48, 775 (in Estonian).

<sup>7</sup> E. Laasik. *Nõukogude tsiviilõigus. Eriosa* (Soviet Civil Law. Special Part). Tallinn: Kirjastus "Valgus" 1975, p. 337 (in Estonian).

<sup>8</sup> J. Ananyeva et al. *Nõukogude tsiviilõigus. Üldosa* (Soviet Civil Law. General Part). Tallinn: Kirjastus "Valgus" 1975, p. 410 (in Estonian). It should be noted that the Civil Code of the Russian Federation (the general part of which was passed by the State Duma on 21 October 1994 and the special part was passed on 22 December 1995) is based on a method of regulation of the structure of tort which is essentially similar to the CC; the same (aforementioned) four prerequisites can be considered as the prerequisites for delictual liability.

<sup>9</sup> K.-H. Gursky. *Schuldrecht. Besonderer Teil. 3. neuarbeitete Aufl.* Heidelberg: C.F. Müller Verlag 1999, pp. 189–194.

<sup>10</sup> *Ibid.*, p. 189.

<sup>11</sup> Civil Code of the German Federal Republic. Text with commentaries in: O. Jauernig. *Eläutert von C. Berger, etc. Bürgerliches Gesetzbuch*. 10. Aufl. München: Verlag C.H. Beck 2003.

<sup>12</sup> Three types of elements of liability may be distinguished in the BGB context regarding delictual liability: firstly the general case of liability, secondly liability based on presumed fault (BGB §§ 831, 833, etc.), and thirdly, liability for damage caused by another person's fault (including state liability). See R. Schulze etc. *Bürgerliches Gesetzbuch. Handkommentar*. 3. Aufl. Baden-Baden: Nomos Verlagsgesellschaft 2003, p. 960.

The French *Code Civil*, like the CC, contains a general clause on delictual liability, according to which any damage caused by one person against his/her obligations to another is subject to compensation (see §§ 1382 and 1383 of the *Code Civil*). Acting against an obligation is a *faute*. Besides *faute* as a basis for liability, the general elements of tort, according to the *Code Civil*, are behaviour, damage, and causality.<sup>\*13</sup>

The tort law of common law countries recognises three main elements as the prerequisites for delictual negligence liability<sup>\*14</sup>, which is regarded in these countries as the most important elements of delictual liability (and the general clause at the same time): duty, breach of duty, and damage or injury. Naturally, a causal relationship is required to exist between the breach of duty and the victim's damage.<sup>\*15</sup> Therefore, the tort law of all common law countries is built on the duties that persons have to each other. According to Lord Atkins' classic formulation, which he presented in the case of *Donoghue v. Stevenson*, duty is defined as follows: You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour. A person has a duty where it seems fair and reasonable in an analysis of the specific case. In addition to that, duty should be assessed based on the predictability of damage and the closeness of the parties to each other.<sup>\*16</sup> When assessing whether a duty has been breached, it should be analysed whether a person has acted reasonably.<sup>\*17</sup>

U. Magnus has found that European tort law should also contain specific elements. Firstly, this includes such main elements as damage, causality, and the victim's complicity.<sup>\*18</sup> Proceeding from article 1:101 of the draft European Civil Code<sup>\*19</sup>, a prerequisite of general delictual liability also includes the intention or negligence of the tortfeasor. Unlawfulness is not an express prerequisite for liability according to the draft.<sup>\*20</sup>

In the LOA applicable since 1 July 2002, the CC scheme of delictual liability has been abandoned and delictual liability is regulated based on the method characteristic of the Germanic legal family.<sup>\*21</sup> Similarly to German tort law, the three-stage structure of the general elements of tort in the LOA follows the classic scheme of penal law, which distinguishes between the objective elements of tort, unlawfulness, and fault. The burden of proof of the objective elements of tort and unlawfulness lies with the victim; the tortfeasor has to prove any circumstances precluding unlawfulness or the lack of fault (LOA § 1050 (1)).<sup>\*22</sup> The objective elements of tort are the act, the unlawful consequence (damage), and the causal relationship between them. The so-called small general tort of the LOA can be seen in the provision of LOA § 1045 (1) 8), which provides that intentional behaviour contrary to good morals is unlawful (the purpose and substance of this provision are principally the same as those of BGB § 826).

The author of this paper believes that the structure of the general elements of tort according to the LOA is justified, as it sets clear limits on the creation of delictual liability and thus ensures sufficient freedom of conduct: an individual can assess before acting whether the act is unlawful and could result in delictual liability.

<sup>13</sup> M. Ferid; völlig neuarbeitete von H. J. Sonnenberger. Das Französische Zivilrecht. Bd. 2. 2. Aufl. Schuldrecht: die einzelnen Schuldverhältnisse. Sachenrecht. Heidelberg: Verlagsgesellschaft Recht und Wirtschaft GmbH 1986, p. 460.

<sup>14</sup> It should be kept in mind that in the tort law of England (and other common law countries), negligence is a tort and not a form of fault. See C. von Bar, J. Shaw. Deliktsrecht in Europa. Systematische Einführungen, Gesetztexte, Übersetzungen. Landberichte Dänemark, England, Wales. Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG 1993, p. 15.

<sup>15</sup> M. D. Bayles. Principles of Law. A Normative Analysis. Boston, Lancaster, Tokyo: D. Reidel Publishing Company 1987, p. 210.

<sup>16</sup> C. von Bar, J. Shaw (Note 14), pp. 17–18.

<sup>17</sup> See also C. von Bar. The Common European Law of Torts. Vol. 2. Oxford: Clarendon Press 2000, p. 249; P. Cane. Accidents, Compensation and the Law. 6<sup>th</sup> Ed. Butterworths, London, Edinburgh, Dublin 1999, p. 26; C. v. Bar, J. Shaw (Note 14), p. 15.

<sup>18</sup> U. Magnus. Elemente eines europäischen Deliktsrechts. Zeitschrift für Europäisches Privatrecht. 6. Jahrgang. München: Verlag C.H. Beck 1998, p. 612.

<sup>19</sup> Draft European Civil Code. Available at [http://www.sgecc.net/index.php?subsite=subsite\\_4](http://www.sgecc.net/index.php?subsite=subsite_4) (15.07.2007).

<sup>20</sup> C. von Bar. Konturen des Deliktsrechtskonzeptes der Study Group on European Civil Code – Ein Werkstattbericht. – Zeitschrift für Europäisches Privatrecht. 9. Jahrgang. München: Verlag C. H. Beck 2001, pp. 520–521. Namely the working group considered it reasonable not to use the concept *culpa in abstracto*, but to stress that important in the framework of negligence liability was the failure to exercise due diligence. *Ibid.*, pp. 520–521. The author of this paper deems it inevitable for the European CC to become a certain compromise between the provisions and principles of tort law applicable in different countries. Such a compromise can be reached if we take only the common part of domestic laws (however, e.g., a distinction between unlawfulness and fault is foreign to French law). About the feasibility of the European Civil Code and the idea behind it see M. W. Hesselink (ed.). The Politics of a European Civil Code. Hague: Kluwer Law International 2006, pp. 73–79.

<sup>21</sup> The author admits that the main elements of delictual liability are the same in the CC and LOA; the differences concern the systematisation and regulation of these elements.

<sup>22</sup> Decision 3-2-1-53-06 of the Civil Chamber of the Supreme Court of 26 September 2006 (RT III 2006, 33, 283 (in Estonian)) also mentions that in the event of general delictual liability, the employer as the tortfeasor is released from the obligation to compensate if the employer proves the presence of any of the circumstances precluding unlawfulness as specified in LOA § 1045 (2) 1)–4) or the lack of fault.

## 2. Act as an objective element of tort and fault

A person's act is the first objective element of tort and hence one of the main bases of liability.<sup>\*23</sup> In tort law, an act means the behaviour of a person which is controlled by the mind and the person's will and is thus controllable.<sup>\*24</sup> Gestures which are not controllable (e.g., those done when unconscious) or which result from direct physical duress, as well as reflexes, cannot be regarded as acts and do not give rise to civil liability.<sup>\*25</sup> Only a person who has acted on his or her free will can be liable.<sup>\*26</sup> An act may also lie in inactivity, but inactivity can result in delictual liability only if a person was under a duty to act but failed to do so. It is often difficult to draw a clear line between an act and inactivity: for example in a situation where a person suffers damage caused by a defective product it may be said that the producer acted when placing the defective product on the market, but was inactive when failing to check the product.<sup>\*27</sup>

It should be noted that the concept of an act is essentially the same under tort law and penal law. Professor J. Sootak mentions that the purpose of describing an act in criminal law is to delimit a person's relevant, i.e., will-driven behaviour from behaviour without social quality such as reflexive gestures, etc. Where behaviour does not constitute an act within the meaning of criminal law, naturally such behaviour cannot be legally assessed.<sup>\*28</sup> In penal law, an act is behaviour guided by a person's will, which is expressed in the external world. Thoughts, opinions, feelings, gestures resulting from *force majeure*, common somatic or pathological bodily reflexes, sleepwalking and an animal act do not constitute acts. However, learned reflexes or acquired automatism (such as gestures made while driving a car, writing), as well as acts performed under mental duress, constitute acts.<sup>\*29</sup>

Therefore, delictual liability may be precluded because of a lack of an act relevant for the purposes of tort law. In some cases, however, it may be difficult to decide whether a person's liability should be precluded because of the lack of an act or the lack of fault. For example, it is possible that a person suffers an epileptic seizure in an antique store and causes a valuable vase to break as he falls. In Estonian law, gestures caused by epilepsy should be regarded as acts for the purposes of tort law, but if the person had to be aware of the risk of a fit of a **certain** illness, his or her very entrance into the shop could be regarded as an act. When judging a person's act, it should be taken into account, amongst other things, what the doctor having treated the patient has said to the patient and the likelihood of attacks occurring, according to the doctor.

It is important to note that an inculpable person may commit a relevant act under tort law. In such a case, the parent, curator, or person supervising the inculpable person under a contract may be liable for the damage caused by the inculpable person (see LOA § 1053). However, the lack of an act by an inculpable person precludes the liability of the aforementioned persons. For example, if a 13-year-old is pushed onto the carriageway by a third party and a driver knocks over a traffic sign to avoid collision, it may be said that the child did not act and, hence, the persons listed in LOA § 1053 are not liable for the damage. However, if the child suddenly runs onto the carriageway on his or her own accord, a parent or curator or contractual supervisor may be liable for the damage (provided that the objective elements of tort are present, the child's behaviour was unlawful and objectively negligent). A person's inability to control his or her behaviour should therefore be distinguished from inculpability (LOA § 1052).

<sup>23</sup> E. Deutsch, H.-J. Ahrens. Deliktsrecht. Unerlaubte Handlungen. Schadenersatz. Schmerzensgeld. 4, völlig überarbeitete und erweiterte Aufl. Köln, Berlin, Bonn, München: Carl Heymanns Verlag 2002, p. 15.

<sup>24</sup> See O. Jauernig. Eläutert von C. Berger, etc. Bürgerliches Gesetzbuch. 10. neuarbeitete Aufl. München: Verlag C. H. Beck 2003, p. 1022; K. Larenz. Lehrbuch des Schuldrechts. Zweiter Band. Besonderer Teil. Zwölfte, völlig neuarbeitete Aufl. München: C. H. Beck'sche Verlagsbuchhandlung 1981, pp. 589–590.

<sup>25</sup> V. Emmerich. BGB-Schuldrecht. Besonderer Teil. 10. völlig neubearbeitete Aufl. Heidelberg: C.F. Müller Verlag 2003, p. 255.

<sup>26</sup> B. Berofsky (ed.). Free Will and Determinism. New York, London: Harper & Row Publishers 1966, pp. 59–63.

<sup>27</sup> About this see also C. Van Dam. European Tort Law. Oxford: University Press 2006, p. 205.

<sup>28</sup> See J. Sootak. Kuriteomõiste ja õigusriiklik kriminaalõigus. Kolme-elementilisest kuriteomõistest karistusseadustiku üldosa eelnõus (Definition of Crime and Criminal Law Based on Rule of Law. The Concept of Crime Consisting of Three Elements in the Draft General Part of the Penal Code). – Juridica 1998/1, pp. 23–27 (in Estonian).

<sup>29</sup> See J. Sootak. The Definition and Structure of Offence in the Penal Code. – Juridica 2001/7, p. 451 (in Estonian).

### 3. Damage as an objective element of tort and fault

The causing of damage is the second of the objective elements of tort. Although it is difficult to present the one and only correct definition of damage, it could be said that any reduction of a personal or patrimonial benefit may be regarded as damage.<sup>\*30</sup> Section 1293 of the Austrian Civil Code provides a definition of damage: damage means any impairment caused to someone's property, rights, or person.<sup>\*31</sup> Soviet civil law theory understood patrimonial damage as the negative consequences in one person's proprietary sphere resulting from the unlawful behaviour of another person.<sup>\*32</sup> According to CC § 222, a distinction was made between direct damage, i.e., the expenses of a creditor, loss of or damage to the creditor's assets, and loss of profit. The principle of full compensation for damage was set forth in CC § 448 (1), according to which damage caused to a citizen's person or property, as well as damage caused to an organisation, is subject to full compensation by the tortfeasor.

In the currently applicable law, the objective of compensation for damage is provided in LOA § 127 (1). The latter provision refers directly to the requirement of applying the difference hypothesis known from German law. Types of damage are governed by LOA § 128, according to which damage subject to compensation may be patrimonial or non-patrimonial. Patrimonial damage is divided into direct patrimonial damage and loss of profit (subsection 2). Purely economic loss could be mentioned as a type of patrimonial damage, compensation for which cannot, as a rule, be claimed under tort law.<sup>\*33</sup> Non-patrimonial damage involves primarily the physical and emotional distress and suffering caused to the aggrieved person (subsection 5).<sup>\*34</sup>

In French law, as in most other countries, any patrimonial or non-patrimonial influence may serve as damage.<sup>\*35</sup> The draft European Civil Code also distinguishes between types of damage. Article 2:101:1 thus provides that loss, whether economic or non-economic, or injury is legally relevant damage (and subject to compensation) if: (a) one of the following rules of this Chapter so provides; (b) the loss or injury results from a violation of a right otherwise conferred by the law; or (c) the loss or injury results from a violation of an interest worthy of legal protection. In the latter two cases, it should be considered whether considering the loss or injury legally relevant would be fair and reasonable (article 2:101:2).<sup>\*36</sup>

From the aspect of fault it is important that two levels of damage as an objective element of tort are distinguishable. The first level is the level of unlawful elements of tort, which focuses mainly on the damage required for the emergence of liability. According to BGB § 823 (1), protected legal rights include, in the first order, life, physical freedom from injury, health, freedom and ownership.<sup>\*37</sup> Causality causing liability exists where a person's act has led to the damaging of a legal right. The second level is the level of the scope of compensation for damage; on this level it is checked whether the damage to the legal right has caused damage subject to compensation under delictual liability (causality fulfilling liability).<sup>\*38</sup> Relevant to this level are the types of damage (BGB also distinguishes between patrimonial and non-patrimonial damage) and the difference hypothesis, meaning a comparison between two situations of rights, the application of which ensures the realisation of the principle of total reparation.<sup>\*39</sup> It should be noted that fault must be verified only on the first level, i.e., the level of causality causing liability. It is therefore irrelevant whether and to what extent the

<sup>30</sup> Attempts have been made to bring up discussion on whether tort can exist without a consequence or damage. See W. Münzberg, *Verhalten und Erfolg als Grundlagen der Rechtswidrigkeit und Haftung*. Bd. 4. Frankfurt am Main: Vittorio Klostermann 1966, p. 34. The author of this paper is of the opinion that damage is a prerequisite in order to claim compensation or it must be clear that damage will occur in the future (see LOA § 127 (7)).

<sup>31</sup> The Austrian Civil Code entered into force in 1812. See R. Dittrich, *Das Allgemeine Bürgerliche Gesetzbuch*. 18. völlig umarbeitete Auflage. Wien: Manzsche Verlags- und Universitätsbuchhandlung 1997.

<sup>32</sup> J. Ananyeva et al (Note 8), p. 411.

<sup>33</sup> See CCSCd 30.11.2005, 3-2-1-123-05 (RT III 2005, 43, 427 (in Estonian)) and CCSCd 13.06.2005, 3-2-1-64-05 (RT III 2005, 23, 244 (in Estonian)).

<sup>34</sup> About compensation for non-patrimonial damage in the Estonian judicial practice see CCSC decision 3-2-1-11-04 of 11 February 2004 (RT III 2004, 6, 66 (in Estonian)), according to which the court has to decide on a case by case basis whether non-patrimonial damage, which needs to be compensated for financially, has occurred or not.

<sup>35</sup> See C. von Bar, P. Gotthard, *Deliktsrecht in Europa. Systematische Einführungen, Gesetztexte, Übersetzungen. Landberichte Frankreich, Griechenland. Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG 1993*, p. 22.

<sup>36</sup> About legally relevant damage see J. Blackie, *The Torts Provisions of the Study Group on a European Civil Code. – European Tort Law. Eastern and Western Perspectives*. M. Bussani (ed.). Bern: Stämpfli Publishers 2007, pp. 64–74.

<sup>37</sup> K. Larenz, C.-W. Canaris, *Lehrbuch des Schuldrechts. Zweiter Band. Besonderer Teil. 2. Halbband*. München: C. H. Beck'sche Verlagsbuchhandlung 1994, p. 949.

<sup>38</sup> For details on causality causing and fulfilling liability, see, e.g., P. Schlechtriem, *Võlaõigus. Eriosa. Neljas, ümbertöötatud trükk (Law of Obligations. Special Part. Fourth, revised edition)*. Tallinn: Õigusteabe AS Juura 2000, pp. 256–259 (in Estonian).

<sup>39</sup> The main issues in German law concern the type of damage that is to be compensated for (in marginal cases such as an unwanted child or unused holiday) and how to correctly take account of the benefits received from the damage when determining the amount of compensation. About this see P. Schlechtriem, *Võlaõigus. Üldosa. Teine, ümbertöötatud trükk (Law of Obligations. General Part. Second, Revised Edition)*. Tallinn: Õigusteabe AS Juura 1994, pp. 71–77 (in Estonian).

tortfeasor wished to cause damage.<sup>\*40</sup> For example, a shoplifter cannot claim that he or she only wanted to steal things and had no intention of reducing the shopkeeper's income.

It also arises from the above that when it comes to prerequisites of liability, it is not the occurrence of damage but whether it was legal rights that were damaged. Whether damage to a relevant legal right led to legally relevant damage needs to be assessed when determining the scope of compensation (see also, e.g., decision of the Civil Chamber of the Supreme Court of 13 February 2002, in matter 3-2-1-14-02).

## 4. Causal relationship as an objective element of tort and fault

### 4.1. Concept of causal relationship

A causal relationship between an act and damage is the third objective element of tort. The importance of establishing a causal relationship lies in the principle that a person should be liable only for such damage and to such an extent that he or she has caused by his or her acts. In other words, in order for a person to bear civil liability for the damage he or she caused, a causal relationship must be established between his or her unlawful act and the consequence. Various theories have been developed for establishing a causal relationship.

Soviet legal theory did not contain generally recognised criteria of causality. Sometimes, for example, the categories of possibility and actuality by O. Joffe were occasionally accepted.<sup>\*41</sup> The theory, which is based on classifying relationships into inevitable and objectively accidental, was more widely recognised. There was no consensus as to whether liability could be based on only inevitable relationships or it follows from both types of relationships.<sup>\*42</sup>

LOA § 127 (4) provides that a person shall compensate for damage only if the circumstances on which the liability of the person is based and the damage caused are related in such a manner that the damage is a consequence of the circumstances. According to the draft European Civil Code, liability depends on a causal relationship between the defendant's act and the damage caused.<sup>\*43</sup> As noted above, causality causing liability is distinguished from causality fulfilling liability.

Causality is established in two stages: at first, the test of the necessary cause or the equivalence theory is applied — it is asked whether the consequence would have arrived without the act in question (the *condition sine qua non* rule or the but-for test).<sup>\*44</sup> The elimination and substitution methods are expressions of the *condition sine qua non* rule. In the first case, the defendant's act is removed from the "arena" and it is checked whether the consequence would have arrived or not. This method is applicable especially to active behaviour. In the substitution method, the defendant's unlawful act is substituted with a lawful one and it is checked whether the consequence would have been avoided by the lawful act. This method is applied especially in the event of passive behaviour.<sup>\*45</sup> The Civil Chamber of the Supreme Court applied the necessary cause test, e.g., in its decision of 10 December 2003 in matter 3-2-1-125-03<sup>\*46</sup>, in which the court found that an offence and damage are causally related if the damage could not have occurred without the offence. Causality needs to be affirmed if the tortfeasor's act triggered a chain of events that eventually caused the damage. The author of this paper would also add that if we speak about a causal chain, it is usually in a case of the joint causing of damage.

M. Schultz has proposed the replacement of the *condition sine qua non* test with the so-called NESS test (Necessary Element of a Sufficient Set). According to this theory, a condition causes a consequence if the condition was a necessary element for the consequence, on the one hand, and sufficient for the consequence,

<sup>40</sup> The Civil Chamber of the Supreme Court has also pointed this out in its decision of 27 November 2002 in matter 3-2-1-129-02 (RT III 2002, 35, 386 (in Estonian)). See also J. Kropholler, *Bürgerliches Gesetzbuch. Studienkommentar*. 6. neuarbeitete Aufl. München C.H. Beck 2003, p. 583.

<sup>41</sup> About this theory see J. Ananyeva et al (Note 8), p. 420.

<sup>42</sup> J. Ananyeva et al (Note 8), pp. 418–419.

<sup>43</sup> See article 4:101:1 of the draft European Civil Code. The fact that the victim is especially susceptible to damage does not release the tortfeasor from liability; the predictability of damage is not relevant in such case (2).

<sup>44</sup> O. Jauernig (Note 11), p. 1022. About judicial practice regarding the establishment of the necessary cause in European Union countries see R. Zimmermann, B. Winiger, B. A. Koch, H. Koziol (eds.), *Essential Cases on Natural Causation*. Wien: Springer Verlag 2006.

<sup>45</sup> See also T. Tampuu, *Deliktõigus võlaõigusseaduses. Üldprobleemid ja delikti üldkoosseisul põhinev vastutus* (Tort Law in the Law of Obligations Act: General Problems and Liability). – *Juridica* 2003/2, p. 76 (in Estonian).

<sup>46</sup> RT III 2004, 1, 9 (in Estonian).

on the other. Therefore, if A and B shoot C and C dies, the act of A or the act of B in a separate capacity is not a necessary condition under the *conditio sine qua non* rule, but it is under the NESS test.<sup>\*47</sup>

The act of a third party or the victim himself or herself, or *force majeure*, may have broken the causality.<sup>\*48</sup>

Lately there have been problems in Estonian judicial practice involving cases where it is not quite clear whether the damage was caused by circumstances arising from the victim or from the tortfeasor's behaviour. In its decision of 3 October 2006, in matter 3-2-1-78-06<sup>\*49</sup>, the Civil Chamber of the Supreme Court noted that if the plaintiff's personal injury could alternatively have arisen due to a treatment error or other circumstance (such as his own health status) for which the doctor is not liable, causality between a treatment error and the damage has to be presumed. If the plaintiff's personal injury and damage was caused by both a treatment error and (an)other circumstance(s), for which the doctor is not liable, this does not release the defendant from liability, because the defendant's act also caused damage.<sup>\*50</sup>

After the but-for test, causality is assessed using the legal cause test, because using the but-for test only can lead to an inadmissible situation where a compensation claim can be submitted against an unreasonably wide circle of persons.<sup>\*51</sup> In German law, the expressions of the legal cause test are, primarily, various modifications of the adequacy theory established in 1888 by von Kries, and the purpose of a provision theory.<sup>\*52</sup>

According to the adequacy theory, an act can be regarded as the cause of a consequence if the act considerably heightens the risk of damage, considering the knowledge of an average person and the circumstances in which the damage occurred.<sup>\*53</sup> It could be said that the adequacy theory precludes liability in an unusual, onetime and not reasonably predictable course of events.<sup>\*54</sup> In research and judicial practice, adequacy is mainly understood via predictability.<sup>\*55</sup> For example, if A runs his or her car over B's lapdog, it may be argued, under the adequacy theory, whether B's heart attack resulted from A's act.

The purpose of provision theory asks whether the purpose of the violated provision or duty was to protect the victim and, if so, to protect him or her against the damage suffered in the particular case.<sup>\*56</sup> The necessity to apply these theories arises from LOA § 127 (2) and § 1045 (3). The purpose of a provision theory should be applied if unlawfulness is derived under LOA § 1045 (1) 7)<sup>\*57</sup> or from a breach of general duties.<sup>\*58</sup>

<sup>47</sup> See M. Schultz. Further Ruminations on Cause-In-Fact. P. Wahlgren (ed.). Scandinavian Studies in Law. Volume 41. Tort Liability and Insurance. Stockholm: The Stockholm University Law Faculty 2001, pp. 485–486.

<sup>48</sup> C. von Bar, J. Shaw (Note 14), p. 32. Neither is damage caused by *force majeure* legally relevant under article 6:108 of the draft European Civil Code. It should also be noted that LOA § 103 (2) allows for an interpretation to the effect that *force majeure* may indeed lie in the intentional behaviour of a third party or the victim, amongst other things. About this, see also the decision of the Civil Chamber of the Supreme Court of 20 June 2006 in matter 3-2-1-64-06 (RT III 2006, 26, 241 (in Estonian)), in which the Chamber found that the victim's activity as a circumstance precluding the application of LOA § 1059 logically means the victim's self-damage, because only such activity of the victim precludes the realisation of a danger characteristic of a structure as a major source of danger.

<sup>49</sup> RT III 2006, 34, 289 (in Estonian).

<sup>50</sup> See about a similar case in the decision of the Civil Chamber of the Supreme Court of 26 September 2006 in matter 3-2-1-53-06 (RT III 2006, 33, 283 (in Estonian)), in which the court found that for the defendant to be released from liability in the event of rivaling causes of damage, the defendant had to prove that his act did not cause the death, i.e., that the other alternative circumstance caused the death.

<sup>51</sup> About this see also M. Adams. Ökonomische Analyse der Gefährdungs- und Verschuldenshaftung. Heidelberg: R. von Decker's Verlag, G. Schenck 1985, p. 117.

<sup>52</sup> Recent decisions in the German Federal Republic have shown that the issue of causality cannot be decided by mere logic and abstract standards, but it involves a substantial degree of value decisions. See K. Zweigert, H. Kötz. Introduction to Comparative Law. 3<sup>rd</sup> Ed. Oxford: Clarendon Press 1998, p. 602. Of the same opinion are French judges, who find that the issue of causality needs to be decided applying common sense and justice. See C. von Bar, P. Cotthard. Deliktsrecht in Europa. Systematische Einführungen, Gesetztexte, Übersetzungen. Landberichte Frankreich, Griechenland. Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG 1993, p. 29. The author of this paper takes the view that causality theories actually enable judges to exercise their own values and sense of justice quite freely when deciding on liability.

<sup>53</sup> M. L. Müller believes that the adequacy theory is not a causality theory, but is rather decisive in establishing unlawfulness. See P. Sourlas. Adäquanztheorie und Normzwecklehre bei der Begründung der Haftung nach § 823 Abs. 1 BGB. Berlin: Duncker&Humblot 1974, p. 137.

<sup>54</sup> V. Emmerich (Note 25), p. 255.

<sup>55</sup> P. Sourlas. Adäquanztheorie und Normzwecklehre bei der Begründung der Haftung nach § 823 Abs. 1 BGB. Berlin: Duncker&Humblot 1974, p. 155. About the adequacy theory see also K.-H. Gursky (Note 9), p. 190; C. Oswald (Note 5), p. 28.

<sup>56</sup> V. Emmerich (Note 25), p. 256.

<sup>57</sup> Liability under BGB § 823 (2) also presumes that the victim belongs to the circle of protected persons and that damage was caused for the reason that the law intended to avoid. See O. Mühl, W. Hadding. Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Bd. 5/2. Stuttgart, Berlin, Köln: Verlag W. Kohlhammer 1998, p. 152.

<sup>58</sup> An interesting issue related to causality concerns consequential damage. Namely, disputes may arise over whether or not there is a causal relationship between the tortfeasor's behaviour and the victim's damage which occurred significantly later. For example, if A caused a leg injury to B and B is run over by a car years later because of the injury, it is questionable whether A should be liable also for that damage. According to newer understanding, the prerequisites for liability, including unlawfulness and fault, need to be justified again if consequential damage arises. On another hand, a simpler way has been taken in solving the problem: it is found that if a person was culpable of committing the first offence, he or she can be charged with any consequential damage which can be reasonably predicted to occur as the potential consequence of the initial offence. See P. Sourlas (Note 55), pp. 152–153.

## 4.2. Distinction between causality and fault

Civil law dogmatics has not adopted a common position on the issue regarding the relation between adequacy theory and the purpose of provision theory, on the one hand, and unlawfulness and fault, on the other hand.<sup>\*59</sup> While according to the classic elements of tort, causality is part of the objective elements and fault is verified separately, on a third level, then in practice the distinction between causality and fault is not clear at all.

Namely, the issue of whether a person exercised due diligence is often decided on the level of causality, applying the adequacy theory and answering the question of whether the damage was predictable, avoidable and reckonable.<sup>\*60</sup> Dogmatically, negligence is certainly a form of fault. It has been found that diligence and adequacy judgments have the same point of content, formally the same content (namely the recognisability of the consequence) and principally the same function of regulating human behaviour<sup>\*61</sup> and limiting liability.

Dividing predictability into objective and subjective predictability still does not completely clarify the issue. Although it could be said that objective and subjective predictability of damage should be assessed in the adequacy test and at the negligence level, respectively, we have to admit that in most legal orders, fault is objective and neither are the tortfeasor's personal qualities taken into account when testing for predictability.<sup>\*62</sup> As the LOA uses a subjective fault standard, causality and fault can still be delimited in the Estonian legal order based on the aforementioned division.

However, attempts have been made to distinguish between causality and fault based on objective negligence. It is claimed that where the unlawfulness of an act is established using the theory of wrongful consequence<sup>\*63</sup>, an adequacy judgment may be viewed as a preliminary decision on the breach of duty and, hence, adequacy is viewed as a preliminary step of fault.<sup>\*64</sup> This argument can be justified by the fact that adequacy and negligence judgments differ in their emphasis. They overlap only with their relation to the predictability of damage, but it is clear that when judging negligence, many other circumstances have to be checked, as negligence pertains to a person's behaviour. In other words, it may be said that the tortfeasor is released from liability if the damage was predictable, but the tortfeasor exercised due diligence (e.g., damage could not be avoided at reasonable cost). It should also be kept in mind that various groups of actors are expected to exercise various degrees of diligence: while a judgment on the predictability of damage is entirely objective on the level of causality, a subjective element is added when it comes to fulfilling a duty.

An interesting question is whether a person should be liable for the damage he or she predicted only because his or her personal qualities allowed him or her to do so.<sup>\*65</sup> The author of this paper finds that if a person has unusual abilities, those should be taken into account in judging the predictability of damage. For example, if the tortfeasor is a medical specialist and among the best experts in his or her field, the predictability of damage should be assessed not from the viewpoint of an average medical specialist, but from what was predictable for a top specialist in the field.<sup>\*66</sup> This approach serves the purpose of giving the victim broader protection.

The link between negligence and the purpose of provision theory has been seen in the fact that where liability is based, e.g., on a breach of duty, such breach is not sufficient for establishing negligence. In addition, the duty must have served the purpose of preventing damage to this very type of legal right.<sup>\*67</sup>

This viewpoint is supported by the fact that a provision can serve the purpose of preventing only the type of damage that is recognisable for the addressee of the provision so that he or she can reasonably take it into account.<sup>\*68</sup> Therefore, if a legal right, which was beyond the scope of protection of a provision, was damaged, the tortfeasor could not predict the damage and we cannot speak about the tortfeasor's negligence, although his or her liability is already precluded on the level of causality. Predictability of damage is thus a "preliminary step" of negligence even when the purpose of a provision theory is applied.

<sup>59</sup> *Ibid.*, p. 123.

<sup>60</sup> *Ibid.*, p. 125. It suffices for establishing civil law negligence if the tortfeasor was able to predict at least some degree of damage. For example, if a mother is shocked seeing the injuries of her child who has been run over by a car, the check of negligence does not test whether the tortfeasor was aware of the child having a parent, but whether he or she had to reckon the parent's extreme reaction. *Ibid.*, p. 159.

<sup>61</sup> *Ibid.*, p. 140.

<sup>62</sup> C. Oswald (Note 5), p. 26.

<sup>63</sup> According to the theory of wrongful consequence, damage to an absolutely protected legal right induces unlawfulness.

<sup>64</sup> P. Sourlas (Note 55), p. 140.

<sup>65</sup> C. Oswald (Note 5), p. 27.

<sup>66</sup> The negligence of persons with unusual abilities should be judged using the same logic.

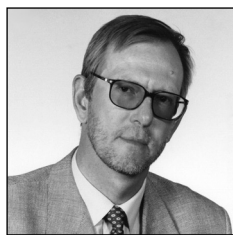
<sup>67</sup> P. Sourlas (Note 55), p. 156.

<sup>68</sup> *Ibid.*

## 5. Conclusions

While as a rule, distinguishing and finding connections between and the prerequisites for delictual liability is of interest only to legal science, in certain cases it also has a practical meaning. For example, when judging the creation of liability, the issue of whether the person was not at fault in causing the damage or has not even committed an act relevant to tort law can be decisive. In the same way, the choice of which circumstances are to be proved by the victim and which ones by the tortfeasor depends on the distinction between causality and fault. The principle that whether and to what extent the tortfeasor wished to cause damage is irrelevant is important with respect to the scope of compensation for damage.

The author of the paper is convinced that a discussion over the content and meaning of the prerequisites for delictual liability help to better understand the nature of delictual liability and thereby guide the Estonian judicial practice in a single and desired direction.



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# Some Issues Regarding Entrepreneurial Universities and Intellectual Property

## 1. Introduction

Historically, the main tasks of a university have been instruction and research. *Alma mater* has been a benevolent and kind mother feeding society with knowledge. The state has given its guarantees to such education and research activities at universities. Section 38 of the Constitution of the Republic of Estonia<sup>1</sup> provides that: “Science and art and their instruction are free. Universities and research institutions are autonomous within the restrictions prescribed by law”.

The present reality is, however, that the university as an instructor and disseminator of knowledge is increasingly becoming a seller of knowledge. The objective of this article is to examine the change in the role of the university in society as well as some accompanying theoretical and legal issues. The article discusses whether the university is becoming a type of entrepreneur in contemporary society and which role is played by intellectual property in it. Of various types of intellectual property<sup>2</sup>, the article focuses only on some issues of the patent policy of the university. The examples are mostly based on the regulatory documents of two leading Estonian universities — the University of Tartu (UT) and the Tallinn University of Technology (TUT).

<sup>1</sup> Eesti Vabariigi põhiseadus. Entered into force on 3.07.1992. – RT 1992, 26, 349; 2003, 64, 429 (in Estonian). English translation available at <http://www.legaltext.ee/et/andmebaas/document.asp?ptyyp=RT&q2=p%F5hiseadus&order=TA&tyyp=X&query=&display=1&nupp=Otsi%21> (17.09.2007).

<sup>2</sup> In this article, the notion of intellectual property is used as defined in article 2 (viii) of the Convention establishing the World Intellectual Property Organisation (WIPO), i.e., as the rights relating to the results of various creative and commercial activities. See Convention establishing the World Intellectual Property Organisation. Stockholm, 14.07.1967, entered into force on 26.04.1970. – 828 UNTS 3 (entered into force on in respect to Estonia 5.02.1994. – RT II 1993, 25, 55 (in Estonian)).

## 2. University as entrepreneur or entrepreneurial university?

The traditional activities of a university are instruction and research. In Estonian legal literature, the autonomy of a university has been defined through provision of instruction and research.<sup>3</sup> This gives rise to the question of whether such constitutional guarantees also cover the business and economic activities of universities.

The contemporary university has been subjected to the task of participating in direct economic activities and promoting the development of society as a whole. Today's keyword, both in the European Union and on the global level, is innovation, and the role of universities in developing the innovation of a society is considerable.

The European Commission communication "Putting knowledge into practice: A broad-based innovation strategy for the EU"<sup>4</sup> contains ten politically prioritised actions to implement the EU Lisbon strategy. Action 1 is directed towards the significant increase of "the share of public expenditure devoted to education and to identify and to tackle obstacles in their educational systems to promoting an innovation friendly society". Action 4 "Strengthening research-industry links" should contribute to the removal of administrative barriers which affect knowledge transfer between universities and industry. One of the aims is to encourage researchers' interaction with industry and their activities related to patenting, licensing and spin-off creation. Actions 7 and 8 are directed towards the enhancement of IPR protection. Special measures are introduced for universities by a special Communication<sup>5</sup> to provide "better education and innovation skills". Several other EU documents have been passed to enhance university and industry links in developing innovation.<sup>6</sup>

Estonian legislation proceeds from the traditional directions in the activities of universities when regulating the relations between universities and society. Section 1 of the Organisation of Research and Development Act<sup>7</sup> regards scientific and technological creation as part of the Estonian economy. The Universities Act<sup>8</sup> (UA), University of Tartu Act<sup>9</sup> (UTA), and also the statutes of the University of Tartu<sup>10</sup> (Statutes) set out as one of the missions of a university to provide services based on instruction and research, which are necessary for society.<sup>11</sup> The statutes of the Institute of Technology<sup>12</sup> operated by the University of Tartu imposes on the Institute of Technology, as an institution of the University of Tartu for research and development, the obligation to protect and commercialise the intellectual property of UT and to create a contemporary technological and material basis for filling the orders placed by entrepreneurs as well as state and other organisations in the fields of activity developed by the Institute of Technology.

The statutes of the Tallinn University of Technology proceed from different theoretical grounds. Subsection 47 (5) of the statutes of TUT<sup>13</sup> defines TUT as an "entrepreneurial university" that "shall promote the innovative activities of its membership, offer in an active capacity research and development services to society, plan profit-based activities and make allocations contributing to the development of TUT".

The new role of the contemporary university is also reflected in several Estonian state and university strategies. The Government of the Republic Strategy Paper "Estonian Success 2014" provides that in order to increase the competitiveness of the Estonian economy it is important to develop cooperation relations between

<sup>3</sup> T. Annus. § 38. – Panel of editors led by E.-J. Truuväli. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia. Commented Edition). Tallinn: Juura, Õigusteabe AS 2002, pp. 291–292 (in Estonian).

<sup>4</sup> COM (2006) 502 of 13.09.2006.

<sup>5</sup> COM (2006) 208 of 10.05.2006.

<sup>6</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions. COM (2007) 182 final, 4.04.2007. Improving knowledge transfer between research institutions and industry across Europe: embracing open innovation. Implementing the Lisbon agenda; Commission Staff Working Document Accompanying document to Economic and Social Committee and the Committee of Regions Improving knowledge transfer between research institutions and industry across Europe: embracing open innovation. Implementing the Lisbon agenda — Voluntary guideline for universities and other research institutions to improve their links with industry across Europe.

<sup>7</sup> Teadus- ja arendustegevuse korralduse seadus. Entered into force on 2.05.1997. – RT I 1997, 30, 471; 2006, 14, 114 (in Estonian). Unofficial translation available at <http://www.legaltext.ee> (17.09.2007).

<sup>8</sup> Ülikooliseadus. Entered into force on 18.02.1995. – RT I 1995, 12, 119; 2005, 61, 475 (in Estonian). Unofficial translation available at <http://www.legaltext.ee> (17.09.2007).

<sup>9</sup> Tartu Ülikooli seadus. Entered into force on 21.03.95. – RT I 1995, 23, 333; 2004, 56, 404 (in Estonian). Unofficial translation available at <http://www.legaltext.ee> (17.09.2007).

<sup>10</sup> Adopted by decision No. 47 of the University of Tartu Council on 28.05.1999, registered by Minister of Education directive No. 201 of 24.08.1999.

<sup>11</sup> UA § 4 (2), UTA § 2 (2), Statutes § 4.

<sup>12</sup> Approved by regulation No. 8 of the University of Tartu Council on 26.05.2006, clauses 3.2 and 3.4.

<sup>13</sup> Approved by regulation No. 14 of the Tallinn University of Technology Council of 16.12.2003, registered by directive No. 86 of the Minister of Education and Research of 4.02.2004.

enterprises, their clients as well as institutions of higher education, and research and development.<sup>\*14</sup> The development plan of the University of Tartu for 2008 (UT Development Plan) proceeds from the objective that “the University of Tartu shall increase intellectual capital through the transfer of knowledge and know-how as well as research and development activities, shall use it on a much wider scale in society, particularly in innovative production and knowledge-based politics, and shall considerably increase the profit derived from the implementation and protection of intellectual property”.<sup>\*15</sup> Further to that, the development plan of the Tallinn University of Technology for the years 2006–2010<sup>\*16</sup> (TUT Development Plan) provides that in the context of an entrepreneurial university, TUT shall promote the development of the national innovation system and technology and know-how transfer and extend contract-based cooperation with domestic large enterprises and organisations of the public sector.

To define the new role of the university in society, above all, two alternative questions must be answered: (1) has the university become a type of entrepreneur — an entrepreneurial university —, or (2) whether it continues to be a traditional university, but the traditional areas of activity of the university must be complemented, and participation in entrepreneurship must be included as a new area of activity. This also gives rise to the question whether the new role of the university should be clearly reflected in legislation as well.

The activities of universities are increasingly associated with the provision of commercial education, additional training and consulting services offered for a fee, organisation of research events based on the participation fee, commercialisation of intellectual property, which could be manifested in the creation of spin-offs<sup>\*17</sup>, licensing of intellectual property and its assignment, etc.<sup>\*18</sup> Both commercial training as well as research and development services constitute a rather significant part of the budget of Estonian public universities. At the same time, the bulk of the funds used for research in Estonian universities comes from the state budget. The share of private capital in financing research in Estonian universities is still relatively modest, if compared to the relevant proportions in the US, for example.

It is common knowledge that the task of a university is to participate in the promotion of the economic development of society. The state takes clear interest in financing research in universities. The classical areas of interest of the state to finance the research in universities comprise culture, health and national defence.<sup>\*19</sup> The need to ensure a healthy living environment must be included here as well. At the same time, the creation of prerequisites for financing research contributes to the economic development of the state. This prerequisite has been taken as the basis in the relevant research and development policies of the US, Japan and European Union. It is the extremely clear interest of the state in obtaining a specific service from the universities that does not allow for defining universities as classical entrepreneurs in private law in our opinion. Universities may engage in entrepreneurship within the limits of the tasks imposed by the state and the rules prescribed by the state. These tasks allow for referring to the contemporary university as an entrepreneurial university.

The category of the entrepreneurial university has established itself in specialised literature over the past few years. For example, the entrepreneurial university has been defined as a university that has a wide scale infrastructure for supporting internal enterprise. In addition to traditional fields, the activities of such a university include commercial courses, consulting services, the patenting of its inventions, licensing of the results of various creative activities deriving from the university and establishment of start-ups.<sup>\*20</sup> The contemporary

<sup>14</sup> Estonian Success 2014. Government of the Republic Strategy Paper, clause 9. Available at <http://www.riigikantselei.ee/failid/EE2014.doc.pdf> (7.11.2006) (in Estonian).

<sup>15</sup> Approved by decision No. 79 of the University of Tartu Council, clause 14.

<sup>16</sup> Approved by decision No. 10 of the Tallinn University of Technology Council, clause 5.3.

<sup>17</sup> The TUT has defined a spin-off as a legal person in private law, which has been established at the participation of an employee of a university or research institution or a member (members) of a university or an employee (employees) of a research institution and uses the results and/or know-how of the research and development of the university or research institution in its activities and has been registered according to the internal rules of procedure of the TUT. See § 1 (3) of the Principles of the External Economic Activities of the Members in the Tallinn University of Technology. Approved by regulation No. 8 of the Tallinn University of Technology Council of 22.04.2003.

<sup>18</sup> The bases of the knowledge services in the Tallinn University of Technology, approved by regulation No. 5 of the Tallinn University of Technology Council of 18.03.2003 can be provided as an example here; their objective is to develop a range of TUT knowledge services provided and ensure the development of knowledge services (§ 2 (1)).

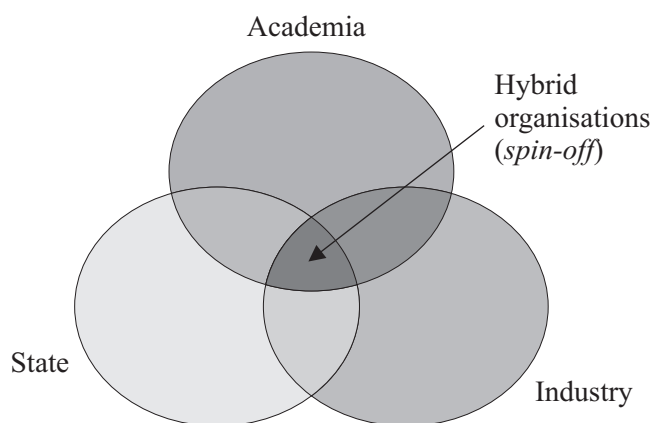
<sup>19</sup> H. Etzkowitz, L. Leydesdorff. The dynamics of innovation: from National Systems and “Mode 2” to a Triple Helix of university–industry–government relations. – *Research Policy* 2000/29, Elsevier Science B. V, pp. 110, 117.

<sup>20</sup> M. Jacob, M. Lundqvist, H. Hellsmark. Entrepreneurial transformations in the Swedish University system: the case of Chalmers University of Technology. – *Research Policy* 2003/32, Elsevier Science B. V, pp. 1555–1556. For the concept of an entrepreneurial university, see B. R. Clark. *Creating Entrepreneurial Universities: Organizational Pathways of Transformation*. – *Issues in Higher Education* 1992/12. London: Pergamon Press; L. L. Leslie, S. Slaughter. *Academic Capitalism — Politics, Policies and the Entrepreneurial University*. Baltimore, MD: John Hopkins University Press 1997; H. Etzkowitz, A. Webster et al. The future of the university and the university of the future: evolution of ivory tower to entrepreneurial paradigm. – *Research Policy* 2000/29, pp. 313–330; H. Etzkowitz. *MIT and the Rise of Entrepreneurial Science*. London: Routledge 2002; H. Etzkowitz. Research groups as quasi firms: the invention of the entrepreneurial university. – *Research Policy* 2003/32, pp. 109–121.

university has become an important part of creative industries.<sup>\*21</sup> The role of the university in creative management is expressed in the creation of new knowledge and its commercialisation, and to a lesser degree also in production.

An entrepreneurial university promotes a regulatory and institutional framework that differs from that of a traditional university. The regulatory framework must provide prerequisites for researchers to support the entrepreneurship of the university. One of the potential measures is to consider inventions as part of research.<sup>\*22</sup> An entrepreneurial university presumes the existence of a structural unit that unites academics and industry, research and the utilisation of resources assigned for research in line with market demand.<sup>\*23</sup> As a rule, a special structural unit (Technology Transfer Office — TTO; Research and Development Department — RDD, etc.) is established to support the entrepreneurship of a university, and its activities are prescribed by the rules issued by the university. Scholars have also raised a justified question to what extent would knowledge be communicated to industry if there were no mechanisms for identifying knowledge and ensuring its use.<sup>\*24</sup> Some universities have taken as the basis an approach according to which such technology transfer organisations must work very closely with the faculties and researchers of universities. This would contribute to the identification of the opportunities provided by research, which can be used in business and which the university can commercialise.<sup>\*25</sup> However, any commercialisation presumes the analysis of new knowledge created by the university from the point of view of legal protection. It must be emphasised that the creation of a structure supporting commercialisation is not an objective on its own. There is a point in such a structure, provided that it supports the protection and commercialisation of the intellectual property created at the university or by the university. Thus, there is a direct link between the new role of the university and intellectual property.

The institutions operating in society have different functions; hence, it is necessary to create a new model of cooperation between universities and society. Etzkowitz and Leydesdorff provide the following model for discussing society, industry and university, which in our opinion is an excellent expression of the role of the contemporary university.<sup>\*26</sup>



The model creates a new institutional infrastructure in the overlapping area of the activities of various institutions, where each participant assumes the role of the other participants and the characteristics of a so-called hybrid organisation appear. The authors are of the opinion that it is a universal model that is characteristic

<sup>21</sup> Several doctrines of creative industries, cultural industries, copyright-based industries, etc. have been developed. See, e.g., A. Kalvi. The Impact of Copyright Industries on Copyright Law. — *Juridica International* 2005 (10), pp. 95–104; A. Kalvi. Kultuuritööstuse olemus ja selle osatähtsus rahvamajanduses (The Nature of Cultural Industry and Its Role in the National Economy). — *Juridica* 2002/10, pp. 656–657 (in Estonian).

<sup>22</sup> For instance, the patent applications and patents registered in a member state of the Organisation for Economic Cooperation and Development (OECD) or the European Union are considered as a criterion for assigning basic financing (§ 3 (1) 5)). The coefficient of both a patent application and two or more chapters in a recognised monography of international circulation is two (§ 3 (1) 4)). See Conditions and procedure for assignment of basic finances to research and development institutions. Regulation No. 11 of the Minister of Education and Research of 21 March 2005. — *RTL* 2005, 34, 483 (in Estonian).

<sup>23</sup> M. Jacob, M. Lundqvist, H. Hellsmark (Note 20), pp. 1555–1556.

<sup>24</sup> H. Etzkowitz, L. Leydesdorff (Note 19), p. 110.

<sup>25</sup> M. Wright, S. Birley, S. Mosey. Entrepreneurship and University Technology Transfer. — *Journal of Technology Transfer*, Kluwer Academic Publishers 2004/29, p. 241.

<sup>26</sup> The authors themselves call it the Triple Helix Model of University-Industry-Government. See H. Etzkowitz, L. Leydesdorff (Note 19), p. 111.

of all states seeking to create an innovation and knowledge-based economy.<sup>\*27</sup> Estonian universities have significant experience in the practical application of that model.<sup>\*28</sup>

Although the model provided describes, above all, the overlapping objectives and activities of different institutions, the impact of its implementation is wider. It has also been pointed out in specialised literature that the university culture is in the process of change. Entrepreneurship, as an economic and business activity, is increasingly accepted as part of university culture.<sup>\*29</sup> Acknowledgement of intellectual property is becoming more and more a part of university culture; an entrepreneurial university is unthinkable without intellectual property. The principle “patent and prosper” has become part of academic culture.<sup>\*30</sup>

The entrepreneurship of a university does not mean that the university must become a company. The concept of an entrepreneurial university based on economic and business activities must be linked to the traditional concept based on instruction and research. It may be inferred that Estonian universities have redefined, to date, or are redefining their traditional role. Nevertheless, only TUT has defined itself unambiguously as an entrepreneurial university in its regulatory documents. Although the activities of UT conform to all the criteria of an entrepreneurial university, UT does not specifically define itself as an entrepreneurial university. Perhaps the concept of an entrepreneurial university still needs to be adjusted to the present university culture in Estonia.

Proceeding from the principles concerning the role of universities in developing innovation provided in the EU regulatory documents and the current practice of the Estonian universities, we are of the opinion that the principal Estonian legislation governing the activities of universities (above all, the Universities Act, the University of Tartu Act, the Research and Development Organisation Act) should be improved. It would be necessary to specify the rights and duties of a university in the Universities Act, which would facilitate the use of the research results for commercial purposes (commercialisation).

It would also be necessary to redefine the interpretation of the autonomy of universities provided in § 38 of the Constitution. This constitutional provision should serve as a guarantee for the instruction, research and economic activities of universities.

### 3. Intellectual property as a prerequisite for an entrepreneurial university

#### 3.1. Significance of intellectual property in society

Intellectual property is one of the foundations of a knowledge-based economy. Intellectual property aims to encourage the development and dissemination of knowledge and innovations, with a view towards fostering social progress.<sup>\*31</sup> Intellectual property ensures investment in research, culture and other areas. Unless investments in research are protected, this could become an impediment to scientific progress. The provisions of intellectual property can be regarded as the protective mechanisms of certain economic interests. Economic activities may also in turn affect the development of intellectual property. That is why specialised literature has indicated that the scope of intellectual property continues to expand.<sup>\*32</sup> Intellectual property is the main property of a university and its creation may be seen as the core role of a university.<sup>\*33</sup> As the objective of this paper is to analyse, first of all, the effect of patent law upon the implementation of the entrepreneurial university theory, the other types of intellectual property will be discussed only in the context directly related to the subject below.<sup>\*34</sup>

<sup>27</sup> H. Etzkowitz, L. Leydesdorff (Note 19), pp. 111–112.

<sup>28</sup> Several spin-off companies have been established in Estonian universities, such as Quattromed AS in the UT, ProtoBios OÜ in the TUT.

<sup>29</sup> M. Wright, S. Birley, S. Mosey (Note 25), p. 236.

<sup>30</sup> H. K. Schachman. From “Publish or Perish” to “Patent and Prosper”. – *Journal of Biological Chemistry* 2006 (281) 11, March 17, p. 6903.

<sup>31</sup> OECD Council. Recommendation on the Licensing of Genetic Inventions. 23 February 2006 (C (2005) 149/Rev1), p. 5. Available at <http://www.oecd.org/dataoecd/39/38/36198812.pdf> (23.03.2006).

<sup>32</sup> P. Drahos. The Universality of Intellectual Property Rights: Origins and Developments, p. 1. Available at [www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf](http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf) (10.01.2006).

<sup>33</sup> M. Wright, S. Birley, S. Mosey (Note 25), p. 235.

<sup>34</sup> For problems of copyright law in universities, see H. Pisuke. Copyright at Universities: Some Issues Concerning the Regulation of Academic Works. – *Autoriu teises i literaturos, mokslo ir meno kurinius: aktualijos ir perspektyvos. Prane imu rinkinys*. Vilnius Lietuvos Respublikos kulturos ministerija, Vilniaus universitetas, Mykolo Remeris universitetas 2004, pp. 57–67.

### 3.2. Intellectual property regulation supporting the entrepreneurship of a university

The Estonian legal system does not contain an Act directly regulating the intellectual property issues related to a university.<sup>\*35</sup> Yet, it would not be correct to assert that such a regulation is non-existent. Thus, it is derived from § 12 (2) of the Patents Act<sup>\*36</sup> (PA) that if an invention is created in the performance of contractual obligations or duties of employment, the right to apply for a patent and to become the proprietor of the patent is vested in the author or other person pursuant to the contract or employment contract. Subsection 13 (8) of the Patents Act provides that an author has the right to receive fair proceeds from the profit received from the invention.<sup>\*37</sup> Subsection 32 (1) of the Copyright Act<sup>\*38</sup> sets out a general rule, pursuant to which the author of a work created in the execution of his or her direct duties shall enjoy copyright of the work but the economic rights of the author to use the work for the purpose and to the extent prescribed by the duties shall be transferred to the employer. Consequently, a contract and provisions applicable within a university are decisive when it comes to an invention and works created in an employment relationship.

Section 117 of the UT statutes provides an important principle: UT shall recognise its members' moral and property rights resulting from their intellectual activity. Clause 11 of subsection 3 (2) of the TUT statutes sets out the development of legal protection of intellectual property as a task of TUT. The intellectual property policy of the universities is embodied in the principles of treating intellectual property (IP Principles), adopted by the universities as separate documents). The existence and content of the IP Principles serves as evidence of the objectives of the universities. On the one hand, it confirms that the administration of the university considers the area an important one and in need of independent regulation; on the other hand, it presumes the willingness of the academic community to adhere to the regulation. It would be ideal if the IP Principles are set out as the result of the natural development of the university culture, that is, when the academic members of the university recognise the need to protect their intellectual property and use it for economic purposes. It is claimed in literature that the relationship between the policy of the university as an institution and the individual behaviour and conduct of teachers and scientists often remains unclear.<sup>\*39</sup> Based on Estonian practice, it may also be said that the academic staff of the university is frequently unaware or has minimum knowledge of the intellectual property policy of their university or does not observe several of its principles in practice. Below, the regulation of some intellectual property principles in Estonian universities will be analysed.

From a practical point of view, the most important question is to whom the rights to inventions created at a university belong. The principles governing the handling of intellectual property at the University of Tartu<sup>\*40</sup> (Principles Governing IP at UT) provide an answer in clause 5.2. According to the provision, the transfer of the right to apply for a patent or other protection document, and the right to become the proprietor of a patent, utility model or other object of industrial property from the author, shall be formalised if the object of industrial property is created:

- (a) as the result of the author's creative activities in the execution of his or her duties or on the basis of any other contract entered into between the university and the author;
- (b) in the execution of duties arising from a contract between the university and the person ordering research and development or a research and development cooperation project by the author;
- (c) when using the property of the university (equipment, working premises, contribution of the university staff, etc.).

In a similar manner, the proprietorship of intellectual property rights is governed by the Rules of Handling the Intellectual Property at the Tallinn University of Technology<sup>\*41</sup> (Rules of Handling IP at TUT). Subsection 8 (1) of the Rules of Handling IP at TUT sets out a general principle according to which "[t]he industrial property belongs to TUT, if it has been created in the execution of contractual duties or official duties and/or the material resources of TUT have been used in the creative process". The Principles of Handling Intellectual

<sup>35</sup> Finland adopted in 2006 an Act governing the ownership of rights to inventions made at universities. See Laki oikeudesta korkeakouluissa tehtäviin keksintöihin (369/2006). Available at [www.finlex.fi](http://www.finlex.fi) (29.11.2006).

<sup>36</sup> Patendiseadus. Entered into force on 23.05.1994. – RT I 1994, 25, 406; 2006, 58, 439 (in Estonian). Unofficial translation available at <http://www.legaltext.ee> (17.09.2007).

<sup>37</sup> In principle, it can be said that the rights of an inventor have constitutional bases in Estonia. See A. Kelli. Patendiõiguse põhiõiguslikud alused ja piirangud (Constitutional Bases and Limitations of Patent Law). – Acta Societatis Martensis 2005/1, pp. 158–172 (in Estonian).

<sup>38</sup> Autoriõiguse seadus. Entered into force on 12.12.1992. – RT I 1992, 49, 615; 2007, 13, 69 (in Estonian). Unofficial translation available at <http://www.legaltext.ee> (17.09.2007).

<sup>39</sup> M. Wright, S. Birley, S. Mosey (Note 25), p. 239.

<sup>40</sup> The principles governing handling of intellectual property at the University of Tartu. Adopted by directive No. 17 of 18 November 2003 of the University of Tartu Council (entered into force 28 November 2003).

<sup>41</sup> Rules of Handling Intellectual Property at Tallinn University of Technology. Adopted by directive No. 4 of 21 March 2006 of the Tallinn University of Technology Council (entered into force 21 March 2006).

Property in the Estonian University of Life Sciences<sup>\*42</sup> (IP Principles of Estonia University of Life Sciences) (clause 4.2) and the Regulation of Legal Protection of Intellectual Property in the Tallinn University<sup>\*43</sup> (IP Regulation of Tallinn University) (clause 3.3) generally proceed from a similar solution. Thus, all the leading Estonian universities in public law have proceeded from the interests of the university as an institution regarding the proprietorship of intellectual property. Several countries use, as an alternative, a completely different approach where the rights rest with the immediate creator. Sweden, for example, uses a system, according to which the teacher has exclusive rights to the inventions created by him or her, which he or she exercises at his or her discretion (so-called teacher's exception).<sup>\*44</sup>

Several problems may arise in practice when determining the inventions created in the execution of duties and the proprietorship of the rights. For example, who will hold the rights if a researcher finds a technical solution while on holiday? There have been situations in practice when an employee of a university keeps the knowledge of an invention created in the exercise of duties to himself or herself, takes up a post with a new employer and then applies for the legal protection of the invention. The above-mentioned situation has been regulated in Finland where the Act of Inventions Made at Universities has been adopted. Subsection 12 (3) of the Finnish Act provides that if the patent application is submitted within six months of the expiry of the employment contract, the inventor must prove that the invention was not created during the validity of the previous employment relationship. In Estonia, a similar dispute must be settled on the basis of the regulations on intellectual property of the universities and it must be agreed, on a case-by-case basis, who holds the rights.

If it derives from an employment contract that the university as the employer holds the rights to the invention created in the course of work, the inventor has the right to receive remuneration for his or her invention. Subsection 13 (8) of the Patents Act provides that an author has the right to receive fair proceeds from the profit received from the invention. This gives rise to the question what constitutes "fair proceeds". Specialised literature recommends the application of the principle that the compensation payable to a researcher for his or her invention should at least be as good as he or she would receive when commercialising the invention himself or herself.<sup>\*45</sup> Such a principle cannot obviously be applied in practice as it does not take into account of the interests of the university.

The principles of intellectual property of Estonian universities apply the principle of "fair proceeds" rather differently, leaving the author 1/3 to 2/3 of the profit received. Thus, clause 5.3 of the Principles Governing IP at UT prescribes that UT generally pays the author 2/3 of the profit received from the invention, from which the legal protection of the invention and other such costs have been deducted first.<sup>\*46</sup> Clause 3.16 of the IP Regulation of Tallinn University provides that the author has the right to receive fair proceeds on account of the profit received from the invention and the proceeds are divided according to the principle that the share of the university may not be below 33%. Section 10 of the Rules of Handling IP at TUT is the most specific concerning the proceeds payable to the inventor, which provides that the division of proceeds shall be based on the general rule, according to which the authors' proceeds constitute 1/3 of the profit received, 1/3 of the profit belongs to the structural unit(s) of TUT contributing to the creation and development of the industrial property and 1/3 to the commercializer of the industrial property; exceptions may be made upon the division of the proceeds at the rector's consent, while the share retained by TUT may not be below 20%.

The model chosen by TUT, in which the inventor, the faculty and the technology transfer unit obtain 1/3 of the profit each is also relatively widespread elsewhere in the world. Such division of proceeds may be reasoned by a researcher's duty to contribute to the development of the university and his or her structural unit as well, since he or she receives his or her basic salary in addition to the 1/3. However, it is questionable if 1/3 of the profit is sufficiently motivating for the employee. The decision of the University of Tartu to give 2/3 of the profit to the researcher may be ascribed to the expected objective of motivating researchers to more intensive inventing activities, which will certainly have a positive outcome both for the reputation of the university and its economic activities.

It has been studied in several countries to what extent the formal pay policies to researchers, the faculty and technology transfer unit contribute to the commercialisation of research and the entrepreneurship of the university.<sup>\*47</sup> It is obvious that without the positive attitude of researchers and the faculty the university cannot

<sup>42</sup> Approved by regulation No. 15 of the Estonian Agricultural University Council of 23.12.2003.

<sup>43</sup> Approved by regulation No. 9 of the Tallinn Pedagogical University Council.

<sup>44</sup> There is a discussion about the possible change in the current system. Two alternatives are seen as the main options. Firstly, an obligation to notify the university of the invention could be imposed on employees with research duties (mandatory reporting). This enables the university to decide whether to start negotiations with the employee for the acquisition of the rights or not. According to the other option, the university will, in return for compensation, acquire immediately all the rights related to the invention (takeover). See M. Levin et al. The right to the results of higher education research, p. 26. Available at <http://regeringen.se/content/1/c6/05/34/08/5b44c128.pdf> (21.02.2007).

<sup>45</sup> M. Levin et al (Note 44), p. 22.

<sup>46</sup> Clause 4.3 of the IP Principles of Estonian University of Life Sciences is essentially identical with clause 5.3 of the TU IP Principles.

<sup>47</sup> G. D. Markman, P. T. Gianiodis, P. H. Phan, D. B. Balkin. Entrepreneurship from the Ivory Tower: Does Incentive Systems Matter? – Journal of Technology Transfer 2004/29, Kluwer Academic Publishers, p. 354.

develop and introduce new technical solutions. One such study showed, however, that increasing the share of proceeds given to researchers and faculty did not correspond with their entrepreneurship or result in the creation of additional inventions to be commercialised. Nevertheless, increasing the share of the proceeds of employees of the technology transfer unit had a positive effect on the commercialisation of the inventions.<sup>\*48</sup> Perhaps it would be necessary to conduct a similar study in Estonian universities and research institutions, which would enable the universities to implement certain more uniform criteria in the future.

In order to allow for the patenting of inventions and their later economic exploitation, the university must have enough information about the potential intellectual property objects created by its employees. For this purpose, the Estonian universities require, in their principles of intellectual property<sup>\*49</sup>, their teachers and researchers to report all potential inventions to the specified unit at the university.<sup>\*50</sup> However, this gives rise to the question what happens if, instead of reporting to the relevant unit of the university, the teacher or researcher publishes an article describing the invention or gives a presentation at a research event. The obligation imposed on teachers and researchers in the intellectual property principles of the universities to patent the research results may come into conflict with § 38 of the Constitution. The comments on the Constitution, dating from 2002, take the position that “academic freedom protects both research and teaching of research achievements at the universities. As to research, both conducting research in itself as well as the publication and dissemination of the research results are protected”.<sup>\*51</sup> Naturally this does not mean that academic freedom could not be limited under any circumstances. The comments to the Constitution also set out that individual academic freedom and the objectives of the university may differ<sup>\*52</sup> while the autonomy of the university and research institutions essentially means the right to organise itself<sup>\*53</sup>, which in turn may set as its objective the commercialisation of research results. It must be nevertheless analysed whether the desire of the university to commercialise inventions and participate in economic activities thereby is a sufficient basis for limiting academic freedom and whether the limitation of academic freedom for such purposes would be proportional.

It may be said that Estonian universities do not face any impediments arising from legislation to implementing the doctrine of an entrepreneurial university. The general regulation of the relevant legal Acts (the Patents Act, the Copyright Act, etc.) can also be applied to universities, and the lack of specific provisions does not hinder the entrepreneurship of the universities. Estonian universities have adopted their own intellectual property rules that are quite different from each other. It would obviously be necessary to harmonise these rules between the universities. This is in compliance with the interests of all the universities and teachers and prepares the ground for legislative regulation based on the interests of the universities. In such a case, it would also be possible to prevent any potential problems arising from the mobility of academic staff between the universities. The recommendation that the consistent implementation of the existing regulation, dissemination of information within the university and compliance with the regulations by teachers and researchers may sometimes be even more important than the creation of new intellectual property regulation<sup>\*54</sup> applies also to Estonia.

At the same time, the authors support the position that the regulator should regulate more precisely the issues related to intellectual property created in the exercise of duties in the future. Several researchers have supported, since the beginning of the 1990s, the adoption of a special Act on inventions created in the course of work.<sup>\*55</sup> One of the most recent scientific analyses originates from Jaak Ostrat, who has assumed the following position: “The legal regulation of industrial property created in an employment relationship and in the performance of any other contract needs to be developed further in Estonia”.<sup>\*56</sup> The idea of adopting specific provisions deserves to be supported. Yet it is disputable whether the inventions created at the universities need specific regulation in the form of an independent Act in Estonia, as has been done in Finland. It would be pos-

<sup>48</sup> *Ibid.*, pp. 357–360.

<sup>49</sup> Clause 8.2 of the TUT IP Principles; § 5 of the Rules of Handling IP at TUT; clause 7.2 of the IP Principles of Estonian University of Life Sciences; § 5 of the IP Regulation of Tallinn University.

<sup>50</sup> Further to the imposition of the reporting obligation on researchers, a measure supporting efficiently the commercialisation of research is the construction of research financing mechanism. If the state reduces the funds prescribed for research, the university must take better account of the needs of the economy and orientate itself to the wishes of the economic sector. Decrease in state financing may come into conflict with academic freedom. The comments on the Constitution have inferred correctly that academic freedom and institutional autonomy cannot be possible if there are no funds for research and teaching. Funds obtained from the private sector entail guidance by the wishes of those who allocate the funds; thus, it is important that the state support basic research. See T. Annus (Note 3), p. 292.

<sup>51</sup> See T. Annus (Note 3), p. 290.

<sup>52</sup> *Ibid.*, p. 291.

<sup>53</sup> T. Annus. *Riigiõigus* (Constitutional Law). Tallinn: Juura, Õigusteabe AS 2001, p. 266 (in Estonian).

<sup>54</sup> H. K. Schachman (Note 30), p. 6897.

<sup>55</sup> Professor Ants Kukrus has proposed to adopt an Act on inventions made in employment relationships. See A. Kukrus. *Tööstusomandi õiguskaitse* (Legal Protection of Industrial Property). Tallinn: Mats 1995, p. 65 (in Estonian).

<sup>56</sup> J. Ostrat. *Töösuhtes või muu lepingu täitmisel tehtud leiutise õigusliku reguleerimise probleeme. Kas lepinguvabadus või eraldi seadus?* (Problems in the Legal Regulation of an Employment-Relationship Invention. Freedom of Contract or a Separate Law?). – *Juridica* 2007/3, p. 198 (in Estonian).

sible and obviously more economical to provide the principles of intellectual property created at universities in the applicable Patents, Utility Models and Copyright Acts.

### 3.3. Dilemma — to patent or publish?

The functioning of a university has historically proceeded from the principle that the academic community shares their knowledge with society through teaching and publication of research. When it comes to the patenting of inventions, however, the university acts based on commercial considerations. The goal of the patent system in itself is simple and understandable — to continually improve upon existing technology. At the same time, the knowledge created must become accessible to the public. The patent system guarantees to the inventor, in return for making his or her invention public, for a certain period, the exclusive right to prohibit any other persons from using the invention, except for those exceptional cases prescribed by law. The provision of exclusive rights is reasoned by the fact that if there had not been an inventor, the invention would not have been created.<sup>\*57</sup> Below, we will examine the impact of patenting by the university on one of the underlying principles of the university — publication of research results.

The problem arising in connection with patenting and publication is related to the novelty requirement of the invention to be patented. Pursuant to § 8 (1) of the Patents Act, an invention is patentable if it is new, involves an inventive step and is subject to industrial application. The disclosure of the nature of the invention, for example, in a research paper, conference presentation and conference theses, can preclude the patenting of the invention later on. The legislator has attempted to alleviate the situation here and provided the grace period regulation of the invention<sup>\*58</sup>, according to which, in determining the state of the art, any information relating to an invention is not taken into consideration, provided that a corresponding request is submitted, if such information is disclosed by a person who is entitled to the patent or another person with the knowledge of the said person within twelve months before the filing date of the first patent application containing the invention in the Republic of Estonia or abroad.<sup>\*59</sup> Here it must be kept in mind that due to the principle of territoriality of intellectual property the grace period need not exist in other jurisdictions or it may be considerably different there.

Any behaviour violating the novelty of an invention (e.g., publication of a research paper, public recital of a conference presentation, etc.) can be prevented by explanation of the novelty requirement for patentable inventions to the researchers at a university. A researcher should thus know when a potentially patentable invention is concerned. When creating a potential invention as a result of research, he or she should consult the head of the structural unit, an employee of a technology transfer unit or any other employee of the support structure who helps decide whether patenting is economically justified. After the patent application has been filed, the researcher may publish the outcome of his or her research in research papers and presentations.

The relationship between publication and patenting may give rise to the question to what extent the university must patent inventions. Several arguments have been pinpointed in literature against patenting by universities.

The first argument against patenting by universities is related to the financing of research. One of the areas of activity of the university is research, and the necessary means are generally provided by the state (and ultimately by the taxpayer). This gives rise to the question why the university should make further profit through commercialising the patented invention and cannot simply disclose research data to society by publishing the outcome of research in an article, for example. Several objections can be made to this argument.

Patenting may indeed inhibit the use of research results, for which society has already paid.<sup>\*60</sup> Patenting is traditionally motivated by remuneration of the inventor, return of the investments made, and other arguments. The widespread opinion is that an unpatented invention is not an attractive investment object for companies.<sup>\*61</sup> Even the goal of the patenting strategy of the university is to promote investments in the economic application of

<sup>57</sup> WIPO. Introduction to Intellectual Property. Theory and Practice. London/Hague/Boston: Kluwer 1997, p. 7. See also H. Koitel. *Rahvusvaheline eraõigus ja intellektuaalomandi kaitse* (Private International Law and Protection of Intellectual Property). – Audentese Ülikooli Toimetised 2001/1, p. 49 (in Estonian).

<sup>58</sup> About the grace period for an invention, see J. Ostrat, R. Kartus. *Leiutise uudsussoodustus* (Grace Period for Inventions). – *Juridica* 2002/10, pp. 695–701 (in Estonian).

<sup>59</sup> Patents Act § 8 (3).

<sup>60</sup> B. M. Frischmann. *Commercializing University Research Systems in Economic Perspective: A View From the Demand Side* (2005), p. 2. Available at <http://ssrn.com/abstract=682561> (6.11.2006).

<sup>61</sup> For a more substantial analysis of the statement it should be examined to what extent the industrial sector has implemented unprotected technologies created by the university. In essence, this is not precluded because besides intellectual property rights there may be other market barriers (expensive equipment, the financial capacity of the entrepreneur, the existence of the necessary human capital), which encourage investment in technology.

the invention.<sup>\*62</sup> It has been correctly claimed in literature that an unprotected invention remains underutilised, since the research institution may lack the necessary resources while companies lack interest in developing the unprotected invention.<sup>\*63</sup> An example could be the development of a medication, the discovery and marketing of which may be separated by several years, and which demands large investments. In the absence of adequate protection, the medicine would simply not be placed on the market.<sup>\*64</sup>

Another argument against patenting by the university is the idea that companies have most often not reacted when their rights to patented inventions are infringed in research conducted at universities (*de facto* research exemption). Thus, unless universities engage in commercialising intellectual property, companies would overlook the infringement of intellectual property held by them in research.<sup>\*65</sup> We cannot agree with such a position. A university cannot expect that there will be no reaction to their unlawful acts, but should instead influence the legislator to apply a more extensive exception to the use of inventions in research, restrict the range of patented objects, or apply for additional grants.

A threat to changing academic conventions has been pinpointed as the third argument against patenting by the university. It has been claimed that if the patenting of research results becomes an established practice, it will bring about imposition of restrictions on the use of knowledge and impede the dissemination of research results in society. Therefore, universities and researchers will no longer share research information with each other.<sup>\*66</sup>

Such a threat does exist. It is nevertheless important to emphasise that patenting, in itself, is neither good nor bad. The core question is how the university will use the patented invention. The university may set the goal of only earning profit and blocking the activities of other people in certain areas in both the research and business sectors. At the same time, it is possible to pursue an open patent policy supporting society, economy and research, which will ensure honour, fame and income for the university. We can agree with the idea expressed by G. Hardin that society faces several problems that do not have a technical solution.<sup>\*67</sup> The creation of the balanced intellectual property policy of the university is one of them. The progress of technology cannot prescribe here how the university should act.

Thus, patenting and publishing need not be always contrasted. Although publication should be avoided before filing the patent application, this is not the most important thing. The main question is related to what is patented and how the exclusive rights are used.

### 3.4. Intellectual property policy aimed at openness

A functional and mutually supportive cooperation between various social institutions is in the interests of the development of society. A university can contribute to achieving this through intellectual property policy aimed at openness. Some of the main aspects of this intellectual property policy will be discussed below.

It has been pointed out in scientific literature that the United States of America is characterised by a strong trend of measuring the contribution of universities to technical progress by the number of patents issued. Such an attitude is about to spread to both Europe and Japan.<sup>\*68</sup> The strategy document "Estonian Success 2014" sets out the following objective: "the number of patents registered per 100,000 inhabitants in Estonia will be decupled, developing for that purpose technology transfer programmes and institutions".<sup>\*69</sup> In our opinion, an increase in the number of patent applications and patents issued cannot serve as an objective itself. Applying for patents must proceed from economically justified grounds. When analysing the patenting of biotechnological inventions by universities, H. K. Schachman reached the conclusion that regardless of the large number of

<sup>62</sup> The Bayh-Dole Act regulating patenting by US universities is based on the theoretical assumption that technology transfer from the university to industry becomes simpler if universities have applied for patents for their inventions. The Bayh-Dole Act constituted the principle that universities could patent inventions that have been created from research funded by the state. – R. R. Nelson. Is University Patenting Necessary or Sufficient to Make University Research Valuable Economically? – O. Granstrand. Economics, Law and Intellectual Property. Seeking Strategies for Research and Teaching in a Developing Field. Boston/Dordrecht/London: Kluwer Academic Publishers 2003, pp. 349–350.

<sup>63</sup> B. M. Frischmann (Note 60), p. 25.

<sup>64</sup> Unfortunately IP protection does not solve all problems. For instance, recital 18 of Directive on biotechnological inventions (European Parliament and Council Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions. – OJ L 213, 30/07/1998, p. 13) points out that the patent system provides insufficient incentive for encouraging research into and production of biotechnological medicines which are needed to combat rare or orphan diseases. That kind of goods could be considered "non-market goods" that are not provided or demanded effectively through market mechanisms. For the general discussion on non-market goods see B. M. Frischmann (Note 60), p. 13.

<sup>65</sup> R. R. Nelson (Note 62), p. 359.

<sup>66</sup> *Ibid.*, p. 357.

<sup>67</sup> G. Hardin. The Tragedy of the Commons. – Science 1968 /162, p. 1243.

<sup>68</sup> R. R. Nelson (Note 62), p. 348.

<sup>69</sup> Eesti Edu 2014. Vabariigi Valitsuse strateegiadokument, p. 10. Available at <http://www.riigikantselei.ee/failid/EE2014.doc.pdf> (7.11.2006) (in Estonian).

patents for which the universities had applied, the majority of them had not produced actual income.<sup>\*70</sup> Hence, the formal approach patent for the sake of a patent does not take account of the economic prerequisites for intellectual property. Application for and commercialisation of a patent is related to large financial expenses and labour costs. From an economic point of view it is not reasonable to hold a patent if the income is zero or the expenditure exceeds revenue.

Even if formal indicators are not pursued as the goal, the university still has to consider what it should patent. It is appropriate to apply for protection if the invention is likely to make its way to market. Scholars also emphasise that it is justified to patent inventions which are close to commercial use.<sup>\*71</sup> The decision to patent is an important question of the intellectual property policy of a university. The patent policy of a university always serves as a link between innovation and the motivation of subsequent research.<sup>\*72</sup> It is in essence logical that further research output is based on the previous output. The university must regard itself here as part of the general infrastructure of knowledge-based economy and acknowledge that patenting is not the duty of the university but its right. The entire functioning of society cannot rely solely on market mechanisms because there are also, so to say, non-market goods. The allocation of such benefits is not regulated by the market but it is ensured by other mechanisms (culture, society, family, etc.) The free provision of knowledge by the university in its historically developed form is comparable to such unmarketable values as freedom of speech, access to education, etc.<sup>\*73</sup> When exercising its patent policy, the university must also have regard for the promotion of research not only within its own institution but on the regional and global level. The objective of an entrepreneurial university should not be the monopolisation and blocking of further research. It would be in conflict with the internationalisation of the university and the principles of international cooperation.

If the university has decided to patent the invention, an approach aimed at openness is possible here as well. The fact that the university holds an exclusive right does not mean that the university should not permit the other research institutions to use its invention. Opinions have been expressed in literature that if universities patent inventions that are important inputs to further research, their licensing policies should ensure that all potential researchers are able to use the inventions for low transaction costs.<sup>\*74</sup> In other words, the university should, above all, enter into non-exclusive licence agreements with users for commercial purposes or delimit the objective of an exclusive licence agreement so that the university itself retains the opportunity to issue licences for research.

It must be pointed out that the intellectual property principles adopted in Estonian universities attempt to govern the proprietorship of rights but remain rather laconic regarding the use of intellectual property. The authors of the paper are of the opinion that the objective of using the intellectual property created in research institutions should be clearly set out in the regulatory documents of the university. The wording of the objective of using intellectual property would send society an unambiguous message about the priorities of the university, including for example promotion of research through an open licensing policy, support for regional economic development, earning of income for teaching and research as well as for developing the infrastructure of the university, etc.

An important aspect in the use of intellectual property is consideration of the interests of the creator. Worth being observed, § 9 (5) of the Rules of Handling IP at TUT provides that TUT shall take account of the interests of the authors when entering into a licence agreement and also involve the authors in the negotiations.

## 4. Conclusions

The tasks of a university have undergone a significant change to date. Historically, universities have been characterised by open instruction and research. The provision of commercialised services and the use of research results for commercial purposes (commercialisation) have, by today, become an integral part of the activities of a university and its culture. Yet universities do not become commercial entrepreneurs. The concept of an entrepreneurial university, serving as the basis for the approach used by the authors of the paper, allows for defining the new role of the university as a participant in direct economic activities. The concept of an entrepreneurial university has been provided in the regulatory documents of the Tallinn University of Technology, while the University of Tartu in fact also functions as an entrepreneurial university. A relevant institutional

<sup>70</sup> H. K. Schachman (Note 30), p. 6902.

<sup>71</sup> R. R. Nelson (Note 62), p. 358.

<sup>72</sup> B. Koo, B. D. Wright. Economics of Patenting an Input Essential to Further Research. – O. Granstrand. Economics, Law and Intellectual Property. Seeking Strategies for Research and Teaching in a Developing Field. Boston/Dordrecht/London: Kluwer Academic Publishers 2003, p. 332.

<sup>73</sup> B. M. Frischmann (Note 60), pp. 11–14.

<sup>74</sup> R. R. Nelson (Note 62), p. 359.

structure has been established for promoting innovation. Nevertheless, according to the authors, the new role of the university as a participant in economic activities should also be reflected in Estonian legal acts.

The central notion of an entrepreneurial university is intellectual property. The general provisions of the applicable Estonian Acts concerning intellectual property (Patents Act, Copyright Act, etc.) can also be applied to universities. Estonian universities have adopted separate documents, defining the bases of the intellectual property policy of a university and establishing specific provisions for the individual types of intellectual property. As there are considerable differences between the principles, it would be necessary to harmonise them between universities. It is disputable whether the inventions created at universities require specific regulation in the form of an independent Act, as has been done in Finland. Yet it would be necessary to set out the principles of intellectual property created at universities by specific provisions contained in the applicable Patents Act, Utility Models Act and Copyright Act, etc.

Because of the use of research results for commercial purposes, questions about the relationship between the disclosure of research results for the public (publication) and patenting have become more frequent at universities. Patenting and publishing need not be always contrasted. However, as a rule, it is advisable to avoid publication before the patent application has been filed.

According to the authors, an increase in the number of patent applications and patents issued cannot serve as a goal in itself. Application for patents by universities must proceed from economically justified grounds.

One of the main issues related to intellectual property at universities is what is patented and how exclusive rights are used. Universities should use the exclusive rights obtained through patenting based on concordance between business interests and interests in promoting research. A university should issue licences to other universities and research institutions for using its inventions at favourable conditions. The authors are of the opinion that the intellectual property policy, including the patent policy, of universities should be open, enabling society to use the research results of universities.



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# *Lexica iuridica* in *Juridica*: Latin Terms as a Reflection of Europeanisation of Estonian Legal Culture

## 1. Introduction

Latin has always had a special role to play in the Western legal tradition. The Estonian legal system as part of the legal system of Continental Europe is based on Roman law, which is considered the common denominator of European legal systems; it is also called the *lingua franca* of the world's jurisconsults.<sup>\*1</sup> The same consistency can be observed in the language of Roman law as well — the Latin language. Thus, in Estonian texts we can find juridical terms in Latin that developed more than two thousand years ago.

In recent decades, Latin juridical terminology has gradually been growing more important as regards understanding and communication between lawyers representing different languages and legal systems.<sup>\*2</sup> It is also observed that the use of Latin expressions facilitates unifying the European judicial system and makes juridical literature internationally understandable.<sup>\*3</sup> In no way do such Latin words and expressions minimise the importance of developing and using legal terminology in our native language; on the contrary, these terms enrich the language of the law.

The terminology analysed in the present article comprises the terms collected from the Estonian periodical *Juridica* over the past 14 years, 1993–2006. The aim of surveying the usage of Latin from this perspective was conditioned by the following factors.

This particular period is of interest first and foremost due to the substantial changes in the development of the state and law in Estonia. The Republic of Estonia regained her independence in 1991. A radical legal reform followed, which can be characterised in brief as abandoning the former Soviet law and becoming part of the Western legal environment. In this era, also the accession of the Republic of Estonia to the European Union took place (on 1 May 2004). This, in turn, has brought along the application of European law and the rulings of the European Court of Justice within the context of the laws of the Estonian state. The integration into international trade and cross-border transactions additionally entails the growing import of private international law. Against this background, the material collected during my survey reflects, in the context of the Estonian language, the integration of one special language, legal language, into the Western European legal environment. Use of Latin is clearly an indicator of that process. Therefore, one of the questions raised in this article is how the changes introduced by the above-mentioned legal reform are mirrored in the usage of language by Estonian lawyers with regard to Latin terms.

<sup>1</sup> F. Wieacker. Vom Lebenswert des römischen Rechts. – K. Büchner (Hrsg.). Latein und Europa. Stuttgart: Philipp Reclam jun. 1978, p. 97.

<sup>2</sup> N. Benke, F. S. Meissel. Juristenlatein. Lateinische Fachausdrücke und Redewendungen der Juristensprache, übersetzt und erläutert. Wien: Juridica 1997, p. 10.

<sup>3</sup> R. Knütel. Rechtseinheit in Europa und römisches Recht. – Zeitschrift für Europäisches Privatrecht 1994, p. 251.

The usage of Latin terminology provides an opportunity to assess the educational level of lawyers and the situation of legal culture, including the quality of legal education. That is, we can appraise the quality of the preparation of Estonian lawyers, as their usage of Latin legal terms depends on that preparation. In the span of time under observation, new textbooks were compiled and published in Estonia addressing virtually all aspects of law, which familiarise law students with European legal traditions and teach them the usage of terminology. In acquisition of technical terminology, a central factor is that a basic course on Roman private law is a compulsory subject for Estonian law students, and closely linked to that course are the special juridical Latin classes taught by the author of this article. Both subjects are read in the same term. This has proved fruitful on account of the fact that under the same name the same notions and expressions are taught: in the class on Latin for lawyers, the form and grammar of terms are explained, and in the Roman private law class, the content is discussed. Consequently, the extensive material on Roman law becomes more easily understood by the students and the terminology memorised more quickly and effectively.

To facilitate the teaching of juridical Latin, the author of this article has compiled the course-book *Latin for Lawyers*<sup>4</sup>, which enables the law students to gain an overview of Latin grammar and whose vocabulary includes, in essence, only legal terminology. The course-book is based on the special literature that has been or is published in Estonia: the journal *Juridica*, new course-books for students of law compiled by the professors of the University of Tartu, and various course-books on Roman law. (In addition, several terms and quotations in Latin have been provided in the course-book, concerning international law and diplomacy and the Anglo-American legal system.)

A key point in the research into Latin terms on the basis of the periodical *Juridica* was the compilation of the *Latin–Estonian Legal Dictionary*<sup>5</sup>, published in 2005 by Prof. Klaus Adomeit, Merike Ristikivi, and Hesi Siimets-Gross. Until the publication of this lexicon, a comprehensive glossary of Latin legal terms did not exist in Estonia. A handful of Latin juridical terms together with their translations could be found only in general reference books and teaching materials. As a member of the group involved in this work, I held as my main interest and purpose to ascertain which legal terms of Latinate origin, as well as their context, have entered common use in Estonian legal language; to analyse the problems arising from and typical of the use of Latin terms; and to focus on the linguistic aspect of the terms employed, including their orthographic peculiarities, their morphology, and their relationship with Estonian sentence structure.

## 2. The journal *Juridica* as the basis for the research

The reason I chose *Juridica* as the basis of my research was that it has been the most important Estonian juridical journal and currently is the only one in that particular field. The first issue of *Juridica* was published in 1993 as a journal of the law faculty of the University of Tartu. In 14 years *Juridica* has developed from a small faculty magazine into a nationwide legal journal.

The 136 issues of *Juridica* analysed for the study include 1192 articles and 8077 pages.<sup>6</sup> Table 1 shows how the number of pages in the periodical has increased over the years, as the articles have become longer and more comprehensive, even though they are fewer in number in single issues than they were in the earlier years. For instance, in the first year of publication, 1993, 61 articles in total were published and the total number of pages for the whole year was 135, and in 1994 there already were 104 articles, in 249 pages. Thus, in the earlier years the articles were relatively short, 2–3 pages on average. The biggest qualitative change occurred in 2000, when the periodical had 687 pages altogether. However, the number of articles decreased to 74, making the average length about nine pages. The same volume-to-article-number ratio has been retained to this day – i.e., about 75 articles per 730 pages published in a year.

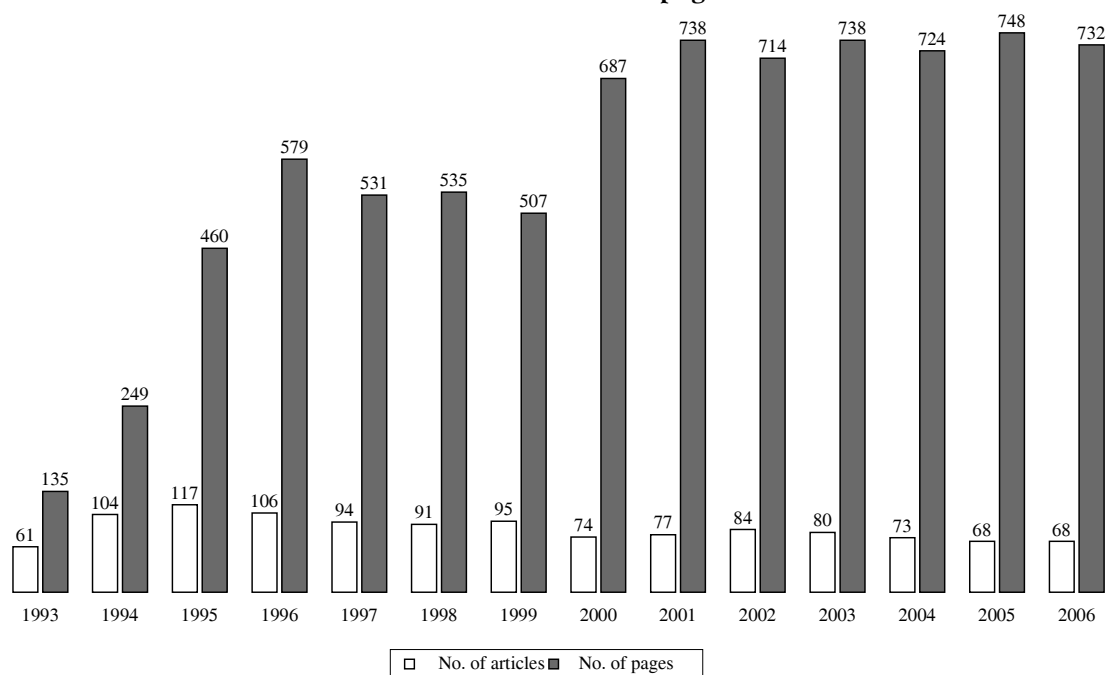
The articles in *Juridica* consist of texts concerned with all major areas of law and thus give an objective overview of the different aspects of terminology. Articles have been published on public and private law in Estonia, as well as international law; the laws of the EU; and the theory, history, and philosophy of law. Still, it should be specified that articles concerning the history of law and Roman law — that is, topics that in general involve numerous Latin terms — were few; for instance, there were only two articles about Roman law. Hence, the list of terms and phrases does not represent legal history first and foremost; rather, it offers an overview of the general vocabulary of today's lawyers.

The circle of co-authors is very wide. Specialists in a variety of legal disciplines have published their articles in *Juridica*. Besides law professors, we can see among the authors also the legal chancellor, attorneys, prosecutors, and judges.

<sup>4</sup> M. Ristikivi. *Ladina keel juristidele*. Tallinn: Juura 2000 (2nd edition 2003, 3rd edition 2006) (in Estonian).

<sup>5</sup> K. Adomeit, M. Ristikivi, H. Siimets-Gross. *Ladina-eesti õigussõnastik*. Tallinn: Eesti Keele Sihtasutus 2005 (in Estonian).

<sup>6</sup> It ought to be remarked that the periodical *Juridica* is issued as a quarterly.

Table 1: Number of articles and pages in *Juridica*

Over the years, the journal *Juridica* has been used as additional study material in teaching lawyers; every year, also summaries of the bachelor's and master's theses of law students have been published in it. In special issues covering bachelor's and master's students' work, Latin is used quite often: on average, 29–35 terms per issue of *Juridica*; in recent years, the usage of Latin terms has even increased.<sup>7</sup> Those articles compiled by students enable us to get a good overview of the tendency in use of Latin by a future generation of lawyers.

### 3. Frequency of usage of Latin terms and phrases

The research includes issues of *Juridica* from the years 1993–2006<sup>8</sup> (i.e., from the beginning until today). All in all, there are 136 issues. In the first year, 1993, six issues were published; the years 1994–2006 each saw 10 issues *per annum*. There are 732 different Latin terms and phrases to be found in the articles. In total, Latin was used 4602 times — consequently, on average, 30 terms or phrases *per* issue and 3–4 terms or phrases *per* article. If we divide the number of pages by the number of terms and phrases, we can see that the Latin language appears on every second page of *Juridica*, on average.

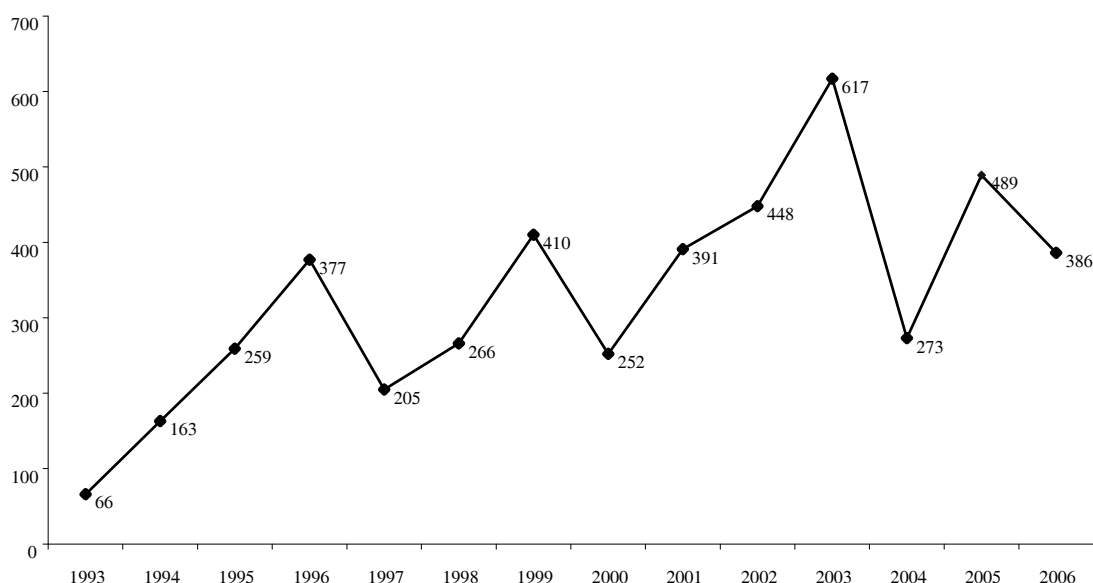
According to Table 2, the usage of Latin terms has increased significantly over the years. In 1993, 66 terms were used in total, for a rather modest 1.08 Latin expressions per article on average. Seven years later, in 2000, in comparison, Latin terms were used 250 times already, which is 2.9 expressions per article on average. And in recent years, there have been approximately 450 instances of Latin terms used in the articles, which is 5.3 Latin expressions per article on average. It must be remarked that the more frequent usage of Latin terms in 2003 and 2005 was conditioned by the publication of articles on Roman law and legal terminology. If we disregard the Latin terms used in those articles, the average term usage for those years comes to about 450, as in other years.

During the period investigated, international legislation was studied in detail in Estonia and the local legislation was harmonised with international and EU legislation. Legal reforms also influence the usage of legal language. It is important to note at this point that qualitative change in language usage has not occurred in recent years — i.e., since Estonia became a member of the EU, in 2004. The most significant changes in terminology started years earlier when the readiness to try to again become part of the European legal environment surfaced. In a broader sense, it means that language usage must keep up with the developments in society. The legal environment changes; subsequently, language usage must change also. Thus, the rearrangements in the Estonian legal system have caused Estonian lawyers to include in their usage of legal language those Latin terms that have become rooted in the legal tradition of Europe and are widely used in practice.

<sup>7</sup> Special issues of bachelor and master students: 1996/6 (29 Latin terms were used), 1997/7 (11), 1998/6 (16), 1999/6 (20), 2000/5 (17), 2001/5 (47), 2002/5 (64), 2003/6 (30), 2004/6 (32), 2005/6 (44), 2006/6 (42).

<sup>8</sup> The *Juridica International*, published in English once a year since 1996, has been excluded from the study because the objective of this research is to examine the usage and impact of Latin legal terminology in the professional publications in the Estonian language.

Table 2: Latin terms through the years



The usage of Latin terms primarily depends on the historical development of the particular area of law concerned. Latin terms often are used in articles on legal theory, philosophy of law, criminal law, international law, succession, and the law of obligations. In all of these areas, the body of terminology in use nowadays had developed already in ancient times or evolved during the Middle Ages. Numerous Latin expressions can be found in the 2002 issues of *Juridica*: 108 expressions in 2002/1 (special issue on contracts) and 86 expressions in 2002/9 (special issue on codification), 91 expressions in 2001/6 (special issue on fundamental rights and human rights), 156 expressions in 1996/8 (special issue on right of ownership, public procurement, courts administration, and state budget), and even 195 Latin phrases in 1999/4 (special issue on ethics).

Very few Latin terms or none at all are to be seen in articles on labour law, family law, and business law. The development and study of these fields has taken place mostly in the 20<sup>th</sup> century. Hence, there is very little or no connection with Roman law, from which the greater part of Latin legal terms originates. The graph shows that there are three major dips in the rising line — in the years 1997, 2000, and 2004. In the issues of those years, several articles on the so-called new areas appeared, or special issues even were compiled. For example, in 1997/4 (special issue on employment and service relationships) only one Latin phrase can be found.

Turning to the frequency of usage, one finds that 134 terms and phrases were used at least five times, 192 were mentioned at least three times, and 297 Latin terms and phrases were used at least twice. If we look at the frequency of usage, we can say that approximately 200 Latin terms and phrases are part of the active vocabulary of Estonian lawyers.

## 4. The most frequent terms

Latin juridical terms are typically single words — stem words or compound words. In addition to nouns, also verbs, adjectives, pronouns, numerals, and adverbs are used as terms. Latin terms are concise and economical, enabling one to convey a notion that otherwise in one's native language might require a lengthy explanation.

The most frequent Latin words in *Juridica* are *lex* (814 times), *ius* (567), *corpus* (315), and *forum* (253). This result is not very surprising, as 'the law', 'the right', 'the body', and 'the court of justice' are the basic elements of the law. Similarly, the words following in the list correspond to expectations: *culpa* (112, 'fault, negligence'), *ratio* (98, 'reason'), *res* (82, 'thing, object'), *factum* (78, 'fact, deed'), *poena* (63, 'punishment'), *crimen* (51, 'crime'), *vis* (44, 'force or violence'), *conditio* (42, 'condition'), *pactum* (39, 'pact'), *locus* (37, 'place'), *causa* (35, 'cause'), *actio* (32, 'claim or legal action'), *fides* (29, 'faith or trust'), and *status* (27, 'state or condition').

The most frequently appearing terms and phrases are *corpus iuris* (236, 'body of law'), *lex mercatoria* (134, 'commercial law'), *de lege ferenda* (118, 'desirable to establish according to the law'), *culpa in contrahendo* (79, 'pre-contractual liability'), *lex fori* (66, 'the law of the court'), *de facto* (64, 'in fact'), *de lege lata* (58, 'according to the law in force'), *pacta sunt servanda* (43, 'agreements of the parties must be observed'), *lex*

*specialis derogat generali* (38, 'a special statute overrules a general one'), *ius cogens* (37, 'peremptory norm'), *nullum crimen nulla poena sine lege* (35, 'there is no crime and no punishment without a law fixing the penalty'), *in dubio pro reo* (24, 'in a doubtful case, the defendant is to be preferred'), and *ne bis in idem* (18, 'not twice for the same' — i.e., an individual may not be tried twice for the same crime). The most frequent of the expressions are complex terms concerning legal theory, contract law, international law, and penal law. In the expressions, mostly words contained in the above list can be seen.

In addition to juridical terms, widespread Latin expressions and abbreviations often are used in articles: *expressis verbis* (212, 'pointedly'), *op. cit.* standing for *opus citatum* or *opere citato* (156, 'quoted book, in the quoted book'), *ad hoc* (76, 'for this, for this special purpose'), *ca.* standing for *circa* (61, 'about, around'), *sui generis* (58, 'of its own kind'), *prima facie* (56, 'at first sight'), *a priori* (45, 'from the former'), *ib.* or *ibid.* standing for *ibidem* (36, 'in the same place or book'), *supra* (26, 'above, upon'), and many others. Such expressions ordinarily are used in their general and neutral meaning in the articles. Yet, at times, an author may employ them in a narrower juridical sense.

## 5. The context of Latin terms and phrases

One of the sources for enriching specialised vocabulary is borrowing words from other languages. In law, Latin is a very useful source. In the course of time, the bulk of Latin terms now used in the legal environment of Continental Europe have developed on the basis of Roman law. However, various important legal terms in Latin that are in current usage also come from the Middle Ages or the modern age. Namely, the development of law was based on Latin for centuries, even while national languages began to prevail in science. At the same time, Latin was still taken as an example on which to rely not only in terms of vocabulary and phraseology but also in relation to syntax and style. Also, new legal terms in Latin have been coined in recent decades, particularly in order to denote new activities pertaining to various legal contexts, or societies and organisations, and so on. For instance, the European Company uses the Latin name *Societas Europaea*. The European Court of Justice as well is known to coin new terms and employ less known phrases. Through its materials and publications, the expression *fumus boni iuris* ('an air of good law') has entered Estonian legal texts.<sup>9</sup>

Examining the contexts in which Latin terms occur in the writings of contemporary lawyers, we must remember that denoting a legal concept is not so unconstrained as is the case with other terms. Legal terms must be precise, effective, and clear. Legal terms derive from the legal context and constitute the vocabulary of legal language. The terms in legal texts must convey accurately and wholly the content and meaning of the notions they represent. Therefore, the Latin terms found in the articles in *Juridica* occur, as a rule, as normative arguments and contain specific juridical information, e.g., "Therefore the legal definition of the delict in modern penal codes contains primarily the principle *nullum crimen nulla poena sine lege*"<sup>10</sup>.<sup>11</sup> Often such concise Latin terms enable us to convey univocally and precisely ideas that otherwise would have to be described in a long sentence or even several sentences.

Occasionally, the terms are used in rhetoric or for illustrative purposes — e.g., "The appendix of the Directive is *mutatis mutandis*"<sup>12</sup> in the Law of Obligations Act, § 42".<sup>13</sup> In this category belong mostly generally known Latin expressions such as *expressis verbis*, *ad astra*, and *dum spiro spero*, along with other widely employed maxims. However, it is most difficult to draw a line between juridical argumentation and rhetoric in cases of phrases that may acquire specific meaning in juridical contexts. A legal term might occur in legal language yet also be a word in the common language, having a particular meaning. Expressions like *ultima ratio*, *a priori*, *prima facie*, and *de facto* are of the kind used by lawyers in their general meaning but also in a specific juridical sense.

Often it can be noticed that, although Estonian lawyers like to use Latin expressions in their articles, the translation into Estonian is missing.<sup>14</sup> It is clear that sometimes Latin expressions in the text can create mis-

<sup>9</sup> The expression means that the request for the application of legal remedies is justified. K. Adomeit, M. Ristikivi, H. Siimets-Gross (Note 5), p. 112.

<sup>10</sup> *Nullum crimen nulla poena sine lege* 'there is no crime and no punishment without a law fixing the penalty'. (Hereinafter translations by the author of the article.)

<sup>11</sup> J. Sootak. Karistusseadustiku süüteomõiste ja deliktstruktuur (The Definition and Structure of Offence in the Penal Code). — *Juridica* 2001/7, p. 448 (in Estonian).

<sup>12</sup> *Mutatis mutandis* 'with the necessary changes'.

<sup>13</sup> C. Ginter. Tüüptingimustest VÕS ja direktiivis 93/13/EMÜ (Standard Terms in the Law of Obligations Act and Directive 93/13/ECC). — *Juridica* 2001/7, p. 506 (in Estonian).

<sup>14</sup> This is an interesting issue. Especially if one looks at older texts, this is standard where terms or even extended passages from the 'scholarly languages' are used. Supplying translations was considered patronising. Nowadays, not doing so can be seen as a sign of the author wishing to show off and to make the reader feel less for not knowing what the reader is apparently 'expected to know'.

understanding and misinterpretation on the part of the reader. The problem is not very acute when well-known juridical terms are used. Examples are the *nemo iudex* principle (*Nemo iudex in causa sua*, meaning ‘No man can be a judge in his own case’), the *lex specialis* precept (*Lex specialis derogat legi generali*, ‘A special statute overrules a general one’), or the *stare decisis* (‘to stand by matters decided’) concept, or the following quotation from one issue of *Juridica*:

On certain conditions it can be claimed that what in Germany is with the status of the prosecutor in the criminal procedure *de facto* is in Estonia at the moment *de lege lata*, and, in my opinion, it could also be, with slight modifications, *de lege ferenda*.<sup>\*15</sup>

Although the sentence may be long and difficult to follow, all of the terms used belong to the basic vocabulary of lawyers (according to the frequency of usage) and are therefore actually known.

However, quite often very rare terms can be found that contain specific juridical information. It seems to me that, for those readers without a background in legal studies or special commentaries and explanations, those sentences might not be completely understandable. A good knowledge of Latin alone is not sufficient for the correct interpretation here. Even more, it might happen that the whole concept of the context will be unclear if the meaning of the Latin word or term is misunderstood. We take as an example this quotation from *Juridica*:

The doctor must replace the paternalistic Hippocratic approach *salus aegroti suprema lex*<sup>\*16</sup> with the current principle of contemporary society *voluntas aegroti suprema lex*, which is specified by the tenet *nihil nocere*.<sup>\*17</sup>

At the same time, such usage of terms draws attention to the fact that technical language has its own characteristics in comparison with general language. The neutral vocabulary of general language, legal terms, the technical terms of specific fields, and the grammar of modern standard language constitute the instruments of legal language.<sup>\*18</sup> Accordingly, legal texts have specific characteristics; yet, besides juridical terms, the terminology of the field that is the object of the particular legal text, in addition to general language, has an effect on legal language.<sup>\*19</sup>

## 6. Problems and mistakes

There occur several problems in using Latin terms. In Latin, a synthetic language, grammatical relationships are represented in the words by applying inflectional endings and suffixes. As a result, the recognition and understanding of a Latin term may be affected by the use of the singular and the plural form, as well as the use of the term in different case forms or with various prepositions. Examples include *actio* > *actiones* (‘action’ > ‘actions’), *pactum* > *pacta* (‘pact’ > ‘pacts’), *lex* > *leges* (‘law’ > ‘laws’), *ius* > *iura* (‘right’ > ‘rights’), *tacitus consensus* > *tacito consensu* (‘tacit consent’ > ‘in or with tacit consent’), *bona fides* > *bona fide* > *ex bona fide* (‘good faith’ > ‘in or with good faith’ > ‘according to good faith’).

Mistakes frequently appear in the orthography of Latin terms, as well as in the agreement between case forms and gender forms and in translation of Latin terms. The most common problem in using Latin terms, however, is adapting the foreign words to the context and incorporating them into the Estonian sentences. Ordinarily mistakes occur in the usage of two forms — the basic form in the nominative case and the adverbial in the ablative — in the proper context.

I found that the most common errors in *Juridica* were misprints, usually involving incorrect vowels and consonants: use of *vocatio legis* for *vacatio legis*; *preater* (or *prater*) *legem* for *praeter legem*; *numerantur sententiae*, *non ponderander* for *numerantur sententiae*, *non ponderantur*; *summa summarium* for *summa summarum*; *nebisin idem* for *ne bis in idem*; *op. cot.* for *op. cit.*; *ubiquae* for *ubique*; *lucrum sessum* for *lucrum cessans*. When one uses unadapted foreign words, it is customary to spell them as in the original. In a few isolated cases, though, the authors of the articles had applied the pronunciation rules of the Latin language and changed the orthography of a term if the pronounced form was different from the written variant: *c* —

<sup>15</sup> E. Kergandberg. Kümme märkust seoses prokurööri funktsionaalse rolliga Eesti tänases ja tulevases kriminaalmenetluses (Ten Remarks on the Functional Role of Prosecutors in Proceedings in Criminal Matters in Estonia at Present and in the Future). – *Juridica* 1999/2, p. 65 (in Estonian).

<sup>16</sup> *Salus aegroti suprema lex* ‘the welfare of the unhealthy is the supreme law’, *voluntas aegroti suprema lex* ‘the wish of the unhealthy is the supreme law’, *nihil nocere* ‘do no harm’.

<sup>17</sup> A. Nõmper. Stigma abordi kaigus (The Abortion Case of Stigma. Proposal to Amend the Draft Penal Code). – *Juridica* 2000/7, p. 447 (in Estonian).

<sup>18</sup> K. Kerge. Õiguskeel, tema vahendid ja väljavaated (Legal Language: Means and Perspectives). – *Õiguskeel* 1995/4, p. 6 (in Estonian).

<sup>19</sup> R. Narits. Õigusteaduse metodoloogia I (Methodology of Law). Tallinn: Juura 1997, pp. 80–82 (in Estonian).

[ts] and *x* — [ks] as in *ekspressis verbis* for *expressis verbis*, *lex spetsialis* for *lex specialis*, and *sine periculo sotsiali* for *sine periculo sociali*.

Also, mistakes in declension and agreement were found. Several such errors concern the agreement between nouns and adjectives, which in Latin must always be in the same case: *strictu sensu* for *stricto sensu*, *ultimo ratio* for *ultima ratio*, *lex posteriori derogat priori* for *lex posterior derogat priori*, *lex posteriori derogat leges priori* for *lex posterior derogat legi priori*, *lex generali* for *lex generalis*. Moreover, nouns and adjectives always agree in Latin where gender is concerned. The Latin word *mos* ('custom, tradition') is masculine and requires the masculine form for an adjective used with it. In the given phrase, however, the feminine adjective form is used: *bonae mores* instead of *boni mores*. Also, the term *ius* ('law') sometimes is used erroneously. This word in Latin is neuter, and thus its attributive adjective should also be neuter. Yet, in a couple of cases masculine endings were to be found in the articles: *ius naturalis* for *ius naturale* and *ius animatus* in place of *ius animatum*.

It must be pointed out that mistakes as such were typical of the first issues and earliest years of the *Juridica* journal. In recent years, serious errors no longer can be found. Avoiding mistakes and checking Latin and other foreign terms is particularly important, because the journal is also used as study material. Incorrect grammatical forms, especially in an article by a legal professor, can be misleading to students. For example, the term *strictu sensu* — with the wrong grammatical ending — appeared first in an article by a professor and later in the article of one student. Such repeated mistakes and undesirable constructions indicate that legal language is, above all, acquired through work with the existing texts.

## 7. Conclusions

Law is a field where linguistic means of expression are of utmost importance. This discipline operates directly through language; a word or expression acquires juridical power in it. Estonian law, including the usage of legal language, is based on the historical traditions of Europe. The time span considered in the present research has been a decisive era in the development of Estonian law: once again we have turned back to the Western legal environment, which largely depends on the Latin language. The legal reform in Estonia has been accompanied by changes in the usage of terms by Estonian lawyers. In the periodical *Juridica*, the integration of Estonian legal language into European legal culture is reflected by a relatively great increase in the usage of terms in Latin, both in the sense of the general occurrence of terms and with regard to the adoption of numerous new Latin terms. It can be observed that the biggest changes in terminology and its usage originate from a time preceding the official accession to the EU. Hence, the current study clearly reveals preparedness for reforms on the linguistic level as well.

The spread of Latin juridical terms in the contemporary world and the principles of their usage depend on the conditions arising from historical development, the linguistic economy of Latin terms, and their effectiveness in communication in the field concerned. For the most part, Latin terms occur in the fields of legal theory, legal philosophy, law of obligations, succession, and penal power, which evolved, and whose terminology was formed already, in the time of Ancient Rome or in the Middle Ages. In newer fields of law like commercial law or labour law, terminology was formed when Latin no longer predominated as the language of science. Consequently, in articles concentrating on these matters, Latin terms are few. On the one hand, Latin expressions are used for rhetorical and illustrative purposes; in general, though, Latin terms as normative arguments convey specific juridical information.

The principles of and trends in terminology usage take shape in legal education. The combination of teaching a basic course on Roman private law and juridical Latin has provided Estonian lawyers with good preparation and conditions for acquiring and employing Latin terms. At the same time, the mistakes made in the orthography and morphology of the terms draw attention to the practical problems accompanying the usage of a foreign language. The regular utilisation of Latin terms in the special issues of *Juridica* containing summaries of bachelor's and master's theses reveals that we are likely to witness a similar use of terminology in the writings of the future lawyers in Estonia. Hence, we may hope that changes in law and the usage of Latin terminology, which reflect the present Estonian legal culture, develop along with the legal traditions of Europe. *Tempora mutantur, nos et mutamur in illis.*



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# Roman Law in the Baltic Private Law Act — the Triumph of Roman Law in the Baltic Sea Provinces?

A part of the Baltic countries belonged to the Holy Roman Empire from the 13<sup>th</sup> century. Roman Law was received in Europe and legal education was usually based on sources of Roman Law; the Baltic countries which belonged to the Holy Roman Empire of the German Nation also received Roman law, both as a part of canon and secular law. Roman Law remained in force even after the status of the Baltic states changed.<sup>\*1</sup> Until the entry into force of the Baltic Private Law Act<sup>\*2</sup> (BES) in 1865 Roman Law applied in the Baltic states subsidiarily with the European *ius commune*. In other words, it was applied only if local sources of law did not provide a solution to an issue. In the practice of not later than the 18<sup>th</sup>–19<sup>th</sup> centuries Roman Law was still applied quite extensively; it was preferred to local law and in many areas it was even transposed in its entirety.<sup>\*3</sup>

## 1. Conflicting conclusions of earlier studies

Such a wide application of Roman law gave reason for criticism by proponents of local law. The author of the draft BES, Friedrich Georg von Bunge<sup>\*4</sup> was convinced that local practitioners rely too much on the principles of Roman law.<sup>\*5</sup> In his programmatic writing on the drafting of provincial law, Bunge claimed that Roman law should be avoided as much as possible in the preparation of the future law<sup>\*6</sup>, but at the same time he stated

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<sup>1</sup> H. Blaese. Einflüsse des römischen Rechts in den Baltischen Staaten. – IRMAE, V, 9, 1962, p. 13.

<sup>2</sup> Provinzialrecht der Ostseegouvernements. Dritter Theil. Privatrecht. Liv-, Est- und Curländisches Privatrecht. Zusammengestellt auf Befehl des Herrn und Kaisers Alexander II. St. Petersburg: Buchdruckerei der Zweiten Abtheilung Seiner Kaiserlichen Majestät Eigener Kanzlei 1864. For details of the creation of the BES see A. E. Nolde. Očerki po istorii kodifikatsii mestnyh grazhdanskikh zakonov pri Graf Speranskom. St. Petersburg 1914, especially pp. 390 ff.

<sup>3</sup> In his 1889 textbook on the Baltic private law system, Carl Erdmann states that before the adoption of the Baltic Private Law Act, judges were used to often have recourse to *ius commune* when settling legal issues. See C. Erdmann. System des Privatrechts der Ostseeprovinzen Liv-, Est- und Curland. I. Bd. Riga: S. Roderer Verlag 1889, p. 6. See also F. G. von Bunge. Das liv- und estländische Privatrecht. 2. Ausgabe. I Theil. Reval: Kluge Verlag 1847, p. 31.

<sup>4</sup> Bunge (1802–1897) was studying at that time at the University of Tartu (Dorpat); he was a private docent at the same university in 1825–1830 and also the municipal syndic of Tartu. In 1831–1842, he was the Professor of Provincial Law at the University of Tartu. Then, in 1843–1856, he was the Tallinn (Reval) syndic, mayor, and president of the municipal consistory. In 1856–1865, he was a clerk in the Second Department of the Imperial Chancellery in St. Petersburg. In 1869–1897, after retirement, he lived in Gotha and Wiesbaden.

<sup>5</sup> F. G. von Bunge. Wie kann der Rechtszustand Liv, Esth- und Curlands am zweckmässigsten gestaltet werden? Riga und Dorpat: Frantzen 1833, pp. 28–29, 32.

<sup>6</sup> *Ibid.*, pp. 25, 33, 36. For details read M. Luts. Die Begründung der Wissenschaft des provinziellen Rechts der baltischen Ostseeprovinzen im 19. Jh. – J. Eckert. K. Modéer (Hrsg.). Geschichte und Perspektiven des Rechts im Ostseeraum. Erster Rechtshistorikertag im Ostseeraum

that Roman law was the common part of all provincial law and its omission from the Provincial Code would imply an incomplete approach to the local private law. However, the approach to local private laws should be “reliable and complete”.<sup>7</sup> In addition, there are gaps in provincial law where the principles of Roman law should be referred to and their applicability defined, but not more.<sup>8</sup>

At the same time, researchers of the BES have often stated that Roman law was the main source of the BES. J. Jegorov finds that the reception of Roman law, especially its third part plays an important role in the codification of local laws.<sup>9</sup> A. Ylander has even cheered that in the form of the BES, Roman and canon law was able to celebrate its triumph in the Baltic Sea provinces.<sup>10</sup> The BES references and index of sources seem to refer to that, as many authors have concluded.<sup>11</sup> These suggest that despite Bunge’s efforts and claims, Roman law was indeed the main source for the BES. The reason why the sources were added was the requirement arising from the rules of the Russian imperial codification project that sources should be cited under each article. The requirement was based on the idea of gathering together all existing law and the same applied to other legislation of the Russian empire. As the Baltic Private Law Act was essentially a collection of various local and subsidiary laws<sup>12</sup>, each section was supplied with a reference to the source. Roman law (the codification composed in 529–533, *Corpus iuris civilis* – CIC) was cited as the source very often.<sup>13</sup>

Hermann Blaese has claimed (as opposed, e.g., to Samson von Himmelstierna<sup>14</sup>, the author of the previous draft provincial law, whose CIC citations were not always valid, especially where the article was copied from the General Prussian Land Law<sup>15</sup>) that when compiling the BES, Bunge personally checked “all the referenced citations from textbooks and only if they proved to be correct, he transposed the text and the latter [i.e., citations]”.<sup>16</sup> Such a multitude of references to Roman law and Bunge’s alleged diligence in checking them is somewhat out of line with Bunge’s words about the necessity to reduce the proportion of Roman law.

## 2. Objective and methodology of this paper

In this paper I have tried to identify whether and to what extent the references of the BES articles actually refer to the substance of the Roman law sources referred to. As Hermann Blaese has (probably based on A. E. Nolde) stated that “codifiers were able to find ready formulations from textbooks and it was easy to transpose

8–12. März 2000. Peter Lang 2002, pp. 161–167. Differently from M. Luts, see Landsberg. Geschichte der deutschen Rechtswissenschaft. Abt. 3, Halbbd. 2: 19. Jahrhundert bis etwa 1870. Text. Noten. München, Berlin: Oldenbourg 1910. Neudr. Aalen: Scientia 1978, p. 561.

<sup>7</sup> F. G. von Bunge (Note 5), pp. 35–26, 39.

<sup>8</sup> *Ibid.*, pp. 38–39. In addition, Bunge initially planned to keep Roman law subsidiarily applicable, as the complete incorporation of Roman law into the new code would not possible due to human resources and would be “unfeasible at least now”. *Ibidem*.

<sup>9</sup> J. Jegorov. Retseptsija prava v istorii Estonii (XIII–XIX vv.). – Studia iuridica. 2. Tartu 1989, p. 104. Dietrich A. Loeber has carried the same claim over to the Latvian Civil Code of 1937 — namely, that it was something quite extraordinary as two-thirds of it was based on Roman law. See D. A. Loeber. Lettlands Zivilgesetzbuch von 1937 in seiner wechselvollen Geschichte. – Kontinuität und Neubeginn. Festschrift für Georg Brunner. Baden-Baden: Nomos 2001, p. 492. Latvian Civil Code is in turn largely based on the BES. Loeber indeed, in substantiating his reasoning, refers to BES and not to the writings on Latvian civil law as does the aforementioned writing by A. E. Nolde and H. Blaese. Bedeutung und Geltung des römischen Privatrechts in den baltischen Gebieten. Leipzig 1936. Therefore, his claims concern also BES and not only the Latvian Civil Code.

<sup>10</sup> A. Ylander. Die Rolle des römischen Rechts im Privatrecht der Ostseeprovinzen Liv-, Est- und Kurland. – Zeitschrift für vergleichende Rechtswissenschaft. Bd. 35. 1918, p. 441.

<sup>11</sup> “As the list of sources [index of sources] indicates, more than a half of the BES has been directly or indirectly received from Roman law”. J. Jegorov (Note 9), p. 104.

<sup>12</sup> About the drafting principles of the Baltic Private Law Act see M. Luts. Privatrecht im Dienste eines ‘vaterländischen’ provinzialrechtlichen Partikularismus. – Rechtstheorie 2000/31, Berlin, Duncker & Humblot, lk 383–393; M. Luts. Private Law of the Baltic Provinces as a Patriotic Act. – Juridica International 2000 (5), Tartu, pp. 157–167.

<sup>13</sup> The index of sources of the BES editions specifies all sources separately. For example, in the edition of 1864, the index of sources contains 82 pages of references to various parts of the CIC and 39 pages of references to other sources (including knighthood, municipal and land laws, Russian law, German and canon law). See Provinzialrecht der Ostseegouvernements (Note 2), pp. 1–122.

<sup>14</sup> R. J. L. Samson von Himmelstierna(a) (1778–1858) studied in Leipzig; in 1798–1807, he was a lawyer at the Livonian Knighthood, in 1807–1819 Judge of the Tartu (Dorpat) County Court, in 1824–1829, President of the Committee for the Livonian Provincial Laws, in 1824–1834, Vice President of the Livonian Highest Court, in 1827–1851, District Magistrate of Livonia, in 1829–1840, a clerk of the Imperial Chancellery, in 1843–1851, President of the Livonian Consistory and member of the Livonian Highest Court, and in 1851–1856, President of the Livonian Highest Court.

<sup>15</sup> H. Blaese. Bedeutung und Geltung des römischen Privatrechts in den baltischen Gebieten. – Leipziger rechtswissenschaftliche Studien. Heft 99. Leipzig: Verlag von T. Weicher 1936, p. 69. However, Samson v. Himmelstierna did not refer to the sources of the articles of his draft, as Bunge did in the BES. Since the sources of articles were not supplied, they did not necessarily have to correspond to the “original text” but could also differ from it.

<sup>16</sup> *Ibid.*, p. 71.

those to the codification”<sup>17</sup>, I have viewed not only “pure” Roman law<sup>18</sup> but also the textbooks and manuals that Bunge could have used for drafting the BES, so as to identify whether they and which of them could serve as the basis for the sections and the references to the CIC. My choice of authors is based on Bunge’s own references, the study by A. E. Nolde<sup>19</sup> and contemporary standard literature.

In the course of writing the paper, a question arose which is posed at the end of the paper: what was Bunge’s goal of adding the source references? It may have been a wish to simply present the sources, or he may have had broader objectives. For example, when drafting the Svod Zakonov, M. Speranski who was criticised for excessive reliance on the Western, especially French legislation, was ordered to supply references to Russian law to all the articles. For this task Speranski selected a famous specialist in Russian law, who performed the task “with great difficulties and often with extremely strained interpretation”. Nevertheless, the Svod Zakonov contains articles which are almost identical to the wording of the French *Code civil* and institutes that Russian law was formerly unfamiliar with.<sup>20</sup> One of Bunge’s objectives was certainly to lay down as many provisions applicable in the “prevailing practice” of the Baltic provinces, so as to compile a full set of laws. Or did Bunge, as already mentioned, wish to reduce the proportion of Roman law?

My analysis is based on the chapters of the BES governing the classification of things and servitudes. These parts were chosen because they are especially based on the *ius commune* tradition and are still largely based on Roman law (CIC) today.<sup>21</sup> The source references of the relevant articles of the BES also refer to Roman law and Bunge has stressed that only the general principles should be adopted from Roman law.<sup>22</sup>

In identifying the origin of the text of the BES articles, I used first of all the statement by F. G. von Bunge in his autobiography that “when studying the sources of private law of all three provinces I took the edition of Dabelow’s general private law handbook (*Handbuch des gemeinen Civilrechts*) with the empty supplementary sheets and filled them in with citations from provincial laws. This became the basis of all my later works on this law”.<sup>23</sup> I, too, referred to Dabelow’s *Handbuch*....<sup>24</sup> In addition, Bunge has provided indirect hints on the preparation of the BES, namely that the comments of Ottomar Meykow, Professor of Roman Law at the University of Tartu have special value for him so that he took them into account to a great extent.<sup>25</sup> According to Bunge, Meykow was the editor of the BES and had services in bringing its content into conformity with the newer doctrine.<sup>26</sup> Therefore I compared the final version of the BES also with the draft prepared by Bunge alone.<sup>27</sup> There were hardly any differences in the two chapters I reviewed. One article concerning the classification of things had been split into two articles in the final version. One article had been added to the servitudes chapter compared to the draft. One source reference had been added later and one had been deleted.

Since Meykow may have advised Bunge also on the contemporary standard works, I looked for the textbooks which Meykow himself used for teaching. In the university’s lecture plan, the main work listed under the literature of Meykow’s lectures was the pandect textbook by L. Arndts in various editions.<sup>28</sup> In addition I studied the pandect textbook by K. A. Vangerow, which was also a common approach and used by O. Meykow in his thesis for a candidate’s degree.<sup>29</sup> I also checked the pandect textbook by F. G. Puchta, one of the best-known jurists of the 19<sup>th</sup> century, which was considered a standard work at the time.<sup>30</sup>

<sup>17</sup> *Ibid.*, p. 72.

<sup>18</sup> References to Roman law were checked using the publication *Corpus Iuris Civilis*. P. Krüger, T. Mommsen (eds.). Vol. I. Berlin 1922. The BES mainly refers to the *Institutiones* (Inst.) and *Digesta* (D.), rarely also to the *Codex* (Cod.) parts of the CIC.

<sup>19</sup> A. E. Nolde. Proishozhdenie tshashti teksta deistvujushthavo Svoda grazhdanskikh uzakonenii gubernii pribaltiskikh. Tablitsa zaimstvovaniia teksta statei iz literatury rimskavo prava i inozemnykh kodeksov. S.-Petersburg. Senatskaya tipografija 1912.

<sup>20</sup> Speranski denied using French law as a source. See A. D. Rudokvas. The Alien. Acquisitive Prescription in the Judicial Practice of Imperial Russia in the XIXth Century. – *Rechtsgeschichte* 2006/8, p. 60 (with further references).

<sup>21</sup> See, e.g., H. Coing. *Europäisches Privatrecht*. Bd. 1. *Älteres Gemeines Recht (1500–1800)*. München: Beck 1985, p. 271 ff., especially p. 274 ff. (classes of things) and pp. 404–406 (servitudes). About the classification things and about servitudes in classical Roman law see M. Kaser. *Römisches Privatrecht (RPR) I*. – *Handbuch der Altertumswissenschaften*. 3. Teil. 3. Bd. 1. Abs. München 1971; RPR. II Abs. 3. Teil. 3. Bd. 2. Abs. München 1975.

<sup>22</sup> F. G. von Bunge: “[...] die Angabe der darüber im römischen Rechte enthaltenen *Hauptgrundsätze*, so weit sie anwendbar sind, genügen.” See F. G. von Bunge (Note 5), p. 36.

<sup>23</sup> W. Greiffenhagen. Dr. jur. Friedrich Georg von Bunge. Reval: Verlag Kluge 1891, p. 10.

<sup>24</sup> C. C. Dabelow. *Handbuch des heutigen gemeinen römisch-deutschen Privatrechts*. 1. Theil. Halle: Hemmerde u. Schwetscke 1803.

<sup>25</sup> F. G. von Bunge. *Geschichte der Entstehung des Provinzialrechts*. – Estonian History Museum, reserve 53, inventory 1, item 49, p. 5.

<sup>26</sup> M. Luts. Juhuslik ja isamaaline: F. G. v. Bunge provintsiaalõigusteadus (Accidental and Patriotic: the Provincial Legal Science of F. G. v. Bunge). – *Dissertationes iuridicae universitatis Tartuensis* 3. Tartu 2000, p. 183 (in Estonian).

<sup>27</sup> Entwurf des Liv-, Est- und Curländischen Privatrechts. Provinzialrecht der Ostseegouvernements. 3. Theil. S. Petersburg 1860.

<sup>28</sup> L. Arndts. *Verzeichnis der Vorlesungen an der kaiserlichen Universität Dorpat*. 1858–1865. I had at my disposal only the edition of 1879. L. Arndts R. von Arnesberg. *Lehrbuch der Pandekten*. I. Bd. 10. Aufl. Stuttgart: Verlag der J.F. Cotta’schen Buchhandlung 1879.

<sup>29</sup> K. A. Vangerow. *Leitfaden für Pandecten-Vorlesungen*. 1. Bd. 1. Abtheil. Marburg/Leipzig: Elwert Verlag 1839. About O. Meykow see H. Siimets-Gross. Scientific Tradition of Roman Law in Dorpat: *usus modernus* or Historical School of Law? – *Juridica International* 2006, pp. 76–84.

<sup>30</sup> F. G. Puchta. *Pandekten*. 2. Ausgabe. Leipzig: Verlag Barth 1844.

A. E. Nolde, Docent of the University of St. Petersburg has written a paper on which textbooks and sources the articles of BES were based on. Nolde has distinguished between the authors used in Bunge's so-called original draft (C. F. Mühlenbruch, C. F. Glück, F. Mackeldey, K. A. D. Unterholzner, C. F. Koch, A. C. I. Schmid, K. A. Vangerow)<sup>31</sup> and those used in editing the draft, i.e., the “newer” pandect textbooks (C. F. F. Sintenis, L. Arndts, J. Weiske<sup>32</sup>). Unfortunately, he has not explained his principles of selection; he has only noted that Bunge himself provided almost no references at all. Although Nolde claims that wherever an article of the BES originated from the works of different authors, he specified all of them, this does not always seem to be the case. However, he has expressly omitted only those articles which were not Roman law and those whose author he was unable to identify.<sup>33</sup> If we look which articles he has actually not included on the list, I believe there are more of them. I cannot say on which basis the remaining articles were omitted. In the chapters viewed in this paper, he referred to two works: C. F. Mühlenbruch's *Lehrbuch des Pandektenrechts*<sup>34</sup> and C. F. Glück's *Ausführliche Erläuterung der Pandecten nach Hellfeld*.<sup>35</sup> This is why I have also compared the sections of the BES with those. My choice and Nolde's were similar to some extent, but I have also considered other works which Nolde did not regard, but which seemed important to me.

### 3. Roman law provisions in the BES classification of things

Firstly, I analysed thoroughly the first chapter of the first title, “Corporeal and non-corporeal, movable and immovable things” of the second book of the BES (property law). It contains 10 articles, nine of which are referenced to the CIC. In addition, four articles are supplied with references to local sources of law such as knighthood and municipal laws, etc. Out of the nine articles with references to Roman law, only three and a half had a direct link to the sources referred to. In three cases out of ten, the concept contained in the article was present in the Roman law text, but in a completely different context. The remaining two and a half articles have no relation whatsoever to the sources referred to. I will not give a full account of the analysis of each article; below are some more typical examples.

For example, there is a direct link with the references in the BES basic classification of things, in which things were divided into corporeal and non-corporeal (articles 529 and 535). As opposed to the following examples, article 529 was more or less in conformity with the Roman law referred to.<sup>36</sup> The texts of the BES and CIC are not entirely similar. While in the *Institutions*<sup>37</sup> (Inst. 2.2.1) it is written that “corporeal things can actually be touched” (*corporales hae sunt, quae sui natura tangi possunt*), BES article 529 is about general perception: “things are corporeal or non-corporeal depending on whether or not they are perceivable by the external senses” (*die durch die äusseren Sinne wahrnehmbar sind*). The BES definition is thus much more equivocal and broader. Perception by the senses covers also sight, smell, hearing, etc., and the line between corporeal and non-corporeal things is completely different than in the CIC.

If we search C. C. Dabelow's *Handbuch...* for corporeal and non-corporeal things, we will find the original Roman form with the following extension: “All things which can be touched or otherwise perceived by the

<sup>31</sup> Nolde provided the following references, which list the author of this article has supplemented where possible: C. F. Mühlenbruch. *Lehrbuch des Pandektenrechts nach Doctrina Pandectarum deutsch bearbeitet*. Vierte verbesserte Auflage. O. C. v. Madai (Hrsg.). 3 Theile. Halle 1844; C. F. Glück. *Ausführliche Erläuterung der Pandecten nach Hellfeld*. 1790–1830; F. Mackeldey. *Lehrbuch des römischen Rechts*. 1814–1862; K. A. D. Unterholzner. *Quellenmässige Zusammenstellung der Lehre des römischen Rechts von den Schuldverhältnissen mit Berücksichtigung der heutigen Anwendung*. Nach Verfassers Tode hrsg. Von P. E. Huscke. 2 Bände. Leipzig 1840; C. F. Koch. *Das Recht der Forderungen nach Preussischem Rechte, mit Rücksicht auf neuere Gesetzgebungen historisch-dogmatisch dargestellt*. 3 Bände, 1835–1859; A. C. I. Schmid. *Handbuch des gegenwärtig geltenden deutschen bürgerlichen Rechts*. Besonderer Theil. I. Bd. Leipzig 1849; K. A. Vangerow. *Lehrbuch der Pandekten*. 3 Bände. See A. E. Nolde (Note 19), pp. 10–12.

Among those rarely used is also C. F. v. Savigny. *System des heutigen römischen Rechts* (8 Bände); H. Thöl. *Das Handelsrecht*. Bd. 1 and J. F. M. Kierulf. *Theorie des gemeinen Civilrechts*, 1839. See A. E. Nolde (Note 19), p. 13.

<sup>32</sup> Those references too come from Nolde: C. F. Sintenis. *Das praktische gemeine Civilrecht*. 3 Bände. 2. Aufl. 1861; L. Arndts. *Lehrbuch der Pandekten*. (As the editions have only small differences, the number of the edition and the year cannot be identified.); J. Weiske. *Rechtslexikon für Juristen aller teutschen Staaten, enthaltend die gesammte Rechtswissenschaft* 1839. See A. E. Nolde (Note 19), pp. 15–16.

<sup>33</sup> *Ibid.*, pp. 9, 41.

<sup>34</sup> I used the edition: C. F. Mühlenbruch. *Lehrbuch des Pandektenrechts*. Nach der 3. Aufl. der *Doctrina Pandectarum deutsch bearbeitet*. 2. Theil. Halle: Schwetschke und Sohn 1836.

<sup>35</sup> C. F. Glück. *Ausführliche Erläuterung der Pandecten nach Hellfeld*. Ein Kommentar für meine Zuhörer. Erlangen: Johann. J. Palm. Nolde referred to the second edition of the book (printed in 1791) and to the 9<sup>th</sup> and 10<sup>th</sup> editions (1808).

<sup>36</sup> The BES uses a former system of references; I have used the modern system in the main text of my article.

<sup>37</sup> The *Institutions* were translated here and henceforward with the help of: Justinian's *Institutes*. P. Birks, G. McLeod (translators). London 1987.

senses are corporeal things.”<sup>38</sup> It seems that in BES article 529, Bunge may have used Dabelow’s handbook and the definition contained in it. At the same time, it is not the “more Roman” part of the definition that has been adopted, but only its second half.<sup>39</sup> Bunge may have used Mühlenbruch’s textbook<sup>40</sup>, although the text of the BES is slightly different also from Mühlenbruch’s.

The following example is of how contemporary civil law theory on the concept of fungible things influenced the drafting of the BES articles and their references. It also resulted in the fact that most of the references under the articles concerning fungible and consumable things are inaccurate. Namely, in article 532 of the BES, things are divided into fungible and non-fungible. The source of Roman law referred to under this article (D. 12.1.2.1) was, however, the direct source for only the last sentence of the article concerning fungible things; the rest of the article was added by jurists of later centuries. In Bunge’s draft BES, article 532 (article 733 part (a) in the draft) and article 534 (article 733 part (b) in the draft) were contained in a single article — article 733.

Article 733 part (b) of the draft BES later became BES article 534 and it defined consumable things, but only one of the three sources of Roman law referred to concern consumable things (D. 7.5.1). The other sources referred to (D. 30.1.30.pr.; D. 35.2.1.7) concern fungible things. Therefore, the latter references are not relevant to this article, but should belong to article 532. The probable reason for the inaccurate references was the difference between the final version and the draft of the article. According to the draft, all the three sources referred to should have belonged to the same article (article 733) and would have been correct there, but when the articles were changed, the sources were probably misplaced. Another thing is that these references would not have added anything new even if placed correctly, as their content was the same as regards fungible things.<sup>41</sup>

Nolde’s claim that the texts of articles 532–534 originate from Mühlenbruch proved to be true; most of the references are also the same, but Mühlenbruch does not have all the references: namely, he does not have reference to D. 7.5.1 concerning consumable things. However, Mühlenbruch has expressly cited in his textbook only that *Digesta* text which Bunge referred to under article 532.<sup>42</sup>

I compared the articles of the BES also with other textbooks and identified certain similarities with Arndts. The text of article 532 of the BES does not entirely overlap with the text from Arndts’ book, although it may have been used. Of the references of article 534 concerning fungible things, the text of one (D. 35.2.1.7) is cited in Arndts’ textbook in Latin. It has not been used in the text concerning consumable things, but the reference to consumable things under the text of the article is the same.<sup>43</sup>

The confusion with the concepts of fungible and consumable things and the references is probably due to the change in relevant legal theory. B. Windscheid has said that it was quite common earlier to confuse between consumable and fungible things, but at Windscheid’s times (the second half of the 19<sup>th</sup> century) the difference need not be stressed anymore, as it is already known.<sup>44</sup> The two authors that Bunge could have used in this respect did not consider the difference between these classes of things so self-evident. Namely, in his handbook Dabelow provided consumable things with the Latin equivalent of fungible things, *res fungibiles*. Dabelow has not separately written about fungible things.<sup>45</sup> Mühlenbruch considered consumable things a subcategory of fungible things and has mentioned that there was no legal difference between fungible and non-fungible things. As far as wording goes, the text of these articles of the BES bears more similarity to Mühlenbruch<sup>46</sup> than to Dabelow. A reconstruction of the origin of BES articles 532–534 may be proposed: when Bunge wrote the draft BES, he used Dabelow and Mühlenbruch on the premise that those were the same things. The editors of the BES (e.g., Meykow) drew his attention to the fact that those were not the same things and should be split into different articles. Once Bunge did it, the references of the articles were not changed.

<sup>38</sup> C. C. Dabelow (Note 24), p. 64. It contains a reference to Inst.2.2.1.

<sup>39</sup> In his commentary to BES article 529, C. Erdmann was forced to restore the wording of the “Roman sources” by interpretations. Namely, Erdmann finds that “in such case [if the direct wording of the BES is used — H. Siimets-Gross], the right to another person’s works of art should be a corporeal thing, as a work of art is perceivable by the senses. However, the further classification of all corporeal things into movable and immovable things, the opposition between things and acts, as well as the sources of Roman law referenced under article 529 show that for the purposes of this article, an object must be a thing delimited in space. The right to a thing must be construed only in this latter sense.” See C. E. Erdmann (Note 3), p. 134. The references under this article may also originate from L. Arndts, because the references of article 529 are the same as Arndts’ first references, although Arndts’ textbook contained much more references. See L. Arndts (Note 28), p. 55.

<sup>40</sup> A. E. Nolde has not proposed the author of the text of this article. His references of the property law part begin only from article 532. See A. E. Nolde (Note 19), p. 42. As, e.g., Mühlenbruch’s textbook, which Nolde refers to at article 532, contains similar text, it seems that he may have done it also here, but he has not. I cannot imagine the reason why. Other contemporary textbooks did not contain a similar definition; rather, the CIC tradition was followed.

<sup>41</sup> As each added reference may imply a potentially wider application of Roman law, it could be presumed that Bunge would have added as few as possible references in order to limit the use of Roman law.

<sup>42</sup> Although, as concerns this reference, Mühlenbruch referred to D. 12.1.2.1 and Bunge referred to D. 12.1.1.2. This was probably Bunge’s error.

<sup>43</sup> The references of articles 532 and 533 do not originate from Arndts. See L. Arndts (Note 28), pp. 59–60.

<sup>44</sup> B. Windscheid. *Lehrbuch des Pandektenrechts*. Bd. 1. Düsseldorf: Buddeus 1862, pp. 352–353.

<sup>45</sup> C. C. Dabelow (Note 24), p. 65.

<sup>46</sup> C. F. Mühlenbruch (Note 34), pp. 14–15.

The last example is of two mutually related articles of the BES, in which case the only link between the articles and the referred sources is that the texts contain the same concepts, but the text of the article does not arise from the referred source. Namely, article 536 of the BES concerns property law and the classification of things into movable and immovable property.<sup>\*47</sup> The sources referred to under the article (D. 43.16.3.15; 50.17.15; Inst. 4.6.1) indeed concern movable things and *res mobiles* and ownership actions and *actio in rem*, but the content of the article cannot even remotely be derived from these sources. Those were completely different texts, whose only common feature is the same concepts. Of the chosen authors, only Glück discussed the classification of things into movables and immovables, but not exactly in the same way as in article 536 of the BES. Glück generally discussed real right claims and claims under the law of obligations together. However, he provided, e.g., an examples of servitudes, which are considered to be immovable property.<sup>\*48</sup>

Article 537 which elaborates on article 536 of the BES provides: *Persönliche und Forderungsrechte, wenn letztere auch auf die Erlangung einer unbeweglichen Sache gerichtet sein sollten, gehören zu dem beweglichen Vermögen.*

*L.15 § 4 D. qui satisfacere coguntur (II,8), vgl. mit § 1 I. de action. (IV,6).*<sup>\*49</sup>

However, the first of the two provisions of Roman law referred to (D. 2.8.15.4<sup>\*50</sup>) states: It is a different case with one who has a personal claim to land. And the second one (Inst. 4.6.1<sup>\*51</sup>) reads: “The main classification is into two: every action which takes an issue between parties to a trial before a judge or arbiter is either real or personal. A plaintiff may sue a defendant who is under an obligation to him, from contract or from wrongdoing. The personal actions lie for these claims. In them the plaintiff says that the defendant ought to give him something, or ought to give or and do something. [...]”

It is difficult to derive the text of the BES even indirectly from these two citations. The only similarity is that the text of the BES mentions movable property and the *Digesta* mentions a parcel of land — both are properties, but of different classes. Also, both the BES and *Digesta* mention personal claims (*Persönliche und Forderungsrechte* and *petitio personalis* ja *actio in personam*<sup>\*52</sup>). However, these sources of Roman law do not indicate in which case movables are concerned or are not concerned. It cannot be identified from which textbooks the references to sources originate from, as the only author who has discussed this subject was Glück, and he did not refer to these sources.

Nolde believes that the text of the article originates from Glück, but this is not exactly the truth: Namely, Glück states the opposite: “rights, rights of claim, and claims are classified as immovables if their objects are immovables [...]”<sup>\*53</sup> Why Bunge worded this in the opposite way is not clear.

## 4. Roman law provisions in the BES general principles of servitudes

The first title “General Provisions” of Title 4 “Servitudes” of property law contains 14 articles, two of which make reference to not only Roman law, but also other laws (e.g., the statutes of Courland and Lübeck law). The coincidence of the text of the articles and the sources referred to is greater in the title on servitudes than in the classification of things. There are few completely erroneous or irrelevant references; however, one-third of the references require a great degree of generalisation or all the references of an article regard only one point

<sup>47</sup> Dingliche Rechte sind, je nachdem sie bewegliche oder unbewegliche Sachen zum Gegenstande haben, zum beweglichen oder unbeweglichen Vermögen eines Menschen zu rechnen.

<sup>48</sup> Nolde referred to him in the following articles, but not in this one. Nevertheless, C. F. Glück is the most likely author who inspired the text of this article. See C. F. Glück (Note 35), pp. 483, 485.

<sup>49</sup> “Personal rights and rights of claim, even if the latter have the objective of demanding the recovery of an immovable, are classified as movables.

D. 2.8.15.4, cf. Inst. 4.6.1.”

<sup>50</sup> As the fourth section is difficult to understand without the third, I am citing both in Latin: *Si fundus in dotem datus sit, tam uxor, quam maritus propter possessionem eius fundi possessores intelliguntur. (3) Diversa causa est eius, qui fundi petitionem personalem habet. (4) Digesta* has been translated here and henceforward using: The Digest of Justinian. A. Watson (ed.). Vol. 1, 2. Philadelphia: University of Pennsylvania Press 1998.

<sup>51</sup> *Omnium actionum, quibus inter aliquos apud iudices arbitrosve de quacunque re quaeritur, summa divisio in duo genera deducitur: aut enim in rem sunt, aut in personam. Namque agit unusquisque aut cum eo, qui ei obligatus est vel ex contractu, vel ex maleficio, quo casu proditae actiones in personam sunt, per quas intendit adversarium ei dare aut dare facere oportere et aliis quibusdam modis: [...]*

<sup>52</sup> Although the common meaning of *actio* is “action”, it also means a claim. *Petitio* also means a claim amongst other things.

<sup>53</sup> “Wenn Rechte, Ansprüche und Forderungen unbeweglichen Sachen zum Gegenstand haben, werden sie ebenfalls zu den unbeweglichen Gütern gerechnet [...]”. C. F. Glück (Note 35), Vol. 2, p. 485. Neither is Nolde’s reference correct, as p. 537 of Vol. 2 does not even remotely consider this subject.

of the article, while there are no references concerning the rest of the article. There are many articles that are completely correspond to the provisions of Roman law (BES articles 1094, 1095, 1096, 1097, the first half of articles 1098, 1099)<sup>\*54</sup>, i.e., six out of fourteen articles. The texts of different authors often coincide in their approach to servitudes. Although Nolde has mainly referred to Mühlenbruch, other authors (e.g., Arndts) often use exactly the same wording. Some typical examples are provided below.

In the first example, the references under the BES article are partly relevant, while others could be replaced with other references:

BES article 1090: *Betrifft die Servitut den Vortheil einer bestimmten physischen oder juristischen Person, so heisst sie Personalservitut; bezweckt dieselbe dagegen den Vortheil eines bestimmten Grundstücks, so dass dieser also von dem jedesmaligen Eigenthümer des Grundstücks beansprucht werden kann, so wird sie Real- oder Prädialservitut genannt.*

*L.1. L.15 D. de servitut. (VIII,1). § 2 et 3 I. De rebus incorporal. (II,2).*<sup>\*55</sup>

This article provides the main classification of servitudes and defines the concepts of personal and real servitudes. The first source referred to, D. 8.1.1, also provides a classification of servitudes: Servitudes attach either to persons, as in the case of the right to use and usufruct, or to things, as in the case of rustic and urban praedict servitudes.<sup>\*56</sup> The second reference, D. 8.1.15, is not quite exact, as the 15<sup>th</sup> fragment is divided into principium and section 1. However, references are usually made with the precision of a section. D. 8.1.15.pr. contains a few examples of invalid servitudes.<sup>\*57</sup> D. 8.1.15.1 defines the nature of servitudes, which lies not in doing something, but in tolerance and inactivity.<sup>\*58</sup> Neither of these is related to the text of the article.<sup>\*59</sup> The third and fourth references (Inst. 2.2.2 and 3) are to the chapter on non-corporeal things and it notes that, e.g., the right of usufruct is also a non-corporeal thing. “The rights which belong to urban and rustic estates also come under this heading. These are also called servitudes.”<sup>\*60</sup>

In conclusion, although these references are about servitudes and at least some of them mention the classification of servitudes, none of them define the nature of personal and real servitudes. They can serve as the basis for this article only very remotely. However, the article should have a reference, e.g., to Inst. 2.2.3 a few fragments below, which clearly states that “the reason these rights are called servitudes belonging to land is that they cannot exist independently of land”, which would be much closer to the text of the article. Other more suitable sources could be referred to.

As the sources of Roman law which are referred to do not provide for such a definition, and it is hardly likely that Bunge referred to the incorrect sources when knowing the correct ones, I tried to find a similar definition from textbooks. Arndts defined them not word for word, but still in a very similar way: “Rights of use are [...] whether personal, *servitutes personarum*, personal servitudes, or rights of use of plots of land, *servitutes rerum, iura praediorum*, praedial or real servitudes depending on whether the right has been established for the benefit of a certain person or a certain immovable, meaning the actual owner of the immovable.”<sup>\*61</sup> Arndts also provides the first reference mentioned by Bunge, D. 8.1.1; his other references differ from those of the BES. Dabelow’s wording is a lot more different from the BES, although he uses the same first source reference, but not the others.<sup>\*62</sup> Puchta’s wording also differs from the BES, although he maintains the same principle. At the same time, stressing the need of each owner of a servitude to gain benefits, Puchta refers to another source, D. 8.1.15.pr., which is referred to in BES article 1090, noting that the impulse for creating the principle of the need of a benefit arose from D. 8.1.19<sup>\*63</sup>; he has not referred to the other sources mentioned in

<sup>54</sup> As each article usually has more than one reference (usually three to seven), one reference may be accurate and the others not. This is how several examples can be obtained from the source references of various articles.

<sup>55</sup> “A servitude which benefits a certain natural or legal person is called a personal servitude; where the purpose of a servitude is to benefit a certain immovable so that it may be claimed by the actual owner of the immovable, the servitude is called a real or praedial servitude.

D. 8.1.1; 8.1.15; Inst. 2.2.2 and 2.2.3.”

<sup>56</sup> *Servitutes aut personarum sunt, ut usus et usus fructus, aut rerum, ut servitutes rusticorum praediorum et urbanorum.*

<sup>57</sup> D. 8.1.15.pr.: “Whenever a servitude is found not to be for the benefit of an individual or an estate, a servitude preventing you from walking across or occupying your own land. Thus, nothing is achieved if you grant me a servitude to the effect that you shall not have the right to use and enjoy your own land. It would, of course, be otherwise if the grant was to the effect that you should not have the right to obtain water from your own land at the expense of my supply.”

<sup>58</sup> D. 8.1.15.1: “It is not in keeping with the nature of servitudes that the servient owner be required to do something, such as to remove trees to make a view more pleasant or, for the same reason, to paint something on his hand. He can only be required to allow something to be done or to refrain from doing something.”

<sup>59</sup> References to D. 8.1.15.pr. and D. 8.1.15.1 can also be found under articles 1094 and 1097, where they are indeed relevant.

<sup>60</sup> Inst. 2.2.2: [...] *nam ipsum ius hereditatis et ipsum ius utendi fruendi et ipsum ius obligationis incorporale est.* Inst. 2.2.3: *Eodem numero sunt iura praediorum urbanorum et rusticorum, quae etiam servitutes vocantur.*

<sup>61</sup> L. Arndts (Note 28), p. 271.

<sup>62</sup> C. C. Dabelow (Note 24), p. 338. Vangerow’s wording differs from the BES and he does not refer to any sources in his definition. K. A. Vangerow (Note 29), pp. 627–631.

<sup>63</sup> However, D. 8.1.19 practically confutes the content of article 1090 and the statement of 8.1.15.

the BES.<sup>\*64</sup> The common part of these sources which the BES refers to is that the above textbooks contain not only the references to Roman law, but also the Latin text of the provisions. Although the textbooks contained other references to sources, the BES mentions those whose text was provided in the textbooks and which were therefore easy to check. It seems that Bunge has taken the text of this and other articles almost or completely word for word from a textbook and added some references to Roman law on the basis of the citations made in the books without delving into the substance of the citations.

As regards servitudes, there were many cases (4.5<sup>\*65</sup>) (BES articles 1090, 1092, 1098 point d, 1099, 1102) where one of the sources referred to in the text reflects the Roman law source of the BES text, while the other references made in the BES are irrelevant. It also happens that various references to a source repeat the same idea, while the repeated part makes up only a half of the BES article and the other half has no reference (BES article 1101).

It is quite common that a source contains a specific example or case, from which the BES draws a general rule (BES articles 1092, 1093, 1102). In such case, secondary literature has done the generalisation work. Some sources may have served merely as inspiration for the text of the BES (BES articles 1089, 1090, 1091, 1101). Among the general principles of servitudes, none of the articles have only completely irrelevant references to sources.

I would like to give an example of the source reference of an article, in which case the general principle is presented more specifically as a principle of the right of servitude and others need to be generalised or modified in order to understand the connection with the text of the BES article:

BES article 1092: *Ist der Umfang einer Servitut zweifelhaft, so spricht die Vermuthung für den geringsten Umfang des Servitutenrechtes.*

*L.20 § 4 u. 5 D. De servitut.praed.urb. (VIII,2); L.20 D. De servitut.praed. rust. (VIII,3); L.9 D.de regulis iuris (L,17).*<sup>\*66</sup>

The third reference of this article (D. 50.17.9) is to the principle of Roman private law serving as the basis for the article — *Semper in obscuris quod minimum est sequimur* (In matters that are obscure we always adopt the least difficult view), which has been transposed to servitudes.

D. 8.2.20.4 gives a specific example of the servitude of stillicide (*stillicidium*): If rainwater was originally discharged from tiles, it is not permissible subsequently to discharge it from broad-work or any other material.<sup>\*67</sup> D. 8.2.20.5 goes further with the servitude of stillicide and describes other possibilities or acquiring it and the establishment of such a servitude. It has been stated amongst other things that “a servitude can be rendered lighter, but not heavier”.<sup>\*68</sup> While the remaining text described various cases, this part of a sentence contained a more general rule, which, however, requires further generalisation and a quite different approach for the text of BES article 1092. The reference to D. 8.3.20 is again inaccurate, as it consists of four fragments; however, if all four were to be true, we have another four inappropriate references. Namely, they all describe methods of establishing other servitudes in addition to the right of servitude or the extinguishment of such servitudes, but that the rights of the owner of the dominant parcel of land correspond to the applicable servitudes.

The content of BES article 1092 has thus been provided in a generalised form in only one source. In addition, another source contains a rule that needs to be modified. The remaining sources describe in smaller or greater detail specific servitudes, but they can only serve as inspiration for article 1092 at best. In addition to that, they could have served as inspiration to many other articles to at least an equivalent extent.

Such a principle of the right of servitude, although not in quite the same wording, has been mentioned only by Mühlenbruch, from whom the first two sources also originate.<sup>\*69</sup> None of the other authors (Dabelow, Arndts, Vangerow and Puchta) discuss such a principle of the right of servitude and neither do they refer to these sources.

<sup>64</sup> F. G. Puchta (Note 30), p. 248.

<sup>65</sup> Four and a half articles because one article has separate references for its various parts. One of these references was completely irrelevant while the other could serve as a source of the text.

<sup>66</sup> “If the scope of a servitude is arguable, the servitude is presumed to apply to the smallest scope. References: D. 8.2.20.4; 8.2.20.5; 8.3.20; 50.17.9.”

<sup>67</sup> *Si antea ex tegula cassitaverit stillicidium, postea ex tabulato vel ex alia materia cassitare non potest.*

<sup>68</sup> *Stillicidium quoquo modo adquisitum sit, altius tolli potest: levior enim fit eo facto servitus, cum quod ex alto, cadet lenius et interdum direptum nec perveniat ad locum servientem: inferius demitti non potest, quia fit gravior servitus, id est pro stillicidio flumen. eadem causa retro duci potest stillicidium, quia in nostro magis incipiet cadere, produci non potest, ne alio loco cadat stillicidium, quam in quo posita servitus est: lenius facere poterimus, acrius non. et omnino sciendum est meliorem vicini condicionem fieri posse, deteriore non posse, nisi aliquid nominatim servitute imponenda immutatum fuerit.*

<sup>69</sup> C. F. Mühlenbruch (Note 34), p. 138. Erdmann does not describe this as an inherent characteristic of servitudes, but as a confirmation that also under the BES, the owner of a servitude can use the servient property only partly. See C. Erdmann (Note 3), pp. 255–256.

Compared to all textbooks, the regulation of the BES is extremely detailed and casuistic<sup>\*70</sup>; article 1092 is a good example of this. Namely, essentially the same (the fact that the right of servitude is applicable in an as small as possible scope) can be concluded from BES article 1101. Also in the event of references to sources, Bunge has remained true to the principle of great detail and casuistry — he has added as many references as possible that repeat each other, are partly irrelevant, or simply decorative. For example, article 1093 has seven references, all of which contain more specific, more or less relevant examples that support the general principle of the article. As many of them are only very remotely related to the text of the BES article, at least some of them could have been omitted, especially considering that Bunge wanted to reduce the role of Roman law. Considering all the incorrect or inaccurate references, he would have had plenty of opportunities to reduce the number of references to Roman law.

To summaries to results of this random analysis, all completely irrelevant references were found in the part concerning types of things; there were none in the servitudes part. Thus, of the 23 articles of the BES analysed, 3.5 articles contained only incorrect references; 6 articles referred to the same concept in a different context, and the remaining 13.5 articles had at least one source each that served as the basis for the article, even when it had to be generalised.

## 5. Purpose of the BES references to Roman law sources

Although Bunge himself claimed that the proportion of Roman law in the BES should have been reduced, this wish did not apply to adding references to Roman law sources.<sup>\*71</sup> More rather than less of such references have been added to the parts of the BES studied in this paper. Quite a few of the references are irrelevant. As a rule, the references have been drawn from textbooks, in which they were relevant (although perhaps in a different context), but they are irrelevant to the specific article of the BES. Considering that most articles were still supplied with at least one relevant source, it may be presumed that Bunge did not choose the references quite randomly, but made a certain choice, probably choosing references from textbooks and preferring those which provided also the text of the source and not only a reference. Bunge's own words suggest that he wished to reduce the role of Roman law. However, this does not seem to be the case if we consider the multitude of references to Roman law sources. Although the references are not completely random, he has chosen to add a larger rather than smaller number of them. This raises the question of what role these references to Roman law played. Was the instruction to supply all articles with references to applicable law the only reason why Bunge added such a great number of references to Roman law?

The multitude of references to sources (based only on the index of sources) is one of the reasons why the BES embodies the triumph of Roman law. Could Bunge have wished the BES to strike as mainly the outcome of Roman law, even if it was not entirely so? Did the great number of references to Roman law serve to legitimise Bunge's undertaking despite his intention to reduce the use of Roman law? On the one hand, it may have been necessary to legitimise the BES for the local provincial practitioners who had been constantly using Roman law in their practice and wished to continue doing so. It should be admitted that provincial legal science was still in a much poorer state compared to Roman law research. This way, practitioners would have been left with the impression of "soft landing" and the hope that former Roman law practice would still be usable.

On the other hand, times had changed also in terms of imperial governance: a former toleration for the special regulations applicable in various parts of Russia was being replaced at the beginning of the 1860s with the Russian central government's wish to harmonise Russian legislation<sup>\*72</sup>, and in such case, a great number of local sources would not have been accepted so well. In addition, the Russian government was at that time fascinated by everything originating from Rome<sup>\*73</sup> — it was certainly more acceptable for the central government for the

<sup>70</sup> The same is stated in M. Luts. Textbook of Pandects or New Style Legislation in Estonia. – Juridica International 2001, p. 153. Marju Luts means the multitude of types of real servitudes, but the number and detailed nature of general provisions is also remarkable and quite unusual to pandect textbooks, at least as far as servitudes go.

<sup>71</sup> There are not many references to other sources. For example, specific types of servitudes often have references to only common law or to one or two sources of local law.

<sup>72</sup> In the judicial reform of 1864, various regions were no longer allowed to have their own codes of law; only minor deviations from the general were tolerable.

See F. B. Kaiser. Die Russische Justizreform von 1864. Zur Geschichte der russischen Justiz von Katharina II bis 1917. Leiden 1972, p. 21 ff. Most likely this view was not adopted suddenly but was the result of a longer development process.

<sup>73</sup> About the fascination of Roman law in about 1864, G. Sersenevich has said that a dogmatic branch of private law was developed here after 1864: "dogmatic study of civil law has a prevalent/enormous meaning in legal science. A system of generalisation and definition is actually developed primarily in Roman law, after which the system is used for single bodies of legislation. For example, for French, German, and Russian law. [...] Here, the dogmatic branch of private law was developed after 1864, when new judicial establishments developed a need for systematised

BES as a local special law to rely on Roman rather than the local law. Therefore, it was perhaps possible to legitimise the BES this way for both local practitioners and the Russian government, while preserving many aspects of local laws.

Certainly the references may have been of help for users in interpreting the provisions of the BES; some examples of this are known. For example, Erdmann used the references of BES article 529 in his commentary to the article.<sup>\*74</sup> However, the references to the BES article served a minor role in his argumentation and were not among the main arguments. Judicial practice has not been studied in this context; this is a subject for further research. The highest court of the Russian Empire, the Senate, has used a source reference of the BES in its reasoning in at least one case. A Senate decision of 1878 relies amongst other things on a reference to Roman law provided under BES article 1602, which was cited first in Latin and then in a translation into Russian. Luckily, the source of that article was in line with the content of the article.<sup>\*75</sup> Although Roman law no longer served as a subsidiary law, the source references in the BES and their texts could thus be regarded as a part of law. How often this was done and to what extent the references could be used to extend the wording of the law and not just serve as supporting arguments, is not yet known.

## 6. Conclusions

Naturally this small excerpt cannot serve as a basis for very far-reaching conclusions. Still, it may be said that when the classification of things gave the impression that most references had no connection or had only a very indirect connection with the sources of Roman law; this was not the case with servitudes. However, it is the classification of things that would not be expected to deviate so much from Roman law. Servitudes are an area where later theory may have much to say and change. The result is therefore surprising.

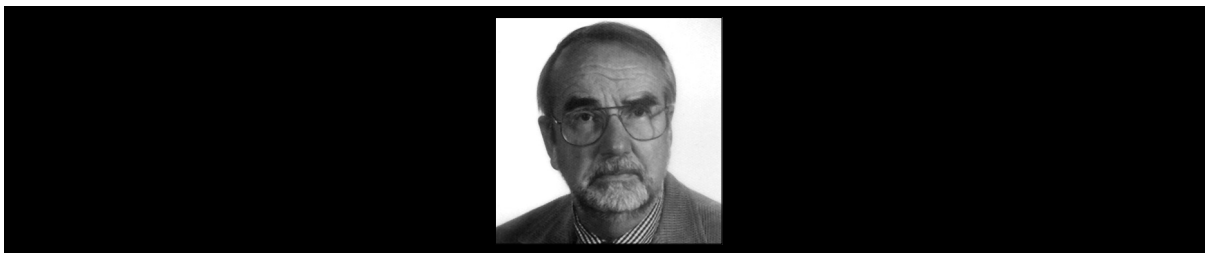
When writing the BES articles that originate from Roman law, both Bunge and the editors of his draft used the textbook by L. Arndts “Lehrbuch des Pandektenrechts”, which Professor of Roman law O. Meykow of the University of Tartu used in his lectures. The wording of several sections of servitudes, but not so much of the classification of things, corresponds to the wording of Arndts’ textbook. Although Nolde refers almost only to Mühlenbruch and Glück in this chapter, they do not seem to be the only authors who have been used in the part discussed in this paper. It is possible that the works of various authors (e.g., Arndts and Mühlenbruch) were used in several articles of the BES. Bunge has also used Dabelow’s *Handbuch...* in the wording of several articles.

Most of the additions in the wording of the articles certainly originate from Arndts; some corrections seem to have been guided by Dabelow’s approach. Whether these were done by Meykow or someone else (Bunge himself) is not clear. In any case, the references in the observed chapters were added by Bunge himself in 95% or more of the cases. The question of whether the coincidence between the references of article 1090 and the Roman law sources cited in textbooks is accidental or intentional needs further investigation. I cannot currently confirm or refute whether any other textbooks were used. The reason for the large number of references to Roman law requires further research, but probably it arises from the wish to legitimise the BES in the eyes of local provincial practitioners as well as the Russian central government. However, it may be said that the multitude of references to Roman law did not imply an equally extensive use of Roman law, and we cannot speak about the triumph of Roman law that has been claimed so far.

legal knowledge in order to understand the nature of institutes of law and not merely learn the text of the law by heart.” See G. Sersenevits. *Utsebnik russkovo grazdanskovo prava*. 1907, p. 17. See also V. Letyayev. *Vospriyatiye rimskogo naslediya rossiiskoi naukoi XIX – natshala XX veka*. Volgograd 2002, p. 19 ff. The author thanks Toomas Anepaio for the references and for drawing attention to this possibility.

<sup>74</sup> C. E. Erdmann (Note 3), p. 134. See also Note 39 of this paper.

<sup>75</sup> Senate Ukase in the case J. H. Koch Department Store vs. Provincial Prosecutor Wilhelm v. Stackelberg, 22 June 1878. – Estonian History Archives 858-1-86, p. 170 ff. Marju Luts-Sootak drew the author’s attention to this decision; Luts-Sootak states that using the referenced source in the interpretation of the BES articles was an exception rather than a rule in the practice of the Senate.



# Peter Schlechtriem

(2.3.1933–23.4.2007)

Peter Schlechtriem, a great researcher, person, teacher and colleague, has passed away. The people who knew him admired and respected him as an exceptionally wise and intelligent scholar, an energetic advocate for comparative legal science, a person with a great heart, whose amiability and helpfulness will never be forgotten by those who experienced it. His clear and simple style, which made every discussion he participated in an enjoyable insight into complicated legal discourses, is unforgettable.

Peter Schlechtriem was born in Jena, studied law in Hamburg and received a Doctoral level degree in 1964 in Freiburg, while working as an assistant to Professor Ernst von Caemmerer. Throughout his life Schlechtriem was involved with the University of Freiburg. After receiving a Master's level degree in Comparative Law in 1964/1965 at the University of Chicago, he returned to Freiburg and was habilitated in 1970, again under the supervision of Professor von Caemmerer. Cooperation with one of the most renowned jurists was decisive in his later activities as a researcher and teacher. From 1971–1977 Professor Schlechtriem worked as a Professor in the University of Heidelberg and was the Director of the Institute of Private International Law. After returning to Freiburg, he became a successor of Professor von Caemmerer and Co-director of the Institute for Foreign and International Private Law, until the year 2000. From 1970–1977 he was the President of the Comparative Law Society (*Gesellschaft für Rechtsvergleichung*). In 1995 he was elected Honorary Doctor of the University of Basel and in 2002 Honorary Doctor of the University of Tartu. Schlechtriem worked as a Visiting Professor for the Universities of Oxford, Chicago, Harvard, Wellington, Fribourg and Zurich.

Professor Schlechtriem was an internationally acclaimed and known specialist in commercial law and participated in drafting the United Nations Convention on Contracts for the International Sale of Goods and the UNIDROIT Principles of International Commercial Contracts. He made an invaluable contribution to the harmonisation and development of the European law of obligations. He was a member of the Study Group for a European Civil Code, member of the UNIDROIT II principles working group, and advisor to the American Law Institute. He was a creator and developer of today's theory of unjustified enrichment.

In addition to that, he had the time and willingness to be present at the development of Estonian law of obligations, to contribute his knowledge and experience and to make his best efforts to make the Estonian Law of Obligations Act not only a carrier of modern principles and approaches, but also a practical and effective system of provisions. Several young Estonian researchers have written their Doctoral and Master's theses under the supervision of Schlechtriem. For them it was an inexhaustible experience, luck and opportunity that will never be forgotten. His textbooks were the first Estonian textbooks on the law of obligations. His students were the first to present to Estonian legal practitioners the European way of thinking, understanding of law and its role in society. Schlechtriem was a foreign member of the editorial boards of the law journal *Juridica International*. His support gave Estonian jurists an opportunity to actively participate in drafting the European Civil Code. He made an invaluable contribution to the advocacy of Estonian legal science, offering publishing opportunities to our jurists, and introducing the findings of Estonian civil law science to the entire world.

It is hard to believe that we can no longer ask for advice and benefit from the simple answers to complicated questions from a colleague who has been a good friend and loyal companion for many years. It was a great honour and privilege for all of us to know Peter Schlechtriem.

In memory of Peter Schlechtriem.  
The Faculty of Law of the University of Tartu.



Conference on Developments in European Law:  
European Initiatives (CFR)  
and Reform of Civil Law in New Member States

Dedicated to the 375th Anniversary of the University of Tartu  
Venue: Assembly Hall of University of Tartu, Ülikooli 18, Tartu, Estonia

With the support of the **Fritz Thyssen Stiftung**, Köln/Germany

### Programme

#### Thursday, 15 November 2007

- 9:00-9:30 Registration
- 9:30-10:00 Opening Speeches  
**Prof. Alar Karis**, Rector, University of Tartu  
**Mr. Rein Lang**, Minister of Justice  
**Mr. Märt Rask**, Chief Justice of the Supreme Court  
Representative of the EC Commission
- I The Present State and Future Perspectives of Harmonization of Private Law
- Chair: **Mr. Rein Lang**, Minister of Justice, Estonia  
**Prof. Norbert Reich**, University of Tartu, Estonia
- 10:00-10:30 **Prof. Christian von Bar**  
University of Osnabrück, Germany  
An Introduction to the Academic Draft Common Frame of Reference
- 10:30-11:00 **Prof. Hugh Beale**  
University of Warwick, Great Britain  
The Nature and Purposes of the Common Frame of Reference
- 11:00-11:30 Coffee Break
- 11:30-12:00 **Prof. Walter van Gerven**  
University of Leuven, Belgium  
The Open Method of Convergence, Coordination and Education
- 12:00-12:30 **Prof. Hans Schulte-Nölke**  
University of Bielefeld, Germany  
From the *Acquis Communautaire* to the Common Frame of Reference –  
the Contribution of the *Aquis* Group

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## II The Influence of Harmonization of Private Law upon the Development of the Civil Law in New Member States of the European Union and Non-Member States

Chair: **Prof. Thomas Wilhelmsson**, University of Helsinki, Finland  
**Prof. Paul Varul**, University of Tartu, Estonia

15-minute presentations from the representatives of the new member states and non-member states regarding their states, followed by discussion.

- 14:00-15:30     **Prof. Jerzy Rajska**, University of Warsaw, Poland  
                  **Dr. András Kisfaludi**, University of Budapest, Hungary  
                  **Prof. Valentinas Mikelenas**, University of Vilnius, Lithuania  
                  **Prof. Luboš Tichy**, University of Prague, Czech Republic  
                  **Dr. Damjan Možina**, University of Ljubljana, Slovenia  
                  **Prof. Kalvis Torgans**, University of Riga, Latvia
- 15:30-16:00     Coffee Break
- 16:00-17:15     **Prof. Irene Kull**, University of Tartu, Estonia  
                  **Dr. Monika Józson**, University of Transylvania, Roumenia  
                  **Dr. Monika Jurcova**, University of Trnava, Slovakia  
                  **Prof. Christian Takoff**, University of Sofia, Bulgaria  
                  **Prof. Andreas Furrer**, University of Luzern, Switzerland
- 17:15-17.45     Discussion

### Friday, 16 November 2007

During the second day of the conference three topics are discussed mainly from the point of view of what has been done to harmonize the law in the given field and how the given problems are dealt with in the new member states. The presenters will give 30-minute presentations followed by discussion.

- 9:00-11:00     **Pre-contractual Obligations**  
Chair:     **Prof. Christian von Bar**, University of Osnabrück, Germany  
Speakers: **Prof. Hugh Beale**, University of Warwick, Great Britain  
                  **Prof. Thomas Wilhelmsson**, University of Helsinki, Finland  
                  Discussion
- 11:00-11:30     Coffee Break
- 11:30-13:30     **Unfair Terms**  
Chair:     **Prof. Hugh Beale**, University of Warwick, Great Britain  
Speakers: **Prof. Fryderyk Zoll**, University of Krakow, Poland  
                  **Prof. Thomas Wilhelmsson**, University of Helsinki, Finland  
                  **Prof. Norbert Reich**, University of Tartu, Estonia  
                  Discussion
- 14:30-16:30     **Secured Transactions**  
Chair:     **Prof. Hans Schulte-Nölke**, University of Bielefeld, Germany  
Speakers: **Prof. Anna Veneziano**, University of Teramo, Italy  
                  **Prof. Hugh Beale**, University of Warwick, Great Britain  
                  Discussion
- 16:30-17:00     Closing Remarks  
                  **Prof. Norbert Reich**, University of Tartu, Estonia  
                  **Prof. Christian von Bar**, University of Osnabrück, Germany  
                  **Prof. Paul Varul**, University of Tartu, Estonia