



Dear reader,

This issue of *Juridica International* continues a solid tradition of offering articles to a wide range of readers while concentrating on one central topic, which this time is the prospects of the right of obligation in Estonia and in Europe. With 2012 came the 10-year anniversary of entry into force of the Law of Obligations Act, the last of the five parts that make up the Estonian Civil Code Act. The highly significant event for Estonian private law of its entering into force on 1 July 2002, together with the General Part of the Civil Code Act, was celebrated on 29–30 November 2012 in Tartu by an international conference at which the issues of implementation of the act were discussed and the tendencies in development of the right of obligation in Europe were analysed. The Law of Obligations Act may be called a science-based act, since its preparation involved analysis of the law of other countries, the sources of common European contract law and international law, and foreign judicial practice at the level of norms and principles, as well as implementation. This was an act prepared on the principle of the ‘best solution’, one that contributed substantially to the foundation for comparative legal implementation of law and for theoretical studies in comparative law. The method of the best solution has since justified itself, along with adoption of the principles of common European contract law and international trade law. It can be said that efforts to develop direct legal loans, foreign judicial practice, and theoretical views into an internally coherent system that functions without major failures yet can still be called modern and European law in its essence have succeeded. However, it would be incorrect to state that all purposes of the act have been fulfilled—mainly in light of the regulations that have been added later. For instance, the actual purposes of the consumer-protection norms in the Law of Obligations Act and other acts have become questionable, since the solutions provided are ineffective and often discordant with the already developed private-law system. Accordingly, several articles in this issue are dedicated to critical analysis of the purposes of the act and the legal instruments chosen for achieving these purposes.

In the decades since the act was passed, the meaning of national law has changed significantly. In this issue, the reader can find an article by H. Beale, based on a presentation in the private-law portion of the XXXII Estonian Lawyers’ Days (‘The Constitution at 20: Legal Practice from Pragmatism to Constitutionalism’), examining the Common European Sales Law as a competitor or alternative to the Estonian law. In his article, Prof. Beale gives a simple and clear explanation of the prospects of the private law in the Member States. He envisions competition with the common European private law, which, as part of each Member State’s national law, will become a 29th legal system. Publication of a presentation of the proposal for the Common European Sales Law by the European Commission has unleashed new processes in European private law. Therefore, on one hand, we can say with satisfaction that, in principle, Estonia has established its modern private-law system and there is no need for its constant large-scale amendment and rewriting. On the other hand, however, the situation foreseen, involving impending competition, forces the Member States to undertake critical analysis and modernisation of their national legal systems. Issues related to the wider functions of international private law and the position of national law in the private-law system and in administration of justice in the European Union arise with increasing acuteness in this process.

Since each legal system in Europe represents an independent legal culture characteristic only to that legal system, it is inevitable for interpretation of law also to

be culturally determined. In my opinion, the critical element for Estonian law is the lack of fundamental dogmatics of private law in several important fields related to the right of obligation. Considering the Law of Obligations Act from a development perspective in the context of shaping a common European private law means that our understanding of the internal structure of our laws, the hierarchy of our norms, and the methods for interpretation and implementation of law becomes important. For instance, several issues of legal dogmatics pertaining to legal remedies in the Estonian law are raised in this issue of the journal, along with the actual level of protection accorded to consumers in consumer-credit contracts, restitution upon expiry of a contract, etc. It is equally important to know what problems are addressed in Latvia, Russia, Germany, Belgium, or the Nordic countries.

The development of the common European law proceeds from the presumption that supplier parties are less and less tied to a specific country and that, therefore, a neutral law shall be provided to the market participants, so as to speed up and support economic circulation. This would be beneficial to consumers and undertakings alike since it would eliminate the advantages enjoyed by states with so-called well-developed legal systems, whose law is trusted more. Neutral law is based on specific definitions and rules. Estonian lawyers have certain advantages in this process, in that the Law of Obligations Act largely contains the law that has come to be defined as the Common European Sales Law. However, that is not enough. Development of a common understanding is rooted in comparative legal studies, which have not yet, however, been performed in sufficient quantities in Estonia. Turning from private law to common understanding, I would now like to emphasise the importance of law, especially comparative law, in the development of a state's legal system. To the best of my knowledge, legal base studies have received no support or acknowledgement from the Estonian state in recent years. Vital for a strong economy are a coherent legal system and the effective functioning of that system; however, to come up with the best solutions, we have to be familiar with the law of other states, common European private law, and international trade law. In doing so, we should still bear in mind, though, that the basis for comparative legal studies is formed first and foremost of a systematic and scientifically grounded understanding of the law of one's own state, which is, above all, a process, not a condition justified simply by declaring that the Estonian private-law system is complete and needs no amendments.

Comparative legal studies form an inseparable part of more than just private law. The articles on environmental law, financial law, administrative law, penal power, and procedural law published in this issue are also based on comparison, whether norm-based or functional. It is important for us to know what the problems in other countries are and whether they have developed solutions that we could adopt. Estonian participation in the global discourse through legal studies is equally important and a process in which *Juridica International* continues to play an important part.



Irene Kull

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The Role of Comparative Law in the Making of European Private Law

1. Affinitive legal systems

Estonia can now celebrate the tenth anniversary of its Law of Obligations Act, and this is perhaps a not inappropriate occasion to reflect on the role of comparative law in the development of a European private law. After all, the Estonian code on the law of obligations arose out of foundation work conducted in comparative law. Peter Schlechtriem's contribution to that is not forgotten. The commentary on the code, all three volumes of which have since been completed, is likewise rich in references to international material; the team of editors and contributors led by Paul Varul has succeeded in weaving into the text extensive treatment of the Draft Common Frame of Reference (DCFR) in particular. Now that the code of obligations has passed its probation, the task for the legal scholars of Estonia may well lie first and foremost in shadowing and chap-eroning the text and consolidating its sensible practical application. For that purpose of reinforcing the Est-onian law of obligations, it long ago became more important to concentrate once again on the national code rather than to consult foreign legislation, case law, and literature. Of course, one may well wish to assure oneself of the correctness of the route the code has apparently chosen through the light cast by foreign legal materials and to check whether, even after such a short time, reforms to particular provisions are already needed. Apart from this, however, foreign law remains confined as a rule to the role of a stopgap; it will be enlisted when it pinpoints a solution to questions that could not be sufficiently analysed in this jurisdiction.

Thus, in a case of doubt one may well look to Germany. That makes sense most of all in those instances wherein the German and Estonian legal systems assume a parent–child relationship in which the defining elements of the Estonian code of obligations have been borrowed from German law. The tort-law concept of unlawfulness, the law of unjustified enrichment, and the complicated doctrine of *negotiorum gestio* constitute prominent examples among many. Similar phenomena are to be found in many parts of the European Union—for instance, in the relationship between Portugal and Italy, between Cyprus or the Isle of Man^{*1} and England, between Belgium and France, between Finland and Sweden, between the Czech Republic and Austria, and between Greece and Germany. Within closely related legal systems, developments are also followed in the country from which the relevant regime or rule is derived. Germany—on the scale of a Europe divided into small domains—is already a ‘large’ country; moreover, at any rate, it possesses comparatively more copious jurisprudence and scholarly legal literature than Estonia. One may well, therefore, long continue to draw inspiration from it—if that is desired.

¹ On which one can now consult the impressive work by M. Zillmer. *Die Rechtsordnung der Isle of Man – mit Schwerpunkt im Wirtschaftsrecht, verglichen mit dem englischen Recht*. Universitätsverlag Osnabrück 2012.

2. Information and opinion about foreign law

That is admittedly ‘only’ one particular form of practical useful application of comparative legal research, but it is at least directed toward a concrete aim and for that reason has sustained value. At the same time, it contributes (albeit on a modest scale) to maintaining networks of interlinkage between the European systems of private law. In no way is this something that can be asserted about every focus on foreign law—not even when it is flagged as comparative law. ‘Comparative law’ is a term originating in the world of nation-states, a description that even today continues to mislead many legal minds. For the most part, they associate the term ‘comparative law’ with the—trivial—notion (born out of the prevailing conditions of the 19th and early 20th centuries) that it consists of juxtaposing at least two national legal systems, ascertaining where the law of A and the law of B are the same and where they differ, and finally determining which of them is ‘better’. A hundred years ago, it was, of course, always one’s own law that was ‘better’, and, if the Law Society of England and Wales is to be believed, there are still regions in the north-west of our union where that deeply rooted conviction is still alive and kicking.^{*2} It is part of the standard repertoire of academic writing on the law of delict in my own country to make indignant observations about the ‘general clause’ of the French law on liability; the standard textbooks of French law, by contrast, are so utterly infatuated with the elegance of their own system that as a rule they do not even consider looking outward to other systems. That said, they are still self-confident enough in France not to join in the chorus of legal comparativists whose—perfectly contrary—refrain in the final decades of the last century rang out that the cherries are rosier in the neighbour’s garden (or, as one says in England, the grass is greener on the other side). Some German authors, returning after the Second World War from a period of study in the USA, tended to demonstrate the correctness of their new ideas by showing that the Supreme Court of Alabama saw matters in much the same way they did. It is only now, once we have already reached the threshold of a European sales law, that the pendulum is swinging back. The internationalism peppering the career-advancing dissertation of a young politician turns out not to be so Europhile in nature after all! Legal chauvinism and legal narcissism are spreading.^{*3} Hardly anything ‘European’ has stirred the soul of private-law jurists quite as much as the DCFR and the draft Common European Sales Law derived from it. The commotion is not justified from the standpoint of substance; it is all about emotions. Rules that encroach far more on national sovereignty (e.g., in the law on recognition of foreign judgements or in international insolvency law) pass through the legislative process almost devoid of any echo in the literature—‘anything, just not a European sales law’ is the resounding message in German, French, and English circles.

Anxiety about being swamped by foreign influences and losing a knowledge power base is spreading. Have we who regard ourselves as legal comparativists done something wrong? Have we failed to reflect sufficiently on what our branch of scholarship can and should yield for Europe? Internationalism is important at a personal level because it establishes trust, but at the technical level it bears no fruit as long as it is pursued merely for its own sake. Intellectual tourism, to coin a term, does not generate fresh insights. At best, the sum of legal knowledge is added to only marginally when a particular rule can be identified as Italian, Estonian, or Polish. Such knowledge assists in private international law and international civil-procedure law (and, of course, when the relevant EU regulation has to be interpreted correctly^{*4}) when in a particular case foreign law falls to be applied. A great deal is demanded of courts nowadays; European rules on jurisdiction that are consumer-friendly and advantageous to injured parties are causing the number of legal proceedings that fall to be decided on the basis of foreign law to escalate on a phenomenal scale. The rules on free movement of companies, meanwhile, also oblige courts to render the most surprising judgements. A recent decision of the Berlin *Kammergericht*, for example, set out what a German *Amtsgericht* has to take

² Law Society of England and Wales. England and Wales: The jurisdiction of choice. Dispute resolution. London 2008. Available at http://www.lawsociety.org.uk/documents/downloads/jurisdiction_of_choice_brochure.pdf. The UK Minister of Justice states there that he is ‘committed to supporting the legal sector’s success on the international stage [and] therefore delighted to introduce this brochure by the Law Society promoting England and Wales as the jurisdiction of choice for the resolution of disputes arising over the world’ (*ibid.*, p. 5).

³ On this point, see C. von Bar. Konkurrenz der Rechtsordnungen und „Law made in Germany“. – *Liber Amicorum Ole Lando*. Copenhagen 2012, pp. 13–25.

⁴ A fine example is provided by Article 13 of the Rome I Regulation, which in English is headed simply ‘Incapacity’. In its German-language version, the provision refers to ‘Rechts-, Geschäfts- und Handlungsfähigkeit’, but in the context of this provision the concept of *Handlungsfähigkeit* has no sensible meaning. What is meant here can only be appreciated against the background of legal concepts such as the *capacità di agire* (‘acquired by adulthood’) of Italian law.

into account when an ‘English PLC’ (whatever the court may have meant by that) aspires to be a founding member of a German GmbH. The ‘PLC’, according to the *Kammergericht*, is ‘represented by its director. However, it is the Company Secretary who is responsible for complying with formal requirements [...]. The Company Secretary is chosen as a rule by the director. Companies with a single director [...] may not also appoint [him] as Company Secretary’.⁵ I have no idea whether that is accurate, but it takes my breath away in view of the sheer extent of the demands made of a poor registrar snowed under with court files in the court of first instance.

If we as a team of academic lawyers interested in foreign legal systems really want to help our courts, then we must stand together and wrench from the Ministers of Justice in our countries the wherewithal—sufficient in terms of staffing, equipment, and funding—to establish on a distributed basis across the European Union a number of centres of information on the law in the member states of said union. These would be centres that can provide reliable information—in the language of the court making the request—on the detail of the legal system in focus, for which that centre is competent to answer. The European Convention on Information on Foreign Law⁶, signed in London under the mantle of the Council of Europe, was well meant, but it simply does not function. In my country, information about foreign law continues to be obtained from universities or other institutions of higher education, a form of ‘passing the buck’ in which the latter are in principle unable to cope with the demand. It is a scandal verging on a denial of justice, and I am shocked by how little attention it attracts. Eradicating the practice, however, will be a difficult task. That is only too apparent from the chorus urging anything but a European sales law. And yet would they therefore at least advocate investing in an efficient and productive system for imparting information? ‘Much too expensive’ they would doubtless say. In our institute in Osnabrück, we have attempted some amelioration by compiling a comprehensive bibliography of more than 25,000 monographs, journal articles, court decisions, and other materials in German on foreign law.⁷ But this too is only modest assistance; either the answer to questions on which the resolution of a case hangs cannot be found in the literature we have listed or the parties and the court are unswerving in continuing to insist on an elaborate expert report. There are still liability insurers in Europe who appear to be unperturbed by the disproportionality between the sum in dispute and the cost of obtaining an expert opinion.

3. Petty internationalism

When the task at hand, determined by the happenstance facts of a particular case, is one of ascertaining certain particular rules of a given foreign legal system, on the basis of which the case is to be resolved, much depends for the parties on the correct answer; in academic terms, however, such serendipities do not as a rule lead anywhere. That holds even for the occasional ‘academic’ article proceeding from such an expert report. What, for example, does one glean from the fact that the rule that civil-law ownership is confined to ‘corporeal objects’ can be found not merely in Germany and Estonia but also in Greece, the Netherlands, and Poland? It may be cause for a little self-affirmation for jurists in those countries perhaps, but what else does it yield? Confronted with a ‘So be it, then’ and a shrug of the shoulders from those of his colleagues who are not interested in comparative law, the proud author of such an article ultimately can only parry with difficulty. A lemon remains a lemon, even if it originates in Sicily rather than Crete. Let us not kid ourselves. A typical comparative legal study, usually confined to a few legal systems, tends (after elaborating on differences in method in resolving the given problem) to end ultimately with the thesis that the legal systems examined are nevertheless similar. In essence it is always the same. Comparative law of this type remains unengaging. It offends no-one—and passes away gracefully in oblivion.

⁵ KG 22.2.2012. – ZIP 2012, pp. 1462, 1463.

⁶ Reproduced in, among other works, the German BGBI, 1974 II, p. 938.

⁷ C. von Bar. *Ausländisches Privat- und Privatverfahrensrecht in deutscher Sprache*. 9. Aufl. Munich: Sellier European Law Publishers 2013.

4. Political correctness

It is downright menacing to purport to be international merely in order to be fashionable or ‘politically correct’. I decline to make manifest poor comparative law that takes a lead from the so-called Bologna process, at the end of which the academic world is suddenly divided into Bachelor and Master from Coimbra to Tartu and not merely from Galway to East Anglia. We would ruin the German system of legal education for good if we were to convert to this system.^{*8} A Belgian colleague recently drew my attention to the new Rwandan Contract Law, a lengthy legislative measure that, he observed, looked as if a jurist trained in the common law had tried to make sense of the Code Napoléon! I have not formed my own opinion on that point, but I discern that matters here in Europe are sometimes somewhat similar, though under different auspices. Too many people are trying with too much haste to understand and copy the common law; and thus it is that we discover the trust suddenly in the heart of the continent in the new Czech civil code.^{*9}

5. Legal families

This brings us to a further stereotype in comparative law: the conviction that the legal systems of this world can be tidily arranged into legal families (or spheres). For a long time now, that assumption has not withstood detailed examination, yet it is so deeply anchored in the human consciousness that there is little prospect of success in pointing out the deficiencies in this system of ordering jurisdictions. The notion of legal families feigns an intellectual certainty where none exists and prompts causal theses to be proffered by authors who are not prepared to exert themselves. Above all, the notion of legal families creates lines of demarcation and thus zones of exclusion. Considered in this light, it also has a political dimension. If, within the European Union, one still intends to think in terms of legal families at all, then these must be mapped out differently from one area of the law to another. In the law of tort or delict, the great European dividing line does not run along the Channel or across the Baltic Sea; it runs along the Rhine. Estonia and Lithuania do not constitute part of a ‘Baltic legal family’; nor can their self-esteem tolerate being simply shoved into the ‘German’ or the ‘French’ legal camp. Such statements are reminiscent of the language of the 19th century; they should not be admitted into the vocabulary of our time. Moreover, within the ‘families’ that ostensibly partition the European Union there are in any case diverse jurisdictions, whether the focus is on the substance of the law; its systematic arrangement; its methodological apparatus; or, quite simply, the culture of legal reasoning that the courts of a country adopt in forming their judgements.^{*10}

6. The European Union as one area of law

If I had to summarise the role of comparative law in the creation of a European private law in a single sentence, I would say this: it is all about taking a closer look. That alone is able to place us in the position—in spite of all the opposition—in which the Union can be conceived as **one** area of law and our national jurisdictions can be understood as local manifestations of an all-encompassing whole. The role of comparative law in the creation of a European private law does not consist in urging a comprehensive harmonisation of our national legal systems; that is or would be either a dream or a nightmare, depending on one’s point of view—a political issue, at any rate. Naturally, it is exciting for many legal comparativists to collaborate in this political work, but it is not their actual task. A uniform law that has solidified into the form of a legislative text is and remains a cumbersome and unwieldy product. Jurists do not identify with it; it generates too little positive emotion. There are many reasons for that, among others the incompleteness of the uniform law and its artificial concentration on cross-border matters. However, European uniform law can easily

⁸ Justifiably critical of the ‘tendencies of German law faculties to increase their attractiveness to foreign lawyers or students, particularly in the field of private law, by lightening their requirements for undergraduate and postgraduate study’. See G. Matsos. Rechtswissenschaftliche Ausbildung in Deutschland: attraktiver zu machen? – *GPR* 2012, p. 225 (editorial).

⁹ §§ 1448–1474 Czech Civil Code (2014). These provisions are copies of Articles 1260–1370 of the Civil Code of Québec (K. Eliáš *et al.* *Nový občanský zákoník s aktualizovanou důvodovou zprávou a rejstříkem*. Ostrava 2012, p. 580 (in Czech)).

¹⁰ For an impressive discussion, see L. Tichý, P. Holländer, A. Bruns (eds). *Oduvodnení Soudního Rozhodnutí – the Judicial Opinion – Begründung von Gerichtsentscheidungen*. Prague 2011 (in Czech).

reach and indeed exceed the quality of national law and arouse the same fascination the autonomous law possesses; the regulations on private international law offer sound testimony to that. A prerequisite for that, however, is sufficient legislative competence, and this is not to be found in the substantive law. It is not the case that one has to circumscribe the legislative competencies of the Union in the interest of preserving quality in the law; rather, it is the restrictions on the legislative competence of the Union that limit the measures that it can achieve. The Union's private law is the victim, not the assailant.

7. A common-law approach to European private law

Scholarly comparative law will not rescue us from this dizzy whirr of multitudinous interests. However, it can sow seeds for improvement by diligently sifting through the existing materials, opening the possibility for each national legal system to track and map out its private law, and putting all interested parties in a position from which one can edge without coercion toward the question of how far they want to embark on a shared journey. To Lord Neuberger of Abbotsbury, at the time Master of the Rolls and now President of the Supreme Court of the United Kingdom, the question was once posed in the middle of Berlin of how or whether European private law should develop. With inimitable enigmatic ambiguity he gave this reply: '[M]y answer is that its development should learn from the common law (just as the common law will, as it has always done, learn from European law). [...] If European law is to develop its full potential in the future, it needs a fresh approach: it needs a common law approach.'¹¹ It may surprise you, but in large measure I agree with him. European legal scholars and the European judiciary are often able to converge in a more flexible and relaxed manner than are European governments and legislative bodies.

The problem, of course, remains of what form a 'common-law approach' in European private law might take. Is there not buried beneath that elegant *bon mot* something akin to the thesis that the best scenario is for nothing at all to happen and that one should leave these things to themselves? European private law is a *mixtum compositum* of the private law of the Union and the autonomous private-law systems of the Member States. The key problems in researching it can be listed quickly: the sheer volume of material; the multitude of languages, systems, and methods; and, last but not least, the lack of research funding with which to penetrate this thicket. There is certainly no lack of clamour as regards all the matters that should be taken into account in development of the European private law—Lord Neuberger's European common law. Our colleague in Heidelberg Christian Baldus, for example, warns us that 'the whole of Europe has an interest in the legal cultures of the South of Europe being able to disseminate their laws (and legal languages) convincingly. They are the great laboratory of juridical Europe'¹². He too is right. But such assertions are no less valid for the West, East, and North; the regions of the Union should not be pitted against one another—not civilians against islanders, nor the West clinging to its traditions against those in the East who already stand on new ground. Let me quote once more Professor Baldus, who in the same article adds, with sensitivity: 'If French private law has continually lost influence since the middle of the nineteenth century, despite its dogmatic level, then that is due to its self-referential introspection and its imprisonment in its own concepts and because of the tardiness and the ties of hierarchy in academic communication.' That too is correct, but it extends further and is also a warning to us all.

First and foremost, therefore, modern comparative law must attempt an intellectual renaissance. In my opinion, it must aspire to penetrate as far as possible **all** the legal systems of the Member States and to project a single 'superimposed portrayal'. We will succeed in laying the foundation for a 'common European private law' only if we decipher our private law piece by piece on a pan-European basis and when we have succeeded in each area of the law, in turn, in construing diversity of national law as a natural plurality of opinion within one and the same legal domain. That is really difficult and demanding—and not merely because it requires one to work on the basis of a far larger array of information than a jurist working only on a national dimension must tackle. Above and beyond that, it requires a completely fresh methodology and, in particular, repeatedly posing familiar questions afresh in a European light, including questions directed at our own system. To pursue as scholars a European 'common-law approach' presupposes a quite different

¹¹ Lord Neuberger of Abbotsbury. Towards a European law? Australian Bar Association Conference Berlin. Available at <http://www.scribd.com/doc/59598543/TOWARDS-A-EUROPEAN-LAW-LORD-NEUBERGER-OF-ABBOTSBURY-MASTER-OF-THE-ROLLS-Berlin-Lecture-July-2011> (most recently accessed on 20.10.2013).

¹² C. Baldus. Europäischer Süden und Europäisches Privatrecht. – *GPR* 2012, p. 105.

infrastructure from that deployed in traditional individual-centric legal research. It requires teamwork, because one researcher alone cannot command all the languages of the Union, nor can one person exploit single-handedly the mountains of information that already exist.

Above all, however, what is needed is the development of a distinct pan-European dogmatic framework or—if the word ‘dogmatic’ sounds alien and antiquated—the development of a legal language and a juridical system that is ‘europeanizable’. Both are possible; we have attempted to show this in a book on the law of extra-contractual liability¹³, and we are currently attempting something similar in the law of things or property. There the task is orders of magnitude more difficult than for the law of delict or tort because—and here I can only allude to the problem—every word, every juridical concept, every scheme of categorisation cries out for careful reconsideration and evaluation: ‘thing’, ‘ownership’, ‘possession’, ‘movables’ and ‘immovables’, ‘absolute right’—none of these terms is self-evident, none of them can be carried over without scrutiny into a ‘European common law’, and none can be grasped by ‘functional comparative law’ in the style of the 1960s. One has to be prepared, therefore, to engage with a sort of meta level, an attempt at a new description of what unites us and what separates us. Such a venture, however, will itself also give rise to negative reactions. It is, of course, also prone to error. But it does cut the first paths through the chaotic jungle of handed-down concepts and specific decisions of legal policy. It is true that this will not be certain to enjoy the same intensity of reception as a classical textbook or manual on a given area of the law of a single national legal system, just as equally such books cannot at present keep up with the pulse of change through new editions correctly tracking current developments; that too entails a burden that at the moment no-one will finance. Nevertheless, I consider it to be by means of such books and the casebooks¹⁴ accompanying them that a first decisive step in the direction of a ‘European common law’ can be taken. It may even be that such studies are also of appreciable relevance for the further development of the real (i.e., legislatively ordained) EU law. The law of property is a good example. Although Article 345 of the Treaty on the Functioning of the European Union precludes a direct impact on the system of property ownership of the Member States, the law of the Union still provides for a variety of indirect connections to categories under property law. Whenever, for example, Union texts refer to a sale, ‘ownership’ is ultimately at stake, although the parties concerned would not actually know precisely what that, in turn, entails. In the law on compensation for productive liability, ownership is no less a prerequisite than in the law on preventing the unlawful transfer of cultural property, and in the EU regulations on private international law it is no less a background feature than in the rules on state aid. Wherever such measures invoke the notion of immovable or *Grundstücke*, they refer tacitly to national laws without even so much as remotely grappling with their conceptual diversity on this point or even being able to do so.

8. Rule-making

This form of comparative legal work, however, is only one of many. In contract law, wherein the Europeanization of law has hitherto achieved the most tangible progress, a manual that fathoms this area of the law in its entire breadth and depth on a European basis has never been published, and I do not know of anyone who would now work on one. To some extent, we have skipped the first step and already taken the second. The Lando Principles and the DCFR made a ‘flying start’ resulting directly in making of pan-European rules. That was indeed a sensible move and, seen from today’s vantage point, proved to be particularly successful. The DCFR currently numbers among the most frequently translated and most cited academic legal texts of this world. There are thus materials for which we can state that—and on this point too Lord Neuberger and I are in complete agreement—‘comparative law is not enough’. We must go beyond it. A synthesis of our national traditions is necessary if we are to identify general principles that underpin the different traditions of the European states. And once that is done, they should be assessed in line with their practical utility, and if implemented they should be capable of effective judicial interpretation. From that point on, the task of legal scholarship is complete; from there on, what is to be forged from the results of the research is a matter for legal policymaking.

¹³ C. von Bar. *The Common European Law of Torts* (Vol. 1: Oxford 1998; Vol. II: Oxford 2000).

¹⁴ A brilliant example is the volume edited by S. van Erp and B. Akkermans in the series *Jus Commune Casebooks for the Common Law of Europe* entitled *Cases, Materials and Text on Property Law* (Oxford 2012).

9. Conclusions

I was assigned the task of formulating a statement of how I see the role of legal scholarship in the construction of a European system of private law. My answer runs as follows: I see comparative law as a conveyor belt to a European future in which local particularities are set in relation to a common juridical composite system. Comparative law will then cease to be a special branch of legal science. As all legal scholarship, it will only be concerned with identifying good and bad legal rules. Expressed differently, it reduces to this: what we today still call comparative law will no longer play out in the body of the text; it will be consigned to the footnotes.



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Application of General Principles in Private Law in the Nordic Countries

1. Introduction

General principles, for instance the principle of good faith and fair dealing, reputedly play a prominent role in the law of the Nordic countries. Further, the application of rules is said to be rather pragmatic in Nordic law. As a result, the dominant approach in contract law is to search for a reasonable outcome in the interpretation and performance of contracts. This picture of the role of general principles and of pragmatism in contract law corresponds fairly well to the self-image frequently found in Nordic legal doctrine and in governmental documents. My aim here is to show that such a reputation may be undeserved, for better or for worse. In my opinion, the margin for applying general principles to soften the results of literal interpretation and strict performance of contracts is less wide in practice than legal doctrine often suggests.

‘Nordic’ countries will be defined as Denmark, Finland, Iceland, Norway and Sweden. These countries share a long history, including a history of legislative co-operation, that justifies considering them together in discussions of comparative law. Important differences do however subsist both in the legal traditions and in more recent developments of the law.^{*1} Given these differences, it will be necessary to take Norwegian law, which the author knows best, as a starting point here, while comments on the law of the other Nordic countries will necessarily be less accurate. Politically speaking, the expression ‘Nordic countries’ could also comprise Estonia, Latvia and Lithuania, but this definition would be less meaningful in comparative law.

The present discussion will concentrate on contract law. General principles are of course relevant in other parts of private law as well, but analysis of the entire field would become too abstract.

2. General principles, in particular the principle of *lojalitet*

The expression ‘general principles’ has been used with different meanings in different legal contexts. It is not always clear what is meant when general principles or maxims (*Grundsätze*) are referred to in government documents, in judgments, or in legal doctrine.

Nowadays, any discussion on the general principles of European private law must take into consideration the recent academic texts on principles and model rules, in particular the Draft Common Frame of

¹ For some reflections, see K. Lilleholt. European private law: Unification, harmonisation or coordination? – R. Brownsword *et al.* (eds). *The Foundations of European Private Law*. Oxford and Portland, Oregon: Hart Publishing 2011, Chapter 21, pp. 353–361.

Reference (DCFR) and the *Principes contractuels communs*. In the DCFR, four ‘underlying principles’ are presented, namely freedom, security, justice and efficiency.^{*2} In the *Principes contractuels communs*, there are three *principes directeurs*, namely *la liberté, la sécurité et la loyauté contractuelles*.^{*3} In their general form, such ‘underlying’ or ‘guiding’ principles may be thought of as values. In both of the texts referred to, there is more detailed discussion of the values, demonstrating the effects of each value, whether direct or indirect, on legal rules and legal reasoning. The values, or principles, may be coined as general norms or guidelines, i.e., norms that point in a certain direction, without determining the outcome of concrete cases, or they may contribute to the formation of certain patterns of reasoning in the search for the best solution to a legal problem.

In the European Commission’s proposal for a common European sales law (CESL), there is a section on general principles.^{*4} It includes freedom of contract, good faith and fair dealing, and co-operation. The difference with the DCFR and the French principles is probably merely a question of level of abstraction.^{*5}

For some decades now, a principle of *lojalitet* has been thoroughly discussed in Nordic contract law doctrine.^{*6} The term *lojalitet* corresponds of course to French *loyauté*, and this word is said to have common roots in Latin with the word ‘legal’. It is interesting to note that the French groups in their translation of the guiding principles into English have chosen the term ‘fairness’ for *loyauté*, obviously based on the conception that ‘loyalty’ in English would not convey the same associations as *loyauté* in French. At the same time, the French groups point out that the expressions *bonne foi* (‘good faith’) and *loyauté* (‘fairness’) should be interchangeable when we are talking about a norm of behaviour and not of knowledge or mistake.^{*7}

In Nordic doctrine, the principle of *lojalitet* is often described as the duty of a contracting party to take into consideration the other party’s interests. The word *lojalitet* is not much used in legislation, where expressions like *god tro og redelighet* or *tro och heder*, which both literally translate into ‘good faith and honesty’, are more common. The parallel in continental law and in the European academic texts to both *lojalitet* and ‘good faith and honesty’ is ‘good faith’ or ‘good faith and fair dealing’. In this paper, I will refer mostly to *lojalitet* when alluding to the Nordic context.

Another discussion in Nordic law should be mentioned here: the discussion on social contract law, which has been particularly important in Finland.^{*8} In social contract law, the contents of the contract, together with the idea of fairness and the protection of the weaker party, are central elements, more so than in the discussion of the principle of *lojalitet*. There are, however, close connections between the two discussions, not least because the general clause in the Formation of Contracts Act may serve as a basis for both the principle of *lojalitet* and the protection of weaker parties. Some questions concerning fairness and the protection of weaker parties will also be touched upon in this paper.

² C. von Bar, E. Clive (eds). *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*. Full edition, 6 vols. Munich: Sellier 2009, p. 37.

³ B. Fauvarque-Cosson, D. Mazeaud (eds). *Projet de cadre commune de référence. Principes contractuels communs*. Paris: Société de Législation Comparée 2008, p. 19.

⁴ COM(2011) 635 final, Chapter 1, Section 1.

⁵ For (critical) comments, see R. Schulze (ed.). *Common European Sales Law (CESL) – Commentary*. Munich: Beck 2012, pp. 85–94 (comments by H. Schulte-Nölke).

⁶ Some comprehensive works are A. Holm. *Den avtalsgrundade lojalitetsplikten*. Linköping: Avdelningen för Rätt och rättsfilosofi, Linköpings universitet 2004; J. Munukka. *Kontraktuell lojalitetsplikt*. Stockholm: Jure 2007; H. Nazarian. *Lojalitetsplikt i kontraktsforhold*. Oslo: Cappelen 2007. Comments pertaining to Danish law are found in L.L. Andersen, P.B. Madsen. *Aftaler og mellemmand*. 6th ed. Copenhagen: Karnov 2012, pp. 413–423; M.B. Andersen. *Grundlæggende aftaleret*, *Aftaleretten I*. Copenhagen: Gjøellerup 2008, pp. 113–116. On pre-contractual liability in particular, see L. Simonsen. *Prekontraktuel ansvar*. Oslo: Universitetsforlaget 1997; E.P. Björkdahl. *Lojalitet och kontraktsliknande förhållanden*. Uppsala: Iustus 2007 (107).

⁷ B. Fauvarque-Cosson, D. Mazeaud (see Note 3), p. 133; B. Fauvarque-Cosson, D. Mazeaud (eds). *European Contract Law: Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*. Munich: Sellier 2008, p. 515.

⁸ For a presentation in English, see, for example, T. Wilhelmsson. *Social Contract Law and European Integration*. Aldershot: Dartmouth 1995, pp. 25–43.

3. The principle of *lojalitet* in legislation: the general clauses

Perhaps the most distinct feature of Nordic contract law is the general clause in Section 36 in the Formation of Contracts Act in each of the Nordic countries. The wording of this provision is essentially the same in all five Acts and among Nordic contract lawyers the general clause is usually referred to simply as ‘Section 36’. The essence of the rule is that a contract term may be adjusted or set aside if the application of the term would lead to unfair results (the Norwegian version refers also to results contrary to ‘good business practice’). In the assessment, the content of the contract, the position of the parties, the conditions at the time of conclusion of the contract, as well as subsequent developments and other circumstances, are all taken into consideration. Section 36 was included in the Formation of Contracts Acts of the Nordic countries during the 1970s and 1980s. The Formation of Contracts Acts were originally the result of Nordic legislative co-operation at the beginning of the twentieth century and the Acts were passed in the various countries during the period 1915–1936.⁹ None of the Nordic countries has a civil code. The Formation of Contracts Act in each country is one of the few pieces of contract law legislation with general scope; in addition there are separate enactments regulating quite a few types of specific contracts, the most important being the Sale of Goods Act in each country.

The Formation of Contracts Acts have from the outset contained a provision, Section 33, which is now, since the inclusion of Section 36, sometimes called the ‘minor general clause’. Section 33 also has essentially the same wording in each of the five Nordic countries:

An otherwise valid declaration of intent may not be invoked by the person to whom it is made if it would be contrary to good faith and honesty to rely on the declaration because of circumstances which existed at the time when the declaration was made and which must be regarded as having been known to that person. (Author’s translation)

According to the committee which prepared the Acts, this provision was primarily intended to avoid interpretation using arguments *e contrario* of the provisions on voidability for coercion, for fraud and for unfair exploitation. We shall see that Section 33 was received quite differently from country to country.

Besides Section 33, some other provisions have been included over a long period of time in special legislation allowing for the voidability of contract clauses producing results contrary to reasonableness or good business practice. Most of these provisions were abolished when Section 36 was introduced in the 1970s and 1980s.¹⁰

In the Nordic countries, the general clause in Section 36 is meant to be sufficient implementation of Directive 93/13 on unfair terms in consumer contracts, with only some small additions.¹¹ The common view in the Nordic countries is that Section 36 protects the consumer better than does the Directive. Over the years, simply referring to this view without comparing the subsequent development in the EU and Nordic law, has, of course, become rather problematic.

⁹ Denmark: lov nr. 242 af 8. maj 1917 om aftaler og andre retshandler på aftalerettens område, most recently published as LBK nr. 781 af 26/08/1996; Finland: lag om rättshandlingar på förmögenhetsrättens område 13.6.1929/228; Iceland: lög 1936 nr. 71. febrúar 1926 um samningsgerð, umboð og ógilda löggjörninga; Norway: lov 31. mai 1918 nr. 4 om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer; Sweden: lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område. The translation ‘Contracts Act’ is also in use.

¹⁰ For an overview with reference to Norway, see the Government’s proposal for Section 36, Ot.prp. No. 5 (1982–83) (the Government’s proposal to the Parliament), Chapter 2.4.

¹¹ In Finland and Sweden, the rules on consumer contracts have their place in separate legislation, outside the Formation of Contracts Acts, but in substance the situation is the same.

4. The principle of *lojalitet* in legal doctrine

In Norwegian legal doctrine, Section 33 of the Formation of Contract Act (the ‘minor general clause’) was received with enthusiasm, in particular by one of its drafters, the Oslo professor Fredrik Stang (1867–1941, professor 1897–1933). He asserted that this provision was a confirmation and further development of ideas already established in Norwegian law, and that the rule had a wide scope of application. In particular, he emphasised that the provision applied to cases where a contract was concluded due to a mistake concerning facts or law, i.e. the problem of *error in motivis*. If the promisee is regarded as having known—or in Stang’s opinion, even if he ought to have known—of the mistake, the principle of good faith and honesty determines whether or not the promisee can rely on the promise. Good faith and honesty referred, in Stang’s opinion, to the general conception in society of loyal and decent behaviour, in particular the prevailing rules on good business practice.^{*12} One of his illustrations concerned the sale of a house: if the prospective buyer has revealed that he is buying the property because of a planned new railway line, the seller must inform the buyer if he knows that these plans have been definitely cancelled before the contract is concluded. If not, the buyer is not bound by the contract. On the other hand, the seller does not have to inform the buyer if he simply has his doubts about whether the railway line will ever be built.^{*13}

In the other Nordic countries, Section 33 was met with scepticism by legal scholars, and particularly so in Sweden.^{*14} By and by, however, it was generally accepted in legal doctrine in all the Nordic countries that parties to a contract have a general duty to take into consideration the interests of the other party. A requirement of good faith, or *lojalitet*, both in the formation and the performance of contracts was advocated even prior to the introduction of the Section 36 general clause in the Formation of Contracts Acts. Typically, the influential Finnish professor Lars Taxell characterised contracts as a form of co-operation between the parties, stating in 1972 that the *lojalitet* approach underlined the relation of trust between parties.^{*15} In today’s doctrine, duties of good faith or of *lojalitet* are of course thought to be expressed in Section 36 in particular, but not exclusively. That such a principle of *lojalitet* is part of contract law is generally accepted in leading textbooks and monographs.^{*16}

Interpretation of contracts is usually regarded as an area of law where general principles play a very important role. This holds true also for Nordic legal doctrine. With some small exceptions for non-negotiated terms, there is no general legislation on the interpretation of contracts in Nordic countries. In Nordic legal doctrine, it has often been pointed out that the distinction is not clear-cut between interpretation on the one hand and control of unreasonable terms on the other. Basic principles of interpretation leave much room for a good faith approach. The common intention of the parties prevails even where it differs from the literal meaning of the words used. Further, one party must accept the meaning intended by the other party where this meaning was known, or could reasonably be expected to have been known, to the first party. Even the so-called objective interpretation has a good faith element, as one seeks the meaning which a reasonable person would give to the contract under the circumstances. In other words, a party must accept the meaning that the other party might reasonably give to the contract under the circumstances. These principles leave much leeway for a judge to choose the interpretation which seems to lead to the most reasonable reading of the contract. In this way, a more or less bold interpretation of a contract may reduce the need to avoid the contract or to set it aside because of unfairness. It has been observed that this kind of ‘hidden review’ by way of interpretation is less necessary after the introduction of the general clause in Section 36, as an unfair outcome resulting from a literal interpretation can be softened by application of the general clause.^{*17} Further, interpretation guidelines like the *contra proferentem* rule may be regarded as related to a principle of good faith.

¹² F. Stang. *Innledning til formueretten*. Oslo: Aschehoug 1935, p. 596.

¹³ *Ibid.*, p. 600.

¹⁴ On this point, see J. Munukka (see Note 6), pp. 52–58.

¹⁵ L.E. Taxell. *Avtal och rättsskydd*. Åbo: Åbo Akademi, 1972, p. 81.

¹⁶ See, for example, (Denmark) L.L. Andersen, P.B. Madsen (see Note 6), pp. 413–423; B. Gomard. *Obligationsret 1. del*. 4th ed. Copenhagen: Djøf 2006, pp. 48–58; (Iceland) Þ. Örlygsson *et al.* *Kröfuréttur. I. Efndir kröfu*. Reykjavík: Bókaútgáfan Codex 2009, pp. 86–87; (Norway) V. Hagstrøm. *Obligasjonsrett*. 2nd ed. Oslo: Universitetsforlaget 2011, pp. 77–82; E. Selvig. *Inngåelse av kontrakt*. – K. Lilleholt (ed.). *Knophs oversikt over Norges rett*. 13th ed. Oslo: Universitetsforlaget 2009, Chapter 44 (V. Hagstrøm), pp. 228–247, 240; (Sweden) J. Ramberg, C. Ramberg. *Allmän avtalsrätt*. Stockholm: Norstedts juridik 2010, pp. 37–39.

¹⁷ L.L. Andersen, P.B. Madsen (see Note 6), p. 392 (with further references).

The rules on interpretation advocated in Nordic legal doctrine find their parallel in the DCFR and the CESL. In these texts, good faith and fair dealing are explicitly included among the matters which are relevant to interpretation. At the same time, the rules on interpretation are formulated in such abstract terms that the results may vary quite a lot in practice. We shall see that, at least for Norwegian law, courts seem not to be prone to depart much from the literal meaning of words.

In sum, it seems fair to say that the principle of *lojalitet* has a central position in Nordic contract law doctrine and that the principle embraces formation and performance of contracts as well as interpretation of contracts.

5. The principle of *lojalitet* in the courts

As already suggested in the introduction, the advocacy of a principle of *lojalitet* in legal doctrine has hardly found full resonance in the practice of Nordic courts, at least not in the Norwegian Supreme Court, where the general clauses in Sections 33 and 36 of the Formation of Contracts Acts have been applied in only few cases. In Denmark and Sweden, there are significantly more examples of contract terms being set aside or amended on the basis of Section 36, but my impression is that the threshold for review is still relatively high.

When it comes to a non-legislated principle of good faith or *lojalitet*, the conclusion is necessarily more uncertain, as the application of such a principle will tend to be less explicit. In particular, where a court has reached a reasonable result by way of interpretation of a contract, it is not always easy to tell whether the court was convinced that such was the real intention of the parties or whether it was exercising more or less hidden control of the fairness of the contract. The impression is, however, that the Supreme Courts tend to stick to a rather literal interpretation.

The practice of the lower instance courts is more varied, as may be expected. Admittedly, there is also a possibility that the general clauses and the broad acceptance in legal doctrine of a principle of *lojalitet* may have influenced Nordic lawyers to the point that business practice is less harsh than it would otherwise be or at least that parties do not try to rely on clauses contrary to *lojalitet* before the courts. The existence of such an influence seems rather doubtful however. Textbooks may shape the minds of law students and young practicing lawyers to a certain extent, but in the long term, Supreme Court cases and the clients' desire for economic results are more important sources of inspiration.

Section 33 of the Formation of Contract Act, the 'minor general clause', has been part of Norwegian law since 1918, but there are very few cases where the provision has been successfully invoked before the Supreme Court. After 1945, there are no cases where Section 33 has been decisive in disputes between professionals^{*18} and just a few examples of direct application of Section 33 where non-professionals have been involved.^{*19} In another few cases, principles close to the one in Section 33 have been referred to.^{*20} In total, we are talking of less than ten cases in more than sixty years. Earlier cases are also rare, and they are in any case of less interest today.

As for Section 36, the wider and more recent general clause, the situation is much the same. In Norway, Section 36 was introduced in 1983 and to date has been decisive in about ten cases, depending a little on the counting. The most important cases dealt with old ground lease contracts where the rent had become extremely low due to inflation; the landowners were allowed, on the basis of Section 36, to adjust the rent in order to compensate for inflation. Apart from this, the cases where Section 36 led to contract terms being set aside or amended have been rather peculiar and of little general interest. The numerous cases where Section 36 has been invoked without success have demonstrated that the threshold for setting aside a contract or a contract term is very high. The Norwegian Supreme Court has characterised the relevant criterion as 'qualified unfairness'.^{*21} Prior to March 2013, there were no Supreme Court cases setting aside non-negotiated terms in contracts between consumers and professionals.

¹⁸ See V. Hagstrøm (see Note 16), p. 152.

¹⁹ Examples (not necessarily exhaustive): Rt. 1956, 572 (on mental capacity); Rt. 1959, 1048 (on contracts that could not possibly have been performed by the non-professional); Rt. 1997, 1445 (on sham contracts); Rt. 2003, 521 (on division among heirs).

²⁰ Rt. 1984, 28 (on suretyship and breach of a creditor's duty to inform); Rt. 1995, 1460 (also on breach of the duty to inform).

²¹ Rt. 2003, 1132; Rt. 2012, 1537.

The first case of real general interest in which a consumer successfully invoked Section 36 was decided on 22 March 2013.^{*22} This case, dealing with consumer investment services, will be commented upon following some observations concerning the previous cases.

Two cases from 2011 illustrate the Norwegian Supreme Court's rather reserved approach to the general clause to date. The disputes concerned the interpretation and fairness of terms in some consumer contracts for planned new residential dwellings, more specifically the terms concerning time of delivery. According to the wording of the contracts, the seller 'aimed' to deliver the apartments in the second half of 2007, in one contract and 'planned' to deliver the apartments in the third quarter of 2007, in another. As it turned out, the apartments were delivered much later and the consumers claimed economic compensation for the delay, without success. Firstly, the Supreme Court interpreted the clauses strictly literally, stating that there was no actual agreement on the time of delivery. Secondly, the Court did not even discuss possible review under Section 36 and the Directive on unfair terms was not mentioned. This is surprising, as the 'grey list' in the annex to the Directive (that is the list of terms presumed to be unfair) gives several examples of terms leaving a wide range of choice to the professional regarding correct performance of the contract. It should be added that the consumer authorities later took the initiative to prohibit the use of the relevant clauses under public law legislation.

In two cases from 2012, the Supreme Court dealt with consumer investment services.^{*23} Again, the Court approached the cases rather formally, assessing whether the information given, including the information in 'small print', was correct and complete and whether the contracts were balanced, rather than asking how the marketing of the products was perceived, and was meant to be perceived, by the consumers.

In the case decided on 22 March 2013, a bank had sold a so-called index-linked bond to one of its customers, for money borrowed from the bank. The combination of the interest on the loan, the banking fees, and a rather uncertain yield on the bond made the bond a rather risky investment. The Supreme Court, in a 'Grand Chamber' decision, unanimously held that the contract was not invalid under Section 36 solely because of a lack of balance between the obligations of the parties. However, what made the contract invalid was insufficient and partly incorrect information from the bank regarding the risk of loss resulting from the transaction. If the bank had given more sober, and correct, information, the consumer would not have entered into the contract, the Court found.

Interestingly, the Supreme Court concentrates on the consumer's right to receive sufficient and correct information. The Court even referred to the Directive on unfair contract terms, more or less for the first time ever, as a supporting argument. Given the importance accorded to insufficient and partly incorrect information, the same result could probably have been reached on the basis of Section 33, the 'minor general clause' (which was not invoked by the consumer).

The cases prior to 2013 can also serve as illustrations regarding the Norwegian Supreme Court's approach to the interpretation of contracts. The contracts for the planned apartments were interpreted quite literally, as we saw, and the same may be said for the two consumer investment services cases of 2012. As for disputes between professionals, the Supreme Court has underlined on several occasions that the interpretation of contracts should be based on objective and available elements, first and foremost the wording of the contracts, for reasons of legal security and predictability, as well as third parties' reliance on the contract.^{*24} There are exceptions, however. In two recent cases on suretyship, the Supreme Court applied an approach similar to the Common Law 'business common sense' rule^{*25}, and, in another suretyship case, a surprisingly bold application of the *contra proferentem* rule.^{*26} All three cases dealt with disputes between businesses and there were no references to a principle of *lojalitet* or good faith. In my opinion, it cannot be said that the Norwegian Supreme Court applies a principle of *lojalitet* in its interpretation of contracts any more so than what would be regarded as normal in most jurisdictions.

The somewhat more generous application of Section 36 in the Danish Supreme Court includes, amongst others, cases of unreasonable terms concerning remedies for non-performance in contracts between

²² Rt. 2013, 388.

²³ Rt. 2012, 355; Rt. 2012, 1926.

²⁴ See, in particular, Rt. 2003, 1132; see also Rt. 1994, 581; Rt. 2000, 806; Rt. 2002, 1155; Rt. 2005, 268; Rt. 2005, 1447; Rt. 2009, 813; Rt. 2011, 1153; Rt. 2012, 1267.

²⁵ Rt. 2012, 96, and Rt. 2011, 1553 (both on the majority vote). For the 'business common sense' rule, see, in particular, *Rainy Sky S. A. and Others v. Kookmin Bank* [2010], UKSC 50.

²⁶ Rt. 2012, 1267.

professionals and a couple of remarkable cases on suretyship.^{*27} The threshold for applying Section 36 seems to be lower in Denmark than in Norway, in particular when it comes to review of the contents of the contract. My impression is that the situation in Sweden lies somewhere in-between; Section 36 has been applied more often than in Norway but perhaps a little more strictly than in Denmark.^{*28} In particular, several arbitration clauses have been set aside by the Swedish Supreme Court. I have not sufficient information on the court practice of Finland and Iceland regarding Section 36 to draw conclusions.^{*29}

As for the style of interpretation of contracts, it is difficult to draw conclusions for Nordic countries other than Norway, as a reliable impression of a court's style of interpretation requires a close reading of a great number of cases over a long period.

6. Duty of information and lack of conformity

The principle of *lojalitet* is important in the assessment of whether performance is in conformity with the contract. If a contracting party has not disclosed to the other party circumstances which the former is expected to have known of and which the latter had reason to expect to be informed about, this may result in a lack of conformity, giving rise to ordinary remedies for non-performance. For example, if the seller does not inform the buyer that the car has severe, but hidden, corrosion damage, despite being aware of this fact, the car will regularly be regarded as non-conforming. This is so even if the buyer might have had to accept this as the normal condition of an old car if the seller was not aware of the damage.

The Sale of Goods Acts in Finland, Iceland, Norway and Sweden have provisions to this effect for contracts where the goods are sold 'as is' or with similar reservations.^{*30} The same rule does of course apply even when the seller has *not* tried to reduce his liability in this way. In contracts for the sale of consumer goods, the rule is even more buyer-friendly in Denmark, Norway and Sweden, as it includes circumstances which the seller ought to have known of.^{*31} In Denmark, the provision applies only to consumer sales.^{*32} It should be added that lack of conformity was unsuccessfully invoked by the consumers in the second 2012 case on consumer investment services.^{*33}

There is no corresponding rule on lack of conformity as a result of breach of information duties in the CISG, the DCFR or the CESL. According to CESL Article 69, incorrect information may lead to a lack of conformity, as the information is incorporated as a term of the contract. There are duties to supply pre-contractual information, but it seems that a lack of information may only lead to liability in damages or to voidability for mistake, as the case may be. Strictly speaking, a seller may also avoid a defect being regarded as a lack of conformity under these instruments by informing the buyer of the defect, but this is another kind of rule: the information duty we are considering under Nordic law implies that an otherwise conforming performance will be regarded as non-conforming solely because of the breach of the duty to inform.

²⁷ U 1987, 526 H; U 1987, 531 H; U 1987, 801 H; U 1991, 4 H; U 1994, 898 H; U 1998, 281 H; U 2002, 74 H; U 2002, 706 H; U 2002, 1224 H; U 2002, 1698 H; U 2004, 1268 H (on suretyship); U 2004, 2400 H; U 2005, 1978 H; U 2010, 1628 H (on suretyship); U 2011, 2654 H; U 2012, 535 H. See generally, M.B. Andersen (see Note 6), pp. 423–448; L.L. Andersen, P.B. Madsen (see Note 6), pp. 198–239.

²⁸ Some examples: NJA 1979, 666; NJA 1981, 711; NJA 1982, 613; NJA 1982, 800; NJA 1982, 853; NJA 1983, 865; NJA 1983, 332; NJA 1987, 639; NJA 1989, 346; NJA 1997, 524; NJA 1999, 408; NJA 2009 N 3. See generally, K. Grönfors, R. Dotevall. *Avtalslagen. En kommentar*. Stockholm: Norstedts juridik 2010, pp. 237–292; J. Ramberg, C. Ramberg (see Note 16), pp. 175–181.

²⁹ On the principle of loyalty in Finnish Supreme Court practice, see S. Nystén-Haaral. *Lojalitetsprincipen både från domstolens och från rättsanvändarens perspektiv – kommentar med betoning på proaktiv avtalsverksamhet*. – B. Flodgren *et al.* (eds). *Avtalslagen 90 år. Aktuell nordisk rättspraxis*. Stockholm: Norstedts Juridik 2005, pp. 437–445. For Iceland, see P. Sigurðsson. *Samninga- og kröfuréttur*. – B. Thorarensen *et al.* (eds). *Um lög og rétt*. 2nd ed. Reykjavík: Bókautgáfan Codex 2009, pp. 219–279, 242–246 ('applied with caution and moderation', *af varkárni og hófsemd*, p. 244).

³⁰ Finland: *köplag 27.3.1987/355* (Sale of Goods Act), Section 19, and *konsumentskyddslag 20.1.1978/38* (Consumer Protection Act), Section 4:14; Iceland: *lög um lausaffárkaup 2000 nr. 50 16. mai* (Sale of Goods Act), Section 19, and *lög um neytendakaup 2003 nr. 48 20. mars* (Consumer Sales Act), Section 17 (cf. Section 16(1)(b)); Norway: *lov 13. mai 1987 nr. 27 om kjøp* (Sale of Goods Act), Section 19; Sweden: *köplag (1990:931)* (Sale of Goods Act), Section 19.

³¹ Denmark: *lov om køb LBK nr 237 af 28/03/2003* (Sale of Goods Act, originally from 1906), Section 76(3); Norway: *lov 21. juni 2002 nr. 34 om forbrukerkjøp* (Consumer Sales Act), Section 16(1)(b) (cf. Section 17); Sweden: *konsumentköplag 1990:352* (Consumer Sales Act), Section 16(3)(2) (cf. Section 17).

³² J. Munukka (see Note 6), pp. 364–369.

³³ Rt. 2012, 1926.

The rule on lack of conformity resulting from breach of information duties is included in legislation concerning several types of specific contracts. It is of particular importance in contracts for the sale of real property, even outside the scope of legislation.^{*34} Lack of conformity resulting from a breach of information duties may occur even for contracts concerning non-physical assets, for example in a sale of all the shares of a limited company.^{*35} Whether or not this rule can be regarded as a general principle in contract law is debatable however.

The rule on lack of conformity due to breach of information duties is commonly used as an example of the principle of *lojalitet* and it has been pointed out that the rule is closely related to the rule on voidability due to mistake.^{*36} In particular in Norway, voidability due to *error in motivis* has been based on Section 33 of the Formation of Contracts Act (the ‘minor general clause’). A party has no duty to furnish the other party with all possible information regarding the contract. Here we are talking about information of importance to the other party and the test is whether the other party could reasonably have expected to receive the information.

In my opinion, this rule on lack of conformity due to breach of information duties is the most remarkable example of application of a general principle of good faith and fair dealing in Nordic contract law. The rule has turned out to be very important in practice, unlike the general clauses of the Formation of Contracts Acts.^{*37} In legal doctrine, the opposite is true to a certain degree: the general clauses have been extensively discussed, while the more fundamental aspects of the rules on lack of conformity have attracted less interest.

7. Conclusions

This paper has concentrated on some aspects of the principle of *lojalitet* (fairness, loyalty), which has been discussed in legal doctrine in the Nordic countries for about 100 years. A survey of a limited topic like this is of course insufficient as a basis for general conclusions concerning the application of general principles in private law in the Nordic countries. Some observations seem justified however.

The principle of *lojalitet*, in the sense that a contract party must take into consideration the other party’s interests, belongs to the realm of principles or values often referred to as ‘good faith’, ‘good faith and honesty’ or ‘good faith and fair dealing’. The principle has been advocated in doctrine as applicable to the formation of contract phase, the interpretation phase, and the performance and remedies phases. A duty of *lojalitet* has been regarded as an important aspect of the general clause in Section 36 of the Formation of Contract Acts in the Nordic countries. In this author’s opinion, the principle of *lojalitet* has played a less significant role in practice than one might expect from its place in legal doctrine, with one important exception: the principle of *lojalitet* is a central element in the assessment of conformity of performance with the contract.

³⁴ For Denmark: B. Gomard (see Note 16), pp. 191–193 (see also N.J. Clausen *et al. Købsretten*, 5th ed. Copenhagen: Karnov 2012, pp. 165–169); for Sweden: NJA 2007, 86; J. Hellner *et al. Speciell avtalsrätt II. Kontraktsrätt. 1 häftet. Särskilda avtal*, 5th ed. Stockholm: Norstedts Juridik 2010, pp. 61–63.

³⁵ Rt. 2002, 1110; M.B. Christoffersen. *Kjøp og salg av virksomhet: risiko og ansvar for mangler*. Oslo: Gyldendal 2008, pp. 491–558; C. Ramberg. *Kontraktsbrott vid köp av aktie. Särskilt om fel*. Stockholm: Juristförlaget 1992, pp. 103–129.

³⁶ V. Hagstrøm (see Note 16), pp. 135–149; J. Munukka (see Note 6), p. 366.

³⁷ See, for example, for Norwegian law, Rt. 1998, 1510; Rt. 2001, 369; Rt. 2002, 696; Rt. 2002, 1110.



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The CESL Proposal:

An Overview^{*1}

1. Introduction

The European Commission has prepared a proposal for a Common European Sales Law (CESL) for B2C and B2B contracts.^{*2} This would be an ‘optional instrument’: a set of rules that would form part of each Member State’s law and which the parties could choose to use instead of the ‘pre-existing’ or ‘domestic’ rules. For issues that fall within the scope of the CESL, it would be the rules of the CESL (most importantly, the mandatory rules of the CESL) that would apply. The CESL is not intended to replace domestic contract law in the way that, for example, the Rome I Regulation^{*3} has replaced the earlier law of each Member State (MS), but if the parties choose to use the CESL, its rules would displace the domestic rules that would otherwise apply.

How have we arrived at this proposal? What is its purpose? How would it work? Is it needed? These are the questions I hope to answer in this paper.

2. Background^{*4}

In 2001, the European Commission issued a consultation paper titled ‘Communication on European Contract Law’.^{*5} From the responses, the Commission concluded that, while differences between the laws of contract in the various Member States do not prevent trade, they represent an obstacle that increases the cost and therefore the attractiveness of cross-border contracting. Indeed, it seems self-evident that having to deal with a variety of legal systems must add to the cost, or the risk, of all but the simplest of cross-border transactions. Each business will want to know what difference it will make if the other party is a consumer who has rights under the law of his own country of residence that may not be taken away under that law, or if the other party is a business that insists on the contract being governed by its own country’s law or even

¹ An earlier version of this paper was presented at a conference at the Centro di eccellenza Altiero Spinelli per l’Europa dei Popoli e la Pace nel Mondo, Rome III, in May 2012 and has been published in L. Moccia (ed.), *The Making of European Private Law: Why, How, What, Who?*. Munich: Sellier, 2013, pp. 65–76.

² Proposal for a Regulation on a Common European Sales Law, 11 October 2011, COM(2011) 635 final. The proposal contains a draft regulation, dealing primarily with the scope of application of the CESL, and an Annex containing the substantive rules. In this paper, Articles of the proposed Regulation are referred to as ‘Regulation Article oo’ and Articles of the Annex as ‘CESL Article oo’.

³ Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations.

⁴ A more detailed account of the background to the CESL can be found in H. Beale, *European contract law: The Common Frame of Reference and beyond*. – C. Twigg-Flesner (ed.), *The Cambridge Companion to European Union Private Law*. CUP 2010, pp. 116–130.

⁵ Communication from the Commission to the Council and the European Parliament on European Contract Law, COM(2001) 398 final.

the law of a third country. Will our standard contract ‘work’ as well under that law as it does under our own law? Perhaps even more important is that, for many businesspeople, differences between legal systems create a psychological barrier. And whether we are speaking of B2B or B2C contracts, the barriers are likely to be much more significant for small and medium-sized enterprises (SMEs) than for larger businesses. First, larger businesses may actually not sell across borders: they may open a subsidiary in the buyers’ country. Secondly, larger businesses are more likely to have expertise in dealing with foreign laws. Thirdly, larger businesses are likely to enter larger transactions, involving higher values, or larger numbers of similar contracts—when the cost of obtaining legal advice about foreign law is, in relative terms, much lower than with smaller or less frequent transactions. Lastly, I strongly suspect that smaller businesses are generally more risk-averse than larger ones. In simple terms, they can’t afford to take the same risks. I suspect many are simply put off from attempting cross-border sales. So the problems are likely to be much greater for SMEs than for larger businesses. It is precisely these firms that we hope to encourage by providing the CESL.

The Commission also concluded that the existing consumer legislation needed to be improved. In 2003, the Commission produced its ‘Action Plan on a More Coherent European Contract Law’.⁶ This suggested revising the consumer *acquis* in line with a Common Frame of Reference (CFR) and reflecting on the need for some further harmonising measure such as an optional instrument. In 2004, in a document called ‘The Way Forward’⁷, the Commission indicated that the CFR should contain fundamental (guiding) principles; definitions, which could be used in interpreting the European legislation or which future legislation could adopt; and model rules, ‘best solutions’ found in the national laws or international instruments. At an earlier conference, in Tartu⁸, I also suggested that the CFR might provide comparative material, which is essential background information for any legislation. The Commission’s immediate aim seemed to be to use the CFR to revise and possibly extend the various consumer directives, with the aim of amending the laws of the various states. It was said that the CFR might form the basis for an optional instrument; but as late as 2009 that seemed a long way off.⁹

Though the signs were clear in the Commission documents, I had not appreciated that the Commission’s approach to the consumer *acquis* had undergone a very significant shift. The earlier directives were justified in terms of improving the functioning of the internal market—consumer protection was originally not an end in itself. However, the Commission’s approach was all about building the confidence of consumers to ‘shop abroad’ by ensuring that, wherever in the EU the consumer made a purchase, he would possess a set of minimum rights. But in the Action Plan documents there were clear indications that the approach was changing. It was now about encouraging cross-border sales by removing the barriers faced by businesses. Later it emerged that the Commission wants to do this for not only B2C but also B2B contracts.

In particular, the Commission wanted to tackle what it perceives to be a major problem for B2C contracts arising from what is now Article 6 of the Rome I Regulation.¹⁰ Under said Regulation, the parties to a consumer contract may choose which law is to apply to the contract and the seller may use its standard terms and conditions; but the consumer cannot be deprived of the protection of the mandatory rules of the state in which he is habitually resident if the contract resulted from the trader directing its activities to consumers in that state. This means that a trader seeking to sell across borders may need to know the mandatory rules of each country toward which it directs its activities. An Internet shop running a Web site that appears to invite customers from all over the EU may, therefore, have to know no fewer than 29 or more individual sets of laws.

The answer to this found in ‘The Way Forward’ was not just that eight directives would be improved¹¹ but that there might be a move from minimal harmonisation to full harmonisation¹²—so that, within the fields covered by the directives, the substance of the law would be the same in each MS.

⁶ COM(2003) final, OJ C 63/1.

⁷ Communication from the Commission to the European Parliament and the Council, COM(2004) 651 final, 11 October 2004.

⁸ See H. Beale. The nature and purposes of the Common Frame of Reference. – *Juridica International* 2008 (XIV), p. 10.

⁹ See H. Beale. The content of the political CFR—how to prioritise. – J. Kleinman (ed.). *A Common Frame of Reference for European Contract Law* (Centrets skriftserie, 14). Stockholm: Stockholm Centre for Commercial Law 2011, pp. 27–32.

¹⁰ See Note 3, above.

¹¹ The Way Forward (see Note 7), p. 3. To be reviewed were directives 85/577 (‘the Doorstep Selling Directive’), 90/314 (‘the Package Travel Directive’), 93/13 (‘the Unfair Contract Terms Directive’), 94/47 (‘the Timeshare Directive’), 97/7 (‘the Distance Selling Directive’), 98/6 (‘the Price Indication Directive’), 98/27 (‘the Injunctions Directive’), and 99/44 (‘the Consumer Sales Directive’).

¹² The Way Forward (see Note 7), p. 4. See also paragraph 4.2.2 of the Action Plan.

This was the approach of the proposal for a Consumer Rights Directive (CRD) made in 2008.^{*13} The new directive would have replaced four major directives. There would have been some increase in the degree of consumer protection, but that would have been only slight, with the important shift being toward full harmonisation. The result would have been that Member States that had given consumers stronger protection than was required by the directives (or had stronger protection already and left it in place) would have had to remove it. Not surprisingly, this approach was a failure. If there was to be any significant reduction in the variety of mandatory rules that might affect cross-border sellers, there would have to be substantial interference with MS laws. The only alternative was to narrow the scope of the CRD and its full harmonisation provisions. And that is what happened. The Commission opted for a new directive that applies only to distance and off-premises contracts and, for the most part, governs only pre-contractual information and withdrawal rights.^{*14} In effect, the Commission decided to cut its losses on the CRD, because by then it had a new approach.

The new approach is the CESL. Rather than seek further harmonisation of Member States' laws for all B2C transactions, the CESL creates an optional law that can be used for cross-border contracts. The Regulation will insert into each Member State's law a separate set of rules, which the parties may choose to apply for cross-border contracts in place of the 'pre-existing' or 'domestic' rules. If they have chosen the CESL, for any issues that fall within the scope of the CESL, its rules shall apply, not the rules of the 'domestic' law. Most importantly, this includes mandatory rules. The CESL contains its own set of mandatory rules for consumer contracts and, within the scope of its application, it is these that would apply, not the mandatory rules of the 'pre-existing' domestic law. As we will see, these mandatory rules provide a high level of consumer protection; and for a consumer contract, Article 8 (3) of the Regulation provides that the CESL can only be adopted in its entirety. This means that the trader cannot 'cherry-pick' just those rules of the CESL that are more favourable to it than the rules that would otherwise apply.

So, though the CESL does not replace domestic contract law, if the parties choose to use it, its rules will displace the domestic rules that would otherwise apply. Therefore, for most purposes a trader who can persuade a consumer to buy goods with the CESL governing the contract need worry only about one set of rules—the rules of the CESL.

The neatness of the solution is that Article 6 of the Rome I Regulation ceases to be a problem. Suppose an English Internet seller directs its Web site toward consumers in Estonia but asks the consumers to agree to using the CESL. A consumer habitually resident in Estonia who agrees to buy goods on these terms will still be entitled to the protection of the mandatory rules of Estonian law—but, because that consumer has agreed to use the CESL, it is the mandatory rules of the CESL that will apply^{*15}—and these rules will be the same in both Estonian and English law.

3. Scope of application

The scope of application of the CESL is limited in a number of ways.

3.1. Types of contract

First, the CESL applies only to contracts for the sale of goods or for the supply of digital content that is not supplied via a tangible medium (such as a DVD) but, for example, is downloaded directly from the Internet. The provisions on digital content, which were drafted by the Commission after the Expert Group's Feasibility Study^{*16} had been published, are a major innovation for many countries. In the UK, for example, digital

¹³ Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614.

¹⁴ Directive 2011/83/EU of 25 October 2011 on consumer rights.

¹⁵ It is true that some commentators question whether the consumer's agreement to use the CESL provisions of the applicable law (in the example given, the seller is likely to have stipulated English law) means that the consumer has also agreed to accept the CESL provisions of the law of the consumer's habitual residence (in the example, Estonian law); see, for example, the Law Society of England and Wales, *European Brief*, November 2012, p. 3. If there is any real doubt on this point, it seems simple enough to amend the proposed Regulation to make this effect clear.

¹⁶ See May 2011's 'A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback'.

content supplied via a tangible medium falls within the scope of the Sale of Goods Act but we have no legislation applying to digital downloads.

The CESL applies also to ‘related services’ that the seller or supplier agrees to supply in the contract of sale/supply or in a separate contract made at the same time. However, ‘related services’ are limited to matters such as installation, maintenance, and repair.^{*17} If the seller agrees to provide other services, this will not fall within the scope of the CESL, and if the provision is under the main contract, it will bring the whole contract outside the scope of the CESL through being a ‘mixed purpose’ contract, which Article 6 (1) of the proposed Regulation states is not covered.

Contracts involving consumer credit (such as for sales wherein the consumer pays by instalment) are also outside the scope of the CESL, see Regulation’s Article 6 (2).

3.2. Territorial scope

Secondly, the CESL applies only to cross-border contracts. For a B2B contract, the definition of a cross-border contract in Regulation’s Article 4 (2) appears to be simple: it is one wherein the parties have their habitual residence in different countries, at least one of which is a Member State. I pause only to note that this means that the CESL is not wholly internal to the EU. The CESL may be used when a business that is ‘resident’ in an MS is selling to or buying from a business that is resident outside the EU. For B2C contracts, the same is true under Regulation’s Article 4 (1). So a seller in Russia, which will not be subject to the Regulation, may nonetheless sell to an Estonian consumer on CESL terms; and it seems that Article 4 (1) envisages also the converse case, wherein an Estonian seller supplies a consumer resident in Russia. But whether the private international law of Russia would permit the mandatory rules of Russian law to be displaced by those of the CESL, I have no idea.

In B2C contracts, the scope of application is broader than for B2B contracts. The parties do not have to be habitually resident in different countries. It is enough if

either the address indicated by the consumer, the delivery address for goods or the billing address are located in a country other than the country of the trader’s habitual residence.^{*18}

So it seems that the CESL can be applied even if the consumer would not benefit from Article 6 of Rome I when, for example, the consumer buys on a Web site that is not targeted at his country or the consumer is in the trader’s country and buying in the trader’s shop, provided that the consumer gives an address in another country.

3.3. The issues covered

Thirdly, the scope of the CESL is limited to the issues that are most likely to arise under a contract for sale or supply of digital content. This is explained in Recital 27 of the proposed Regulation. Matters that are beyond its scope are left to be governed ‘by the pre-existing rules of the national law outside the Common European Sales Law’. They include ‘legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts’.

¹⁷ See the proposed Regulation’s Article 2 (m).

¹⁸ See the proposed Regulation’s Article 4 (3) (a).

4. Benefits for the trader in B2C relations

One advantage of the CESL for the trader in a B2C contract is that for most disputes that are likely to arise, the CESL would provide a ‘neutral’, non-national system of rules. The text of the rules would be available in all the EU languages. One hopes that it would be applied uniformly in all of the individual Member States. However, with B2C contracts the principal advantage would be to overcome the problem posed by Article 6 of the Rome I Regulation. There is, in effect, a trade-off. A business that uses the CESL would find that it has to give consumers in some Member States—states that do not have a particularly high level of consumer protection—more extensive rights than if the trader were to sell on the basis of the pre-existing law qualified, as it would be, by the consumer’s rights under Article 6 of Rome I. But, in exchange, the business would be able to sell across borders on the basis of a single law applying equally to all and with which, hopefully, all would become equally familiar. It would allow firms to use a ‘single operating platform’ for all cross-border sales. Being able to use a single system may indeed be so much more convenient that traders will put pressure on the Member State in which they are resident to exercise the option given by Article 13 of the proposed CESL Regulation to permit the use of the CESL when the parties are resident in the same MS.^{*19}

5. Benefits of the CESL for the consumer

Some consumers will benefit directly from using the CESL. If the level of consumer protection in both the country where they live and the country whose law governs the consumer sale is relatively low, by using the CESL they can increase their protection. Other consumers, those who live in a country with very high levels of protection, may get slightly less protection under the CESL. But again there is a trade-off. If the CESL has the effect the Commission hopes for—namely, increasing the number of traders willing to sell across borders—all consumers should benefit from increased choice and more competition, leading to lower prices.

6. Safeguards for the consumer

There are some built-in safeguards for the consumer. First, the Regulation provides that in a B2C contract the CESL can be adopted only through

an explicit statement which is separate from the statement indicating the agreement to conclude a contract. The trader shall provide the consumer with a confirmation of that agreement on a durable medium.^{*20}

Accordingly, the choice of the CESL cannot be simply made one of the trader’s standard terms; the consumer will have to sign a separate document or, on a Web site, click on a special ‘Blue Button’^{*21}.

In addition, the trader will have to send a Standard Information Notice.^{*22} As currently drafted, this is merely a bit of advertising of the advantages of the CESL. As does the European Law Institute^{*23}, I have serious doubts about the usefulness of this: it would be better to require a link to a Web site giving the consumer information about the differences between the CESL and each national body of ‘domestic’ law.

But the chief protection for consumers is simply the content of the CESL, the high level of consumer protection that it affords.^{*24} If, in fact, the consumer will be well protected, warnings and the like are not needed. So is it true that the level of consumer protection is high?

¹⁹ Proposed Regulation’s Article 13 (a).

²⁰ Proposed Regulation’s Article 8 (2).

²¹ See H. Schulte-Nölke, <http://www.eesc.europa.eu/resources/docs/schulte-nolke-budapest-march-2011.pdf>.

²² Proposed Regulation’s Article 9.

²³ Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law, COM(2011) 635 final, para. 23.

²⁴ A high level of protection is an explicit aim of the CESL; see Recital 11.

The CESL does not provide the highest level of protection found within the EU in every respect. I think that, in comparison to the law of most Member States, the level of consumer protection is very good, however. I will give just three examples.

6.1. Pre-contractual information duties

The CRD requires the trader to give the consumer specified information before the contract is concluded, and it provides that the information ‘shall form an integral part of the contract’—i.e., the trader undertakes to ensure that the information is correct.^{*25} But the CRD does not provide the individual consumer with a remedy if the information is **not** given and the consumer suffers a loss as a result. The CESL gives the consumer a right to damages for breach of the duty.^{*26}

6.2. Unfair terms

In some respects, the CESL follows the minimum requirements of Directive 93/13. Thus, the controls apply only to terms that are not individually negotiated, and ‘core terms’ (the main definition of the subject matter and, more importantly, the amount of the price) cannot be challenged under these provisions.^{*27} But certain types of term are ‘blacklisted’ as always unfair^{*28} while other terms are not merely ones that ‘may be unfair’, as under ‘Indicative list’ in the directive, and are actually ‘grey-listed’—i.e., presumed to be unfair unless the trader shows otherwise.^{*29}

6.3. Remedies for non-conformity

The Consumer Sales Directive^{*30} gives a consumer who has been supplied with non-conforming goods the right to repair or replacement. However, the choice between repair and replacement is the seller’s; and the consumer cannot rescind the contract and ask for its money back, or demand a price reduction, without first giving the seller the chance to repair or replace (unless neither is possible or each would be disproportionate)—the so-called hierarchy of remedies. The CESL allows the consumer to choose between repair and replacement, where appropriate^{*31}, but also allows the consumer to demand termination or price reduction immediately.^{*32} This may be much more convenient for the consumer, who may be able to get a substitute more quickly than the seller can repair or replace the non-conforming goods. Nor is there any time limit on termination, provided that it can be shown that the goods did not conform to the contract at the outset, and the consumer has to pay for use he had from the goods before termination only if it would be inequitable to allow the recipient the free use of the goods for that period.^{*33} This strengthens the consumer’s hand in negotiating with the seller. These provisions may even go too far; I would prefer to give the consumer the right to terminate or have the price reduced, without first asking for repair or replacement, for only a short period after delivery.

So even if the CESL does not match the level of consumer protection in every MS point for point, the overall level of consumer protection in the CESL is very high. My own view is that, insofar as it is possible to ‘average’ these things, the ‘average’ level of protection across all of the issues that may affect consumers is about as high under the CESL as it is under any national system of law. Therefore, very few consumers would suffer any real loss of protection, while all should gain a good deal from the increased choice and competition.

²⁵ Consumer Rights Directive’s Article 6 (5).

²⁶ CESL, Article 29.

²⁷ CESL, Article 80.

²⁸ CESL, Article 84.

²⁹ CESL, Article 85.

³⁰ Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, Article 3.

³¹ CESL, Article 111.

³² See CESL’s Article 106.

³³ CESL, Article 174 (1) (c).

I would add that it is essential to the scheme that this overall high level of consumer protection in the CESL not be watered down in any significant way. Article 8 (3) of the proposed Regulation is also essential, to prevent traders from omitting articles of the CESL that would give the consumer more protection than the law of the consumer's habitual residence. Consumers are unlikely to know the details of the law—neither the law of their habitual residence nor that of the CESL—but they should know that by pressing the Blue Button they will get the full, high-level protection of the CESL.

7. Advantages for B2B contracts

In contrast, the case for the CESL for B2B contracts rests more on the substance of the rules. In particular, the CESL contains many provisions aimed at providing the kind of legal protection needed by SMEs—protection that is found in some laws but that in others is noteworthy by its absence.

8. The disincentives to cross-border trade for SMEs

I have already explained why I think that differences between legal systems create much larger obstacles—even if they are psychological rather than real obstacles—to cross-border selling by SMEs than for bigger businesses. First, larger businesses may actually not sell across borders: they may open a subsidiary in the buyers' country. Secondly, larger businesses are more likely to have the expertise to deal with foreign laws. Thirdly, larger businesses are likely to enter larger transactions, with higher values, or conclude similar contracts in large numbers—such that the cost of obtaining legal advice about foreign law should be relatively low in comparison to that with smaller or less frequent transactions. Often SMEs are not so sophisticated and will not consider the cost of taking expert advice justified. So if they were to make cross-border contracts, they would have to take the legal risk. However, SMEs are likely to be risk-averse.

9. Model contracts and adoption of principles by contract

Obviously, there are fewer mandatory rules for B2B contracts than there are for B2C contracts in the CESL, just as in most national laws. With a B2B contract, the parties are free to agree on their own terms to a much greater extent. This suggests another way in which to solve the problem of different laws: provision of model standard contracts prepared for cross-border transactions. Bodies such as the International Chamber of Commerce have done a great deal in this respect. But there are two serious limitations with this approach. The first is that very few model forms are anything like complete—they frequently leave out important matters that are covered only by the otherwise applicable law. True, this problem can be solved via incorporation of sets of principles such as the Principles of European Contract Law³⁴ (PECL) or the UNIDROIT Principles of International Commercial Contracts (UPICC) into the contract,³⁵ but that will not address a second problem: often, one party will try to modify the model contract or the set of principles that the parties have agreed to incorporate. The modification may be hidden in the small print and be unknown to the other party. This is particularly likely when one party is a large, sophisticated business using its standard form in a contract with a much smaller and less sophisticated business. In such a situation, the SME may assume that, because the contract looks like the model form or appears to incorporate the PECL or the UPICC, the SME will get the protection it wants, when, in fact, the exclusions or alterations take away that protection. This problem can be dealt with only by having mandatory rules such as controls over unfair terms. The risks to an SME cannot necessarily be resolved by the parties using a model form or a set of internationally accepted principles as part of their contract.

³⁴ O. Lando, H. Beale (eds). *Principles of European Contract Law, Parts I and II*. The Hague: Kluwer 2000.

³⁵ Third edition (Rome, 2010).

10. The need for protective rules for SMEs

In other words, the problems faced by SMEs are not just ones of understanding foreign laws. They are also about the terms of the contract or, indeed, the way in which the contract is made or the way in which the other party might behave during the validity of the contract. When a party is relatively inexperienced or unsophisticated in negotiating contracts and cannot afford legal advice, there are serious dangers. An SME, for example, may not know what is in the standard contract terms supplied by the other party, or it may not understand the implications of those terms. In the course of negotiations, it may not think to ask for information that might affect its decision on whether or not to enter the contract—it may assume the other party will disclose such information. And it may not anticipate the other party behaving opportunistically during the course of performance, and so not seek to insert safeguards into the contract.

11. Different approaches to inexperienced parties

There are marked differences in the way in which our various national laws deal with such issues. Some national laws of contract offer protection to businesses that get themselves into trouble of the kinds I have just described. German law, for example, allows a business to challenge the other party's standard terms^{*36}, and it imposes a duty of disclosure if non-disclosure would be contrary to good faith.^{*37} Some laws, such as Dutch law^{*38}, give the court very wide powers to refuse enforcement to a party whose behaviour has been contrary to good faith. Other systems, such as English law, take a very different attitude.^{*39} English law for B2B contracts can be described as highly 'individualistic'—the parties are expected to stand on their own two feet and not look to the court for assistance. There are very few controls over unfair terms—in essence, controls exist only over clauses that limit or exclude liability.^{*40} There is generally no duty to disclose facts, however crucial^{*41}, and, in effect, there is no doctrine of mistake that can be used to escape the contract.^{*42} Finally, there is no general doctrine of good faith.^{*43} English law's attitude is this, broadly speaking: read the contract; ask questions before you agree; and if you don't want the other party to behave in a certain way, insert a term in the contract to prevent it. And if you didn't, well, tough luck. You'll know better for next time.

Many English lawyers believe that English law is, by and large, appropriate for the kinds of cases that are normally heard by the English courts, especially the Commercial Court. I agree. The 'typical litigant' in an English contract case is a large company that is either sophisticated (many of them are 'repeat players' in the relevant market) or represented by highly trained lawyers; a party that knows what is in the standard-form document, if there is one; a party that knows what facts it should ask for before entering into a contract; and a party that can anticipate at least most of the tricks that the other party might get up to. Moreover, such parties do not mind risk; what they dislike is uncertainty about the legal effect of their

^{*36} See §§305–307 of the BGB. The 'grey' and 'black' lists (see §§308 and 309, respectively) do not apply to B2C contracts, but §310 (1) means that the courts can and do reach similar results under the general provision of §307; see B. Markesinis, H. Unberath, A. Johnston. *The German Law of Contract: A Comparative Treatise*. Second edition. Oxford: Hart 2006, p. 177.

^{*37} *Ibid.*, 306–310.

^{*38} Article 6:2 of the BW.

^{*39} Some of these characteristics of English law are explored in more depth in H. Beale. *Mistake and Non-Disclosure of Facts*. Oxford: Oxford University Press 2012, Chapter 3. Some possible reasons for them are surveyed in H. Beale. Characteristics of contract laws and the European optional instrument. – H. Eidenmüller (ed.). *Regulatory Competition in Contract Law and Dispute Resolution*. Munich: Beck 2013, p. 315.

^{*40} Under the Unfair Contract Terms Act, 1977.

^{*41} *Smith v. Hughes* (1871) LR 6 QB 597 and, more recently, *Statoil ASA v. Louis Dreyfus Energy Services LP (The Harriette N)* [2008] EWHC 2257 (Comm), [2008] 2 Lloyd's Rep. 685.

^{*42} When the mistake is as to the substance or the surrounding facts (as opposed to being a mistake as to the terms, which may give rise to relief, as in *Hartog v. Colin and Shields* [1939] 3 All E.R. 566), it is legally relevant only if it is shared by both parties and renders the contract or the 'contractual venture' impossible: *Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679, at paragraph 76.

^{*43} In the recent case *Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] EWHC 111 (QB), the Court stated that, on the particular facts (involving a long-term distribution contract that had been drafted without legal advice and comprised, in all, eight clauses), there was an implied term under which the parties should behave toward each other with good faith, but the actual decision seems to have rested on much narrower implied terms.

agreement—uncertainty that is inevitable if the court has power to assess the validity of the contract terms or to assess, after the event, whether the parties' behaviour was or was not in accordance with good faith and fair dealing. This is particularly true when the contract is in a fluctuating market, where one or the other party may have very strong incentive to find legal grounds for avoidance of the contract if the market has moved against it.^{*44} But this kind of law is not suitable for many SMEs, which do not have the same characteristics and which do not, in general, sign large contracts or contracts in fluctuating markets.

12. Why the CISG is not the answer

This explains my answer to a question that is frequently asked: why do we need a CESL when we already have the Convention on Contracts for the International Sale of Goods (CISG)? It so a good question. The CISG offers many of the same advantages as the CESL. It provides a neutral, internationally accepted law that is translated into many languages. Moreover, it is already part of the law of many countries and we have developed case law and wide experience of the CISG. But my answer is simple. There are crucial elements—validity and the control of unfair terms—that are not covered by the CISG. They are left to be determined by the otherwise applicable law of contract. And that brings us back to the problem of knowledge. Unless it is familiar with the otherwise applicable law affecting the contract, an SME that is offered a contract to which the CISG will apply but which is on standard terms will not know whether it would be able to challenge one of those terms if it is unfair; it will not know whether the other party has a duty of disclosure; it will not know whether it might have a remedy if it finds that it has made a fundamental mistake; and it may have enormous difficulty in knowing to what extent it will have protection if the other party behaves badly. All of that will depend on what the law that governs these issues provides. And the position is made even more complex by the fact that in some systems of law, the protections that apply to domestic contracts do not apply to 'international' (i.e., cross-border) contracts.^{*45}

13. Protection within the CESL

If I am right in saying that many SMEs are risk-averse, then I would expect many SMEs to want to have the kind of protection that the mandatory rules of the CESL provide even for business-to-business contracts. They will want to have protection in case terms that were not negotiated are unfair. They will find this in the CESL. CESL's Article 86 provides the following:

Meaning of 'unfair' in contracts between traders

1. In a contract between traders, a contract term is unfair for the purposes of this Section only if:
 - (a) it forms part of not individually negotiated terms within the meaning of Article 7; and
 - (a) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.
2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:
 - (b) the nature of what is to be provided under the contract;
 - (c) the circumstances prevailing during the conclusion of the contract;
 - (d) the other contract terms; and
 - (e) the terms of any other contract on which the contract depends.

SMEs will want the right to avoid the contract on grounds of mistake, at least when the other party knew or ought to have known of the mistake and should have said something. They will find this in CESL's Article 48:

⁴⁴ See the analysis by G. Priest. Breach and remedy for the tender of non-conforming goods. – *Harvard Law Review* 1978 (91), p. 960.

⁴⁵ For example, the UK's Unfair Contract Terms Act (1977) does not apply to international supply contracts (S. 26); neither does it apply to contracts to which English law applies only because the parties have chosen English law to govern the contract and which otherwise would be governed by some other law (S. 27).

Mistake

1. A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
 - (a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms and the other party knew or could be expected to have known this; and
 - (b) the other party:
 - (i) caused the mistake;
 - (ii) caused the contract to be concluded in mistake by failing to comply with any pre-contractual information duty under Chapter 2, Sections 1 to 4;
 - (iii) knew or could be expected to have known of the mistake and caused the contract to be concluded in mistake by not pointing out the relevant information, provided that good faith and fair dealing would have required a party aware of the mistake to point it out; or
 - (iv) made the same mistake.

SMEs will welcome the duty of disclosure in CESL's Article 23:

Duty to disclose information about goods and related services

1. Before the conclusion of a contract for the sale of goods, supply of digital content or provision of related services by a trader to another trader, the supplier has a duty to disclose by any appropriate means to the other trader any information concerning the main characteristics of the goods, digital content or related services to be supplied which the supplier has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party.
2. In determining whether paragraph 1 requires the supplier to disclose any information, regard is to be had to all the circumstances, including:
 - (a) whether the supplier had special expertise;
 - (b) the cost to the supplier of acquiring the relevant information;
 - (c) the ease with which the other trader could have acquired the information by other means;
 - (d) the nature of the information;
 - (e) the likely importance of the information to the other trader; and
 - (f) good commercial practice in the situation concerned.

SMEs may even welcome the general duty of good faith and fair dealing contained in Article 2 of the CESL:

Good faith and fair dealing

1. Each party has a duty to act in accordance with good faith and fair dealing.
2. Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.
3. The parties may not exclude the application of this Article or derogate from or vary its effects.

Article 2 is not supposed to assume the major role that is played by good faith in some legal systems: it is intended to be subsidiary. Recital 31 states that

[t]he principle of good faith and fair dealing should provide guidance on the way parties have to cooperate. As some rules constitute specific manifestations of the general principle of good faith and fair dealing, they should take precedent [*sic*] over the general principle. The general principle should therefore not be used as a tool to amend the specific rights and obligations of parties as set out in the specific rules.

Nonetheless, good faith and fair dealing is an important principle under which SMEs can expect significant protection.

14. Will SMEs pay for protection?

However, there is a very real question. Will the other party—a large business, say—ever agree to a contract on the terms of the CESL? The CESL provides, as I have shown, ‘consumer-like’ protection to the other party. That will mean that the larger business may face increased costs if it agrees to contracting under the CESL. For example, a business that usually concludes contracts on its own standard terms and insists on the contract being governed by English law will find that suddenly the other party may be able to challenge those terms on grounds of unfairness—with the result, for example, that the large business may be unable to increase its prices suddenly or, if it breaks the contract, it may have to pay additional compensation. It might have to disclose information that it had no duty to disclose under English law. Its behaviour may be challenged. The challenge may or may not succeed, but the business will in any event face additional uncertainty. Even if it can show that its terms are fair and its behaviour was impeccable, there may be delay while the issue is argued before a judge—most of these are not issues that can be dealt with upon application for summary judgement. The large business may decide, therefore, that it will agree to use the CESL for a contract only if it is paid enough extra or obtains the goods or services that it wants at a sufficiently low price, to compensate for this. In other words, the SME may have to pay a ‘premium’ to the larger business in order to use the CESL for the contract and therefore obtain the legal protection that the SME wants.

Will the SME be prepared to pay? I think the answer is ‘yes’—at least some SMEs will think that it is worth paying the premium. The increase in cost is likely to be relatively small, and I think the SMEs will view it as a kind of insurance: pay a small premium and get protection against a range of ‘contractual accidents’. And basic law and economics tells us that if the SME is prepared to pay the premium (or, as the case may be, accept slightly lower prices for its products), the larger firm will find it worthwhile to offer the CESL option as a way of attracting those SMEs that otherwise would not accept such a contract. There is room, in other words, for an efficiency gain that leaves both parties better off. Of course, not all SMEs will want to pay the premium. They may prefer better prices over increased protection. Let them opt then for a law that does not offer them protection, such as English law. That is their choice. The great advantage of the CESL, and its advantage especially over the alternative of further harmonisation of general contract law, is precisely that it is optional. No business needs to use it if it does not wish to do so. In addition, it may well be that a company’s willingness to adopt the CESL may be taken as a sign that ‘we are a good company; our terms are fair, so challenges to them will not bother us; and our behaviour is impeccable’. In other words, willingness to apply the CESL may become a signal of trustworthiness and reliability.

15. The CESL as a signal of reliability

I hope this is the case, not only because it would mean that the CESL will be used. I do not think we can expect companies, particularly SMEs, ever to become familiar with the details of the law. But if the CESL is adopted, I think, the trade associations and federations of small businesses will be able to get a simple message across to their members, that message being to look for the CESL: ‘If you contract on terms of the CESL, you will have a good degree of protection against nasty surprises in the other party’s terms or behaviour.’ That is an indicator of quality that is worth paying for.

That leads me to a crucial point. If we are to encourage SMEs to look for and use the CESL as a sign of quality and protection, it must be a reliable sign. A party having opted for the CESL must have confidence in getting what said party expects. Unfortunately, the current draft seems to have a mistake that could undermine this completely. I referred earlier to Article 8 (3) of the Regulation, which provides the following:

- (3) In relations between a trader and a consumer the Common European Sales Law may not be chosen partially, [...] only in its entirety.

This prevents the business in the B2C contract from ‘cherry-picking’ just parts of the CESL and ignoring the rest. But the obvious implication is that in a B2B contract the parties—or, more realistically, the party whose standard terms are used—**can** cherry-pick. That is, the contract might purport to be on CESL terms while the ‘small print’ might go on to exclude vital provisions such as the chapter on unfair terms or the chapter on validity. That would deprive the other party—typically the SME—from the protection that it was seeking to receive by asking to contract on the basis of the CESL. I believe this to be a mistake. Commission officials

have told me that they think Article 8 (3) does not allow a business, even in a B2B contract, to exclude the rules that the CESL states are mandatory. Their interpretation is almost certainly incorrect. They rely on Regulation's Article 1 (2), which provides that

[p]arties may exclude the application of any of the provisions of the Common European Sales Law, or derogate from or vary their effects, unless otherwise stated in those provisions.

Article 1 bites only where there is a provision elsewhere in the CESL making a particular article mandatory. The language of Article 81, which specifies that the rules on unfair terms are mandatory, is contained in the chapter on unfair terms. So if the CESL were adopted without that chapter, there would be nothing to make the rules mandatory and they would be excluded. This is a drafting mistake that must be put right.

16. Risks and remaining problems

It is true that there are some risks in using the CESL. It may be some years before we have an established body of jurisprudence. The Commission's proposal for a database^{*46}, such as the ones available for the CISG, will be useful here. The CESL will also have the advantage over the CISG that there is a court—the Court of Justice of the EU—with ultimate authority to rule on the correct interpretation of the instrument. Perhaps we can avoid some of the cost and delay in obtaining rulings from the Court of Justice by creating a special lower tribunal to deal with CESL cases.

We also need clarification on some points. In particular, it is hard to know whether some issues are within the scope of the CESL though there is no provision dealing directly with them or whether, instead, they lie outside its scope, such that the mandatory rules of the 'domestic' applicable law shall apply. For example, what about national rules on penalty clauses, on terms that were 'individually negotiated' but are nonetheless unfair, or on granting an individual remedy to a consumer who has been the victim of an unfair commercial practice such as aggressive selling? We should also clarify the scope of illegality and immorality and of 'public policy', to prevent judges who are faced with the displacement of a local consumer protection provision by the CESL from 'reinventing' the local provision as a rule of legality or morality (and thus beyond the scope of the CESL), or as a rule of public policy of the forum or of the place of performance that can be applied regardless of the choice of the CESL under Rome I's Article 9.^{*47}

The CESL cannot, by any stretch of the imagination, solve all of the problems associated with cross-border trading. There will still be major language problems—sales literature will have to be translated, and staff who handle complaints and warranty claims will need to be fluent in more than their mother tongue. In some countries, there may remain problems with ensuring delivery and in obtaining payment. And if there is a dispute, problems of dispute resolution and of enforcement are far more important than those of substantive law, which is all that the CESL tackles. Nonetheless, the CESL is a step in the right direction. I hope that readers will support it.

⁴⁶ Proposal for a Regulation on a Common European Sales Law, 11 October 2011, COM(2011) 635 final, p. 10.

⁴⁷ The Draft Report of the European Parliament's Legal Affairs Committee (2011/0284(COD)) of 18 February 2013, amendment 70, is aimed at addressing precisely this point.



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Protection of Consumers in Consumer-Credit Contracts:

Expectations and Reality in Estonia^{*1}

1. Introduction

Consumer protection in credit agreements has become an increasingly acute legal and social problem during the recent economic crisis. This crisis was at least partly rooted in the lending boom, during which credit was extremely easily obtainable even for non-creditworthy borrowers. Since 2008, we have been experiencing the sobering effects of the recession, in Estonia just as much as in other countries, and it has very often been the consumer who faces the bitter consequences of over-indebtedness.

This article discusses the development and experiences of Estonian consumer-credit law over the last 10 years—i.e., since the codification of the new Estonian law of obligations. The paper is based on the assumption that the analysis of consumer-protection issues in consumer credit cannot be limited solely to the provisions of substantive law: while in Estonia the contractual aspects of credit transactions are regulated by the Law of Obligations Act^{*2} (LOA), including the norms implementing the new EU Consumer Credit Directive^{*3} (CCD), the enforcement of the claims arising from consumer-credit contracts are to a great extent set forth in or affected by other legal acts, most importantly in the General Part of the Civil Code Act^{*4} (GPCCA) and the Civil Procedure Code.^{*5} The Consumer Protection Act^{*6}, in turn, regulates the public-law requirements of offering of credit services and the supervision thereof. The article shows that it is not possible to achieve effective protection of consumers in credit relationships by substantive-law regulation alone. On the contrary: in reality, it is very much dependent on aspects of procedural law.

¹ The research leading to these results has received funding from the Norway Financial Mechanism 2009–2014 under project contract No. EMP205.

² Võlaõigusseadus. – RT I 2001, 81, 487; RT I, 11.6.2013, 3 (in Estonian).

³ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC. – OJ L 133/66, 22.5.2008.

⁴ Tsiviilseadustiku üldosa seadus. – RT I 2002, 35, 216; RT I, 6.12.2010, 12 (in Estonian).

⁵ Tsiviilkohtumenetluse seadustik. – RT I 2002, 35, 216; RT I, 22.3.2013, 16 (in Estonian).

⁶ Tarbijakaitseseadus. – RT I 2004, 13, 86; RT I 2010, 77, 590 (in Estonian).

2. The problem of the decade: usurious electronic consumer credit

2.1. Usurious lending practices in Estonia and the response from the legislator and the Supreme Court

The most acute consumer-protection problems in consumer credit have largely been related to the usurious practices involved in electronic consumer credit. Using small-scale electronic consumer loans—that is, unsecured instant loans obtainable via text message (so-called SMS loans) or via the Internet—has become extremely popular in Estonia in the last 7–8 years. Such loans are widely offered—partly by the same companies^{*7}—also in other Baltic and Nordic countries. On one hand, such kind of electronic consumer credit is a modern and highly innovative credit product: new technical possibilities make it extremely easy to obtain credit. On the other hand, the usurious and irresponsible lending practices of electronic-credit providers have created new tensions and substantial socio-economic problems, including over-indebtedness of consumers, in Estonia just as much as in other Nordic-Baltic societies. To a great extent, those problems stem from the usurious nature of the loans, as an extremely high annual percentage rate of charge (APRC) is charged on them: for example, if the user takes out credit of 100 euros for one month, the average APRC might be slightly over 600%. It has not been rare in Estonia for the APRC of an electronic consumer loan to exceed 1,000%.^{*8} The information obligations of the creditor and the right of withdrawal of the consumer set forth in the European consumer-protection directives have proved to be ineffective against usurious lending practices in Estonia.^{*9}

So far, different methods of combating those problems have been applied in other European countries (administrative methods, interest- or APRC-rate caps, unconscionability doctrine, etc.) with ongoing legal discussion of whether more efficient methods should be employed.^{*10} The Estonian legislator, for example, has tried to solve those problems by setting relative APRC-rate caps in combination with the unconscionability doctrine. In 2009, the Estonian Parliament passed a legislative amendment changing the notion of a transaction violating ‘good morals’ as characterised in §86 of the GPCCA. With this amendment the legislator attempted to set forth a rule that usurious credit contracts can be considered to be against good morals and thus void under §86 (1) of the GPCCA. According to the new §86 (2) of the GPCCA, a transaction is deemed contrary to good morals if, *inter alia*, a party knew or had to have known that the other party entered into the transaction because of urgent needs, dependence, or inexperience of the other person, or similar circumstances, and if 1) the transaction was carried out on terms grossly unfair for the other party or 2) an imbalance exists between the value of the mutual obligations of the parties that is deemed contrary to good morals. To ease the consumer’s burden of proof, the second sentence of §86 (3) of the GPCCA stipulates that in cases of consumer-credit contracts it is assumed that the value of the parties’ mutual obligations is disproportionate and contrary to good morals if, *inter alia*, at the time of issuing of the loan the APRC payable by the consumer is more than three times the average APRC charged on consumer credit by credit institutions as determined from the latest statistics prepared by the Estonian Central Bank.

The applicability of this unconscionability doctrine to electronic instant consumer loans was clarified in Supreme Court case 3-2-1-49-11. To hold the credit contract void under §86 of the GPCCA—so the Supreme Court stated—one must determine, first, whether there is a gross imbalance between the values of the mutual obligations of the parties and, second, whether the consumer concluded the contract due to his urgent needs, dependence, or inexperience.^{*11} Most importantly, the Supreme Court stressed that it is the

⁷ Such as Bigbank, Folkia, or Ferratum.

⁸ See, for example, the APRC figures for electronic small-scale credit company SMSLaen at <https://www.smslaen.ee/?mod=ModLaenTables&menuID=56&lang=est>.

⁹ For further information, see K. Saare, K. Sein, M.A. Simovart. Protection of consumer rights in SMS loan agreements. – *European Review of Private Law* 2010 (18)/1, pp. 129–142.

¹⁰ The most recent thorough comparative study of interest-rate restrictions in Europe was published in 2010. See U. Reifner, S. Clerc-Renaud, M. Knobloch. Study on interest rate restrictions in the EU: Final Report. Available at http://ec.europa.eu/internal_market/finances-retail/docs/credit/irr_report_en.pdf (most recently accessed on 21.10.2013). However, since then, legislative changes or amendment proposals have been made in several Member States (e.g., Finland and Lithuania).

¹¹ CCSCr 17.6.2011, 3-2-1-49-11, para. 8. Available at <http://www.riigikohus.ee/?id=11&tekst=RK/3-2-1-49-11> (most recently accessed on 10.4.2013) (in Estonian).

consumer who has to plead and prove the existence of that second element; however, the standard of proof may be lower in those cases wherein the disproportion of the parties' obligations is extreme.^{*12}

2.2. The effectiveness of the unconscionability doctrine against usurious practices

The purpose of introducing the unconscionability doctrine in combination with relative interest-rate caps in §86 of the GPCCA was to 'reduce the social problems related to the fast development of instant consumer credit market'; it was admitted that the current legal rules were not able to solve those problems in accordance with social needs and the society's sense of justice.^{*13} As the new rules of §86 of the GPCCA have been in force for four years already, the first conclusions can be drawn on whether the amendments have reached this goal or, instead, there is a need for stricter consumer-protection mechanisms.

As is described above, the Estonian Supreme Court took the position that merely establishing that the APRC of a particular consumer-credit contract is in excess of three times the average APRC (i.e., establishing the existence of a disproportion of the parties' obligations) is not, in itself, enough for assumption of the existence of the subjective component and, as a result, for one to consider the credit transaction to be against good morals and thus void. Moreover, it is necessary that the consumer additionally plead and prove that he concluded the credit contract as a result of urgent needs or inexperience. This means that in reality the norm providing for the voidness of a usurious credit contract cannot be applied *ex officio* by the court, particularly if the consumer is not present for the proceedings (in the case of default judgement), as is often the case in Estonia.^{*14} This is probably one of the most important reasons for which the unconscionability doctrine has proved to be ineffective against the usurious practices.^{*15} There are practically no cases wherein the voidness of a usurious credit contract has been established by the court and in which the consumer has been able to prove his urgent needs or inexperience.^{*16}

There are also other procedural and, in addition, psychological reasons for which the problems of usurious consumer credit continue to exist in Estonia. First, the creditors often assert their claims against consumers not in ordinary court proceedings but, rather—as their first resort—by using debt-collection agencies. After receiving the payment reminder from the collection agency, consumers are often ready to pay voluntarily, as they are afraid of the creditor reporting their default to the credit-information registry^{*17} and thereby bringing about their stigmatisation for the whole credit market.

Secondly, the creditors apply the order-for-payment procedure in hopes that the consumers will not lodge a statement of opposition. Namely, if the debtor does not file a timely statement of opposition to the claim, the court issues a payment order in accordance with §489 of the Estonian Civil Procedure Code. Such a payment order can be enforced without any other formalities. Therefore, in the order-of-payment procedure, if the consumer does not lodge an objection—as is often the case in Estonia—the validity of the claim is not examined by the court at all. It is unfortunate that there is no such restriction in Estonian civil-procedure law as in Germany, where §688 (2), No. 1 of the German Civil Procedure Code does not allow the order-for-payment procedure to be used in cases of consumer-credit claims if the APRC of the credit

¹² SCCCd 3-2-1-49-11, para. 9.

¹³ Tsiivilseadustiku üldosa seaduse ja võlaõigusseaduse muutmise seaduse eelnõu seletuskiri ['Explanatory Notes to the Act Amending the General Part of Civil Code Act and Law of Obligations Act']. Available at <http://www.riigikogu.ee/?page=eelnou&op=ems2&emshelp=true&eid=420369&u=20130411155159> (most recently accessed on 10.4.2013) (in Estonian).

¹⁴ See, for further details, I. Ulst, *Balancing the Rights of Consumers and Service Providers in Electronic Retail Lending in Estonia*. Tartu: Tartu Ülikooli Kirjastus 2011, p. 75.

¹⁵ It is interesting to note that exactly the same tendency has been observed in a country as far away as Australia; see J. Tuffin, *Responsible lending laws: Essential development or overreaction*. – *QUT Law & Justice Journal* 2009 (9)/2, pp. 289, 291.

¹⁶ M. Vutt, *Tehingu heade kommete vastasus TSÜS § 86 alusel* ['Transactions Contrary to Good Morals under Section 86 of GPCCA'], pp. 6–18, 25–26. Available at http://www.riigikohus.ee/vfs/1352/TehinguHeadeKommeteVastasus_MargitVutt.pdf (most recently accessed on 3.4.2013) (in Estonian). There is, however, a recent judgement of Tallinn District Court (No. 2-11-60438) in which the court held asserting claims arising from a consumer-credit contract with an APRC of 441% to be incompatible with the principle of good faith. Here the court explicitly did not apply the unconscionability doctrine of Section 86 of the GPCCA and instead stated that enforcing contracts with an excessive APRC runs counter to the principle of good faith.

¹⁷ There is no state-owned official credit information registry in Estonia. Credit information registries are run by private companies, the biggest being Krediidinfo AS.

contract exceeds the average market interest by 12%.^{*18} Thus it is that the interests of consumers are not protected in the order-for-payment procedure.^{*19}

The norms banning usurious contracts have further been avoided through the use of abstract acknowledgements of debt: when a consumer defaults, the creditor offers him an abstract acknowledgement of debt to sign (or sometimes manipulates him into so doing), according to which the consumer acknowledges that he owes the creditor a certain sum of money. This acknowledgement of debt contains no details about how much of that sum is the capital of the debt and how much the interest, penalty interest, or other costs. Those acknowledgements of debt are then enforced either in order-for-payment procedure or in ordinary proceedings, making it impossible or at least very difficult for judges to determine whether the underlying contract is void in consequence of the excessive APRC rate.

It is also the Estonian reality that most debtors in cases of usurious consumer loans are persons who are not ready to assert their rights in the courts or who do not possess the financial means necessary for this. Moreover, consumer-credit norms are often highly complicated, and consumers, as a rule, are not able to resort to them^{*20}, at least not without professional legal aid. All in all, I share the view of the Estonian Consumer Protection Board that the unconscionability doctrine and the relative APRC restrictions in §86 of the GPCCA have not fulfilled their purpose of effectively limiting the usurious practices of electronic consumer-loan providers.^{*21}

2.3. A plea for introducing APRC restrictions in Estonia

In order to put an end to usurious lending in Estonia, the author suggests introducing APRC restrictions, at least for consumer credit. This would seem to be the only way of effectively protecting consumers against such practices: when one turns an eye to neighbouring countries facing the same kinds of problems, it seems that other, less restrictive measures have not been a success. For example, the Finnish legislator has only very recently implemented an important legal reform related to instant credit in order to reduce consumer-debt problems caused by such credits.^{*22} Amendments to the Finnish Consumer Protection Act, introducing interest-rate caps of 50% plus legal interest for small-scale consumer-credit contracts (i.e., credit under 2,000 euros) in its Article 17a, were approved in the Finnish Parliament in February 2013.^{*23} This is a development that, in my opinion, should be very carefully monitored. Finland, along with other Nordic countries, has traditionally opposed interest-rate restrictions, differing in this respect from such Member States as Germany, France, Belgium, Italy, or Poland, where interest-rate caps in one or another form have existed already for a long time. The Finnish legislator has thus far opted instead to use administrative methods restricting the 'opening hours' of instant-credit providers in order to prevent impulsive borrowing in the late evening and during the night. Obviously, those administrative methods have not proved to be effective, for Finland has now deemed it necessary to set the maximum interest rate as low as 52%.

Quite similarly, in Lithuania, an absolute APRC cap of 200% has been introduced since the beginning of 2011.^{*24} In other words, our close neighbours who have been facing exactly the same problems of usurious electronic lending as we are in Estonia have seen no other way of solving them except to introduce

¹⁸ K. Saare, K. Sein, M.A Simovart. Laenusaja õiguste kaitse SMS-laenu lepingute puhul ['Protection of consumers in SMS loan agreements']. – *Juridica* 2010/1, p. 49 (in Estonian); M. Vutt. Maksekäsu kiirmenetluse kohtupraktika probleeme ['Problems of order-for-payment procedure'], p. 6. Available at http://www.riigikohus.ee/vfs/1140/Maksek2suKiirmenetlus_MargitVutt.pdf (most recently accessed on 3.4.2013) (in Estonian).

¹⁹ This is also stressed by V. Kõve. Tsiviilkohtumenetluse kiirendamise võimalused ja nendega seotud ohud ['Possibilities for expediting civil proceedings and dangers thereof']. – *Juridica* 2012/9, pp. 670–671 (in Estonian).

²⁰ *Ibid.*, p. 668.

²¹ *Tarbijakaitseameti aastaaruanne 2010* ['Yearbook of the Consumer Protection Board'], p. 55. Available at http://www.tarbijakaitseamet.ee/public/Aastaaruanne_2010.pdf (most recently accessed on 11.4.2013) (in Estonian).

²² Key reforms in collection and instant loan legislation. *Current Issues in Consumer Law* 2013/1. Available at <http://www.kuluttajavirasto.fi/en-GB/articles/current-issues-in-consumer-law-1-2013/key-reforms-in-collection-and-instant-loan-legislation> (most recently accessed on 3.4.2013).

²³ Laki kuluttajansuojalain 7 luvun muuttamisesta. Available at <http://www.finlex.fi/fi/laki/alkup/2013/20130207> (most recently accessed on 4.4.2013) (in Finnish). The act entered into force on 1.6.2013.

²⁴ Section 21 of the Law on Consumer Credits of the Republic of Lithuania (or *Lietuvos Respublikos vartojimo kredito įstatymas*). Available at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_e?p_id=413353&p_query=&p_tr2=2 (most recently accessed on 4.4.2013) (in Lithuanian).

some sort of interest or APRC caps. Therefore, in my opinion, the Estonian legislator should have second thoughts about the solution of the unconscionability doctrine implemented back in 2009 and seriously consider the possibility of setting APRC restrictions either in §86 of the GPCCA or in the chapter of the LOA on consumer-credit contracts.

It must be noted that the possibility of APRC restrictions has not been favoured by all Estonian authors. In the Estonian legal literature, even the Constitutional compliance of APRC restrictions has been cast into doubt with the assertion that ‘the APRC limit disproportionately restricts the constitutionally protected right of entrepreneurship freedom of service providers. In weighing the proportionality of the restriction, an important issue is the conflict between the principle of [the] social state and the fundamental right of entrepreneurship freedom’^{*2523}. Instead of limiting the cost of credit, this author favours higher information, disclosure, and prudent-marketing requirements reconcilable with the idea of responsible borrowing.^{*26}

In essence, this is a classical argument against interest-rate caps: if in a free-market society we do not restrict by law the price of bread or cars, then how could we regulate how much a borrower should pay for the credit money? A classical counter-argument, of course, states that we cannot compare credit with other products, such as bread or cars: ‘Credit is different from other products and services offered to consumers in the sense that it will also affect their economic situation in the future.’^{*27} Indeed, if I waste all of my money today on a new car or expensive shoes, then I can have a fresh start tomorrow, but if I buy those things on credit, I will be financially bound for many years to come.

Thus the positive sides of APRC restrictions—if they are not set too low—do outweigh the negative effects: in my view, there seems to be no other possibility for effectively fighting the usurious lending practices that have been commonplace in Estonia for almost a decade. It is, of course, a question of legal policy how high the interest-rate cap should be set; in my view, a good starting point could be the threshold of thrice the average APRC charged on consumer credit by credit institutions that is currently set forth in §86 (3) of the GPCCA. Yet, should the Estonian legislator follow the Finnish and Lithuanian model and introduce APRC restrictions in domestic law, one must not forget the procedural aspects of the problem. To ensure that the APRC caps set forth in substantive law are not avoided by procedural means, it should further be specified in regulations that claims arising out of consumer-credit contracts exceeding the APRC ceiling may not be asserted via order-for-payment procedure.

3. The principle of responsible lending

The negative effects of irresponsible lending became obvious during the recent financial crisis, which in Estonia was preceded by a lending boom. One instrument intended to reduce the level of over-indebtedness or debt default of consumers on the European level was the introduction of the principle of responsible lending in Article 8 of the CCD.^{*28} The essence of the principle of responsible lending was, in my view, very pointedly described in a Tartu County Court decision stating that ‘bad’ borrowers are connected to ‘bad’ creditors and that ‘the creditor is not forced to give out credit’.^{*29} This really is the core idea of responsible lending: if creditors were paying more attention to consumers’ creditworthiness when making their credit decisions in the first place, there would be many fewer defaulting consumers.

²⁵ I. Ulst (see Note 14), p. 79. In my view, however, it is somewhat ambiguous to state that such interest-rate caps are in contradiction with the Estonian Constitution while similar or even more stringent caps in Germany, France, or other European countries are not considered to be unconstitutional in those countries.

²⁶ *Ibid.*, p. 81. Other authors, in contrast, are of the opinion that the regulation of APRC limits is justified for protection of consumers, especially in account of the fact that in various European countries similar or even more restrictive interest limits exist; see K. Saare, K. Sein, M.A. Simovart (see Note 9), pp. 141–142.

²⁷ Instant loans marketed to the young as a way to [a] good life. *Current Issues in Consumer Law* 2012/5. Available at <http://www.kuluttajavirasto.fi/Page/34eb3afa-518b-450d-ab79-b13b2e0256b8.aspx?groupId=6090d570-ba72-4182-82f8-300406e80f02&announcementId=621124d5-ddbe-4129-9e6b-3a76d1d9dd21> (most recently accessed on 3.4.2013).

²⁸ For further information, see I. Ramsay. From truth in lending to responsible lending. – G. Howells, A. Janssen, R. Schulze. *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness*. Aldershot: Ashgate 2005, p. 15.

²⁹ Decision of Tartu County Court 2-11-4320.

Although the principle of responsible lending is set forth in the full harmonisation CCD, that directive gives Member States broad discretion over regulation of how exactly the creditor is to assess the consumer's creditworthiness and what the sanctions should be for the breach of such obligation.^{*30} In Estonia, the principle of responsible lending was implemented in §403² of the LOA, requiring that, prior to conclusion of a consumer-credit agreement, creditors 1) acquire the information necessary to assess the creditworthiness of the consumer; 2) assess the consumer's creditworthiness, and 3) counsel consumer before he takes out credit so that the consumer can evaluate whether the consumer-credit contract offered to him is adjusted to correspond to his needs and financial situation. When acquiring information for the assessment of creditworthiness, the creditor is obliged to solicit information from the consumer and, where appropriate, consult relevant databases. If the consumer can be expected to need or wish for more explanations as to the pre-contractual information or the main features or legal consequences of the contract, including legal consequences of default by the consumer, the creditor is obliged to furnish corresponding explanations and to warn the consumer of the risks incidental to consumer credit (see §403² (4) of the LOA). Thus the standard of responsible lending has been set relatively high in Estonia: although there is no prohibition of conclusion of a credit contract with a non-creditworthy consumer, the creditor is obliged to warn such a consumer^{*31} and failing to do that may lead to sanctions for the creditor.

Those sanctions are not harmonised by the CCD; instead, this was left to the discretion of the Member States, with Article 23 of the CCD requiring only that 'the penalties provided for must be effective, proportionate and dissuasive'. Estonian law provides for public-law sanctions in §41¹ (1) of the Consumer Protection Act, entitling a supervisory official to issue an injunction to cease the breach of the obligation and to refrain from it in the future. If the order is not complied with, a penalty payment may be imposed, with its upper limit being 650 EUR. Furthermore, recent case law has also awarded the borrower a damages claim for negative interest if the creditor is in breach of the responsible-lending obligation. Namely, in case 3-2-1-136-12, the Estonian Supreme Court stated that the obligation of the creditor to assess the creditworthiness of the borrower constitutes a pre-contractual obligation under the LOA's §14 (1), according to which persons engaged in pre-contractual negotiations or other preparations to enter into a contract shall take reasonable account of one another's interests and rights.^{*32} Breaching this obligation may give the consumer a right to damages under §§14 and 115 of the LOA whereby the damages should be assessed on the basis of the expectation of (negative) interest. Therefore, the borrower should be compensated for all negative consequences of the credit (interest for late payment, penalty for breach of contract, and decrease in assets) and the borrower can set off this claim for damages with the repayment claim of the creditor.^{*33}

Here we see that the private-law sanctions for breach of the responsible-lending obligation can be relatively far-reaching under Estonian law. Further, the recent legislative amendments of the LOA specified the obligations of the creditor in respect of assessing the consumer's creditworthiness and stated clearly that it is the creditor who—in case of a dispute—has to prove that he has fulfilled all his obligations required for compliance with the principle of responsible lending (LOA, §403² (7)).^{*34} This is, no doubt, a positive development, as a recent study by the Estonian Consumer Protection Board^{*35} has shown that in practice the principle of responsible lending is not observed by all creditors even though awareness of it is constantly increasing. It remains to be seen, however, whether those private-law sanctions will really be enforced in case law or whether, instead, they will again be outweighed by procedural-law aspects.

³⁰ For further information, see K. Sein. Transposition of the new Consumer Credit Directive in Estonia. – *European Review of Private Law* 2012/2, pp. 439–440.

³¹ SCCCd 27.11.2012, 3-2-1-136-12, para. 24. Available at <http://www.nc.ee/?id=11&tekst=RK/3-2-1-136-12> (most recently accessed on 10.4.2013) (in Estonian).

³² *Ibid.*

³³ *Ibid.*, para. 25.

³⁴ Those amendments entered into force on 1.7.2013. – RT I, 11.6.2013, 3 (in Estonian).

³⁵ Tarbijakrediidi uuring ['Study of consumer credit']. Available at <http://www.tarbijakaitseamet.ee/tarbijakrediidi-uuring/> (most recently accessed on 10.4.2013) (in Estonian).

4. Unfair terms and other party-autonomy restrictions in consumer-credit contracts

4.1. Contractual penalty for late payment

One of the most important aspects of consumer protection in consumer-credit transactions is related to the limitations to party autonomy—i.e., whether and to what extent the statutory rules may be derogated from by (standard) contract. Although it could be argued that current restrictions of party autonomy in consumer law are over-protective and paternalistic, the Estonian experience suggests that, rather, the view of I. Ramsay might be true: regulation of contractual terms and mandatory terms may increase consumer autonomy, defined as future (economic) freedom.^{*36} Step by step, Estonian case law has acknowledged the dangers associated with absolute party autonomy (which in practice means the freedom of the creditor to dictate contract terms) and has started to dismiss the abusive clauses in credit contracts.

A good example can be cited in relation to the contractual penalty for late payment. Before 2008, it was common practice among creditors (mostly those offering usurious consumer credit) to provide for a contractual penalty for late payment, which was claimed in addition to the interest on late payments. The Estonian Supreme Court declared such clauses void in case 3-2-1-120-08, as contrary to the mandatory provisions of the LOA's consumer-credit contract terms.^{*37} After that decision, the legislator even inserted an express provision in the LOA precluding such contract terms: according to the newly added third sentence of §415 (1) of the LOA, agreements that allow claiming payment of earnest money or contractual penalty from the consumer in the case of late payments are void. This has brought about changes in creditors' practices—largely thanks to continuous supervision by the Estonian Consumer Protection Board—and today such clauses cannot be found in most standard terms anymore. Here we can again observe one positive development in the consumer protection in credit transactions in recent years.

4.2. Liquidated-damages clauses for debt-collection and payment-reminder costs

Another positive development, although thus far somewhat less successful, has to do with liquidated-damages clauses involving debt-collection and payment-reminder costs. Charging unreasonably high fees for debt collection and payment reminders has been regular practice among credit providers, again mostly those providing usurious consumer loans. Here too, the Supreme Court intervened and ruled in case 3-2-1-120-08 that clauses according to which consumers have to compensate for debt collection and for payment-reminder fees as fixed in the standard terms of the creditor can be deemed unfair under §42 (3), item 5 of the LOA, if they are unreasonably high.^{*38}

There is, however, no consistent understanding of when such costs can be considered unreasonably high and the clauses thus void. One can find decisions wherein the court has deemed such costs to be unreasonably high and, accordingly, unfair and, therefore, in which the consumer does not have to bear them or has to compensate for them only to a reduced extent.^{*39} On the other hand, there are also decisions in which the court has held those clauses to be valid and ordered the consumer to pay collections costs in considerable amounts.^{*40}

The absence of uniform case law is, of course, understandable, since Estonian law does not provide for clear criteria to apply in decisions upon the possible unfairness of such clauses. One possibility for creation of legal certainty on the extent to which the debt-collection costs of the credit provider should be subject to compensation would be to turn once more to the Finnish model: in Finland, the maximum amounts of

³⁶ I. Ramsay (see Note 28), p. 16.

³⁷ SCCCd 14.1.2009, 3-1-1-120-08, para. 15. – RT III 2009, 3, 17 (in Estonian).

³⁸ *Ibid.*

³⁹ E.g., decisions of Tartu County Court 2-08-14356 and 2-11-19661, wherein said court considered 3,100 kroons (approx. 199 EUR) and 166.14 EUR debt-collection fees to be unreasonably high.

⁴⁰ See, for example, decision of Harju County Court No. 2-07-3204, wherein the creditor was afforded 86.92 EUR in debt-collection fees.

debt-collection and reminder costs are set forth by law.^{*41} Very recently, the Finnish Debt Collection Act was amended, and those maximum amounts have been lowered, especially for small debts, of no more than 100 euros, in which case the debtor's total liability for fees may be no greater than 60 euros.^{*42} For a normal payment reminder, the maximum amount under Finnish law is 5 EUR^{*43}; in Estonia, one can often find much higher fees in the standard terms of credit providers, although the actual costs should be considerably lower in Estonia than in Finland.

4.3. The court's right to assess unfairness of a contract term in order-for-payment procedure

As described above, the substantive consumer-protection norms are often ineffective if the creditor asserts his claim via the order-for-payment procedure. The same is true for provisions of substantive contract law aimed at combating unfair contract terms: when issuing the order for payment, the judge does not assess the possible unfairness of the contract term on which the claim is based. These negative effects of procedural law have been acknowledged also by the Court of Justice of the European Union (CJEU), in the *Banco Español de Crédito* case, wherein a Spanish court asked for a preliminary ruling on the question of whether a national court should be able to assess the unfairness of a term related to interest on late payments of its own motion in the order-for-payment procedure proceedings, in situations wherein the consumer has not lodged an objection.^{*44} It has long been established in CJEU case law that in ordinary court proceedings the court should always determine *ex officio* whether the contractual term is unfair or not.^{*45} The order-for-payment procedure, however, is a specific procedure characterised by the purpose of offering creditors easier and more rapid access to justice; therefore, it is not at all self-evident that the *ex officio* obligations of the court should be applied in this kind of procedure as well.

The CJEU stated that 'Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which does not allow the court before which an application for an order for payment has been brought to assess of its own motion, in *limine litis* or at any other stage during the proceedings, even though it already has the legal and factual elements necessary for that task available to it, whether a term relating to interest on late payments contained in a contract concluded between a seller or supplier and a consumer is unfair, in the case where that consumer has not lodged an objection'.^{*46} In essence, the CJEU ruled that if a judge responsible for an order-of-payment procedure notices that there is an unfair contract term upon which the creditor's claim is based, he should be entitled—but not obliged—to assess it of his own motion even if the consumer has not objected and that a national procedural law that does not give the judge such a right is contrary to the Unfair Terms Directive. The CJEU justified such intervention in the procedural autonomy of Member States with the argument that otherwise businesses would be able to deprive consumers of the benefit of the protection intended by the Unfair Terms Directive just by initiating an order-for-payment procedure instead of ordinary civil proceedings.^{*47}

What does the judgement of the CJEU in *Banco Español de Crédito* mean for Estonian civil-procedure law? Subsection 489 (1) of the Estonian Civil Procedure Code stipulates that if the debtor has neither paid the debt specified in the application nor lodged an objection, the court shall issue an order of payment. This order is enforceable even before it is served to the debtor (see §489 (7) of the Civil Procedure Code). Under Estonian rules on order-of-payment procedure, there is no requirement to find out and prove the facts of

⁴¹ Debt Collection Act (*laki saatavien perinnästä*). Available at <http://www.finlex.fi/fi/laki/ajantasa/1999/19990513> (most recently accessed on 10.4.2013) (in Finnish).

⁴² Key reforms in collection and instant loan legislation. *Current Issues in Consumer Law* 2013/1. Available at <http://www.kuluttajavirasto.fi/en-GB/articles/current-issues-in-consumer-law-1-2013/key-reforms-in-collection-and-instant-loan-legislation> (most recently accessed on 3.4.2013) (in Estonian).

⁴³ Finnish Debt Collection Act, §10a, item 1.

⁴⁴ Judgement of the Court of Justice of the European Union, 14.6.2012, in Case C-618/10, *Banco Español de Crédito SA v. Joaquín Calderón Camino*, not yet published, paras 37–38.

⁴⁵ See, in depth, V. Trstenjak. Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU. – *European Review of Private Law* 2013/2, pp. 463–472.

⁴⁶ C-618/10, *Banco Español de Crédito*, para. 57.

⁴⁷ *Ibid.*, para. 55.

the case; neither is the court obliged to assess of its own motion whether the claim is well-founded.^{*48} Nor is there a right of the court to do so. As the Estonian civil-procedure law does not entitle the court to assess of its own motion the possible unfairness of the contract term upon which the claim of the creditor is based, it is, in my view, not in conformity with the European Union law on unfair contract terms as explained by the CJEU in *Banco Español de Crédito*.^{*49} Therefore, it is necessary either to interpret the Estonian civil-procedure rules on the order-for-payment procedure in conformity with European law or—preferably—to amend the Estonian Civil Procedure Code accordingly.

5. Conclusions

The most acute consumer-protection problems in consumer credit in Estonia have largely stemmed from usurious and irresponsible lending practices of unsecured electronic consumer credit, leading in many cases to a vicious circle of debt and consumer insolvency. The unconscionability doctrine introduced in Estonian law for purposes of combating those problems has proved to be ineffective in practice, largely for procedural-law reasons. Therefore, the author makes a plea for introducing APRC restrictions into Estonian law—in a parallel to what was done recently by our neighbours Finland and Lithuania—as this seems to be the best way to protect consumers against usurious lending practices. It is also worth opening discussion about setting forth maximum amounts for debt-collection fees by law. The positive tendencies in consumer protection in Estonian consumer-credit law are related primarily to gradual removal of unfair contract clauses and also to the possibility of claiming expectation damages from the creditor for breaching the principle of responsible lending.

The Estonian experience shows once again that substantive-law provisions alone are not enough for effective consumer protection. The fact that consumers tend to be rather passive in asserting their rights means that in practice procedural-law factors such as whether and when the court is entitled or obliged to take action of its own motion or who bears the burden of proof are at least equally important.

⁴⁸ M. Vutt (see Note 16), p. 3.

⁴⁹ Such doubts have also been expressed by V. Kõve (see Note 19), p. 671.



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Restitution of Performances after Avoidance of Contracts under the CESL and Estonian Law

1. Introduction

In October 2011, the European Commission issued a proposal for a regulation of the European Parliament and of the Council on a common European Sales Law^{*1} (CESL). The aim of the future regulation is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers. The CESL rules would apply only upon express agreement of the parties to a cross-border contract. It is contended that the rules of a CESL should maintain or improve the level of protection that consumers enjoy under European Union consumer law.^{*2}

In academic circles, the CESL has already received much attention^{*3}, including suggestions as to how the proposed rules should be redrafted.^{*4} The present article focuses on the text of the proposed CESL as it stands and compares certain aspects of the CESL and Estonian civil law. It has been found in Estonian legal literature that, with regard to contractual remedies and standard terms, the CESL rules provide for more favourable treatment of a consumer than does Estonian law.^{*5} This article focuses on the rules on restitution of performances, with particular stress on the avoided contracts. The rules of Part VII of the proposed CESL on restitution (Articles 172–177) are compared to those of Estonia's Law of Obligations Act^{*6} (LOA)

¹ COM(2011) 635 final.

² Proposed CESL, Recital 11.

³ See, for example, the bibliography compiled by Ewoud Hondius: E. Hondius. Common European Sales Law: If it does not help, it won't harm either(?). – *European Review of Private Law* 2013/1, pp. 1–12.

⁴ Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final, 2012. Available at http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on_a_Common_European_Sales_Law.pdf (most recently accessed on 8.4.2013).

⁵ K. Sein. Tarbija õiguste kaitse Euroopa müügiõiguse eelnõus: kas kõrgem tase Eesti tarbija jaoks? ['Protection of consumer rights in the draft of the European Sales Law: A step ahead for Estonian consumers?']. – *Juridica* 2013/1, p. 73 (in Estonian).

⁶ Võlaõigusseadus. – RT I 2001, 81, 487; RT I, 8.7.2011, 6 (in Estonian). Available in English at <http://www.legaltext.ee/en/andmebaas/ava.asp?m=022> (most recently accessed on 8.4.2013).

and their application in Estonian legal practice. The aim for the article is to identify the similarities and differences of the two regimes and to evaluate the results from the consumer's point of view, asking which of the two offers a greater level of protection for the consumer.

2. Scope of analysis: Avoided contracts

2.1. The meaning of avoidance

Article 172 (1) of the proposed CESL provides for application of the rules of restitution in cases wherein a contract covered by the CESL⁷ is avoided or terminated by either party. Pursuant to Article 54 (1) of the proposed CESL (hereinafter 'CESL' if not otherwise specified), a contract that may be avoided is valid until avoided but once avoided is retrospectively invalid from the beginning. Similarly the Estonian General Part of the Civil Code Act⁸ (GPCCA) provides that a transaction that is avoided is invalid from its inception (§90 (1)). This means that the two sets of regulations agree on the *ex tunc* effect of the avoidance. To avoid the contract, a party must give notice to the other party (CESL, Art. 52 (1); GPCCA, §98 (1)). The rules of Part VII of the CESL do not apply to contracts that are null and void *ab initio* on some other grounds. For example, matters related to invalidity of a contract arising from lack of capacity, illegality, or immorality are excluded from the CESL's scope and thus left within the area of application of the existing rules of the relevant Member State's civil law.⁹

Besides the avoided contracts, the CESL's Articles 172–177 apply to restitution of contracts that are terminated—e.g., ineffective *ex nunc*. In contrast, Estonian law recognises two regimes of restitution of contracts. On one hand, a special set of norms (LOA, §§188–194) is provided for unwinding the contracts after termination. On the other hand, restitution of contracts that are void or avoided is subject to rules of unjustified enrichment. As a legal consequences of the two regimes being somewhat different, it may be relevant under Estonian law whether a party has chosen to withdraw from or instead avoid the contract.¹⁰

The present article focuses on restitution of contracts in cases of avoidance. This means that it first considers under which conditions a contract may be avoided pursuant to Estonian law and the CESL. Second, the CESL's Articles 172–177 will be compared to the LOA's §§1028–1036, as the latter is the set of rules determining the legal consequences of avoidance.

2.2. Criteria for exercise of avoidance

At first sight, the grounds for avoidance of contracts under the CESL and Estonian law seem to coincide: both systems allow a party to a contract to avoid the contract in the case of a mistake (CESL, Art. 48; GPCCA, §92), fraud (CESL, Art. 49; GPCCA, §94), or threats (CESL, Art. 50; GPCCA, §96). A closer look, however, reveals some differences, of which the most important has to do with the issue of unfair exploitation.

Article 51 of the CESL gives a party the right of avoidance if three prerequisites are met: 1) that party was dependent on, or had a relationship of trust with, the other party; was in economic distress or had urgent needs; and/or was improvident, ignorant, or inexperienced; 2) the other party knew or could be expected to have known this; and, 3) in light of the circumstances and purpose of the contract, said party exploited the first party's situation by taking excessive benefit or unfair advantage. Under Estonian law, such a situation is considered to be in contradiction with good morals (GPCCA, §86 (2)) and thus null and void *ab initio*; in other words, no activity is required from the parties in order for the contract to be held to be void. Before May 2009, unfair exploitation was regulated in §97 of the GPCCA as grounds for avoidance. Because of social and political pressure and the social need, the definition of good morals in the GPCCA

⁷ The CESL applies to cross-border sales contracts and contracts for the supply of digital content (see its Articles 4 and 5).

⁸ Tsiviilseadustiku üldosa seadus. – RT I 2002, 35, 216; RT I, 6.12.2010, 1 (in Estonian). Available in English at <http://www.legaltext.ee/en/andmebaas/ava.asp?m=022> (most recently accessed on 8.4.2013).

⁹ CESL, Recital 27. For a critical view, see R. Zimmermann. Perspektiven des künftigen österreichischen und europäischen Zivilrechts. – *Juristische Blätter* (134)/1, January 2012, p. 9.

¹⁰ For a detailed analysis in this respect, see K. Saare, K. Sein, M.A. Simovart. The buyer's free choice between termination and avoidance of a sales contract. – *Juridica International* 2008 (XIV)/ 2, pp. 43–53.

was specified so as to include unfair exploitation. The objective of said amendment was to protect consumers from overindebtedness resulting from unreasonably high loan percentage rates (especially in SMS loan contracts).^{*11} This means that when the parties have opted for the CESL and the trader has unfairly exploited the consumer, the contract is not void and must be fulfilled unless the consumer gives notice to the other party within one year after becoming aware of the relevant circumstances or becoming capable of acting freely (CESL, Art. 52 (2) (b)). It may, therefore, be concluded that in this respect the CESL is less advantageous for the consumer than the Estonian regulation.

If the reason for avoidance is mistake, the regulation of the CESL resembles that in the GPCCA to a great extent, but there are some differences too. Firstly, the apparent difference in wording regarding the notion of mistake may be pointed out—‘mistake of fact or law’ in the CESL’s Article 48 (1) and ‘an erroneous assumption related to existing facts’ in the language of §92 (1) of the GPCCA. The latter might suggest that Estonian law offers less protection to the consumer, who in reality is often unaware of the relevant provisions of the law. However, recent Estonian legal literature refers to the notion of legally relevant mistake as including an erroneous assumption as to the legal consequences of the transaction.^{*12}

The second difference is more substantial. Pursuant to the GPCCA, it is only a **fundamental mistake** that justifies the avoidance (§92 (2)), and it is necessary that the other party have caused the mistake, made the same mistake, or known or had cause to have known of the mistake and that leaving the mistaken party in error was contrary to the principle of good faith (§92 (3)). Whereas the Estonian regulation clearly refers to the principle of reasonableness for decision on the fundamentality of the mistake^{*13}, the CESL does not apply this criterion.^{*14} It may be concluded that under the CESL, the decision on the relevance of a mistake must be taken on the basis of subjective criteria, with account taken of various factors related to the very person seeking avoidance. This approach of the CESL may in general be more advantageous for the consumer, but, on the other hand, this advantage is immediately ‘balanced’ by the requirement in Article 48 (1) (a) that the other party have known or could be expected to have known **this**. So what is it that the other party ought to know? Under the Estonian regulation, it is enough if the other party knew or should have known of the **mistake** (§92 (3) 2)). If a consumer has agreed to application of the CESL, the wording of Article 48 (1) (a) suggests that the other party (e.g., the trader) should have known of the **fundamentality** of the mistake for **that particular** consumer. It is hard to see how that can be proved at all, especially when the contract has been concluded over the Internet and the parties have never actually met.

Pursuant to Estonian law, the person relying on fraud as grounds for avoidance does not need to show the fundamentality of the mistake.^{*15} But, whilst the regulation of the CESL on fraud is comparable with the relevant provisions in Estonian law (GPCCA, §§94–95), it favours the defrauded party in that the time window within which notice of avoidance may be given (pursuant to Art. 52 (2) (b) is one year after said party becomes aware of the fraud, in comparison to the six months specified in §99 2) of the GPCCA). Accordingly, the defrauded consumer may expect better protection under the CESL. The same applies to contracts concluded under threat (CESL, Art. 50). On the other hand, it is difficult to see why the CESL refers only to threats and not to violence (as is the case in §96 of the GPCCA). It would only be justified if the scope of application of the CESL were to be limited only to those contracts concluded over the Internet or via other means of modern communication.

¹¹ For general discussion, see K. Saare, K. Sein, M.A. Simovart. Protection of consumer rights in SMS loan agreements. – *European Review of Private Law* 2010/18, pp. 129–142; P. Varul, I. Kull, V. Kõve, M. Käerdi. *Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne* [‘General Part of the Civil Code Act, Commented Edition’]. Tallinn: Juura 2010, p. 275 (in Estonian).

¹² P. Varul et al. *Tsiviilseadustiku üldosa* [‘General Part of the Civil Code’]. Tallinn: Juura 2012, p. 155 (in Estonian).

¹³ GPCCA, §92 (2): ‘A transaction is entered into under the influence of a relevant mistake if upon entry into the transaction the mistake was of such importance that a **reasonable person** similar to the person who entered into the transaction would not have entered into the transaction in the same situation or would have entered into the transaction under materially different conditions’ (emphasis added).

¹⁴ Article 48 (1) (a) reads: ‘[T]he party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms.’ Article 5 (2) states that ‘[a]ny reference to what can be **expected** of or by a person, or in a particular situation, is a reference to what can reasonably be expected’ (emphasis added).

¹⁵ For a detailed analysis, see K. Saare, K. Sein, M.A. Simovart. Differentiation of mistake and fraud as grounds for rescission of transaction. – *Juridica International* 2007 (XII), pp. 142–151.

3. Legal consequences of avoidance: Restitution

3.1. The principle of unjustified enrichment as a starting point

It has been maintained that, although Part VII of the CESL in its explicit wording does not refer to unjustified enrichment, the principle of preventing unjustified enrichment can be considered nonetheless to be the underpinning of the rules on restitution.^{*16} In most legal systems in continental Europe, unjustified enrichment law is a traditional part of the law of obligations^{*17}, regulating situations in which one person has received something (i.e., been enriched) to the disadvantage of another person without legal basis. On the other hand, the regulation of issues related to unjustified enrichment law is almost absent from European Union consumer directives^{*18}; therefore, it is difficult, if not impossible, to satisfy the demand that the rules of the CESL maintain or improve the level of protection that consumers enjoy under Union consumer law^{*19} in this respect.

In Estonia, as in other Continental legal systems, nullity of contract is a typical example of this 'absence of legal basis' prerequisite. Thus, unwinding of void or avoided contracts represents a typical area of application of unjustified enrichment law. In line with §84 (1) of the GPCCA, that which is received on the basis of a void transaction shall be returned pursuant to the provisions pertaining to unjustified enrichment unless the law provides otherwise. The LOA's §1028 (1) states that if a person (the recipient) receives anything from another person (the transferor) for the performance of an existing or future obligation, the transferor may reclaim it from the recipient if the obligation does not exist or is not created or if the obligation ceases to exist later. The objective of reversal is to put the parties in such a position as if the contract had never existed. This means that the parties must return or compensate for what has been received under contract, including the fruits and use of the object received.

3.2. Rules in particular

3.2.1. The recipient's state of mind

It is widely accepted in Continental legal systems that the recipient's state of mind plays a role in decision over the extent of his liability in restitution. The recipient in good faith enjoys certain privileges, although not all of the systems' notions of good faith necessarily overlap.^{*20} Estonian enrichment law, which to a great extent is based on the theory and practice of German enrichment law^{*21}, also differentiates between recipients in good and in bad faith. Section 139 of the GPCCA states that if legal consequences are bound to good faith by law, good faith shall be presumed unless the law provides otherwise. A person acting in good faith does not or need not know certain circumstances that could influence the legal consequences of a transaction (and, on the contrary, bad faith means that the person knows or must know the facts).

¹⁶ P. Sirena. The rules about restitution in the Proposal on a Common European Sales Law. – *European Review of Private Law* 2011 (19)/6, p. 983.

¹⁷ R. Zimmermann. *Grundstrukturen des Europäischen Bereicherungsrechts*. Tübingen: Mohr Siebeck 2005, p. 21. For general discussion, see P. Schlechtriem. *Restitution und Bereicherungsausgleich in Europa*. Bd 1–2. Tübingen: J.C.B. Mohr (Siebeck) 2001; J. Beatson, E. Schrage (eds). *Cases, Materials and Texts on Unjustified Enrichment*. Oxford: Hart Publishing 2003.

¹⁸ As an exception, Directive 97/7/EC lays down the principle that in the case of inertia selling to the consumer, a sender engaged in economic and professional activities has no claims against the consumer. See Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts. – OJ L 144, 4.6.1997, pp. 0019–0027.

¹⁹ CESL, Recital 11.

²⁰ K. Zweigert, H. Kötz. *Einführung in die Rechtsvergleichung*. Tübingen: Mohr Siebeck 1996, p. 621.

²¹ In fact, a recognisable model for systematisation of the provisions of Chapter 52 of the Law of Obligations Act is the draft proposed by D. König for reforming unjustified enrichment law in the German Civil Code. See D. König. *Empfehl es sich, das Bereicherungsrecht im Hinblick auf seine Weiterentwicklung in Rechtsprechung und Lehre durch den Gesetzgebern neu zu ordnen?* – Bundesminister der Justiz (Hrsg.). *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*. Bd II. Köln: Verlag Bundesanzeiger 1981, pp. 1515–1590. English translation of the König draft is available in R. Zimmermann. *Unjustified enrichment: The modern civilian approach*. – *Oxford Journal of Legal Studies* 1995 (15)/3, pp. 425–429.

The Supreme Court of Estonia has found that a person is considered to be in bad faith from the moment that he became or ought to have become aware of the circumstances that give reason for restitution.^{*22} If the enriched person acted in good faith, his liability for the reversal of the performance is restricted to the reversal of that which was transferred (or provision of compensation, in the case of destruction) and the gains. The main advantage to the recipient in good faith is the availability of defence of disenrichment (LOA, §1033). The recipient in bad faith may not rely on the fact that he is disenriched, and he is also obliged to transfer the gains derived from that which is received, pay interest to the extent provided by law for any money received, and compensate for any profits not gained from that which is received that the recipient could have gained by adhering to the rules of regular management (LOA, §1035).

Although the CESL's Part VII does not refer to good or bad faith *expressis verbis*, the rules on restitution refer to the parties' state of mind in certain articles, which mostly serve to the detriment of the party who knew or could be expected to have known of the grounds for avoidance or termination (see Articles 173 (5), 174 (1), 174 (2), and 175 (2)).

3.2.2. The general principle of restitution *in natura*

Article 172 (1) of the CESL specifies that where a contract is avoided or terminated by either party, each party is obliged to return what that party ('the recipient') has received from the other party. This means that the primary obligation is aimed at return of the received item or benefit in kind.^{*23} Similarly, §1028 (1) of the LOA obliges the debtor to return that which is received. The principle of restitution *in natura* corresponds to the traditions of most European national legal systems.^{*24}

Money and movables are the classic examples of transferable assets that can be returned. If the value of a thing received has changed (for example, the value of a painting has increased because the painter has become famous) and the debtor is still in possession of it, the change in value does not matter from the angle of restitution. The debtor may not rely on the fact that the object he received has no value for him and he is not enriched and thus is not liable for restitution, nor may the creditor choose to claim compensation for the object at its new, higher value.

Article 173 (1) of the CESL contains an amendment to the principle of reversal *in natura*, stating that where return is possible but would create unreasonable effort or expense, the recipient may choose to pay the monetary value, provided that this would not harm the other party's proprietary interests.^{*25} At first sight, this approach seems to favour the consumer, enabling him to choose between restitution and compensation. On the practical side, it must be noted that it remains in the hands of the courts, with the aid of the CESL's Article 5, to establish the ceiling to what is regarded as 'reasonable' efforts and expenses.^{*26} Following the principle that restitution should not put the recipient in a worse position^{*27}, the LOA in its §1033 (3) provides that the transferor shall bear the costs of restitution. The CESL does not address the issue of restitution costs; it even leaves open whether the trader has to collect the goods at the buyer's location or, instead, the buyer must send them back.^{*28} That said, Article 173 (1) receives a different meaning. Now it seems to suggest that the restitution costs must be borne by the recipient—why else does it use the expression 'unreasonable expense'? Taking into account that, especially in cases of cross-border transactions, returning goods to the trader can mean considerable efforts and costs, most consumers would probably abandon a plan to send the goods back to the seller. Accordingly, the non-existent regulation of costs of restitution in the CESL is to be evaluated as unfavourable to the consumer.

^{*22} CCSCd 16.6.2008, 3-2-1-54-08, para. 12; CCSCd 28.4.2009, 3-2-142-09, para. 18.

^{*23} R. Schulze (ed.). *Common European Sales Law (CESL): Commentary*. Baden-Baden: Nomos 2012, p. 680.

^{*24} C. von Bar, S. Swann. *Principles of European Law: Unjustified Enrichment*. Munich: Sellier 2010, pp. 452–455.

^{*25} This principle is also referred to in the Article VII-5:101 (2) of the DCFR.

^{*26} On the notion of 'reasonableness' in general and in Estonian law: M.A. Simovart. The standard of reasonableness in the Estonian Law of Obligations. – I. Kull (ed.). *Developments of Estonian Contract and Company Law in the Context of the Harmonized EU Law*. Tartu: Tartu University Press 2007, pp. 65–86.

^{*27} P. Varul et al. *Võlaõiguseadus III. Kommenteeritud väljaanne* ['Law of Obligations III. Commented Edition']. Tallinn: Juura 2009, p. 598 (in Estonian).

^{*28} See also C. Wendehorst. *Restitution in the Proposal for a Common European Sales Law*. European Parliament 2012. Available at <http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=75251> (most recently accessed on 8.4.2013).

The CESL's Article 173 (1) stipulates that the recipient of digital content—irrespective of whether it was supplied via a tangible medium—must pay its monetary value. This is another deviation from the principle of restitution *in natura*. Estonian law does not contain a comparable provision. If the consumer has downloaded a song, purchased an e-book via the Internet, or listened to streaming music, restitution in kind is in principle possible in some cases but is not consistent with the unjustified enrichment approach, because the seller may get back the electronic file while the consumer has already received the benefit of listening, playing, reading, etc.^{*29} Traders will probably welcome this approach, and it must be said that this provision constitutes reasonable modification of rules of restitution. However, if the digital content is supplied through a tangible medium, such an all-or-nothing rule might not be justified, particularly when the digital content has not been used at all. It is quite common practice that consumers may return computer and video games if the package has not been opened. Therefore, it is difficult to see why a defrauded, exploited, or threatened consumer is refused the right to make a return even if return is possible and he has not used the goods; this may lead to a forced exchange. As stated above, Estonian law does not compel the buyer of digital content to compensate for its value instead of returning it in an unopened package; thus it may be concluded that the buyer of digital content is in a better position under Estonian law.

3.2.3. Substitutes and value

It is often the case that the performance received under contract cannot be returned, either because it has been destroyed, sold, or similar or on account of its nature (in the case of services, for example). In this situation, the question of substitutes and value arises.

In its §1032 (1), the LOA stipulates that in the event of the destruction or consumption of, damage to, or seizure of the transferred object, the transfer of that which is acquired in compensation for said object may be demanded. This means that, for example, an insurance indemnity or compensation for damage received in the case of destruction or damage of the object of the enrichment must be reversed to the transferor. The CESL's Article 173 (5) similarly provides for the principle of returning the substitute but combines it with the choice of compensation for the value of the substitute, whereas the right to choose may be exercised either by the recipient or by the giver, depending on the recipient's state of mind. It follows that the understanding of what constitutes a 'substitute' differs between Estonian law and the CESL. Under the LOA, the substitute is a monetary claim for damages or insurance indemnity. When the recipient has sold the object or bartered it for another object, money or another object received is not considered a substitute and may not be claimed by the creditor. He may instead demand that the recipient compensate for the value of the goods.^{*30} In contrast, Article 173 (5) of the CESL has been interpreted as extending the claim to both objects and the price received for goods or digital content.^{*31} This approach is nothing new, as it is present in unjustified enrichment laws of many European jurisdictions.^{*32} The CESL goes even further by recognising the monetary value of the substitute as the content of a claim. The effect of Article 173 (5) is that if a buyer who is in good faith has bartered the received goods against some other, less expensive goods as a substitute, he may choose between giving up the substitute and compensating for its value. This means that the buyer's liability in the situations described may be lower than the value of the original goods he received from the seller. That solution puts the buyer in a better position than he would hold under Estonian law.

When a buyer in bad faith has received a substitute for the goods, it follows from the CESL's Article 173 (5) that now the seller has the right to choose between a claim for giving up of the substitute and one for the value thereof. This provision has been interpreted as a rule on disgorgement of profits.^{*33} However, Article 173 (5) creates some advantages for the seller only if the buyer has made a good bargain—for example, if he has earned profits. If the buyer has bartered original goods for cheaper goods, the seller will be worse

²⁹ For a recent detailed analysis of regulation of issues related to digital content, see M. Loos *et al.* Digital content contracts for consumers: Analysis of the applicable legal framework and suggestions for the contours of a model system of consumer protection in relation to digital content contracts. Available at http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf (most recently accessed on 8.4.2013).

³⁰ T. Tampuu. *Lepinguväliste võlasuhete õigus* ['Law of Non-contractual Obligations']. Tallinn: Juura 2012, p. 119 (in Estonian).

³¹ P. Sirena (see Note 16), p. 993.

³² P. Schlechtriem (see Note 17), pp. 355 *ff.* This principle is also adopted in the DCFR's Article VII.-5:101 (4).

³³ C. Wendehorst (see Note 28), p. 19.

off regardless of his right to choose between a substitute and the value of the substitute. Estonian law does not contain a rule on disgorgement of profits in relation to restitution of contracts^{*34}, which means that the buyer's liability is measured by the value of the original goods even if he is in bad faith.^{*35} Therefore, it may be concluded that a buyer in bad faith may be in a better position under Estonian law if he has made profits by disposing of the original goods; if, on the other hand, no profits are made, the buyer's liability is stricter under Estonian law than under the CESL.

Regarding compensation for the value of the goods, the LOA's §1032 (2) states that if it is impossible to deliver that which is received, whether on account of the nature thereof or for any other reason, the recipient shall compensate for the usual value obtaining when the right to reclaim was created. This corresponds to the idea that unjustified enrichment regulation is applied to contracts that are ineffective *ex tunc*. This means that when the contract was void *ab initio*, the value is to be calculated as of the time at which the performance was made.^{*36} However, the legal literature shows differing views on the starting point of the value calculation in cases of avoidance: some authors find that it is the moment when the notice of avoidance enters into force (e.g., when it reaches the other party^{*37}), others say that it is the time of performance.^{*38} Estonian law provides for objective assessment of value: the LOA's §1032 refers to the usual value, and according to §65 of the GPCCA, the usual value of an object is deemed to be the value of that object unless the law or a transaction determines otherwise. The usual value of an object is taken to be its average local selling price (market price).

Pursuant to Article 173 (2) of the CESL, the monetary value of goods is the value that they would have had on the date when payment of the monetary value would have been made if they had been kept by the recipient without destruction or damage until that date. It remains unclear what is meant by 'the date when payment of the monetary value would be made'—does it refer to the date of avoidance or to some later date? In any event, starting the calculation of value later than the avoidance of contract would contradict the idea that the parties should be put in such a position as if the contract had not existed.

It may be concluded that, with respect to the question of how to calculate the value of the goods in the case of avoidance of a contract, neither Estonian law nor the CESL provides a clear answer.

When deciding on the extent of enrichment claims in the case of nullity of a mutual contract, the Estonian Supreme Court has stated that the reciprocal claims of the parties may be considered set off (balanced) and the court shall require the party in whose disadvantage the balance (*saldo*) remains to pay the other party the difference of the claims.^{*39} It also follows from the provisions of the CESL that, as an outcome of reversal of performances, the parties may end up having reciprocal monetary claims. Therefore, it seems rather surprising that the CESL does not include regulation of such a practical matter as set-off.^{*40}

3.2.4. Fruits and use

Article 172 (2) of the CESL states that the obligation to return what was received includes any natural and legal fruits derived from what was received. This is in line with the principles of Estonian unjustified enrichment law, which provides that the transferor may demand that the recipient return that which is received and any gains derived therefrom (LOA, §1032 (1)). 'Gains' are to be understood as the fruits of the object and the advantages receivable from the use of the object (i.e., advantages of use) (GPCCA, §62 (1)).

The CESL does not define 'natural or legal fruits'. It is explained in the legal literature that natural fruits are products derived naturally from that received and legal fruits are benefits that are derived from that received through the operation of the law.^{*41} In Estonian law, 'fruits' are defined as 'fruits of a thing' or 'fruits received from a right' (GPCCA, §62 (2) and (3)). This reveals that the understanding of the notion of

³⁴ But disgorgement of profits is explicitly provided for in cases wherein the enrichment is a result of infringement of another's rights and the infringer is in bad faith (LOA, §1039).

³⁵ T. Tampus (see Note 30), p. 133.

³⁶ CCSCd 2.5.2007, 3-2-1-33-07, para. 10.

³⁷ P. Varul *et al.* (see Note 27), p. 595.

³⁸ T. Tampus (see Note 30), pp. 121–122.

³⁹ CCSCd 20.12.2005, 3-2-1-136-05, para. 27.

⁴⁰ The CESL's Recital 27 lists set-off among the issues to be resolved under national law; see also R. Zimmermann (see Note 9), p. 9.

⁴¹ R. Schulze (see Note 23), p. 688.

‘fruits’ differs somewhat between the CESL and Estonian law: while it is suggested that the type of fruit in the CESL is distinguished on the basis of the object (a thing or a right), in Estonian law the classification of fruits is based on the manner of production of the fruit. Therefore, for example, renting out a flat involves ‘legal fruit’ under the CESL but ‘natural fruit’ under Estonian law.

Article 174 (1) of the CESL contains rules on payment for use. One’s first impression is that only the recipient in bad faith (e.g., one who has caused or was aware of the grounds for avoidance or termination)^{*42} is liable for compensation of use. This deviates from Estonian law (LOA, §1032 (1)), which orders the recipient to pay for the use irrespective of his state of mind. This explains why the Supreme Court of Estonia has found that ‘in using another person’s property, presumably one always receives advantages of use, which, among other things, means saving on one’s costs’^{*43}. It is worth mentioning that this view was expressed in a case related to a house that was (allegedly) so dilapidated that it was not fit for habitation. The Supreme Court tried to mitigate the above-mentioned rule by stressing that the other party must first establish the value of the use.^{*44} Also, in another dispute, the Supreme Court has stated that, pursuant to the principle of good faith, the transferor may demand reversal of gain only in the extent that amounts to the gain that he could have received upon adherence to the requirements for regular management if the unjustified enrichment had not occurred.^{*45}

Having said that, one might conclude that the recipient in good faith is in a better position under CESL rules, as he is not liable for compensation for use of the goods. Yet it appears that the CESL’s Article 174 (1) (c) provides for compensation if it would be inequitable to allow the recipient the free use of the goods for that time. The criteria that could be taken into account are the nature of the goods, the nature and amount of the use, and the availability of remedies other than termination. Therefore, one may say that the answer to the question of compensation for use under the CESL might not turn out to be that different from the Estonian solution.

If we now turn to the seller who has received the money in exchange for goods, the issue of the extent of his liability arises. First and foremost, the question that must be answered is whether the seller must pay interest. Under Estonian law, a recipient acting in bad faith must pay interest to the extent provided by law for any money received (LOA, §1035 (3)). A party threatening, exploiting, or defrauding the other party is definitely acting in bad faith so is expected to pay interest. The outcome would be the same under the CESL’s Article 174 (2) (b), which states that the recipient must pay interest if he gave cause for avoidance, on grounds of fraud, threats, and/or unfair exploitation. The wording of the LOA’s §1035 (3) has led to the conclusion in Estonian legal literature that the recipient in good faith need not pay interest, because the use of money does not have any value in itself.^{*46} This statement is questionable, especially when the recipient of the money is a business. To say that the trader must pay interest only if he was in bad faith would ignore the economic reality: it would be rather exceptional if the trader (whatever his state of mind) were **not** to use the money. When the buyer of a dilapidated house is obliged to pay for use because it is **presumed** that he has saved on costs, why is it not presumed that, by receiving the money from the buyer, the seller has saved on costs that he would normally incur if he were to borrow this money? This is a question that in the author’s view has not yet been answered in Estonian law. In comparison, the CESL’s Article 174 (2) (a) stipulates that a party must pay interest when the other party is obliged to pay for use. This means that the trader may be ordered to pay interest even when he is in good faith. This solution is not as unjust as it might appear, because, irrespective of the reasons for avoidance, the trader has had the opportunity to use the money.

Alongside fraud, threats, and unfair exploitation caused by the trader, other scenarios are possible when the trader is in bad faith. Accordingly, it is unclear in the author’s view why the buyer’s obligation to pay for use depends on his awareness of the grounds for avoidance or termination (CESL, Art. 174 (1) (c)) yet the seller’s liability for interest is tied not to such **awareness** but to the fact of him having defrauded, threatened, or exploited the other party (CESL, Art. 174 (2) (b)). Therefore, Pietro Sirena quite rightly observes that under Article 174 the undesirable result is possible that, because the consumer does not have

^{*42} In fact, it is not clear what is meant under ‘caused the grounds’ – e.g., whether this covers also those situations in which the consumer has made a mistake.

^{*43} CCSCd 20.12.2005, 3-2-1-136-05, para. 26.

^{*44} *Ibid.*

^{*45} CCSCd 15.6.2005, 3-2-1-67-05, para. 11.

^{*46} P. Varul *et al.* (see Note 27), p. 594.

to pay for the use, even the trader in bad faith may be exempted from the obligation to pay interest.^{*47} It may be concluded in view of this that, in respect of fruits and use, neither the Estonian law nor the CESL can be praised for presenting a clear and understandable solution, especially where the obligation of a trader to pay interest is concerned. Therefore, it is not possible to say which rules would be generally more advantageous for the consumer. Instead, the answer depends on the details of each particular case.

3.2.5. Disenrichment and expenditure

The defence of disenrichment has been introduced in Estonian legislation by the LOA (which came into force on 1 July 2002), except with respect to matters related to performances, for which it is regulated in §1033 of the LOA. The underlying idea of disenrichment is that a recipient in good faith is not required to return that which is received or compensate for the value thereof to the extent to which the recipient is not enriched thereby in consequence of the destruction or consumption thereof, damage thereto, or seizure thereof or for any other reasons.^{*48} 'Not enriched' means, for example, the defendant not having saved any costs because he himself would not have incurred the respective expenses.^{*49} If the enriched person disposed of the enrichment gratuitously and thus saved costs (for example, avoided costs that he otherwise would have incurred in buying a birthday present), he is still regarded as having been enriched. Also, the recipient's transfer of the money to a third party as a gift should not be considered to be disenrichment on the basis of the principle of good faith.^{*50} If a mutual contract (such as a sales contract) is void, the recipient may rely on the disenrichment only if the contract is void on account of the incapacity of the recipient or because of threats or violence on the part of the transferor (§1034 (1) of the LOA).^{*51}

The CESL does not appear to include the defence of disenrichment. Instead, Article 176 includes a general 'equity clause', stipulating that any obligation to return or to pay under that article may be modified to the extent that its performance would be grossly inequitable, in into consideration of, in particular, whether the party did not cause, or lacked knowledge of, the grounds for avoidance or termination. This solution is not to be applauded, because it is hard to imagine how this kind of regulation could facilitate cross-border trade and enable traders to avoid additional costs; it might instead discourage traders from applying the CESL. In Estonian law, it is possible to fill the gaps and even overrule the statutory provisions with the aid of the principle of good faith (LOA, §6). But, as the Estonian regulation on unjustified enrichment demonstrates, before one resorts to general principles it is more practicable to lay down the rules as to liability of the recipient in good faith and in bad faith. The author finds that the presence of rules on disenrichment in the LOA provides for greater clarity in comparison to the CESL's Article 176, and this clarity is advantageous for both the seller and the buyer.

Besides destruction or consumption of the goods, the recipient's disenrichment may occur in the form of expenditures he has made. This conclusion may be drawn from §1033 (2) of the LOA, which states that if the recipient indeed believed that the ownership of that which was received is permanent, he must return or compensate for the value of that received only if he is compensated for the expenditure.

This provision does not require that the expenditure be **for goods received**, or that the other party be enriched as a result of that expenditure.^{*52} Therefore, it is suggested in the literature that §1033 (2) of the LOA does not give rise to an active claim and only allows the recipient to refuse the return of what was received; instead, legal scholars are willing to grant the recipient an active claim for expenditures on grounds of the LOA's §1042.^{*53} The first sentence of §1042 (1) stipulates that 'a person who incurs expenditures with regard to an object of another person without a legal basis therefor may demand compensation

⁴⁷ P. Sirena (see Note 16), p. 998.

⁴⁸ German law is similar in this respect (with *Wegfall der Bereicherung*). See P. Schlechtriem (see Note 17), pp. 359 ff.

⁴⁹ ALCSCd 17.6.2004, 3-3-1-17-04, para. 22.

⁵⁰ T. Tampuu (see Note 30), p. 125.

⁵¹ Whether this principle is to be extended to cases involving fraud or exploitation is subject to debate; the general view seems to be that it should not. See T. Tampuu (see Note 30), p. 124; P. Varul *et al.* (see Note 27), p. 600.

⁵² This may be explained by reference to the requirement of the recipient's belief in the irrevocability of his ownership. One can conclude from this that said provision serves as a means of protection of the interests of a recipient in good faith; it is designed for providing grounds for evaluating the recipient's disenrichment, not the other party's enrichment (which may occur if the other party gets back an object that is improved in consequence of the recipient's expenditures).

⁵³ P. Varul *et al.* (see Note 27), p. 598; T. Tampuu (see Note 30), p. 125.

for the expenditures to the extent to which the person on whose object the expenditures are incurred has been enriched thereby, in consideration of, *inter alia*, the fact of whether said expenditures are useful to the person and the intent of the person with regard to the object'. Pursuant to §1042 (2) of the LOA, the claimant does not gain the right to state a claim if the other party requires the improvements to be removed; if, because of circumstances arising from him, the claimant failed to notify the other party in time of the intent to make expenditures; if the other party has contested the expenditures; or if making such expenditures was prohibited by law or by contract. In comparison, Article 175 of the CESL provides that 1) in the case of a party who did not know and could not be expected to have known of the grounds for avoidance or termination, the recipient is entitled to compensation to the extent that the expenditure benefited the other party and 2) a recipient who knew or could be expected to have known of the grounds for avoidance or termination is entitled to compensation only for expenditure that was necessary to protect the goods or digital content involved from being lost or diminishing in value, provided that the recipient had no opportunity to ask the other party for advice.

Thus it is that, in general, under both the LOA's §1042 and the CESL's Article 175 a person who had the opportunity to ask the other person's consent but did not do so is barred from making a claim for compensation at all, whereas a person in good faith may claim compensation only if the expenditure is useful (beneficial) for the other party. Commentators find that, in deciding whether the expenditures are beneficial (CESL, Art. 175 (1)), one must take into account the personal situation of the person in question: the mere fact that the goods are improved does not necessarily constitute a benefit.⁵⁴ This is, in fact, also the result that is sought with the LOA's §1042 (1). A certain difference can be observed between the CESL and LOA in situations wherein the recipient knew or could be expected to have known of the grounds for avoidance but could not ask the other party's consent for the expenditures: in such cases, the CESL provides compensation for necessary expenditure, whereas compensation under the LOA depends on the utility of the expenditures for the other party. The CESL's distinguishing between necessary and beneficial expenditures speaks for the conclusion that necessary expenditures shall be subject to compensation without regard for their actual result; for example, attempting to protect the goods will suffice and compensation will be granted even if the goods were destroyed. This outcome is not justified because, as is stated above, the compensation given to the recipient in good faith is contingent on the benefit for the other party.⁵⁵ Therefore, in comparison to the LOA, the CESL as it stands today, appears to be friendlier toward a recipient in bad faith.

4. Conclusions

The aim of this article has been to compare the rules of the CESL and Estonian law regarding the avoidance of contracts and restitution of performances made under such contracts. It was asked which of the two regimes offers a higher level of protection for the consumer. The results may be summarised thus: a consumer who has opted for the CESL is in a more advantageous position if it turns out that he has been defrauded. In that case, the period for giving notice of avoidance is longer than it would be under Estonian law. On the other hand, Estonian law offers somewhat better protection to the consumer who has concluded a contract under conditions of unfair exploitation: such a contract is considered to be null and void, whereas the CESL in such a situation grants the right to avoidance.

When it comes to restitution of performances, the CESL seems to provide more favourable treatment to a buyer who has made expenditures on goods while being aware of the grounds for avoidance. If the buyer has disposed of the goods through some form of transfer to a third party against money or some other object as a substitute, the buyer's position is better if the CESL is applied, because it allows the buyer to choose between giving up the substitute and compensating for its value (which may be lower than the value of the original goods). On the other hand, the CESL deprives the recipient (even a defrauded, exploited, or threatened consumer) of the right to return the digital content even if this is stored on a tangible medium and in its sealed package. This solution differs from that seen with the LOA and is clearly not preferable from the consumer's point of view. The CESL does not include a defence of disenrichment, which is less advantageous for the consumer than are the provisions of the LOA.

⁵⁴ R. Schulze (see Note 23), p. 713.

⁵⁵ C. Wendehorst (see Note 28), p. 22.

That said, it must be concluded that, with regard to restitution of avoided contracts, it is not possible to say which of the two regimes in general is more advantageous for the Estonian consumer as a buyer: as was demonstrated above, the level of protection of the buyer (as a recipient) under the CESL and LOA may vary with the situation. However, there are also some important issues that the CESL does not address at all (in particular, who should bear the costs of restitution, or the rules for set-off) or that the CESL does not regulate with sufficient clarity (such as the recipient's obligation to pay for use of goods). Therefore, it can be said that parties opting for the CESL as it stands today must in cases of restitution of avoided contracts be ready to face greater unpredictability than they would experience if the rules of the LOA were to be applied.



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Should Price Reduction be Recognised as a Separate Contractual Remedy?

1. Introduction

Price reduction as a remedy is found in many international instruments and in the legal tradition of diverse countries. For example, it has been regulated in the German Civil Code^{*1} (BGB), the Dutch Civil Code^{*2} (BW), and the Estonian Law of Obligations Act^{*3} (LOA).^{*4} In addition, price reduction belongs to the system of remedies acknowledged in international and EU legislation and model regulations. For instance, price reduction is provided for as a remedy in Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees^{*5} (i.e., the Consumer Sales Directive), United Nations Convention on Contracts for the International Sale of Goods^{*6} (CISG), Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law^{*7} (CESL), and Draft Common Frame of Reference^{*8} (DCFR).

Bearing in mind the recent developments in European contract law that are evident in, for example, the Consumer Sales Directive, the CESL, and the DCFR, one finds price reduction as a remedy to be clearly a topical issue. First of all, the question arises of whether providing for price reduction as a remedy is justified, since, for example, in the Anglo-American legal system it is believed that there is no need for price reduction as a separate remedy—because a set-off between the claim for damages and claim for payment would produce a similar outcome.^{*9} The position has been taken in Dutch law that the effects of price reduction can

¹ *Bürgerliches Gesetzbuch, Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002* (BGBl. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 7 des Gesetzes vom 19. Oktober 2012 (BGBl. S. 2182) geändert worden ist.

² *Burgerlijk Wetboek*, 1.1.1992.

³ *Võlaõigusseadus*. – RT I 2001, 81, 487; RT I 08.07.2011, 21 (in Estonian).

⁴ P. Varul et al. *Võlaõigusseadus III. Kommenteeritud väljaanne* [‘Law of Obligations Act III. Commented Edition’]. Tallinn: Juura 2009, p. 370 (in Estonian).

⁵ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. – OJ L 171, 7.7.1999, pp. 12–16.

⁶ RT II 1993, 21/22, 52.

⁷ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:EN:PDF> (most recently accessed on 10.4.2013).

⁸ C. von Bar, E. Clive (eds). *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*. Full Edition. Munich: Sellier 2009.

⁹ J. Basedow, K.J. Hopt, R. Zimmermann, A. Stier (eds). *The Max Planck Encyclopedia of European Private Law*. Oxford: Oxford University Press 2012, p. 1314.

be obtained via partial termination of the contract and that, therefore, there is no need for price reduction as a separate remedy.^{*10} German legal literature too has stated that in some situations the outcome of price reduction and partial termination is similar.^{*11} There may also be some similarities between the outcome of price reduction and withholding of performance. Similarly to national regulations, model rules exhibit differences with respect to price reduction. The Principles of European Contract Law and the DCFR recognise price reduction as a separate remedy, but the drafters of the UNIDROIT Principles of International Commercial Contracts^{*12} (PICC) have decided not to include this remedy therein.

The goal of this article is to answer the question of whether price reduction as regulated in §112 of the LOA, the CISG's Article 50, the CESL's Article 120, Article III-3:101 of the DCFR, and the BGB's §§441 and 638 differs sufficiently from other remedies and whether the function of price reduction, which lies in maintaining the balance of the bargain, can be fulfilled by means of other remedies. For this reason, the preconditions for, and consequences of, price reduction, claim for damages, termination, and withholding of performance are analysed.

2. Price reduction and damages claim

2.1. Preconditions for price reduction and claiming for damages

Of all remedies, price reduction and compensation for damage in lieu of performance of the obligation are considered the most similar to each other.^{*13} The consequence of use of either of these remedies for the obligee may be the return of a certain amount of money from the obligor or a reduced payment obligation to the obligor.

In terms of the preconditions for applying either remedy upon a breach of a contractual obligation, the two are quite similar. The precondition for both the right to price reduction and filing a contractual claim for damages is that there is a valid contract between the parties and that the obligor has breached his contractual obligation. For compensation for damage, the contract does not have to be a reciprocal contract for pecuniary interest; nor is the precise nature of the breach important. Price reduction, on the other hand, is possible only upon the breach of a reciprocal contract for pecuniary interest by way of defective performance of an obligation.

The third precondition for a claim for damages is the debtor's liability for the breach. Price reduction, however, can be exercised by the obligee whether the obligor is liable for the breach of obligation or not. Accordingly, if the obligor's breach of obligation can be excused, the obligee can use only price reduction as a remedy (LOA, §105; CISG, Art. 79; DCFR, Art. III-3:101 (2); CESL, Art. 106 (4)).

The position taken in Estonian legal theory with respect to sales contracts and contracts for work is that the liability of the seller and the contractor for defective goods or work is absolute, as §218 (1) and §642 (1) of the LOA prescribe that the seller or the contractor, respectively, is liable for the non-conformity of the goods/work, if the non-conformity existed upon the transfer of the risk of accidental loss or damage. It has been suggested that the above-mentioned norms are specific to the general rule under which the obligor is liable if his breach of obligation is not excusable.^{*14} Therefore, even if the breach of obligation is excusable, the seller or contractor shall remain liable for the defects of the goods or work. This, in turn, would mean that the buyer or customer could issue a claim for damages from the seller or contractor even when the breach of obligations is excusable.

The sources used as the basis for drafting of the LOA do not prescribe the seller's or contractor's liability so strictly that the obligee could claim compensation for damage even if the breach of obligation is excusable. In this regard, the seller's liability for defective performance of an obligation is precluded on the basis

¹⁰ *Ibid.*

¹¹ P. Schlechtriem, M. Schmidt-Kessel. *Schuldrecht. Allgemeiner Teil*. 6. Aufl. Tübingen: Mohr Siebeck 2005, p. 259.

¹² S. Vogenauer, J. Kleinheisterkamp (eds). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. Oxford: Oxford University Press 2009.

¹³ See also J. Basedow, K.J. Hopt, R. Zimmermann, A. Stier (Note 9), p. 1314.

¹⁴ P. Varul *et al.* *Võlaõigusseadus II. Kommenteeritud väljaanne* ['Law of Obligations Act II. Commented Edition']. Tallinn: Juura 2007, p. 33 (in Estonian); P. Varul *et al.* (see Note 4), p. 61; see also CCSCd 3-2-1-80-08, para. 22; 3-2-1-177-11, para. 11; 3-2-1-5-12, para. 27. Available at <http://www.nc.ee/> (in Estonian).

of Article 79 of the CISG even if the defect existed at the time of transfer of the risk^{*15} if said defect existed in consequence of a circumstance that would be considered to be *force majeure*. The obligor's liability for breach of obligation has also been precluded pursuant to Article III-3:104 of the DCFR and Article 88 of the CESL. The regulation set forth in the BGB is different from that described above, but this law also does not establish the seller's or contractor's liability as absolute.^{*16}

If one were to assume that the excusability of the breach of obligation is of no significance in claiming of compensation for damage when there are defects in the goods or work, it would follow that in contracts of this type, the right to price reduction and the claim for compensation for damage would not differ in terms of liability. This would mean that the advantages of price reduction as a remedy when compared to compensation for damage pursuant to Estonian law would be less than those provided by the CISG, BGB, or DCFR. The fact that price reduction can be applied regardless of excusability, however, has been considered one of the characteristic features of this remedy, especially with regard to sales contracts.^{*17}

The next precondition we consider for the claim for damages is the existence of damage.^{*18} In contrast, the existence of damage need not be proved in the case of price reduction. The same applies for the final condition for the claim for damages—i.e., the causal link between the breach of obligation and the damage incurred.^{*19} Naturally, the existence of a causal link is not necessary for price reduction.

In addition to the material preconditions, there are differences in the enforcement of these two remedies. For a reduction in the price, the obligee must make a declaration, and the contract is amended thereby.^{*20} The right is that of unilaterally altering a legal relationship by means of the declaration (LOA, §112 (2); BGB, §441 (1); CISG, Art. 50). On the other hand, pursuant to the DCFR and CESL it is not completely clear whether it suffices for the declaration to be made in order for the price to be reduced or, instead, a claim must be filed in court. The claim for damages, on the other hand, is a claim and, as such, may be submitted to the obligor directly or through the courts.^{*21} For this reason, the obligee must also account for the possibility of negotiations or a court dispute, which must be settled before he achieves the result he sought when exercising the remedy.^{*22} The situation is similar when the obligee wishes to reduce the price in a case wherein he has already paid the difference from the reduced price. However, if the amount in excess of the reduced price has not been paid yet and thus the claim for repayment of that sum paid in excess does not arise, using price reduction is significantly easier for an obligee than is filing a claim for damages.

One may conclude from the above that price reduction differs significantly in preconditions from the claim for damages. Therefore, price reduction cannot be considered a more specific case of claim for damages even if the outcomes with these two remedies are sometimes similar.

2.2. Enforcement of price reduction and damages claim

The position expressed in legal theory is that price reduction and compensation for damage are separate remedies as the purpose achieved by using each of them is different.^{*23} The purpose of price reduction is to maintain the balance of the contracting parties' obligations in a situation wherein the obligee has accepted the defective performance of an obligation by the obligor.^{*24} The purpose of compensation for contractual

¹⁵ P. Schlechtriem, I. Schwenzer. *Commentary on the UN Convention on the International Sale of Goods (CISG)*. 23rd edition. Oxford: Oxford University Press 2010, p. 597.

¹⁶ R. Zimmermann. *Breach of Contract and Remedies under the New German Law of Obligations*. Roma: Centro di studi e ricerche di diritto comparato e straniero 2002, p. 2.

¹⁷ J.O. Honnold. *Uniform Law for International Sales under the 1980 United Nations Convention*. Fourth edition. The Hague: Kluwer Law International 2009, p. 337.

¹⁸ P. Varul et al. *Võlaõiguseadus I. Kommenteeritud väljaanne* ['Law of Obligations Act I. Commented Edition']. Tallinn: Juura 2006, p. 393 (in Estonian).

¹⁹ *Ibid.*

²⁰ CCSCd 3-2-1-13-04, para. 26; 3-2-1-156-11, para. 21; 3-2-1-17-12, para. 12. Available at <http://www.nc.ee/> (in Estonian).

²¹ P. Varul et al. (see Note 18), p. 318; T. Bachmann. *Die elektive Konkurrenz*. Berlin: Duncker & Humblot 2010, p. 294.

²² C.M. Bianca, M.J. Bonell. *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*. Milan: Giuffrè 1987, p. 373.

²³ *Ibid.*, p. 372.

²⁴ C. Twigg-Flesner. The E.C. Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees – all talk and no do? – *The Journal of Current Legal Issues* 2000/2. Available at <http://webjcli.ncl.ac.uk/2000/issue2/flesner2.html> (most recently accessed on 10.4.2013); B.S. Markesinis, H. Unberath, A. Johnston. *The German Law of Contract:*

damage, on the other hand, 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 that are the basis for the compensation obligation had not occurred.^{*25} Through this, the aggrieved person's performance interest is deemed protected.^{*26} On the other hand, the regulation of compensation for damage is not used to protect the obligee's interests with regard to the proportion of the ratio between the price and the value of performance of the obligation.^{*27}

Since these two remedies have different purposes, the methods for determining the amount to be saved or returned as a result of their use vary too. The reduced price is commonly found by multiplying the price agreed upon between the parties by the value of the defective performance and dividing the result of this multiplication by the value of conforming performance.^{*28} To determine the amount of compensation for damage upon the performance of an obligation being of lesser value than that agreed upon, one takes the difference between the values of conforming performance and defective performance in order to obtain the amount of damage.^{*29} In the case of defective performance of a reciprocal contract for pecuniary interest, one contracting party shall have a payment obligation and simultaneously a claim of compensation for damage against the other party to the contract. This creates a situation wherein the person described has the right to offset his claim against the obligor arising from the compensation for damage against the claim arising from his own obligation of payment. Therefore, to determine the amount to be paid back to or saved by the obligee, one must subtract the difference between the values of conforming and defective performance from the price agreed upon between the parties.^{*30}

Although the reduced price and the amount of compensation for damage are found through different methods, there are often cases wherein the use of both of these remedies would yield the same result.^{*31} However, offsetting the claim for damages against the other party's claim for payment does not always lead to the same results as the method used for reducing the price. In the case of proportional price reduction, comparison is made between the proportion of the ratio of the value of conforming to defective performance and the original price.^{*32} In determination of the amount of compensation for damage incurred on account of the lower value of the performance of the obligation, however, the price agreed upon between the parties bears no significance.^{*33} Therefore, one must conclude that price reduction and the claim for damages are two clearly different remedies and that price reduction cannot be considered a specific type of damages.

3. Price reduction and termination of, or withdrawal from, the contract

3.1. Preconditions for price reduction and termination of and withdrawal from contract

Although, in general, price reduction and compensation for damage have been considered the most similar remedies, there are also similarities between price reduction and termination. The outcomes of price reduction and partial termination of the contract may turn out to be especially similar. For example, the position taken with regard to Dutch law is that, even though price reduction has not been stipulated as a remedy at

A comparative Treatise. Second edition. Oxford: Hart Publishing 2006, p. 510; CCSCd 3-2-1-131-05; 3-2-1-156-11, para. 23; 3-2-1-17-12, para. 12.

²⁵ CCSCd 3-2-1-106-03, para. 14; 3-2-1-32-12, para. 11; P. Varul *et al.* (see Note 18), p. 439.

²⁶ G.H. Treitel. *Remedies for Breach of Contract: A Comparative Account*. Oxford: Oxford University Press 1988, p. 82.

²⁷ M. Hirner. *Der Rechtsbehelf der Minderung nach dem UN-Kaufrecht (CISG)*. Frankfurt/M. etc: Peter Lang 2000, p. 329.

²⁸ J. Basedow, K.J. Hopt, R. Zimmermann, A. Stier (see Note 9), p. 1315; H. Sivesand. *The Buyer's Remedies for Non-Conforming Goods: Should There Be a Free Choice or Are Restrictions Necessary?* Munich: European Law Publishers 2005, p. 66. For further discussion, see P. Kalamees. *Hinna alandamine õiguskaitsevahendite süsteemis* ['Price Reduction in the System of Remedies']. Tartu: Tartu Ülikooli Kirjastus 2013, p. 18 (in Estonian).

²⁹ P. Varul *et al.* (see Note 18), p. 443; CCSCd 3-2-1-32-12, para. 11; S. Kröll, L. Mistelis, P.P. Viscasillas. *UN-Convention on the International Sales of Goods (CISG)*. Munich: C.H. Beck 2011, Article 50, Comment 36.

³⁰ G.H. Treitel (see Note 26), p. 105; P. Varul *et al.* (see Note 18), p. 443.

³¹ P. Kalamees (see Note 28), p. 91.

³² J. Basedow, K.J. Hopt, R. Zimmermann, A. Stier (see Note 9), p. 1315.

³³ G.H. Treitel (see Note 26), p. 105; C. von Bar, E. Clive (see Note 8), p. 924; P. Schlechtriem, I. Schwenzer (see Note 15), p. 1004.

all there, price reduction is still possible through partial termination of the contract (BW, Art. 6:270).^{*34} In addition to outcomes, price reduction and termination of the contract have other features in common.

The precondition for exercise of either the right of price reduction or termination of the contract is that there is a valid contract between the parties and that the obligor has breached contractual obligation. Since price reduction is possible only in cases of reciprocal contracts^{*35} and cases of defective performance of an obligation, the possibilities for termination of the contract are somewhat broader in this regard. However, further similarities between price reduction and termination of the contract can be found only if the obligor breaches an obligation arising from a reciprocal contract by performing the obligation defectively, because price reduction is possible only with reciprocal contracts^{*36} and in cases of defective performance of an obligation.

The consequences of price reduction and termination of the contract may be similar upon partial termination of the contract (LOA, §116 (3); BGB, §323 (5); BW, Art. 6:270; CISG, Art. 51; DCFR, Art. III-3:506; CESL, Art. 117). Generally, under those rules, a contracting party may partially terminate the contract only if the obligations arising from that contract are to be performed in parts and the fundamental breach of contract has occurred with regard to only some obligation or part of an obligation.^{*37} Therefore, normally the similarity between partial termination of the contract and price reduction can only be discussed when an obligor breaches an obligation that can be divided into parts.

The next condition for termination of the contract is that the breach of obligation is fundamental (§116 (1) of the LOA; CISG, Art. 49 (1a); DCFR, Art. III-3:502; CESL, Art. 114). For one to be able to use the right of price reduction, the existence of a fundamental breach of contract is not required.

Similarly to price reduction, termination as a remedy is a right to alter legal relations unilaterally.^{*38} This means that both price reduction and termination take place by way of the corresponding declaration to the other party to the contract.^{*39}

In principle, all of the above is applicable also to withdrawal from the contract.

From the foregoing discussion, one can conclude that the preconditions for price reduction and termination of the contract or extraordinary withdrawal from the contract as remedies are somewhat similar. In their preconditions, price reduction and termination of, or withdrawal from, the contract are actually more similar than compensation for damage and price reduction are.

3.2. Results of price reduction and termination of, and withdrawal from, a contract

As a result of price reduction, the obligee does not have to pay the obligor the price agreed upon in the contract and instead pays a reduced price. If already having paid the other contracting party the price agreed upon in the contract and only after the price having been reduced, the obligee has the right to make a claim for the return of the amount in excess of the reduced price (LOA, §112 (3); BGB, §441 (4); DCFR, Art. III-3:601 (2); CESL, Art. 120 (2)). As a result of termination, the rights and obligation arising from the contract are terminated *ex nunc* and a so-called obligation of contractual restitution is created.^{*40} Thus, the outcome of both price reduction and termination is transformation of the obligation and in certain cases the creation of a restitution obligation. Therefore, the content of the restitution obligations created through use of these two remedies must be compared.

The outcomes reached through price reduction and that of termination of the contract are mostly similar if the obligee is entitled to reduce the price to zero.^{*41} If the value of defective performance is equal to

³⁴ J. Basedow, K.J. Hopt, R. Zimmermann, A. Stier (see Note 9), p. 1314.

³⁵ P. Varul *et al.* (see Note 18), p. 365.

³⁶ *Ibid.*

³⁷ Only the regulation provided in the BW's Article 6:265 is different.

³⁸ B.S. Markesinis, H. Unberath, A. Johnston (see Note 24), p. 420; P. Varul *et al.* (see Note 18), p. 315.

³⁹ On termination, see H.G. Bamberger, H. Roth, *Beck'scher Online-Kommentar BGB. Stand 1.11.2012*, 25th edition, §323, column 31. Available at <http://beck-online.beck.de/Default.aspx?typ=reference&y=400&w=BeckOK&name=ZivR> (most recently accessed on 10.4.2013).

⁴⁰ I. Kull, M. Käerdi, V. Kõve, *Võlaõigus I. Üldosa* ['Law of Obligations Act I. General Part']. Tallinn: Juura 2004, p. 298 (in Estonian); CCSCd 3-2-1-107-08, para. 9; 3-2-1-57-11, para. 31; 3-2-1-104-11, para. 25.

⁴¹ P. Schlechtriem, I. Schwenzer (see Note 15), p. 777.

zero, the amount of the reduced price too will be zero. If the obligee has not paid the price, the contract is deemed amended after the declaration of price reduction is made and the obligee is not obliged to pay the price agreed upon in the contract.^{*42} On the other hand, if the obligee has already paid the amount in excess of the reduced price, he can reclaim the sum paid in excess pursuant to the corresponding provisions pertaining to termination (LOA, §112 (3); BGB, §441 (4)). Unlike in the case of termination, there is no reciprocity in the case of price reduction, and, consequently, under Estonian law, the obligee does not have to surrender what he received simultaneously with the return of the money (LOA, §112 (3)).^{*43} That is, the precondition for price reduction is that the obligee has accepted the defective performance 'as-is'.

The commentators on the BGB have taken different positions on this issue. One position is that if the price is reduced to zero since the performance of the obligation has no value whatsoever, in the case of a sales contract the valueless object must be returned to the seller, as otherwise there would be an unacceptable conflict with the regulation of termination.^{*44} In the opinion of the authors of the present article, it is not necessary to return the completely valueless performance of an obligation upon price reduction. If the performance of the obligation has become completely valueless, the other contracting party does not have a justified interest in its return, and the obligee would only incur additional expenses in relation to such a return.

An obligee may obtain an outcome that is similar in essence to price reduction by exercising his right of termination. In a parallel to the consequences of price reduction when the price has been reduced to zero and the price has been paid, the obligee shall have a claim against the obligor for the return of the amount paid and for the surrender of fruit and other profit obtained. Unlike upon price reduction, however, the obligee must also return what was given to him on the basis of the contract. Therefore, one cannot conclude that reducing the price to zero is a certain type of termination.

Another situation wherein price reduction and termination of the contract have notably similar features is when it is possible to terminate the contract partially.^{*45} To illustrate the similarity of the remedies mentioned, the authors at this point provide the following example involving a sales contract. Imagine that a seller has promised to deliver six coffee machines to the buyer with the parties having agreed that the seller shall deliver the machines to the buyer in two separate deliveries (three coffee machines in each). The buyer undertakes to pay 6,000 EUR in total for the machines (making the price of one machine 1,000 EUR). The price agreed upon corresponds to the market value of similar coffee machines.

The first batch of coffee machines is in complete conformity with the terms and conditions agreed upon in the contract. The coffee machines in the second batch, however, have such extensive defects that it is impossible to use them and, on account of the defects, they have no market value. Neither can they be repaired. This would probably constitute a fundamental breach of contract. Consequently, the buyer can terminate the contract only with regard to the coffee machines in the second batch. The restitution obligation created as a result of such termination does not cover all of the parties' contractual obligations. Specifically, the buyer shall have the right to reclaim the amount he paid for the three coffee machines in the second batch, 3,000 EUR.

The buyer would reach the same outcome if deciding to reduce the price paid instead of terminating the contract. The amount of the reduced price in this case would be 3,000 EUR ($3,000 \times 6,000 / 6,000 = 3,000$). Therefore, it makes no difference for the buyer in the example case which remedy he decides to use – the amount returned to him is exactly the same.

The differences between the outcomes of price reduction and partial termination of the contract, however, become evident when, even though a party has fundamentally breached obligations divided into parts, the performance of the obligation has not been rendered completely valueless as a result. In the case described, one could imagine a situation wherein, defects notwithstanding, a market value for the machines can be found (even if only as spare parts for other machines). Let us presume that the value of the coffee machines with the defects that constitute a fundamental breach of contract is 300 EUR. The remaining market value of the machines does not affect the consequences of partial termination of the contract, but the machines are to be returned to the seller on account of the restitution obligation created between the

⁴² H.G. Bamberger, H. Roth (see Note 39), §441, column 14.

⁴³ P. Varul *et al.* (see Note 18), p. 375.

⁴⁴ H.G. Bamberger, H. Roth (see Note 39), §441, column 26.

⁴⁵ H. Kötz, *Vertragsrecht*. Tübingen: Mohr Siebeck 2009, p. 389; E. Bergstein, A. Miller. The remedy of price reduction. – *American Journal of Comparative Law* 1979 (27), p. 275.

parties. Contrastingly, the situation upon price reduction would be significantly different: the amount of the reduced price would be 3,300 EUR (since $3,300 \times 6,000 / 6,000 = 3,300$). This means that, after the price reduction, the buyer can reclaim 2,700 EUR (or $6,000 - 3,300$) from the seller. The amount received upon partial termination would be 3,000 EUR. The example provided above leads to the conclusion that, regardless of certain similarities between the outcomes of price reduction and partial termination of the contract, it cannot be said that these two remedies are essentially the same.^{*46}

Similarly to termination and price reduction, withdrawal from the contract is a right to alter legal relations unilaterally. Unlike in the case of the right of termination, however, restitution does not take place.^{*47} Upon withdrawal, both contracting parties are released from any future performance of principal contractual obligations. Still, the rights and obligations already created under the contract shall remain valid. The consequences of price reduction in cases of continuous contracts are generally directed at the transformation of obligations that have already become due, and obligations created in the future should not be affected by the price reduction. This means that the consequences of price reduction and withdrawal from the contract are not substantively similar.

As an exception, it is possible under Estonian law (§112 (4) of the LOA) to reduce the price prior to the obligation becoming due. Price reduction can primarily be considered when it is certain that the obligation will be performed defectively.^{*48} Then, price reduction also has an impact on the future performance of contractual obligations. The distinction between these two remedies is clear if there is no wish to reduce the price to zero: as mentioned before, all parties' future obligations are terminated upon withdrawal from the contract, while in the case of price reduction, they remain in place in their post-amendment form. On the other hand, the situation may be more complicated if the obligee wishes to reduce the price to zero prior to the obligation becoming due, as the obligee will come to the same general outcome by means of either of these remedies. Still, these cases are probably quite rare in practice. It is rather difficult to imagine a situation wherein, for example, in the case of a lease contract it is clear in advance that the lessor can only perform his obligations with such extensive defects that they would render the performance valueless in full but the lessee still does not wish to withdraw from the contract. In theory, however, this is still possible. In this case, price reduction and withdrawal from the contract lead to exactly the same outcome with regard to payment of the price. Still, reducing the price to zero is an exception, so one cannot conclude from it that price reduction and withdrawal from the contract are the same remedy in essence. Additionally, in the case of price reduction in continuous contracts prior to the obligation becoming due, some accessory contractual obligations that would be terminated upon withdrawal from the contract may remain in force.

4. Price reduction and withholding performance

In addition to similarities with compensation for damage and termination of, or withdrawal from, the contract, price reduction possesses certain features similar to those of withholding performance of an obligation.^{*49} Comparison can only be drawn with the right to withhold performance in the case of a reciprocal contract (LOA, §111; BGB, §322; DCFR, Art. III-3:401, CESL, Art. 113). In the case of a reciprocal contract, one party may withhold performance until the other party has performed his obligation. The preconditions for price reduction and withholding performance thus are quite similar. Most importantly, both remedies can only be exercised with reciprocal contracts and when the obligation is due but yet to be performed whereas price reduction can only be considered upon defective performance of an obligation.

The next precondition for withholding of performance is that the reciprocal obligations arising from the contract must be performed simultaneously or that the party wishing to withhold performance has to perform his obligation after the other party fulfils his own.^{*50} If the party wanting to withhold performance of his obligation owes the other party a certain sum of money, this means that he can only withhold

⁴⁶ See also M. Hirner (Note 27).

⁴⁷ P. Varul *et al.* (see Note 18), p. 651.

⁴⁸ *Ibid.*, p. 374.

⁴⁹ F. Faust, Remedies for breach of contract in the DCFR. – G. Wagner (ed.), *The Common Frame of Reference: A View from Law and Economics*. Munich: Sellier 2009, p. 21.

⁵⁰ P. Varul *et al.* (see Note 18), p. 365.

performance as long as he has not paid the money. Price reduction, on the other hand, is possible also after the obligee has performed his payment obligation when he wishes to reclaim the amount paid in excess.

The primary difference in the preconditions for these two remedies is the fact that, in order to reduce the price, the obligee must have accepted the obligor's defective performance. This situation also reflects the fundamental difference between these two remedies—namely, that price reduction is a right of unilaterally altering legal relations that is directed at transforming the contract between the parties as if it had been concluded with defective performance in mind to start with. Withholding performance is essentially an objection^{*51} that an obligee may enforce in order to bring about performance of the contract as agreed (i.e., a coercive feature).^{*52} Minimising the obligee's damages could be considered the second purpose of the right to withhold performance.^{*53} Evidently, the purposes of these two remedies differ significantly. Therefore, one can conclude that, regardless of some similarities in the preconditions for the two remedies, they are still two separate remedies, serving vastly different purposes.

However, there are individual situations wherein price reduction and withholding performance would have quite similar consequences for the obligee. This is possible if, for example, the obligee withholds his performance whilst the obligor does not wish to rectify his defective performance at all. Still, even in this situation it is rather unlikely that the application of either of these remedies would yield the exact same outcome as the use of the other. Whereas the amount the obligee may refuse to pay or may reclaim upon price reduction depends on the proportions of the values of performance of the obligation, the situation is not the same upon withholding of performance. The obligee has been granted the right to withhold performance primarily in view of situations wherein he may refuse to perform his obligation in full. The right to withhold performance is limited when its exercise would not be reasonable in the given circumstances (LOA, §111 (3); BGB, §320 (2); DCFR, Art. III-3:401 (4); CESL, Art. 113 (3)), primarily when the other party to the contract has performed most of the obligation.^{*54} Referring to this provision of the LOA, the Estonian Supreme Court has stated that upon defective performance, a party cannot withhold performance in the full amount if the defects in the performance of the obligation are minor in relation to the total amount to be paid.^{*55} In this case, the obligee may withhold payment only in the amount that would likely be required for elimination of the defects and for compensation for expenses and other damage related thereto. Upon price reduction, one does not have to take these values into account. Accordingly, the outcomes of price reduction and withholding of performance generally do not match.

Once again, the exception to this is the situation wherein the obligation has been performed with such extensive defects that the value of the defective performance is equal to zero. In this case, the defects are probably sufficiently fundamental to justify withholding performance in full. In this situation, the price upon price reduction would be zero and the obligee would not be obligated to pay the obligor the remuneration agreed upon. If the obligor does not perform his obligation, withholding performance, too, is essentially permanent.

Still, if the obligor wishes to conclusively refuse payment for performance of an obligation, under Estonian law he must terminate the contract or reduce the price in the relevant extent. The Estonian Supreme Court has pointed out that the right to withhold performance does not terminate the obligation; it is essentially a temporary objection.^{*56} Therefore, the right to withhold performance does not, in general, enable one to conclusively refuse payment of the remuneration. The latter reasoning leads to the conclusion that price reduction and withholding performance may have a similar impact on the obligation if the other party to the contract does not wish to cure his defective performance at all. Still, the two remedies are essentially different.

⁵¹ *Ibid.*

⁵² C. von Bar, E. Clive (see Note 8), p. 843.

⁵³ CCSCd 3-2-1-80-08, para. 34; C. von Bar, E. Clive (see Note 8), p. 843.

⁵⁴ See also R. Feltkamp, F. Vanbossele, The optional European sales law: Better buyer's remedies for seller's non-performance in sales of goods? – ERPL 2011 (6), p. 898.

⁵⁵ CCSCd 3-2-1-80-08, para. 34; 3-2-1-73-10 and 3-2-1-93-10.

⁵⁶ CCSCd 3-2-1-42-12, para. 11; C. von Bar, E. Clive (see Note 8), p. 843.

5. Conclusions

The Estonian legislator has made a principal decision to provide price reduction as a separate remedy for the obligee in the LOA. In the present paper, it has been examined whether this decision was justified in consideration of the preconditions for various remedies, the results of those remedies, and also modern developments in European contract law.

Price reduction and compensation for damage are designed to protect different interests of the obligee even though, depending on the circumstances of each specific case, the use of these remedies may yield similar results. Therefore, the two must be considered as two clearly different remedies, enabling the obligee to reach different goals. Also, regardless of the fact that price reduction and termination of the contract (and, especially, partial termination of the contract) have significant similarities—both of them may be invoked regardless of the excusability of the obligor's breach of obligation and constitute rights to unilateral alteration of legal relations—in Estonian, German, and Dutch law and in the DCFR and CESL, the two are still remedies that have different functions, which cannot be achieved through other remedies. When considering the preconditions for, and consequences of, price reduction and of withholding performance, one must, regardless of a few exceptional cases, reach the conclusion that these remedies fulfil the same purposes only occasionally and are meant to protect different interests of the obligee.

Therefore, it has to be concluded that the goal of price reduction as regulated in §112 of the LOA, the CISG's Article 50, Article 120 of the CESL, the DCFR's Article III-3:101, and the BGB's §441 and §638 differs enough from the goals of other remedies. The results achieved via price reduction cannot as a rule be reached by means of other remedies analysed in this article. Therefore, the authors of this article are of the opinion that price reduction should be recognised as a separate remedy if the legislator wishes for a remedy that would aid in keeping the bargain in balance.



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Fitting the Estonian Notions of Contractual and Non-contractual Obligations under the European Private International Law Instruments^{*1}

1. Introduction

After the entry into force of the Estonian Law of Obligations Act^{*2} (LOA) in 2002, Estonian courts have been faced with the need to distinguish among various contractual and non-contractual obligations, of which some, such as the non-contractual obligation related to the public promise to pay (LOA, §1009) or the obligation to present a thing (LOA, §1014), were previously not even known in Estonian substantive law of obligations. Although the distinctions among various obligations in Estonian substantive law have become clearer and clearer as the case law has evolved, it is still unclear how the Estonian notions of contractual and non-contractual obligations should fit within the framework of the private international law instruments applicable in the Estonian courts.^{*3} So far, the characterisation of contractual and non-contractual obligations has attracted undeservedly little attention in Estonian literature on private international law^{*4}, although such disputes are at the heart of international trade and commerce.

The need to deal with the problem of characterising contractual and non-contractual matters became more pressing when the Republic of Estonia joined the European Union, in 2004. It is well known that the terms found in the European private international law instruments should be interpreted autonomously and independently of any national laws in order to guarantee that such instruments are applied uniformly

¹ The article has been written with the support of grant project ETF9301.

² *Võlaõigusseadus*. – RT I 2001, 81, 487; RT I 8.7.2011, 2 (in Estonian). English text available at <http://www.just.ee/23295> (most recently accessed on 1.4.2013).

³ These instruments may be international conventions, European private international law regulations or the Estonian Private International Law Act. For the latter act, see *rahvusvahelise eraõiguse seadus* ['Private International Law Act']. – RT I 2002, 35, 217; 2009, 59, 385 (in Estonian). English text available at <http://www.just.ee/23295> (most recently accessed on 1.4.2013).

⁴ For a general reference, see I. Nurmela. *Rahvusvaheline eraõigus* ['Private International Law'] Tallinn: Juura 2005, pp. 113–151 (in Estonian).

across all member states of the European Union.^{*5} Therefore, it is possible for the terms ‘contractual’ and ‘non-contractual’ matters to refer to something quite different in Estonian national law than the same terms do in European private international law. However tempting such a solution would be, Estonian judges should not limit themselves to characterising contractual and non-contractual matters strictly in accordance with Estonian substantive law when faced with the need to apply European private international law instruments.

The purpose of the present article is to analyse how the Estonian notions of contractual and non-contractual matters, as recognised in Estonian substantive law, accord with the relevant provisions of European private international law instruments. The European instruments referred to in this connection are the Brussels I Regulation^{*6}, which provides for special rules of jurisdiction for matters relating to ‘contract’ and matters relating to ‘tort, delict or quasi-delict’, and the Rome I Regulation^{*7} and the Rome II Regulation^{*8}, which, respectively, provide for the choice-of-law rules for contractual and non-contractual obligations. The aim of this article is to map the most problematic areas of Estonian law of obligations where contradictions of characterisation could arise between Estonian substantive law, on one hand, and European private international law, on the other. On account of the relevant case law of the Court of Justice of the European Union (CJEU), it is proposed that not all matters dealt with as ‘contractual’ or ‘non-contractual’ under Estonian substantive law could be regarded in the same way under the European private international law instruments.

2. The ‘matters relating to contract’ and ‘contractual obligations’ in European private international law and Estonian national law

The private international law elements relating to contractual matters have been dealt with by the European legislator in the Brussels I Regulation and the Rome I Regulation. Under the Brussels I Regulation Article 5 (1) (a), a person domiciled in a Member State may, in another Member State, be sued in ‘matters relating to contract’^{*9}, in the courts for the place of performance of the obligation in question. Correspondingly, the applicable law in such cases would usually^{*10} be determined by a judge of a court of the Member State under the Rome I Regulation, which applies, in situations involving a conflict of laws, to ‘contractual obligations’^{*11} in civil and commercial matters. The terms ‘matters relating to contract’ and ‘contractual obliga-

⁵ Unless, of course, specific reference is made to a particular national law in the European instrument itself. See for example Article 59 (1) of the Brussels I Regulation, which refers to a national law of the court for determination of whether a party is domiciled in the Member State whose courts are seized of the matter. For the Brussels I Regulation see Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. – OJ L 012, 16.1.2001, pp. 1–23.

⁶ Note that the Brussels I Regulation is soon to be replaced with the Brussels I Regulation (recast), which will be applied from 10 January 2015. See Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). – OJ L351, 20.12.2012, pp. 1–32.

⁷ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). – OJ L 177, 4.7.2008, pp. 6–16.

⁸ 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). – OJ L 199, 31.7.2007, pp. 40–49.

⁹ In the Estonian version of the Brussels I Regulation, the term ‘matters relating to contract’ is referred to as ‘matters relating to contracts’ (*lepingute seotud asjad*). This difference does not, however, change the meaning of the term.

¹⁰ The word ‘usually’ is used here because sometimes the law applicable may be determined under other choice-of-law instruments, depending on the time of conclusion of a particular contract or its type. For example, if the contract was concluded before 17 December 2009, the court may need to turn to the Rome Convention or to its national private international law provisions in order to determine the law applicable to a particular contract. For the Rome Convention, see 80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (consolidated version), CF 498Y0126(03). – OJ L266, 9.10.1980, pp. 1–19.

¹¹ In the Estonian version of the Rome I Regulation, the term ‘contractual obligations’ (*lepingulised võlasuhted*) refers not to contractual obligations in their strict sense (*lepingulised kohustused*) but to the relationships giving rise to such obligations. This is a correct translation, as the applicable law to be determined under the Rome I Regulation is not limited to determining various aspects of contractual obligation in its strict sense and, instead, also covers such questions as the interpretation or consequences of nullity of the contract. See Article 12 (1) of the Rome I Regulation.

tions' as used in the Brussels I Regulation and the Rome I Regulation should be interpreted autonomously and independently from any national laws.^{*12} Therefore, the concepts of 'contract', 'contractual claims' and 'contractual obligations' as recognised in any national laws cannot be more than mere starting points for a judge when determining international jurisdiction or applicable law in a particular dispute.

Although the CJEU has not yet had time to provide a comprehensive definition for 'contractual obligations' as used in the relatively new^{*13} Rome I Regulation, the corresponding term in the Brussels I Regulation (i.e., 'matters relating to contract') has been scrutinised extensively by the CJEU.^{*14} Most importantly, according to the case-law of the CJEU, the term 'matters relating to contract' cannot cover a situation where there is no obligation freely assumed by one party towards another.^{*15} For example, in a case in which the manufacturer of a product sells the product to a retailer who, in turn, sells that product to a buyer, the buyer's claim against the manufacturer should not be considered as falling under the Brussels I Regulation Article 5 (1) (a) even if it would be regarded as contractual under the applicable law or under the national law of the court hearing the claim. Although the CJEU has several times stressed the need to avoid interpreting the exceptions to the general rule of jurisdiction, including the Brussels I Regulation Article 5 (1) (a), in a way going beyond the situations envisaged by the Brussels I Regulation^{*16}, the terms 'matters relating to contract' and 'contractual obligations' should not be given overly strict interpretation. For example, according to the CJEU, the plaintiff can invoke the jurisdiction of the court of the place of performance of the contract under Article 5 (1) (a) even when the existence of the contract on which the claim is based is in dispute between the parties.^{*17} Thus, the Brussels I Regulation Article 5 (1) (a) can be relied upon even if the claim has arisen because of the invalidity of a contract, although the claim is not directly based on the contract.^{*18} Similarly, if the applicable law was determined under the Rome I Regulation, such law would, based on Article 12 (1) (e) of the Rome I Regulation, also cover the consequences of nullity of the contract. Hence, the terms 'matters relating to contract' and 'contractual obligations' can also refer to situations where the existence of the contract itself is disputed by one of the parties or where the plaintiff's claim is based on the restitution of an invalid contract.

The idea of a contract as covering a situation where someone has freely assumed an obligation toward another person corresponds perfectly with the notion of a contract under Estonian substantive law. Conclusion of a contract under Estonian substantive law requires the existence of a 'will' of a party (*tahe*) and an 'expression of such will' (*tahteavaldus*)^{*19}, which are distinguished from the motives (*motiiv*) and bases for concluding the contracts (*lepingu alus*).^{*20} However, under Estonian substantive law, a characterisation problem may arise in relation to certain obligations, which have been assumed freely towards another person, but are not necessarily based on a contract, although they have a similar nature to contractual relationships. These are the so-called obligations of courtesy (*viisakuskohustused*) and the imperfect obligations

¹² On the autonomous interpretation of the term 'matters relating to contract', see the Judgment of the Court of Justice of the European Communities of 22 March 1983, Case 34/82, *Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging*, para. 9. – ECR 1983, p. 987. On the autonomous interpretation of the term 'contractual obligations', see R. Plender, M. Wilderspin. *The European Private International Law of Obligations*. Third edition. London: Thomson & Reuters 2009, pp. 47–48; G.-P. Calliess (ed.). *Rome Regulations Commentary on the European Rules of the Conflict of Laws*. The Netherlands: Kluwer Law International 2011, p. 38.

¹³ According to Article 28 of the Rome I Regulation, said regulation shall apply to contracts concluded 'as from' 17 December 2009. See Corrigendum to Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). – OJ L 309, 24.11.2009, p. 87.

¹⁴ Note, however, that, to simplify matters for the reader, the references made by the Court of Justice to the Brussels Convention (which was a preceding instrument to the Brussels I Regulation) have been treated in this article as references to the old Brussels I Regulation. For the Brussels Convention, see 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. – OJ L 299, 31.12.1972, pp. 32–42.

¹⁵ *Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA*, para. 15. – ECR 1992, p. I-03967.

¹⁶ See for example, the Judgment of the Court of Justice of the European Communities of 17 June 1992, Case C-26/91, *Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA*, para. 14.

¹⁷ Judgment of the Court of Justice of the European Communities of 4 March 1982, Case 38/81, *Effer SpA v. Hans-Joachim Kantner*. – ECR 1982, p. 825, para. 8.

¹⁸ See, further, U. Magnus, P. Mankowski (eds). *European Commentaries on Private International Law Brussels I Regulation* 2nd Revised Edition. Munich: Sellier European Law Publishers 2012, pp. 130–131.

¹⁹ The making, altering, and other aspects of such expressions of will are regulated by the General Part of the Civil Code Act (GPCA). See tsiviilseadustiku üldosa seadus ['General Part of the Civil Code Act']. – RT I 2002, 35, 216; RT I, 6.12.2010, 1 (in Estonian). English text available at <http://www.just.ee/23295> (most recently accessed on 1.4.2013).

²⁰ P. Varul *et al.* *Võlaõigusseadus I. Üldosa (§§ 1–207) Kommenteeritud väljaanne* ['Law of Obligations Act I. General Part']. Tallinn: Juura 2006, p. 38 (in Estonian).

(*mittetäielikud kohustused*), which cannot be enforced.^{*21} For example, such would be the moral obligations or the obligations arising from gambling. Although these obligations may sometimes be based on contracts, they might also be based on agreements that are not considered to be contracts in the strict sense, if the parties to said agreements lack the will to be legally bound. In this case, an Estonian judge might question the application of the Brussels I Regulation Article 5 (1) (a) and the Rome I Regulation when determining jurisdiction or applicable law in relation to such obligations, as such obligations would not necessarily be considered contractual under Estonian substantive law. However, treating such obligations as contractual under the European private international law instruments could be justified, since the notion of imperfect obligations could vary in different Member States and it is possible that these obligations could be treated as enforceable obligations in some other Member States or under the applicable law.^{*22} Of course, such characterisation would not mean that the performance of these obligations could be enforced if Estonian substantive law were to be applicable in the given dispute. In addition, if the performance of the obligations regarded as imperfect under Estonian law is requested in an Estonian court under the applicable foreign law, the Estonian judge could refuse to apply foreign law, which would enforce such obligations on the basis of the public-policy clause found in Article 21 of the Rome I Regulation.

3. The matters relating to ‘torts, delicts and quasi-delicts’ and ‘non-contractual obligations’ in European private international law and Estonian national law

3.1. Torts, delicts and quasi-delicts

The Brussels I Regulation Article 5 (3) refers to ‘torts, delicts and quasi-delicts’, which, according to the case law of the CJEU, is an autonomous term intended to cover all actions which seek to establish the liability of a defendant and which are not related to ‘contract’ within the meaning of Article 5 (1) of the Brussels I Regulation.^{*23} Thus, the relationship between the ‘contractual matters’ and ‘matters relating to torts, delicts and quasi-delicts’ is mutually exclusive and a judge is first required to ascertain whether a certain issue could be characterised as contractual before he can move on to the analysis of the Brussels I Regulation Article 5 (3).

It is clear that the term ‘matters relating to torts, delicts and quasi-delicts’ within the meaning of the Brussels I Regulation Article 5 (3) would cover all the ‘delicts’ referred to in Chapter 53 of the LOA, such as the damage caused by a major source of danger (LOA, §1056), damage caused by death (LOA, §1045 (1) 1)), damage caused by bodily injury (LOA, §1045 (1) 2)), and damage caused by violation of a personality right of the victim (LOA, §1045 (1) 4)).^{*24} However, the term ‘matters relating to torts, delicts and quasi-delicts’ as used in Article 5 (3) of the Brussels I Regulation could, potentially, also cover certain other non-contractual obligations, which are characterised in Estonian substantive law not as ‘delicts’ but, rather, as non-contractual obligations based on unjust enrichment or *negotiorum gestio*. For example, if a person incurs costs with regard to an object of another person without legal basis, he may, on certain conditions, under Estonian substantive law of unjust enrichment (LOA, §1042), claim compensation for the costs to the extent to which the person on whose object the costs are incurred has been enriched thereby. Under Estonian substantive law, his claim would be characterised not as tort but, instead, as a claim based on unjust enrichment.^{*25} However, since, in essence, his action against the defendant would seek to establish the liability of a defendant and such claim would not be related to contract between the parties, his claim would, in the

^{*21} On the treatment of such obligations in Estonian contract law, see also I. Kull *et al.* *Võlaõigus I. Üldosa* [‘Law of Obligations I. General Part’]. Tallinn: Juura 2004, pp. 27–28 (in Estonian).

^{*22} See also Dickinson, who proposes characterisation of fiduciary obligations under English law in the context of the Rome Regulations as ‘contractual’ if attached to a contractual relationship between the parties but not otherwise: A. Dickinson. *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*. Oxford: Oxford University Press 2008, p. 195.

^{*23} Judgment of the Court of Justice of the European Communities of 27 September 1988, Case 189/87, *Athanasios Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst and Co. and Others*. – ECR 1988, p. 5565, para. 18.

^{*24} Note, however, that the latter are excluded from the scope of the Rome II Regulation by its Article 1 (2) (g). Of course, this exclusion does not affect the characterisation of such obligations as non-contractual.

^{*25} See also T. Tampuu. *Lepinguväliste võlasuhete õigus* [‘Law of Non-Contractual Obligations’]. Tallinn: Juura 2007, pp. 85–88 (in Estonian).

context of the Brussels I Regulation Article 5, most probably be characterised as a matter relating to ‘tort, delict and quasi-delict’. Similarly, the claim for compensation for damage to the *negotiorum gestor* (LOA, §1025) could be characterised as relating to ‘tort, delict and quasi-delict’ within the meaning of the Brussels I Regulation Article 5 (3), although such a claim would not be characterised as ‘delict’ under Estonian substantive law. The same should hold true for a claim for compensation for the value of the violation of a right (LOA, §1037), which under Estonian substantive law would be characterised as a claim based on unjust enrichment.^{*26}

In contrast with the Brussels I Regulation, the Rome II Regulation distinguishes among various types of non-contractual obligations. The autonomous^{*27} term ‘non-contractual obligations’ within the meaning of the Rome II Regulation is defined in Article 2, according to which, for the purposes of the Rome II Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio*, or *culpa in contrahendo*. Thus, in the context of the Rome II Regulation, the examples given above (i.e., those of claims referred to in the LOA’s §§ 1025, 1037, and 1042) would not be characterised as something similar to ‘torts’, but instead as claims for damage arising out of unjust enrichment or *negotiorum gestio*. This corresponds to the characterisation of such claims under Estonian substantive law.

3.2. Unjust enrichment

Under Estonian substantive law, all claims based on unjust enrichment are characterised as non-contractual.^{*28} Such non-contractual obligations give rise, for example, to the claims for compensation relating to spending on someone else’s property (LOA, §1042) and the claims relating to the fulfilment of someone else’s obligation (LOA, §1041) but also to the claims for the return of contractual performance if the contract has been deemed to be void or invalidated *ab initio* (LOA, §1028).^{*29} However, as is explained in the first section of the present article, the latter claims would not be characterised as claims based on non-contractual obligations within the meaning of European private international law instruments. This is because the terms ‘matters relating to contract’ and ‘contractual obligations’ as used in the Brussels I Regulation Article 5 (1) (a) and the Rome I Regulation, correspondingly, are intended to cover also the situations where the claim is based on the initial voidness of the contract. As the authors of the commentary on the Brussels I Regulation put it, ‘the reason why the contractual exchange failed should not be decisive for the characterisation of the claim aiming at the return of the already exchanged’^{*30}. Hence, a claim for the return of the performance of a contractual obligation, which under Estonian substantive law is characterised as a claim based on unjust enrichment, would be treated as a contractual claim in the context of European private international law.^{*31} This should hold true also in the case of claims based on unjust enrichment in situations where the performance has been rendered by a debtor to a third party if the contract was concluded in favour of the third party (LOA, §1030) or if the creditor instructed the debtor to render performance to the third party (LOA, §1029), as such claims are fundamentally related to contracts.

Other types of non-contractual obligations based on unjust enrichment that are recognised in Estonian substantive law (LOA, §§ 1037–1042) could be characterised in theory as ‘quasi-delicts’ within the meaning of the Brussels I Regulation Article 5 (3)^{*32} and as ‘non-contractual obligations’ of ‘unjust enrichment’ in the sense of Article 10 of the Rome II Regulation. However, in the context of Article 5 (3) of the Brussels I Regulation, such characterisation would require that it be possible to identify a ‘harmful event’ giving rise to damage as required by Article 5 (3) of the Brussels I Regulation. In the context of the Rome II Regulation,

^{*26} For further details, consult the work of T. Tampuu (see Note 25), pp. 79–82.

^{*27} The autonomous nature of the term ‘non-contractual obligations’ is stressed by Recital 11 of the Rome II Regulation.

^{*28} In the LOA, obligations based on unjust enrichment are dealt with in Chapter 52 (titled ‘Unjust Enrichment’), which is found in Part 10 of the LOA (under the title ‘Non-Contractual Obligations’). See also P. Varul *et al.* *Võlaõigusseadus III. Kommenteeritud väljaanne* [‘Law of Obligations III. Commented Edition’]. Tallinn: Juura 2009, p. 545 (in Estonian). See also the Estonian Private International Law Act (see Note 3), §48¹, titled ‘Unjust enrichment’. The exact scope of application of this provision, however, is unclear, as it has rarely been applied in Estonian case law.

^{*29} LOA, §1028.

^{*30} U. Magnus, P. Mankowski (see Note 18), pp. 130–131.

^{*31} See also A. Dickinson (see Note 22), p. 496.

^{*32} However, Mankowski and Magnus warn against over-extending the term ‘quasi-delict’ to cases of unjust enrichment and *negotiorum gestio*. U. Magnus, P. Mankowski (see Note 18), p. 235.

such characterisation would require that the claim, in its essence, be for damages^{*33}, which makes it hard to distinguish between non-contractual obligations based on tort and obligations based on unjust enrichment within the meaning of the Rome II Regulation.^{*34} It would be hard to present an argument as to, for example, why a claim by a person who has fulfilled someone else's obligation, which is characterised as a claim based on unjust enrichment under Estonian substantive law (LOA, §1041), should be treated as non-contractual obligation based on unjust enrichment within the meaning of the Rome II Regulation or as related to 'tort, delict or quasi-delict' within that of the Brussels I Regulation Article 5 (3). In this case, it is hard to conclude that any harmful event has occurred in the meaning of the Brussels I Regulation Article 5 (3) and it is debatable also whether the claim of such a person could be treated as a claim for damages as Recital 29 of the Rome II Regulation requires.

3.3. *Negotiorum gestio*

Similarly to claims based on unjust enrichment, claims based on *negotiorum gestio* are, under Estonian substantive law, always characterised as non-contractual.^{*35} It is not problematic to distinguish such obligations from contractual obligations within the meaning of Estonian substantive law and European private law. However, one can question whether all the non-contractual obligations based on *negotiorum gestio* as recognised in Estonian substantive law could be treated as matters relating to 'tort, delict or quasi-delict' within the meaning of the Brussels I Regulation Article 5 (3) or as 'non-contractual obligations' under the Rome II Regulation. As is the case with claims based on unjust enrichment, in order for such claims to fall under the Brussels I Regulation Article 5 (3) or the Rome II Regulation, they must relate to certain 'harmful events', as required by Article 5 (3) of the Brussels I Regulation and have to be made in relation to situations where 'damage' was caused by an act of *negotiorum gestio* as is required by Recital 29 of the Rome II Regulation. An example in which a claim of a *negotiorum gestor* could theoretically fall under these regulations would be a situation where the *negotiorum gestor* claims compensation under the LOA's §1025—namely, if he makes a claim against the principal for compensation for damage which was created as a result of a risk characteristic to the prevention of imminent significant danger to the principal.

3.4. Pre-contractual obligations and *culpa in contrahendo*

Estonian substantive law distinguishes between two types of pre-contractual obligations. The first is related to various duties in the carrying out of pre-contractual negotiations: the duty to conduct negotiations in good faith, the duty to facilitate the effective conduct of negotiations, the duty to refrain from disclosing information to any third parties, and so on. These duties can be derived from the general good-faith clause in the Estonian law of obligations (LOA, §6 (1)) or from the special provision in the LOA that deals only with pre-contractual negotiations—namely, §14 requires the persons who engage in pre-contractual negotiations to take reasonable account of another's interests and rights; to exchange accurate information in the course of preparing to enter into contract; and to inform each other of all circumstances with regard to which the other party could, given the purpose of the contract, have an identifiable essential interest. It is still unclear whether liability upon the breach of such duties would, under Estonian substantive law, be characterised as contractual or non-contractual, although the prevailing opinion in Estonian legal literature seems to favour the former, since these obligations have been regulated by the legislator alongside contractual obligations.^{*36} However, such characterisation cannot automatically be carried over into private international law. In the context of the Brussels I Regulation, claims for damages based on the breach of pre-contractual

³³ See Rome II Regulation's Recital 29, which refers to rules for those cases where 'damage' is caused by an act other than a tort/delict, such as unjust enrichment, *negotiorum gestio*, or *culpa in contrahendo*.

³⁴ For example, according to Dickinson, if the claimant can frame his claim to reverse the defendant's enrichment without relying on the defendant's tort/delict, that claim, being independent of the 'wrong', could fall under Article 10. See A. Dickinson (Note 22), p. 496.

³⁵ Chapter 5 of the LOA (titled 'Negotiorum Gestio') is found in Part 10 of the LOA, which is entitled 'Non-Contractual Obligations'.

³⁶ P. Varul *et al.* (see Note 20), p. 58. However, also see J. Lahe. Lepingueelsete kohustuste ning eellepingu rikkumisest tulenev tsiviilõiguslik vastutus [Civil Law Liability Pursuant to the Infringement of Pre-contractual Obligations and Preliminary Contracts]. – *Juridica* 2004/10, p. 682 (in Estonian).

duties could be characterised as ‘matters relating to contract’ only if there was a special agreement between the parties as to the conduct of such negotiations. As the CJEU has explained, in the situation where there is no obligation freely assumed by one party toward another on the occasion of negotiations with a view to the formation of a contract but where there is a breach of rules of law—in particular, the rule that requires the parties to act in good faith in such negotiations—an founded on the pre-contractual liability of the defendant is not a ‘contractual matter’ within the meaning of the Brussels I Regulation Article 5 (1) (a) and should instead be considered a matter relating to ‘tort, delict or quasi-delict’ within the meaning of Article 5 (3) of the same regulation.^{*37} Correspondingly, the law applicable to such obligations would be determined under Article 12 of the Rome II Regulation, which is intended to cover violation of the duty of disclosure and the breakdown of contractual negotiations.^{*38}

The second type of pre-contractual duties recognised under Estonian substantive law involves the duties relating to the obligation to conclude the main contract. Such duties can arise only in very limited situations where there is prior agreement between the parties on the conclusion of the main contract in the future.^{*39} Since the law requires the existence of a prior agreement (*eelleping*)^{*40} between the parties in order for such duties to arise, the duties arising between the parties in relation to such agreement should be characterised as ‘contractual’ under Estonian substantive law.^{*41} This solution is consistent with the view in European private international law in which ‘matters relating to contract’ require the existence of an obligation freely assumed by the parties. Hence, the jurisdiction and applicable law in relation to such obligations should be determined under the Brussels I Regulation Article 5 (1) (a) and the Rome I Regulation correspondingly.

3.5. Other non-contractual obligations

The LOA recognises certain other types of non-contractual obligations, which are not specifically referred to in the European private international law instruments. These are the non-contractual obligations of competition (LOA, §§ 1009–1013), the non-contractual obligation relating to the public promise to pay (LOA, §1009), and the non-contractual obligation to present a thing (LOA, §1014). While the non-contractual obligations of competition and the non-contractual obligation relating to the public promise to pay both presume that the unilateral obligation has been assumed voluntarily by the obliged party and could, therefore, be characterised as contractual within the meaning of the European private international law instruments^{*42}, the non-contractual obligation to present a thing does not seem to fit anywhere under Article 5 (1) of the Brussels I Regulation or under the Rome II Regulation. Since the jurisdiction in the cases involving such obligations could still be determined under the general rule found in Article 2 (1) of the Brussels I Regulation, it is not necessary to locate such obligations under Article 5 of the Brussels I Regulation. However, the exclusion of such obligations from the scope of application of the Rome Regulations means that the applicable law would have to be determined under the Estonian Private International Law Act (PILA), which, similarly to the Rome Regulations, does not contain any provision for the non-contractual obligation to present a thing. Under the PILA, such an obligation would have to be fitted either under the provision dealing with delicts (§50), unjust enrichment (§48¹), *negotiorum gestio* (§49), or property rights (§18), although the last solution seems to be ruled out by the case law of the Estonian Supreme Court.^{*43}

³⁷ Judgment of the Court of Justice of the European Communities of 17 September 2002, Case C-334/00, *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*, para. 27. – ECR 2002, p. I-07357.

³⁸ Recital 30 of the Rome II Regulation.

³⁹ On the distinction between such agreements and other pre-contractual arrangements, see the Judgment of the Estonian Supreme Court of 8 May 2006, Case 3-2-1-32-06.

⁴⁰ LOA, §33 (1).

⁴¹ This is the prevailing opinion in Estonian legal literature. See P. Varul *et al.* (Note 20), p. 118. For a minority opinion, see T. Tampuu. Sissejuhatus lepinguväliste võlasuhete õigusesse: üldprobleemid, tasu avaliku lubamise ja asja ettenäitamise õigus [‘Introduction to tort law: general problems, public promise to pay and producing thing’]. – *Juridica* 2002/4, p. 232 (in Estonian); J. Lahe (see Note 36), p. 686.

⁴² The Court of Justice has affirmed that the Brussels I Regulation’s Article 5 (1) (a) could cover unilateral promises made by one party to another, in a Judgment of the Court of Justice of the European Communities of 20 January 2005, Case C-27/02, *Petra Engler v. Janus Versand GmbH*. – ECR 2005, p. I-481.

⁴³ In a relatively recent case involving a foreign element, the Supreme Court seems to have affirmed the right of the parties to agree upon the applicable law in relation to such obligation. Because Estonian private international law does not provide for any party autonomy for the law applicable to property rights, doing so only in relation to the law applicable to non-contractual

4. Conclusions

As a general rule, the terms found in the European private international law instruments have to be interpreted autonomously and independently of any national laws. Consequently, the characterisation of contractual and non-contractual obligations under Estonian substantive law can only be a starting point for the Estonian judge resolving cases with an international element. In many instances, the Estonian and European notions of non-contractual obligations differ from each other. Sometimes the obligations characterised as non-contractual under Estonian substantive law would be dealt with as contractual in the context of European private international law instruments and *vice versa*, and sometimes a non-contractual obligation recognised under Estonian substantive law cannot be located under the European choice-of-law instruments at all. However, characterising contractual and non-contractual obligations under Estonian substantive law should not be decisive for the characterisation of such obligations under the European private international law instruments.

obligations, it seems that such obligation should be characterised as non-contractual rather than proprietary. See the Judgment of the Estonian Supreme Court of 17 January 2011 in the civil case denoted as No. 3-2-1-108-10.



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The Latvian Law of Obligations: The Current Situation and Perspectives^{*1}

1. Introduction

The Latvian system of private law is based on the Civil Law, which was adopted in 1937 and came into force on 1 January 1938. After the restoration of independence, Latvia, in a departure from the approach of the other two Baltic States, did not draft a new civil law but, in the early 1990s, reinstated the law that had been adopted prior to World War II. The Civil Law has more than 2,400 sections, which unite and organise within a uniform system the most important provisions of private law. The Civil Law consists of an introduction and four parts: on family, inheritance, property, and the law of obligations. When reinstating the Civil Law, the legislator modernised it to the extent necessary to resume its application under the conditions of the last decade of the 20th century. The amendments that have been made to the Civil Law since the first half of the 1990s have affected mainly family and inheritance law. The amendments to the part on the law of obligations have not been too great; however, most of them have been essential. Over the last two decades, the Civil Law has proved its viability and practical suitability. The high degree of abstraction typical of the Civil Law's provisions significantly facilitates their application in practice.

The purpose of this report is to clarify how the law of obligations incorporated into the Civil Law corresponds to the legal needs of contemporary Latvia. Furthermore, this paper examines the reforms needed for improvement of the law of obligations. This research task is accomplished through discussion of the general characteristics of the Latvian law of obligations, examination of the amendments to the law-of-obligations part, and outlining of the prospects for modernising the law of obligations.

2. General characteristics of the Latvian law of obligations

In its scope, the law of obligations is the most extensive part of the Civil Law. The law of obligations is covered in Sections 1401–2400 of the Civil Law. The latter part of the Civil Law consists largely of the pandect legal provisions derived from Roman law, which have been successfully fused with elements of modern civil law.

¹ Report for the conference called 'Kümme aastat võlaõigusseadust Eestis ja võlaõiguse areng Euroopas' ['Ten years of the Law of Obligations in Estonia and developments of the law of obligation in Europe'], held in Tartu on 29–30.11.2012.

In the objective sense, the law of obligations is a set of legal provisions that regulate the origin, execution, and termination of obligations, just as much as the legal consequences of their infringement.^{*2} Even though civil-law provisions that regulate obligations are found also in many laws outside the Civil Law, traditionally in Latvia the concept 'law of obligations' is understood as exactly the set of provisions that forms the part of the Civil Law on the law of obligations. Obligation rights as a person's subjective rights are defined in Section 1401 of the Civil Law, according to which obligation rights are rights on the basis of which one person—the debtor—is required to perform certain actions of financial value for the benefit of another person, the creditor. Thus, the civil-law obligation encompasses a legal duty the fulfillment of which, in contrast to that of a moral duty, can be achieved through coercive measures of a legal nature, including the assistance of a court.^{*3}

The portion of the Civil Law on the law of obligations is structured as follows: It starts by addressing legal concepts common to the whole law of obligations and after that considers specific legal relationships. Accordingly, the part on the law of obligations is characterised by proceeding from the general to the specific. Sections 1401–1911 of the Civil Law regulate the institutions of law common to all law of obligations. These sections contain the general provisions on legal transactions and contracts, on entering into a contract, and on wrongful actions (including delict, compensation for loss, mutual relations of joint obligors, reinforcement of obligations rights, protection, interests, cession of right to claim, and termination of obligations rights). Thus, the provisions made in Sections 1401–1911 of the Civil Law do essentially constitute the general part of the law of obligations.

Sections 1912–2400 of the Civil Law, in their turn, address specific legal relationships and, in fact, constitute the special part of the law of obligations. These sections predominantly regulate concrete types of contracts under civil law: contracts of sale, barter, gift, rental, loan, maintenance, authorisation, and carriage, along with other important contracts. The Civil Law contains legal provisions for the most prevalent and typical contracts. A number of non-contractual relations are regulated in the conclusion of the part of the Civil Law on the law of obligations: unauthorised management, specific torts, and unjust enrichment.

Section 6 of the Civil Law indicates that the general provisions addressing obligations are applicable accordingly to legal relations pertaining to family, inheritance, and property. It was necessary to include a section of this sort in the introduction to the Civil Law because the Civil Law has no general portion summarising and addressing legal issues common to all civil law. The majority of civil-law concepts that are important for all branches of civil law—for example, persons' legal ability and capacity, expression of will, legal transaction, and contract—along with other concepts important in civil law, are regulated in the part of the Civil Law on the law of obligations. There would be no logic in specially addressing these issues repeatedly in the sections on property, family, and inheritance law. Moreover, alongside the Civil Law there are laws in Latvia that contain special private-law provisions intended for specific fields, among them the Commercial Law, the Labour Law, and the Law on the Protection of Consumers' Rights. The general law-of-obligations provisions mentioned in Section 6 of the Civil Law, thus, are applicable not only to the legal relationships in family, inheritance, and property law but also to those legal relationships regulated by the special private-law provisions.

3. Amendments to the part of the Civil Law on the law of obligations

Most of the fundamental amendments to the part of the Civil Law on the law of obligations were adopted after 2000. The total number of amendments is not large, but they contain important elements for modernisation of legal provisions. According to Section 1635 of the Civil Law, a person who has suffered harm in consequence of a wrongful act has the right to claim satisfaction from the infringer. In January 2006, the Saeima (Parliament) of the Republic of Latvia added to said section of the Civil Law provisions on moral

² K. Torgāns. Iepriekšējās piezīmes Civillikuma 1401.–2400 pantam [Preliminary remarks on Sections 1401–2400 of the Civil Law]. – *Latvijas Republikas Civillikuma komentāri. Saistību tiesības. (1401.–2400. p.)* [Commentaries on the Law of Obligations of the Civil Law of the Republic of Latvia (Sections 1401–2400)]. Second edition. Riga: Mans īpašums 2000, p. 13 (in Latvian).

³ K. Torgāns. *Saistību tiesības. I daļa* [Law of Obligations, Part I]. Riga: Tiesu namu aģentūra 2006, p. 12 (in Latvian).

damage.^{*4} The concept 'moral damages' had been known in Latvian doctrine and judicial practice prior to that; however, with these amendments it became more concretely reflected in the law. The second part of Section 1635 of the Civil Law provides that moral damages should be understood as physical or mental suffering inflicted by way of infringement of the victim's immaterial rights or benefits caused by wrongful actions. The amount of compensation for moral damages is set by the court at its discretion, in view of the severity and consequences of the moral damages.

In January 2006, the part of the Civil Law on the law of obligations was supplemented with provisions following from Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions. In transposition of this directive, first of all, the provisions of the Civil Law's Section 1652 on the preconditions for default of the debtor applying were added. The new provisions allow establishing the setting in of the debtor's default with greater accuracy and simultaneously serve as a preventive measure for avoiding the debtor's default. Section 1765 of the Civil Law, in turn, was supplemented with special provisions on the interest rate that is lawful in the event of late payment of such financial debt as has been addressed in a contract for delivery of goods, purchase, or provision of services. The maximum rate for lawful interest is seven percentage points above the basic interest rate. The basic interest rate is four per cent; however, on each 1 January and 1 July it is adjusted in accordance with the changes in the refinancing rate of the Bank of Latvia. With introduction of the use of a basic interest rate, the rate of interest due has increased. This has a certain disciplinary effect on business transactions. In those transactions to which the new regulation does not apply, including all contracts with consumers, the general interest rate defined in the first part of Section 1765 of the Civil Law, which is six per cent per year, is still to be used.

The next important amendments to the part on the law of obligations were adopted by the Saeima in June 2009.^{*5} One of the main impetuses for these amendments to the law-of-obligations part of the Civil Law were the Principles of European Contract Law, revised and incorporated into the Draft Common Frame of Reference.^{*6} Section 1537 of the Civil Law was expressed in a new wording, providing that a contract is concluded by absent parties at the moment when the unconditional agreement by the party to whom the offer was made has reached the offeror (i.e., it codified the 'mailbox rule'). The new language of Section 1668 of the Civil Law, when compared with the previous wording of this section, regulates clearly and understandably the legal consequences that enter into play if the opposing party accepts performance after default without objection.

Section 1724¹ of the Civil Law is very important in said amendments; it *expressis verbis* provides the right to the payer of contractual penalties to request a decrease in the contractual penalty to a reasonable amount. The legislator also amended a number of provisions on loss and compensation. Section 1776 of the Civil Law states that the victim has to take measures to prevent loss as are reasonable under the concrete circumstances obtaining and that the infringer may request a decrease in the recognised amount of loss in the extent to which the victim, by exercising due care, could have prevented the loss, except in the case of malicious infringement of rights. Also, a new section, Section 1779¹, was added to the Civil Law; this specifies more accurately the amount of compensation for loss in the event of contract default—i.e., the loss for which the person who has caused the loss compensates the party who has suffered the loss, in the amount that could have been reasonably predicted at the moment of concluding of the transaction as the expected consequences of default, unless the default was caused through malicious intent or gross negligence.

⁴ Grozījumi Civillikumā ['Amendments to the Civil Law']. – *Latvijas Vēstnesis*, 9.2.2006 (No. 24) (in Latvian).

⁵ Grozījumi Civillikumā ['Amendments to the Civil Law']. – *Latvijas Vēstnesis*, 17.6.2009 (No. 94) (in Latvian).

⁶ See V. Jarkina. Ceļā uz Latvijas Republikas Civillikuma modernizāciju ['Toward a modernisation of the Civil Law of the Republic of Latvia']. – *Jurista Vārds*, 19.6.2007 (No. 25), p. 10 (in Latvian); V. Jarkina. Vai sabiedrība ir gatava grozījumiem Civillikumā ['Is the society ready for changes in the Civil Law?']. – *Jurista Vārds*, 6.11.2007 (No. 45), p. 15 (in Latvian).

4. The outlook on modernisation of the law of obligations

Latvian legal literature offers advice to employ two possible, parallel ways of improving civil law: 1) introducing the necessary amendments to the Civil Law step by step, along with 2) reforming the Civil Law, with examination of the possibilities for drafting a new, 21st-century Civil Law.^{*7} It is too early to judge how rapidly Latvia could become ready for drafting of a totally new Civil Law, which would also contain a new part on the law of obligations. It is predictable that the coming years will see Latvia take the path of gradually modernising the Civil Law's portion on the law of obligations without making fundamental changes to the structure and system of the Civil Law. It has been emphasised in the legal literature, with good reason, that the attempts to unify the European law of obligations, including the Draft Common Frame of Reference for European Contract Law, will leave a significant impact upon reforms to the Civil Law.^{*8} In 2007, an extensive scientific study was conducted, commissioned by the Ministry of Justice, on the necessary amendments to the various parts of the Civil Law.^{*9} Some of the recommendations made in the study have already become reality with the amendments introduced to the part on the law of obligations in June 2009. It must be added that amendments to the Civil Law require the legislator to be especially careful, since a provision of low quality or that is badly considered could dismantle the meticulously built system of the Civil Law.^{*10}

One can readily agree with the opinion stated in the study commissioned by the Ministry of Justice that those legal provisions that regulate general issues of the law of obligations should be the first to be improved. Some amendments to the provisions addressing specific types of contracts could be considered; however, currently they are not of primary importance. It must be noted that in December 2008 the Commercial Law of Latvia was supplemented with a new part, 'Commercial Transactions'.^{*11} The main objective of the portion on commercial transactions is to simplify and expedite business transactions. The provisions included in it for the specific types of commercial transactions apply only to those transactions in which at least one party is a merchant. And yet the entry into force of the part on commercial transactions, in 2010, has reduced the need to amend the provisions of the commercial-law part of the law of obligations where specific types of contracts are concerned.

The most significant amendments that should be introduced to the part of the Civil Law on the law of obligations in the immediate future are connected with modification of the *pacta sunt servanda* (agreements must be honoured) principle, which is defined in a restrictive way in Section 1587 of the Civil law. It follows from that section that a contract legally entered into imposes upon the contracting party the duty to do what has been promised, and neither exceptional difficulty of the transaction nor difficulties in performance arising later shall give that party the right to withdraw from the contract, even if the other party is compensated for the attendant losses. Section 1588 of the Civil Law, in its turn, enshrines the general principle that one party may not withdraw from a contract without the consent of the other, even if the latter fails to perform its obligation and in consequence of that failure. Section 1589 of the Civil Law specifies that unilateral withdrawal from a contract is permitted only when it is based on the nature of the contract or when the law provides for it in certain circumstances, or when such a right has been expressly made part of the contract. When modifying the principle of the binding power of a contract, the legislator should expand

⁷ K. Torgāns. Eiropas jurisprudences vērtības civiltiesībās: pārņemt vai nogaidīt ['European legal values in civil law: To adopt or to wait']. – *Jurista Vārds*, 20.11.2007 (No. 47), p. 19 (in Latvian).

⁸ J. Kārklīšs. Vienotu Eiropas līgumtiesību veidošanās un ietekme uz Latvijas tiesībām ['Development of a unified European contract law and its influence on Latvian law']. – *Jurista Vārds*, 6.12.2012 (No. 49), pp. 6–13 (in Latvian).

⁹ K. Torgāns. *Zinātnisks pētījums „Civillikuma Saistību tiesību daļas modernizācijas nepieciešamība un aktuālo privāttiesiskā regulējuma tendenču (UNIDROIT, ELTP) iespējamā ietekme uz Civillikuma Saistību tiesību daļas modernizāciju* ['Scientific study: A need for modernisation of the law of obligations part of the Civil Law and the possible influence of the current private-law drafting tendencies (UNIDROIT, PECL) on the modernisation of the law-of-obligations part of the Civil Law']. Available at http://www.tm.gov.lv/files/archieve/lv_documents_petijumi_Saistibutiesibas.doc (most recently accessed on 22.10.2013) (in Latvian).

¹⁰ K. Balodis. Presentation entitled 'Quality aspects of amendments to the Civil Law' at the international scientific conference at the University of Latvia Faculty of Law. Published in the proceedings 'International scientific conference: The Quality of Legal Acts and Its Importance in Contemporary Legal Space. 4–5 October, 2012.' Riga: University of Latvia Press 2012, p. 470.

¹¹ Grozījumi Komerclikumā ['Amendments to the Commercial Law']. – *Latvijas Vēstnesis*, 7.1.2009 (No. 2) (in Latvian).

the possibilities for unilateral withdrawal from a contract and should introduce a 'change of circumstances' clause.^{*12}

It must be noted that the Ministry of Justice had drafted corresponding amendments to the provisions on the binding force of a contract already in 2007.^{*13} Unfortunately, the legislator did not support the planned amendments in 2009, when other proposed amendments to the part on the law of obligations were introduced. The draft law prepared by the Ministry of Justice, on the one hand, maintained the general principle that a contract legally entered into imposes an obligation upon the contracting parties to fulfil the promise and does not confer on a party the right of unilateral withdrawal from the contract, even if compensation is provided for the other party's losses. The amendments to Section 1587 of the Civil Law, drafted by the Ministry of Justice, at the same time envisaged the possibility of terminating or amending a contract whose execution has become exceptionally difficult or in response to certain objectively evident changes in circumstances. The wording for the Civil Law's Section 1587 that was applied in the draft law provided that in cases wherein the meeting of commitments has become excessively difficult on account of objective changes in circumstances, the contracting parties have the duty to negotiate to change or terminate the contract. If the contracting parties are unable to reach agreement within reasonable time on changing or terminating it, any of the contracting parties would have the right to request the court to terminate the contract, setting a date and the conditions for termination, or to amend the contract, providing for fair distribution of the losses and benefits arising from the change in circumstances.

Those opposing the new language prepared for Section 1587 unfoundedly considered the proposed amendments to give contracting parties the right to withdraw practically from any contract and, therefore, concluded that amending the *pacta sunt servanda* principle would neither be reasonable nor be appropriate for the economic situation.^{*14} The fact that provisions similar to the draft for the Civil Law's Section 1587 were later included in the provisions on franchise agreements in the commercial-transactions part of the Latvian Commercial Law, can be regarded as an interesting legislative paradox. Section 478 of the Commercial Law provides that a party to a franchise contract may withdraw from it unilaterally if the fulfilment of commitments has become too burdensome on account of changes in circumstances as objectively evident or if any party, before entering into the franchise contract, provided false information on circumstances that had a substantial meaning at the time of entry into the franchise contract. Thereby, the franchise contract has become the only contract regulated in Latvian law from which a contracting party may withdraw on the above-mentioned legal basis that the legislator was unwilling to apply to contracts in general. In order for a rationally arranged system of private law to be in place, the legal provisions that in their nature are applicable to contracts in general should be set forth in the Civil Law, not the Commercial Law. It is hoped that it will become possible in the coming years to overcome the scepticism of the banking sector and other opponents with regard to the need to amend the Civil Law's provisions on the binding force of a contract.

5. Conclusions

The material on the law of obligations constitutes the most sizeable part of the Civil Law of 1937, which was reinstated and amended after Latvia regained its independence in the early 1990s. The last two decades have proved that the provisions of the law of obligations as included in the Civil Law are sufficient for meeting the contemporary legal needs of Latvia. The high degree of abstraction of the law-of-obligations provisions facilitates their application in practice, enabling their optimal application in dealing with civil-law cases of diverse types.

The current agenda of Latvia's legislator does not feature drafting of a new Civil Law. The law of obligations is improved step by step in Latvia, as part of the effort to modernise the Civil Law, through introduction

¹² J. Kārklīņš (see Note 8), p. 13.

¹³ Likumprojekts „Grozījumi Latvijas Republikas Civillikumā” [‘Draft law “Amendments to the Civil Law of the Republic of Latvia”’]. Available at http://helios-web.saeima.lv/saeima9/lasa?dd=LPO528_o (most recently accessed on 22.10.2013) (in Latvian).

¹⁴ Vai un cik lielā mērā grozāms Civillikums: ekspertu diskusija „Civillikums ceļā uz modernizāciju” [‘Should the Civil Law be amended, and to what extent?: Experts’ discussion “Towards Modernisation of the Civil Law”’]. – *Jurista Vārds*, 29.4.2008 (No. 17), p. 13 (in Latvian).

of amendments—only a few but essential ones—to the provisions of the portion on the law of obligations. The amendments introduced thus far fit quite well into the civil-law system. Cautious and gradual reform of the law of obligations can be expected also in the future. The legislator focuses mainly on improving the general provisions made in the part of the Civil Law on the law of obligations. These include, for instance, the rules on conclusion of a contract and provisions dealing with legal remedies. A reform of the provisions on the binding force of a contract would also help to provide the law of obligations with a more modern outlook.

In general, reforms to the law of obligations in Latvia should correspond to the European trends in civil-law development. The blueprints for unification of the European law of obligations, including the Draft Common Frame of Reference for European Contract Law, will leave a significant impact upon the reform of the Latvian law of obligations.



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A Farewell to (Private) Law: Musings on the Belgian Law of Obligations

Introduction

According to Hegel's Philosophy of Law, '[l]aw (right) considered as the realisation of liberty in externals, breaks up into a multiplicity of relations to this external sphere and to other persons' (§496). This and other statements are symptomatic of a received understanding of nineteenth-century (private) law as the legal expression of economic liberty, or personal freedom—in short, of the individual's subjectivity, written with a capital 'S', as it were. Although this received understanding may be overstated if not mythologised *in toto*¹, it is nonetheless the common self-understanding of the legal profession (as discussed in Section 1 of this paper).

Any move away from this golden age of contractual freedom and spontaneous order, through, for example, the advent of the welfare state, the juridification of social relations², or the birth of the European Union, automatically threatens to diminish the Subjectivity of the individual as epitomised by the sacrosanct freedom of contract

Indeed, the Subjectivity in private-law settings is increasingly limited by scores of national statutes or European initiatives limiting contractual freedom, usually motivated by an argument referring to market failure (e.g., for consumer protection) or an expansion of fundamental rights (e.g., anti-discrimination clauses).

As comprehensive coverage of this vast topic is inconceivable within the confines of a short paper we will highlight some features of the transformation process by referring to the Belgian example in the field of obligations and briefly sketch some recent developments in legislation, jurisprudence, and doctrine³, in Section 2.⁴

¹ S. Hofer. *Freiheit ohne Grenzen? Privatrechtstheoretische Diskussionen im 19. Jahrhundert*. Tübingen: Mohr (Siebeck) 2001; J. Rückert. Zur Legitimation der Vertragsfreiheit im 19. Jahrhundert. – D. Klippel (ed.). *Naturrecht im 19. Jahrhundert*. Goldbach: Keip Verlag 1997, pp. 135–183.

² M.E. Storme. *De juridisering van sociale verhoudingen van de negentiende eeuw tot vandaag*. Leuven 2002, pp. 78–121; L. Blichner, A. Molander: What is juridification? Arena Working Paper 14.3.2005. Available via <http://www.arena.uio.no/>.

³ For a more comprehensive overview of recent developments, see S. Stijns, V. Sagaert, I. Samoy, A. De Boeck (eds). *Themis 75 – Verbintenissenrecht*. Brugge: Die Keure 2012; M.E. Storme. *Recente ontwikkelingen verbintenissenrecht 2000–2011*. Brussels: Syllabus Vormingsinstituut Advocaten 2012; I. Samoy, T. Dang Vu. Belgium. – J. Herbots (ed.). *International Encyclopaedia of Laws: Contracts*. Alphen aan den Rijn: Kluwer Law International 2011; P. Van Ommeslaghe. *Droit des Obligations*. Brussels: Bruylant 2010; P. Wéry. *Droit des Obligations I, Théorie Générale du Contrat*. Brussels: Larcier 2010.

⁴ At the conference titled 'Kümme aastat võlaõigusseadust Eestis ja võlaõiguse areng Euroopas' ['Ten years of the Law of Obligations in Estonia and developments of the law of obligation in Europe'] held in Tartu on 29–30 November 2012, I had to cut short my paper and presented only the Belgium-focused portion.

Section 3 is dedicated to the European input, and in Section 4 we attempt to formulate a preliminary conclusion and examine whether the traditional main pillars of contract law (freedom of contract, party autonomy, and consensualism) have survived the modernisation onslaught intact or whether, instead, a substantive transformation has occurred.

1. Legal subjectivity and private law

Our understanding of private law and legal subjectivity cannot be separated from their philosophical (Enlightenment) and economic (liberalism) background.

The Enlightenment saw the emergence of the modern, scientific paradigm centred on the new concepts of formal logic, universal principles, and abstract axioms.⁵ Jürgen Habermas has described this grand enterprise as ‘the extravagant expectation that the arts and sciences would promote not only the control of natural forces but also understanding of the world and self, moral progress, the justice of institutions and even the happiness of human beings’.

The scientific method became the new paradigm, and it was taken as axiomatic that there was only one correct answer to any question. The word and the law could be controlled and rationally ordered if we could represent it properly—i.e., with mathematical precision, *more geometrico*.

These efforts have directly influenced law by putting forward objectivity, equality, and subjectivity as the new key words. Modern law also swept away the remains of feudalism and its various categories of people, replacing it with the concept of equal citizens and the slogan of the French Revolution that a ‘good law must be good for everyone in exactly the same way that a true proposition is true for all’.

The predominant feature of the new legal paradigm, however, was the emergence of subjectivity. Hegel’s Philosophy of Law describes subjectivity as the distinctive feature of modern times. Indeed, ethics and law no longer reflect an objective natural or divine order; they are now centred on the free will and self-actualisation of the ahistorical, discorporated, and decontextualised individual. Subjective rights are the law’s *modus operandi*, serving the open ends of much-vaunted freedom of contract in any given case.

This open-end-oriented, liberal society was constructed from a radically atomistic perspective. The new rule of law stands for a neutral system of codified, subjective rights allowing all citizens individual-level pursuit of happiness rather than promoting a shared, communitarian concept of the good, as was the case in pre-modern societies. Whilst the material law is in itself open-ended, the formal aspects of modern law can be characterised as emphasising moral neutrality, autonomy, internal unity, and procedural rationality.⁶

Modern law presents itself as a relatively autonomous social practice, distinct from politics, ethics, and religion. Positivism was the credo of the nineteenth century and found its most eloquent representative in Hans Kelsen’s *Reine Rechtslehre* or ‘pure’ theory of law.

Even if after the Second World War the questions of foundations, of the boundaries between the legal and the non-legal, of the relationship between law and justice, were raised again, positivistic practice of law remained untouched by it, by and large. Last but not least, law in modern society understands itself as a unitary and coherent system of rules and norms. The consistency and coherence of the system are guaranteed by *Legitimation durch Verfahren*, legitimisation by internal procedural rationality.

The step from this general characterisation to the early economic liberalism that emerged in the nineteenth century is but a small one. Private law understood in this sense is ‘a system of unlimited liberal freedom, which claimed that fairness would automatically result from a formal law of obligations based especially on formal equality’⁷.

⁵ Stephen Toulmin describes the transition with the following catch phrases: ‘General principles were in, particular cases were out’, ‘General principles were in, rhetoric was out’, ‘Abstract axioms were in, concrete diversity was out’, and ‘The permanent was in, the transitory was out’ (S.E. Toulmin. *Cosmopolis: The Hidden Agenda of Modernity*. Chicago: University of Chicago Press 1990, p. 30).

⁶ A. Zaccaria. Il diritto privato europeo nell’epoca del postmoderno [‘European private law in the postmodern era’]. – *Rivista di diritto civile* 1997/1, pp. 367 ff.; P. Wagner. *A Sociology of Modernity: Liberty and Discipline*. Abingdon: Routledge 1993; B. de Sousa Santos. Law and community: The changing nature of state power in late capitalism. – *International Journal of the Sociology of Law* 1980, pp. 379–397.

⁷ A. Fouillée. *La science sociale contemporaine*. Paris 1880, p. 410, quoted by S. Hofer (see Note 1), p. 1.

In our *idealtypisches* view of the nineteenth century, private law is entirely based on private autonomy and its manifestations in property, obligations, and will. In only a limited number of exceptional situations would private law be placed in the straightjacket of constraint by special legislation.^{*8}

As we have already hinted, in the introduction this stereotype of a liberal *Paradise Lost* might not be entirely correct, as limits to the principle of freedom were already imposed in early liberalism and several socially inspired incursions into contract law (e.g., rent control) have a history of well over a century. Where then does the stereotype come from?

Hofer has advanced the thesis that the nineteenth-century German, French, and English private-law systems were far from dominated by a unifying idea of unlimited freedom. Rather, the stereotyping appears to have its origin in the opposition to the drafting of the *Bürgerliches Gesetzbuch*, the German Civil Code, allowing scholars such as Gierke^{*9} and Menger^{*10} to oppose the Roman-law model of liberalism found in the social features of the BGB as an expression of Germanic thinking, an opposition that ultimately would make its way into the programme of the NSDAP.^{*11}

Another challenge to the private-law stereotype as a haven of subjectivity has arisen, from the emerging welfare state of the early twentieth century. No-one less than Max Weber characterised this as a turn toward substantive justice and away from the pinnacle of formal legal rationality.

Whatever the degree of counter-factuality in the private-law-equals-pure-subjectivity stereotype might be, the fact remains that a huge corpus of scholarly output, along with general self-understanding of the legal profession, upholds the premise, thereby legitimising this enquiry.

2. The fragmented modernisation of Belgium's law of obligations

Belgium has retained the French Code Civil of 1804, albeit with numerous revisions. However, the chapter containing the general rules for all obligations^{*12} has survived remarkably intact—so well, in fact, that the Belgian Civil Code has retained more of the original articles than the present-day French Code Civil does.

When assessing the tenets of the civil code, one should not forget that it was crafted a century before the German *Bürgerliches Gesetzbuch* and nearly double that time before the new codes of the Netherlands, Québec, and Estonia. In other words, the code was drafted well before the boom of international capitalism, the computer age, and e-commerce. Its framework was still very much that of small businesses and small-scale employers confronting an equally small workforce, *du petit commerce et du petit patronat en face de la petite main d'oeuvre*.^{*13}

Naturally, the civil code has been adapted to new realities. This has occurred in several ways.

First of all, certain articles of the code have been abolished^{*14}, altered, or added. Several chapters have been replaced with incorporated statutes^{*15}, which retain their own numbering and, worse still, apply their own style of numbering. As a result, '[t]he current version of the Civil Code does not deserve to get any prizes for its beauty and one can only wonder what its original framers would think of the horrible creature the Belgian legislator has made of it'^{*16}.

⁸ H. Coing, *Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte*. Band III: Das 19. Jahrhundert, Tlbd. 3: Gesetzgebung zu den privatrechtlichen Sondergebieten. München: Beck 1986, p. 2874.

⁹ O. von Gierke, *Der Entwurf eines bürgerlichen Gesetzbuches und das deutsche Recht*. – *Schmollers Jahrbuch für die Gesetzgebung, Verwaltung und Volkswirtschaft*. Berlin: Duncker & Humblot 1889.

¹⁰ A. Menger, *Das bürgerliche Recht und die besitzlosen Volksklassen*. Tübingen: Laupp 1890.

¹¹ Article 19: 'We demand that Roman law, which serves a materialist ordering of the world, be replaced by German common law.'

¹² Book III, Title III, *Des Contrats ou des Obligations conventionnelles en général*, containing Articles 1101–1386. An astonishing 239 articles are still identical to the original text, according to H. Bocken and W. De Bondt (eds). *Introduction to Belgian Law*. Brussels 2001, p. 224.

¹³ G. Morin, *La loi et le contrat. La décadence de leur souveraineté*. Paris: Alcan 1927, p. 57.

¹⁴ Including even the very first article of the code.

¹⁵ E.g., the Mortgages Law of 18 December 1851 and the Commercial Leases Act of 30 April 1951.

¹⁶ D. Heirbaut, M.E. Storme, *Private Law Codifications in Belgium*. Taipei May 2012.

Secondly, several issues have been dealt with in separate statutes that remained outside the civil code^{*17}. This method has been extensively used in dealing with the transposition of European Union directives. What typically happens is that the law is rushed through Parliament on a just-in-time basis. Here one finds a rather pale comparison to the German *Schuldrechtreform*, which, while it too was completed in a hurry, produced a complete overhaul of the law of obligations. In all fairness, one has to mention that Belgian company law and international private law received more attention and were fully codified, in 1999 and 2004, respectively.

The third road to *aggiornamento* has been offered by a vast amount of case law. Over the past 200 years, a mountain of output of case law has fine-tuned (and in some cases completely transformed) the old texts, especially with respect to the general principles related to obligations and tort law.

Finally but not least, doctrine has been as abundantly rich as one might have expected from eight faculties of law, 100 (print-form) legal journals, and almost 13,000 attorneys. A multitude of monographs, journal articles, and conference papers cover just about any conceivable topic.

Completeness has never been an idle word (De Page's elementary treatise on civil law weighed in at more than 10,000 pages, while Van Ommeslaghe's handbook on obligations provided 2,680!), and the computer age has greatly added to this *logorrhoea* of handbooks, papers, and comments. In December 2012, Kluwer's legal database Jura contained no fewer than 70,000 legislative acts, 180,000 judgements, and 220,000 scientific articles and notes.

The interaction between doctrine and jurisprudence has been particularly significant in the development of tort law (entirely based on Articles 1382–1386 of the Civil Code) and concepts such as abuse of rights, good faith, and promissory estoppel (the latter only being accepted as a special case of abuse of rights).

A recent overview intended for European researchers^{*18} dealt with developments of matters such as 'Basic principles of contract law and the role of good faith and fair dealing', 'Dynamic conclusion of the contract and proof', 'Performance and non-performance and termination of the contract', 'Contractual liability by non-performance and termination by fault', and 'Non-performance and termination without fault: impediment, hardship and ending by notice'.

Another influential overview^{*19} concentrated on the diminishing difference between rules of public order and mere compulsory rules and on the ensuing consequences in terms of relative versus absolute nullity, the Cour de Cassation's position on promissory estoppel, extra-judicial termination of contracts, and the co-existence of contractual liability and tort law.

Doctrine has always been in the habit of seeking inspiration from across the border, and it is to be expected that the DCFR will exert a great influence, whether or not it eventually evolves into a full-blown European civil code.

Indeed, a common feature of legislation, jurisprudence, and doctrine alike is their comparative stance, unquestioning europhilia, and automatic embracing of harmonisation initiatives.

Heirbaut and Storme have—though in a slightly different context—denounced the 'pragmatic laziness' of legal transplanting as a national characteristic.^{*20}

Whatever the origin of this attitude, the fragmented, patchwork approach seems to have yielded satisfactory results, but no doubt a new code will be embraced with the usual pragmatism.

A last feature that should not be forgotten is the good-natured disposition of academic writing. Harsh polemics in the vein of Legrand's 'AntivonBar' are a rarity in Belgian legal culture, if not altogether absent.^{*21}

¹⁷ E.g., the Sale of Unfinished Houses Act of 9 July 1971 and the Law of 14 July on Trade Practices. Literally, hundreds of them are connected to the broad field of civil law.

¹⁸ I. Samoy, B. Lambrecht (eds). *Consortium Agreements for Research Projects: Multiparty Agreements under Belgian Contract Law*. Antwerp: Intersentia 2011.

¹⁹ A. Van Oevelen. Enkele knelpunten in het verbintenissenrecht ['Some bottlenecks in the law of obligations']. – *Rechtskundig Weekblad* 2011–2012, pp. 55–61. Amongst other things, Van Oevelen points out that, since the ECJ's *Océano Grupo* and *Pannon* cases, Belgian judges have started to scrutinise unfair consumer contract clauses *ex officio*, thereby influencing the traditional dichotomy between absolute nullity reserved for breaches of the *ordre public* and relative nullity for private interests.

²⁰ D. Heirbaut, M.E. Storme: 'De Belgische Rechtstraditie: Van een lang zoeken naar onafhankelijkheid naar een verlangen naar afhankelijkheid', Belgisch rapport voor het XVIIe Internationaal Congres voor rechtsvergelijking. – *Tijdschrift voor privaatrecht* 2008, pp. 979–1041 (p. 26 of PDF version).

²¹ P. Legrand. AntivonBar. – *The Journal of Comparative Law* 2006, pp. 13–40.

3. Features of European harmonisation in the field of law of obligations

The present Europeanisation of private law as a whole is a process that consists of several components.

First, there is a constantly growing body of applicable secondary law that concerns itself with the direct or indirect regulation of certain fields of law (i.e., taking a vertical approach). Nearly all of these initiatives within the *acquis communautaire* concern themselves with harmonisation in view of the completion of the internal market. However, by invalidating certain contract clauses and imposing minimum standards, they make a distinct mark on private law.

Second comes the constitutionalisation drive and the anti-discrimination law cutting across all fields of law (i.e., applying a horizontal approach). Anti-discrimination rules do not govern a particular field of law in a particular setting; they address all contractual relations as such.

Last but certainly not least, one can look at the imminent advent of a European civil code.

3.1. EU Secondary law takes primacy

Historically, the EEC/EC/EU has not been concerned with private-law-making in the traditional sense of drafting and implementation of rules addressed at private parties for the conduct of their business. Rather, it has intervened in a particular sector of the internal market by outlawing certain practices (that is, applying blacklists) and imposing protection for the weaker party to a contract. In doing so, it has increasingly replaced the public/private distinction with a classification by field of policy.^{*22}

The European Union has been paying particular attention to the following fields: intellectual property rights, company law, insurance and financial law, cross-border credit transfers, e-commerce, distribution agreements, product safety and product liability, and consumer law (commercial practices).

Commercial practices, unfair contract terms, and advertising are especially heavily regulated, by means of several, successive directives.^{*23} Also, there is hardly any other branch of private law in which the European Court of Justice has been so active in defining, *inter alia*, unfair contract terms^{*24} and the boundaries of consumer credit^{*25} laid down by the oft-modified document 'Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit'.^{*26}

The way in which these directives have affected the Member States' consumer law is typical of the manner in which the EU has permeated all fields of private law whilst leaving the overall national structures intact. In the words of Whittaker^{*27}:

EC commercial practices law affects the terms on which the contract is concluded; it demonstrates how EC law leaves basic principles of national private legal orders, such as offer and acceptance, in place, whilst at the same time making them superfluous. It sets standards for the interpretation of private law relations (the average consumer), introduces new regulatory devices, such as the duty to disclose information at the pre-contractual stage and post-contractual monitoring, and reaches beyond the privity of contract law.

²² H.-W. Micklitz. The visible hand of European regulatory private law: The transformation of European private law from autonomy to functionalism in competition and regulation. – *EUI Working Paper Law* 2008/14, p. 26; B. Lurger. The future of European contract law between freedom of contract, social justice, and market rationality. – *European Review of Contract Law* 2005/1, p. 442.

²³ Directives 2005/29/EC (OJ L 149, 11.6.2005, 22) and 2006/114/EC (OJ L 376, 27.12.2006, 21); I. Klauer. General clauses in European private law and 'stricter' national standards: The Unfair Terms Directive. – *European Review of Private Law* 2000/8, pp. 187–210; The E-Commerce Directive, 2000/31/EC. – OJ L 178, 17.7.2000, 1; Directive 99/44/EC 43. – OJ L 171, 7.7.1999, 12.

²⁴ Case C-244/98, *Océano*. – ECR 2000, p. I-4941; Case C-473/00, *Cofidis*. – ECR 2002, p. I-10875; Case C-237/02, *Freiburger Kommunalbauten*. – ECR, p. I-3403.

²⁵ Case C-481/99, *Heininger*. – ECR 2001, p. I-234.

²⁶ OJ (L 042) 1987, 48.

²⁷ S. Whittaker. The relationship of the Unfair Commercial Practices Directive to European and national contract laws. – S. Weatherill, U. Bernitz (eds). *The Regulation of Unfair Commercial Practices under EC Directives 2005/29: New Rules and New Techniques*. Hart Publishing 2007, p. 139 (quoted by H.W. Micklitz (see Note 22), p. 19).

This permeation crops up again in each field examined: the directives and regulations set forth minimum standards of protection and render invalid contrary clauses (that is, apply blacklists) without actually replacing the national legislation in the field at hand. The same holds true for interpreting national rules according to European standards.^{*28}

Another influence, though less direct, has been the liberalisation of former state monopolies in the sector of telecommunications, energy, and transport, which has indirectly increased the importance of contract-law mechanisms.

Certainly, these directives deal with private-law relations only marginally. But the notion of ‘universal services’ for instance has introduced a novel legal concept in private-law relations:

The network law develops, within the boundaries of universal services, concepts and devices whose reach must be tested with regard to their potential for general application beyond the narrow subject matter. Just one example may be mentioned: despite privatisation, network industries have to guarantee the accessibility and the affordability of their services. What is at stake here is the obligation to contract and the duty to continue delivery even in cases of late payment.^{*29}

Yet another field in which EC influence, while unexpected, can be seen is real-property law. The rules for acquiring and transferring property definitely remain national, and so do the rules pertaining to registration and securities.

A uniform mortgage legislation has not yet been implemented, but by applying the basic freedoms to real sureties, the European Court of Justice has ruled unlawful a national prohibition of registering mortgages in foreign currencies.^{*30} Moreover, freedom of circulation of capital allows for smooth cross-border financing of real-estate investments. Real-estate law is affected also by the various directives on doorstep sales, consumer credit, and unfair terms.^{*31}

3.2. Anti-discrimination as a general principle of private law

A second Europeanisation of private law has taken place through the implementation of the anti-discrimination rules.

The original EEC Treaty did not contain a general equality clause. Instead, it identified two forbidden grounds for discrimination—nationality and gender—when speaking specifically of the requirement of equal pay.^{*32}

Fifty years on, the objective has become to eliminate all inequalities and promote gender equality throughout the EU in accordance with Articles 2 and 3 of the EC Treaty (on gender mainstreaming) along with Article 141 (on equality between women and men in matters of employment and occupation) and Article 13 (on discrimination by sex, within and outside the workplace). Also, gender-equality laws have been supplemented by general anti-discrimination legislation, applicable in other fields than economics and labour relations. Article II-81,1 of the Charter of Fundamental Rights, for instance, prohibits any discrimination on any ground:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

A number of directives have brought every branch of private law within the scope of the anti-discrimination principle.^{*33} This drive was reinforced by several landmark ECJ cases.

²⁸ C. Joerges. Interactive adjudication in the Europeanisation process? A demanding perspective and a modest example. – ERPL 2000.

²⁹ P. Rott. A new social contract law for public services? – Consequences from regulation of services of general economic interest in the EC. – *European Review of Contract Law* 2005/3, p. 323.

³⁰ ECJ, C-222/97, *Trummer*, 16.3.1999.

³¹ E.g., C-481/99, *Heininger*, 13.12.2001.

³² Article 119 of the EC Treaty; Directive 75/117/EEC, on equal pay for women, and Directive 76/207/EEC, on equal access to employment.

³³ *Inter alia*, 2000/43/EC. – OJ L 180, 19.7.2000; 2000/78/EC. – OJ L 303, 2.12.2000, 16; 2002/73/EC. – OJ L 269, 23.9.2002, 15; 2004/113/EC. – OJ L 33, 13.12. 2004, 37; 2006/54/EC, 22. – OJ L 204, 26.7.2006, 23.

The specific way in which the secondary legislation banning discrimination (especially directives 2000/43/EC, 2002/78/EC, and 2004/113/EC) is drafted introduces a few novelties and poses a number of problems.

First, these directives have introduced anti-discrimination provisions to civil law (as opposed to labour law) and demand that the Member States provide effective civil-law remedies against horizontal discrimination of all sorts by private persons, including the refusal to deal with other parties. These directives and their transposition laws have sparked great (national-level) controversies because of their horizontal effect and the obligation for parties to form a contract without regard for personal preferences. In particular, the duty of non-refusal of tenants has led to numerous anti-discrimination and racism-related lawsuits and inquiries by monitoring agencies in Western Europe.

Second, Article 8, paragraph 1 of Directive 2000/43/EC and paragraph 1 of Article 9 of Directive 2004/113/EC reverse the burden of proof. Rather than the plaintiff having to bring proof, the respondent in a case of putative direct or indirect discrimination must either prove that there has been no breach of the principle of equal treatment or invoke justified criteria for exception. There is no need to emphasise that this has come as a shock to traditional legal thinking.

Third, key provisions of the directives, including those for definition of the term ‘discrimination’ itself, are blanket norms left to the courts’ interpretation, thereby increasing legal uncertainty. An approximation to some principles laid out by the European Court of Human Rights might be helpful in this respect.

Fourth, national legislation (e.g., in Belgium, Italy, The Netherlands, and the United Kingdom) has often offered anti-discrimination associations *de jure* legal standing to engage in legal proceedings on behalf of the victim. The fact that legal action can now be undertaken by a third party even without the victim’s knowledge or consent has sparked fears of the dreaded *actio popularis* and of legal warfare by all against all.

Of course, much depends on the national implementation of the directives. Some, as the Kingdom of Belgium has, have been rather zealous in stretching the general non-discrimination provision to its maximum. Indeed, Article 2, Section 4 of the bill of 25 February 2003 outlaws ‘[e]very form of direct or indirect discrimination in the dissemination or publishing of a text, message, sign or other expression-bearer as well as in the participation in and exercise of economic, social, cultural and political activities accessible to the public’. This provision, which carries a stiff penalty of up to one year’s imprisonment (i.e., twice the maximum sentence for simple assault), has already served in bringing law suits against landlords who are unwilling to let flats to immigrants, asylum-seekers and people on welfare benefits.

Moreover, Belgium has also amended its criminal code: Article 405quater now doubles the minimum penalty for murder, manslaughter, and assault if these crimes were inspired by the victim’s ‘so-called race, descendance, national or ethnical background, sexual conviction, fortune, religion or beliefs, present or future state of health, handicap or physical characteristic’, thus introducing two categories of victimhood.

Finally but by no means least, there is the much-debated issue of preferential treatment—i.e., permitted discrimination.³⁴ We will not dwell on the landmark cases *Kalanke*³⁵ and *Marschall* but will simply recall that the strict reading applied by the ECJ in the *Kalanke* case as to the grounds of the non-discrimination principle did not please the political powers and, therefore, was overturned through explicit enshrining of the possibility of affirmative action in Article 141 (4) of the Treaty of Amsterdam.

From these angles, it is clear that secondary EU law is already promoting the anti-discrimination principle to a general principle of private law.

³⁴ E. Howard. The European Year of Equal Opportunities for All: Is the EU moving away from a formal idea of equality? – *European Law Journal* E 2008 (14)/2, pp. 168–185; T. Sowell. *Affirmative Action around the World: A Comparative Study*. New Haven 2004.

³⁵ Cases 450/93 (*Kalanke*) and 409/95 (*Marschall*).

3.3. The DCFR

As is well known, the Draft Common Frame of Reference^{*36} (DCFR) has codified general principles, definitions, and model rules both for contract law in general and for specific contracts.^{*37} Accordingly, it adopts the perspective of a legal code that, in the view of some, ‘dares not speak its name’^{*38}.

How much of the DCFR will eventually make its way into the future European civil code remains unclear, but at the very least this ‘toolbox for analysis and comparison’ will have indirect legal effects through (perhaps mandatory) interpretation of secondary law and will thereby affect developments in the Member States’ private-law systems.

Whereas most of the principles and mechanisms exposed in the draft code are technical and comparative in nature, adherence to the anti-discrimination ideology is clearly expressed in the seventh principle of the DCFR:

7. Restrictions on freedom to choose contracting party.

While in general persons should remain free to contract or to refuse to contract with anyone else, this freedom may need to be qualified where it might result in unacceptable discrimination, for example discrimination on the grounds of gender, race or ethnic origin.

Discrimination on those grounds is a particularly anti-social form of denying the contractual freedom, and indeed the human dignity, of the other party. EU law and the DCFR therefore prohibit these forms of discrimination and provide appropriate remedies. (See the DCFR’s Article II–2:101 to 2:105 and Article III–1:105.)

The article is drafted in such a way that it readily allows for the addition of further grounds for discrimination, as they already exist in some Member States. The open ended-phrasing of the last sentence leaves little doubt about the future potential use of these provisions.^{*39}

4. The effects on subjectivity

Several observations are permitted by our all-too-brief analysis.

4.1. How I learned to stop worrying and love the *acquis communautaire*

The EU *acquis* and its sector-based approach have led to a ‘pointillist’ approach to private law—more precisely, to contract law. Whilst this may frustrate national legal systems in possession of a shiny and internally coherent civil code such as the *Bürgerliches Gesetzbuch*, the detrimental effects thereof should not be overestimated, since national systems have always been tinkering with their national codes themselves and have not refrained from introducing legislation addressing specific social or political problems, tenancy law being a prominent example in all Member States. In the words of Matthias Kumm^{*40}:

First, the idea of an autonomous domain of private law as an integral part of an apolitical state-free sphere had collapsed. The belief in a civil society that organizes itself by means of private law, the content of which is defined by apolitical legal experts, no longer resonated. Private law, too, had become the object of self-conscious, broad-based political struggle. Private law was wrested from the legal priesthood and became a mundane object of regulatory intervention. The 19th century ideas of scholarly mandarins, who conceived of private law in natural law, historicist, or conceptual

³⁶ C. von Bar, E. Clive, H. Schulte-Nölke, H. Beale, J. Herre, J. Huet, P. Schlechtriem, M. Storme, S. Swann, P. Varul, A. Veneziano, F. Zoll (eds). *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)*. Final Outline Edition. Munich: Sellier Publishers 2009.

³⁷ H. Collins. *The European Civil Code: The Way Forward*. Cambridge 2008, p. 65; 8.2.2007, COM(2006), 744 final.

³⁸ B. Lurger. The common frame of reference / optional code and the various understandings of social justice in Europe. – T. Wilhelmson, E. Paunio, A. Pohjolainen (eds). *The Hague: Private Law and the Many Cultures of Europe*. Kluwer 2007, p. 180; H. Collins (see Note 37), p. 86.

³⁹ The unequivocal militant stance with respect to this principle contrasts rather with the more cautious approach to the tenth principle, ‘correcting inequality of bargaining power’.

⁴⁰ M. Kumm. Who is afraid of the total constitution? Constitutional rights as principles and the constitutionalization of private law. – *German Law Journal* 2006 (7)/4, p. 342.

terms or thought of the code as the authoritative embodiment of legal rationality, were replaced by ideas that private law, too, was subject to political choice. Correspondingly, the regulatory state, featuring a ‘motorized legislator’ and an increasingly powerful executive branch, flexibly responding to whatever the crisis of the moment happens to be, was in full swing. Governments had already enacted competition laws prohibiting cartels and trusts, laws limiting freedom of contract to legislatively determine minimum wages and maximum hours, and more generally legislatively shape the employer–employee relationship. More radical proposals concerning the transformation of the economy were on the table politically. All this occurs in the context of a severe economic crisis and heated ideological disagreement about the basic terms of social cooperation.

Since the national legislators have intervened into private law whenever the perceived need arose, it seems only natural that the EU-legislators have done likewise, such as with regard to the maximum harmonisation of unfair commercial practices.^{*41} Its ramifications for private law theory (and practice)—the invalidation of scores of contractual provisions—can hardly be underestimated, although the directive is theoretically ‘without prejudice to private law’.^{*42}

4.2. The private (law) is political

Likewise, the blurring of the distinction between public and private law^{*43} by the European approach along the boundaries of policy fields rather than on the basis of sacrosanct doctrinal partitioning is not an EU novelty, the regulation of labour relations being a prominent example in all Member States. It would, therefore, be unfair to burden the EU with ‘all the sins of Israel’, as the tendencies were already present in the Member States’ departure from coherent codification.

But the aggregate weight of the EU initiatives that we have discussed (*acquis*, anti-discrimination directives, and the draft civil-code frame of reference) have nonetheless made a serious impact and have lent further speed and credibility to trends already present in the Member States. The process of silent constitutionalisation of private law through the elevation of certain principles and certain rights will doubtless be instrumentalised to shape society and policy even further in a certain social image.

It is important to understand how radically the meaning and definition of concepts such as rule of law, private contract, and subjectivity are changing as a result of the increasing importance attached to the material aspect of fundamental rights. This has upset the traditional balance in constitutionalism between the fundamental rights of the individual and the legality of democratically enacted civil codes. What we are increasingly witnessing today is a *Hyper-Rechtsstaat* in which the democratic legal activity of the Member States is increasingly made subordinate to a ‘thick’ type of (international) legitimacy based on fundamental rights, leaving only very limited possibilities for changing the structure and outcome of policies.^{*44}

The impact of the ruling in the *Metock* case^{*45} on the Member States’ immigration policies regarding nationals of non-member countries who are family members of European Union citizens is a fine illustration of this phenomenon.

As *acquis* policies cut across contract, property, and fundamental-rights domains, a new ‘architecture’ is warranted.

If it is to avoid total deadlock or chaos, this new architecture must address the relationship between fundamental rights and private law, a new division of competencies between the European Union and its member states, clear hierarchy of sources (including elucidation of overlapping rights), the emergence of the regulatory function of private law, and loyal implementation of the subsidiarity principle.

⁴¹ E.g., Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Directives 84/450/EEC, 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No. 2006/2004 (Unfair Commercial Practices Directive).

⁴² Article 3.2. stipulates: ‘This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract’.

⁴³ M. Freedland, J.-B. Auby. *The Public Law – Private Law Divide*. Oxford 2006.

⁴⁴ R. Bellamy. *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*. Cambridge 2007; R. Hirschl. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge 2004; P. Praet. Politisierung des Rechts oder Verrechtlichung der Politik – Diskurs der Grundrechte. – *Rechtstheorie* 2007 (38)/2–3, pp. 367–378.

⁴⁵ Case 127/08, *Metock and Others*. – OJ C 236 of 13.9.2008, p. 4.

From a doctrinal perspective, this ambitious project is long overdue. Whereas the EU only cites the internal market as rationale for its initiatives, doctrine has embraced the project for the sake of the lost unity and rationality of multilevel civil law.

However, if one judges by the mere 27 (!) responses from practitioners to the European Commission's Communication on European Contract Law^{*46}, the legal 'user community' did not particularly long for a grand initiative, whilst the stakeholders had their own agenda.^{*47}

According to Schepel, 'the European Federation of Small and Medium-sized Enterprises, UAMPME, made it clear that the divergence in contract law did not constitute a significant problem for cross-border transactions'^{*48}. Conventional wisdom, moreover, suggests that SME actors are actually (rationally) ignorant of the legal framework of their transactions.

4.3. An app, an app, my code for an app!

Given national resentment, the non-empirical rationale for the harmonisation^{*49}, and its thoroughly political nature, one can hardly expect the future European civil code of the 'first non-imperial Empire'^{*50} to become a perennial monument.

From a Hegelian understanding of history, this need not worry us. After all, the (homologations of) customs in the *Ancien Régime* were the thesis against which the codification movement reacted. Inevitably, over time these codifications have, in turn, been amended or changed by a myriad separate acts and treaties, thereby thoroughly crushing the code's aspirations of unity, clarity, and completeness.

Given that the European Union is foremost a political-economic endeavour, the temptation will always be there to amend the future code for political purposes (as has been the case for national legislators with respect to tenancy law, consumer protection, etc.).^{*51} Over time, the new code will itself become unrecognisable to its godfathers in the study and *acquis* groups.

This, however, need not be a problem for the postmodern practitioner, who will just as gladly use a new 'app' related to the European civil code as he does any application on his smartphone, without worrying about the underlying structure. Legal practitioners are perfectly capable of switching from one environment to another (say, from rules for general sale via consumer sale to international sale and onward) without worrying about the architecture and unity of the underlying 'operating system' or principles.

Just as codification was driven by a desire for 'user-friendliness', for having all of the relevant text in the same, portable document, the post-codification era can easily forgo this requirement by means of search engines, selection of personal preferences, and add-on applications. In a manner of speaking, the European civil code will be an 'iCode'^{*52}, or will not be.^{*53}

⁴⁶ http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/summaries/sum_en.pdf.

⁴⁷ Not surprisingly, the Belgian Ministry of Finance reacted in its customary altruistic manner by suggesting that 'contract law harmonisation would allow the uniform classification of contracts for tax purposes and thereby avoid distortions of competition in the internal market caused by the application of different tax regimes'. *Ibid.*, p. 5.

⁴⁸ H. Schepel. Professorenrecht? The field of European private law. – P.A.J. den Berg (ed.). *Lawyer's Circles—Lawyers and European Legal Integration*. Amsterdam: Elsevier Reed 2004, pp. 115–124. The derogatory term 'Professorenrecht' obviously brings to mind a slogan directed against the Frankfurt National Convention of 1848: 'Drie mal Hundert Professoren, Vaterland du bist verloren', meaning 'Three times a hundred professors—Fatherland you are doomed'. Less known is the only marginally better first verse of the piece that gave rise to the slogan, 'Drie mal Hundert Advokaten, Vaterland du bist verraten' ('Three times a hundred attorneys—Fatherland, you have been betrayed').

⁴⁹ In 2011, the total of extra-EU imports and exports was €3.26 trillion, in contrast to €2.80 trillion for intra-EU trade. Given this globalisation trend, the European Civil Code is a clear case of 'too little, too late'. The roaring success of instruments such as the UN Convention on International Sale of Goods (CISG) or Incoterms illustrates the viability of international instruments for a global economy.

⁵⁰ J.M. Barroso in an interview on 10 July 2007. Available at <http://euobserver.com/institutional/24458>.

⁵¹ For a specific application of these dialectics, see G. Teubner. Legal irritants: Good faith in British law or how unifying law ends up in new differences. – *Modern Law Review* 1998 (61), pp. 11–32.

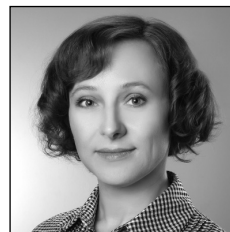
⁵² Pun intended. Incidentally, the 'tablet' had already been introduced into legal history by Moses (Exodus 34:4).

⁵³ One can only be amazed that no 'mobile tool' for finding the applicable legislation in a certain situation has been written yet, whereas exam questions typically challenge the student in this fashion by throwing in plenty of variables (parties with different nationalities and multiple legal qualities) that a computer can easily sort out. A user 'app' for the 4,795 pages of the DCFR would be welcomed too.



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Agreements and Decisions

1. Introduction

The aim of this article is to find an answer to the question of whether agreements and decisions as multi-lateral transactions differ from one another and, if so, how they differ and what the legal meaning of those differences is.

Agreements and decisions pertaining to the joinder of parties contain at least **two** declarations of will. Unlike a decision, an agreement may include not declarations of will but **will performances** (*Willensbetätigungen*)—that is, expression of will performed without the intention to tell anybody about one's intention to cause a legal consequence.^{*1} The standard example of such agreement is the agreement on transfer of cash into ownership, as concluded by the representative who manages the cash account of a party, on his behalf, with regard to himself, and which consists of two expressions of will that are not in pursuit of the aim of communication, aimed at the transfer of the right of ownership for currency notes, and the real act (of transfer of currency units from the cash account of the representative to the cash account of the party he is representing).^{*2}

Clause 154 of the Civil Code (CC) of the Russian Federation (RF) distinguishes between bilateral and multilateral agreements (deals), not mentioning decisions as multilateral deals. Such differentiation, which encourages jumping to an inappropriate conclusion with respect to multilateral deals being limited to agreements entered into by three or more parties, is not justified, **since a bilateral agreement is a type of multilateral agreement**.^{*3} As for decisions pertaining to the joinder of the parties, the omission of this type of multilateral deal from clause 154 of the Civil Code of the RF does not change anything in the merits of the case: since the decision consists of several expressions of will, aimed at causing legal consequences that correspond to their contents, it cannot be anything else but a multilateral deal. To eliminate the shortcomings mentioned above from clause 154 of the CC of the RF, it should reflect the fact that multilateral

¹ For discussion of will performance, see A. Manigk. Zum Begriff des Rechtsgeschäfts. – *Deutsche Juristen-Zeitung* 1902, pp. 281–282; *Idem*. Das System der juristischen Handlungen im neuesten Schrifttum. – *Jahrbücher für die Dogmatik des bürgerlichen Rechts* 1933 (83), pp. 56 ff.; A. Tuhr. *Der allgemeine Teil des deutschen bürgerlichen Rechts*. Bd. 2. Hälfte 1. Munich: Duncker & Humblot 1914, pp. 404–410; *Idem*. *Allgemeiner Teil des schweizerischen Obligationenrechts*. Halbbd. 1. Tübingen: Mohr 1924, pp. 137–138; K. Larenz. *Vertrag und Unrecht*. Hamburg, Teil 1. 1936, pp. 69–72; M. Keller, C. Schöbi. *Das schweizerische Schuldrecht*. 3 Aufl. Bd. 1. Basel: Helbing & Lichtenhahn 1988, pp. 34–36; A. Koller. *Schweizerisches Obligationenrecht. Allgemeiner Teil: Grundriss des allgemeinen Schuldrechts ohne Deliktsrecht*. Bd. 1. Bern: Stämpfli 1996, pp. 35–36; E.A. Крашенинников, Ю.В. Байгушева. Односторонние и многосторонние сделки. – *Вестник Высшего Арбитражного Суда РФ* 2012/7, pp. 30–31, 40.

² A. Tuhr. *Der allgemeine Teil des deutschen bürgerlichen Rechts*. Bd. 2. Hälfte 2. Munich: Duncker und Humblot 1918, p. 362 and Note 180.

³ By answering the question about the ratio between twofold and multifold, which is identical to the ratio between bilateral and multilateral, since both of them are derivatives of the ratio between 'two' and 'many', Aristotle states clearly that 'two is many', which is why 'two is multifold' (Aristotle. *Metaphysics*. Vol. 1 of Works (4 volumes). Москва 1975, p. 264.

deals—i.e., those deals that are performed by two or more parties—that are set in contrast to unilateral deals are divided into agreements and decisions on the joinder of parties.

2. Agreements

Since we are not dealing with agreements including will performances, the agreement consists of **concerted** expressions of will. That the expressions of will are concerted means that each party has expressed its will in relation to another party, aimed at bringing about one and the same legal consequence (for example, establishing the obligations of the seller to transfer the object and the right of ownership of this object and the obligation of the buyer to pay the purchase price). Concerted expressions of will, as a rule, are not identical, meaning that the parties to the agreement shall express their will via different agreement functions (as in the case of a seller who says: ‘I’m selling’ and a buyer who says: ‘I’m buying’).^{*4} However, some agreements (for example, the contract of particular partnership—see clause 1041 (1) of the CC of the RF) consist of identical expressions of will, since their parties perform similar contractual functions.

The parties to the agreement wish to create the legal consequence in conformance with the contract’s contents, not isolated from each other but in connection with the expression of will of another party.^{*5} This is why, on its own, each of the expressions of will included in the agreement **is not a unilateral deal**.^{*6} Hence, if a minor concludes an agreement for the conclusion of which the consent of his legal representative is required, the expression of will of the minor in the absence of said consent shall not be the expression of will that cannot come into effect, which **would** be the case if he were to carry out a unilateral deal; jointly with the expression of will of the contractual counterparty, it can be approved and thus brought into effect by the legal representative.^{*7}

The actual composition of the agreement usually includes two concerted expressions of will. For example, a bank-guarantee contract (see clause 368 of the CC of the RF)^{*8} consists of the expression of will of a guarantor and the expression of will of a beneficiary, while a contract for forgiving of debt (see clause 415 of the CC of the RF)^{*9} consists of the expression of will of a debtor and of a creditor. However, agreements

⁴ A. Tuhr (see Note 1), p. 225; K. Larenz, M. Wolf. *Allgemeiner Teil des bürgerlichen Rechts*. 8. Aufl. Munich: Beck 1997, p. 447.

⁵ A. Tuhr (see Note 1), p. 224.

⁶ Similarly, this is the case with the **joint act** (*Gesamtakt*)—i.e., the expression of will consisting of several identical, parallel expressions of will (e.g., the consent for the transaction performed by the minor, expressed by both parents—see sub-clause 26 1) 1) of the CC of the RF). However, unlike the joint act, an agreement is not just a simple combination of expressions of will but the **mutual action** of its parties (K. Larenz, M. Wolf (see Note 4), pp. 444–445).

⁷ A. Tuhr (see Note 1), p. 225; L. Ennecerus, H.C. Nipperdey. *Allgemeiner Teil des bürgerlichen Rechts*. 14. Aufl. Halbbd. 2. Tübingen: Mohr 1955, pp. 638–639; W. Flume. *Allgemeiner Teil des bürgerlichen Rechts*. 4. Aufl. Bd. 2. Berlin 1992, p. 635; E.A. Kramer. Kommentar zu § 145. – *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. 4. Aufl. Bd. 1. Munich: C.H. Beck 2001, p. 1483.

⁸ The unjustified assumption of the Plenum of the Higher Arbitration Court of the Russian Federation with respect to the idea that the guarantor, by issuing the bank guarantee, performs a unilateral transaction should be disproved (see clause 3 of decree 14 of the Plenum of the Higher Arbitration Court of the Russian Federation, ‘About Individual Issues Concerning the Practice of Resolutions of Disputes Related to Contesting Bank Guarantees’, issued on 23 March 2012). The bank guarantee is a transaction by means of which the guarantor creates a material benefit for the beneficiary, consisting of the accession of the new right to the property of the beneficiary. However, the guarantor cannot force the right upon the beneficiary against his will, since the relations regulated by civil law are built upon terms of equality of their parties. The increase of the property of the beneficiary on the part of the guarantor can only be performed by consent of the parties. Hence, the bank guarantee is an agreement between the guarantor and the creditor on an obligation secured by means of the guarantee. See L. Ennecerus, H. Lehmann. *Recht der Schuldverhältnisse*. 14. Aufl. Tübingen 1954, p. 781; K. Larenz. *Lehrbuch des Schuldrechts*. 11. Aufl. Bd. 2. Munich: Beck 1977, pp. 395–396, 417; K. Larenz, C.-W. Canaris. *Lehrbuch des Schuldrechts*. 13. Aufl. Bd. 2. Halbbd. 2. Munich: Beck 1994, p. 76; H.-J. Lwowski. *Das Recht der Kreditsicherung*. 8. Aufl. Berlin: Erich Schmidt 2000, p. 381; N. Horn. *Bürgschaften und Garantien: aktuelle Rechtsfragen der Bank-, Unternehmens- und Außenwirtschaftspraxis*. 8. Aufl. Cologne: RWS-Verlag 2001, pp. 31–32; H. Weber. *Kreditsicherheiten: Recht der Sicherungsgeschäfte*. 7. Aufl. Munich: Beck 2002, p. 122; P. Bülow. *Recht der Kreditsicherheiten*. 6. Aufl. Heidelberg: C.F. Müller 2003, p. 505; C.-W. Canaris. *Bankvertragsrecht*. – H. Staub. *Großkommentar zum Handelsgesetzbuch*. 4. Aufl. Bd. 5. Teil 1. Berlin: Beck 2005, p. 750; E.A. Крашенинников. Фактический состав сделки. – *Очерки по торговому праву* 2004 (11) (Yaroslavl), p. 6 (Note 6), 10 from Note 18; Ю.В. Байгушева. Договор банковской гарантии. – *Сборник статей к 55-летию Е.А. Крашенинникова*. Yaroslavl: ЯрГУ 2006, p. 88.

⁹ The opinion of C.C. Alekseyev on waiver of debt as a unilateral transaction of the creditor is erroneous (see C.C. Алексеев. Односторонние сделки в механизме гражданскоправового регулирования. – *Теоретические проблемы гражданского права*. Sverdlovsk 1970, p. 56). Imposing material benefit given by one party on another in the form of waiver of debt

can consist of expressions of will in greater numbers. In particular, this is the case with a simple partnership agreement (see clause 1041 (1) of the CC of the RF) that includes the expressions of will of three or more partners. Such agreements should be differentiated from those agreements consisting of two expressions of will under which each of them is performed by several parties (for example, several sellers and buyers within one purchase and sale contract). Each party to agreements that contain three or more expressions of will expresses his will in relation to another party, while the parties representing one and the same party to an agreement consisting of two expressions of will perform joint expression of will in relation to another party to the agreement, which is represented by several parties.

There are agreements that, alongside expression of will, also have **other constituent elements**.^{*10} For example, the actual composition of the tradition—or, in what amounts to the same thing—the contract for transfer of a movable object into ownership^{*11} consists of agreement on the transfer of the right of ownership of the object and of the real act (the transfer of the object)^{*12 *13}; the contract for the transfer of the immovable object into ownership includes agreement on the transfer of that ownership right and the state registration of this agreement^{*14}. The notarised claim-assignment contract, based on the transaction, consists of the agreement on the transfer of this claim and the actions of the notary public certifying the act.^{*15}

The entry into effect of some contracts depends on the availability of **a prerequisite lying outside the framework of their actual composition**.^{*16} A prerequisite for the entry of the contract into effect might be another transaction (for example, the creditor's consent to the transfer of the debt—see clause 391 (1) of the CC of the RF), an administrative act (for example, state registration of the contract of lease of a

is impossible for the same reason applicable to the enforcement of a right. This is why waiver of debt, as is bank guarantee, is a bilateral deal. See O. Gierke. *Deutsches Privatrecht*. Bd. 3. Munich: Duncker & Humblot 1917, pp. 173–174; A. Tuhr. *Allgemeiner Teil des schweizerischen Obligationenrechts*. Halbbd. 2. Tübingen: Mohr 1925, p. 567; H. Siber. *Schuldrecht*. Leipzig: Meiner 1931, p. 137; H. Becker. *Obligationenrecht. Allgemeine Bestimmungen* (Art. 1–183). 2. Aufl. Bern: Stämpfli 1941, p. 600; L. Enneccerus, H. Lehmann (see Note 8), p. 284; K. Larenz. *Lehrbuch des Schuldrechts*. 14. Aufl. Bd. 1. Munich: Beck 1987, p. 267; G.H. Roth. Kommentar zu § 397. – *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. 2. Aufl. Bd. 2. Munich: Beck 1985, p. 1232; J. Gernhuber. *Die Erfüllung und ihre Surrogate sowie das Erlöschen der Schuldverhältnisse aus anderen Gründen*. 2. Aufl. Tübingen 1994, p. 370; E.A. Крашенинников. Правовая природа прощения долга. – *Очерки по торговому праву 2001/8* (Yaroslavl), pp. 40–42; А.А. Павлов. Прощение долга. – *Сборник статей к 55-летию Е.А. Крашенинникова*. Yaroslavl: ЯРГУ 2006, pp. 108–110.

¹⁰ L. Enneccerus, H.C. Nipperdey (see Note 7), p. 617; E.A. Крашенинников (see Note 8), p. 8.

¹¹ As for tradition, E.A. Suhhanov says: 'In the Russian civil law, the right for transfer of the object into the performance of the concluded contract ('tradition') is considered as a unilateral deal aimed at the performance of a contractual obligation' (*Гражданское право. Под ред. Е.А. Суханова*, том 3. Москва: Волтерс Клувер 2005 (2), p. 50). This assumption, which is not in agreement with either Russian civil law or the well-known fact that the transfer of the right of ownership can be performed only by means of entry into an agreement between the alienator and the acquirer, can be set against the following quote from F.C. Savigny: 'The tradition is an agreement, since it contains features typical of the notion of the agreement: [...] it contains the expression of will of two parties, aimed at [...] the transfer of ownership and property' (quoted by P. Dischler. *Rechtsnatur und Voraussetzungen der Tradition: gleichzeitig eine rechtsdogmatische Analyse der Systematik der schweizerischen Fahrmisübergabe*. Basel: Helbing Lichtenhahn Verlag 1992, p. 14).

¹² A. Manigk. *Das Anwendungsgebiet der Vorschriften für die Rechtsgeschäfte. Ein Beitrag zur Lehre vom Rechtsgeschäft*. Breslau: M. & H. Marcus 1901, p. 92; A. Tuhr (see Note 1), pp. 149–150, 221; L. Enneccerus, H.C. Nipperdey (see Note 7), p. 617; K. Larenz. *Allgemeiner Teil des deutschen bürgerlichen Rechts*. Munich: Beck 1967, pp. 317–318; W. Flume (see Note 7), pp. 26, 604; H. Hübner. *Allgemeiner Teil des Bürgerlichen Gesetzbuches*. 2. Aufl. Berlin: de Gruyter 1996, p. 280; E.A. Крашенинников (see Note 8), p. 8; П.А. Варул. Распорядительные сделки. – *Сборник научных статей в честь 60-летия Е.А. Крашенинникова*. Yaroslavl: ЯРГУ 2011, p. 39.

¹³ The contract of transfer of a movable object into ownership is recognised by Russian legislation in clause 491 (1) of the CC of the RF. This article interprets the transfer of the object sold with a proviso pertaining to the preservation of the ownership for the seller before the payment for the goods or the onset of other circumstances—i.e., of suspensive conditioned contract of the transfer of a movable object into ownership. Paragraph 1 of clause 491 of the CC of the RF separates the conditional tradition (real transaction) from the underlying unconditional purchase and sale (binding transaction) and also demonstrates that the agreement on transfer of the right of ownership of the object and the transfer of the object are different parts of the actual composition of this contract, since only the agreement is conditional, while the transfer, just as much as any real act, cannot be conditional.

¹⁴ E.A. Крашенинников. К вопросу о «собственности на требование». – *Очерки по торговому праву*. 2005/12 (Yaroslavl), p. 34 from Note 9; E.A. Крашенинников. Распорядительные сделки. – *Сборник статей памяти М.М. Азаркова*. Yaroslavl: ЯРГУ 2007, p. 27 from Note 12. The registration of an agreement on the transfer of the right of ownership of immovable property, **which is not a deal in itself**, should be distinguished from the state registration of the deal (for example, the agreement on the lease of a building or a construction entered into for a term of at least one year, as dealt with in clause 651 (2) of the CC of the RF).

¹⁵ E.A. Крашенинников (see Note 8), pp. 8–9.

¹⁶ L. Enneccerus, H.C. Nipperdey (see Note 7), p. 613; K. Larenz (see Note 12), p. 318.

building or structure, entered into for the term of at least one year—see clause 651 (2) of the CC of the RF^{*17}), violation of the law (for example, the non-performance of an obligation secured by a bank guarantee, on the part of the principal being a prerequisite for the entry into effect of a bank-guarantee contract^{*18}), etc.

Many agreements are **binding** deals. Examples include contracts of purchase and sale (see clause 454 (1) of the CC of the RF), donation contracts (see sub-clause 572 (1) 1) of the CC of the RF), and leasing contracts (see sub-clause 606 (1) of the CC of the RF).^{*19} Depending on whether binding contracts are entered into with the aim of the establishment of regulatory or protective obligations, they are divided into **regulatory**, **regulatory-protective**, and **protective** contracts.^{*20} The usual examples of regulatory contracts are the barter contract (see sub-clause 567 (1) of the CC of the RF), the contract for rental of living accommodation (see sub-clause 671 (1) of the CC of the RF), and the contract of work and labour (see sub-clause 702 (1) of the CC of the RF). A regulatory-protective contract is the contract of property insurance (see clause 919 (1) of the CC of the RF).^{*21} The protective contracts are the forfeit (see clause 330 (1) of the CC of the RF), the contract of surety (see clause 361 (1) of the CC of the RF), and the bank-guarantee contract (see clause 368 of the CC of the RF).^{*22}

Binding contracts exist in a contrast to **regulatory** contracts. The former often are entered into with the aim of the performance of binding contracts, preparing the transfer of property rights—in particular, the right of ownership—and mediate that transfer. For example, being a binding transaction, the contract of purchase and sale (covered by clause 454 (1) of the CC of the RF) obliges the seller to transfer the object and the right of ownership thereto, while it binds the buyer to pay for the object. The transfer of the ownership right for the purchased object takes place through the real contract (tradition), which for the seller is the order and for the buyer is the acquisitive transaction. The payment of the purchase price, since it is performed by means of paying in cash—i.e., through the transfer of the right of ownership into currency units—is also mediated by the real contract, the actual composition of which includes the agreement on the transfer of the right of ownership for currency units and the real act (the transfer of currency units). Thus the economic outcome pursued by the parties comes about only through the performance of the three transactions mentioned above.

In addition to the transfer of the movable object into ownership, examples of regulatory contracts include the contract for the establishment of servitude (see clause 274 (3) of the CC of the RF); the pledge agreement (see clause 341 of the CC of the RF); the claim-assignment agreement (see sub-clause 382 (1) 1) of the CC of the RF); the contract for the transfer of debt (see clause 391 (1) of the CC of the RF); the contract of the forgiving of debt (see clause 415 of the CC of the RF); the contract of establishment of the limited real right of the buyer to an object sold and transferred to him with a proviso of preservation of the right of ownership (see clause 491 of the CC of the RF); the contract of establishment of the limited real right of the tenant to a movable object transferred to his temporary ownership and use^{*23}; and the marriage contract

¹⁷ Since state registration of the agreement is not included in its actual composition, the agreement that needs to be registered is deemed concluded not from the moment of its registration, as is claimed in clause 433 (3) and clause 651 (2) of the CC of the RF, but with the performance of the actual composition, prescribed by law for the agreement of this type. See Е.А. Крашенинников (see Note 8), p. 9 (specifically, Note 17); Д.О. Тузов. Заметки о консенсуальных и реальных договорах. – *Сборник научных статей в честь 60-летия Е.А. Крашенинникова*. Yaroslavl: ЯрГУ 2011, pp. 123–124.

¹⁸ Е.А. Крашенинников (see Note 8), pp. 9–10.

¹⁹ In sub-clause 222 (2) 1) of the CC of the RF, these contracts are referred to as orders. This term distorts their legal nature, because they are not deals directly aimed at transfer, encumbrance, change, or cessation of right.

²⁰ Е.А. Крашенинников. Основания возникновения притязаний. – *Очерки по торговому праву 2002/9* (Yaroslavl), pp. 6–9.

²¹ This ambivalent agreement is aimed at the establishment of two obligations, different in their legal nature: 1) the regulatory obligation of the insured party to make insurance payments and 2) the **protective** obligation of the insurer to pay out the insurance indemnity. А.Р. Sergeyev speaks against this interpretation of the obligation of the insurer, though unconvincingly. See А.П. Сергеев. Начало течения исковой давности в обязательствах по страхованию. – *Сборник научных статей в честь 60-летия Е.А. Крашенинникова*. Yaroslavl: ЯрГУ 2011, pp. 164–167.

²² Protective agreements are peculiar because their coming into effect depends on *condicio juris*. In particular, for the creation of an obligation of a guarantor, in addition to the conclusion of the agreement on a bank guarantee, the occurrence of the condition of the right is also required. The latter consists in non-performance or in the principal's inadequate performance of his main obligation. See Е.А. Крашенинников, Ю.В. Байгушева. Фактический состав возникновения гарантийного обязательства. – *Вестник Высшего Арбитражного Суда РФ* 2007/8, p. 45 ff.

²³ The legal basis for the two latter contracts is *causa solvendi*, while the actual composition of each of them consists of the agreement on the establishment of a relevant real right and the real act (the transfer of the object). See Е.А. Крашенинников, Ю.В. Байгушева. Спорные вопросы оговорки о сохранении права собственности. – *Очерки по торговому праву*

(see clause 40 of the FC of the RF), through which those to be spouses transform the right to joint property belonging to them into the sole property right of the husband.^{*24}

The legal consequence of the contract usually comes about within the legal sphere of the parties entering into it. Under the conditions for the validity of the principle of private autonomy (see clause 1 (1), sub-clause 2 (1) 1) of the CC of the RF), the parties to a contract cannot change the legal status of a party not entering into the contract against his will by their agreement.

If a party enters into the contract as a representative (see sub-clause 182 (1) 1) of the CC of the RF), the person who is being represented becomes the party to the contract. This is not a departure from the principle of private autonomy, since in the case of voluntary representation, the person represented grants, of his own will, the authorisation right to the representative, which enables him to enter into the contract on behalf of and with direct effect for the person being represented; in the case of legal representation, the person being represented is usually unable to enter into contracts independently, which is why his legal status can be changed only at the will of his legal representative.^{*25}

An exception to the principle of private autonomy is the possibility of entering into a contract on behalf of a third party, prescribed by clause 430 (1) of the CC of the RF, according to which the debtor undertakes to make provision not for his counteragent but for a third party indicated in the contract. However, the law minimises the effect of this exclusion by authorising the third party to reject the claim against the debtor that he has acquired against his will (see clause 430 (4) of the CC of the RF) if he is not interested in preserving this claim for himself.^{*26}

3. Decisions

The main difference between decisions and contracts lies in the fact that the principle of equality of the parties underlies any contract, while the basis for any decision is formed by the decision of the partners to manage the activities of a general partnership (see clause 71 (1) of the CC of the RF), the decision of a general meeting of shareholders to introduce changes to the articles of association of a joint-stock company (see clause 49 (4) of federal law 208-ФЗ, 'On Joint-Stock Companies', passed on 26 December 1995), the decision of a meeting of creditors about establishment of the size and procedure for payment of additional compensation to insolvency officials (see sub-clause 12 (2) 7) of federal law 127-ФЗ, 'On Insolvency (Bankruptcy)', passed on 26 October 2002), a decision of a general meeting of the owners of rooms in a block of flats about its renovation (see sub-clause 44 (2) 1) of the Housing Code of the Russian Federation), etc.—it is based on the **principle of majority rule**.^{*27}

Let's have a look at the most typical features of the decision about the joinder of parties as a type of multilateral deal.

The decision is made by means of **voting** on the issue put to the vote. The voting can take place in a meeting or outside a meeting, which means that it can take place either in the presence of the voters or in

2011/18 (Yaroslavl), p. 24, 27 from Note 12; E.A. Крашенинников, Ю.В. Байгушева. Элементы понятия представительства. – *Вестник Высшего Арбитражного Суда РФ* 2012/3, p. 32 and Note 113.

²⁴ Given the above-mentioned description, the implausible tall story made up by E.A. Suhhanov about valid Russian legislation not addressing executive transactions can be assessed at its true worth. See E.A. Суханов. О видах сделок в германском и в российском гражданском праве. – *Вестник гражданского права* 2006/2, p. 23.

²⁵ E.A. Крашенинников, Ю.В. Байгушева. Представительство: понятие, виды, допустимость. – *Вестник Высшего Арбитражного Суда РФ* 2009/12, p. 18.

²⁶ Clause 430 of the CC of the RF, along with Article 328 of the BGB, interprets binding contracts in favour of the third party. However, this circumstance does not rule out the possibility of assignment of a claim in favour of the third party, in the result of which this party becomes a proximate successor of the person assigning the claim. Such assignment of a claim with preservation of the right to reject the claim assigned to the third party does not contradict the law and is fully acceptable. See P. Heck. *Grundriß des Schuldrechts*. Tübingen 1929, p. 149; L. Enneccerus, H. Lehmann (see Note 8), p. 142; A. Blomeyer. *Allgemeines Schuldrecht*. 4. Aufl. Berlin: F. Vahlen 1969, p. 261; H. Kaduk. Fragen zur Zulässigkeit von Verfügungen zugunsten eines Dritter. – *Festschrift für Karl Larenz*. Munich: Beck 1983, p. 312 ff.; G.H. Roth. Kommentar zu § 398. – *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. 2. Aufl. Bd. 2. Munich: Beck 1985, p. 1246; H. Dörner. *Dynamische Relativität: der Übergang vertraglicher Rechte und Pflichten*. Munich: Beck 1985, pp. 166 ff.; K. Larenz (see Note 9), pp. 232–233, 575 (specifically, Note 1); J. Esser. E. Schmidt. *Schuldrecht: ein Lehrbuch*. 7. Aufl. Bd. 1. Teilbd. 2. Heidelberg: Müller 1993, pp. 278–279; W. Bayer. *Der Vertrag zugunsten Dritter: neuere Dogmengeschichte – Anwendungsbereich – dogmatische Strukturen*. Tübingen: Mohr 1995, p. 203; W. Fikentscher. *Schuldrecht*. 9. Aufl. Berlin: de Gruyter 1997, p. 181.

²⁷ A. Tuhr (see Note 1), p. 232. 'For making a decision, [...] the majority rule is in effect,' states W. Flume (see Note 7), p. 602.

their absence. Accordingly, clause 50 (2) of federal law 208-Φ3, 'On Joint-Stock Companies', prescribes voting at a meeting when the decision is being made by shareholders and about the election of the Board of Directors, while clause 38 (1) of the federal law On Limited Liability Companies (14-Φ3), passed on 8 February 1998, prescribes the possibility of voting outside the meeting when the members of the company are making a decision about the allocation of issue-grade securities. The procedure for voting is established by special legislation and acts of the company in which the voting takes place.

By voting on the issue put to the vote, each participant expresses his will in terms of a 'yes' or 'no'.^{*28} This expression of will, which, together with the expressions of will of other voters, constitutes the actual composition of the decision, **is not a unilateral deal**, since it cannot in itself cause legal consequence corresponding to its content.^{*29} The expression of will of a person taking part in making of a decision has to be expressed to the other participants or to their representative, who is usually the chairman of the meeting or another person authorised to oversee the voting.^{*30}

Expressions of will of people taking part in making a decision are similar to expressions of will of the parties to a contract, since both of them are mutual expressions of will—i.e., expressions of will performed by the parties in relation to each other or to representatives of other parties. However, unlike the expressions of will of contractual counteragents, the expressions of will of people taking part of making a decision can be aimed at different legal consequences, since the participants express their will in the sense of a 'yes' or 'no'.^{*31} Since the people taking part in making a decision usually perform expressions of will in relation to one and the same person, their expressions of will are similar to the expressions of will of people performing a joint act. However, in the joint act, the expressions of will, which are identical in their content, are expressed by one party to the deal and are directed to their recipient as an addressee of a unilateral deal or to the common representative of several parties, acting on one side of the contract, while the people taking part in the decision-making express their will, meaning 'yes' or 'no', as different parties to the deal and address the person carrying out the voting as the representative of another party to the deal; hence, in a contradiction to the opinion of A. Tuhr^{*32} and H. Brox^{*33}, the expressions of will of the people taking part in making a decision are not parallel expressions of will.

The decision is aimed at the **formation of common will** of those who are part of the company^{*34} ^{*35}, which means the will of the majority of voters, who have voted with similar meaning, and also at the establishment of an obligation of each member of the company to other members to behave in accordance with the common will along, with the right of each participant, corresponding to this obligation, to demand this type of behaviour from other participants.

The common will of the company can be the will of the **simple majority** of the voters, expressed during voting. A simple majority of the voters may consist of a minority of the members of the company.

^{*28} The opinion of the people abstaining from the vote, even if they were present at the meeting during which the voting took place, is not taken into consideration in determination of the legal consequence of the decision that has been made; this is why they are not taken into consideration as people taking part in making of the decision in question. See L. Enneccerus, H.C. Nipperdey. *Allgemeiner Teil des bürgerlichen Rechts*. 14. Aufl. Halbbd. 1. Tübingen: Mohr 1952, p. 438 and Note 8; W. Hadding. *Kommentar zu § 32*. – H.T. Soergel. *Bürgerliches Gesetzbuch. Kommentar*. 12. Aufl. Bd. 1. Stuttgart: W. Kohlhammer 1987, p. 319; K. Larenz, M. Wolf (see Note 4), p. 206 (specifically, Note 62); D. Reuter. *Kommentar zu § 32*. – *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. 4. Aufl. Bd. 1. Munich: Beck 2001, p. 625.

^{*29} K. Larenz, M. Wolf (see Note 4), p. 206.

^{*30} When receiving the expressions of will of the voters, the person authorised to moderate the voting performs the function of a passive representative (*passive Vertreter*) – i.e., the representative who receives the expression of will of the third party on behalf of and with direct action for the party represented (for discussion of passive representation, see L. Rosenberg. *Stellvertretung im Prozess. Auf der Grundlage und unter eingehender, vergleichender Darstellung der Stellvertretungslehre des bürgerlichen Rechts nebst einer Geschichte der prozessualischen Stellvertretung*. Berlin: Vahlen 1908, pp. 5–9; A. Tuhr (see Note 9), p. 283; H. Oser, W. Schönenberger. *Das Obligationenrecht. Allgemeiner Teil* (Art. 1–183). 2. Aufl. Zurich: Schulthess 1929, p. 223; W. Flume (see Note 7), p. 754; P. Gauch, W. Schluep, J. Schmid, H. Rey. *Schweizerisches Obligationenrecht. Allgemeiner Teil*. 7. Aufl. Bd. 1. Zurich: Schulthess 1998, pp. 286, 295; E.A. Крашенинников, Ю.В. Байгушева (see Note 25), pp. 12–13).

^{*31} 'We are not dealing with the agreement here, since the voting underlying the decision' is not aimed at reaching of consensus (U. Hüffer. *Aktiengesetz*. Munich: Beck 1993, p. 599).

^{*32} A. Tuhr. *Der allgemeine Teil des deutschen bürgerlichen Rechts*. Bd. 1. Leipzig: Duncker & Humblot 1910, p. 515.

^{*33} H. Brox. *Allgemeiner Teil des Bürgerlichen Gesetzbuchs*. 8. Aufl. Cologne: Carl Heymanns 1984, p. 54.

^{*34} W. Flume (see Note 7), p. 602; U. Hüffer (see Note 31), p. 599; H. Hübner (see Note 12), p. 282; D. Reuter (see Note 28), p. 618.

^{*35} If the company is the body representing another legal person, the formation of the common will of the members of the company is the formation of the will of the legal person himself.

In particular, this is the case if only eight out of 10 members of the company are present at the meeting at which the voting is taking place and three of them vote with the meaning 'yes' whilst five abstain from voting. So that the most important decisions of the company cannot be made via votes of a minority of members, the law sometimes prescribes the formation of common will of the company by the **qualified majority** of votes. For example, the decision to introduce changes to the articles of association of a limited liability company is made through a majority of not less than two thirds of the total number of votes of the members of the company (see sub-clause 37 (8) 1) of federal law 14-Φ3, 'On Limited Liability companies'), while a decision about the restructuring of a joint-stock company shall be made by a majority of three fourths of the votes of shareholder-owners of voting shares taking part in the general meeting of shareholders (see clause 49 (4) of federal law 208-Φ3, 'On Joint-Stock Companies'). The formation of common will of the company by simple or qualified majority of votes may be prescribed not only by law but also through a contract (e.g., a simple partnership contract—see clause 1044 (5) of the CC of the RF).

Cases wherein the common will of the company is determined by the will of **half** or even a **minority** of the people taking part in making a decision are possible too. Therefore, if the vote of the member who has made the highest-value contribution to the share capital of a general partnership has crucial importance; the uniform voting of half of the members taking part in making a decision leads to their victory in the voting only if the member with the deciding vote votes among them.^{*36} If the vote of one of 55 people taking part in making a decision at the general meeting of shareholders has the weight of four votes, 26 members casting uniform votes are going to win only if the person holding the vote that is worth four votes votes among them. The cases described above do not constitute an exception to the principle of majority rule, because the majority here are the voters who have won in the voting together with the voter whose vote has priority over those of other participants on account of the special importance that the decision being made has for him.

For some decisions of a company, the law prescribes **unanimity** of participating votes. For example, clause 1044 (5) of the CC of the RF states that decisions on the common issues of the parties to a simple partnership contract shall be made only by common agreement, while sub-clause 19 (2) 1) of federal law 14-Φ3 ('On Limited Liability Companies') states that a decision of the general meeting of shareholders in the company pertaining to an increase in share capital in connection with the acceptance of a new member should be made unanimously by all participants. However, these decisions are based not on the principle of majority rule but on the principle of equality, which is valid in relation to contracts. This is why in reality these are not decisions but **contracts**^{*37}, aimed at causing the legal consequence, similar to the legal consequence of a decision.

The law mentions the decision also if one person (for example, a shareholder who owns all of the shares in a joint-stock company that entitle their holders to votes—see clause 47 (3) of On Joint-Stock Companies (federal law 208-Φ3)—or the only member of a limited liability company, as discussed in clause 39 of federal law 14-Φ3, On Limited Liability Companies) expresses his will, in accordance with which the members of the company should act—for example, the members of the management board of the joint-stock company (see clause 70 (1) of the law On Joint-Stock Companies) or of the limited liability company (see sub-clause 41 (1) 1) of On Limited Liability Companies). It seems—and actually is true—that in both cases we are dealing not with decisions but with unilateral deals, because decisions cannot consist of the expressions of will of only a single person.

The obligation to act in a certain way, conditioned by the decision that corresponds to the common will of the company, is imposed upon **each** of its members, regardless of whether he has taken part in the voting and whether he has voted with the meaning 'yes' or 'no'. The content of this obligation is determined by the content of the issue put to the vote and the result of the voting. It can be either the obligation of **performance of an action** or the obligation of **forbearance**. Let us consider an example in which the parties to a contract of simple partnership, who have common business, have made a decision about the conclusion of a certain contract with a third party; each member undertakes to express his will to another member, which is an element of their common offer or acceptance. If the parties to the contract of simple partnership, each

³⁶ If the vote of one participant in making of a decision has priority over the vote of another participant, the latter person may be overruled in the decision by two voters casting the opposing vote.

³⁷ A. Tuhr points at this circumstance: 'If the consent of all participants present at the meeting is needed, [...] the name and the form of the decision conceal the transaction of the contractual type' (A. Tuhr (see Note 1), p. 236, specifically, Note 204).

one of them authorised to act on behalf of all other parties, have made the opposite decision, all members undertake to abstain from conclusion of the contract about which the decision was made.

The right and obligations of the members of the company, arising from the decision, constitute **corporate** relations, built among the parties. The decision cannot cause an obligation for the members of the company (or for a legal person that this company represents) to a third party or parties. In order to cause such an obligation, all members of the company or their common representative have to carry out a relevant transaction.^{*38} In particular, the decision made by the general meeting of the members of a limited liability company about the assignment of A as the head of said company does not cause the emergence of the rights and obligations in A that would bind him with this company; they emerge in A only after a relevant management contract has been concluded with A by the chairman of the general meeting of the members of the company at which A was elected as the head of the company (see clause 42 (3) of federal law 14-Φ3, 'On Limited Liability Companies'); in doing this, the chairman of the general meeting shall act as a representative of all members of the general meeting, and, since they form the body of the limited liability company, the expression of their common will is equal to the expression of the will of the company itself.

Since the decision is a transaction, only persons *sui juris* can participate in making decisions (see clause 21 (1) of the CC of the RF). The law here does not refer to highly personalised transactions; this is why each member of a company can take part in making decisions through voting representatives (*Stimmbote*)^{*39} or grant the right to take part in the voting to some other person—for example, in the voting at the general meeting of shareholders (see clause 57 (1) of On Joint-Stock Companies) or the owners of properties in a block of flats (see clause 48 (1) of the HC of the RF).

As any other transaction can, the decision can be invalid—for example, in consequence of not conforming to legal requirements (see clause 168 of the CC of the RF). If there is a circumstance that invalidates one of the expressions of will that is part of the actual composition of the decision, the guidelines of the CC of the RF as to the invalidity of transactions shall apply to this expressions of will, in a parallel to transactions, although the expression of will is not a transaction. For example, the voting of a person who is not *sui juris* can be held to be void (see sub-clause 171 (1) 1) of the CC of the RF)^{*40}, while the voting of a person who was mistaken as to the legal nature of the transaction in question can be contested (see clause 178 (1) of the CC of the RF).^{*41} Invalidity or inefficient contesting of the expression of will included in the decision leads to invalidity of the decision as a whole only if a result of the invalidity of this expression of will is that the decision has been made by 50% or a minority or, if a qualified majority is required for making of the decision, a simple majority of votes.^{*42}

The special procedure for performing the expression of will on the part of the people taking part in making a decision assumes the availability of special reasons for invalidity of that decision, connected with the non-performance of the voting procedure prescribed by law or contract. Therefore, for example, pursuant to clause 43 (6) of federal law 14-Φ3 ('On Limited Liability Companies'), a decision of a general meeting of the members of the company that is made in connection with an issue not on the agenda of the meeting is not valid, regardless of legal recognition of this decision as being invalid, and, consequently, it is a void transaction.

³⁸ K. Larenz, M. Wolf (see Note 4), p. 447.

³⁹ U. Leptien. Vorbemerkungen zu § 164. – H.T. Soergel. *Bürgerliches Gesetzbuch. Kommentar*. 12. Aufl. Bd. 1. Stuttgart: Kohlhammer 1987, p. 1268; U. Hüffer (see Note 31), p. 619.

⁴⁰ The voting of a minor, as a rule, does not require any special consent of the minor's legal representative, because the permission granted by the legal representative for participation of the minor in the company includes participation in making decisions of this company. See L. Enneccerus, H.C. Nipperdey (see Note 7), Halbbd. 1, p. 438 (specifically, Note 7); H. Hübner (see Note 12), p. 282.

⁴¹ The fact that the expression of will included in the actual composition of the decision can be claimed to be void or disputable matters in determination of the subjects of the obligation to compensate for damage that has been caused by this decision. So, in accordance with sub-clause 71 (2) 3) of federal law 208-Φ3, 'On Joint-Stock Companies', passed on 26 December 1995, which is applied here by analogy, a member of the management board of the joint-stock company is under no obligation to compensate for losses incurred by the company through this decision if he voted for this decision under threat and afterward contested his vote.

⁴² L. Enneccerus, H.C. Nipperdey (see Note 7), Halbbd. 1, p. 438 (specifically, Note 7). 'The validity of the decision is affected by invalidity of the vote of one participant only if he had to cast his vote for the sake of the required majority,' says A. Tuhr (see Note 1), p. 517.

4. Conclusions

The expressions of will included in the contract are concerted expressions of will. The fact that the expressions of will are concerted means that each party has expressed will in relation to another party, aimed at causing one and the same legal consequence. As a rule, contractual expressions of will are not identical, meaning that the parties to the contract express their will in different contractual functions.

The actual composition of the contract may consist of concerted expressions of will or feature some other constituent elements (for example, a real act, the state registration of a contractual agreement, or the assistance of a notary public). The cases wherein the contract, in addition to the expressions of will of the parties, includes also other constituents should be distinguished from those in which there is a prerequisite lying outside the framework of the actual composition of the contract for that contract's entry into effect. Another transaction, an administrative act, and violation of the law can be such prerequisites.

Binding contracts can be aimed at the establishment of regulatory and protective obligations. Accordingly, they are divided, as mentioned above, into regulatory (for example, contracts of purchase and sale), regulatory-protective (for example, contracts of property insurance), and protective contracts (for example, the surety contract). The regulatory contracts not researched by civilists include the contract for establishment of the limited real right of the buyer to the object that has been sold or transferred to him with a proviso of retaining the right of ownership and the contract of the establishment of the tenant's limited real right to the movable object transferred to his temporary ownership and use. The legal basis of these contracts is *causa solvendi*, while the actual composition of each of them consists of an agreement on the establishment of a relevant limited real right and the real act (of the transfer).

In summary, the main difference between the contract and the decision lies in the fact that the principle of equality of the parties underlies the contract, while the basis of any decision is formed by the principle of majority rule.

The decision is described by the following peculiarities: a) it is made by voting on the issue put to a vote; b) each participant in making of the decision performs the expression of will meaning 'yes' or 'no'; c) the decision is aimed at the formation of common will of the members of the company, under which the will of the majority of those voting with similar meaning is assumed along with the establishment of the obligation of each member of the company to other members to behave in accordance with the common will and also the establishment of the right of each member to demand such behaviour from the other members, in line with this obligation; and d) the rights and obligations of the participants that arise from the decision constitute the corporate relations that are built among the participants.

The decision is invalid if, as a result of its invalidity or inefficient contesting of the expression of will embodied in the decision, it turns out to have been made by 50%; a minority; or, if a qualified majority is required for making of the decision, only a simple majority of votes.



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Independent Security Rights under Russian Legislation

1. Introduction

Russian legislator places great emphasis on the development of security instruments. The primary trend for a legal regulation involves gradual rejection of the strong link between the underlying and security obligations (the process of weakening of accessory).

This process is accompanied by using of non-accessory (independent) security rights in the economic turnover.

Is accessory the essential feature of security instruments? How does that concept correlate with the concept of independence? What are the differences between the regulation of independent obligations and abstract ones? Experts argue about all of these questions, whose answers form the subject of this paper. In addition, the reader may become familiar with features of independent security rights regulation under Russian law.

1.1. The types of security instruments

Under clause 329 of the Civil Code of the Russian Federation (*Гражданский кодекс Российской Федерации*¹), security instruments include the forfeit, the advance, the pledge, the right of retention of possession, the suretyship, the bank guarantee, and other security instruments established by the rule of law or by agreement.

It should be emphasised that the forfeit and advance are not supposed to serve security purposes. This idea is not new in the doctrine. For example, G.F. Shershenevich (Г.Ф. Шершеневич), one of the classic voices in Russian civil law, wrote about the ephemeral nature of the forfeit's security function: while the fear of the forfeit encourages the performance, the effect of the forfeit depends essentially on the debtor's ability to perform the obligation *per se*.² M. Plyaniol (М. Пляниоль) claimed that the advance is now seen rather more as a departure from a contract than as a remedy assisting in the fulfilment of its terms.³

Regardless, a tradition seems to have established itself in Russian law of classifying the forfeit (clause 330 of the Civil Code) and advance (clause 380 of the Civil Code) both as security instruments and as types of remedies (liabilities arising from non-performance of the obligation), simultaneously. Meanwhile, in practice, these instruments are unambiguously considered only as remedies. Nobody would think of

¹ Hereinafter 'the Civil Code'.

² Г.Ф. Шершеневич. Курс гражданского права. Тула 2001, pp. 384 ff.

³ М. Пляниоль. *Курс гражданского права*, Ч. 2: Договоры. Петроков: Изд. тип. С. Панского 1911, pp. 519 ff. The notions of the advance under French law and Russian law coincide.

assuring his right to performance of the obligation by means of the forfeit or advance. Nor is the forfeit or advance among the means considered by the Bank of Russia to be collateral for the repayment of loans.*⁴ This is easily explained by the nature of security rights. The effect of the security mechanism is clear: if the debtor fails to fulfil the obligation, the creditor has an opportunity to employ an additional (a reserve) source for this purpose.

1.2. Personal security instruments

Suretyship, the most traditional personal security instrument, is well known in the Russian legal tradition. Suretyship arises from a contract of surety*⁵, according to which the surety (security provider) shall be obliged to the creditor (secured creditor) of the other person (the main debtor) to perform the latter's obligation (the underlying obligation) if the main debtor has not duly fulfilled the obligation (clause 361 of the Civil Code). Suretyship is a dependent personal security. Its legal nature is similar to that of the security instrument, described in Article IV. G.-1:101 of *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference**⁶: '(a) a "dependent personal security" is an obligation by a security provider which is assumed in favour of a creditor in order to secure a right to performance of a present or future obligation of the debtor owed to the creditor and performance of which is due only if, and to the extent that, performance of the latter obligation is due'.

The norms addressing the independent personal security appeared in Russian law when Part 1 of the active Civil Code came into force, on 1 January 1995. This security instrument was termed a 'bank guarantee' instead of a 'demand guarantee' (although the International Chamber of Commerce's*⁷ Uniform Rules for Demand Guarantees constituted a prototype for the Russian legislator). The key point here is that only banks and insurance companies were granted legal capacity to issue independent guarantees (clause 368 of the Civil Code).

A non-typical personal security instrument such as co-debtorship with a security function is not used in practice; a comfort letter is not binding under Russian law.

1.3. Proprietary security instruments

A pledge should be treated as a traditional proprietary security instrument under Russian law. It is a security right in a movable or immovable asset that entitles the secured creditor to preferential satisfaction of the secured right*⁸ from the encumbered asset (clause 334 of the Civil Code). Both possessory and non-possessory security rights are considered under Russian law to be a pledge; a pledge in immovables is traditionally called 'ипотека' (from the Latin 'hypotheca')—i.e., a mortgage.

Another security right that should be associated with proprietary security instruments is the right of retention of possession. The opportunities this right creates for the secured creditor are similar to the consequences of a pledge. The claims of the creditor who is retaining the thing shall be satisfied from its value in the amount and by the procedure stipulated for the satisfaction of the claims secured by the pledge (clause 360 of the Civil Code). This type of security has been part of practice for a long time, but it was only in the active Civil Code (clause 359) that it came to be specified through a statutory rule.

Russian law is familiar with devices for retention of ownership. Retention of ownership by a seller under a contract of sale, stipulated in clause 491 of the Civil Code, can be considered to be a security instrument. Retention of ownership by a lessor under a contract of financial leasing (clause 665 of the Civil Code)

⁴ See, for example, Положение Центрального банка Российской Федерации от №254-П от 26 марта 2004 «О порядке формирования кредитными организациями резервов на возможные потери по ссудам, по ссудной и приравненной к ней задолженности» ['Provision of the Central Bank of the Russian Federation N 254-P of 26 March 2004 'On forming the reserves for possible losses on loans and similar debts by credit organisations']. — *Бюллетень Банка России* 2004/28.

⁵ As a general rule, any kind of security right may arise from a contract. When a special clause exists, a security right may arise by the functioning of the law.

⁶ C. von Bar, E. Clive, H. Schulte-Nölke (eds). *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of reference (DCFR)*. Outline edition. 2009. Hereinafter 'the DCFR'.

⁷ Hereinafter 'the ICC'.

⁸ To describe the notion of a secured right in Russian civil-law parlance, the term 'обеспеченное обязательство' (literally 'secured obligation') is commonly used. The two expressions have the same meaning.

also has a security purpose. There are other examples wherein parties to a contract attempt to construct a security instrument by using a title of ownership. However, rules of law for these instruments have not yet been developed and feature mainly at the level of doctrine.^{*9}

2. Bank (independent) guarantee

2.1. The ICC Uniform Rules for Demand Guarantees— the model for the Russian law

The bank guarantee is the only independent security used in Russian law.^{*10} The norms governing this guarantee coincide in essence with the ICC Uniform Rules for Demand Guarantees, publication 458 (1992).^{*11} The main differences are the following:

- 1) As was mentioned above, only banks and insurance companies are authorised to issue independent guarantees. An independent security is a risky instrument, especially when a form unfamiliar to the participants in the economic relations as was the case in Russia. This is why only financial institutions (banks and insurance companies) as professional ‘merchants of money’ were given legal capacity to be guarantors under an independent-security arrangement. In fact, only banks issue guarantees, because the structure of insurance companies’ assets is not well suited to such transactions.
- 2) In accordance with UR N 458, a so-called first demand guarantee (this is a guarantee that must be paid on demand without indication as to the principal’s violation of the underlying obligation) was allowed as an exception to the general rule under the condition expressly set forth by the parties involved (Article 20 (c) of UR N 458).^{*12} Outside highly confidential relationships, a guarantee of such a type turns into a ‘suicide letter’, as bankers put it. To protect the principal’s interests, practising this type of guarantee has been prohibited by Russian law. In accordance with clause 374 of the Civil Code, a demand under a guarantee shall be supported in any event by a statement indicating in what respect the principal is in breach of the underlying obligation.
- 3) To prevent abuses by beneficiaries, the Russian legislator introduced an additional stage to the procedure for satisfying the beneficiary’s demand (not provided for by UR N 458^{*13}). If the guarantor comes to know that the underlying obligation has already been performed or has been terminated on some other grounds or been invalidated, he shall be obliged to notify the beneficiary and the principal about this immediately, and the guarantor shall be liable to pay upon receiving a second demand from the beneficiary (clause 376 of the Civil Code).

The provisions of paragraph 6, ‘Bank guarantee’ (Chapter 23 of the Civil Code), are brief. The parties involved may stipulate that the ICC Uniform Rules for Demand Guarantees are applicable to their relationship in full or in part when they are not in contradiction with the mandatory rules set forth by law.^{*14} Moreover, judges and experts with the Supreme Arbitration Court of the Russian Federation^{*15} take into account approaches employed in the ICC Uniform Rules (as a part of *lex mercatoria*) in the course of preparing documents issued by the Supreme Arbitration Court in order to create uniform judicial practice.^{*16}

⁹ For details, see С. Сарбаш. Обеспечительная передача правового титула. – *Вестник гражданского права* 2008/1, pp. 7 ff.

¹⁰ Aval with respect to the bill of exchange should be considered separately. See the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930), Article 30 (hereinafter ‘the Geneva Convention on Bills of Exchange’). Russia is a party to this convention.

¹¹ Hereinafter ‘UR N 458’.

¹² Now see Article 15 ICC of the Uniform Rules for Demand Guarantees, publication 758 (2010), hereinafter ‘UR N 758’.

¹³ Also in UR N 758.

¹⁴ See, for example, определение Высшего Арбитражного Суда Российской Федерации № ВАС-11455/10 от 23 августа 2010 [‘Resolution of the Supreme Arbitration Court of the Russian Federation N VAS-11455/10 of 23 August 2010’] and постановление Президиума Высшего Арбитражного Суда Российской Федерации № 6040/12 от 2 октября 2012 [‘Decision of the Presidium of the Supreme Arbitration Court of the Russian Federation N 6040/12 of 2 October 2012’].

¹⁵ Arbitration courts in the Russian Federation are part of the state court system and deal with economic litigation.

¹⁶ The most important forms are the Plenum of the Supreme Arbitration Court’s Rulings and the Presidium of the Supreme Arbitration Court’s Information Letters. See Информационное письмо Президиума Высшего Арбитражного Суда РФ от 15.01.1998 N 27 «Обзор практики разрешения поров, связанных с применением норм Гражданского кодекса Российской Федерации о банковской гарантии» [‘Information letter of the Presidium of the Supreme Arbitration Court of

2.2. The future of bank guarantees in Russian civil law

In accordance with an order from the President of the Russian Federation, the concept for development of the civil legislation of the Russian Federation was elaborated upon in 2009.^{*17} The Draft Federal Law on amendments to the Civil Code^{*18} was prepared on the basis of the Concept. The Draft Amendments are now under discussion in the State Duma of the Russian Federation.

Considerably more detailed regulation of relations under a bank guarantee than that in the active Civil Code is to be found in the Draft Amendments. The new norms were developed in consideration of UR N 758, but the specific features inherent to Russian practice have been retained. All of the novel elements can be classified into one of three groups:

- 1) Changes related to the fact that Russian participants in economic relations are already familiar with the bank guarantee as it stands. In accordance with the Draft Amendments, not only banks but also any commercial organisation shall be authorised to issue a guarantee. Accordingly, instead of 'bank guarantee', the name of the instrument shall be 'independent guarantee', which reflects the nature of the instrument more accurately.
- 2) Changes that are aimed at diminishing the impact of the mistaken notion that private law is, similarly to public law, imperative in nature.

Socialism was based on a planned economy and administrative methods of management, so several generations of Russian lawyers were brought up with the idea that any permitted deviation from the norms must be stated in a normative act *expressis verbis*. The impact of this idea on Russian jurisprudence is still noticeable. There are more than a few judgements that are based on the assertion that everything not expressly provided for in normative acts is considered to be in contradiction with the legislation. And this persists notwithstanding the fact that the private-law principle 'everything is permitted that is not forbidden' is formulated in clause 1 of the Civil Code as follows: natural persons and legal entities 'shall be free to establish their rights and duties on the basis of an agreement and to define any terms of the agreement, that are not in contradiction with legislation'. It is clear that a formal approach to the interpretation of the law should be set aside in favour of proper education of the lawyers, and that this will take time. As a quick way to rid ourselves of the limitations that affect freedom of contract in practice, the drafters are forced to include in the Draft Amendments rules confirming authorisation of what is not prohibited.

A good illustration is the requirement to issue a bank guarantee in written form. Issuing a guarantee is a unilateral juridical act. The standard written form of any juridical act is a paper document with the hand-written signature of the authorised person. But it is not prohibited to use any other technical means that still allows one to read, record, and reproduce information in tangible form (clauses 156, 160, and 434 of the Civil Code). However, there is no direct reference in the Civil Code to such an opportunity with regard to the bank guarantee. As a result, courts have often decided that a guarantee was not 'in writing' if it was issued by means of electronic communication, including the standard SWIFT transmission. To overcome this approach, the Supreme Arbitration Court was forced to issue a special instruction regarding electronic transmissions.^{*19} For the same reason, direct reference to a guarantee given in any written form that enables determination of the identity of the guarantor and the conditions of the guarantee is included in the Draft Amendments (in the new language of clause 368 of the Civil Code).

the Russian Federation N 27 of 15 January 1998, "Review of the practice of settlement of disputes related to the application of provisions of the Civil Code on bank guarantee norms" (hereinafter 'Letter of the Supreme Arbitration Court N 27'), and Постановление Пленума Высшего Арбитражного Суда РФ от 23.03.2012 N 14 «Об отдельных вопросах практики разрешения споров, связанных с оспариванием банковских гарантий» [The ruling of the Plenum of the Supreme Arbitration Court of the Russian Federation N 14 of 23 March 2012 "On some issues of the practice of settlement of disputes related to challenged bank guarantees" (hereinafter 'The Plenum's Ruling N 14')].

¹⁷ Концепция развития гражданского законодательства Российской Федерации. Москва, 2009 [The Concept of Development of Civil Legislation of the Russian Federation. Moscow, 2009], hereinafter 'the Concept'.

¹⁸ Проект Федерального закона «О внесении изменений в части первую, вторую, третью и четвертую Гражданского кодекса Российской Федерации, а также в отдельные законодательные акты Российской Федерации» N 47538-6 [Draft Federal Law "On amendments to the first, second, third and fourth parts of the Civil Code and to some legislative acts of the Russian Federation", N 47538-6]. Available at <http://www.consultant.ru/law/doc/gk/>. Hereinafter 'the Draft Amendments'.

¹⁹ The Plenum's Ruling N 14', item 3.

- 3) Changes aimed at reducing the risk of abuse by beneficiaries. The norms of clause 376 of the Civil Code²⁰ are detailed in the Draft Amendments. The concept remains the same: if the demand meets the conditions of the guarantee but the guarantor has reasonable doubt as to whether it is justified, the latter may suspend payment (for not more than seven calendar days following receipt of the demand) upon notification of the other parties involved. It is important to emphasise that the guarantee is not converted into a dependent security instrument. The situation involves just a delay of payment, nothing more. Such suspension is possible only in the following cases:
 - a) Any document submitted is unreliable (contains inaccuracies in the facts)
 - b) The circumstances or the risk under which the beneficiary's claim for payment shall be presented did not arise
 - c) The secured obligation is invalid
 - d) The secured obligation has been performed in favour of the beneficiary

In all of these cases, the bank **needs** to verify the circumstances beyond the documents submitted. That contravenes the documentary nature of the guarantee (see Article 7 UR N 758). To fulfil its documentary obligation (such as payment under an independent guarantee and letter of credit), the bank need only check the apparent indicators of the documents and is not liable for any discrepancies between the contents of the documents and the facts (delivery of goods, their quality, etc.). But in fact the specified contradiction does not exist. The guarantor has no the obligation to check outside circumstances, it has a **right** to do so. But the main thing is that after seven days the payment shall be made on the basis of the due documents having been submitted in due time regardless of any other circumstances. The balance of interests of the parties involved is also supported by the rule that a guarantor is obliged to pay damages in the event of unjustified suspension of payment.

As we can see, the new norms do not affect the independent nature of the guarantee, and at the same time they emphasise the security function of the instrument. It is also important that they aid in achieving one of the main purposes of civil law—to protect *bona fides* as the basis of civil turnover.

Two other provisions of the Draft Amendments that are not in line with UR N 758 attract attention.

First, the norms related to independent guarantees should be applied in cases wherein the obligation of the grantor is to transfer shares, bonds, or generic things. It is recognised in practice that suretyship may secure an underlying obligation to deliver generic assets. In this case, the security provider's obligation consists of transferring a similar asset (e.g., shares traded on the organised market). To apply this approach to the independent personal security may appear theoretically appropriate. The problem is whether it is at all practical. We have no knowledge of the extent to which the financial market is in need of such transactions. Therefore, the forecast related to this unknown instrument can be based on legal logic alone. The independent guarantee makes it possible to eliminate, with the aid of a legal mechanism, such specific risks as cannot be avoided by means of other security instruments: for the beneficiary (the risk of the principal's late performance of the underlying obligation) and for the guarantor (the risk associated with checking whether the beneficiary has a right to claim the performance). To reach a fair balance of interests, the principal is entitled to recover damages for any losses in case of the beneficiary's unjustified demand. When an underlying obligation is the obligation to pay money, all relationships between the parties involved are similar in nature, amounting to an obligation to pay. This renders sufficient protection to the principal.

The situation is different when the guarantor delivers under the beneficiary's demand any securities or equivalent negotiable instruments. If such a demand was unjustified, the negative consequences for the principal may be irreversible (e.g., loss of control over the business), so it would be impossible to render complete protection. In other words, the legal mechanism of independent security may fail in the relationships between the principal and the beneficiary. But it is only in these relationships that the security function of an independent guarantee is manifested.²¹ Except for these relationships, the whole structure converts into a sale transaction between the principal and the guarantor with a performance in favour of the beneficiary. It is subject to doubt whether the guarantee 'payable' through generic assets is eligible as a genuine security instrument. Meanwhile, suretyship in such cases enables maintaining the balance of interests and protecting the principal.

²⁰ See Subsection 2.1 of this paper, above.

²¹ See Section 5, below.

Secondly, it is stipulated in the Draft Amendments that instead of showing a fixed amount the guarantee may suggest a manner of its calculation. This may be more convenient for the parties to the underlying obligation, as they can synchronise the terms of this obligation and the guarantee. However, it is not convenient for the guarantor, since the amount of the guarantee is the basis for calculating the fees for the guarantor (e.g., bank charges), the total risk accepted by the guarantor, and the amount that the principal is due to give the guarantor if a payment under the guarantee is made. Therefore, it is recommended in UR N 758 to issue a guarantee with indication of the amount or maximum amount payable (Article 8).

3. Independent mortgage in the Draft Amendments

The drafters suggest two types of mortgage: the accessory mortgage and independent mortgage (new clause 303.1 of the Civil Code under the Draft Amendments). In a contract for accessory mortgage, the underlying obligation must be specified in every detail (including its substance, its amount, and the time of performance of the obligation). For independent mortgage, it is sufficient to indicate in the contract the maximum amount that can be due to the pledgee from sale of the encumbered immovable and the expiry time of the security right.

What is the meaning of the term ‘independent mortgage’? Is it a genuinely independent security right, which (similar to the independent guarantee) can be implemented regardless of whether the underlying obligation exists? Independent proprietary security is unknown in Russia. Introducing to the law any untested instruments would be dangerous *per se*, to say nothing of such a high-risk instrument as an independent security. It is necessary to take into account the peculiarities of the Russian market. Its participants frequently suffer through lack of professionalism and sometimes do not show reasonable caution, and, regrettably, there have been many abuses in business relations. In spite of the fact that independent proprietary security instruments had been in use there for over a century, Germany was forced to reform its legislation in 2008. In particular, the famous *Grundschild* was turned into an accessory security right to counteract the abuse of mortgage securities holders.^{*22} From the perspective of Russian realities, it would be too radical a solution to allow for a genuine independent mortgage.

Detailed study of the Draft Amendments shows that an independent mortgage cannot be qualified as a truly independent security. It is an accessory instrument, but its accessory is extremely weak. The parties may agree that, regardless of the performance of the underlying obligation, the mortgage remains in force to secure other, existing or future, obligations. The security right is not linked to a specific underlying obligation. It is obvious that this type of mortgage greatly facilitates access to credit. But to retain the mortgage after the termination of the underlying obligation is not equal to being satisfied from the cost of the encumbered immovable after the termination of the obligation. In terms of law, the accessory of a security instrument is a general rule while any independence of the security right (as an exception) is to be set out in the law *expressis verbis*.^{*23} Such provision is not made in the Draft Amendments.

The independent mortgage under the Draft Amendments has something in common with the German *Höchstbetragshypothek* (a mortgage with a maximum upper limit). The *Höchstbetragshypothek* is used to secure loans with an indefinite amount of debt. Therefore, in the land register the maximum amount the pledgee can receive is indicated instead of the underlying obligation being specified. However, to exercise a security right, the pledgee will have to prove the existence of this obligation and the amount of the secured debt^{*24}, which means that this instrument is accessory in nature.

^{*22} For details, see L. van Vliet. The German Grundschild. – *The Edinburgh Law Review* 2012 (16), p. 2.

^{*23} See, for example, clause 329 of the Civil Code and the new version of this clause in the Draft Amendments.

^{*24} В.М. Будилов. *Залоговое право России и ФПИ*. СПб 1993, pp. 45 ff.

4. Independence of security rights as an alternative to their accessory

All security rights always fulfil a security function. To present the problem in the simplest way, one can describe a security function as follows. Firstly, by using a security instrument the creditor acquires an additional (to the initial claim against the debtor) source for performance of the underlying obligation. Secondly, the creditor is entitled to use only one of the sources (either initial or additional). Thirdly, this additional facility gives privilege against non-secured creditors of the debtor. The mechanism of such privilege varies, depending on whether the case involves a personal, proprietary, accessory, or independent security, but in any case the position of a secured creditor is more advantageous.

Therefore, to analyse the security function, it is necessary to describe the connection between the underlying obligation and the security instrument. For this purpose, the doctrine traditionally resorts to the categories of accessory and independence. To create an internally consistent system of regulation, one should treat these two categories as mutually exclusive: a security instrument is either accessory or non-accessory—i.e., independent. The absence of accessory means independence, and vice versa.

There are varying degrees of accessory: from very strict (in which case the underlying obligation must be given a detailed description in the security contract—e.g., the contract under which a security right is created—and the security right is terminated with any change of the underlying obligation) to extremely weak (in which case the underlying obligation is described in the security contract in very general terms or not described at all, because it has not yet arisen). But no matter whether the connection between the underlying obligation and the security instrument is strong or weak, it does exist and, consequently, the security right is accessory. Accessory always has two attributes: 1) exercise of a security right is possible if the secured right exists, and 2) the secured creditor is entitled to receive not more than the amount of debt under the underlying obligation at the time of collection.

The independence of the security right has no degrees: either it exists or it does not. On receiving the secured creditor's claim, the independent security provider has no right to declare that the secured right does not exist or exists only in part. This is equally true for the independent personal security^{*25} and for independent proprietary security instruments.^{*26}

It may be difficult to distinguish between accessory security instruments and independent ones, because of terminological confusion. Security rights with extremely weak accessory are sometimes referred to as non-accessory or independent. Accordingly, the classification of mortgages drawn up by experts with the European Bank for Reconstruction and Development includes a mortgage that can be created in the absence of the underlying obligation. The authors of the document refer to such a mortgage as a **mortgage without accessory**. But they explain in brackets that it is impossible to enforce the security right under a 'mortgage without accessory' in the absence of the underlying obligation.^{*27} This means that the accessory of the security, while it may be extremely weak, still exists, and the security provider may put forward objections against the secured creditor's right with respect to the underlying obligation.

The contents of contracts and unilateral juridical acts, along with the rights and obligations arising from them, are to be interpreted in terms of the fundamental difference between accessory and independent security instruments. In Russian practice, the following forms for the text of bank guarantees can be found: 'We undertake to pay on your demand in the amount of [...], provided that the principal is in breach of its obligations under the underlying contract' and 'We undertake to pay on your demand in the amount of [...]. This guarantee is issued in case of violation of the underlying obligation by the principal.' At first sight, it may appear that the details of such documents (the title and the specific language of the document) indicate an intention to issue an independent guarantee (or bank guarantee, as it is referred to in the active Civil Code). However, closer consideration can lead us to a question: what obligations arise from such juridical acts? How should the words 'to pay, provided that the principal is in breach' and 'to pay in the event of violation of the obligation' be treated? The literal meaning of these phrases is that the guarantor undertakes to pay, with

²⁵ Clause 329 of the Civil Code, Article 5 of UR N 758; A. Pierce. *Demand Guarantees in International Trade*. London: Sweet & Maxwell 1993, pp. 45 ff.

²⁶ В.М. Будилов (see Note 24), pp. 48 ff; L. van Vliet (see Note 22), pp. 162 ff.

²⁷ *Ипотека в странах с переходной экономикой. Режим правового регулирования ипотеки и ипотечных ценных бумаг* [Mortgage in transition economies. The legal framework for mortgages and mortgage securities]. 2008, p. 24. Available at <http://www.ebrd.com/>.

this depending on the factual state of matters with the underlying relationship. This, in turn, means that the guarantor's obligation should be treated as accessory. Insofar as it is accessory that distinguishes an independent guarantee from suretyship—in other words, an independent personal security instrument is a dependent personal security less accessory—obligations arising out of the documents mentioned above can be interpreted as involving suretyships. In this case, the bank, as a security provider, is liable to pay the beneficiary on condition that the underlying obligation has been violated. Unless the bank verifies the existence of violation, the debtor shall not be obliged to reimburse the bank. When one takes into account all the circumstances, the litigation that may arise could be resolved in favour of the principal.

5. Can a genuine security be truly independent?

It must be admitted that it was not easy for Russian jurisprudence to adopt the concept of independent security. The idea that it is impossible to combine the security function and genuine independence was developing in two directions.

1. Some lawyers, trying to create a strictly symmetrical legal system, took a simple approach to the problem: independent security is anything but security. Indeed, from the point of view of the civil law, an obligation under an independent guarantee is an obligation to pay. Yet anyone familiar with practice will confirm that an independent guarantee is a security, often a very reliable one. To explain this contradiction, one must consider the whole structure of relations, not only the independent guarantee. The structure always consists of more than two relationships.^{*28} The most common structure includes relations between 1) the parties to the underlying obligation (the debtor and the secured creditor), 2) the debtor and the security provider, and 3) the security provider and the secured creditor. The security function manifests itself not in the relations between the security provider and the secured creditor (as in the case of an accessory security) but in the relations between the parties to the underlying obligation.^{*29} This idea finds support in the law: 'The obligation of the guarantor to the beneficiary **in the relationships between them** shall not depend upon the underlying obligation' (clause 370 of the Civil Code) (emphasis added). The beneficiary's right to demand payment under the guarantee is in no way connected with, or bound by, the underlying obligation under the relationship to the guarantor. But in relations with the principal, the beneficiary has no right to refer to the independence of the guarantee and is bound by the security purpose of the latter. This fact predetermines the final reimbursement to be rendered between the principal and the beneficiary.

2. The line of thought proceeding from the idea that security cannot be entirely independent has found more proponents. For a long time after the Civil Code came into force (in 1995), a reference to the underlying obligation incorporated into the guarantee was often treated as evidence of a legal connection between the two obligations (underlying and guarantor's). This entailed two practical consequences.

Firstly, guarantees may contain conditions that can be complied with only on the basis of full understanding of the relations between the principal and the beneficiary. An example is use of 'the guarantor shall pay under the condition that the underlying obligation has been violated' instead of 'the beneficiary's demand shall be supported by a statement indicating in what respect the underlying obligation is violated'. In UR N 758, this problem is considered in terms of distinguishing non-documentary conditions from documentary ones.^{*30}

²⁸ If a security instrument is granted by the debtor (for an obvious reason, it involves proprietary security alone) and the framework covers only the underlying contract and the contract for proprietary security, the secured creditor in any event is unable to cite independence as a legal attribute. The creditor's unjust claim shall be blocked by the debtor's reference to the principle of good faith and fair dealing.

²⁹ Independent proprietary security instruments may be included in another framework, which requires special consideration. It can be assumed that the conclusion (i.e., that the security function manifests itself not in the relations between the security provider and the secured creditor but in other relations) from the analysis of personal security instruments can be applied also to the independent proprietary security, if any.

³⁰ UR N 758, Article 7, 'Non-documentary conditions': 'A guarantee should not contain a condition other than a date or the lapse of a period without specifying a document to indicate compliance with that condition. If the guarantee does not specify any such document and the fulfillment of the condition cannot be determined from the guarantor's own records or from an index specified in the guarantee, then the guarantor will deem such condition as not stated and will disregard it except for the purpose of determining whether data that may appear in a document specified in and presented under the guarantee do not conflict with data in the guarantee.'

Secondly, guarantors, encouraged by their principals, may refuse to pay on the pretext of the absence of violation of the underlying obligation. For a long time after the appearance in our civil law of norms regulating bank guarantees, courts actively defended the principal's interests. If the beneficiary filed claim against the guarantor with the court and the latter (usually after a lengthy examination) found out that at the time of the beneficiary's demand there was no violation as stated in the demand, the court would reject the claim of the beneficiary on grounds of abuse of the right by the latter.^{*31} In fact, in such cases independent guarantees were treated as dependent—i.e., as suretyship—with the only difference being that in making their judgements the courts addressed rules of good faith and fair dealing rather than norms on suretyship.

Recently, the practice has changed. Decision of the Supreme Arbitration Court of the Russian Federation N 6040/12, of 2.10.2012, may be seen as exemplary.^{*32} The bank (the guarantor) refused to pay on the client's (beneficiary) demand, stating that the contractor (the principal) had not violated the contract and was not liable to return the advance payment to the client. With reference to clause 370 of the Civil Code and UR N 758, the court obliged the guarantor to pay, emphasising that: 'only circumstances connected with failure to meet the terms of the guarantee *per se* can be recognised as grounds for refusal to satisfy the claim of the beneficiary.'

So, in following of the legislators' lead, the existence of independent personal security has been accepted by the courts.^{*33}

6. Independence versus abstraction

Semantically, independence and abstraction are concepts that are close in their meanings. There is something in common between the legal concepts 'independent obligation' and 'abstract obligation', since both of them describe the absence of any essential link between an obligation and a particular legal phenomenon.^{*34} Independent and abstract obligations are both exceptions to the general rule. Their existence is possible only by force of an express provision in the law.

Russian legal tradition employs the term 'independence' for analysing security structures, with accessory seen as an alternative to independence, whereas the term 'abstraction' is used for describing the relationship between an obligation and the grounds from which it arose, with 'causality' as its alternative.

In the theory, there are differences in the regulation of independent obligations and abstract ones. But whatever the differences, the ultimate result will be the same: a debtor shall be bound to lose the right of objection to the demand of a creditor. Thus, a debtor under an independent obligation is not entitled to raise an objection with regard to the underlying obligation^{*35}, while a debtor under an abstract obligation has no right to raise an objection with respect to the grounds for such obligation.^{*36}

Clause 370 of the Civil Code contains a direct provision referring to the independence of a bank guarantee. There is no reference to the abstraction of the latter in the Civil Code. A bank guarantee would be abstract if its force did not depend on the grounds for its issue. The grounds for issuing a guarantee lie in an agreement between the principal and the guarantor. The Civil Code does not contain an express statement that the guarantee is not connected with the agreement. Therefore, *de lege lata* the obligation of a guarantor to pay on demand depends on whether the agreement is valid.

^{*31} See Letter of the Supreme Arbitration Court N 27's item 4 and Information Letter of the Presidium of the Supreme Arbitration Court N 29 (of 16 February 1998), 'Review of the practice of settlement of disputes involving foreign persons', item 3.

^{*32} This decision gives special notice that earlier judgements of courts of arbitration on similar cases may be reconsidered on grounds of new findings.

^{*33} In addition, the decision contains the important conclusion that the terms of a bank guarantee should be interpreted in favour of the creditor (beneficiary) in order to preserve security. The Court emphasised the priority of a creditor's interests. This is especially important for Russian law since it has long been oriented toward protecting the debtor as the weaker party to an obligation.

^{*34} The concept of the abstract obligation formed in Russian law under the influence of the German pandectic doctrine. See, for example, A.C. Кривцов. *Абстрактные и материальные обязательства в римском и в современном гражданском праве* ['Abstract and material obligations in Roman and modern civil law']. Москва: Статут 2003, pp. 124 ff.; Ю.С. Гамбаров. *Гражданское право: Общая часть* ['Civil law: General part']. Москва: Зерцало 2003, pp. 709 ff.; В.М. Хвостов. *Система римского права* ['System of Roman law']. Москва: Спарк 1996, pp. 170 ff.

^{*35} Clauses 370 and 376 of the Civil Code, Article 20 of UR N 758.

^{*36} See, for instance, the Geneva Convention on Bills of Exchange, Annex 2, Article 16.

To strengthen a beneficiary's position, the authors included in the Draft Amendments clause 370 of the Civil Code in a new wording: 'An obligation of the guarantor to the beneficiary, stipulated by the bank guarantee, shall not depend in the relationships between them on the underlying obligation, on the relationships between the principal and the guarantor or on any other obligations, even if the guarantee contains references to them.'

When and if this new rule finds its way into the Civil Code, a bank guarantee will be not only an independent but also an abstract obligation under Russian law.

7. Conclusions

The bank (independent) guarantee is the only independent security right known under Russian law. It follows the model of the ICC Uniform Rules for Demand Guarantees with one significant distinction, arising from the intention of the legislator to create additional obstacles to abuse by beneficiaries. The independent mortgage envisaged by the Draft Amendments cannot be qualified as a truly independent security. It is a security instrument with weak accessory.

When there are varying degrees of accessory (from very strict to extremely weak), the independence of the security right has no degrees (it either exists or does not). To create a coherent regulatory system, the categories 'accessory' and 'independence' should be treated as incompatible. The absence of accessory means non-accessory—i.e., independence. And vice versa.

The independent security instruments should be considered genuine security. Their specificity is that the security function manifests itself not in the relations between the security provider and the secured creditor (as is the case with an accessory security) but in the relations between the parties to the underlying obligation.

In theoretical terms, there are differences between the regulation of independent obligations and abstract ones, but, from a practical point of view, the ultimate result will be the same: the debtor has to lose the right of objection against the creditor.



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Non-married Cohabiting Couples and Their Constitutional Right to Family Life

1. Introduction

The traditional model of the family, consisting of husband, wife, and children, has ideological roots that extend far back through history and plays an important role in most societies.^{*1} However, it cannot be claimed to be the only form of family life, not least because there are many other forms, among them non-marital cohabitation, present in modern society.^{*2} The number of non-married cohabiting couples and the number of children born in such relationships are both rising steadily in Europe.^{*3} There have been significant increases in non-marital cohabitation in recent decades in Estonia too^{*4}, and relative to other European countries, Estonia has one of the highest numbers of children born outside marriage.^{*5} These changes in family structure, along with favourable attitudes toward new forms of family, have brought with them an expectation of family law that reflects these societal changes.

Legislation specifically aimed at non-traditional forms of the family has been enacted in many jurisdictions, but these vary considerably in their details,^{*6} often causing a lot of confusion from one jurisdiction to the next and in translations. More than half of the European Union's member states have adopted laws on cohabitation.^{*7} The traditional approach of considering marriage to be the only officially recognised personal

¹ M. Ebejer, E. Mills. *Focus: Family Law*. 4th edition. Chatswood, N.S.W.: LexisNexis 2010, p. 1.

² J.M. Scherpe. The legal status of cohabitants—requirements for legal recognition. – K. Boele-Woelki (ed.). *Common Core and Better Law in European Family Law*. Antwerp; Oxford: Intersentia 2005, p. 283.

³ In Sweden, Denmark, France, and Slovenia, some 40–50% of all children are born outside marriage. *Ibid*.

⁴ According to the 2011 Population and Housing Census (PHC 2011), 34.5% of the population aged 15 and older lived with a legal spouse and 15.6% lived in a *de facto* union. From the figures in the 2000 Population Census, the proportion of persons living with a legal spouse fell by 5.4 percentage points and that of persons living in a *de facto* union increased by 4.7 percentage points. In 2011, of all cohabiting persons, 428 were cohabiting with a same-sex partner. See this press release of Statistics Estonia: PHC 2011: Popularity of consensual union is growing. 24.4.2013. Available at http://www.stat.ee/65350&parent_id=39113 (most recently accessed on 1.6.2013).

⁵ Overall, 59% of children in Estonia were born out of wedlock (including to single mothers) in 2009. Only Iceland showed a higher percentage for this (64%). See European Commission, Eurostat. Live births by mother's age at last birthday and legal marital status. Available at <http://appsso.eurostat.ec.europa.eu/> (most recently accessed on 1.6.2013).

⁶ W.M. Schrama. General lessons for Europe based on a comparison of the legal status of non-marital cohabitants in the Netherlands and Germany. – K. Boele-Woelki (ed.). *Common Core and Better Law in European Family Law*. Antwerp; Oxford: Intersentia 2005, p. 280.

⁷ See Appendix 1 in I. Curry-Sumner. *All's Well That Ends Registered? The Substantive and Private International Law Aspects of Non-marital Registered Relationships in Europe: A Comparison of the Laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*. Antwerp; Oxford: Intersentia 2005, pp. 537–541.

relationship changed in 1989, when Denmark became the first country in the world to grant legal recognition to (same-sex) non-married cohabiting couples and thus created a new institution referred to as registered cohabitation—^{*8} a term also used for opposite-sex cohabiting couples in some jurisdictions. In recent years, several studies have been published in Estonia on the social and legal aspects of non-marital cohabitation^{*9}, and debates over the need for a Cohabitation Act have been given a clearer framework. A general vision of the provisions that a Cohabitation Act should contain, according to the opinion of the former Minister of Justice Kristen Michal, was drawn up in 2012^{*10}; however, this did not lead to a distinct legislative initiative on the subject, no matter the vital statistics and the rapid developments seen in other jurisdictions.

Family is at the core of society, and the effective functioning of families creates an important foundation for societal welfare in general. This is one of the main reasons many international instruments and the constitutions of most legal systems feature rules pertaining to marriage and the family.^{*11} In Estonia, the fundamental rights and obligations of family members are dealt with primarily in §§26 and 27 of the Constitution.^{*12} For measurement of the extent of these rights and obligations, it is crucial to ascertain which personal relationships are covered by the notion of family in the Constitution.^{*13} The main purpose of this paper is, therefore, to examine which types of non-marital cohabitation are and should be covered by the notion of family in the Constitution of Estonia, whether there is a governmental obligation to enact special regulations on non-marital cohabitation, and how any such obligation has been met.

2. Terminology

To understand the legal issues surrounding non-marital cohabitation, one first must understand the relevant terminology. There is lack of uniformity in the terminology used to refer to individual forms of cohabitation in Estonian legislation^{*14} and judicial practice^{*15}, resulting in simultaneous usage of various terms, covering different semantic fields. One possibility for the arrangement of the terminology^{*16} is to use 'cohabitation' (the Estonian concept of *kooselu*) as a general term, covering all possible forms of cohabitation, including marriage, neutral sharing of a dwelling by friends or relatives, etc. Under the general term, the intimate types of cohabitation are marriage (*abielu*) and non-marital cohabitation (*mitteabieluline kooselu*). The term 'non-marital cohabitation' does not comply with the linguistic recommendations made

⁸ D. Jakob. *Die eingetragene Lebenspartnerschaft im Internationalen Privatrecht*. Cologne: Schmidt 2002, p. 13.

⁹ The Ministry of Social Affairs published a study of social aspects of non-marital cohabitation in 2008. See L. Järviste, K. Kasearu, A. Reinomägi. *Abielu ja vaba kooselu: trendid, regulatsioonid, hoiakud* ['Marriage and free cohabitation: Trends, regulations, attitudes']. – *Poliitikaanalüüs. Sotsiaalministeeriumi toimetised* 2008/4. Available at <http://www.sm.ee/fileadmin/meedia/Dokumentid/V2ljaanded/Toimetised/2008/04.pdf> (most recently accessed on 1.6.2013) (in Estonian). The Ministry of Justice published a study analysing the legal aspects of same- and/or opposite-sex non-marital cohabitation in 2009. See A. Olm. *Mitteabieluline kooselu ja selle õiguslik regulatsioon* ['Non-marital cohabitation and its legal regulation']. Tallinn: Ministry of Justice 2009. Available at <http://www.just.ee/35424> (most recently accessed on 28.5.2013) (in Estonian).

¹⁰ The Ministry of Justice prepared a project for a Cohabitation Act in 2012, offering a legislative scheme for registered and *de facto* cohabiting couples. See *Kooseluseaduse kontseptsioon* ['The Project for a Cohabitation Act']. Ministry of Justice 27.8.2012, p. 4. Available at http://www.just.ee/orb.aw/class=file/action=preview/id=57140/Kooseluseaduse_kontseptsioon.pdf (most recently accessed on 1.6.2013) (in Estonian).

¹¹ D. Coester-Waltjen. Human rights and the harmonization of family law in Europe. – K. Boele-Woelki, T. Sverdrup (eds). *European Challenges in Contemporary Family Law*. Antwerp; Oxford; Portland, Oregon: Intersentia 2008, p. 5.

¹² Eesti Vabariigi Põhiseadus ['The Constitution of the Republic of Estonia']. – RT I 1992, 26, 349; RT 27.4.2011, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 1.6.2013).

¹³ See also A. Henberg, K. Muller, A. Alekand. *Perekonna kohustused (sotsiaalsete probleemide tõttu) abi vajavate pereliikmete ees* ['The obligations of family to members of the family in need of help (due to social problems)']. Tallinn 2012, p. 29 (in Estonian).

¹⁴ E.g., *de facto* marriage (*faktiline abielu*) in §84 (2) of the Credit Institutions Act (*krediidiastutuste seadus*. – RT I 1999, 23, 349; 29.06.2012, 1 (in Estonian)); stable cohabitation (*püsiv kooselu*) in §§23 and 257 (1) of the Code of Civil Procedure (*tsiviilkohtumenetluse seadustik*. – RT I 2005, 26, 197; 5.4.2013, 1 (in Estonian)); a relationship similar to marriage (*abieluga sarnanev suhe*) in §15 of the Public Service Act (*avaliku teenistuse seadus*. – RT I, 6.7.2012, 1; 26.3.2013, 3 (in Estonian)). English text available via <http://www.legaltext.ee/> (most recently accessed on 1.6.2013).

¹⁵ E.g., *de facto* marital cohabitation (*faktiline abieluline kooselu*) in Tartu Circuit Court civil chamber decision II-2-97/95, of 28.4.1995 (in Estonian); *de facto* marital relationship (*faktiline abielusuhe*) in Tallinn Circuit Court civil chamber decision II-2/1487/01, of 14.12.2001 (in Estonian); non-binding marriage (*vabaabielu*) in CCSCd 20.12.2005, 3-2-1-142-05, para. 13.

¹⁶ Similar terminology has been used in the draft work in the Project for a Cohabitation Act (see Note 10).

by Estonian philologists^{*17}, though it does express the nature of the phenomenon most precisely, referring to a marriage-like relationship of cohabitantes and at the same time distinguishing it from marriage, and is commonly used internationally, especially in Germany.^{*18} Therefore, it is used also in this paper to refer to a personal relationship of cohabitantes outside marriage. Non-marital cohabitation can, in turn, be divided into registered cohabitation (*registreeritud kooselu*), for cases wherein a formal legal act is required and in which the cohabiting couple enters into the legal regime willingly and consciously, and *de facto* cohabitation (*faktiline kooselu*), for which the legal rules are to be applied under certain factual circumstances and possibly against the explicit wishes and decisions of the cohabitants. All these types of intimate cohabitation may be either gender-neutral (encompassing both same- and opposite-sex couples)^{*19} or classified on the basis of the gender of the cohabitants^{*20}, depending on the jurisdiction.

3. Non-marital cohabitation under the Constitution

According to a study carried out by the Ministry of Social Affairs, non-marital cohabitation of opposite-sex couples is recognised and supported in Estonian society alongside the institution of marriage. According to the study, these two models of cohabitation are considered similar and should, therefore, enjoy similar legal guarantees. The prevailing opinion is not that positive in the case of same-sex cohabiting couples, recognised by only about a third of the respondents.^{*21} The attitudes in society matter, given that family law is substantially inextricable from the prevailing social values and moral norms and that it depends on the development of society more than any other field of private law does.^{*22} However, family law does not operate in isolation. It is important to bear in mind the constitutional factors when one is attempting to adjust family law with respect to informal lifestyles.^{*23}

The second chapter of the Estonian constitution stipulates fundamental rights, freedoms, and duties. In its §26, the Constitution stipulates the right to respect for private and family life, and §27 (1) emphasises governmental protection of the family. These two sections create the basis for the governmental family policy.

Pursuant to §26 of the Constitution, '[e]veryone is entitled to inviolability of his or her private and family life. Government agencies, local authorities, and their officials may not interfere with any person's private or family life, except in the cases and pursuant to a procedure provided by law to protect public health, public morality, public order or the rights and freedoms of others[:] to prevent a criminal offence[:] or to apprehend the offender'. Two separate fundamental rights are protected by §26: to family life and to private life. The spheres of protection of these two fundamental rights partially overlap. Both are part of the *forum internum* (personal life), tied up with the principles of freedom, human dignity, and free self-realisation or self-determination.^{*24} Every person and couple unquestionably enjoys the protection of private life, irrespective of sex or gender. There is less certainty when it comes to the protection of family life, since the protection provided by this norm is constantly broadening, following the changes in understanding of the notion of the family in society. The aim of §26 of the Constitution is to protect a person against the arbitrary intervention of governmental institutions, giving all people the right to expect that these institutions will not interfere in their family and private life other than for the purpose of reaching the objectives listed in the

¹⁷ L. Seestrand. Mitteläbimõeldud väljendite mittekasutamisest tõuseks mittekahju kõigile ['The non-usage of non-considered expressions would be non-harmful to everyone']. – *Õiguskeel* 2002/3, pp. 25–27 (in Estonian).

¹⁸ The concept of *Nichteheliche Lebensgemeinschaft* (non-marital cohabitation) is used in the same meaning in Germany. See, for example, H. Grziwotz. *Nichteheliche Lebensgemeinschaft*. Munich: Verlag C.H. Beck 2006.

¹⁹ E.g., a *pacte civil de solidarité* (PACS) in France. See Code Civil, Articles 515–1 to 515–7. Available at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721&dateTexte=20080121> (most recently accessed on 1.6.2013).

²⁰ For example, *eingetragene Lebenspartnerschaft* (registered cohabitation) in Germany is open only to same-sex partners. See Gesetz über die eingetragene Lebenspartnerschaft. Available at <http://bundesrecht.juris.de/lpartg/BJNR026610001.html#BJNR026610001BJNG000200305> (most recently accessed on 1.6.2013).

²¹ L. Järviste, K. Kasearu, A. Reinomägi (see Note 9), pp. 16–17.

²² T. Göttig, T. Uusen-Nacke. Perekonnaõiguse seosed teiste tsiviilõiguse valdkondadega ['The connections of family law with other branches of civil law']. – *Juridica* 2010/2, p. 86 (in Estonian).

²³ W.M. Schrama (see Note 6), p. 276.

²⁴ R. Maruste. *Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse* ['Constitutionalism and the Protection of the Fundamental Rights and Freedoms']. Tallinn: Juura 2004, p. 421 (in Estonian).

Constitution. According to the Supreme Court of Estonia, family members also have a justified expectation that the state will not wrongfully and excessively hinder their cohabitation.^{*25}

While §26 of the Constitution is the general provision protecting the sphere of private life, §27 (1) is the specific provision for the protection of family life.^{*26} According to §27 (1) of the Constitution, '[t]he family, which is fundamental to the preservation and growth of the nation and which constitutes the foundation of society, enjoys the protection of the government'. This entails the exterior protection of family life, giving a person the right to positive actions by the governmental power, enabling him or her to enjoy genuine family life^{*27} and proceeding from the governmental power to enact regulation and designate legal remedies in order to avoid violation of family and private life^{*28} by other persons. Unlike §26 of the Constitution, §27 (1) provides for protection of family life without reservation^{*29} and the sphere of protection of §27 (1) encompasses all issues related to the family, from its creation to the most different aspects of familial cohabitation.^{*30}

Because the recognition of family life as a constitutional value obliges government agencies to offer protection to families, support the fundamental rights of family members, and ensure the inviolability of family life, it is essential to determine the forms of non-marital cohabitation that fall under the notion of family according to the Constitution. The constitutional protection entitles the members of these formations to insist on enactment of appropriate regulation allowing them to enjoy genuine family life.^{*31}

Family is based either on a stable and close personal-intimate relationship or on close affinity.^{*32} The commentators on the Constitution class under protection of family life primarily the relations of a married man and woman and the relations of a child and his or her biological and—equally—adoptive parents, and they note that even relations between a child and his or her step-parent or foster parent might fall under that protection.^{*33} In addition, opposite-sex cohabiting couples ('the familial cohabitation of a man and woman that is not formalised according to law') constitute a family in the view of the Supreme Court.^{*34} The commentators on the Constitution support these views, stating that '[i]n view of the diversity of human relationships in contemporary society, it is not justified to bind the constitutional notion of family solely to formal marriage^{*35}. Hence, it is clear that *de facto* cohabitation of an opposite-sex couple is covered by the notion of family in the Constitution.

There is no clear position taken in legislation and judicial practice, however, on whether same-sex cohabitees should be considered family under the Constitution.^{*36} Political and legal debates on this subject still tend to be polarised. The reproductivity argument is quite often employed for countering interpretation of the constitutional notion of family as encompassing same-sex couples. For example, former judge of the European Court of Human Rights and current chairman of the Constitutional Committee of the Riigikogu, Rait Maruste, stated in 2004 that the constitutional protection of family life is bound to the preservation and growth of the nation, which refers to the function of reproduction, referring to a family with children in a traditional sense, with any other type of cohabitation remaining a question of private life.^{*37} Former Chancellor of Justice, Allar Jõks, shared his views over the possible discrimination of same-sex cohabiting couples in 2006. Under his interpretation, marriage is seen as a sustainable unit consisting of a man and

^{*25} ALCSCd 13.10.2005, 3-3-1-45-05 (in Estonian), para. 16.

^{*26} *Eesti Vabariigi Põhiseadus: kommenteeritud väljaanne* ['The Constitution of the Republic of Estonia: Commentary']. Tartu: Juura 2012, commentary on §26 of the Constitution, para. 7. Available via <http://www.pohiseadus.ee/> (most recently accessed on 1.6.2013) (in Estonian).

^{*27} CRCSCd 5.3.2001, 3-4-1-2-01, para. 14 and ALCSCd 17.3.2003, 3-3-1-10-03, para. 32 (both in Estonian).

^{*28} R. Maruste (see Note 24), p. 283.

^{*29} *Eesti Vabariigi Põhiseadus: kommenteeritud väljaanne* (see Note 26), commentary on §26 of the Constitution, item 7.1.

^{*30} ALCSCd 18.5.2000, 3-3-1-11-00 (in Estonian), para. 2.

^{*31} Section 14 of the Constitution stipulates 'the duty of the legislature, the executive, [and] the judiciary, and of local authorities, to guarantee the rights and freedoms provided in the Constitution', where the obligation to guarantee the rights and freedoms does not refer only to prohibition of state authorities' intervention in the fundamental rights. Rather, the governmental power is, according to §14, obliged also to create appropriate procedures to ensure the protection of these rights. See CRCSCd 14.4.2003, 3-4-1-4-03 (in Estonian), para. 16.

^{*32} A. Henberg, K. Muller, A. Alekand (see Note 13), p. 36.

^{*33} *Eesti Vabariigi Põhiseadus: kommenteeritud väljaanne* (see Note 26), commentary on §27 of the Constitution, para. 14 to item 15.4.

^{*34} ALCSCd 19.6.2000, 3-3-1-16-00 (in Estonian), para. 1.

^{*35} *Eesti Vabariigi Põhiseadus: kommenteeritud väljaanne* (see Note 26), commentary on §27 of the Constitution, para. 14.

^{*36} Henberg, Muller and Alekand also note this in their analysis (see Note 13), pp. 35–36.

^{*37} R. Maruste (see Note 24), p. 442.

a woman who are capable of having children with each other and therefore of securing the preservation of society and same-sex couples' lack of this opportunity is a difference justifying different treatment of same- and opposite-sex couples.^{*38}

Historically, the family unit evolved indeed in virtue of the need of caring for the protection and socialisation of children; hence, reproduction has traditionally been seen as the primary function of the family.^{*39} However, various economic and cultural factors, especially the growth of individualism, have been moulding people's priorities and have resulted in increasing importance being accorded to the function of the family as expressive of a wish to be with the partner and spend time together, which is among the most important motives for establishing a family in a modern welfare state.^{*40} While same-sex cohabiting couples' possibilities for fulfilling the function of reproduction are limited, these couples can still successfully perform all other main functions of the family, such as the economic and companionship function, along with the function of socialisation, so do not differ significantly from opposite-sex couples in the associated respect.

The creation of a family that helps and supports its members, ensuring also the preservation and growth of the nation, shall indeed enjoy special protection^{*41}, yet the reproduction function of a family should not be overemphasised. Overemphasising the function of reproduction in case of marriage would in addition rule out unions of elderly or otherwise infertile people, which was presumably not the intention of Maruste or Jõks. The family shall be protected also as the foundation for an individual's existence and lifestyle.^{*42} In the opinion of the Supreme Court, one should not conclude from the wording of §27 (1) of the Constitution that family is protected only as long as it ensures the preservation and growth of the nation; instead, this norm highlights family as the foundation of society and in need of special protection, assuring its constitutional protection. If family were only the tool of preservation and growth of the nation, there would be no reason to give it special, explicit mention in the Constitution. On the contrary, §27 (1) proves that family has independent value under the Constitution, since it entails a subjective right to protection by the governmental power.^{*43} Defining the notion of family only in terms of the function of reproduction would mean treating it as a solely collective interest and would therefore result in an excessively narrow interpretation.

The Supreme Court of Estonia often relies on the views of the European Court of Human Rights (ECtHR) and refers to its case law when interpreting the norms of the Constitution.^{*44} The Supreme Court has also pointed out that the influence of Article 8 of the European Convention of Human Rights^{*45} (ECHR) is evident from the wording of §26 of the Constitution.^{*46} The ECtHR is the primary actor in the European human rights arena, and in its interpretations of the ECHR a shift from the previous, restrictive policy toward recognition of non-marital cohabitation is visible.^{*47} The notion of family in the case law of the ECtHR has grown year by year to encompass broader variety in the forms of personal relationships. However, until recently the ECtHR accepted the relationship of a same-sex couple only as being covered by the protection of private life, not by that of family life, and allowed contracting states a wide margin of discretion in this area. The breakthrough for same-sex couples arrived in 2010, when the ECtHR recognised in *Schalk and Kopf v. Austria* the right of homosexual couples to family life under Article 8 of the ECHR.

^{*38} See the letter of the Chancellor of Justice to the Gay and Lesbian Information Centre 'The position on the legalisation of same-sex familial relationships', of January 2006, No. 6-1/060166/0600782. This was also reflected in the press release of the Chancellor of Justice entitled 'The unequal treatment of same-sex couples in the regulation of family relationships is in accordance with the Constitution', of 2.2.2006. Available at <http://oiguskantsler.ee/et/oiguskantsler/suhted-avalikkusega/pressiteated/samasooliste-isikute-ebavordne-kohtlemine-peresuhte> (most recently accessed on 1.6.2013) (in Estonian).

^{*39} F. Swennen. *O tempora, o mores! The evolving marriage concept and the impediments to marriage.* – M. Antokolskaia (ed.). *Convergence and Divergence of Family Law in Europe.* Antwerp; Oxford / Amsterdam: Intersentia 2007, p. 121.

^{*40} E.-M. Tiit. *Sündimuse dünaamika Eestis. Mõjutused, trend ja prognoos Euroopa rahvastikuprotsesside taustal* ['The dynamics of birth rate in Estonia: Influences, trends, and prognosis in the background of the demographic processes in Europe']. Report of the research project. University of Tartu 2000, p. 14 (in Estonian).

^{*41} P. Smith. *Liberalism and Affirmative Obligation.* New York; Oxford: Oxford University Press 1998, p. 14.

^{*42} R. Alexy. *Põhiõigused Eesti põhiseaduses* ['Fundamental rights in the Estonian Constitution']. – *Juridica*, special edition, 2001, p. 85 (in Estonian).

^{*43} ALCSCd 3-3-1-11-00 (see Note 30), para. 2.

^{*44} See, for example, ALCSCd 3-3-1-11-00 (*ibid.*).

^{*45} Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950. Available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (most recently accessed on 1.6.2013).

^{*46} CRCSCd 5.3.2001, 3-4-1-2-01 (in Estonian), para. 14.

^{*47} C. Sörgjerd. *Reconstructing Marriage: The Legal Status of Relationships in a Changing Society.* Cambridge; Antwerp; Portland, Oregon: Intersentia 2012, p. 275.

Here, the ECtHR noted the rapid evolution of social attitudes toward same-sex couples in many Member States, the fact that a considerable number of Member States have afforded legal recognition to same-sex couples, and certain provisions of EU law that reflect a growing tendency to encompass same-sex couples by the notion of family. Accordingly, the Court considered it artificial to maintain the view that, unlike an opposite-sex couple, a same-sex couple cannot enjoy family life with respect to Article 8 of the ECHR.^{*48} This statement undoubtedly proves that the stable *de facto* relationship of a same-sex couple is, according to the ECHR, covered by the notion of family and even though the protection spheres of §26 and §27 (1) of the Estonian constitution differ from the sphere of protection of Article 8 of the ECHR^{*49}, the new position of the ECtHR on the notion of family reflects a general trend in Europe with respect to the rights of same-sex couples and is likely to influence future interpretation of the notion of family in the Estonian constitution.

Departing from the opinion of the former Chancellor of Justice and in accordance with the views recently expressed by the ECtHR, the current Chancellor of Justice, Indrek Teder, is convinced that same-sex cohabiting couples form families and should enjoy the constitutional protection of family life. Teder considers the current situation in Estonia, wherein the family relations of same-sex couples are not specified by legislation, unconstitutional and emphasises the need to create an appropriate legal framework for the regulation of these relationships. According to him, it is the constitutional obligation of the governmental power to encompass the creation of a procedural framework acknowledging the family life of same-sex cohabiting couples and, in connection with that, regulating the personal, proprietary, and other kinds of relations derived from their family life.^{*50}

Following the recommendations given in the memorandum of the Chancellor of Justice and the conclusions drawn on the basis of previous analysis^{*51}, the Ministry of Justice drafted the project work for a Cohabitation Act^{*52} in August 2012. The project entailed a proposal to allow same- and opposite-sex couples to register their cohabitation after concluding a notarial contract of cohabitation. The intent with this contract of cohabitation was to cover issues such as the property regime of the cohabitees, maintenance obligations toward each other, and inheritance. The project covered, in addition, the main legal problems associated with a *de facto* relationship that involves children. However, the project did not find sufficient support from the coalition parties of Parliament and the Ministry of Justice abandoned the plan to draft a Cohabitation Act proceeding from the project work.

4. The legal position of *de facto* cohabitees

Several provisions in current legislation are applicable to *de facto* cohabitees. Unlike that of same-sex couples, constitutional protection of family life for opposite-sex *de facto* couples does not entail an obligation of the state to create additional possibilities for the registration of a relationship, since the cohabitees already have the option of getting married. In most cases, *de facto* cohabitees do not wish to exercise that option.^{*53} Yet the cohabiting couple choosing not to marry might still wish for some legal guarantees similar to the ones foreseen with married couples, for example, for avoidance of unjust consequences in the event that the relationship breaks down. Special attention should be given here to the position of economically vulnerable partners and children.^{*54} The simplistic argument that it is 'these people's own fault if they do not marry' does not hold true in all cases, particularly—but not exclusively—if the couple have children.^{*55}

⁴⁸ *Schalk and Kopf v. Austria*, ECtHR 24.6.2010, application No. 30141/04, pp. 93–94.

⁴⁹ According to the views of ALCSC, the possible restrictions to the subjective right listed in Article 8 of the ECHR and §26 of the Constitution, in combination with the existence of §27 of the Constitution, prove to be different spheres of protection. See ALCSCd 18.5.2000 (see Note 30), para. 2.

⁵⁰ Memorandum of the Chancellor of Justice to the Minister of Justice No. 6-8/110661/1102390, of 23.5.2011. Available in Estonian at http://oiguskantsler.ee/sites/default/files/field_document2/6iguskantsleri_margukiri_samasooliste_isikute_pere-suhe.pdf (most recently accessed on 1.6.2013) (in Estonian).

⁵¹ A. Olm (see Note 9).

⁵² Kooseluseaduse kontseptsioon (see Note 10).

⁵³ In most countries foreseeing the possibility for opposite-sex couples to register their cohabitation as an alternative to marriage, this option has been rarely used, unless the status of registered cohabitees provides significant tax or other kinds of benefits.

⁵⁴ W.M. Schrama (see Note 6), p. 281.

⁵⁵ J.M. Scherpe (see Note 2), p. 283.

In Estonia, there is currently no special type of contract addressing intimate relationships other than marriage. Similarly to Germany's, Estonia's regulation of marriage may be applied to *de facto* cohabitation by analogy only if it pertains to very specific aspects of cohabitation and expresses general principles of law relevant to close personal relationships.^{*56} In most cases, using analogy is not allowed, because not every *de facto* cohabiting relationship can be seen as a broad community of rights and obligations.^{*57} Therefore, *de facto* cohabitees can determine their legal relations only by entering into contracts in accordance with the law of obligations (e.g., a contract of partnership^{*58}) or the law of succession (e.g., a contract of succession^{*59}). However, with it being rather uncommon in Estonia to conclude contracts in the context of personal relationships, most cohabiting couples normally become conscious of legal problems only after these problems emerge.

In cases of a property adjustment claim deriving from *de facto* cohabitation, it is crucial to determine which investments either party made in any property acquired by the other party during the cohabitation^{*60}, and the only kind of non-proprietary contribution that is recognised at all by some Estonian courts is the physical labour of one partner to improve the property of the other or increase its value without compensation—for example, by building or renovating a family dwelling.^{*61} The non-proprietary contributions to the welfare of the family are usually not taken into account. If a relationship breaks down, the matter of reimbursement for proprietary contributions by cohabitees can be resolved by means of the law of obligations, as a party to a relationship may, for example, claim reimbursement on grounds of unjust enrichment.^{*62} However, no special recognition, whether on the legislative level or in judicial practice, is granted to the non-proprietary contributions of the cohabitees. Injustice might appear when one of the partners' participation in working life was altered during the relationship, for purposes of caring for the home and family. This usually is seen upon the birth of a child.^{*63} Estonia's generous parental-benefit system^{*64} and recent addition of a maintenance obligation in the case of birth of a child^{*65} have reduced the possible injustice derived from *de facto* cohabitation, though caring for a child has broader financial impact, which needs to be taken into account.

Regardless of the above, even in cases of proprietary relations, the possibilities for applying the principles of a contract of partnership to cohabitants, unless they have concluded such a contract in writing, are limited, according to the judicial practice of the Supreme Court. Firstly, the Supreme Court has emphasised that, even if the cohabitants' intention to buy property (for example, a dwelling for the family) jointly is ascertained, co-ownership should be created at the moment of the purchase.^{*66} Secondly, if the cohabitants have a common goal of jointly acquiring that kind of property whose acquisition is subject to certain formal restrictions (e.g., notarial certification in the case of real estate), the contract endorsing their common goal (e.g., a contract of partnership) needs to meet the same formal requirements.^{*67} As a result, an economically vulnerable *de facto* partner who has, for example, been caring for children during the cohabitation might find him- or herself in a financially difficult situation if the relationship breaks down. Such circumstances could lead to injustice in many relationships, given the large number of children being born outside wedlock in Estonia.

^{*56} E.g., the assumption of confidentiality between cohabitees. See also *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. Band 7. 1. Halbband: Familienrecht I. 5. Aufl. Munich: Verlag C.H. Beck 2010, p. 105.

^{*57} H. Grziwotz (see Note 18), p. 22.

^{*58} *Võlaõigusseadus* ['Law of Obligations Act'], Chapter 52. – RT I 2001, 81, 487; 5.4.2013, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 1.6.2013).

^{*59} *Pärimisseadus* ['Law of Succession Act'], Chapter 4. – RT I 2008, 7, 52; 2010, 38, 231 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 1.6.2013).

^{*60} Tartu Circuit Court decision II-2-249/00, of 1.11.2000 (in Estonian).

^{*61} Tartu Circuit Court decision 2-06-8290, of 4.6.2008 (in Estonian). The Court asserted that a contract of partnership existed between the cohabitees, although the parties had not declared their intention to enter into that contract. The Court found the factual behaviour of the parties sufficient for assuming the existence of a contract of partnership, when the parties have a joint household and their behaviour reflects a common goal.

^{*62} *Võlaõigusseadus*, Chapters 30–33.

^{*63} See also P. Parkinson. Quantifying the homemaker contribution in family property law. – *Federal Law Review* 2003/1, pp. 11–14.

^{*64} *Vanemahüvitise seadus* ['Parental Benefit Act']. – RT I 2003, 82, 549; 6.12.2012, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 1.6.2013).

^{*65} *Perekonnaseadus* [Family Law Act], §§ 111–112. – RT I 2009, 60, 395; 27.6.2012, 4 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 1.6.2013).

^{*66} CCSCd 26.1.1999, 3-2-1-8-99 (in Estonian).

^{*67} CCSCd 20.12.2005, 3-2-1-142-05 (in Estonian), para. 14.

5. Conclusions

By relying on judicial practice, the views of the commentators on the Constitution, and public opinion, one can conclude that, alongside 1) children with their parents and 2) married couples, 3) opposite-sex *de facto* couples are considered family in Estonia. In light of recent developments in Estonia (such as the project for a Cohabitation Act and new, favourable views expressed by the Chancellor of Justice) and Europe and regardless of rather negative public attitudes, the author of this paper is of the opinion that 4) same-sex cohabiting couples too should be considered family. Differential treatment of same- and opposite-sex couples on grounds of the argument of reproductivity as referred to by the former Chancellor of Justice appears to be artificial, given that same-sex cohabiting couples can fulfil all of the other important functions of the family. These couples should, therefore, have an equal right to enjoy the protection of family life foreseen in §§26 and 27 (1) of the Estonian constitution. This argument is supported by the new position of the ECtHR on the notion of family, which can be seen as a reflection of a general trend in Europe with respect to the rights of same-sex couples, and is likely to shift the understanding of the notion of family in the Constitution toward a more favourable interpretation in Estonian judicial practice for these couples in the future.

The constitutional right of non-married cohabiting couples (both same- and opposite-sex) to family life has a number of legal consequences. One of the most important of these is the obligation of the governmental power to offer protection to those new forms of the family. This protection does not cover merely the obligation of the state to protect a person against arbitrary intervention in his or her family and private life; it also entitles cohabitantes to insist on enactment of appropriate regulations allowing them to enjoy genuine family life and seek justice when the relationship ends.

Even though (opposite-sex) *de facto* cohabiting couples are considered families in Estonia and covered by the protection of §27 (1) of the Constitution, their actual protection is limited. There is a need for additional safeguards for the weaker party in the relationship, if any, especially in view of the large number of children born outside married relationships in Estonia. Reimbursement for a cohabitee's financial contributions may currently be claimed on such grounds as unjust enrichment, foreseen in the Law of Obligations Act. However, the possibilities for a *de facto* partner to claim for non-proprietary contributions are very limited and the current regulatory system could create injustice when, for example, one of the partners changed his or her participation in working life during the cohabitation in order to care for a child. The law has been adapted very little to the increasing diversity of forms of the family, and enactment of appropriate legislation could reduce the possible injustice stemming from *de facto* cohabitation involving children. Until special regulation is adopted in Estonia⁶⁸, cohabitantes ought to find suitable legal instruments from other fields of law instead of family law, in order to resolve their legal disputes—mainly the law of obligations, property law, and the law of succession.

⁶⁸ According to the work schedule of the Ministry of Justice, the first version of the draft legislation on *de facto* cohabitation should be completed in December 2013. It is intended to resolve some of the problematic elements mentioned above. See the work schedule of the Ministry of Justice for 2013, task 32. Available at <http://www.just.ee/orb.aw/class=file/action=preview/id=58158/Justiitsministeeriumi+2013.+aasta+t%F6%F6plaan.pdf> (most recently accessed on 1.6.2013) (in Estonian).



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Kommissionsvorschlag zur Klärung der Vermögens- verhältnisse bei internationalen Paaren und mögliche Folgen

Einführung und aktuelle Rechtslage

Die Überwindung der Staatsgrenzen und der grenzüberschreitenden Mobilität wirkt sich unmittelbar auch auf die Erfordernisse der Ehen und Familien aus. Von den 122 Millionen Ehepaaren in der Europäischen Union sind heute schon beachtliche 16 Millionen bzw. 14 Prozent Paare, die einen internationalen Bezug aufweisen.^{*1} Aufgrund der weiter anzunehmenden verstärkten Mobilität der Unionsbürger^{*2} und der damit verbundenen zunehmenden Anzahl der binationalen Ehen steigt auch in Ehe- und Familiensachen die Notwendigkeit nach mehr Rechtssicherheit bei grenzüberschreitenden Sachverhalten. Die mangelnde Homogenität der familienrechtlichen Regelungen in den einzelnen Mitgliedstaaten stellt internationale Paare gerade bei Scheidungen vor große rechtliche Probleme. Dabei zeigen die jüngsten Statistiken, dass heute fast jede zweite Ehe in Europa geschieden wird.^{*3} Die Zahlen in Estland unterscheiden sich kaum vom EU-Durchschnitt – hier wurden im Jahr 2009 entsprechend vier Ehen pro tausend Einwohnern geschlossen und 2,38 Ehen geschieden.^{*4} Um dieser gesellschaftlichen Realität gerecht zu werden, wurden in den vergangenen Jahren in der Europäischen Union bereits verschiedene Regelungen verabschiedet, die die Scheidungsfälle mit Auslandsbezug erleichtern und mehr Transparenz schaffen sollen. Diese betreffen, wie nachfolgend dargestellt wird, die Harmonisierung der verfahrensrechtlichen Regelungen. Für eine Sachrechtsvereinheitlichung fehlt es an der Kompetenz der EU, wenngleich auch im Bereich des Sachrechts in den vergangenen Jahren verschiedene Überlegungen, wie z.B. durch einen Wahlgüterstand oder Sachrechtsannäherung, erfolgt sind. Die gemeinschaftsrechtlichen Bestimmungen für das Verfahrens- und Vollstreckungsrecht in Familiensachen sowie die Anerkennung von familienrechtlichen Entscheidungen

¹ Mitteilung der Europäischen Kommission an das Europäische Parlament, den Rat, den europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen – Klärung der Vermögensverhältnisse bei internationalen Paaren KOM (2011) 125 vom 16.03.2011, S. 2, abrufbar unter: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0125:FIN:DE:PDF> (24.05.2013).

² Nach Angaben des Bürgerregister Estlands („Rahvastikuregister“) leben auch geschätzt bis zu ca. 200 000 Esten außerhalb Estlands (02.02.2012).

³ Die Angaben von Eurostat sind abrufbar unter: http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Marriage_and_divorce_statistics/de (27.09.2012).

⁴ Die Statistik ist zugänglich über die Homepage <http://www.stat.ee/34272?highlight=abielud,lahutused> (24.05.2013) (auf Estnisch).

richten sich heute insbesondere nach der Brüssel IIa – Verordnung⁵ (sog. EheVO). Diese steht jedoch in berechtigter Kritik, denn gemäß Art. 3 ff. können die angebotenen, alternativen und gleichwertigen Zuständigkeiten in ein und demselben Scheidungsfall in Zuständigkeit der Gerichte verschiedener Mitgliedstaaten fallen und demnach auch von den Parteien zugleich angerufen werden. Die Folge kann der Eintritt „doppelter Rechtshängigkeit“ sein bzw. ein „Wettlauf der Gerichte“, bei dem ein Ehegatte alles daran setzt, die Scheidung zuerst einzureichen, um sicherzugehen, dass sich das Verfahren nach einer Rechtsordnung richtet, die seine Interessen am besten schützt. Die Brüssel IIa – Verordnung regelt kein internationales Privatrecht und kein Sachrecht. Um mehr Rechtssicherheit im Zusammenhang der Familiensachen zu schaffen, wurde auf Initiative einiger Mitgliedstaaten⁶ auf der Rechtsgrundlage der „Verstärkten Zusammenarbeit“ gem. Art. 326 ff. des Vertrages über die Arbeitsweise der Europäischen Union⁷ (AEUV) die Verordnung (EU) Nr. 1259/2010 zur Durchführung einer verstärkten Zusammenarbeit im Bereich der auf die Ehescheidung und Trennung ohne Auflösung des Ehebandes anzuwendenden Rechts, die sog. Rom III-Verordnung, erlassen.⁸ Im Verhältnis zu EheVO ist diese Verordnung ein eigenständiger Rechtsakt, der das Ziel verfolgt, den Ehegatten die Möglichkeit zu geben, das auf ihr Scheidungsverfahren anzuwendende Recht zu wählen. Die Verordnung ersetzt somit die nationalen Kollisionsnormen des internationalen Privatrechts der teilnehmenden Staaten.⁹ Die verbindlichen Anknüpfungspunkte bei mangelnder Rechtswahl werden für die Betroffenen – nicht nur für die binationalen Ehen, sondern auch für Eheleute, die die gleiche Staatsangehörigkeit haben, sich jedoch im Ausland aufhalten – nach dem Willen des Gesetzgebers mehr Rechtssicherheit und Vorausschaubarkeit bieten. Denn wo bis jetzt das nationale internationale Privatrecht gilt, erfolgt nun die Entscheidung nach den Regelungen der Rom III-Verordnung. Nach der gegenwärtigen Rechtslage fehlt in Estland für die internationalen Paare die Möglichkeit, das auf ihr Scheidungsverfahren anzuwendende Recht zu wählen. Die Anknüpfungspunkte des anwendbaren Rechts auf das Scheidungsverfahren werden in §§ 60, 57 IPR-Gesetz (*rahvusvahelise eraõiguse seadus*) geregelt.¹⁰

Keine Rechtssicherheit für ehgüterrechtliche Fälle

Für die güterrechtlichen Rechtsbeziehungen der Eheleute und den sonstigen finanziellen Ausgleich zwischen ihnen ergeben sich aus den oben dargelegten Verordnungen jedoch keine unmittelbaren Folgen. Ein klarer und einheitlicher Rahmen für die Bestimmungen des zuständigen Gerichts und des anzuwendenden Rechts bei den güterrechtlichen Angelegenheiten fehlt bis heute. In der Regel entscheiden die Mitgliedstaaten hier auf der Basis ihres autonomen Rechts sowie ggf. nach Abkommen einzelner Mitgliedstaaten, welches Recht in güterrechtlichen Sachverhalten mit Auslandsbezug anwendbar ist. In Estland können die Eheleute das anzuwendende Recht bei güterrechtlichen Angelegenheiten gem. § 58 IPR-Gesetz entweder nach dem Aufenthaltsort oder dem Recht des Staates, dessen Staatsangehörigkeit einer der Ehegatten zum Zeitpunkt der Rechtswahl besitzt, wählen. In Ermangelung einer Rechtswahl gilt das zum Zeitpunkt der Eheschließung für die allgemeinen Ehwirkungen geltende Recht, § 57 IPR-Gesetz. Ferner hat

⁵ Verordnung (EG) 2201/2003 des Rates vom 27. November 2003 über die Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Ehesachen und in Verfahren betreffend die elterliche Verantwortung und zur Aufhebung der Verordnung (EG) Nr. 1347/2000 (Abl. L 338 vom 23.12.2003), abrufbar unter: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:DE:PDF> (24.05.2013).

⁶ Bulgarien, Frankreich, Griechenland, Italien, Luxemburg, Österreich, Rumänien, Slowenien, Spanien und Ungarn.

⁷ Konsolidierte Fassung des Vertrags über die Arbeitsweise der Europäischen Union (Abl. C 115/189 vom 9.05.2008) abrufbar unter: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:de:PDF> (24.05.2013).

⁸ Verordnung (EU) 1259/2010 vom 20. Dezember 2010 zur Durchführung einer Verstärkten Zusammenarbeit im Bereich des auf die Ehescheidung und Trennung ohne Auflösung des Ehebandes anzuwendenden Rechts (Abl. L 343 vom 29.12.2010), abrufbar unter: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:343:0010:0016:DE:PDF> (24.05.2013).

⁹ Estland gehörte zwar nicht zu den Ursprungsstaaten, die die Verordnung vorangetrieben haben, sieht es jedoch in der Prioritätenliste zum Arbeitsprogramm der EU vor, der Rom III – Verordnung beizutreten. Es herrschte ursprünglich die Meinung, dass eine verstärkte Zusammenarbeit im Bereich des Zivilrechts eine weitere Rechtszersplitterung mit sich bringt und die Arbeit der Gerichte schwieriger gestaltet. Doch nunmehr folgt man der Ansicht, dass hierdurch eine einheitliche Gestaltung des Zivilrechts und dadurch die Verstärkung des Binnenmarkts erreicht werden könnte. So die Agenda der Politik der Europäischen Union der Republik Estland für 2011–2015 (Eesti EL-i poliitika raamseisukohad), abrufbar unter: http://valitsus.ee/UserFiles/valitsus/et/riigikantselei/euroopa/Eesti%20EL%20poliitika_EST.pdf (24.05.2013) (auf Estnisch).

¹⁰ *Rahvusvahelise eraõiguse seadus*. – RT I 2002, 35, 217 (auf Estnisch). Englische Übersetzung zugänglich über die Homepage: www.legaltext.ee (24.05.2013).

Estland mit den baltischen Staaten, Polen, Russland und der Ukraine ein Abkommen über Rechtshilfe und Rechtsverhältnisse, u.a. betreffend die Regelung des ehelichen Güterstandes abgeschlossen.^{*11} In anderen Mitgliedstaaten werden die ehgüterrechtlichen Angelegenheiten anhand anderer Kriterien entschieden. Beispielsweise^{*12} wird im griechischen Recht nach dem Anknüpfungskriterium des gemeinsamen gewöhnlichen Aufenthalts der Eheleute zum Zeitpunkt der Eheschließung entschieden. Nach der ungarischen Kollisionsnorm ist hingegen das ungarische Recht bei der gemeinsamen gewöhnlichen Aufenthalt der Eheleute zum Zeitpunkt der Scheidung maßgebend. Die unterschiedlichen Anknüpfungen haben weitergehende Folgen und führen zu einem unterschiedlichen Güterstand. Zumindest für gut beratene Parteien mit größeren Vermögensmassen wird hierdurch das Tor eröffnet, bei einer Streitigkeit schnell das für sie „günstigere“ Gericht aufzusuchen, um durch die Wahl des Gerichts auf die Anwendung des maßgeblichen Güterrechts und so auf Verwaltung und Teilung des gemeinsamen Vermögens Einfluss nehmen zu können.

Bereits vor zwei Jahren, im März 2011, hat die Europäische Kommission Verordnungsvorschläge zum Ehegüterrecht^{*13} (EhegüterR-VO) sowie zum Güterrecht von eingetragenen Partnerschaften^{*14} (PartgüterR-VO) vorgelegt. Im Folgenden wird geprüft, welche Fälle von dem Anwendungsbereich des Verordnungsentwurfs umfasst werden und ob eine neue europäische Regelung zum Ehegüterrecht mehr Rechtsklarheit und mehr Rechtssicherheit, insbesondere für Bestimmungen des zuständigen Gerichts und des anzuwendenden Ehegüterrechts bei einem Scheidungsfall, verschafft. Insbesondere wird dargestellt, welche Rechtsfolgen mit der angedachten Verordnung in Estland einhergehen werden.^{*15}

Anwendungsbereich der Verordnung

Gemäß Art. 1 Abs. 1 EhegüterR-VO findet die Verordnung auf die ehelichen Güterstände Anwendung. Nach der Begründung des Verordnungsentwurfs ist der Begriff des Ehegüterrechts bzw. der ehelichen Güterstände autonom auszulegen. Er umfasst sowohl die Aspekte, die mit der Verwaltung des Vermögens der Eheleute im Alltag zusammenhängen, als auch die Aspekte, die bei der güterrechtlichen Auseinandersetzung infolge der Trennung des Paares oder des Todes eines Ehegatten zum Tragen kommen.^{*16} In Art. 2 lit. a der Verordnung erfolgt die Begriffsbestimmung, wonach der Ausdruck „ehelicher Güterstand“ sämtliche vermögensrechtliche Regelungen, die im Verhältnis der Ehegatten untereinander sowie zwischen ihnen und Dritten gelten, umfasst. Eine eigene Bestimmung, die den Geltungsbereich näher eingrenzt, so wie es in anderen europäischen Verordnungen^{*17} zu finden ist, beinhaltet der Verordnungsentwurf nicht. Aus dem Entwurf ergibt sich daher nicht eindeutig, was alles als vermögensrechtlich anzusehen ist. Angesichts des unterschiedlichen Ausmaßes güterstandrechtlicher Regelungen in den autonomen Sachrechten bietet diese Formulierung somit keine klare Abgrenzung. Der Umfang des sachlichen Anwendungsbereichs beschäftigte bereits das Grünbuch Güterrecht.^{*18} Es stellte sich seinerseits die Frage, ob sich ein Gemeinschaftsinstrument auf die güterrechtlichen Fragen im Zusammenhang mit der Beendigung der Ehe beschränken soll oder ob das Gemeinschaftsinstrument das anwendbare Recht für güterrechtliche Fragen, die sich

¹¹ Ein Überblick über die bilateralen Abkommen der Republik Estland ist abrufbar unter: <http://www.kohus.ee/3582> (24.05.2013) (auf Estnisch).

¹² So in KOM (2011) 125 (Fn. 1).

¹³ Vorschlag für eine Verordnung des Rates über die Zuständigkeit, das anzuwendende Recht, die Anerkennung und die Vollstreckung von Entscheidungen im Bereich des Ehegüterrechts KOM (2011) 126 vom 16.3.2011 (nachfolgend EhegüterR-VO) abrufbar unter: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:DE:PDF> (24.05.2013).

¹⁴ Vorschlag für eine Verordnung des Rates über die Zuständigkeit, das anzuwendende Recht, die Anerkennung und die Vollstreckung von Entscheidungen im Bereich des Güterrechts eingetragener Partnerschaften KOM (2011) 127 vom 16.03.2011 (nachfolgend PartGüterR-VO), abrufbar unter: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0127:FIN:DE:PDF> (24.05.2013). Ein weiterer Vorschlag zum Güterrecht war aus Sicht der Kommission erforderlich, weil das Institut der eingetragenen Partnerschaft zwar mittlerweile in vierzehn Mitgliedstaaten etabliert ist, aber mit den Fragen des ehelichen Güterrechts nicht deckungsgleich zu behandeln ist.

¹⁵ Sofern einzelne Rechtsinstitute des Familienrechts betrachtet werden, wird dies vergleichend zu dem deutschen Recht vorgenommen. Das deutsche Familienrecht ist ein wesentliches Vorbild für das estnische Familienrecht.

¹⁶ KOM (2011) 126 (Fn. 13), S. 6.

¹⁷ vgl. Art. 12 der Rom I-VO oder Art. 15 der Rom II-VO zum Geltungsbereich des anzuwendenden Rechts.

¹⁸ Grünbuch zu den Kollisionsnormen im Güterrecht unter besonderer Berücksichtigung der gerichtlichen Zuständigkeit und der gegenseitigen Anerkennung, abrufbar unter: http://eur-lex.europa.eu/LexUriServ/site/de/com/2006/com2006_0400de01.pdf.

im Laufe der Ehe ergeben, mit regeln soll. Vornehmlich dem Argument folgend, dass durch einen weiten Ansatz eine starke Rechtszersplitterung vermieden wird, ergab die Konsultation, dass nicht nur die Beendigung des Güterstandes, sondern auch das Güterrecht während der Ehe erfasst werden soll.^{*19} Von dem Anwendungsbereich abgedeckt sind demzufolge sowohl die Geltung eines bestimmten gesetzlichen oder vereinbarten Güterstandes, das Bestehen und die Verwaltung von Vermögensmassen sowie Ausgleichsansprüche unter den Ehegatten. Die Vermögensverhältnisse gegenüber Dritten umfassen die Haftung der Ehegatten und etwa bestehende Verfügungsbeschränkungen.^{*20}

Ferner stellt sich bei dem sachlichen Anwendungsbereich die Frage, ob hierbei nur die vermögensrechtlichen Aspekte betreffend den Güterstand oder auch die vermögensrechtlichen Ehefolgen, die im Recht der allgemeinen Ehewirkungen geregelt sind, mit umfasst werden. In Art. 1 Abs. 3 lit a der PartGüterR-VO werden z.B. die personenbezogenen Wirkungen der eingetragenen Partnerschaft vom Anwendungsbereich ausgenommen. In dem Vorschlag zur EhegüterR-VO findet sich zu den personenbezogenen Wirkungen keine Erklärung, inwieweit der Bereich der Ehewirkungen ausgeschlossen bzw. mit umfasst sei. Dabei ist das Problem bereits im Grünbuch Güterrecht erkannt worden. Die Mehrheit der Stellungnahmen favorisierte einen engen Anwendungsbereich, also den Güterstand im eigentlichen Sinne und lehnte es ab, die personenbezogenen Aspekte von dem Rechtsinstrument mit zu umfassen.^{*21} Die Tatsache, dass der Verordnungsvorschlag nun weit gefasst ist, muss eher als Diskussionsgrundlage und nicht als eine klare Aussage gesehen werden. Letztendlich ist zu berücksichtigen, dass der Bereich der Ehewirkungen sehr heterogene Fragen betrifft. Dies könnte nur durch ganz unterschiedliche Kollisionsnormen zufriedenstellend gelöst werden.^{*22}

Das estnische Familienrecht versteht unter ehегüterrechtlichen Fragen typische güterrechtliche Fragen im traditionellen Verständnis, also die Beurteilung der Vermögensverhältnisse der Eheleute nach dem Ehegüterrecht.^{*23} Auch wenn in anderen Rechtsordnungen die personenbezogenen Aspekte des Güterrechts vermögensrechtliche Bezüge haben können^{*24}, muss die von allen betroffenen Staaten getragene Lösung nach dem Prinzip des kleinsten gemeinsamen Nenners gefunden werden. Somit ist an dieser Stelle – bei dem zentralen Begriff der Verordnung – eine Klarstellung erforderlich.

Im Zusammenhang des Anwendungsbereichs ist ferner zu beachten, dass das eheliche Güterrecht auf einer Ehe beruht. Das frühere, gegenwärtige und zukünftige Bestehen einer Ehe muss Voraussetzung der vermögensrechtlichen Beziehungen sein.^{*25} Also bedarf es für die vorliegende Anwendung einer wirksamen Ehe. Eine Definition zum Begriff der „Ehe“ wird in der Verordnung nicht vorgenommen. Das Verständnis des Ehebegriffs obliegt nach dem Entwurf den Mitgliedstaaten.^{*26} Einige mitgliedstaatliche Rechte kennen lediglich die Ehe von Mann und Frau. So kann auch in Estland laut § 1 Familiengesetzbuch^{*27} (FamGB) eine Ehe zwischen einem Mann und einer Frau geschlossen werden. Andere Rechtsordnungen erlauben dagegen eine Ehe zwischen Mann und Frau, eine registrierte gleichgeschlechtliche Partnerschaft oder gar eine gleichgeschlechtliche Ehe.^{*28} In der Mitteilung der Kommission heißt es, dass Ehe und Partnerschaft je nach Mitgliedstaat sowohl hetero- als auch homosexuellen Paaren offen stehen kann, daher sind die vorgelegten Verordnungen geschlechtsneutral formuliert.^{*29} Die Bezeichnung „ehelich“ in dem Verordnungsvorschlag bedeutet mithin eine verschieden- oder gleichgeschlechtliche Ehe. Das

¹⁹ R. Wagner. Konturen eines Gemeinschaftsinstruments zum internationalen Güterrecht unter Berücksichtigung des Grünbuchs der Europäischen Kommission. – FamRZ 2009, S. 277.

²⁰ D. Martiny. Die Kommissionsvorschläge für das internationale Güterrecht. – IPRax 2011, S. 444.

²¹ R. Wagner (Fn. 19), S. 278.

²² D. Martiny (Fn. 20), S. 444; P. Finger. Güterrechtliche Rechtsbeziehungen mit Auslandsbezug. – FuR 2013, S. 13.

²³ Perekonaseaduse eelnõu seletuskiri 55 SE 28.5.2007 [‘Erläuterungen zu dem Entwurf des Familiengesetzes’], S. 9. Zugänglich über die Homepage <http://www.riigikogu.ee> (22.02.2010) (auf Estnisch).

²⁴ D. Martiny (Fn. 20), S. 444; Ch. Kohler, W. Pintens. Entwicklungen im europäischen Personen- und Familienrecht 2010–2011. – FamRZ 2011, S. 1435.

²⁵ W. Thieler. – J. von Staudinger. Kommentar zum BGB. Buch 4. Berlin: Sellier – de Gruyter 2007. Einl. zu § 1363 Rnd.1.

²⁶ Erwägungsgrund 10 in KOM (2011) 126 (Fn. 13), S. 13.

²⁷ Perekonaseadus. – RT I 2009, 60, 395; RT I, 27.06.2012, 12 (auf Estnisch). Englische Übersetzung zugänglich über die Homepage: www.legaltext.ee (24.05.2013). Im vergangenen Jahr wurde in Estland ein Konzept zu einem Entwurf des Gesetzes der Lebensgemeinschaft (kooseluseadus (KooS)) vorgelegt. Dieses sieht die Möglichkeit der Regelung der Lebensgemeinschaft für Personen gleichen und verschiedenen Geschlechts vor. Das Konzept ist abrufbar unter: <http://www.just.ee/orb.aw/class=file/action=preview/id=57140/Kooseluseaduse+kontseptsioon.pdf> (24.05.2013) (auf Estnisch).

²⁸ D. Martiny (Fn. 20), S. 439 zu unterschiedlichen nationalen Regelungen der Paarbeziehungen.

²⁹ KOM (2011) 125 (Fn. 1), S. 6.

Verständnis des Ehebegriffs obliegt wie oben gesagt jedoch den Mitgliedstaaten. Daher ist fraglich, wie nach dem nationalen Recht, welchem die gleichgeschlechtliche Ehe unbekannt ist, zu verfahren ist. Der Ansicht, wonach die kollisionsrechtliche Gleichstellung der heterosexuellen und gleichgeschlechtlichen Ehe die Konsequenz hat, d.h. dass nationales Recht, das an sich nur für heterosexuelle Ehen konzipiert ist, auch auf die gleichgeschlechtlichen Ehen anzuwenden ist³⁰, kann nicht gefolgt werden. Es ist vielmehr das nationale Verständnis zu berücksichtigen. So wird beispielsweise auch in der Rom III – Verordnung festgelegt, dass das nationale Gericht nicht verpflichtet werden kann, eine Ehescheidung vorzunehmen, wenn es die Ehe nicht als gültig ansieht.³¹ Daher kann es auch bei den güterrechtlichen Angelegenheiten nur als folgerichtig gelten, dass es auch hierbei die mitgliedstaatliche Entscheidung ist, ob das angerufene Gericht über die vorgelegten güterrechtlichen Streitigkeiten zu befinden hat, die nach dem nationalen Recht nicht auf einem anerkannten Ehebegriff beruhen. Da eine Eheschließung gleichgeschlechtlicher Paare nach estnischem Recht nicht zulässig ist, werden die gleichgeschlechtlichen Ehen von den estnischen Behörden nicht anerkannt. Dies hat zur Folge, dass die vermögensrechtlichen Auseinandersetzungen solcher Ehen in der derzeitigen Rechtslage nicht unter den Anwendungsbereich des Verordnungsentwurfs fallen.

Die Verordnung erstreckt sich somit auf die oben dargelegten ehelichen Güterstände, sofern sie nicht gem. Art. 1 Abs. 3 c) und e) Ehegüter-VO vom Anwendungsbereich ausgeschlossen sind. An dieser Stelle sieht der Vorschlag eine Abgrenzung des Anwendungsbereichs zu den anderen Rechtgebieten vor. Ausgenommen von dem Anwendungsbereich der Verordnung sind ausdrücklich die Steuer- und Zollsachen sowie verwaltungsrechtliche Angelegenheiten. Ferner findet die Verordnung keine Anwendung auf die Rechts-, Geschäfts- und Handlungsfähigkeit der Ehegatten und die Unterhaltspflichten, die in das Anwendungsgebiet der Unterhaltsverordnung (EG) Nr. 4/2009³² fallen, sowie auf Nachlassansprüche des überlebenden Ehegatten, die unter die neue Erbrechtsverordnung³³ fallen werden. Ebenso ausgeschlossen sind Ehegattengesellschaften sowie die Art der dinglichen Rechte an einem Gegenstand und die Publizität dieser Rechte, Art. 1 Abs. 3 Nr. f der Verordnung. Letztlich sollen auch die unentgeltlichen Zuwendungen zwischen den Ehegatten, die von der Verordnung (EG) Nr. 593/2008 des Europäischen Parlaments und des Rates über das auf vertragliche Schuldverhältnisse anzuwendende Recht, sog. Rom I-Verordnung³⁴, erfasst werden, von dem Anwendungsbereich ausgeschlossen sein. Dies gilt auch für gemischte Schenkungen, teilentgeltliche Übertragungen und ehebedingte Zuwendungen.

Zuständigkeit des Gerichts

Der Vorschlag bietet den Eheleuten die Möglichkeit, die Wahl des zuständigen Gerichts in güterrechtlichen Angelegenheiten vorzunehmen und somit die verschiedenen und miteinander zusammenhängenden Verfahren vor den Gerichten desselben Mitgliedstaates im Verbund zu verhandeln.³⁵ Die Parteien können vereinbaren, dass das Gericht eines Mitgliedstaates, das mit einem Antrag auf Ehescheidung, Trennung ohne Auflösung des Ehebandes oder Ungültigerklärung der Ehe nach der Verordnung Nr. 2201/2003 befasst ist, auch für güterrechtliche Fragen in Verbindung mit dem Antrag zuständig ist (Art. 4 der VO).

Zur Einhaltung der formellen Anforderungen ist zu unterscheiden, ob die Vereinbarung bis zur Anrufung des Gerichts geschlossen wurde oder ob die Vereinbarung erst während des Verfahrens erfolgt. Sofern die Vereinbarung vor dem Verfahren geschlossen wird, bedarf sie der Schriftform, der Datierung und der Unterzeichnung beider Parteien, Art. 4 der Verordnung. Das Schriftformerfordernis zusammen mit der Unterschrift gewährleistet, dass die Vereinbarung tatsächlich Gegenstand einer Einigung zwischen den

³⁰ U. P. Gruber. Scheidung auf Europäisch – die Rom III-Verordnung. – IPRax 2012, S. 382.

³¹ Erwägungsgrund 26 in VO (EU) 1259/2010 des Rates zur Durchführung einer verstärkten Zusammenarbeit im Bereich des auf die Ehescheidung und Trennung ohne Auflösung des Ehebandes anzuwendenden Rechts <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:343:0010:0016:DE:PDF>.

³² Verordnung (EG) 4/2009 des Rates vom 18.12.2008 (Abl. L 7/1 vom 10.1.2009) abrufbar unter: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:007:0001:0079:DE:PDF> (24.05.2013).

³³ Verordnung (EU) Nr. 650/2012 (Abl. L 201 vom 27.07.2012) abrufbar unter: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0107:0134:DE:PDF> (24.05.2013).

³⁴ VO (EG) Nr. 593/2008 vom 17.06.2008 (Abl. L 177/6 vom 4.07.2008) abrufbar unter: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:DE:PDF> (24.05.2013).

³⁵ Eine solche Annexzuständigkeit ermöglicht auch bereits die EG-UnterhaltsVO, hierzu T. Rauscher. Gerichtstandsvereinbarungen in Unterhaltssachen mit Auslandsberührung. – FamFR 2013, S. 25 ff.

Parteien geworden ist.^{*36} Zudem macht sie die Willenseinigung der Parteien bezüglich des Gerichtstandes erkennbar und schließt stillschweigende und konkludente Vereinbarungen aus.^{*37} Nach dem Verordnungsentwurf soll eine rügelose Einlassung zur Hauptsache allerdings ebenso ausreichend sein, wonach die Zuständigkeit des angerufenen Gerichts, ohne dass ein rechtsgeschäftlicher Wille zur Unterwerfung unter dessen Entscheidungsgewalt vorliegen müsste, begründet wird. Eine solche Möglichkeit entspricht nicht dem Verordnungsziel, einen weniger gut beratenen Ehepartner vor unbewusster stillschweigender Zustimmung zu einem für ihn ungünstigen und damit ungewollten Gerichtsstand zu schützen. Daher erscheint auch eine ausdrückliche Belehrung über die rügelose Einlassung und ihre Rechtsfolgen sinnvoll.

Für den Fall, dass die Eheleute keine Vereinbarung geschlossen haben, bestimmt sich die Gerichtszuständigkeit nach Art. 5 Abs. 1 der Verordnung. Diese entspricht den Zuständigkeitsvoraussetzungen der Brüssel IIa-VO. Allerdings handelt es sich hierbei um eine bindende Reihenfolge und nicht um alternative Anknüpfungspunkte. In erster Linie soll hier an den gewöhnlichen Aufenthalt geknüpft werden.^{*38} Die Zuständigkeit der Gerichte richtet sich somit an den gewöhnlichen Aufenthalt der Ehegatten, an den letzten gewöhnlichen Aufenthalt der Ehegatten, sofern einer von ihnen dort noch seinen gewöhnlichen Aufenthalt hat,^{*39} an den gewöhnlichen Aufenthalt des Antragsgegners, an die gemeinsame Staatsangehörigkeit oder im Fall des Vereinigten Königreichs und Irlands, in dem sie ihr gemeinsames „domicile“ haben. Der Begriff des „gewöhnlichen Aufenthalts“ wird im familienrechtlichen Kontext vielfach wie in der Brüssel IIa-VO, Rom III-VO und Unterhaltsverordnung (EG-UntVO) gebraucht. Das Tatbestandsmerkmal des „gewöhnlichen Aufenthalts“ wird in dem Verordnungsentwurf nicht definiert, es ist einheitlich-autonom auszulegen. Nach der Rechtsprechung des EuGH ist der gewöhnliche Aufenthalt an dem tatsächlichen Lebensmittelpunkt einer Person zu bestimmen. Dieser setzt eine physische Präsenz in einem bestimmten Staat voraus, doch führt nicht jeder (vorübergehende) Aufenthaltswechsel zum Verlust eines gewöhnlichen Aufenthalts. Der Aufenthalt muss objektiv von gewisser Dauer und subjektiv auf gewisse Dauer angelegt sein.^{*40} Die Beurteilung des gewöhnlichen Aufenthaltes hat folglich durch eine sorgfältige Abwägung alle Umstände des Einzelfalles zu erfolgen. Dabei dürfen an die Feststellung des gewöhnlichen Aufenthalts keine geringen Anforderungen gestellt werden.^{*41}

Ferner können die Parteien vereinbaren, dass die Gerichte des Mitgliedstaates, dessen Recht sie nach Art. 16 und Art 18 der Verordnung als auf ihren ehelichen Güterstand anwendbares gewählt haben, für ihren Güterstand betreffende Fragen zuständig ist, Art. 5 Abs. 2 der Verordnung. Richtet sich die Zuständigkeit des Gerichts mangels Rechtswahl nach Art. 5 Abs. 1 der Verordnung, ist zu beachten, dass das zuständige Gericht ggf. das Recht eines anderen Landes anwenden soll, wenn die Ehegatten kein auf ihren ehelichen Güterstand anwendbares Recht gewählt haben. Denn die Anknüpfungspunkte der Zuständigkeit nach Art. 5 der Verordnung und des anwendbaren Rechts nach Art. 17 der VO sind nicht identisch. Während Art. 5 Abs. 1 der Verordnung auf den gewöhnlichen Aufenthalt der Ehegatten abstellt, spricht Art. 17 der Verordnung vom Recht des Staates, in dem die Ehegatten ihren ersten gemeinsamen gewöhnlichen Aufenthalt nach der Eheschließung haben. In der Praxis würde dies bedeuten, dass bei der Scheidung eines estnischen Paares, das aus beruflichen Gründen bei Eheschließung seinen gemeinsamen Aufenthalt im Ausland hatte, das Recht des Landes einschlägig wäre, welches die beiden Eheleute bewohnten, auch wenn das Paar später wieder nach Estland zieht, es sei denn, es wurde eine entsprechende Rechtswahlvereinbarung getroffen. Es bleibt jedoch fraglich, wie viele Eheleute eine solche Vereinbarung schließen und sich der Rechtsfolgen bewusst sind. Gerade in Zeiten, in denen die Mobilität der EU-Bürger aus verschiedenen Gründen stetig steigt, erscheint es nicht nachvollziehbar, den Ort der Eheschließung als ein Anknüpfungskriterium zu bestimmen.

³⁶ J. Kropholler, J. von Hein. Europäisches Zivilprozessrecht. 9. Aufl. Frankfurt am Main: Verlag Recht und Wirtschaft GmbH, Art. 23 EuGVO Rnd. 25.

³⁷ D. Henrich. Internationales Scheidungsrecht – einschließlich Scheidungsfolgen. 3. Aufl. Bielefeld: Kiesecking Verlag 2012, Rnd. 80.

³⁸ Die primäre Anknüpfung an den gewöhnlichen Aufenthalt setzt den Trend von der Abkehr des Staatsangehörigkeits- hin zum Aufenthaltsprinzip fort. Ausführungen hierzu u.a. in R. Wagner (Fn. 19), S. 279. D. Henrich (Fn. 37), Rnd. 84.

³⁹ vgl. in der Rom III – Verordnung darf der Umzug des anderen Ehegatten nicht länger als ein Jahr vor Anrufung des Gerichts zurückliegen.

⁴⁰ T. Helms. Reform des internationalen Scheidungsrechts durch die Rom III-Verordnung. – FamRZ 2011, S. 1765 mit Verweis auf die Schlussanträge der Generalanwältin Kokott in der Rs. C-523/07 v. 29.01.2009 sowie auf die Entscheidungen des EuGH v. 2.04.2009 – Rs. C-523/07, EuGH v. 22.10.2010 – Rs. C-497/10.

⁴¹ M. Völker. H. Prütting/ P. Gehrlein. Kommentar ZPO. 4. Aufl. Köln: Luchterhand Verlag 2012, Art. 3 EheGVO Rnd. 5 ff.; U. Spellenberg, J. von Staudinger Kommentar zum BGB. EGBGB/IPR. Berlin: Sellier – de Gruyter 2005, Art. 3 EheGVO Rnd. 38 ff.

Anwendbares Recht

Die Verordnung sieht neben der Vereinbarung der Gerichtszuständigkeit also auch vor, dass die Eheleute oder die künftigen Eheleute das auf ihren ehelichen Güterstand anzuwendende Recht wählen können, Art. 16 der Verordnung. Maßgeblicher Zeitpunkt für die Rechtswahl ist der Zeitpunkt der Eheschließung. Dies soll gewährleisten, dass beide Eheleute wissen, welche Ansprüche sie haben bzw. welchen Forderungen sie ausgesetzt sind. In den meisten Mitgliedstaaten wird der eheliche Güterstand jedoch von der Mehrheit der Ehepaare nicht ausdrücklich gewählt, weshalb sich die Kommission verpflichtet sieht, eine Rangfolge der Anknüpfungspunkte aufzustellen, die für die Ehegatten sowie für Dritte eine gewisse Berechenbarkeit gewährleisten sollen und womit verhindert werden soll, dass ein Recht gewählt wird, das mit der realen Lebenssituation des Ehepaares und ihrer Lebensplanung nicht im Einklang steht.⁴² Den Ehegatten oder den künftigen Ehegatten steht hier gem. Art. 16 der Verordnung das Recht des Staates zur Wahl, in dem sie ihren gemeinsamen gewöhnlichen Aufenthalt haben bzw. in dem einer von ihnen seinen gewöhnlichen Aufenthalt hat sowie schließlich, dessen Staatsangehörigkeit einer von ihnen zum Zeitpunkt der Rechtswahl besitzt. Die Eheleute können durch die Rechtswahl während der Ehe ihren Güterstand jederzeit einem anderen Recht unterwerfen. Sie haben dann die Möglichkeit, zwischen dem Recht des Staates, in dem einer der Ehegatten zum Zeitpunkt der Rechtswahl seinen gewöhnlichen Aufenthalt hat, oder dem Recht eines Staates, dessen Staatsangehörigkeit einer der Ehegatten zum Zeitpunkt der Rechtswahl besitzt, zu wählen, Art. 18 Abs. 1 der Verordnung. Der nachträgliche Wechsel der Rechtswahl soll ex-nunc gelten, es sei denn, die Ehegatten verleihen der Rechtswahl ausdrücklich rückwirkende Kraft, Art. 18 Abs. 2 der Verordnung. Die Autonomie der Parteien beeinträchtigt aber nicht die Gültigkeit früherer Rechtshandlungen sowie die Rechte Dritter, die sich aus dem früheren Güterrechtsstatut ergeben, Art. 18 Abs. 3 der Verordnung.

Die Form der Absprachen der Ehegatten zur Wahl ihres Güterrechts unterscheidet sich von der Wahl gerichtlicher Zuständigkeiten. Art. 19 Abs. 1 der Verordnung besagt, dass die Rechtswahl in der Form erfolgt, die für den Ehevertrag entweder nach dem anzuwendenden Recht des gewählten Staates oder nach dem Recht des Staates, in dem die Rechtswahlvereinbarung aufgesetzt⁴³ wurde, vorgeschrieben ist. Ungeachtet des anzuwendenden Rechts muss die Rechtswahl ausdrücklich erfolgen und sie bedarf der Schriftform, der Datierung und ist von den Ehegatten zu unterzeichnen. Legt dagegen ein Mitgliedstaat strengere Anforderungen, beispielsweise eine notarielle Beurkundung eines Ehevertrages, bzw. zusätzliche Formvorschriften fest, sind diese bei den Formerfordernissen maßgeblich. In Estland würde die Rechtswahl der notariellen Beglaubigung unterliegen, denn die Eheleute müssen den Ehevertrag vor einem Notar abschließen, § 60 FamG.

Haben die Ehegatten keine Rechtswahl getroffen, unterliegt der Ehegüterstand den Anknüpfungen des Art. 17 der Verordnung. An erster Stelle kommt demnach das Recht des Staates zur Anwendung, in dem die Ehegatten nach der Eheschließung ihren ersten gemeinsamen gewöhnlichen Aufenthalt haben. Es ändert sich nicht beim Wechsel des gewöhnlichen Aufenthaltes. Andernfalls kommt das Recht des Staates zur Anwendung, dessen Staatsangehörigkeit beide Ehegatten zum Zeitpunkt der Eheschließung besitzen (diese Anknüpfung entfällt, wenn die Ehegatten mehr als eine gemeinsame Staatsangehörigkeit besitzen) oder andernfalls mit dem die Ehegatten unter Berücksichtigung aller Umstände, insbesondere des Orts der Eheschließung, gemeinsam am engsten verbunden sind.

Der Verordnungsvorschlag geht vom Grundsatz der Einheit des anzuwendenden Rechts aus. In der vorliegenden Regelung wurde gezielt gegen eine Rechtsspaltung entschieden, d.h. das gesamte Vermögen – bewegliches und unbewegliches Vermögen – der Ehegatten unterliegt nach Art. 15 der Verordnung ein und demselben Recht, und zwar dem Recht, das für den betreffenden ehelichen Güterstand gemäß den Art. 16, 17 und 18 der Verordnung gilt. Die Verordnung erkennt dabei die Problematik des anzuwendenden Rechts bei dem unbeweglichen Vermögen der Ehegatten, welches eine Sonderstellung innehat. Die Kommission spricht sich in ihrem Vorschlag jedoch dagegen aus, die Immobilien dem Recht des Belegenheitsstaats zu unterwerfen (*lex rei sitae*), so wie es im Haager Ehegüterrechtsübereinkommen vom 14. März 1978⁴⁴ vorgesehen ist und auch im estnischen Recht gilt, § 18 IPR-Gesetz. Aus Sicht der Kommission würde die Wahl

⁴² KOM (2011) 126 (Fn. 13), S. 8.

⁴³ Zum Begriff „aufsetzen“ s. P. Finger, Güterrechtliche Rechtsbeziehungen mit Auslandsbezug, S. 16 ebenso Ch. Döbereiner, Der Kommissionsvorschlag für das internationale Güterrecht. – MittBayNot 2011, S. 466.

⁴⁴ Abkommen der Haager Konferenz für Internationales Privatrecht abrufbar unter: http://www.hcch.net/index_de.php (24.05.2013).

des Belegenheitsrechts eine Rechtsspaltung bedeuten. Gerade dies kann gewisse Komplikationen nach sich ziehen, da sie zu einer Spaltung des Güterrechts und zur Anwendung unterschiedlicher Sachrechte auf die verschiedenen Vermögenswerte, aus denen sich das Ehevermögen zusammensetzt, führen würde. In der Verordnung verfolgt man daher das Ziel, das auf den Ehegüterstand anzuwendende Recht unabhängig davon, ob es von den Ehegatten gewählt oder mangels Rechtswahl nach Maßgabe anderer Bestimmungen festgelegt wurde, für das gesamte bewegliche und unbewegliche Vermögen der Eheleute unabhängig vom Belegenheitsort zu bestimmen.^{*45}

Die Einheitlichkeit des anzuwendenden Rechts ist grundsätzlich zu begrüßen. Allerdings stellt sich hier die Frage, ob die Einheit des anzuwendenden Rechts auch in der Praxis umsetzbar ist, wenn beispielsweise der Erwerb einer Immobilie nur durch einen Ehegatten erfolgen soll, dies jedoch nach dem gewählten Recht nicht möglich ist oder vorausgesetzt, zum Vermögen der Eheleute gehört eine Immobilie in einem Mitgliedsstaat, für die die Eheleute bei Beendigung des Güterstandes eine Teilung zu Bruchteilen anstreben, die nach dem gewählten Recht des anderen Mitgliedstaates nicht möglich ist. Die unterschiedlichen Voraussetzungen der nationalen Rechtsordnungen bedürfen hier einer gründlichen Prüfung und Belehrung bei der Rechtswahl, was in der Anwendung Erschwernisse zur Folge haben wird.

Anerkennung und Vollstreckung

Entscheidungen aus anderen Mitgliedstaaten werden ohne ein besonderes Verfahren anerkannt, es sei denn, es liegt ein in Art. 27 der Verordnung genannter Grund für die Nichtanerkennung, wie z.B. ein Verstoß gegen *ordre public*, vor. Für die Vollstreckung der Entscheidungen wird auf die Verordnung (EG) Nr. 44/2001, die sog. Brüssel I – Verordnung, verwiesen. Öffentliche Urkunden werden anerkannt, es sei denn, ihre Gültigkeit wird nach Maßgabe des anzuwendenden Rechts angefochten oder die Anerkennung verstößt gegen den *ordre public*, Art. 32. Die Anerkennung verleiht der Urkunde Beweiskraft hinsichtlich ihres Inhalts und für sie gilt die – widerlegbare – Vermutung der Rechtsgültigkeit. Die Vollstreckung der öffentlichen Urkunden und gerichtlicher Vergleiche richtet sich ebenso nach der Brüssel I – Verordnung.

Wirkung gegenüber Dritten

Die Wirkung des Ehegüterstandes gegenüber Dritten bestimmt sich nach dem Recht, das nach dem vorliegenden Verordnungsvorschlag auf den ehelichen Güterstand anzuwenden ist, Art. 35 Abs. 1 der Ehegüter-VO. Registrierungs- und Publizitätsvorschriften sind im Vorschlag nicht vorgesehen und werden den Mitgliedstaaten überlassen. Diese können zudem in Bezug auf eine auf ihrem Gebiet belegene unbewegliche Sache die Rechtsbeziehungen zwischen einem Ehegatten und einem Dritten regeln. Ein Ehegatte kann somit das auf seinen Güterstand anzuwendende Sachrecht dem betreffenden Dritten nur entgegenhalten, wenn die in diesem Mitgliedstaat geltenden Registrierungs- und Publizitätspflichten eingehalten wurden, es sei denn, der Dritte hatte von dem auf den Güterstand anzuwendenden Sachrecht Kenntnis oder hätte davon Kenntnis haben müssen.

Fazit

Die neuen gesellschaftlichen Realitäten in Europa erfordern gezielte Initiativen der Europäischen Union, damit internationalen Ehen zu mehr Planungs- und Rechtssicherheit verholfen wird. Die Probleme heute liegen oft in dem Konflikt zwischen einzelstaatlichen Vorschriften. Deshalb können sie am effektivsten auch nur auf europäischer Ebene im Wege der Harmonisierung gelöst werden. Der Verordnungsvorschlag der Kommission im Bereich des Ehegüterrechts ist daher folgerichtig. Der Anwendungsbereich des Vorschlags allerdings, welcher sich auf die ehelichen Güterstände erstreckt, ist nicht klar formuliert und lässt Abgrenzungsschwierigkeiten vermuten. Im Sinne des estnischen Rechts wären typische güterrechtliche Fragen im traditionellen Verständnis umfasst. Der geschlechtsneutrale Ehebegriff dagegen ermöglicht es dem

⁴⁵ KOM (2011) 126 (Fn. 13), S. 8.

nationalen Gesetzgeber auch weiterhin darüber zu entscheiden, welchem Eheverständnis gefolgt wird. Bei den Zuständigkeitsvoraussetzungen der güterrechtlichen Angelegenheiten kommt in Estland bereits heute das Prinzip des gewöhnlichen Aufenthalts zur Anwendung. Die in dem Vorschlag vorgesehene Möglichkeit, einvernehmlich die Wahl über das anwendbare Recht und auch über die Gerichtszuständigkeit zu vereinbaren, fördert die Autonomie der Parteien und dient der Rechtssicherheit. Allerdings ist hier Vorsicht geboten, denn eine, wenn auch einvernehmliche Vereinbarung, birgt stets die Gefahr, dass eine Partei bevorzugt wird oder sich über die Folgen der Vereinbarung nicht bewusst ist. Daher wäre es angebrachter, auch bei Gerichtsstandvereinbarungen, da auch sie zur Änderung der Rechtsanwendung führen können, strengere Formerfordernisse, wie sie auch bei den Rechtswahlvereinbarungen möglich sind, anzuwenden, damit die Beteiligten rechtlich belehrt sind und die Tragweite einer solchen Vereinbarung erkennen können. Im Bereich der Zuständigkeit des anwendbaren Rechts erscheint die Anknüpfung an den ersten gewöhnlichen Aufenthalt der Eheleute nach der Eheschließung nicht im Sinne der hohen Mobilität, die die Kommission unter den Unionsbürgern selbst hervorhebt. Eine Kohärenz zwischen den geltenden Regelungen der Brüssel IIa-Verordnung, der Rom III-Verordnung und den in der neuen Güterrechtsverordnung vorgesehenen Vorschriften ist geboten, insbesondere hinsichtlich der Anknüpfungspunkte, die mangels Rechtswahl zur Anwendung kommen. Ansonsten sind die hierarchisch geordneten Anknüpfungskriterien zu begrüßen. Die Wahl des Belegenheitsrechts, wie sie heute im estnischen Recht möglich ist, soll zukünftig dagegen unzulässig sein.

Am 10. September 2013 stimmte nun das Europäische Parlament über seine Stellungnahme zu dem Kommissionsvorschlag mit großer Mehrheit ab.⁴⁶ In der vom Parlament gebilligten Entschließung werden Änderungen vorgebracht, die zu mehr Rechtssicherheit bei grenzüberschreitenden Scheidungen führen sollen. Die Vorschläge des Europäischen Parlaments beziehen insbesondere Stellung zum Anwendungsbereich der Verordnung – wobei hier sämtliche vermögensrechtliche Regelungen umfasst werden sollen – und sie enthalten weitere Erläuterungen im Bereich der Gerichtsstandvereinbarungen. Zudem wird das Verständnis des gemeinsamen gewöhnlichen Aufenthalts konkretisiert und der Grundsatz der Einheit des anzuwendenden Rechts bestätigt.

Die letzte Entscheidung zu der Ehegüterrechtsverordnung liegt jedoch beim Rat. Gem. Art. 81 Abs. 3 AEUV muss der Rat das Europäische Parlament bei Regelungen zum Familienrecht mit grenzüberschreitendem Bezug lediglich anhören. Für die Schaffung einheitlicher Voraussetzungen im Bereich des Familienrechts und die Verbesserung der oft unklaren Situation der betroffenen Ehepaare bedarf es somit einer einstimmigen Entscheidung der Mitgliedstaaten.

⁴⁶ Der vorläufige Text zur legislativen Entschließung des Europäischen Parlaments vom 10. September 2013 zu dem Vorschlag für eine Verordnung des Rates über die Zuständigkeit, das anzuwendende Recht, die Anerkennung und die Vollstreckung von Entscheidungen im Bereich des Ehegüterrechts COM (2011) 126 ist abrufbar unter: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0338+0+DOC+XML+Vo//DE&language=DE> (22.10.2013).



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Loyalty to the EU and the Duty to Revise Pre-Accession International Agreements

1. Introduction

One must but refrain from considering simple the legal solutions that form the basis of the European Union (hereinafter 'EU') and its interrelations with the Member States and third countries. Application of these rules constitutes a complicated balancing exercise between contradicting yet equally valid interests. One source of such complications is the need to take the binding nature of existing international agreements into account at the time of accession of any state. One seeks to avoid situations wherein the signing of an act of accession to the EU for a new Member State would lead to a breach of international agreements ratified by that state on an earlier date. In extreme cases, such a risk could lead to a state refusing EU accession in order to respect its prior international commitments. According to the Court of Justice of the European Union (hereinafter 'CJEU'):¹

[T]he purpose of that provision is to lay down, in accordance with the principles of international law, that the application of the Treaty does not affect the duty of the member state concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder.

Advocate General (hereinafter 'AG') Kokott states: 'In other words, membership of the European Union does not impose an obligation on Member States to act, vis-à-vis third countries, in breach of international agreements previously entered into.'² Thus, the treaty framework must cater for this need for flexibility even if at some cost to the uniformity of application of the EU *acquis*. At the same time, a Member State could not be given *carte blanche* to continue operating on the basis of different rules forever. This would constitute disproportionate interference with *une certaine idée de l'Europe*.

This article is an attempt to analyse the role and implications of Article 351 (formerly Art. 307 EC and prior to that Art. 234 EC) of the Treaty on the Functioning of the EU (hereinafter 'TFEU'), also known as the 'conflict clause', which has been tailored to deal with these dichotomies.³ According to the CJEU, '[t]he

¹ Case C-812/79, *Attorney General v. Burgoa*, para. 8. – ECR 1980, p. 2787.

² Opinion of AG Kokott in C-366/10, *Air Transport Association of America and Others*, para. 56. – ECR not yet published

³ Treaty on the Functioning of the European Union. – OJ C 326, 26.10.2012.

purpose of this provision is to make it clear, in accordance with the principles of international law, that application of the EC Treaty does not affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations thereunder^{*4}.

The importance of said article is underscored by the case law, which states that if the conditions for its application have been satisfied, it can allow derogation even from primary law.^{*5} In fact, the Court expressly admits that it ‘implicitly permits obstacles to the operation of the common market when they are caused by measures taken by a Member State to carry out the international obligations’^{*6}.

In an equally pompous manner, the Court has laid down an unequivocal limitation to its effect, stating that ‘Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights’^{*7}.

While arising from clear logic in response to a necessary evil, academic research and case law demonstrate that the scope and application of the article are far from clear. The present paper is an attempt to analyse the rights and obligations arising by way of the conflict clause and to identify its key elements and the methodology of its application. In order to do so, we address the controversies arising from the above-mentioned provisions.

This paper examines the scope of Article 351 (1) of the TFEU by elaborating on the determination of the conclusion date of international agreements, the effects of later amendments to international agreements, the need to take potential collision into account, and the need to guarantee the effective application of EU law. The exclusion of international agreements concluded between Member States is discussed, and the balance in favour of protection of third countries in interpretation of the exception is stressed. The division of competencies between the CJEU and the national courts in interpretation of international agreements is analysed. Finally, the obligations arising out of paragraph 2 of Article 351 of the TFEU for the Member States, including the obligations to renegotiate or terminate existing international agreements, are analysed.

2. The scope and consequences of Article 351

According to the TFEU’s Article 351:

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

The first clause enables the Member States to respect their international-law obligations *vis-à-vis* third countries even if the duties are in conflict with EU law. The second paragraph imposes an active duty to deal with the controversies both upon the acceding state and, where appropriate, on other Member States. The third provision **precludes** the application of the first clause to ‘most favoured nation’ clauses.

⁴ See, for instance, T-315/01, *Kadi v. Council and Commission*, para. 186. – ECR 2005, p. II-3649; Case C-324/93, *Evans Medical and Macfarlan Smith*, para. 27. – ECR 1995, p. I-563; Case 10/61, *Commission v. Italy*. – ECR 1962, p. 1; Case C-158/91, *Levy*. – ECR 1993, p. I-4287; Case C-124/95, *Centro-Com*, para. 56. – ECR 1997, p. I-81.

⁵ See Case C-402/05 P, *Kadi and Al Barakat International Foundation v. Council and Commission*, para. 301. – ECR 2008, p. I-6351; Case C-124/95, *Centro-Com*, paras 56–61.

⁶ Case C-402/05 P, *Kadi and Al Barakat International Foundation v. Council and Commission*, para. 302.

⁷ *Ibid.*, para. 304.

At first glance, the criteria for an international agreement falling within the scope of Article 351 of the TFEU appear to be clear. Firstly, the agreement must have been concluded before the relevant state's accession to the EU; secondly, it must be between a Member State and a third country; and, finally, it must give rise to international rights and obligations.

From the wording of the provision, it seems that Article 351 (1) of the TFEU simply gives priority to earlier treaties that meet the criteria. Not surprisingly, the court has opted for a narrow interpretation of the article and, accordingly, has curbed its use. In *Kadi*⁸, it limited the scope of the conflict clause by adding a fourth criterion: for a prior international agreement to prevail, the fundamental principles of the EU must be respected.

2.1. The conclusion date of an agreement

The question of whether an international agreement can be considered concluded prior to a Member State's accession is more complicated than simply looking at the dates. First of all, the concept of conclusion is ambiguous. Secondly, the date of execution of an international agreement might be equivocal in certain situations.

2.1.1. Implementation of the term 'to conclude'

Where a linguist might consider 'to conclude a treaty' to mean to sign it, a lawyer will immediately consider whether the act of its ratification may have an influence. In *Commission v. Italy*, the court had to deal with the General Agreement on Tariffs and Trade (hereinafter 'GATT') agreement, which Italy had signed on 23 May 1956 and ratified after 1 January 1958—i.e., after the entry into force of the EEC Treaty.⁹ Italy argued that Article 234 of the EEC Treaty (Art. 351 of the TFEU) is applicable because 'Article 234 of the EEC Treaty applies to agreements concluded before this date, and not to conventions ratified before it'. Interestingly enough, the court did not take this opportunity to clarify the significance of ratification for the purposes of Article 351 of the TFEU and, instead, focused on the fact that the EEC Treaty had stripped Italy of its right to apply tariffs to other Member States even if this was foreseen by the GATT regime. A similar approach can be deduced from *Commission v. Belgium*.¹⁰ After Belgium stated that the treaty with Zaire had been 'concluded before the date of entry into force of Regulation No. 4055/86 and had been applied *de facto* from its signature' and 'in view of the fact that the formalities required by Belgian legislation for the entry into force of the Agreement had been completed', the Commission reconsidered its legal position and accepted that the treaty could be regarded as an 'existing agreement'. Once again, the significance of ratification was not addressed by the court.

Thus, in fact, the question of whether or not an international agreement has to be ratified in order for it to benefit from the provisions of Article 351 of the TFEU remains unanswered. There are compelling arguments in favour of concluding that ratification should be a condition precedent. The same is argued by Manzini, who refers to the fact that Article 30 of the Vienna Convention always refers to treaties to which states are parties and concludes that, therefore, the treaties must be in force among them.¹¹ A state is only party to an agreement that has been ratified. Manzini further justifies this conclusion by referring to the wording of paragraph 1 of Article 351 of the TFEU, which uses the phrase 'rights and obligations arising from agreements', and he states that neither rights nor obligations arise from international agreements that have not been ratified.

⁸ Joined Cases C-402/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission* (p. I-6351) and Case C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (ECR 2005, p. II-3649).

⁹ See Case 10/61, *Commission v. Italy*, p. 7.

¹⁰ See Case C-170/98, *Commission v. Belgium*, paras 18–21. – ECR 1999, p. I-5493.

¹¹ P. Manzini. The priority of pre-existing treaties of EC member states within the framework of international law. – *European Journal of International Law* 2001 (12)/4, p. 786.

2.1.2. The effect of later amendments to the international agreement

As referred to above, the *raison d'être* of Article 351 of the TFEU has been to enable states to accede to the EU without having to breach their existing international obligations. Therefore, it is only reasonable that when international agreements are revised upon mutual agreement, there cannot be any justification for continued application of the exception. When a Member State is no longer *de facto* bound by its earlier commitments, the EU can rightfully expect the deviations from EU law to have been eliminated in the process.

In the *Open Skies*^{*12} litigation, this was further elaborated on by the CJEU, with respect to cases wherein some Member States had renegotiated earlier international agreements with the United States. As an example we refer to the case against Denmark, wherein the court ruled on the effects of amendments made in 1995 to a 1944 agreement. According to the Court:

It must be pointed out, moreover, that the amendments made in 1995 provide proof of a renegotiation of the 1944 Agreement in its entirety. It follows that, while some provisions of the agreement were not formally modified by the amendments made in 1995 or were subject only to marginal changes in drafting, the commitments arising from those provisions were none the less confirmed during the renegotiation. In such a case, the Member States are prevented not only from contracting new international commitments but also from maintaining such commitments in force if they infringe Community law.^{*13}

The new quality of the international relationship itself provides proof of a renegotiation of the pre-existing treaty. Therefore, the scope of protection of Article 351 (1) of the TFEU does not even cover the provisions that remain identical to those in the original version of the international agreement if, in fact, the quality of the international relationship is changed.^{*14} Accordingly, if a Member State substantially modifies a pre-existing international agreement, that Member State forfeits the opportunity to rely on Article 351 (1). Rosas concludes from the *Open Skies* case law that amendments concluded subsequently fall under the protection of Article 351 of the TFEU only if they constitute 'implementation of an obligation already concluded before the Member State became an EU member'^{*15}. The state's inability to rely on Article 351 (1) of the TFEU is relevant mostly for the purposes of potential infringement proceedings. Whether or not the international agreement, if capable of direct application, may still be relevant for individuals is subject to case-by-case evaluation.

The CJEU has also tackled the issue of subsequent amendments to earlier treaties in the context of the 1992 collapse of the Federal Republic of Yugoslavia^{*16} and the abolishment of the Czech and Slovak Federative Republic, in 1993.^{*17} The CJEU confirmed that it might be possible for such agreements to fall under the protection of Article 351 of the TFEU should the competent court establish that the parties intended to follow the principle of the continuity of treaties.^{*18}

2.2. Collision (potentially) arising after accession to the EU

If read to the letter, Article 351 of the TFEU applies only to pre-Union international agreements that already are in conflict with EU law. The article may, however, have significance in cases wherein a contradiction arises later (e.g., through a shift in competencies) or infringes on the EU's possibilities of exercising its competencies.

¹² See Case C-471/98, *Commission v. Belgium* (ECR 2002, p. I-9681) and the decisions against Denmark in Case C-467/98 (ECR 2002, p. I-9519), Sweden in Case C-468/98 (ECR 2002, p. I-9575), Finland in Case C-469/98 (ECR 2002, p. I-9627), Luxembourg in Case C-472/98 (ECR 2002, p. I-9741), Austria in Case C-475/98 (ECR 2002, p. I-9797), and the Federal Republic of Germany in Case C-476/98 (ECR 2002, p. I-9855).

¹³ C-467/98, *Commission v. Denmark*, para. 39.

¹⁴ *Ibid.*, paras 33–34.

¹⁵ See A. Rosas. The status in EU law of international agreements concluded by EU member states. – *Fordham International Law Journal* 2010–2011, p. 1322.

¹⁶ See Case C-84/98, *Commission v. Portugal*. – ECR 2000, p. I-5215.

¹⁷ See Case C-216/01, *Budějovický Budvar*. – ECR 2003, p. 2787.

¹⁸ *Ibid.*, paras 152–165.

2.2.1. Collision created via modification or exercise of competencies

Contradiction between an international agreement and EU law may, while absent *ex ante*, arise *ex post*. This could occur mainly because of a shift in competencies between Member States and the EU. As witnessed by the *Open Skies* litigation, discussed above, the competencies of the EU change with time, especially with respect to shared competencies, and a Member State's competence to conclude treaties with third countries may disappear as soon as the EU has exercised its corresponding competencies. Therefore, it was only natural that the Member States sought to rely on Article 351 of the TFEU also in cases wherein their international agreements were concluded after EU accession.^{*19} In *Cornelis Kramer and Others*^{*20} and *Procureur General v. José Arbelaiz-Emazabel*^{*21}, the CJEU indicated that Article 351 of the TFEU is not applicable in cases in which the international agreement in question has been concluded by the Member State since its accession to the EU, even if the agreement was concluded at a time when the EU had no competence in the field in question.

2.2.2. Collision related to unexercised EU competencies

If taken literally, the phrase 'incompatibilities established' limits the application of Article 351 of the TFEU to existing contradictions between the international agreement and EU law. However, the CJEU has indicated in recent cases to do with bilateral investment treaties, *Commission v. Sweden*, *Commission v. Austria*, and *Commission v. Finland*, that obligations stemming from Article 351 (2) of the TFEU are also relevant *vis-à-vis* future contradictions.^{*22}

The Kingdom of Sweden and the Republic of Austria had concluded various bilateral investment treaties with third countries before acceding to the EU under which each party took on an obligation to guarantee the investors of the other party the free transfer, in freely convertible currency, of payments connected with an investment.^{*23} The Commission considered that this might infringe on the competencies of the Council to restrict, in certain specific circumstances, movement of capital and payments between the Member States and third countries. Such a need might arise in the future, for example, to give effect to a resolution of the Security Council of the United Nations Organisation.^{*24} The agreements concluded by Sweden and Austria contained no provisions referring to such a possibility for the EU to act or allowing the Member State concerned to exercise its rights and to fulfil its obligations as a member of the EU, and also there was no international-law mechanism that would have made this possible. Therefore, the court rightfully concluded that the Member States had breached their obligations under the second paragraph of Article 351 of the TFEU by failing to take appropriate steps to eliminate incompatibilities.

This line of reasoning seems in line with the general duty of loyalty arising from Article 4, paragraph 3 of the Treaty on European Union (hereinafter, 'TEU'), which imposes a general duty of active support to the pursuit of the goals of the EU and of abstinence from any activity that might be detrimental to the reaching of such goals. De Baere concludes that the duty of co-operation can lead to a duty of abstention even if the competence at issue is neither *a priori* exclusive nor exclusive.^{*25} In principle, a Member State must, in the exercise of its international rights and obligations, always remember to make a reservation permitting the EU to become active in the relevant field in future. This also has an effect on the pre-existing international agreements through the duty of the Member State arising out of the second paragraph of Article 351 of the TFEU to take all appropriate steps to eliminate the incompatibilities created.

¹⁹ See Joined Cases 3,4 and 6/76, *Cornelis Kramer and Others*. – ECR 1976, p. 1303; Case C-181/80, *Procureur General v. José Arbelaiz-Emazabel*. – ECR 1981, p. 2968.

²⁰ See Joined Cases 3,4 and 6/76, *Cornelis Kramer and Others*, p. 1279.

²¹ See Case C-181/80, *Procureur General v. José Arbelaiz-Emazabel*, p. 2961.

²² Case C-249/06, *Commission v. Sweden*. – ECR 2009, p. I-1335; Case C-205/06, *Commission v. Austria*. – ECR 2009, p. I-1301; Case C-118/07, *Commission v. Finland*. – ECR 2009, p. I-10889.

²³ See Case C-249/06, *Commission v. Sweden*, para. 25; Case C-205/06, *Commission v. Austria*, para. 3.

²⁴ See Case C-249/06, *Commission v. Sweden*, para. 32.

²⁵ G. De Baere. 'O, where is faith? O, where is loyalty?' Some thoughts on the duty of loyal co-operation and the Union's external environmental competences in the light of the PFOS case. – ELRev 2011 (36)/3, pp. 405–419.

2.3. The exclusion of intra-EU agreements

Though not clearly arising from wording, the case law leads to the conclusion that application of Article 351 of the TFEU is limited to agreements that have been concluded between Member States and third countries. As a rule of thumb, the conflict clause does not affect intra-EU relations.^{*26} This principle was already stressed by the CJEU in 1962, when the court blocked Italy's attempt to invoke the GATT tariff regime for other Member States.^{*27} The court recognised the exception in favour of third countries. In relation to other Member States, however, the Court stated that '[i]n matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between member states before its entry into force'^{*28}. The Court went on to reiterate that 'the manner in which member states proceed to reduce customs duties amongst themselves cannot be criticized by third countries since this abolition of customs duties [...] does not interfere with the rights held by third countries under agreements still in force'^{*29}.

Lambert argues that such derogation is acceptable only where it would not make the prior treaty ineffective.^{*30} This statement is supported by the *Burgoa* decision, in which the Court clarified that Article 351 of the TFEU cannot adversely alter the nature of the rights that may flow from such prior agreements.^{*31}

Such differentiation can be justified in situations wherein the protection granted by EU law to an individual or a party to the international agreement is inferior to that to which it is entitled under a prior international agreement within the meaning of Article 351 of the TFEU. In the case of a private party, the provisions of the relevant agreement should be capable of directly creating rights of individuals. In such cases, it would be difficult to justify the derivation to the detriment of the individual. In many cases, such controversies could be overcome with consistent interpretation of relevant EU provisions and principles.

2.4. Differentiation between rights and obligations

The literal interpretation of paragraph 1 of the conflict clause implies that both rights and obligations arising from the international agreements would be fully exempted. An interpretation stemming from the purpose of the provision, however, prevails. In fact, the court distinguishes expressly between the two. The term 'rights' is limited to the rights of third countries, and 'obligations' refers to the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement.^{*32} Thus, once again, a balance in favour of protecting the interests of third countries and at the same time not going beyond what is necessary when limiting the effect of the EU *acquis* has been struck.

The Court explained the restriction in *Commission v. Italy*: '[B]y assuming a new obligation which is incompatible with rights held under a prior treaty a State *ipso facto* gives up the exercise of these rights to the extent necessary for the performance of its new obligations.'^{*33} This approach has been confirmed and further developed in *Evans*, wherein the CJEU stressed that 'when an international agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to Community law, the Member State must refrain from adopting such a measure'^{*34}. Accordingly, in most cases, the conflict clause applies only to the obligations of the Member States.

Furthermore, in order for Article 351 (1) of the TFEU to apply, 'it is necessary to examine whether the agreement imposes on the Member State concerned obligations whose performance may still be required by the non-member country which is party to it'^{*35}. Accordingly, one must also determine whether the third

^{*26} See Case C-473/93, *Commission v. Luxembourg*, para. 40 of the Judgment document and the case law cited therein. – ECR 1996, p. 3207.

^{*27} Case 10/61, *Commission v. Italy*, p. 10.

^{*28} *Ibid.*, section II B.

^{*29} *Ibid.*

^{*30} See H. Lambert. The EU Asylum Qualification Directive, its impact on the jurisprudence of the United Kingdom and international law. – *International & Comparative Law Quarterly* 2006, p. 185.

^{*31} See Case C-812/79, *Attorney General v. Burgoa*, para. 10.

^{*32} Case 10/61, *Commission v. Italy*, section II B and Case C-812/79, *Attorney General v. Burgoa*, para. 8.

^{*33} Case 10/61, *Commission v. Italy*, p. 10.

^{*34} Case C-324/93, *R. v. Secretary of State for the Home Department, ex parte Evans Medical Ltd*, para. 32. – ECR 1995, p. I-563.

^{*35} See Case C-216/01, *Budějovický Budvar*, para. 146.

country could, in fact, demand performance of the agreement. If the right is contingent, the Member State should also analyse the circumstances triggering the condition. If the state is actually at liberty to exercise discretion, it will inevitably be bound in its decision by the duty of loyalty toward the EU.

The court has not extended the effects of Article 351 of the TFEU to introduce active obligations to the EU institutions *vis-à-vis* third countries. Instead, it confirmed that the article only imposes a duty on the part of EU institutions not to impede the performance of those obligations of Member States that stem from a prior agreement conferring rights on third countries.^{*36}

For determination of whether an international agreement imposes an obligation on a Member State, it must be settled that the duty of the Member State is clearly in contradiction with EU law and that interpretation of the international obligation as consistent with EU law is impossible. However, it is not clear whether the last word about the possibility of consistent interpretation rests with the Member State or, instead, with the CJEU.

2.5. The limits of the courts' competence to interpret international agreements

Article 19 of the TEU does not attribute to the CJEU the competence to interpret national law or international treaties. Nevertheless, the court has on several occasions implied the possibility of consistent interpretation. The duty of consistent interpretation is derived from the principle of loyalty, which is today stated in paragraph 3 of Article 4 of the TEU. The principle has been strengthened over time in various ways, with the Court declaring it to be 'inherent in the system of the Treaty' and an aspect of the requirement of full effectiveness of EU law.^{*37} The obligation of consistent interpretation means that the courts of the Member States should interpret their national law 'in the light of the wording and purpose' of EU law.^{*38} This requires Member States to take all appropriate measures to ensure fulfilment of the obligations arising from the EU treaties. In relation to interpretation of international agreements, the Court has used very express wording—for example, stating this in *Budvar*:^{*39}

It follows that the national court must ascertain whether a possible incompatibility between the Treaty and the bilateral convention can be avoided by interpreting that convention, to the extent possible and in compliance with international law, in such a way that it is consistent with Community law.

Thus the obligation for the national court to seek the guidance of EU law in its decision on the meaning and effect of an international agreement is obvious. Whether or not, within the division of competencies between the CJEU and national courts, the latter remain the final arbiters over international agreements (or national law, for that matter) is debatable in practice. Often the Court refers to the national court as competent to analyse whether consistent interpretation is possible.^{*40} In *Pupino*, the CJEU decided that the ultimate decision on whether or not an interpretation consistent with EU law is possible lay with the national court.^{*41} By the same token, it pointed out that, in the opinion of the Advocate General, 'it is not obvious that an interpretation of national law in conformity with the framework decision is impossible'^{*42}. Even if consistent interpretation of national law is impossible, the Member States have a duty of minimising inconsistency by all means available.^{*43}

It seems that a two-tier system is created, which, in fact, enables the CJEU to have a say in most matters. Where Article 19 of the TEU excludes the court's competence, the court is still able to exercise review over whether or not discretionary decisions on the national level (including interpretations related to application

^{*36} See Case C-812/79, *Attorney General v. Burgoa*, para. 9.

^{*37} Case C-160/01, *Mau*, para. 34. – ECR 2003, p. I-4791; Joined Cases C-397-403/01, *Pfeiffer*, para. 114. – ECR 2004, p. I-79.

^{*38} The origin of this obligation lies in Case 14/83, *Von Colson and Kamann*, para. 26. – ECR 1984, p. 1891.

^{*39} Case C-216/01, *Budějovický Budvar*, para. 169.

^{*40} See, for example, Case C-365/98, *Brinkmann Tabakfabriken*, para. 41. – ECR 2000, p. I-4619; Case C-177/88, *Dekker v. Stichting*. – ECR 1990, p. I-3941; Case C-300/95, *Commission v. United Kingdom*. – ECR 1997, p. I-2649.

^{*41} Case C-105/03, *Pupino*, para. 48. – ECR 2005, p. I-5285.

^{*42} *Ibid.*

^{*43} Case C-216/01, *Budějovický Budvar*, paras 169–173.

of the international agreement) have been handled in the manner most favourable to the interests of the EU. This inevitably involves interpretation and application of EU law, in relation to which questions of the substance and interpretation of international law are likely to arise. Whether or not in these circumstances one can argue that the limitation of competencies under paragraph 3 of Article 19 of the TEU provides the *effet utile* remains subject to debate.

In the case of international obligations, the specific nature of international commitments must be taken into account and consistent interpretation with EU law must not lead to infringement of international law. The boundaries for interpretation of international treaties are codified in Article 31 of the Vienna Convention on the Law of Treaties, according to which '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Accordingly, consistent interpretation of international agreements and EU law is possible only if the object and purpose of the treaty so allows. AG Tizziani also stresses this position, in his opinion on the *Budějovický* case. He emphasised that consistent interpretation in the context of international law presupposes that the provisions of the treaty in question are ambiguous and lend themselves to being interpreted in such a way.^{*44} Recently, the Court affirmed this approach in the context of Article 351 of the TFEU, stating that a good-faith interpretation must prevail.^{*45} This should serve as a limitation to how much flexibility in interpretation of international agreements can be expected from a national judge.

2.6. The requirement of respect for fundamental rights and other foundations of the EU legal order

The last prerequisite for bringing an international agreement within the scope of Article 351 (1) of the TFEU was introduced in *Kadi*.^{*46} The Court expressed the opinion that a Member State is only allowed to rely on Article 351 (1) if the foundations of the EU legal order, such as fundamental rights, are respected. One may argue that Article 351 (1) gives no indication of this further precondition. The sound-minded counter-argument is made by AG Maduro, stating: 'Measures which are incompatible with the observance of human rights [...] are not acceptable in the Community.'^{*47}

The Court stressed that even Article 351 of the TFEU 'may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights'^{*48}. The CJEU found that fundamental rights violated in the case of *Kadi* were the right to be heard, the right to effective judicial review^{*49}, and the right to property.^{*50} The fact that financial resources of people and entities listed by the resolutions had to be frozen automatically, without any consideration or possibility of objection, constituted determinative circumstance for establishment of infringement of fundamental rights. In this sense, *Kadi* is very significant, since one could argue that the EU introduced unilateral limitations to the effect of an international agreement that had already been concluded.

2.7. The relationship between paragraphs 1 and 3

The CJEU has not elaborated on paragraph 3 of Article 351, and it has seldom been the subject of academic research, which raises doubts about the significance of the paragraph today. However, legal scholars who have analysed the clause interpret it as a limitation to paragraph 1.^{*51}

Occasionally, agreements contain clauses that oblige contractors to extend privileges offered to third states to the other parties to the treaty. These provisions are known as 'most favoured nation clauses' or

⁴⁴ Opinion of Advocate General Tizziani in Case C-216/01, *Budějovický Budvar*, para. 148. – ECR 2003, p. 2787.

⁴⁵ Case C-118/07, *Commission v. Finland*, para. 39. – ECR 2009, p. I-10889.

⁴⁶ Case C-402/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, para. 302.

⁴⁷ Opinion of Advocate General Poiares Maduro in Case C-402/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, para. 31. – ECR 2008, p. I-6351.

⁴⁸ Case C-402/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, para. 304.

⁴⁹ *Ibid.*, paras 304, 333.

⁵⁰ *Ibid.*, paras 304, 335.

⁵¹ P. Manzini (see Note 11), p. 782.

‘the principle of non-discrimination’. However, the advantages granted and shared among the Member States ‘are not separable and are based on an integrated institutional and economic scheme’.^{*52} The third paragraph of the conflict clause is aimed at limiting the possibility of extending benefits of the EU to non-member states through bilateral treaties of Member States. Thus, the section restricts the application of the TFEU’s Article 351 (1).

3. The obligation to eliminate incompatibilities

In the absence of clear collision between an international agreement and EU law, the Member State is normally unable to appeal to Article 351 (1) of the TFEU. In such cases, the Member State concerned is obliged to take a course that enables avoidance of derogation from EU law.^{*53} However, in the case of real collisions between a Member State’s international obligations and EU law, Article 351 (2) of the TFEU becomes relevant and the state is expected to take all appropriate steps to eliminate the incompatibilities. In practical terms, the obligation of taking these appropriate steps entails an obligation for Member States to renegotiate their agreements. In cases of extreme incompatibility with EU law, this may lead to the need to terminate the agreement in accordance with the Vienna Convention of 1969 on the law of treaties.^{*54}

The duty of Member States to render mutual assistance when dealing with such conflicts has been clarified somewhat by the Court in *Commission v. Sweden*, *Commission v. Austria*, and *Commission v. Finland*, wherein several Member States were in similar breach. The Court stated that, in accordance with Article 351 (2) of the TFEU, the Member States must assist each other to eliminate the incompatibilities. According to the judgement, it is for the Commission to take steps to co-ordinate and facilitate such mutual assistance and adoption of a common attitude.^{*55}

3.1. The steps Member States must take under Article 351 (2) of the TFEU

The CJEU has clearly indicated that it is the Member States’ duty to guarantee the compatibility of their international treaties with EU law. In addition, the CJEU has indicated two possible manners of action for Member States wishing to respect their obligations under the treaty.

First of all, a Member State is expected to use diplomatic means to renegotiate the agreements and thereby render them compatible with EU law.^{*56} However, the CJEU has explained that even when the contracting party has expressed its readiness to adjust the prior international treaty, the state has not met its obligations if political events have made it impossible. The Court stressed that ‘the existence of a difficult political situation [...] cannot justify a continuing failure on the part of a Member State to fulfil its obligations under the Treaty’^{*57}.

If the Member State encounters difficulties that render adjustment of an agreement impossible, that agreement must be renounced.^{*58} Article 56 of the Vienna Convention on the Law of Treaties stipulates that a treaty that does not provide for renunciation is not subject to renunciation unless it is established either that the parties intended to admit the possibility of renunciation or that a right of renunciation may be implied by the nature of the treaty. The Vienna Convention also states that a party shall give not less than 12 months’ notice of its intention to renounce a treaty.

⁵² H. Smit, P.E. Herzog. *The Law of the European Economic Community*. New York: LexisNexis Matthew Bender 1992, p. 6-296.30.

⁵³ See Case C-324/93, *R. v. Secretary of State for the Home Department, ex parte Evans Medical Ltd*, para. 32.

⁵⁴ J.P. Terhechte. Article 351 TFEU: The principle of loyalty and the future role of the Member States’ bilateral investment treaties. – *European Yearbook of International Economic Law*, 10.1.2010, p. 7.

⁵⁵ See Case C-249/06, *Commission v. Sweden*, paras 43–44; Case C-205/06, *Commission v. Austria*, paras 43–44; Case C-118/07, *Commission v. Finland*, paras 34–35.

⁵⁶ Case C-84/98, *Commission v. Portugal*, para. 38.

⁵⁷ Case C-170/98, *Commission v. Belgium*, paras 37, 42; Case C-84/98, *Commission v. Portugal*, para. 48.

⁵⁸ See Case C-84/98, *Commission v. Portugal*, para. 58; Case C-170/98, *Commission v. Belgium*, para. 15.

In CJEU case law, said court has demanded renunciation only if that possibility is provided for by the international agreement itself.^{*59} However, until a treaty has been renounced, the Member State concerned remains bound by it.

Where renunciation is not provided for in the treaty and not accepted by the third country that is a party to the agreement, the Member State in question may have to resort to unilateral withdrawal. Article 60 of the Vienna Convention specifies that unilateral suspension or termination of a treaty is regarded as material breach, which leads to international liability. Hence, the consequences of unilateral renunciation may prove difficult for the Member State. As the CJEU has not yet had the possibility of trying a case wherein the international agreement neither expressly nor implicitly provides for renunciation, it remains unclear whether renunciation is required in such circumstances. Nevertheless the CJEU has emphasised that the purpose of the conflict clause is to safeguard the rights of the third country and avoid breaches of international law.^{*60} Requiring renunciation when it would constitute material breach and lead to international liability would diverge from the purpose of the provision.

3.2. Proportionality of the steps taken

In *Commission v. Portugal*, the Portuguese government argued that Article 351 of the TFEU does not impose an obligation to achieve a specific result, in the sense of requiring a Member State to eliminate the incompatibility without regard for the legal consequences and political price.^{*61} In its statement, the Portuguese government clearly referred to the principle of proportionality. Even though all measures of the Union are governed by the principle of proportionality^{*62}, the case law of the CJEU has established that Member States cannot justify not taking all possible measures to eliminate conflicts between EU law and their international treaties by relying on this concept.

Article 351 of the TFEU incorporates the principle of proportionality and serves the purpose of balancing the foreign-policy interests of the Member States and the Union's interests. While Article 351 (2) defends Union goals, Article 351 (1) clearly safeguards the interests of the Member States. In addition, Article 351 allows the Member States to use appropriate means to render agreements compatible with EU law at their own discretion, which balances the powers of the Union and the Member States. Therefore, according to the Court, if Article 351 (2) of the TFEU becomes applicable, the interests of the Member States have already been protected.^{*63}

3.3. The conflict clause in accession treaties

The obligation to eliminate incompatibilities that is derived from the conflict clause is normally encompassed by the accession treaties. Either there is an express reference to the conflict clause or the obligation is stressed without reference to 351 (2) of the TFEU and the conflict clause is implied by accession to the *acquis*. In either case, the obligation to assure the compliance of Member States' pre-Union international obligations with EU law is required.

If the Union is informed about the existence of conflicting international obligations, concrete obligations related to certain subjects/fields or certain agreements that the relevant Member State(s) must deal with are introduced in the Act of Accession. The 2004 Act of Accession, for example, compelled Member States to withdraw from or phase out conflicting obligations associated with international fishery organisations and agreements to which the Community or other Member States are also parties and, in addition, obligations pertaining to free-trade agreements with third countries, with express reference being made to Central European Free Trade Agreement (hereinafter 'CEFTA').^{*64}

⁵⁹ Case C-84/98, *Commission v. Portugal*, para. 58; Case C-170/98, *Commission v. Belgium*, para. 15.

⁶⁰ Case C-84/98, *Commission v. Portugal*, para. 53.

⁶¹ *Ibid.*, para. 30.

⁶² Article 5 of the TEU.

⁶³ Case C-84/98, *Commission v. Portugal*, paras 37, 59.

⁶⁴ See the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia. Act of Accession, Articles 6 (10), 6 (12). – OJ L 236, 23.9.2003.

As a general rule, the state(s) in question must eliminate incompatibilities before the accession to the EU or on the earliest date possible afterward.^{*65} Sometimes specific deadlines for Member States are set out by regulations. For example, Regulation 4055/68, on maritime transport, stipulated that cargo-sharing arrangements incorporated into existing bilateral agreements concluded by Member States with third countries shall be phased out or adjusted within six years from that regulation's entrance into force.^{*66}

3.4. The application of the conflict clause after accession

The situation is more complex when neither the Member State nor the EU is aware of an existing incompatibility between an international commitment of a Member State and EU law or if the Member State denies the existence of an incompatibility or of an obligation to act under terms of the Accession Treaty during the accession process.

In such cases, the Commission as the guardian of the treaties usually calls attention to the incompatibilities between a pre-Union international treaty and EU law by initiating an infringement-related procedure. The aim of this pre-litigation procedure is to point out the problem and to enable the Member State to conform voluntarily to the requirements of Article 351 (2) of the TFEU. If the Member State denies the existence of incompatibility or the obligation to act, the Commission often initiates litigation against the Member State.

It has been pointed out by legal scholars that an implicit result of the CJEU case law is that a Member State may rely on Article 351 (1) of the TFEU for a limited time, from identification of the incompatibility until the first opportunity to renounce the agreement, and if the Member State concerned has not taken any steps under Article 351 (2) to eliminate the incompatibilities, it may lose its right to appeal to Article 351 (1).^{*67}

In a case in point, with *Commission v. Austria* the CJEU examined whether the Republic of Austria had had an opportunity to withdraw from Convention No. 45 of the International Labour Organization, which imposed on that Member State an obligation incompatible with EU law. On the one hand, the CJEU identified that Austria had had a chance to renounce the relevant convention, but, on the other hand, the CJEU stressed that at the time when that possibility existed, the incompatibility was not sufficiently clearly established for the Member State to be bound by an obligation to renounce the convention.^{*68} Nevertheless, the mere fact that the CJEU has analysed the possibility of renouncing an international obligation does not establish that a Member State may lose its right to rely on Article 351 (1) of the TFEU.

If it does not fulfil its obligations under Article 351 (2) of the TFEU, a Member State must face the usual consequences of failing to comply with EU law. This may entail imposition of an obligation to act and/or to pay a penalty or make lump-sum payments but not to lose its rights under EU law such as that of appealing to Article 351 (1) of the TFEU. Since such limits are not established yet, one should refrain from extensive interpretation and follow the main idea of Article 351, which is that conflicting international obligations are maintained until they are renegotiated, phased out, or renounced by the Member State concerned.

4. Conclusions

With Article 351 of the TFEU, the EU has, on the one hand, made a commitment to respect international law, yet at the same time it enforces its position by obliging Member States to take all appropriate steps to eliminate incompatibilities with EU law. The CJEU has used this provision to emphasise the specific *sui generis* nature of the EU by stating that the international commitments of the Member States must be in concordance with human rights and the foundations of EU law.

The purpose of Article 351 (1) of the TFEU is to enable the Member States to respect their international commitments taken on prior to accession to the EU. Judged by its purpose and structure, the exception

^{*65} See, for example, the Treaty of Accession of the Republic of Bulgaria and Romania, Article 12. – OJ L 157, 21.6.2005.

^{*66} 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, Articles 3, 4. – OJ L 378, 31.12.1986.

^{*67} A. Rosas (see Note 15), paras 59–64.

^{*68} Case C-203/03, *Commission v. Austria*, paras 59–64. – ECR 2005, p. I 935.

is designed to be temporary and to promote gradual movement away from differences in external agreements of the Member States. This is well reflected in the case law of the CJEU, which often dismisses as unfounded any arguments as to difficulties of renegotiating. Any serious opportunity to revisit the text of the agreement with the third country is likely to lead to impossibility of future reliance on Article 351 (1). Indeed, even small modifications that bring with them a new quality of international relationship may be considered sufficient for this.

Article 351 of the TFEU is an intrinsic balancing trick that is designed to position the interests of the Union and the Member States in a certain proportion to each other. Even though the provisions are complicated and at times hard to comprehend, the article adeptly achieves its goal.



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The Possibility of Protection of Legitimate Expectations in Recovery of Unlawful State Aid

1. Introduction

Forty years ago, the European Court of Justice (ECJ) stated for the first time, in its 1973 judgement in the *Kohlegesetz* case, that the European Commission may order recovery of unlawful and incompatible state aid.^{*1} In Estonia, state aid has become a household topic recently and precisely because aid might have been granted unlawfully.^{*2}

Article 14 (1) of the Council Regulation laying down detailed rules for the application of Article 93 of the EC Treaty^{*3} (Council Regulation (EC) No. 659/1999) provides that in situations wherein negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all measures necessary to recover the aid from the beneficiary. The Commission shall not require recovery of the aid if to do so would be contrary to a general principle of Community law. In this context, 'general principle' embodies mostly the principles related to protection of legitimate expectations and legal certainty.^{*4}

The principle of the protection of legitimate expectations is among the fundamental principles of the European Union (EU).^{*5} The hope that recipients of aid hold to treat the principle of protection of legitimate expectations as a lifeline to safeguard against recovery of state aid is remarkable if one looks at the case law

¹ Notice from the Commission: Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible state aid. – OJ C 272, 15.11.2007, pp. 0004–0017, reference in para. 9 to Judgment of the Court of Justice of the European Communities of 12.7.1973, C-70/72, *Commission v. Germany*, para. 13.

² The Commission has informed Estonia of having decided to extend the procedure in relation to several measures extended by Estonia to Estonian Air. State aid SA.35956 (2013/C) (ex 2013/NN) (ex 2012/N) – Estonia Rescue aid to Estonian Air. Available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35956 (most recently accessed on 22.5.2013). Some other cases in the aviation sector: can be cited: The Commission ordered Hungary to recover the aid from Malév in its Commission Decision of 9 January 2012 SA.30584 (C 38/10, ex NN 69/10) on the state aid implemented by Hungary in favour of Malév Hungarian Airlines Zrt. – OJ L 92, 3.4.2013, pp. 1–15. The Commission has notified Latvia of its decision to initiate the procedure in relation to the aid to airBaltic, state aid SA.34191 (2012/C) (ex 2012/NN): Alleged aid to airBaltic. – OJ C 69, 8.3.2013, pp. 40–52. The Commission has notified Slovenia of its decision to initiate the procedure in relation to the aid to Adria Airways, state aid SA.32715 (2012/C) (ex 2012/NN): Alleged aid to Adria Airways. – OJ C 69, 8.3.2013, pp. 53–65.

³ Council Regulation No. (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty. – OJ L 83, 27.3.1999, pp. 1–9.

⁴ Notice from the Commission (see Note 1), para. 17.

⁵ Judgment of the Court (First Chamber) of 24.3.2011, C-369/09 P, *ISD Polska and Others v. Commission*, para. 122. – ECR 2011, p. I-02011.

of the Court of Justice of the European Union (EU case law).^{*6} This article is an attempt to assess, on the basis of EU case law, the possibility of applying the principle of the protection of legitimate expectations where unlawful state aid is being recovered from the recipient of aid.

2. State aid

2.1. The notion of state aid

The founding treaties do not precisely and exhaustively define the term ‘state aid’. It has been claimed that the key problem and the source of most of the actions filed by recipients of aid is the fact that it is unclear what exactly qualifies as state aid.^{*7} The provisions of the Treaty on the Functioning of the European Union^{*8} (TFEU) on state aid are subject to the competition rules (TFEU, Title VII, Chapter 1). Article 107 (1) of the TFEU sets out that, save as otherwise provided in the Treaties, any aid granted by a Member State or through state resources in any form whatsoever that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be deemed incompatible with the internal market. It has been settled by case law that classification as state aid requires all of the conditions set out in Article 107 (1) of the TFEU to be fulfilled. First, there must be intervention by the state or through state resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage to the recipient. Fourth, it must distort competition or threaten to do so.^{*9} The court has also referred to meeting of these four conditions as the principle for prohibition of state aid.^{*10}

Article 107 (1) of the TFEU states an aim of not distorting competition in the internal EU market. The General Court has clarified that the aim of Article 87 (1) of the EC Treaty (TFEU, Art. 107 (1)) is to prevent trade between Member States from being affected by advantages granted by public authorities that, in various forms, distorts or threatens to distort competition by favouring certain undertakings or certain products. In order to determine whether a state measure constitutes aid, one must, therefore, establish whether the recipient undertaking receives economic advantage that it would not have obtained under normal market conditions.^{*11} The established case law indicates that Article 87 (1) of the EC Treaty (TFEU, Art. 107 (1)) does not distinguish between the causes or the objectives of state aid but defines them in relation to their **effects**.^{*12}

2.2. Compatible aid

The prohibition of state aid is not absolute. Certain categories of aid shall be compatible with the internal market (TFEU, Art. 107 (2)). Certain categories of aid may be considered to be compatible with the internal market (TFEU, Art. 107 (3)). Pursuant to Article 108 (4) of the TFEU, the Commission may adopt regulations related to the categories of state aid that the Council has determined may be exempted from the procedure provided for by paragraph 3 of Article 108, and the Commission has, indeed, adopted regulations

⁶ A search of the database Infocuria yields 130 results for enforced judgements. A note on the criteria employed (on 23.5.2013): Court = ‘Court of Justice, General Court’; documents = documents published in the ECR Judgments; text = ‘legitimate expectations’; subject matter = ‘State aids’; case status = ‘Cases closed’.

⁷ A. Giraud. A study of the notion of legitimate expectations in state aid recovery proceedings: ‘Abandon all hope, ye who enter here?’ – *Common Market Law Review* 2008 (45), p. 1408; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. EU State Aid Modernisation (SAM), COM(2012) 209 final, 8.5.2012, para. 23(a). – OJ C 11, 15.1.2013, pp. 49–53.

⁸ Treaty on the Functioning of the European Union (consolidated version 2012). – OJ C 326, 26.10.2012, pp. 47–200.

⁹ Judgment of the Court (First Chamber) of 8.5.2013, C-197/11, *Libert and Others*, references for a preliminary ruling: Cour constitutionnelle – Belgium, p. 74. These conditions are also mentioned as ‘the four cumulative elements’: European Commission. Guidance Paper on state aid-compliant financing, restructuring and privatisation of State-owned enterprises, 10.2.2012. Available at http://ec.europa.eu/competition/state_aid/studies_reports/swd_guidance_paper_en.pdf (most recently accessed on 21.5.2013).

¹⁰ Judgment of the General Court (Fifth Chamber) of 1.7.2010, T-335/08, *BNP Paribas and BNL v. Commission*, para. 159. – ECR 2010, p. II-03323.

¹¹ Judgment of the General Court (Fourth Chamber) of 3.3.2010, T-163/05, *Bundesverband Deutscher Banker v. Commission*, paras 34, 35. – ECR 2010, p. II-00387.

¹² Judgment of the Court (Third Chamber) of 8.12.2011, C-81/10 P, *France Télécom v. Commission*, para. 17.

pertaining to certain categories of aid that are exempted from the requirement of prior notification of the Commission. Examples are investment and employment aid to small and medium-sized enterprises; aid for creation of enterprises by female entrepreneurs; aid for environmental protection; aid for research, development, and innovation; training aid; and aid for disadvantaged or disabled workers.^{*13} The Commission has set out various *de minimis* aid thresholds beneath which aid measures are not subject to the notification procedure provided for in Article 108 (3) of the TFEU.^{*14} The total *de minimis* aid granted to any one undertaking shall not exceed 200,000 euros over any period of three fiscal years, in the road transport sector 100,000 euros^{*15}, and to undertakings providing services of general economic interest 500,000 euros.^{*16} The Commission has initiated modernisation and simplification for EU state aid policy that has to do with the previously mentioned aid as well.^{*17}

2.3. Recovery of aid

Nevertheless, practice has demonstrated that state aid has been granted contrary to the rules. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision (TFEU, Art. 108 (3)). When aid is implemented without prior reporting to the Commission, that aid is unlawful.^{*18}

Article 108 (2) of the TFEU specifies that if the Commission finds that aid granted by a state or through state resources is not compatible with the internal market with respect to Article 107, or that such aid is being misused, it shall decide that the relevant state shall abolish or alter said aid within a span of time to be determined by the Commission. Pursuant to Article 14 (1) and Article 15 (1) of Council Regulation (EC) No. 659/1999, there are only two limits to ordering of recovery of unlawful and incompatible aid. First, the Commission shall not require recovery of the aid if doing so would be contrary to a general principle of Community law. Second, the powers of the Commission to recover aid shall be subject to a limitation period of 10 years.^{*19}

Pursuant to the established case law, abolishing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful. By repaying the aid, the recipient forfeits the advantage it had enjoyed over its competitors in the market and the situation prior to payment of the aid is restored.^{*20}

3. The principle of protection of legitimate expectations in recovery of unlawful state aid

Pursuant to the firmly established EU case law, the protection of legitimate expectations is one of the fundamental principles of the Union.^{*21} The EU Treaty does not define that principle; this has been derived by the ECJ mainly on the basis of the laws of the Member States.^{*22} The ECJ has decided that the principle of

¹³ Commission Regulation (EC) No. 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of articles 87 and 88 of the Treaty (General Block Exemption Regulation), Article 1 (1). – OJ L 214, 9.8.2008, pp. 3–47.

¹⁴ Commission Regulation (EC) No. 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, Preamble (1), Article 2 (1). – OJ L 379, 28.12.2006, pp. 5–10.

¹⁵ *Ibid.*, Article 2 (2).

¹⁶ Commission Regulation (EU) No. 360/2012 of 25 April 2012 on the application of articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, Article 2 (2). – OJ L 114, 26.4.2012, pp. 8–13.

¹⁷ Communication, SAM (see Note 7), para. 20.

¹⁸ C-81/10 P, *France Télécom v. Commission*, para. 59.

¹⁹ Council Regulation No. (EC) 659/1999.

²⁰ Judgment of the Court of Justice of the European Communities (Sixth Chamber) of 29.4.2004, C-298/00 P, *Italy v. Commission*, paras 75, 76. – ECR 2004, p. I-04087.

²¹ C-369/09 P, *ISD Polska and Others v. Commission*, para. 122.

²² T. Tridimas. *The General Principles of EU Law*. Second edition. New York: Oxford University Press 2006, reprinted 2009, p. 4.

legitimate expectations, which is part of the Community legal order, is a corollary of the principle of legal certainty, which requires that legal rules be clear and precise, and it aims to ensure that the situations and legal relationships governed by Community law remain foreseeable.^{*23}

It has been claimed that invoking the principle of legitimate expectations in the area of state aid is not achievable, since the application of protection of legitimate expectations is, in part, blurred in the area of state aid.^{*24} Several authors have referred to the strictly restricted application of the principle of the protection of legitimate expectations by the EU courts in the context of recovery of unlawful state aid and have to a greater or lesser extent criticised such strict application.^{*25} The Commission itself has noted that the ECJ employs very restrictive interpretation of these principles in the context of recoveries.^{*26}

Pursuant to the case law, the recipient's legitimate expectations of being protected must be justified. Below, we take a look at the justifications used to protect legitimate expectations when unlawful state aid is being recovered.

3.1. The notion that there can be no legitimate expectations without notification

In many cases, the root of the problem is in that the state aid is not reported.^{*27} For instance, the Commission may learn about the granting of state aid from the media and make a decision that the relevant EU member state must recover unlawful state aid.^{*28} The ECJ has clarified that the obligation of notification is one of the fundamental features of the system of control put in place by the Treaty in the field of state aid. In that system, Member States are under an obligation, first, to notify the Commission of each measure designed to grant new aid or alter aid for the purposes of Article 87 (1) of the EC Treaty (TFEU, Art. 107 (1)) and, second, not to implement such a measure, in accordance with Article 88 (3) of the EC Treaty (TFEU, Art. 108 (3)), until that institution has taken a final decision on the measure. Thus, in view of the mandatory nature of the review of state aid by the Commission, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 88 of the EC Treaty (TFEU, Art. 108), and a diligent business operator should normally be able to determine whether that procedure has been followed. In particular, where aid is implemented without prior notification of the Commission, with the result that it is unlawful under Article 88 (3) of the EC Treaty (TFEU, Art. 108 (3)), the recipient of the aid cannot at that time have a legitimate expectation that its grant is lawful. Where the Commission has not been notified of the aid, any apparent failure on its part to act in relation to the measure is irrelevant.^{*29}

This standpoint of the Court prevents invocation of legitimate expectations from the onset insofar as this is possible only if the aid was compatible with the procedure. However, for the recipients the gist of the problem has been in that the aid has not been granted in compliance with the procedure. The ECJ has proclaimed a clear statement: an undertaking must be capable of determining whether or not the procedure was complied with.^{*30} The ECJ has noted that the recipients being small undertakings cannot justify a

²³ Judgment of the Court of Justice of the European Communities (Sixth Chamber) of 15.2.1996, C-63/93, *Duff and Others*. Reference for a preliminary ruling: Supreme Court – Ireland, para. 20. – ECR 1996, p. I-00569.

²⁴ A. Giraud (see Note 7), p. 1399.

²⁵ *Ibid.*; T. Tridimas (see Note 22), p. 296; W. Weiß, M. Haberkamm. Legitimate expectations in state aid and the CFI. – *European State Aid Law Quarterly*, June 2010 (9)/2, p. 537; A. Winckler; F.-C. Lapr v te. Reconciling legal certainty, legitimate expectations, equal treatment and the prohibition of state aids. – *European State Aid Law Quarterly*, June 2011 (10)/2, pp. 321–326; N.A. De Vos. Europeanization of the principle of legitimate expectations: *The Significance of the European Principle of Legitimate Expectations for the Equivalent Principles in the Netherlands, France and Belgium in the Framework of a Growing Ius Commune (with a Summary in English)*. Boom Juridische uitgevers 2011, pp. 613–621; M. Koillinen. *Luottamuksensuojaja eurooppalaisena oikeusperiaatteena*. Helsinki: Suomalainen Lakimiesyhdistys 2012, pp. 368–383.

²⁶ Notice from the Commission, p. 17, and the case law referred to therein.

²⁷ Judgment of the Court of Justice of the European Communities of 20.9.1990, C-5/89, *Commission v. Germany*. – ECR 1990, p. I-03437; Judgment of the Court of Justice of the European Communities of 11.7.1996, C-39/94, *SFEI and Others*. Reference for a preliminary ruling: Tribunal de commerce de Paris – France. – ECR 1996, p. I-03547; Judgment of the Court of Justice of the European Communities of 20.3.1997, C-24/95, *Land Rheinland-Pfalz v. Alcan Deutschland*, reference for a preliminary ruling: Bundesverwaltungsgericht – Germany. – ECR 1997, p. I-0159; C-298/00 P, *Italy v. Commission*.

²⁸ C-5/89, *Commission v. Germany*, para. 2.

²⁹ C-81/10 P, *France T l com v. Commission*, paras 58–60.

³⁰ *Ibid.*, para. 59.

legitimate expectation on their part as to the lawfulness of that aid.^{*31} However, the ECJ has not completely closed the door to protection of legitimate expectations in cases wherein state aid is being recovered—namely, one may appeal to exceptional circumstances.

3.2. Exceptional circumstances as potential justification for legitimate expectations

The ECJ has decided that a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and, accordingly, declining to return that aid. If such a case is brought before a national court, it is for that court to assess the material circumstances—if necessary, after obtaining a preliminary ruling on interpretation from the ECJ.^{*32}

The author is aware of just one judgement in EU case law wherein the Court found that there existed exceptional circumstances: *RSV v. Commission*^{*33}. Whereas the Court does not even mention *expressis verbis* in this judgement that the circumstances appealed to by the applicant were exceptional, we learn only from subsequent judgements that the Court had treated the circumstances of the case as exceptional. Namely, in *Germany v. Commission*, Germany claimed that the Commission's delay in making a decision created legitimate expectations and referred to *RSV v. Commission* as a similar situation.^{*34} In *Germany v. Commission*, the ECJ found nevertheless that the circumstances underlying the judgement in *RSV v. Commission* were exceptional and dissimilar to those in the case in hand.^{*35} Likewise, the EU courts have in many cases rejected the applicant's arguments that the circumstances were exceptional and that they led the recipient to expect legitimately that the aid was lawful and thus that the recipient is justified in refusing to return it.^{*36}

As the circumstances of the *RSV v. Commission* judgement seem to be a yardstick for the EU courts and applicants alike with which they determine exceptional circumstances that may lead to legitimate expectations, the circumstances of this particular case are worthy of outlining. In *RSV v. Commission*, the applicant relied, *inter alia*, on the principle of legitimate expectations.^{*37} The applicant (RSV) had been, with the Commission's approval, in receipt of state aid under a restructuring programme designed to terminate certain activities.^{*38} Further aid was granted to RSV, paid before notification of the Commission thereof, which was the subject of the contested decision.^{*39} The applicant argued that, inasmuch as the Commission, in taking 26 months to render the contested decision, disregarded the requirements of legal certainty, it failed to comply with the rules of good administration.^{*40}

The Court found that the aid in question involved only the supplementary costs of one operation, the cessation of certain RSV activities, which had already been the subject of aid authorised by the Commission. The Court found that the situation was, therefore, known to the Commission. It was apparent to the Court that the aid in question was intended to meet additional costs of an operation that had been in receipt of authorised aid. The Court found that the applicant therefore had reasonable grounds for believing that the Commission's doubts no longer existed and that the aid would encounter no objection. The ECJ concluded that the Commission's delay in issuing the contested decision could in the case in question establish a legitimate expectation on the applicant's part that refunding of the aid would not be ordered. Insofar as the contested decision of the Commission from which such a requirement was to be inferred as therefore unlawful, it had to be declared void.^{*41}

³¹ C-298/00 P, *Italy v. Commission*, para. 88.

³² *Ibid.*, para. 86.

³³ Judgment of the Court of Justice of European Communities of 24.11.1987, C-223/85, *RSV v. Commission*. – ECR 1987, p. 04617.

³⁴ Judgment of the Court of Justice of the European Communities of 28.1.2003, C-334/99, *Germany v. Commission*, paras 34, 35. – ECR 2003, p. I-01139.

³⁵ *Ibid.*, para. 44.

³⁶ C-298/00 P, *Italy v. Commission*, para. 86; Judgment of the General Court (Second Chamber) of 15.6.2010, T-177/07, *Mediaset v. Commission*, paras 174–178. – ECR 2010, p. II-02341; C-81/10 P, *France Télécom v. Commission*, para. 64.

³⁷ C-223/85, *RSV v. Commission*, para. 7.

³⁸ *Ibid.*, para. 2.

³⁹ *Ibid.*, para. 6.

⁴⁰ *Ibid.*, para. 12.

⁴¹ *Ibid.*, paras 12–18.

It is precisely in connection with the case law of the EU courts after the *RSV* judgement that W. Weiß and M. Haberkamm have claimed that the protection of legitimate expectations should not merely be a theoretical principle, as in the wake of the *RSV* judgement the Court has taken a very rigid stance. W. Weiß and M. Haberkamm believe that the EU courts should justly weigh all circumstances, including the role of the Commission. If the Commission keeps a recipient of state aid in a state of uncertainty for extremely long periods of time, the situation should also be treated as exceptional.^{*42}

3.3. Legitimate expectations rooted in precise assurances

Pursuant to established court practice, the right to rely on the principle of the protection of legitimate expectations applies to any individual in a situation in which an institution of the EU, by giving that person precise assurances, has led him to entertain well-founded expectations.^{*43}

The EU courts have generally not found that EU institutions had given precise assurances regarding state aid such that the applicant would have been caused to entertain legitimate expectations.^{*44} However, *ESF Elbe-Stahlwerke Feralpi v. Commission* indicates that the Court of First Instance found that the Commission was not justified in requiring recovery of the aid element because of specific assurances provided by the Commission.^{*45} The Commission found that the aid element was not authorised and that it is incompatible with the common market.^{*46} In that case, the Court of First Instance observed that recovery cannot be justified solely on the grounds that the aid in question was not reported to the Commission.^{*47} The Court of First Instance recalled that the recipient of illegal aid may, in order to challenge its repayment, plead exceptional circumstances that legitimately give rise to a legitimate expectation that the aid was lawful. In the case we consider here, the applicant did not even rely on exceptional circumstances^{*48} but referred to the fact that the aid element was included in the state guarantees covering the operating loans and that the Commission had authorised those guarantees in its letters.^{*49} The Court of First Instance decided that, by approving the state guarantees, the Commission granted the applicant precise assurances of such a kind as to give it legitimate expectations as to the lawfulness of the aid element in those guarantees—assurances that prevent the Commission from ordering recovery after a subsequent finding that the guarantees are incompatible with the common market.^{*50}

Also in the case *Belgium v. Commission*, assurances were relevant, but in different circumstances and with different effect. The Court has repeatedly held that the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation wherein a Community authority has caused him to entertain expectations that are justified. However, a person may not plead infringement of the principle unless he has been given precise assurances by the administration. Similarly, if a prudent and alert economic operator could have foreseen the adoption of a Community measure that is likely to affect his interests, he cannot appeal to that principle if the measure is adopted. Furthermore, even if the Community had first created a situation capable of giving rise to legitimate expectations, overriding public interest may preclude transitional measures from being adopted in respect of situations that arose before the new rules came into force but that are still subject to change. However, the Court has also held that, in the absence of an overriding public interest, the Commission infringed a superior rule of law by failing to couple the repeal

⁴² W. Weiß, M. Haberkamm (see Note 25), p. 536, 537 and Note 71 therein.

⁴³ Judgment of the Court (First Chamber) of 16.12.2010, C-537/08 P, *Kahla Thüringen Porzellan v. Commission*, paras 63, 146. – ECR 2010, p. I-12917; *ISD Polska and Others v. Commission*, para. 123.

⁴⁴ For instance, Judgment of the General Court (Fifth Chamber) of 1.7.2010, T-53/08, *Italy v. Commission*, para. 131. – ECR 2010, p. II-03187; C-537/08 P, *Kahla/Thüringen Porzellan v. Commission*, paras 65, 66; C-369/09 P, *ISD Polska and Others v. Commission*, para. 126.

⁴⁵ Judgment of the Court of First Instance (Third Chamber, extended composition) of 5.6.2001, T-6/99, *ESF Elbe-Stahlwerke Feralpi v. Commission*, paras 188, 191. – ECR 2001, p. II-01523.

⁴⁶ *Ibid.*, para. 12.

⁴⁷ *Ibid.*, para. 177.

⁴⁸ *Ibid.*, paras 183, 184.

⁴⁹ *Ibid.*, para. 188.

⁵⁰ *Ibid.*, para. 190.

of a set of rules with transitional measures for protection of the expectations that a trader might legitimately have derived from the Community rules.^{*51}

In the case *Belgium v. Commission*, the Commission found that a tax regime for co-ordination centres—i.e., a certain type of undertaking in Belgium—did not have an aid element.^{*52} Later, the Commission altered its appraisal and handed down a decision (the contested one) that the tax scheme constitutes aid that is incompatible with the common market.^{*53} Significant in this context was Article 88 (1) (TFEU, Art. 108 (1)). Pursuant to this article, the Commission shall, in co-operation with Member States, keep under constant review all systems of aid existing in those states. It shall propose to the latter any appropriate measures required for progressive development or by the functioning of the common market. Should effect not be given to those proposals, Article 88 (2) (TFEU, Art. 108 (2)) entitles the Commission to require the Member State concerned to alter or abolish the aid within the span of time to be determined. The ECJ observed that it is beyond doubt that the tax regime in question constitutes an existing measure, as the Commission was notified of it in the context of its earlier decision and the regime had not been materially altered. The ECJ found also that application of the contested decision was foreseeable by those subject to it.^{*54} The Commission argued that the co-ordination centres could not plead a legitimate expectation in the continued existence of the scheme in question, because there was information available to them that the scheme would not be maintained. The ECJ found that the centres were entitled to expect in any case that a Commission decision reversing the previous stance would give them the time necessary to address that change in approach. It follows that the co-ordination centres were entitled to have a legitimate expectation that a reasonable transition period would be granted for allowing them to adjust to the consequences of that decision. The ECJ stated that the Commission had not shown how the interests of the Community preclude a transition period of that kind. The Court concluded that the plea alleging infringement of the principle of the protection of legitimate expectations was well founded.^{*55}

In the case *Alcoa Trasformazioni v. Commission*, the ECJ clarified that, as far as state aid is concerned, the principle of the protection of legitimate expectations can be infringed when the Commission alters its appraisal of a measure on the basis only of more rigorous application of the treaty rules on state aid. In such a case, the applicants are entitled to expect that a Commission decision reversing the previous approach will give them the time necessary for addressing that change of approach. Such a situation must be distinguished from that in which the Commission does not, in the new decision, question its assessment of the measure examined in an earlier decision but entertains doubts as to the measure at issue on account of, first, the fact that its conclusions in the earlier decision were limited in duration of applicability and based on the circumstances prevailing at a specific time and, second, the changes undergone by the measure to which that decision pertained. In such a case, the earlier decision cannot give rise to a legitimate expectation that the Commission's conclusions in that decision remain valid.^{*56}

3.4. The relationship of the law of Member States to EU law in recovery of state aid

The principle of the protection of legitimate expectations is an attempt to ensure that situations and legal relationships governed solely by Community law remain foreseeable; it does not apply to legal situations that are governed solely by national law.^{*57} N.D. Vos states that the European principle of legitimate expectations is, within the scope of European law, the minimum standard. Whether a national principle of legitimate expectations can be applied depends on the question of whether or not a particular case falls within

⁵¹ Judgment of the Court of Justice of the European Communities (Second Chamber) of 22.6.2006, C-182/03, *Belgium v. Commission*, paras 147–149. – ECR 2006, p. I-05479.

⁵² *Ibid.*, para. 16.

⁵³ *Ibid.*, paras 28–34.

⁵⁴ *Ibid.*, paras 73–77.

⁵⁵ *Ibid.*, paras 160–167.

⁵⁶ Judgment of the Court (Second Chamber) of 21.7.2011, C-194/09 P, *Alcoa Trasformazioni v. Commission*, paras 72–75; *Alcoa Trasformazioni v. Commission*, Summary of the Judgment, para. 4.

⁵⁷ Judgment of the Court of Justice of the European Communities (Third Chamber) of 17.9.2009, C-519/07 P, *Commission v. Koninklijke FrieslandCampina*, para. 28. – ECR 2009, p. I-08495.

a domain that is fully Europeanised.^{*58} In a domain such as state aid, the principle of legitimate expectations is strongly restrained by European conditions.^{*59}

In *Commission v. Germany*^{*60}, the ECJ clarified the application of legitimate expectations when a Member State has failed to adhere to the procedure. The Commission ordered Germany to recover the aid.^{*61} Germany did not contest the Commission's decision^{*62} but neither did it implement that decision; the claim was that it was absolutely impossible to implement the decision, by reason of the principle of the protection of legitimate expectations, which is embodied in particular in §48 of the *Verwaltungsverfahrensgesetz* (Law on Administrative Procedure) (VwVfG) of the state of Baden-Württemberg, which was applicable to the case. Germany claimed that, in accordance with that paragraph and the principles of German constitutional law, a public authority may not revoke an unlawful administrative measure granting a benefit without first weighing the various interests involved. Germany found that, in the circumstances of the case, the national authority was obliged to accord greater weight to the protection of the legitimate expectations of the undertaking that had received the aid than to the public interest of the Community in having that aid recovered. The German Government furthermore argued that recovery of the aid is also prevented by the prohibition in §48 of the VwVfG of revocation of an administrative measure granting a benefit more than one year after that administrative authority became aware of the circumstances constituting grounds for revocation.^{*63}

The ECJ stressed that a Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 93 of the EEC Treaty (TFEU, Art. 108) may not rely on the legitimate expectations of recipients for justification of a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it could do so, Articles 92 and 93 of the Treaty establishing the EEC (TFEU, Articles 107 and 108) would amount to naught, since national authorities would be able to rely on their own unlawful conduct so as to deprive decisions taken by the Commission of their effectiveness. Finally, the ECJ found that the German Government may not rely on the obligations to which the competent administrative authority is subject under the particular rules governing the protection of legitimate expectations in §48 of the VwVfG with regard to the weighing of the interests involved and the period within which an administrative act granting a benefit may be revoked. The Court also mentioned that it has consistently held that a Member State may not refer to provisions, practices, or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under Community law.^{*64}

In *Land Rheinland-Pfalz v. Alcan Deutschland*, the ECJ clearly stated that where state aid is found to be incompatible with the common market, the role of the national authorities is merely to give effect to the Commission's decision. The national authorities do not have any discretion with regard to revocation of a decision granting aid. Therefore, where the Commission, in a decision that has not been the subject of legal proceedings, orders the recovery of unduly paid sums, the national authorities are not entitled to come to any other findings.^{*65}

⁵⁸ N.A. De Vos (see Note 25), p. 614.

⁵⁹ *Ibid.*, p. 620.

⁶⁰ C-5/89, *Commission v. Germany*.

⁶¹ *Ibid.*, paras 1–4.

⁶² *Ibid.*, para. 5.

⁶³ *Ibid.*, paras 9–12.

⁶⁴ *Ibid.*, paras 17–18.

⁶⁵ C-24/95, *Land Rheinland-Pfalz v. Alcan Deutschland*, para. 34.

4. Conclusions

Undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure.^{*66} Meanwhile, the ECJ has pointed out that a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund that aid.^{*67} Legitimate expectations based on precise assurances that the aid is compatible with the internal market may prevent the Commission from ordering recovery^{*68}, and the recipient undertakings are entitled under certain circumstances to expect that a transition period will be granted when the Commission alters its appraisal.^{*69} EU case law indicates that the Court has adopted a very rigid position and has generally identified neither the existence of exceptional circumstances nor precise assurances from institutions. Therefore, the likelihood of the EU courts finding that the principle of legitimate expectations has been infringed in recovery of unlawfully granted state aid is very limited.^{*70} At the same time, it may be said that the case law addressing application of the protection of legitimate expectations to a recipient of unlawful state aid is symmetrical to the essence of the extent of state aid in the EU: the general principle of the prohibition of state aid set out in Article 107 of the TFEU. The goal is non-distortion of competition. It arises from Articles 107 and 108 of the TFEU that state aid is not a conventional measure; it must be compatible with the internal market and feature, *per se*, the dimension of exceptionality. One can only rhetorically ask how the EU courts's 'softer' approach to the application of legitimate expectations to recipients of unlawful state aid would affect competition and through it the internal market.

⁶⁶ C-81/10 P, *France Télécom v. Commission*, para. 59.

⁶⁷ C-298/00 P, *Italy v. Commission*, para. 86; C-223/85, *RSV v. Commission*.

⁶⁸ T-6/99, *ESF Elbe-Stahlwerke Feralpi v. Commission*, para. 190.

⁶⁹ C-182/03, *Belgium v. Commission*, para. 163.

⁷⁰ Successful cases for recipients of the aid: C-223/85, *RSV v. Commission*; T-6/99, *ESF Elbe-Stahlwerke Feralpi v. Commission*; C-182/03, *Belgium v. Commission*.



Einar Vene

Magister iuris

Richter am Bezirksgericht Tartu

Wirksamkeit des angefochtenen Verwaltungsakts als Voraussetzung für die Stattgebung der Aufhebungsklage in der Rechtsetzung und Rechtsprechung Estlands

1. Einführung

Eines der am meisten verbreiteten und in der Gegenwart offensichtlich am meisten Verwendung findenden verwaltungsgerichtlichen Rechtsmittel in Estland ist die in der Verwaltungsgerichtsordnung (*halduskoh-tumenethuse seadustik*^{*1} – HKMS) festgelegte Aufhebungsklage (§ 37 Abs. 2 Nr. 1 HKMS). Im nachfolgenden Beitrag wird betrachtet, welche Bedeutung für die Stattgebung einer Aufhebungsklage der Umstand hat, wenn die Wirksamkeit des Verwaltungsakts bis zum Zeitpunkt des Erlasses eines Gerichtsurteils gemäß § 61 Abs. 2 des Verwaltungsverfahrensgesetzes (*haldusmenethuse seadus*^{*2} – HMS) abgelaufen ist. Genauer wird versucht, eine Antwort auf die Frage zu finden, ob in dem Fall, wenn die Wirksamkeit des Verwaltungsakts gemäß § 61 Abs. 2 HMS abgelaufen ist, die Aufhebung des Verwaltungsakts ausgeschlossen ist? Die Themensetzung wird durch die in der Rechtsprechung Estlands herrschende dualistische Einstellung zur Wirksamkeit des Verwaltungsakts als einer Voraussetzung für die Stattgebung der Aufhebungsklage veranlasst – in einigen Fällen wird der in § 61 Abs. 2 HMS festgelegte Ablauf der Grundlage der Wirksamkeit für einen die Stattgebung ausschließenden Umstand gehalten, in anderen Fällen aber nicht. Ebenfalls wird überprüft, ob irgendwelche anderen ähnlichen Grundlagen vorliegen können, die die Aufhebung des Verwaltungsakts ungeachtet dessen Rechtswidrigkeit verhindern können.

¹ RT I, 23.2.2011, 3; RT I, 28.12.2011, 1 (auf Estnisch).

² RT I 2001, 58, 354; RT I, 23.02.2011, 3 (auf Estnisch).

2. Wirksamkeit, Widerruf und Aufhebung des Verwaltungsakts

Die Wirksamkeit des Verwaltungsakts bedeutet die Eigenschaft, Rechtsfolgen herbeizuführen.^{*3} Aus der Wirksamkeit des Verwaltungsakts ergibt sich wiederum die Bindungswirkung des Verwaltungsakts bzw. die Pflicht zur Einhaltung der im wirksamen Verwaltungsakt enthaltenen Regelung.^{*4} Widerruf und Aufhebung des Verwaltungsakts bedeuten aber die Beseitigung der Wirksamkeit des Verwaltungsakts.^{*5} Im Ergebnis wird auch die Verbindlichkeit des Verwaltungsakts beseitigt und dessen Vollziehung ist keine Pflicht mehr.

Der im HMS geregelte Widerruf des Verwaltungsakts und die in der HKMS festgelegte Aufhebung sind inhaltlich gleichgestellte Begriffe.^{*6} Ein gewisser Unterschied zwischen diesen Begriffen besteht lediglich darin, dass die Aufhebung eines Verwaltungsakts im estnischen Recht den Widerruf des Verwaltungsakts rückwirkend von Anfang an bedeutet^{*7}, der Widerruf dagegen auch die Beseitigung der Wirksamkeit des Verwaltungsakts vorwärtswirkend bedeuten kann.^{*8} Ebenfalls kann der formelle Aspekt differenziert werden – die Aufhebung erfolgt durch das Verwaltungsgericht, der Widerruf aber durch ein Verwaltungsorgan.

Da die Wirksamkeit des Verwaltungsakts durch Aufhebung und Widerruf beseitigt wird, kann an sich logisch behauptet werden, dass die hauptsächliche Voraussetzung für die Aufhebung ist, dass der Verwaltungsakt zum Zeitpunkt der Stattgebung der Aufhebungsklage wirksam ist. Auch die Verwaltungskammer beim Staatsgerichtshof hat in einigen Entscheidungen, insbesondere gerade bei der Baugenehmigung, festgestellt, dass nach Ablauf der Wirksamkeit des Verwaltungsakts die Aufhebung des Verwaltungsakts nicht mehr möglich sei.^{*9} Nachfolgend wird betrachtet, ob eine derartige Behauptung, dass das Ablaufen der Wirksamkeit des Verwaltungsakts die Aufhebung des Verwaltungsakts durch das Verwaltungsgericht ausschließt, stichhaltig ist.

3. Grundlagen des Ablaufens der Wirksamkeit des Verwaltungsakts und deren Bedeutung für die Aufhebung

Die Grundlagen des Ablaufens der Wirksamkeit des Verwaltungsakts sind in § 61 Abs. 2 HMS festgelegt. Gemäß dieser Bestimmung ist ein Verwaltungsakt bis zum Widerruf, bis zum Ende der Wirksamkeitsdauer oder zur endgültigen Verwirklichung des mit dem Verwaltungsakt gewährten Rechts oder bis zur Erfüllung der Pflicht wirksam.

³ § 60 Abs. 1 HMS; So auch Staatsgerichtshof (StGH), 3-31-21-03, P. 13; A. Aedmaa ua. Haldusmenetluse käsiraamat [Handbuch des Verwaltungsverfahrens], Tartu: Tartu Ülikooli Kirjastus 2004, S. 314 (auf Estnisch); I. Pilving. Haldusakti siduvus: Uurimus kehtiva haldusakti õiguslikust tähendusest rõhuasetusega avalik-õiguslikel lubadel [Die Bindungswirkung des Verwaltungsakts: Eine Untersuchung nach der rechtlichen Bedeutung von wirksamen Verwaltungsakten unter besonderer Betrachtung öffentlich-rechtlicher Genehmigungen], Tartu: Tartu Ülikooli Kirjastus 2006, S. 53 (auf Estnisch). S dazu auch I. Pilving. Die Bindungswirkung von Verwaltungsakten in Estland: Deutsche Rechtsdogmatik im Spiegel der Rezeption. – Die Verwaltung 2008 (41) 4, S. 571–588.

⁴ I. Pilving. Haldusakti siduvus: Uurimus kehtiva haldusakti õiguslikust tähendusest rõhuasetusega avalik-õiguslikel lubadel (Fn. 3), S. 59.

⁵ A. Aedmaa ua. (Fn. 3), S. 343.

⁶ Vgl. A. Aedmaa. Haldusakti tühistamine vs kehtetuks tunnistamine [Aufhebung des Verwaltungsakts vs Widerruf des Verwaltungsakts]. – Õiguskeel 2001/5, S. 34–37 (auf Estnisch).

⁷ StGH 3-3-1-21-03, P. 14; I. Pilving. Haldusakti siduvus: Uurimus kehtiva haldusakti õiguslikust tähendusest rõhuasetusega avalik-õiguslikel lubadel (Fn. 3), S. 112.

⁸ Vgl. § 65–66 HMS.

⁹ StGH 3-3-1-33-05, P. 16; 3-3-1-63-10, P. 19.

3.1. Rückwirkender, vorwärtswirkender und teilweiser Widerruf des Verwaltungsakts

Ein Verwaltungsorgan kann ausgehend von §§ 65 ff. HMS einen Verwaltungsakt sowohl vorwärts- als auch rückwirkend widerrufen. Davon, welcher Widerruf stattgefunden hat, kann abhängen, ob dieser Verwaltungsakt noch aufhebbar ist.

Wenn ein rückwirkender, d.h. von Anfang an widerrufender Widerruf stattfindet, dann ist offensichtlich, dass, weil die Wirksamkeit des Verwaltungsakts nachträglich vollständig beseitigt worden ist, dessen ergänzende Aufhebung nicht mehr möglich ist. Diese Schlussfolgerung ergibt sich auch klar aus § 125 Abs. 1 Nr. 4 HKMS, die das Gericht zur Einstellung des Verfahrens verpflichten, wenn der angefochtene Verwaltungsakt widerrufen worden ist. So folgert grundsätzlich auch aus § 113 Abs. 1 Satz 4 der deutschen Verwaltungsgerichtsordnung^{*10} (VwGO).

Wenn dagegen lediglich ein vorwärtswirkender oder aber nur teilweise rückwirkender Widerruf stattgefunden hat und der Verwaltungsakt bezüglich des Teils, der die Rechte der Person verletzt, bestehen bleibt, kann das Verwaltungsgericht diesen Teil des Verwaltungsakts aufheben. Ebenso kann der Verwaltungsakt auch dann, wenn er nur teilweise widerrufen worden war, bezüglich des bestehen gebliebenen Teils gemäß § 3 Abs. 1 des estnischen Staatshaftungsgesetzes (*riigivastutuse seadus*^{*11} – RVastS) als auch gemäß § 5 Abs. 1 Nr. 1 HKMS aufgehoben werden.

3.1.1. Mit dem Widerruf des Verwaltungsakts gleichzustellende Fälle

Das Vorstehende betraf die Fälle, in denen ein ausdrücklicher und eindeutiger sowie vollständiger, vorwärtswirkender oder teilweiser Widerruf des Verwaltungsakts stattgefunden hat. Leider sind diese nicht die einzigen Fälle, wo die Wirksamkeit des Verwaltungsakts durch eine Willenserklärung des Verwaltungsorgans beseitigt wird. Ein Verwaltungsorgan kann die Wirksamkeit des Verwaltungsakts auch auf andere Weise beeinflussen.

3.1.1.1. Konkludenter Widerruf

Unter dem konkludenten Widerruf des Verwaltungsakts wird der Erlass eines neuen, sich von dem früheren unterscheidenden Verwaltungsakts in einer mit dem Verwaltungsakt schon geregelten Frage verstanden, ohne dass der erste Verwaltungsakt ausdrücklich widerrufen wird. Die grundsätzliche Möglichkeit einer derartigen Lösung ist in der Rechtsliteratur an sich zugegeben worden.^{*12} Obwohl man empfohlen hat, ein derartiges Verhalten in der Praxis gewiss zu vermeiden^{*13}, kommen solche Situationen dennoch vor. Auch die Verwaltungskammer beim Staatsgerichtshof hat einen solchen konkludenten Widerruf in gewissen Fällen für möglich gehalten und festgestellt, dass, wenn genau dieselbe Frage mit dem neuen Verwaltungsakt von dem früheren unterschiedlich beschlossen wurde, der frühere Verwaltungsakt widerrufen worden sei, ohne dass man bezüglich des früheren Verwaltungsakts überhaupt einen Standpunkt eingenommen hätte.^{*14}

Somit ist es möglich, dass eine etwaige Aufhebung des Verwaltungsakts auch dadurch ausgeschlossen wird, wenn der Verwaltungsakt früher konkludent widerrufen worden ist. Ähnlich wie beim üblichen Widerruf ist eine Aufhebung des Verwaltungsakts durch das Verwaltungsgericht aber nur dann ausgeschlossen, wenn der Widerruf vollständig war, d.h. nicht teilweise oder vorwärtswirkend erfolgte.

¹⁰ 21.1.1960, BGBl. 1 S. 17; 21.7.2012 BGBl. 1 S. 1577.

¹¹ RT I 2001, 47, 260; RT I, 13.09.2011 (auf Estnisch).

¹² H.-P. Schmieszek. – J. Brandt, M. Sachs (Hrsg.). Handbuch Verwaltungsverfahren und Verwaltungsprozess. 3. Aufl. C.F. Müller 2009, S. 336.

¹³ A. Aedmaa ua. (Fn. 3), S. 368.

¹⁴ StGH 3-3-1-58-03.

3.1.1.2. Gleichstellung der Änderung des Verwaltungsakts mit dem Widerruf

Gesonderte Probleme entstehen in der Situation, wo das Verwaltungsorgan den als Gegenstand der Streitigkeit dienenden Verwaltungsakt ändert. Die Folgen des Änderns sind vom Staatsgerichtshof unterschiedlich behandelt worden, abhängig davon, welchen Charakter das Ändern des angefochtenen Verwaltungsakts getragen hat. Es können zwei unterschiedliche Fälle angeführt werden:

- 1) wenn das Ändern in begünstigender Richtung stattfindet und der ändernde Verwaltungsakt der Person selbständig keine Pflichten auferlegt, wird dies ähnlich mit der Situation behandelt, als ob der Verwaltungsakt teilweise widerrufen worden wäre. Nach einer derartigen Änderung kann nur der Teil des Verwaltungsakts durch das Verwaltungsgericht aufgehoben werden, der bestehen geblieben ist. So ist zum Beispiel das Ändern eines Steuerbescheids und die Verringerung der Steuerpflicht wegen Rechenfehlern^{*15} der Situation gleichgestellt, in der der Steuerbescheid teilweise aufgehoben wird.^{*16}
- 2) wenn die Änderung durch einen neuen Verwaltungsakt stattfindet, der die Pflicht derart ändert, dass er erneut dieselbe Pflicht auferlegt, obwohl in einigermaßen geänderter Form, kann der ursprüngliche Verwaltungsakt für vollständig widerrufen erklärt werden. Die Person sollte in diesem Fall den neuen Verwaltungsakt, der dieselbe Pflicht in geänderter Form auferlegt, anfechten.^{*17}

Unter Berücksichtigung der eventuell in der zuletzt beschriebenen Situation auftauchenden Probleme muss man in die Stellungnahme des Staatsgerichtshofs einwilligen, dass die Verwaltungsorgane in dieser Situation, anstelle den Verwaltungsakt zu ändern, die Verwaltungsakte ausdrücklich widerrufen und ganz neue Akte hätten erlassen müssen.^{*18}

3.2. Endgültige Verwirklichung des mit dem Verwaltungsakt gewährten Rechts oder Erfüllung der Pflicht

Gemäß § 61 Abs. 2 HMS gilt als Grundlage des Ablaufens der Wirksamkeit des Verwaltungsakts auch, wenn das mit dem Verwaltungsakt gewährte Recht endgültig verwirklicht oder die Pflicht erfüllt wird. Somit könnte man schlussfolgern, dass, wenn der Verwaltungsakt erfüllt ist, dessen Aufhebung durch das Verwaltungsgericht auch nicht mehr möglich ist – es fehlt die Wirksamkeit des Verwaltungsakts, die durch die Aufhebung zu beseitigen wäre. Diese Schlussfolgerung wird von der gängigen Rechtspraxis jedoch nicht bestätigt. In der Wirklichkeit kommen offensichtlich sehr viele Verwaltungsakte zur Vollziehung, bevor der Klage durch Gerichtsurteil stattgegeben wird.

Noch mehr, bei einigen Verwaltungsakten ist direkt im Gesetz die Regelung festgeschrieben, die gerade die Möglichkeit berücksichtigt, dass ein belastender Verwaltungsakt, der schon vollzogen worden ist, aufgehoben werden kann, und somit rückgängig zu machen ist. So ist zum Beispiel in § 105 Abs. 4 des Gesetzes über den öffentlichen Dienst (*avaliku teenistuse seadus*^{*19}) die Möglichkeit zur Wiedereinstellung eines rechtswidrig vom Dienst freigestellten Beamten vorgesehen und § 116 Abs. 1 des Besteuerungsgesetzes (*maksukorralduse seadus*^{*20}) sieht die Möglichkeit vor, bei Aufhebung eines Steuerbescheids dem Steuerpflichtigen auf den schon entrichteten Steuerbetrag Zinsen zu zahlen. Diese Regelungen verweisen offensichtlich darauf, dass der Gesetzgeber gerade die Möglichkeit berücksichtigt hat, dass ein Verwaltungsakt (Verfügung über Freistellung vom Dienst, Steuerbescheid) ungeachtet dessen Vollziehung aufgehoben werden kann. Derartige schon erfüllte Verwaltungsakte sind auch in der Praxis des Staatsgerichtshofs aufgehoben worden.^{*21}

¹⁵ StGH 3-3-1-11-07.

¹⁶ StGH 3-3-1-40-04.

¹⁷ StGH 3-3-1-85-07, 3-3-1-86-07, 3-3-1-87-07, 3-3-1-88-07.

¹⁸ StGH 3-3-1-85-07, P. 25; 3-3-1-86-07, P. 27, 30; 3-3-1-87-07, P. 27; 3-3-1-88-07, P. 27.

¹⁹ RT I, 06.07.2012, 1; RT I, 20.12.2012, 3 (auf Estnisch).

²⁰ RT I 2002, 26, 150; RT I, 22.12.2012, 13 (auf Estnisch).

²¹ Zur Wiedereinstellung des Beamten s. StGH 3-3-1-83-11, 3-3-1-85-11, 3-3-1-52-10, zum schon vollzogenen Steuerbescheid StGH 3-3-1-23-09.

3.2.1. Ausnahme Baugenehmigung und deren Begründetheit

Dessen ungeachtet ist die Praxis des Staatsgerichtshofs in dieser Frage nicht einheitlich. Die Verwaltungskammer hat nämlich eine Sonderart des Verwaltungsakts – die Baugenehmigung – in dieser Frage im Vergleich zu anderen Verwaltungsakten unterschiedlich behandelt. Ursprünglich vertrat die Verwaltungskammer den klaren und konsequenten Standpunkt, dass eine Aufhebung der Baugenehmigung weder durch Fertigstellung des Bauwerks noch durch Erteilung der Nutzungsgenehmigung für dieses verhindert wird.^{*22} Später hat der Staatsgerichtshof festgestellt, dass, wenn das Bauwerk aufgrund der Baugenehmigung fertig gestellt wurde, die Gültigkeit der Baugenehmigung abgelaufen und die Aufhebung der Baugenehmigung durch das Gericht nicht mehr möglich ist.^{*23} Der Staatsgerichtshof hat seinen Standpunkt endgültig in 2010 erarbeitet, als es von der bisherigen Praxis die letztere Lösung auswählte und den Standpunkt einnahm, dass nach der Fertigstellung des Bauwerks und Erteilung einer Nutzungsgenehmigung für dieses die Aufhebung der Baugenehmigung nicht mehr möglich ist. Der Staatsgerichtshof hat festgestellt, dass die dem Bauwerk erteilte Baugenehmigung bis zur Erteilung der Nutzungsgenehmigung, die die Fertigstellung des Bauwerks festhält, wirksam ist. Nach Erteilung der Nutzungsgenehmigung wird die Baugenehmigung unwirksam, eine Aufhebung ist nicht mehr möglich.^{*24}

Eine derartige Lösung wirft eine Reihe von Fragen auf. Erstens erscheint die Unterscheidung einer vollzogenen Baugenehmigung (Beendigung der Bauarbeiten aufgrund der Baugenehmigung ist Vollziehung der Baugenehmigung) von den anderen vollzogenen Verwaltungsakten unverständlich. In rechtsdogmatischer Hinsicht gibt es keinen Unterschied, ob die Vollziehung des Verwaltungsakts in der Beendigung der Bauarbeiten aufgrund der Baugenehmigung oder etwas anderem besteht. Die Vollziehung des Verwaltungsakts ist die Vollziehung des Verwaltungsakts, unabhängig von der Art des Verwaltungsakts.^{*25}

Es ist auch fraglich, ob der Gesetzgeber mit der in § 61 Abs. 2 HMS festgelegten Regelung, aufgrund derer als Grundlage des Ablaufens der Wirksamkeit des Verwaltungsakts auch die Vollziehung des Verwaltungsakts gilt, zu erreichen wünschte, dass ein bereits vollzogener Verwaltungsakt nicht aufgehoben werden kann. Aus dem Erläuterungsschreiben zum Entwurf des HMS^{*26} geht dies nicht hervor. I. Pilving hat aus dem Erläuterungsschreiben geschlussfolgert, dass man mit dieser Regelung nur zu erreichen versucht hat, dass die Gegenseite weder von einer Person noch vom Verwaltungsorgan nach der endgültigen Erfüllung einer mit dem Verwaltungsakt auferlegten Pflicht erneut die Erfüllung derselben Pflicht verlangen könnte. Ebenfalls findet er, dass bei Erfüllung einer sich aus dem Verwaltungsakt ergebenden Pflicht oder der Ausnutzung des Rechts die Wirksamkeit nur vorwärtswirkend endet.^{*27} Diesen Schlussfolgerungen muss man zustimmen.

Zum Vergleich – wenn man sich die einschlägige Regelung im deutschen Recht anschaut, dann wird ersichtlich, dass abweichend vom estnischen § 43 Abs. 2 HMS das deutsche Verwaltungsverfahrensgesetz^{*28} (VwVfG) als Grundlage für den Ablauf der Wirksamkeit des Verwaltungsakts die Vollziehung des Verwaltungsakts direkt überhaupt nicht vorsieht. In der deutschen Rechtsliteratur wird einstimmig gefunden, dass die Vollziehung des Verwaltungsakts in der Regel dessen Aufhebung nicht auszuschließen braucht. Dies ergibt sich schon aus § 113 Abs. 1 Satz 2 VwGO, der vorsieht, dass, falls der Verwaltungsakt schon vollzogen ist, das Gericht auf Antrag der Person dem Verwaltungsorgan vorschreiben kann, dass und wie der Verwaltungsakt rückgängig zu machen ist. Somit schließt das Vorliegen einer Forderung zur Rückgängigmachung aus, dass ein vollzogener Verwaltungsakt für nicht aufhebungsfähig gehalten wird.^{*29} Auch

²² StGH 3-3-1-42-03, P. 14; auch StGH 3-3-1-25-02, 3-3-2-1-08.

²³ StGH 3-3-1-33-05, P. 15.

²⁴ StGH 3-3-1-63-10, P. 19.

²⁵ Vgl. StGH 3-3-1-41-11, P. 10 uw.

²⁶ Haldusmenetluse seaduse eelnõu seletuskiri [Das Erläuterungsschreiben zu dem Entwurf des Verwaltungsverfahrensgesetzes]. Zugänglich über die Homepage: <http://www.riigikogu.ee> (22.3.2013).

²⁷ I. Pilving, Haldusakti siduvus: Uurimus kehtiva haldusakti õiguslikust tähendusest rõhuasetusega avalik-õiguslikel lubadel (Fn. 3), S. 117.

²⁸ 25.5.1976. BGBl I S. 1253; 14.8.2009. BGBl. I S. 2827.

²⁹ W. R. Schenke, Verwaltungsprozessrecht, 10. Aufl. Heidelberg: C.F. Müller 2005, S. 82; A. Wittern, M. Basslsperger, Verwaltungs- und Verwaltungsprozessrecht. Grundriss für Ausbildung und Praxis, 19. Aufl. Stuttgart: W. Kohlhart GmbH 2007, S. 244; C. Huxtholl, Die Erledigung eines Verwaltungsakts im Widerspruchsverfahren. Berlin: Duncker & Humblot 1995, S. 85.

von § 5 Abs. 1 Nr. 5 des estnischen HKMS kann dieselbe Regelung gefolgert werden – dass nach Aufhebung des Verwaltungsakts dieser rückgängig gemacht werden muss.

Im Lichte des Vorstehenden kann behauptet werden, dass lediglich aus dem Umstand, dass der Verwaltungsakt vollzogen ist – unabhängig davon, ob es sich um eine Baugenehmigung handelt oder nicht – nicht die absolute Schlussfolgerung gezogen werden kann, dass dieser Verwaltungsakt ausgehend von § 61 Abs. 2 HMS nicht mehr aufheben werden kann.

3.2.2. Folgen der Vollziehung des Verwaltungsakts für die Aufhebung

Mann muss jedoch zugeben, dass in der Praxis ziemlich oft eine Lage entstehen kann, in der der Verwaltungsakt bis zum Erlass der Gerichtsentscheidung schon vollzogen worden ist und die Frage entstehen kann, ob die Aufhebung des Verwaltungsakts dem Kläger noch etwas bringt. Beispielsweise kann ein Gefangener eine gegen ihn verhängte und vollzogene Disziplinarstrafe^{*30} oder sonstige Inhaftierungsbedingungen angefochten haben und kann ab dem Zeitpunkt des Erlasses des Gerichtsurteils schon aus der Strafanstalt entlassen worden sein.^{*31}

Wenn man an dieser Stelle die der estnischen ähnliche deutsche Rechtsordnung betrachtet, dann sollte man vorerst die Begriffe ansprechen. Wenn die estnische Rechtsordnung nämlich nur zwischen dem wirksamen und unwirksamen Verwaltungsakt zu unterscheiden scheint, dann wird im deutschen Recht neben diesen Begriffen auch der Begriff „erledigt“^{*32} oder „die Erledigung“ verwendet, was bedeutet, dass dieser Verwaltungsakt nicht mehr aufgehoben werden kann.^{*33} In den Rechtsetzungsakten Estlands wird ein mit diesem Terminus analoger Begriff nicht eingesetzt. In der Rechtsprechung hat man in dieser Bedeutung jedoch den Begriff „Ablauf der Wirkung des Verwaltungsakts“ verwendet.^{*34} Auch in der deutschsprachigen Rechtsliteratur ist der Begriff „die Erledigung“ oft als Ablauf der Wirkung des Verwaltungsakts erklärt worden.^{*35} Somit ist eine derartige „Daseinsform“ des Verwaltungsakts für das estnische Recht nicht völlig fremd, jedoch wird es in den Rechtsetzungsakten nicht geregelt und auch in der Rechtsprechung bezieht man sich nur selten darauf.

Wie angemerkt, bedeutet die Erledigung des Verwaltungsakts, dass der Verwaltungsakt nicht mehr aufgehoben werden kann. Obwohl im deutschen Recht gefunden wird, dass die Vollziehung des Verwaltungsakts in der Regel nicht die Erledigung bedeutet^{*36}, wird zugegeben, dass der Verwaltungsakt in gewissen Fällen nach der Vollziehung erledigt werden kann. Jedoch reicht die bloße Vollziehung des Verwaltungsakts *per se* zur Erledigung des Verwaltungsakts nicht aus. Auch nach Vollziehung kann der Verwaltungsakt als Grundlage des andauernden Fortbestehens der entstandenen Situation dienen, d.h. Grundlage der Vollziehung des Verwaltungsakts bleiben^{*37} und somit eine in die Zukunft gerichtete rechtliche Wirkung besitzen.^{*38} Über die Erledigung des Verwaltungsakts kann man aber solange nicht reden, bis der Verwaltungsakt noch rückgängig gemacht werden kann^{*39}, d.h. die Folgen der Vollziehung beseitigt werden können. Ebenfalls liegt bei Ersatzvornahme die rechtliche Wirkung solange vor, bis die Vollziehungskosten eingefordert werden können.^{*40}

Wenn man die vorstehend beschriebene Ausnahme der Baugenehmigung beiseite lässt, dann scheint eine derartige Lösung eigentlich auch in der estnischen Rechtsordnung zu funktionieren. Erstens scheint

³⁰ Oberlandesgericht Tartu (OblGTrt) 13.4.2012, 3-09-445.

³¹ OblGTrt 30.11.2012, 3-11-140; StGH 3-3-1-77-09.

³² S. z.B. § 43 Abs. 2-3 VwVfG.

³³ § 113 Abs. 1 S. 4 VwGO.

³⁴ OblGTrt 13.4.2012, 3-09-445. P. 26. Unmittelbar auch StGH 3-3-1-41-11, P. 12.

³⁵ R. Schmidt. Zulässigkeit und Begründetheit verwaltungsrechtlicher Verfahren. 10. Aufl. Grasberg bei Bremen: Dr. Rolf Schmidt GmbH 2006, S. 155; M. Sachs. – P. Stelkens, H. J. Bonk, M. Sachs (Hrsg.). Verwaltungsverfahrensgesetz. Kommentar. 7. Aufl. München: C. H. Beck 2008, § 43 Rn. 215; C. Huxholl (Fn. 29), S. 85.

³⁶ W. R. Schenke (Fn. 29), S. 104; A. Wittern, M. Basslsperger (Fn. 29), S. 244; A. Decker. – H. Posser, H. A. Wolff (Hrsg.). Beck'scher Online-Kommentar VwGO. Edition 24. Stand 1.1.2013, § 113 Rn. 84.

³⁷ A. Wittern, M. Basslsperger (Fn. 29), S. 244.

³⁸ R. Schmidt (Fn. 35), S. 156.

³⁹ F. Schemmer. – J. Bader, M. Ronellenfitsch (Hrsg.). Beck'scher Online-Kommentar VwVfG. Edition 13. Stand 1.1.2013, § 43 Rn 54; M. Sachs. – P. Stelkens, H. J. Bonk, M. Sachs (Hrsg.) (Fn. 35), § 43 Rn. 215; C. Huxholl (Fn. 29), S. 85.

⁴⁰ M. Siegmund. – J. Brandt, M. Sachs (Hrsg.) (Fn. 12), S. 141.

es, dass man von diesem Grundsatz öfter auch in der Rechtsprechung Estlands ausgeht – wie vorstehend beschrieben, hat die Vollziehung des Verwaltungsakts dessen Aufhebung in der Regel nicht verhindert. Ebenfalls ist die Möglichkeit zur Rückgängigmachung eines vollzogenen Verwaltungsakts vom Gesetzgeber auch in verschiedenen Gesetzen festgeschrieben worden.^{*41}

Somit kann behauptet werden, dass die Vollziehung des Verwaltungsakts dessen Aufhebung im Verwaltungsgericht nur dann ausschließt, wenn der Verwaltungsakt neben dessen Vollziehung auch erledigt ist.

3.2.3. Möglichkeit der Aufhebung einer vollzogenen Baugenehmigung

Wenn man zu dem vorstehend schon angeführten Urteil der Verwaltungskammer in der Verwaltungssache Nr. 3-3-1-63-10 zurückkommt, wo man den Standpunkt einnahm, dass bei Fertigstellung des Bauwerks die Baugenehmigung nicht aufgehoben werden kann, bleibt fraglich, ob es sich im angeführten Fall um eine Situation handelte, in der die Baugenehmigung erledigt war. In diesem Urteil wurde nämlich nicht im Geringsten darauf eingegangen, ob man die Baugenehmigung noch rückgängig hätte machen können – in erster Linie also das Bauwerk abreißen. Wie vorstehend angemerkt, ist die Wirkung des Verwaltungsakts, wenn diese noch rückgängig gemacht werden kann, noch nicht abgelaufen und kann aufgehoben werden. Obwohl das Abreißen von rechtswidrig errichteten Bauwerken in Estland nicht alltäglich ist, hat es solche Fälle jedoch gegeben.^{*42} Die Möglichkeit der Beseitigung eines rechtswidrig errichteten Bauwerks ist von der Verwaltungskammer selbst eingeräumt worden.^{*43} Auch im deutschen Recht ist die Abrissverfügung eines rechtswidrigen Bauwerks eine durchaus rechtmäßige Maßnahme zur Beseitigung einer rechtswidrigen Situation.^{*44} Eine Baugenehmigung, die vollzogen ist, d.h. das Bauwerk ist fertig gestellt worden, wird in der dortigen Rechtsliteratur auch als ein Beispiel für einen Verwaltungsakt angeführt, der nicht erledigt ist und dessen Aufhebung möglich ist.^{*45}

Da der Staatsgerichtshof bei dieser Frage überhaupt nicht verweilt hat, ist es auch nicht möglich, dem Standpunkt des Staatsgerichtshofs zuzustimmen, dass eine Baugenehmigung nach deren Vollziehung nicht mehr widerrufen werden kann.^{*46}

Auch die Tatsache, dass einem Bauwerk die Nutzungsgenehmigung erteilt worden war, verhindert nicht die Aufhebung der Baugenehmigung. Die Baugenehmigung wird weiterhin als Grundlage des fertig gestellten Bauwerks als einer Folge der Vollziehung eines Verwaltungsakts bleiben. In der Sondermeinung des Gerichtsurteils ist richtig angeführt worden, dass die Baugenehmigung nach der Erteilung der Nutzungsgenehmigung ein rechtlicher Maßstab ist, mit dessen Hilfe man bewerten kann, ob die Nutzungsgenehmigung einem Bauwerk erteilt wurde, das der Baugenehmigung entspricht. Darauf, dass die Baugenehmigung nicht mit der Erteilung der Nutzungsgenehmigung für das Bauwerk erledigt ist, weist auch dies hin, dass die regulativen Ziele der Baugenehmigung und der Nutzungsgenehmigung im Baugesetz unterschiedlich sind – die erste gewährt das Recht zum Bauen und die zweite gewährt das Recht zur Nutzung des Bauwerks und stellt fest, dass das Bauwerk den für das Bauwerk vorgesehenen Anforderungen und dem Bauprojekt entspricht.^{*47} Eine besonders unverständliche Lösung entstand mit dem angeführten Urteil des Staatsgerichtshofs auch dank dem Umstand, dass der Staatsgerichtshof in dieser Sache in die Aufhebung der Nutzungsgenehmigung einwilligte. Somit könnte man ausgehend von der Logik des Staatsgerichtshofs behaupten, dass die Baugenehmigung nach der Aufhebung der Nutzungsgenehmigung wieder in Kraft trat^{*48} und deren Aufhebung möglich hätte sein müssen.

^{*41} Gesetz über den öffentlichen Dienst, § 105 Abs. 4; Besteuerungsgesetz, § 116 Abs. 1.

^{*42} S. z.B. Oberlandesgericht Tallinn (OblGTln) 3.12.08, 3-07-2642.

^{*43} StGH 3-3-1-64-02.

^{*44} Vgl. U. Ramsauer. Ehitusjärelvalve meetmed ebaseaduslike ehitiste kõrvaldamiseks [Maßnahmen der Bauaufsicht zur Beseitigung von ungesetzlichen Bauwerken]. – Juridica 2006/7, S. 479–489 (auf Estnisch).

^{*45} F. Kopp. W.-R. Schenke. Verwaltungsgerichtsordnung. Kommentar. München: C.H.Beck 2005, § 113 Rn. 105.

^{*46} Diese Stellungnahme des Staatsgerichtshofs wirft auch andere Fragen auf. S. P. Sarv. Ehitusloa tühistamine pärast ehitise valmimist [Aufhebung der Baugenehmigung nach Errichtung eines Bauwerks]. – Juridica 2011/2, S. 148–152 (auf Estnisch).

^{*47} Ehitusseadus [Baugesetz] § 22 Abs. 1 und § 32 Abs. 1-1¹. – RT I 2002, 47, 297; RT I, 25.05.2012, 5 (auf Estnisch).

^{*48} Vgl. StGH 3-3-1-53-07.

3.3. Ablauf der Wirksamkeitsdauer

In § 61 Abs. 2 HMS ist als Grundlage des Ablaufens der Wirksamkeit des Verwaltungsakts auch der Ablauf der Wirksamkeitsdauer des Verwaltungsakts festgelegt. Die Wirksamkeitsdauer des Verwaltungsakts kann entweder im Generalakt oder im Verwaltungsakt selbst aufgrund § 53 Abs. 1 Nr. 1 HMS beschränkt werden.^{*49}

Schließt der Ablauf der Wirksamkeitsdauer den Widerruf des Verwaltungsakts aus? Ähnlich zu der Situation, in der der Verwaltungsakt vollzogen ist, kann offensichtlich der Standpunkt eingenommen werden, dass der Ablauf der Wirksamkeitsdauer des Verwaltungsakts den Widerruf des Verwaltungsakts in dem Fall ausschließen kann, wenn damit auch jegliche Wirkung des Verwaltungsakts endet. Wenn es sich aber um einen Verwaltungsakt handelt, auf dessen Grundlage während der Wirksamkeitsdauer des Verwaltungsakts gewisse Handlungen vorgenommen wurden, dann ist die nach Ablauf der Wirksamkeitsdauer des Verwaltungsakts entstehende Situation dem vorwärtswirkenden Widerruf des Verwaltungsakts oder dem Ablauf der Wirksamkeit des Verwaltungsakts wegen dessen Vollziehung ähnlich – in diesem Fall wird der Verwaltungsakt vorwärtswirkend unwirksam und bleibt rückwirkend als rechtliche Grundlage der schon ausgeführten Handlungen bestehen.^{*50} Auf ähnliche Weise muss in diesem Fall die Aufhebung des Verwaltungsakts bezüglich der früheren Periode möglich sein, falls der Verwaltungsakt rechtswidrig war. W.-R. Schenke hat begründet angemerkt, dass der Ablauf der Wirksamkeitsfrist nur dann die Erledigung bedeutet, wenn die rückwirkende Wirksamkeit des Verwaltungsakts nicht als Voraussetzung der Rechtmäßigkeit dessen fortdauernder Folgen dient (z.B. Voraussetzung für die Vollziehung des Verwaltungsakts).^{*51}

Somit kann die Aufhebung eines wegen des Ablaufs der Wirksamkeitsfrist unwirksam gewordenen Verwaltungsakts nur beim Vorliegen einer gleichen Nebenbedingung verweigert werden – wenn der Verwaltungsakt erledigt ist – wie auch beim vollzogenen Verwaltungsakt.

4. Erledigung des Verwaltungsakts als eine die Aufhebung des Verwaltungsakts ausschließende selbständige Bedingung

Aus dem Vorstehenden wurde ersichtlich, dass aus dem Wortlaut von § 61 Abs. 2 HMS „Verwaltungsakt ist wirksam bis zum“ nicht gefolgert werden kann, dass die Aufhebung des Verwaltungsakts nach dem Ablauf der Wirksamkeit des Verwaltungsakts immer unmöglich wird. Es muss gefragt werden, ob der Verwaltungsakt erledigt ist. Lediglich das Ende der Wirksamkeit des Verwaltungsakts braucht nicht die Erledigung zu bedeuten. Dagegen bringt die Erledigung des Verwaltungsakts dessen Unwirksamkeit mit sich.^{*52}

4.1. Bedeutung der Erledigung

In welchen Fällen kann man von der Erledigung des Verwaltungsakts als von einem die Aufhebung des Verwaltungsakts ausschließenden Umstand sprechen? In der deutschsprachigen Rechtsliteratur hat man wiederholt versucht, diesen Begriff zu definieren, jedoch scheint die Findung einer einheitlichen Definition auch deutschen Rechtswissenschaftlern Schwierigkeiten zu bereiten. C. Huxholl hat festgestellt, dass ungeachtet vieler Anläufe die Erledigung gar nicht eindeutig verständlich definiert worden ist und in der Regel nur Gruppen von unterschiedlichen Fällen angeführt worden sind.^{*53}

⁴⁹ Haldusmenetluse seaduse eelnõu seletuskiri (Fn. 26).

⁵⁰ I. Pilving. Haldusakti siduvus: Uurimus kehtiva haldusakti õiguslikust tähendusest rõhuasetusega avalik-õiguslikel lubadel (Fn. 3), S. 116–117.

⁵¹ W. R. Schenke (Fn. 29), S. 104.

⁵² A. Wittern, M. Basslsperger (Fn. 29), S. 244.

⁵³ Zu den verschiedenen Definitionen der Erledigung s. C. Huxholl (Fn. 29), S. 39–42; Vgl. S. Lascho. Die Erledigung des Verwaltungsaktes als materiellrechtliches und verwaltungsprozessuales Problem. Berlin: Duncker und Humblot 2001, S. 25–36.

Nach Auffassung des Autors des Beitrags kann im Kontext des Themas die Definition, dass die Erledigung die Situation bedeutet, in der die Forderung zur Aufhebung des Verwaltungsakts für den Kläger sinnlos geworden ist, für am einfachsten verständlich gehalten werden.^{*54} Die Bedeutung der Erledigung wird ziemlich ausdrucksvoll auch durch die Bemerkung von D. Ehlers ausgedrückt, der aus § 43 Abs. 2 VwVfG, gemäß dem der Verwaltungsakt sich mit dessen Widerruf oder Aufhebung erledigt^{*55}, schlussfolgert, dass die Erledigung wie eine Aufhebung wirkt.^{*56} Auch der Verwaltungsakt verliert ja bei rückwirkendem Widerruf oder Aufhebung seine jegliche rechtliche Wirkung und dessen nochmalige Aufhebung ist nicht möglich. Somit könnte es, um festzustellen, ob der Verwaltungsakt erledigt ist, angemessen sein, zu überprüfen, ob die entstandene Situation dieselbe ist, als ob der Verwaltungsakt rückwirkend widerrufen oder aufgehoben worden wäre.

4.2. Arten der Erledigung

Es ist versucht worden, die beschriebenen Möglichkeiten des Ablaufs der rechtlichen Wirkung des Verwaltungsakts auch einzugliedern. M. Gerhardt hat zum Beispiel drei Arten der Erledigung unterschieden:

- a) Die Erledigung wegen Überschreitens des vom Verwaltungsakt festgelegten Wirkungsrahmens – entweder zeitlicher (z.B. bei Beschränkungen für die Nutzung des Reisepasses der Ablauf der Gültigkeitsdauer des Reisepasses), faktischer (z.B. ein Schüler wird nicht versetzt und er wiederholt das Schuljahr bis zum Ende des Schuljahrs) oder adressatbezogener Art (Person verstirbt, erkrankt, wird schwanger o.a.);
- b) Die Erledigung wegen endgültiger Erreichung des mit ihr verfolgten Zwecks – z.B. der Verwaltungsakt ist vollzogen und kann nicht mehr rückgängig gemacht werden;
- c) Ersetzen des Verwaltungsakts durch einen späteren Verwaltungsakt – hierunter würde in erster Linie die Aufhebung oder Änderung des Verwaltungsakts gehören.^{*57}

Das Angeführte ist bei Weitem kein allein herrschender und allgemein akzeptierter Katalog der Arten der Erledigung. C. Huxholl hat gefunden, dass es sogar neun mögliche Arten der Erledigung gibt^{*58} und S. Lascho hat sogar mehr Arten unterschieden.^{*59} Möglich ist auch eine kürzere Einteilung – zum Beispiel Eingliederung je nachdem, ob dies aus faktischen oder rechtlichen Gründen geschieht.^{*60} Beim Betrachten dieser Aufteilungen fällt auf, dass es schwierig ist, die Fälle erschöpfend unter die eine oder andere Gruppe zu gliedern. So manche konkrete Situation könnte sowohl in der einen als auch der anderen Fallgruppe untergebracht werden – z.B. könnte man bei Ablegung des Wehrdienstes über die Erledigung des Einberufungsbescheids, sowohl wegen der irreversiblen Vollziehung des Verwaltungsakts als auch des Ablaufens der im Verwaltungsakt vorgesehenen Frist sprechen. Deshalb ist eine erschöpfende und klar umrissene Gruppierung der Fälle des Ablaufs der Wirkung des Verwaltungsakts sehr problematisch.

4.3. Erledigung des Verwaltungsakts und mögliche Schadenverursachung

Die Aufhebung eines Verwaltungsakts, der erledigt ist, kann auch dann unterlassen werden, wenn durch diesen einer Person vielleicht Schaden zugefügt worden ist. Dies aus dem Grund, dass die Aufhebung den der Person zugefügten Schaden nicht mehr beseitigen würde^{*61} und die Erreichung der Aufhebung gemäß § 7 Abs. 1 RVastS auch keine Voraussetzung für eine Schadenerstattung ist.^{*62}

⁵⁴ M. Siegmund. – J. Brandt, M. Sachs (Hrsg.) (Fn. 12), S. 141; W.-R. Schenke (Fn. 29), S. 104.

⁵⁵ Dieselbe Folgerung kann man aus § 61 Abs. 2 HMS ziehen.

⁵⁶ D. Ehlers, F. Schoch. Rechtsschutz im Öffentlichen Recht. Berlin: De Gruyter 2009, S. 700.

⁵⁷ M. Gerhardt. – F. Schoch, E. Schmidt-Assmann, R. Pietzner (Hrsg.). Verwaltungsgerichtsordnung. Kommentar. München: Beck 2011, § 113 Rn. 84–89.

⁵⁸ C. Huxholl (Fn. 29), S. 97–101.

⁵⁹ S. Lascho (Fn. 53), S. 92–134.

⁶⁰ A. Wittern, M. Basslsperger (Fn. 29), S. 244.

⁶¹ OblGTrt 9.1.2012, 3-11-1562, P. 7.

⁶² StGH 3-3-1-86-11, P. 11; OblGTrt 9.1.2012, 3-11-1562, P. 8; OblGTrt 13.4.2012, 3-09-445, P. 26.

Diese Auffassung findet aber in dem Fall keine Anwendung, wenn die Wirkung des Verwaltungsakts in irgendeinem anderen Aspekt noch erhalten ist. Wenn der Verwaltungsakt vollzogen ist und der Verwaltungsakt eine Grundlage für das Bestehen der Vollziehungshandlungen des Verwaltungsakts darstellt, dann kann man mit der Klage auf Schadenersatz die Erstattung der durch die Vollziehung des Verwaltungsakts zugefügten negativen Folgen in Form der Schadenerstattung nicht erreichen. Zum Beispiel kann man nach der Bezahlung des Steuerbetrags keine Forderung auf Schadenersatz zum Rückerhalt des Steuerbetrags geltend machen, weil der Steuerbescheid im vollzogenen Teil nach wie vor wirksam ist und nach wie vor eine verbindliche Wirkung besitzt, damit der Steuerbetrag beim Staat verbleibt.⁶³

5. Fazit

Die zum Anfang des Beitrags gestellte Frage muss weitgehend verneint werden. Von den in § 61 Abs. 2 HMS festgelegten Grundlagen des Ablaufens der Wirksamkeit des Verwaltungsakts schließt nur der rückwirkende Widerruf des Verwaltungsakts die Aufhebung des Verwaltungsakts immer aus. In allen übrigen Fällen kann die Aufhebung des Verwaltungsakts jedoch möglich sein. Es stellte sich heraus, dass eine Aufhebung des Verwaltungsakts dadurch ausgeschlossen wird, wenn der Verwaltungsakt erledigt ist. Der Begriff „die Erledigung“ wird zwar in den estnischen Rechtsetzungsakten nicht verwendet, jedoch muss man dieses Institut in unserer Rechtstheorie und -praxis berücksichtigen. In der Rechtsprechung hat man diesen Begriff auch schon ausdrücklich verwendet.

Der vom Staatsgerichtshof erarbeiteten Praxis, dass eine Baugenehmigung nach Vollziehung der Baugenehmigung, d.h. nach Fertigstellung des Bauwerks nicht aufgehoben werden kann, kann man im Hinblick auf das Vorstehende nicht zustimmen. Lediglich die Fertigstellung des Bauwerks bedeutet nicht, dass die Wirkung der Baugenehmigung abgelaufen ist.

In Hinsicht auf die behandelte Problematik kann die Ergänzung der einschlägigen Gesetze durch eine Regelung erforderlich sein, die die Erledigung des Verwaltungsakts berücksichtigt. Wahrscheinlich wäre die Präzisierung von § 152 Abs. 1 Nr. 4 HKMS am dringendsten notwendig. Momentan gibt diese Bestimmung dem Verwaltungsgericht die Möglichkeit, das Verfahren der Aufhebungsklage nur dann zu beenden, wenn der Verwaltungsakt widerrufen worden ist. Unter Berücksichtigung des Vorstehenden muss diese Bestimmung so ausgelegt werden, dass die Aufhebung des Verwaltungsakts unterlassen und das Verfahren nur dann beendet werden kann, wenn der Verwaltungsakt bezüglich des Rechte verletzenden Teils widerrufen wurde. Darüber hinaus sollte aber dem Verwaltungsgericht auch in anderen Fällen eine Möglichkeit zur Beendigung des Verfahrens gewährt werden, wenn der Verwaltungsakt erledigt ist und die Aufhebung des Verwaltungsakts zum Schutz der Rechte des Klägers nicht erforderlich ist. Im Interesse der Klarheit und zur Vermeidung von Missverständnissen sollte ebenfalls die Regelung des HMS kritisch durchgesehen werden und gegebenenfalls sollten auch dort die mit der Erledigung des Verwaltungsakts zusammenhängenden Fragen geregelt werden.

⁶³ M. Sachs. – P. Stelkens, H. J. Bonk, M. Sachs (Hrsg.) (Fn. 35), § 43 Rn. 216. So auch I. Pilving. Haldusakti siduvus: Uurimus kehtiva haldusakti õiguslikust tähendusest rõhuasetusega avalik-õiguslikel lubadel (Fn. 3), S. 117.



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Popular Initiatives as Means of Altering the Core of the Republic of Latvia

1. Introduction

The Constitution of the Republic of Latvia (the *Satversme*) is the oldest Eastern or Central European constitution still in force and the sixth oldest still-functioning republican basic law in the world, having been adopted by the *Constitutional Assembly of Latvia* (*Satversmes sapulce*) on 15 February 1922.

The *Satversme* provides for various forms of direct popular participation. Besides the ordinary right to elect the Parliament, it sets forth rights

- to propose (Article 78 of the *Satversme*), adopt (Article 78 through Article 79, §1 of the *Satversme*), and repeal (articles 72 and 74 of the *Satversme*) ordinary law;
- to propose (Article 78 of the *Satversme*), adopt (Article 78 and Article 79, §1 of the *Satversme*), and repeal (articles 72 and 74 of the *Satversme*) amendments to the *Satversme*, which includes a right to approve amendments made by Parliament to the core articles—1, 2, 3, 4, 6, and 77—of the *Satversme* (Article 77 of the *Satversme*);
- to propose (articles 14 and 48 of the *Satversme*) and decide on recalling the Parliament (Article 48 of the *Satversme*);
- to decide on removing the President instead of recalling the Parliament, if the President proposes a recall (Article 50 of the *Satversme*); and
- to decide on participation in the European Union, including to discontinue participation (Article 68, §3 and Article 79, §2 of the *Satversme*), and on terms of participation in the European Union (Article 68, §4 and Article 79, §2 of the *Satversme*).

There are some limitations in respect of subjects of referenda and time for organising a referendum, yet they are few. Means of legislative referenda are not to be used for decision on matters related to ‘the Budget and laws concerning loans, taxes, customs duties, railroad tariffs, military conscription, declaration and commencement of war, peace treaties, declaration of a state of emergency and its termination, mobilisation and demobilisation, as well as agreements with other nations may not be submitted to national referendum’ (Article 73 of the *Satversme*), with the exception of certain questions of the European Union. As to confidence referenda, electors’ right to propose recalling Parliament ‘may not be exercised [for] one year after the convening of the Saeima [the Latvian Parliament] and one year before the end of the term of office of the Saeima, during the last six months of the term of office of the President, as well as earlier than six months after the previous national referendum regarding recalling of the Saeima’ (Article 14 of the *Satversme*).

The most popularly disputed form of direct popular participation is the referendum on constitutional matters. Although the wording of the *Satversme* seems to limit legislative referendum in respect of certain matters, recent developments show that, in practice, there are no limitations on matters decided upon by legislative referendum. To illustrate this, the author will describe three initiatives for referendum on constitutional amendments—first, on limiting educational rights; second, on introduction of Russian as a second official language and thus making changes to the core of the Republic of Latvia; and, third, on affording of citizenship to as many as 280,584 non-citizens, accounting for 13.74% of all residents of Latvia.^{*1} Although those initiative failed—in the first case, during collection of signatures, the second as a result of a popular vote; and in the third case, after the Central Election Commission stopped further organising actions in respect of submission of a request by 10,000^{*2} people to—they reflect historically and theoretically ascertained^{*3} deficiencies of direct popular participation, which border on violation of human rights and reckless questioning of the state's sovereignty.

2. Language of education

The constitutional content of educational rights in the current Latvian legal framework was long neglected and regarded as self-evident. Although the content was altered through lower external normative acts, this was not carried out to such an extent as would significantly reduce the level of protection of educational rights achieved or come into contradiction with other norms of the *Satversme*. An initiative to organise a referendum to limit state funding for education on the basis of language of education with effect from 1 September 2012 was the first and, thus far, only constitutional development of Article 112 of the *Satversme*.^{*4} Whilst the initiative ended on 9 June 2011 with an insufficient number of signatures (120,433 out of the 153,232 necessary)^{*5}, it raised multiple questions as to how the resolution of conflicts of constitutional norms would have been handled if the initiative had resulted in amendment of the *Satversme* and as to determination of the margin of appreciation of the Central Election Commission for consenting to the initiative and starting to collect signatures for organising a referendum.

The initiative proposed that primary and secondary education in the state language be ensured within the space of a year.^{*6} The initiators planned by this means to put an end to bilingual education or at least to scale it down to a minimum^{*7}, thus leaving it to privately owned education institutions and their determination of tuition fees.^{*8}

¹ Centrālās statistikas pārvaldes datu bāzes, ISG09. Pastāvīgo iedzīvotāju valstiskā piederība 2012. gada sākumā [‘Database of the Central Statistical Bureau, ISG09: Residents by nationality at the beginning of 2012’]. Available at <http://data.csb.gov.lv/> (most recently accessed on 14.10.2012) (in Latvian).

² Article 23 (1) of the law ‘On popular referendum, law initiative, and initiative of citizens of the European Union’. Par tautas nobalsošanu, likumu ierosināšanu un Eiropas pilsoņu iniciatīvu. – *Latvijas Vēstnesis*, 20 April 1994, No. 47 (178) (in Latvian).

³ M. Suksi. Bringing in the people. *A Comparison of Constitutional Forms and Practices of the Referendum*. Dordrecht: Martinus Nijhoff Publishers 1993, pp. 40–125, with the most notorious examples being given on pp. 93–103.

⁴ Article 112 of the *Satversme* provides that ‘[e]veryone has the right to education. The State shall ensure that everyone may acquire primary and secondary education without charge. Primary education shall be compulsory’.

⁵ Par parakstu vākšanas likuma “Grozījumi Latvijas Republikas Satversmē” ierosināšanai rezultātu: Centrālās vēlēšanu komisijas 2011. gada 21. jūlija lēmums Nr. 34 [‘On the results of collection of signatures for initiating the law “Amendments to the *Satversme* of the Republic of Latvia”: Decision of the Central Election Commission of 21 July 2011, No. 34’]. Available at <http://web.cvk.lv/pub/public/30044.html> (most recently accessed on 14.10.2012) (in Latvian).

⁶ The draft amendment to Article 112 of the *Satversme* provided: ‘Everyone has the right to education. The state shall ensure that everyone may acquire primary and secondary education without charge in the state language. Primary education shall be compulsory.’ The draft of the amendment to the *Satversme* provided also this transition provision: ‘From 1 September 2012, all education institutions of the state and local governments ensure education, starting with the first year of primary education, in the state language’. See Grozījumi Latvijas Republikas Satversmē: likumprojekts Centrālajai vēlēšanu komisijai parakstu vākšanai [‘Amendments to the *Satversme* of the Republic of Latvia, draft submitted to the Central Election Commission for collection of signatures’]. Available at <http://web.cvk.lv/pub/public/29883.html> (most recently accessed on 9.12.2011) (author’s translation from Latvian).

⁷ Saruna ar Raivi Dzintaru [‘Interview with Raivis Dzintars’]. – *Latvijas Avīze*, 11 May 2011 (in Latvian).

⁸ On state subsidies to private education, see ‘On the compliance of Section 59 (second paragraph, second sentence in the part on participation in financing private education institutions if the programs are implemented in the official language) of the Education Law with Article 91 of the Republic of Latvia *Satversme* (Constitution) and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (as being read in conjunction with Article 2 of the First Protocol)’ (judgement of the Constitutional Court of Latvia of 14 September 2005 in case 2005-02-0106). – *Latvijas Vēstnesis*,

According to the Constitutional Court of Latvia, the intent of initiators to organise a referendum cannot entail repeal of ‘the principle of wholeness of the *Satversme*’ that ‘prohibits interpretation of separate norms of the *Satversme* as isolated from the other *Satversme* norms, because the *Satversme* as a document, which is a cohesive whole, influences the contents and sense of the norm’⁹. This means that at least the basic human rights and general principles of law listed in the *Satversme*—such as the right of minorities to preserve and develop their language and their ethnic and cultural identity¹⁰, the rights of a child¹¹, and the right to equality and non-discrimination¹², not to mention the principles of proportionality¹³, legal certainty, and legitimate expectations¹⁴—have to be honoured in the interpretation of all proposed amendments. Additionally, the state is obliged to maintain, if not increase, the level of protection of basic human rights.¹⁵ Therefore, even if the above-mentioned referendum had been organised and the *Satversme* had been amended, the result would not have been compliant with the initial intent of its initiators, on account of the necessity to ensure basic human rights and the level of protection of those rights achieved. In fact, there would have been no change at all in primary and secondary education.

The proposal to specify the terms of Article 112 separately would not have expanded the scope of the state’s obligations, because the obligation to provide free education in the state language derives from Article 4 of the *Satversme*.¹⁶ Moreover, it could not have prevented the state from ensuring free education in other languages too, at least proceeding from the basic human rights and general principles of law listed by the *Satversme*. Therefore, the wording proposed for Article 112 of the *Satversme* could not have influenced the currently constitutionally protected content of educational rights.

In its turn, the transition provision constitutes a peculiar challenge to ideas about the ‘fathers of the *Satversme* as the rational constitutional legislator’¹⁷ and ‘dogma on perfection of the *Satversme*’¹⁸. Namely, it lacks a formal link with a legal norm to which it was designed. Moreover, the obligation to provide education in the state language applies to any education institution established by the state or local government, except in provision of pre-school education. Therefore, the transitional norm would, in fact, have been applicable to all levels of education, except pre-school education; all types of education; all forms of acquisition of education; and all education activities at education institutions established either by the state or local-government.

By appealing to rationality and ascribing to the constitutional legislator an understanding of the content of the term ‘institution’ (*iestāde*) as defined by the State Administration Structure Law¹⁹, not by the

16 September 2005, No. 148 (3306). English text available via <http://www.satv.tiesa.gov.lv/upload/2005-02-0106E.rtf> (most recently accessed on 28.10.2013); K. Jarinovska. Komentārs Satversmes 112. pantam [‘Commentary on Article 112 of the Constitution’]. – *Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības*. Rīga: Latvijas Vēstnesis 2011, p. 667, §73 (in Latvian); K. Jarinovska. *Izglītības tiesības: konstitucionālie aspekti Satversmes 112. panta kontekstā* [‘Education Law: Constitutional Aspects in the Context of Article 112 of the Constitution’]. Rīga: Latvijas Universitāte 2011, pp. 63–64 (in Latvian).

⁹ Par Radio un televīzijas likuma 46. panta sestās, septītās, astotās un devītās daļas atbilstību Latvijas Republikas Satversmes 58. un 91. pantam [‘On the compliance of Section 46, paragraphs 6, 7, 8, and 9 of the Radio and Television Law with Sections 58 and 91 of the Republic of Latvia *Satversme* (Constitution)’] (judgement of the Constitutional Court of Latvia of 16 October 2006 in case 2006-05-01). – *Latvijas Vēstnesis*, 24 October 2006, No. 169 (3537), §16. Available at <http://www.satv.tiesa.gov.lv/upload/2006-05-01.rtf> (most recently accessed on 9.12.2011) (in Latvian).

¹⁰ Article 114 of the *Satversme*.

¹¹ Article 110 of the *Satversme*.

¹² Article 91 of the *Satversme*.

¹³ Article 116 of the *Satversme*.

¹⁴ Article 90 of the *Satversme*.

¹⁵ K. Jarinovska. *Informācijas atklātības princips un tā galējā robeža: teorijas īstenošana praksē (promocijas darbs)* [‘Freedom of Information and Its Ultimate Margin: Translating Theory to Reality—a Dissertation’]. Rīga: Latvijas Universitāte 2009, pp. 72–73. Available at <https://luis.lu.lv/pls/pub/luj.fprnt?l=1&fn=F1573561408/Kristine%20Jarinovska%202010.pdf> (most recently accessed on 21.12.2012) (in Latvian).

¹⁶ Article 4 of the *Satversme* provides: ‘The Latvian language is the official language in the Republic of Latvia. The national flag of Latvia shall be red with a band of white.’

¹⁷ J. Pleps. *Satversmes iztulkošanas konstitucionāli tiesiskie un metodoloģiskie problēmjaudājumi (promocijas darbs)* [‘Problems of Constitutional, Legal and Methodological Interpretation of the *Satversme*: A Dissertation’]. Rīga: Latvijas Universitāte 2010, p. 158. Available at <https://luis.lu.lv/pls/pub/luj.fprnt?l=1&fn=F130724837/Janis%20Pleps%202010.pdf> (most recently accessed on 24.10.2013) (in Latvian).

¹⁸ *Ibid.*, p. 199.

¹⁹ Valsts pārvaldes iekārtas likums [‘State Administration Structure Law’]. – *Latvijas Vēstnesis*, 21 June 2000, No. 94 (2669) (in Latvian). English text available via <http://www.vvc.gov.lv/> (most recently accessed on 23.3.2013).

Educational Law^{*20}, one can assume that the content of the legal norm could be limited, with institutions of higher education, e.g. universities, which are derived public persons, being excluded from its application. Moreover, through invocation of a rationality argument, it is possible to assume that the content of the legal norm could be limited, so as to exclude from its content language learning—a native language (one's first language) and a foreign language. However, such reduction does not resolve several other issues—*inter alia*, that of the destiny of such an education institution established by either the state or local government as ensures only a programme of education that cannot be implemented in the state language. Questions include whether the education institution has to be liquidated or reorganised. Another is whether, in the case of liquidation or reorganisation, the necessary means are in place to ensure meeting of all legal requirements. In the case of liquidation, shall a principle of equality and non-discrimination be observed? Yet another question is whether international treaties would have to be renounced and, if so, how many. Furthermore, reduction does not resolve issues related to the legitimate expectations of a person who has started but not yet completed an education programme that cannot be implemented in the state language; whether the state has to allocate aid for education at private education institutions in the event that continuation of the education programme in the state language is impossible; and whether, and to what extent, the state has to allocate aid for continuing education further in the state language. The problems mentioned could have been rationally resolved via norms of external normative acts, though, in account of the time limit set by the transition provision, an optimal—in terms of *légistique*—solution was unlikely. Rather, the transition provision, if it had been adopted, could have become evidence of imperfection of the *Satversme* as a document and an interesting deviation from the concept of 'the *Satversme* as an ideal form'^{*21}.

3. The state language

In an echo to the above-mentioned initiative to organise a referendum, there followed another contradiction-entailing initiative. It proposed several constitutional amendments for introducing Russian as Latvia's second official language—i.e., amendments to the *Satversme*'s Articles 4 (on Latvian as the state language), 18 (on the solemn promise of a member of Parliament to strengthen the Latvian language), 21 (on Latvian as the working language of the Parliament), 101 (on Latvian as the working language of local governments), and 104 (on the right to receive a reply to a petition in Latvian). Obviously, the proposed amendments would have influenced other constitutional norms as well. Moreover, since Article 4 of the *Satversme* alike norms of independence, democracy, sovereignty, territorial wholeness, and basic principles of elections that form the core of the *Satversme* (according to Article 77 of the *Satversme*), the initiative, in fact, proposed discontinuing an existing state and establishing a new one that is no longer a nation-state wherein Latvians exercise their rights to self-determination, enjoying and maintaining their cultural uniqueness.

Beside statehood elements, the initiative would have influenced multiple basic human rights and general principles of law protected by the *Satversme*, such as the right to preserve and develop the Latvian language and Latvian ethnic and cultural identity^{*22}, to participate in the work of the state and of local government, and to hold a position in the civil service^{*23}; the right to choose one's employment and workplace freely^{*24}; the right to education^{*25}; the rights of a child^{*26}; and the right to equality and non-discrimination^{*27}, not

²⁰ Izglītības likums ['Educational Law']. – *Latvijas Vēstnesis*, 17 November 1998, No. 343/344 (1404/1405) (in Latvian). English text available at <http://www.vvc.gov.lv/> (most recently accessed on 23.3.2013).

²¹ J. Pleps (see Note 17), p. 199.

²² Articles 4 and 114 of the *Satversme*. Par Valsts valodas likuma 19. panta un Ministru kabineta 2000. gada 22. augusta noteikumu Nr. 295 "Noteikumi par vārdu un uzvārdu rakstību un identifikāciju" atbilstību Latvijas Republikas Satversmes 96. un 116. pantam ['On compliance of Article 19 of the Language Law and the Cabinet of Ministers August 22, 2000 regulations No. 295 "Regulations on Spelling and Identification of Names and Surnames", with articles 96 and 116 of the *Satversme* (Constitution)'] (judgement of the Constitutional Court of Latvia of 21 December 2001 in case 2001-04-0103). – *Latvijas Vēstnesis*, 22 December 2001, No. 187 (2574). Available at <http://www.satv.tiesa.gov.lv/?lang=2&mid=19/upload/2001-04-01-3E.rtf> (most recently accessed on 24.10.2013) (in English); European Court of Human Rights, decision of 7 December 2004, case 71074/01, *Mentzen alias Mencena v. Latvia* (in English).

²³ Article 101 of the *Satversme*.

²⁴ Article 106 of the *Satversme*.

²⁵ Article 112 of the *Satversme*.

²⁶ Article 110 of the *Satversme*.

²⁷ Article 91 of the *Satversme*.

to mention the principles of proportionality^{*28}, legal certainty, and legitimate expectations.^{*29} To illustrate what has been mentioned above, the right to education is taken as an example here. Although the initiative did not propose amendments to Article 112 (on education-related rights), it obviously would have had an influence on the content of that article if the outcome of the referendum had been in favour of the proposed amendments: 229,039 pupils at primary and secondary general education institutions, 35,767 pupils at vocation secondary education (ISCED-97 3 level) institutions, and 103,856 students at higher education institutions^{*30} suddenly would have had an obligation to know Russian as their first language, and 151,912 pupils at primary and secondary general education institutions (or 2/3 of all pupils at primary and secondary general education institutions) to acquire an education in Latvian^{*31}, whereas only 81,753 pupils at these education institutions chose to learn Russian as a foreign language^{*32} (54% of the total number of pupils learning in Latvian). In comparison, 188,357 pupils at primary and secondary general education institutions chose to learn English as a foreign language^{*33} (82% of all pupils at these education institutions). Moreover, the 20 years since the end of the occupation by the USSR have bred a new generation, without any knowledge of Russian. Thus, again an initiative to organise a referendum raises a host of questions with respect to the core of educational law, including several of resolution of conflict of constitutional norms.

Although the initiative to introduce Russian as a second official language was wound up on 18 February 2012 on account of an insufficient number of ballots (82.3%, or 1,271,657 against the initiative, with 821,722 of these by active participation and 449,935 through passive participation, including 3,524 invalid votes; 17.7%, or 273,347 in favour of the initiative)^{*34}, even this political defeat of pro-Soviet ideology may in the long run turn into an effective tool for destruction of the nation-state in which Latvians exercise their right to self-determination and to enjoy and maintain their cultural uniqueness.

There was an opportunity for the Constitutional Court of Latvia to mark a line for popular initiatives in time; however, it refrained from fulfilling the associated responsibility. For almost 11 months, the Constitutional Court of Latvia did not review an application by members of Parliament challenging the constitutionality of normative incapacity of authorities involved in organising popular referenda such as the one for introduction of a second official language, to stop further organising actions, if necessary, in respect of a popular initiative. As a result, a popular referendum did take place and the question of conflict of constitutional norms and the right of creation of such a conflict through a popular initiative escalated. On 19 December 2012, the Constitutional Court of Latvia dismissed the application, indicating that authorities involved in organising popular referenda have a right to review the constitutionality of a popular initiative and a right to stop further organising actions, if this should be necessary. However, any authority bringing a popular initiative to a halt has to be aware that its action may be reviewed by either the Department of Administrative Cases of the Senate of the Supreme Court of Latvia or the Constitutional Court of Latvia, depending on authority.^{*35}

^{*28} Article 116 of the *Satversme*.

^{*29} Article 90 of the *Satversme*.

^{*30} Centrālās statistikas pārvaldes datu bāzes, IZG01. Izglītības iestādes un izglītojamo skaits (mācību gada sākumā) [‘Database of the Central Statistical Bureau, IZG01: Education institutions and the number of enrolled (at the beginning of the school year)’]. Available at <http://data.csb.gov.lv/> (most recently accessed on 9.12.2011) (in Latvian).

^{*31} Centrālās statistikas pārvaldes datu bāzes, IZG01. Izglītības iestādes un izglītojamo skaits (mācību gada sākumā), IZG10. Vispārīglītojošo dienas skolu skolēnu sadalījums pa mācību valodas (mācību gada sākumā; bez speciālajām skolām un klasēm) [‘Database of the Central Statistical Bureau, IZG01: Education institutions and the number of enrolled (at the beginning of the school year); IZG10: Distribution of pupils at primary and secondary general education (daytime) institutions by language of education (at the beginning of the school year, excluding special-education schools and classes)’]. Available at <http://data.csb.gov.lv/> (most recently accessed on 9.12.2011) (in Latvian).

^{*32} Centrālās statistikas pārvaldes datu bāzes, IZG01. Izglītības iestādes un izglītojamo skaits (mācību gada sākumā), IZG11. Svešvalodu apguve vispārīglītojošajās skolās (mācību gada sākumā) [‘Database of the Central Statistical Bureau, IZG01: Education institutions and the number of enrolled (at the beginning of the school year); IZG11: Languages of learning at the primary and secondary general education institutions (at the beginning of the school year)’]. Available at <http://data.csb.gov.lv/> (most recently accessed on 9.12.2011) (in Latvian).

^{*33} *Ibid.*

^{*34} 2012. gada 18. februāra tautas nobalsošanas par likumprojekta “Grozījumi Latvijas Republikas Satversmē” pieņemšanu rezultāti [‘Results of the referendum of 18 February 2012 on the law “Amendments to the *Satversme* of the Republic of Latvia”’]. Available at <http://www.tn2012.cvk.lv/> (most recently accessed on 20.11.2012) (in Latvian).

^{*35} Par likuma “Par tautas nobalsošanu un likumu ierosināšanu” 11. panta pirmās daļas un 25. panta pirmās daļas atbilstību Latvijas Republikas Satversmes 1., 77. un 78. pantam [‘On compliance of Section 11 (1) and Section 25 (1) of the law “On

4. Latvian citizenship

On 2 September 2012, the Central Election Commission received a draft for amendments to the Citizenship Law, providing that, from 1 January 2014, all non-citizens (a status held by former USSR citizens who do not possess citizenship of Latvia or any other state and who do not apply for citizenship while residing in Latvia^{*36}) who by 30 November 2013 had not applied, under the rules of the Cabinet of Ministers, to retain the status of non-citizen shall be considered to be citizens of Latvia.^{*37} In fact, these amendments would have automatically granted citizenship to any person who might have the status of non-citizen, without regard for place of residence, interest in acquiring citizenship of Latvia, and awareness of the amendments. Therefore, if the amendments had been made, they would have called into question the sovereignty of the Republic of Latvia. The core component of the state would be formed of a decision of the type made on casual matters, a decision disregarding the political and legal consequences of such an act and, in essence, stating that the regaining of independence for the Republic of Latvia in 1990 and the acknowledgement of the continuity of the republic established in 1918 have been faulty.^{*38} Moreover, automatic and forced acquisition of citizenship after more than 20 years of reinstatement of the Republic of Latvia and dissolution of the USSR comes into strong conflict with general principles of international law on citizenship^{*39} and disregards multiple legal issues that would arise from people unwillingly acquiring citizenship—such as questioning a right to other citizenship, putting an end to any naturalisation process, burdening one with unpredictable legal liabilities and consequences, and raising questions of cession of citizenship.

Taking into account outcry from society in general and previous experience, the Central Election Commission sought opinions from legal experts before itself making any decision on the admissibility and sufficiency of the popular initiative. Since the majority of the acknowledged legal minds were inclined to consider there to have been sound arguments for ceasing organisation of the popular initiative, the Central Election Commission went along with their opinion.^{*40} The very fact that the Constitutional Court of Latvia had missed an opportunity to take the lead in handling the constitutional dispute on whether the Central Election Commission has a right to stop the organisation of a popular initiative on grounds of its unconstitutionality, adopting the decision on the normative capacity of the authorities involved in organising popular referenda a month after the Central Election Commission had issued its own, illustrates the reluctance to address constitutional justice in Latvia. The question of the constitutionality of this popular initiative is still to be decided, on account of an appeal of the decision of the Central Election Commission, and it remains unclear how quickly a decision will be reached, and by whom. Because of the amendments to the law called ‘On Popular Referendum, Law Initiative and Initiative of Citizens of the European Union’, adopted on 8 November 2012^{*41}, any appeal of a decision of the Central Election Commission on a popular initiative has to be decided by the Department of Administrative Cases of the Senate of the Supreme Court

National Referendum and Legislative Initiatives” with Article 1, Article 77 and Article 78 of the *Satversme* of the Republic of Latvia]—decision on termination of the Constitutional Court of Latvia of 19 December 2012 in case 2012-03-01, §19.3, 20, and 21. Available at http://www.satv.tiesa.gov.lv/upload/2012-03-01_tiesv_izb_lem_ENG.pdf (most recently accessed on 11.3.2013) (in English).

³⁶ Par to bijušās PSRS pilsoņu statusu, kuriem nav Latvijas vai citas valsts pilsonības [‘On the status of those former USSR citizens who do not have citizenship of Latvia or of any other state’]. – *Latvijas Vēstnesis*, 25 April 1995, No. 63 (346) (in Latvian). English text available at <http://www.vvc.gov.lv/> (most recently accessed on 23.3.2013).

³⁷ Likumprojekts “Grozījumi Pilsonības likumā” [‘Draft of amendments to the Citizenship Law’]. Available at <http://web.cvk.lv/pub/public/30419.html> (most recently accessed on 20.11.2012) (in Latvian).

³⁸ See I. Ziemeļe. Latvijas prasība par valstiskuma turpināšanās atzīšanu 1990. gada 4. maija Deklarācijā un tās starptautiski tiesiskās sekas [‘Latvian claim for recognition of state continuity in the declaration of 4 May 1990 and its international consequences’]. – 4. maijs. Rakstu, atmiņu un dokumentu krājums par Neatkarības deklarāciju. Dr. iur. hab. T. Jundža redakcijā. Rīga: Latvija Zinātņu akadēmija, Fonds Latvijas Vēsture 2000, pp. 80–89 (in Latvian); I. Ziemeļe. Latvijas valsts nepārtrauktība un mūsdienu politiskā realitāte [‘Latvian state continuity and today’s political reality’]. – *Diena*, 24 September 1997, p. 2 (in Latvian); I. Ziemeļe. Pilsonība un cilvēktiesības valstu pēctecības kontekstā [‘Citizenship and human rights in the context of state continuity’]. – *Likums un Tiesības* 2002 (4)/8 (36), pp. 228–239 (in Latvian).

³⁹ *Ibid.*

⁴⁰ Par parakstu vākšanu likuma “Grozījumi Pilsonības likumā” ierosināšanai: Centrālās vēlēšanu komisijas 2012. gada 1. novembra lēmums Nr. 6” [‘On collecting of signatures for initiating the law “Amendments to the Citizenship Law”: Decision of the Central Election Commission of 1 November 2012, No. 6’]. Available at <http://web.cvk.lv/pub/public/30441.html> (most recently accessed on 23.3.2013) (in Latvian).

⁴¹ Grozījumi likumā “Par tautas nobalsošanu, likumu ierosināšanu un Eiropas pilsoņu iniciatīvu” [‘Amendments to the law “On Popular Referendum, Law Initiative, and Initiative of Citizens of the European Union”’]. – *Latvijas Vēstnesis*, 27 November 2012, No. 186 (4789) (in Latvian).

of Latvia as the first and the last instance within a month or two, if necessary (Article 23.1). Regardless of this definite term, the Department of Administrative Cases suspended the administrative process in court and submitted an application to the Constitutional Court of Latvia challenging the norm specifying the competence for administrative courts to decide on issues of the constitutionality of the substance of popular initiatives, arguing that it seems to be in conflict with the doctrine of separation of powers.^{*42} In its turn, the Constitutional Court of Latvia accepted this application and set its review for 12 August 2013^{*43}, yet afterward it postponed that review to 19 November 2013 and set 19 December 2013 as a deadline for reaching a judgement.^{*44} Accordingly, the issues of constitutionality of a popular initiative and the normative capacity of authorities involved in organising popular referenda are again in dispute, with clear answers postponed. Furthermore, new questions with regard to the constitutionality of popular initiatives arise.^{*45}

Multiple state institutions are in a rush to solve problem of misuse of the popular initiative. Worth noting is one of these attempts, presented by a judge with the European Court of Justice, to feature a preamble to the *Satversme* in particular.^{*46} Judge Egils Levits is well known for his non-traditional concepts and approaches in respect of resolving constitutional issues. For example, during discussions of the

⁴² Decision SA-1/2013 of the Department of Administrative Cases of the Senate of the Supreme Court of Latvia of 11 February 2013 in case A420577912. Available at <http://at.gov.lv/files/uploads/files/archive/departments3/2013/1-sa-2013.doc> (most recently accessed on 1.11.2013) (in Latvian).

⁴³ Par likuma "Par tautas nobalsošanu, likumu ierosināšanu un Eiropas pilsoņu iniciatīvu" 23. panta piektās daļas 2. punkta un 23.1 panta pirmās daļas atbilstību Latvijas Republikas Satversmes 1. pantam ["On compliance of para 2 of Section 23 (5) and Section 231 (1) of Law on national referendums, legislative initiatives and European citizens' initiative with Article 1 of the *Satversme* of the Republic of Latvia"]. – Press release of the Constitutional Court of Latvia of 12 March 2013 on a case 2013-06-01 initiation. Available at http://www.satv.tiesa.gov.lv/upload/2013-06-01_PR_par_ierosinasanu_ENG.pdf (most recently accessed on 1.11.2013).

⁴⁴ The Constitutional Court of Latvia. Material available at <http://www.satv.tiesa.gov.lv/?lang=1&mid=19> (most recently accessed on 24.10.2013) (in Latvian).

⁴⁵ For example, on 20 December 2012, the Central Election Commission received a request to organise signing for popular initiative on the draft law 'On Popular Participation with Regard to the Date of Introduction of the Euro'. Par tautas līdzdalību eiro ieviešanas termiņa izlemšanā: likumprojekts Centrālajai vēlēšanu komisijai parakstu vākšanai. Available at <http://web.cvk.lv/pub/public/30456.html> (most recently accessed on 23.3.2013) (in Latvian).

⁴⁶ Izvērstas Satversmes preambulas iespējamā teksta piedāvājums un komentārs ['Proposition for probable text for an extended preamble to the *Satversme* and its commentary']. – *Jurista Vārds*, 24 September 2013, No. 39 (790). Available at <http://www.juristavards.lv/index.php?menu=DOC&id=260080> (most recently accessed on 24.10.2013) (in Latvian). The draft of preamble to the *Satversme* states the following, in the author's translation from Latvian:

In order to ensure the existence of the Latvian nation through the ages [*cauri gadsimtiem*, literally 'over the centuries'], preservation and development of the Latvian language and culture, [and] prosperity of every human being and people [of Latvia] as a whole, the Latvian people

- having regard for the fact that, as a result of the consolidation of nation and the formation of national consciousness on 18 November 1918, the Republic of Latvia that has been proclaimed on the lands historically belonging to Latvians has been established upon the immutable will of the Latvian nation and its inextinguishable right to self-determination in order freely to self-determine and as a nation-state to build the future in its own state;
- bearing in mind that the people won their state during the Latvian War of Liberation [*Latvijas Brīvības cīņas*, or, literally, 'the struggles for Latvia's freedom'], that it did not recognise the occupation authorities, and that it resisted them, and on the basis of state continuity, restoring state independence, it regained its freedom;
- expressing gratitude to the state's founders, honouring its freedom-fighters, and commemorating the victims of retaliations by invaders' forces;
- in awareness that the Latvian state's basic task is to promote the spiritual, social, cultural, and material welfare, ensuring legal order, safety, environmental protection, and conservation of nature and reconciling economic development with human values and necessities;
- recognising that the traditions of Latvian democracy are the citizens' direct participation in the conduct of public affairs and the parliamentary republic, and providing that the Latvian state in its activities especially respects principles of democracy and the rule of law and principles of a national and social state, [and that Latvian state] recognise and protect human rights, including minority rights;
- recognising the inviolability of the independence of the Latvian state, its territory, its territorial integrity, the sovereignty of the people, the Latvian language as the only state language, [and] the democratic set-up of the state, and that it is the responsibility of everyone to protect these values;
- pointing out that all have a duty to take care of themselves, their kinsmen, and the common good of society and to behave responsibly toward their fellow human beings, society, the state, the environment, nature, and future generations;
- being aware that Latvian ethno-cultural *Weltanschauung* [*dzīvesziņa*, literally 'wisdom of existence'] and Christian values significantly shaped our identity; that the values of the society are freedom, honesty, justice, and solidarity; that family is the basic unit of the society; and that work is a foundation for growth and prosperity of everyone and the nation as a whole;
- emphasising that Latvia is actively participating in international affairs; protecting its interests; and contributing to the human, sustainable, democratic, and responsible development of Europe and the world at large,

constitutional issues surrounding accession to the European Union, he proposed granting a portion of the state's sovereignty to the European Union and, for this, including a further article on state sovereignty (2a), providing that Latvia is a member state of the European Union.⁴⁷ However, this approach did not gain the necessary agreement; therefore, it was not applied. The idea he has proposed recently is to describe all basic values of the Republic of Latvia in order to put a stop to misuse of popular will. Such a declaratory part of a constitution usually is drafted first, not last. Yet, in view of the constitutional controversies that have continued for several years now with regard to direct popular participation, it may bring some useful certainty⁴⁸ as to the future of direct popular participation within the Latvian legal system. The draft for a preamble has already stimulated passionate discussion and, unfortunately, encouraged marginalisation of some opinions.⁴⁹ Some regard the proposed preamble to constitute a 'business card of Latvia'⁵⁰ as a part of nation branding while some radical intellectuals link it to 'the ideas of the pre-Holocaust era'⁵¹. At present, it remains unclear whether the preamble will be a panacea for resolving the issue of 'constitutional extremism'. In the author's opinion, the first order of business is to become aware that the *Satversme* is a replica of traditions from the 1919 German Constitution; only from this starting point is to start looking for a proper cure to misuses of popular initiatives. As long as the lessons taught by the 1919 German Constitution and the historical examples of twisting around with popular will remain overlooked, consensus on resolving conflicts of constitutional norms and imposition of conflicts by means of direct democracy will not be found. Eliminating elements of direct democracy does no more good than misuse of popular will.

– in line with the national anthem 'God Bless Latvia!', which expresses the idea of a free nation-state in its freely elected *Constitutional* Assembly, have strengthened the Latvian national constitutional order and adopted the following *Satversme* of the state: [...]

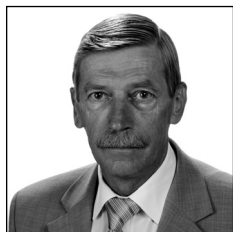
⁴⁷ E. Levits. *Satversme un Eiropas Savienība* ['The *Satversme* and the European Union']. – *Jurista Vārds*, 8 June 2000, No. 23 (176) (in Latvian).

⁴⁸ On the role of the declaratory part of a constitution, see R. Gavison. What belongs in a constitution? – *Constitutional Political Economy* 2002/13, pp. 97–99.

⁴⁹ See *Jurista Vārds*, 22 October 2013, No. 43 (794) (in Latvian).

⁵⁰ M. Zālīte. *Satversmes preambula ir Latvijas vizītkarte* ['Preamble of the *Satversme* is a business card of Latvia']. – IR.lv. Available at <http://www.ir.lv/2013/10/24/mara-zalite-satversmes-preambula-ir-latvijas-vizitkarte> (most recently accessed on 24.10.2013) (in Latvian).

⁵¹ See S. Veinberga. *Vai Latvijā tiešām iestāsies holokausts?* ['Whether, in deed, in Latvia, there will be the holocaust?'] – TVNET, 18 October 2013. Available at <http://www.tvnet.lv/zinas/viedokli/483039-vai-latvija-tiesam-iestasies-holokausts> (most recently accessed on 24.10.2013) (portions in English); K. Sedlenieks. *Par pirmsholokausta laikmeta domāšanu uc komentāri pie preambulas teksta* ['On the pre-Holocaust-era thinking and other comments on the text for the preamble']. – *Klāva domas*, 16 October 2013. Available at <http://sedlenieks.wordpress.com/2013/10/> (most recently accessed on 24.10.2013) (in Latvian).



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Problems of Estonian Local Government in 2013 and Co-operation as an Instrument of Their Resolution

In 1928, Estonian lawyer E. Maddison wrote on the expanding load of a local government's (LG's) tasks: "The way out would be through joining forces and working together with some other local government."¹ Eighty-four years later, the document titled 'Survey of the Trends and Problems of Estonian Local Government Organisation and Proposals Made by Different Parties' states that, while there exist some examples of co-operation among LGs, this opportunity is, in fact, not very widely exercised.² Because of the real-world nature of the problems seen today, the authors of the present article have focused on the issues of LG co-operation law. Also, there is a relative scarcity in Estonia of relevant legal writings on this particular subject.³ The format for this article determines certain decisions as to the subject matter: themes related to potential models for a metropolitan area remain beyond the scope of study.

The authors search for and attempt to formulate answers to the following questions:

- 1) What main problems are characteristic of the current Estonian LG system?
- 2) What can/should be done in LG law, particularly in co-operation law, to solve these problems?

Although this article focuses on the themes of voluntary co-operation, its opposite pole – mandatory co-operation—cannot fully be overlooked. As a matter of fact, in the Estonian legal system voluntary co-operation among LGs is synonymous with their co-operation as a whole: unlike many countries (Finland, Denmark, Latvia, etc.), Estonia has no regulations in its legislation addressing obligatory co-operation among LGs.

¹ Sihtühisuste probleem meie omavalitsuste elus ['The problem of joint ventures in the life of our local governments']. – *Maaomavalitsus*. Eesti Maaomavalitsuste Liidu häälekandja 1928/12, p. 181 (in Estonian).

² Ülevaade Eesti omavalitsuskorraldust puudutavatest tendidest, probleemidest ja eri osapoolte ettepanekutest ['Overview of the Trends, Problems and Proposals from Various Parties']. Tallinn 2012, p. 21. Available at https://www.siseministeerium.ee/public/Lisa_2_Ulevaade_KOV_trendidest_probleemid..pdf (most recently accessed on 3.3.2013) (in Estonian).

³ One could mention as an exception the commented edition of the Constitution of the Republic of Estonia, wherein certain aspects of co-operation among LGs are dealt with under §159 (*Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. Kolmas, täiendatud väljaanne* ['Constitution of the Republic of Estonia, Commented Edition. Third, Revised Edition']. Tallinn: Juura 2012, pp. 878–881 (in Estonian)), and the final report from the study of legal and managerial solutions for co-operation models of metropolitan areas compiled by the Tallinn University of Technology by order of the Union of Harju County Municipalities (*Projekti „Pealinnaregiooni omavalitsusüksuste koostöö- ja haldusvõimekuse tõstmine” raames pealinnapiirkonna koostöömudelite õiguslike ja juhtimisalaste lahenduste väljatöötamine. Lõpparuanne*. Tallinn 2011. Available at http://43939.edicypages.com/files/Tallinna_Tehnikaülikooli_lõpparuanne_15_02_2011.pdf (most recently accessed on 2.3.2013) (in Estonian)).

1. The Estonian local government system in 2013: Essential characteristics and problems

1.1. Voluntary co-operation and mergers thus far: Results still to be achieved

In the 22 years since Estonia regained its independence, a sufficient level of administrative capability has not yet been reached through voluntary co-operation (including mergers) of LGs. As of 1 March 2013, there are 226 LG units in Estonia: 193 rural municipalities and 33 cities.^{*4} In Europe, methods for both unification of LGs and their voluntary co-operation are used to provide public services with appropriate quality and access. The slowness of the process of voluntary merger is conditioned by the dissent related to reduction in the number of LG public servants, anxiety of the local community over the potential for being relegated to the periphery, current LG leaders' fears about their political and economic future, etc. Since the entry into force of the Promotion of Local Government Merger Act^{*5} (PLGM) in 2004, the number of LGs has decreased only by 19—from 245 to 226.^{*6} The regulations promoting voluntary co-operation of LGs have no clear object, schedule, and sanctions, and the mechanisms promoting mergers are relatively weak.^{*7} Paying attention to these problems, the OECD^{*8} has noted, *inter alia*, that the question may not be one of co-operating sufficiently so much as a question of co-operating effectively.^{*9}

1.2. Globalisation of public tasks along with depopulation of local government—fundamental reasons for insufficient administrative capability

The territory of Estonia (45,227 km²) is divided among LGs in such a way that the average territory of an LG unit is 221.31 km² (cities: 19.49 km²; rural municipalities: 233.57 km²).^{*10} The population of the country (1,286,540 people by 1 January 2013 reckoning)^{*11} is distributed such that there are fewer than 1,800 persons residing in over half of the LG units and under 1,000 people in 40 of the LG units. Estonian rural municipalities and cities are very different also in their population density, which varies by a factor of more than 1,000 (Illuka has 1.72 people per square kilometre, while the city of Tartu has 2,683.22 people per square kilometre).^{*12} However, pendulum migration of the population links cities and their hinterlands in the form of integrated socio-economic units, which go beyond existing administrative borders.

⁴ Vabariigi Valitsuse 03.04.1995. a määrus nr 59 „Eesti territooriumi haldusüksuste nimistu kinnitamine” [‘Decree of the Government of the Republic from 03.04. 1995 No. 59 ‘Approval of the List of Administrative Units’]. – RT I 1995, 49, 567; 2009, 32, 204 (in Estonian).

⁵ Kohaliku omavalitsuse üksuste ühinemise soodustamise seadus [‘Promotion of Local Government Merger Act’]. – RT I 2004, 56, 399; RT 19.3.2013, 1 (in Estonian).

⁶ OECD Public Governance Reviews: Estonia: Towards a single government approach (2011), p. 50. Available at http://www.keepeek.com/Digital-Asset-Management/oecd/governance/oecd-public-governance-reviews-estonia-2011_9789264104860-en (most recently accessed on 3.3.2013).

⁷ Subsection 6 (1) of the PLGM provides merger grants to be allocated from the state budget to the LGs formed as the result of a merger. A merger grant of €50 per resident of a merged LG is calculated separately for each merged LG; the size of said grant shall be not less than €150,000 and not more than €400,000 per LG. Upon transfer of a territorial area to an LG formed as the result of a merger, a grant of €50 for each resident of the transferred territorial area shall be allocated from the state budget to the merged LG. For payment upon merger of a grant to an LG formed as the result of a merger, the merger grants separately calculated for each merged LG or transferred territorial area shall be totalled.

⁸ OECD Public Governance Reviews: Estonia: Towards a single government approach (see Note 6), pp. 49–50.

⁹ *Ibid.*, p. 51.

¹⁰ In territorial terms, the largest LG unit is the Märjamaa rural municipality in Rapla County (872 km²), and the smallest is Tootsi, a rural municipality in Pärnu County (1.8 km²). See Kohalik omavalitsus Eestis [‘Local government in Estonia’], p. 11. Available at http://siseministeerium.ee/public/Kohalik_omavalitsus_Eestis_2008.pdf (most recently accessed on 6.3.2013) (in Estonian). The largest city by territory is Tallinn (158.27 km²); the smallest are Kallaste and Võhma (each 1.93 km²). The average territorial size of LG units in Estonia—199 km²—is mentioned in the following work: EU sub-national governments: Key figures. 2009/2010 Edition, p. 4. Available at http://www.ccre.org/docs/nuancier_2009_en.pdf (most recently accessed on 3.3.2013).

¹¹ Statistikaamet: mullu rändas Eestist välja 10 000 inimest [‘Statistics Estonia: Last year, 10,000 people emigrated from Estonia’], p. 9. Available at <http://www.delfi.ee/news.paevauudised/est/statistikaamet-mullu-randas-eestist-valja-10-000-inimest.d?id=65548200> (most recently accessed on 1.4.2013) (in Estonian).

¹² Omavalitsusreformi eesmärk, võimalikud mudelid ja ajakava [‘Object, potential models, and schedule of the local government Reform’], p. 9. Available at https://www.siseministeerium.ee/public/Lisa_1_KOV_reformi_eesmark_mudelid_ja_aja.pdf (most recently accessed on 1.3.2013) (in Estonian).

In the years since restoration of independence, the population of Estonia has decreased, and this tendency, along with ageing, only continues: it has been estimated that the country will see a 7% decrease in its population by 2050^{*13}, while, according to one scenario, in the most extreme cases LG units' population will decrease by 30% and the proportion of the elderly will rise to 28% by 2030.^{*14} Concentration of the population in areas with larger cities, particularly the more urban areas of Tallinn and Tartu, is taking place.^{*15}

At the same time, several of the problems to be resolved (related to planning needs, the environment, traffic growth, education, mobility of residents, etc.) have transcended their formerly local character. A considerable proportion of Estonian LGs are—whether in the sense of population figures or territorially—too small for carrying out all of the many tasks currently assigned to them.^{*16} This, in turn, imposes strong limits on their capability to employ top-standard local officials. As an example, the capability of LGs to perform tasks of state supervision can be mentioned here. In a situation wherein 23 individual legislative acts have endowed LGs with a broad variety of supervision powers or with competence of extra-judicial handling of misdemeanours^{*17}, performance of the associated tasks in practice has turned out to be largely insufficient and irregular.^{*18} Particularly acute are problems of this kind in smaller and more remote LGs.^{*19} It should also be pointed out that insufficient administrative capabilities among LGs has been cited as a fundamental problem by the President of the Republic^{*20}, the Chancellor of Justice^{*21}, the Auditor General^{*22},

¹³ *Ibid.*, pp. 7–8.

¹⁴ Geomedia (2012): *Rahvastiku võimalikud arengutrendid 2012–2030* ['Potential development trends of population'], pp. 20, 27. Available at https://www.siseministeerium.ee/public/KOV-indeks_2011_rahvastiku_aruanne.pdf (most recently accessed on 1.4.2013) (in Estonian). See also Eesti Inimvara Raport (IVAR): võtmeprobleemid ja lahendused (2010). Säästva arengu komisjon. Raportöör Eesti Koostöö Kogu ['Report on Estonian human assets (IVAR): Key problems and solutions (2010), Committee on Sustainable Development, Rapporteur Estonian Cooperation Assembly'], pp. 22–24. Available at http://www.kogu.ee/public/Eesti_Inimvara_Raport_IVAR.pdf (most recently accessed on 1.3.2013) (in Estonian). From 2000 to 2010, populations have grown in only 41 LG units, with only 10 LG units showing growth each year over that period. See also OECD Public Governance Reviews: Estonia: Towards a single government approach (Note 6), p. 245.

¹⁵ See Regionaalse arengu suundumised Eestis (aastatel 2005–2011). ['Trends of regional development in Estonia (in the years 2005–2011)']. Tallinn: Siseministeerium 2011, pp. 1–7. Available at <https://www.siseministeerium.ee/uuringud-ja-analuusid> (most recently accessed on 19.2.2013) (in Estonian).

¹⁶ See, for example, Ülevaade Eesti omavalitsuskorraldust puudutavatest trendidest, probleemidest ja eri osapoolte ettepanekutest (Note 2), pp. 8–10.

¹⁷ See M. Ranne. Valla- või linnavalitsuse korrakaitseüksuse tegevuse õiguslikud alused ja seadusest tulenevad kitsaskohad tegutsemisel ['Legal foundations of the activity of law-enforcement units of the rural municipality or city government and legislative bottlenecks'], p. 2. Available at http://f.ell.ee/failid/LVP/2012/11/09_b_MET_tegevuse_probleemid_ja_oiguslikud_kitsaskohad.pdf (most recently accessed on 1.4.2013) (in Estonian).

¹⁸ See Riigikontroll (20.1.2009). Audit. Seadusest tulenevate järelevalvefunktsioonide täitmine valdades ja linnades ['National Audit Office (20.1.2009) audit: Performance of the supervision functions arising from law in rural municipalities and cities']. Available at <http://www.riigikontroll.ee/tabid/215/Audit/2077/WorkerTab/Audit/WorkerId/71/language/et-EE/Default.aspx> (most recently accessed on 1.3.2013) (in Estonian). A summary of the overview's results is available in English at <http://www.riigikontroll.ee/tabid/206/Audit/2077/OtherArea/1/language/en-US/Default.aspx> (most recently accessed on 6.4.2013).

¹⁹ See Riigikontroll (31.1.2012). Audit. Avalike teenuste pakkimise eeldused väikestes ja keskustest eemal asuvates omavalitsustes ['National Audit Office (31.1.2012) audit: Assumptions for provision of public services within small and remote local authorities']. Available at <http://www.riigikontroll.ee/tabid/215/Audit/2210/Worker/Tab/Audit/WorkerId/76/language/et-EE/Default.aspx> (most recently accessed on 1.3.2013) (in Estonian). A summary of the overview's results is available in English at <http://www.riigikontroll.ee/tabid/206/Audit/2210/OtherArea/1/language/en-US/Default.aspx> (most recently accessed on 6.4.2013).

²⁰ Greetings from the President of the Republic of Estonia on Cities and Rural Municipalities Day, Viru Hotel Conference Centre, 16 February 2011. Available at <http://www.president.ee/en/official-duties/speeches/5666-greetings-from-the-president-of-the-republic-of-estonia-on-cities-and-rural-municipalities-day-16-february-2011-viru-hotel-conference-centre/index.html> (most recently accessed on 6.4.2013).

²¹ Õiguskantsler: suur osa omavalitsusi ei suuda piisavalt tagada isikute põhiõigusi ['Chancellor of Justice: A large proportion of local governments cannot sufficiently guarantee the fundamental rights']. Available at <http://oiguskantsler.ee/et/oiguskantsler/suhted-avalikkusega/udised/oiguskantsler-suur-osa-omavalitsusi-ei-suuda-piisavalt> (most recently accessed on 29.1.2013) (in Estonian).

²² For example, Riigikontrolör Mihkel Oviiri ettekanne Riigikogus 7. novembril 2012 riigi majanduse ja haldamisega seotud probleemide kohta ['Report of Auditor General Mihkel Oviir to the Riigikogu on 7 November 2012 on problems related to the state's economy and administration']. Available at <http://www.riigikontroll.ee/Suhtedavalikkusega/Pressiteated/tabid/168/557/GetPage/1/557/Year/-1/ItemId/655/amid/557/language/et-EE/Default.aspx> (most recently accessed on 29.1.2013) (in Estonian).

various ministries^{*23}, the OECD^{*24}, the European Commission^{*25}, several scholars, public figures, and others.^{*26}

1.3. Tiny rural municipalities and the capital city performing the same tasks

The competence of rural municipalities and of cities are not differentiated in the Constitution of the Republic of Estonia, or CRE (according to §154 (1) of the CRE, all local issues shall be resolved and managed by LGs, which, pursuant to the law, shall operate independently; according to §154 (2), duties may be imposed on an LG only pursuant to the law or by agreement with the LG, and expenditure related to duties of the state imposed by law on an LG shall be funded from the state budget), but in cases involving clear and substantiated criteria, the legislator may do this: it cannot be expected that, for example, the rural municipality of the small island Piiressaare (with around 100 local inhabitants)^{*27} perform the same tasks to the same level of quality as its urban neighbour Tartu with its population of more than 95,000. It should be pointed out that CRE does not exclude regulation by means of a special law of the status of a capital city as a special form of LG unit. Generally, however, current legislation does not differentiate between the competencies of rural municipalities and cities. This unified approach is applied amidst a situation of unbalanced regional development. The actual capability of LGs to provide public services, in fact, varies greatly. As a rule, major problems appear, with LGs being unable to employ the necessary officials. The country's economic activity is predominantly concentrated in Tallinn and in Harju County generally.

1.4. Incompleteness or lack of requirements pertaining to public services

For evaluation of the successfulness of an LG unit in a certain sphere of activity, the minimal level required for the relevant service should be determined.

At present, there are no such requirements for public services or they exist only to the extent of formal requirements for LGs to deal with certain issues or to prepare a procedure that regulates a specific area. Until the state establishes at least some requirements as to the quality of the services provided by LGs and imposes obligations also on the officials who provide them, it is not possible to perform an objective assessment of whether or not LGs are able to perform their tasks. Also, it is difficult to make justified changes in the administrative arrangements, which act is obviously necessary for improvement in service quality, before the relevant analysis has been carried out.^{*28} It has been stated at the ministerial level that, for the most part, Estonian LGs are not able on their own to provide sufficiently high-quality, accessible, and sustainable services, whether those services be social services; primary, basic, or vocational education; waste management territorial plans; related to road and communication infrastructure; or other services.^{*29}

It is essential to point out that a general legal obligation for rural municipalities and cities to provide a particular service does not in itself say much about how that service should be rendered in practice. Rather, it depends on certain characteristics mentioned above (i.e., on administrative standards).

²³ Ülevaade Eesti omavalitsuskorraldust puudutavatest trendidest, probleemidest ja eri osapoolte ettepanekutest (see Note 2).

²⁴ OECD Public Governance Reviews: Estonia: Towards a single government approach (see Note 6).

²⁵ See Recommendation for a Council recommendation on Estonia's 2012 national reform programme and delivering a Council Opinion on Estonia's stability programme for 2012–2015. Available at http://ec.europa.eu/europe2020/pdf/nd/csr2012_estonia_en.pdf (most recently accessed on 6.4.2013).

²⁶ See also Kohaliku omavalitsuse võimekuse indeks ['Index of local government units' capacity']. Available at http://www.siseministeerium.ee/public/KOV-indeks_2011_luhikokkuvote.pdf (most recently accessed on 29.1.2013) (in Estonian).

²⁷ See Omavalitsusüksuste võrdlus ['Comparison of local government units']. Available at <http://www.stat.ee/ppe-46953> (most recently accessed on 6.4.2013) (in Estonian).

²⁸ Assumptions for provision of public services in small and remote local authorities (see Note 19), p. 2.

²⁹ Overview of the Trends, Problems and Proposals from Various Parties (see Note 2), pp. 12–18.

1.5. (Un)equilibrium of the revenue base and tasks

LGs are under pressure that is influenced by non-conformance between the public tasks delegated to them and the—insufficient—resources assigned for their performance.^{*30} In the estimation of the OECD, Estonia's sub-national finance system, while being sound, could be strengthened in several areas. Regardless of this soundness, the level of financing provided through the current system does not match the level of the competencies or requirements associated with municipal tasks, thereby calling into question municipal finances' sustainability.^{*31}

An LG's taxing power is limited (revenue received from local taxes accounts for approximately 1% of the volume of local budgets, and this level cannot be raised through current local taxes). Over-centralised taxing power impairs LGs' financial autonomy (referred to in the CRE's §§154 (1) and 157 (2) and in the European Charter of Local Self-Government^{*32} (ECLSG), Art. 9).

Reductions in the income basis for LGs (lowering of the rate of income tax paid by resident natural persons to be received by local budgets from 11.93% to 11.4%) during the recent economic crisis, in combined effect with unemployment, creates a setback to the capability of LGs to guarantee fundamental rights and freedoms (CRE^{*33}, §14)^{*34}, to their administrative capability in a larger sense, and with respect to their incomes.^{*35}

The persistence of an unconstitutional situation in the Estonian legal system with respect to financing of LGs should be taken into consideration. In its decision 3-4-1-8-09, on 16 March 2010, the Supreme Court declared unconstitutional the failure to adopt such legislation of general application as would distinguish the funds allocated to LGs for deciding on and organising handling of local issues from the funds allocated for performance of national obligations and provide for funding of the national obligations imposed on LGs by law out of the state budget.^{*36}

1.6. The problem of the legal status of the county association of local governments

Problems appear also with regard to the legal status of county associations of LGs, as well as their tasks and financing. To create an appropriate broader background, one must, by necessity, determine the legal status of a regional administrative level and correct the management model applied therein. This issue is, in turn, related to the potential national administrative-territorial reform. For the time being, Estonia's 15 counties are administrative units, wherein state administration is carried out by the county governors and government agencies pursuant to the law.^{*37} At the same time, county associations operate in all counties (only six LGs are non-members at the moment).^{*38} The right of LGs to form associations is provided for

³⁰ See Recommendation 294 (2010), Local democracy in Estonia. Available at <https://wcd.coe.int/ViewDoc.jsp?id=1689329&Site=Congress> (most recently accessed on 9.4.2013); see also OECD Public Governance Reviews: Estonia: Towards a single government approach (Note 6), pp. 231–242.

³¹ OECD Public Governance Reviews: Estonia: Towards a single government approach (see Note 6), p. 231.

³² Available at <http://conventions.coe.int/Treaty/en/Treaties/Html/122.htm> (most recently accessed on 6.4.2013).

³³ Available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X0000K2&keel=en&pg=1&ptyyp=RT&tyyp=X&query=p%F5hiseadus> (most recently accessed on 6.4.2013).

³⁴ See also Supreme Court en banc decision of 16.3.2010 3-4-1-8-09. English text available at <http://www.nc.ee/?id=1122> (most recently accessed on 6.4.2013).

³⁵ So it appears from the spring 2011 audit by the National Audit Office that from 2009 to 2010 the number of employees was reduced in half of the rural municipalities and cities, the employees' salary has been cut in more than half of the LGs, and reduction in staffing costs has decreased the availability of services in almost a third of LGs. See Tulude vähenemise mõjud valdade ja linnade tegevusele perioodil 2009–2010. Ülevaade [Impacts of the decrease in revenue on the activities of municipalities and cities 2009–2010: An overview]. Tallinn 2011, p. 3. Available at <http://www.riigikontroll.ee/tabid/206/Audit/2174/OtherArea/1/language/et-EE/Default.aspx> (most recently accessed on 6.4.2013) (in Estonian). A summary of the survey's results is available in English at <http://www.riigikontroll.ee/tabid/206/Audit/2174/OtherArea/1/language/en-US/Default.aspx> (most recently accessed on 3.4.2013).

³⁶ Supreme Court en banc decision of 16.3.2010 3-4-1-8-09 (see Note 34).

³⁷ Eesti territooriumi haldusjaotuse seadus [Territory of Estonia Administrative Division Act], §2 (2). – RT I 1995, 29, 356; 1996, 42, 808 (in Estonian).

³⁸ The following reasons typically lie behind non-membership: various associations duplicate each other's activities; remaining outside this form of co-operation makes it possible to save resources; the value for money generated is insufficient; the

in the CRE (§159), ECLSG (Art. 10), Local Government Associations Act^{*39} (LGAA) and Local Government Organisation Act^{*40} (LGOA) (§62 (1) 3)).

While the CRE leaves the legal status of the association of LGs open (i.e., legal person in public law or in private law), the LGAA (§1 (2)) has defined it as being a not-for-profit association (therefore, a voluntary legal person in private law), to which the Non-profit Associations Act^{*41} applies, taking account of the specifications prescribed in the LGAA. Financing of associations takes place mostly from the budgets of the rural municipalities and cities belonging to them, and revenues have thus far been relatively low (around 21 million euros was received, from various sources, from 2008 to 2010 for all associations together).^{*42}

Not-for-profit association cannot be considered to be an appropriate legal form for drawing together LGs for common execution of public tasks. As a level of application of state functions, county associations, acting in the form of not-for-profit associations, have not proved to be legal subjects to whom a state would extensively delegate state functions with larger scale than that of the current administrative borders of LGs.^{*43} Presumably, the reasons for this are 1) that LGs have a right to secede from an association whenever they consider this to be necessary and 2) insufficient administrative capabilities of associations. According to the law, an association performs state functions that have been assigned to it by law or on the basis thereof, including formation of contracts under public law, in which consensus among the members of an association is needed—no member of the association may be against the act in question.^{*44} Certainty is lacking also with respect to LG functions performed by an association: for example, in the case of a change in leadership, its priorities may change and, therefore, some long-time common project fail. Because the Supreme Court has stated that the delegation of proceedings addressing offences and the related penal power of the state to a legal person in private law is in conflict with the provisions of §§3, 10, and 14 of the CRE in their conjunction^{*45}, provision of certain public services (e.g., waste management and public transport) through an association of LGs has become problematic.

1.7. The problem with establishment of joint administrative agencies

In a situation of insufficient administrative capability and lack of specialists, LGs have made efforts to resolve this problem by employment in service of so-called joint officials (e.g., in the county Ida-Viru, a law-enforcement unit was established by a certain rural municipality government and two law-enforcement officials were employed by five rural municipalities on a part-time basis).^{*46} It is not, however, permitted

association cannot protect enough interests of its members, with it being unable to aid against, for example, forceful state activities with regard to LGs; having an equal number of representatives in the association is unfair for a large LG unit; and the dissemination of information is insufficient.

³⁹ Kohaliku omavalitsuse üksuste liitude seadus ['Local Government Associations Act']. – RT I 2002, 96, 565; 2009, 54, 363 (in Estonian).

⁴⁰ Available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X2009K8&keel=en&pg=1&ptyyp=RT&tyyp=X&query=kohaliku+omavalitsuse> (most recently accessed on 7.4.2013).

⁴¹ Available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X1013K10&keel=en&pg=1&ptyyp=RT&tyyp=X&query=mittetulundus%C3%BCh> (most recently accessed on 7.4.2013).

⁴² Maakondlike omavalitsusliitude tegevus ja sisekontrollisüsteemi toimimine. Riigikontrolli aruanne Riigikogule ['Activities of county associations of local governments and functionality of the internal control system: Report of the National Audit Office to the Riigikogu']. Tallinn 2012, p. 1. Available at <http://www.riigikontroll.ee/tabid/206/Audit/2237/OtherArea/1/language/et-EE/Default.aspx> (18.2.2013) (in Estonian). A summary of the conclusions is available in English at <http://www.riigikontroll.ee/tabid/206/Audit/2237/OtherArea/1/language/en-US/Default.aspx> (most recently accessed on 7.4.2013).

⁴³ Pursuant to the applicable law, the following tasks have been assigned to county associations: participation in preparation of a national spatial plan and in its concertation (planeerimisseadus ['Planning Act'], §§16 (1) 1) and 17 (1). – RT I 2002, 99, 579; RT 29.12. 2011, 1 (in Estonian)); making proposals to the Minister of Education and Research on state-commissioned education (Universities Act, §50¹ (6) (available at <http://www.legaltext.ee/et/andmebaas/paraframe.asp?loc=text&dk=e&t&sk=en&dok=X60039K8.htm&query=%FClkooliseadus&tyyp=X&ptyyp=RT&fr=no&pg=1>) (most recently accessed on 7.4.2013)); issuing an opinion (non-binding) on a candidate presented by the Minister of Regional Affairs (Vabariigi Valitsuse seadus ['Government of the Republic Act'], §86 (3). – RT I 1995, 94, 1628; RT 29.12.2011, 1 (in Estonian)); and organisation of county-level public transport (when assigned to this by relevant authorities) (ühistranspordiseadus ['Public Transport Act'], §4. – RT I 2000, 10, 58; RT 28.6.2012, 3 (in Estonian)).

⁴⁴ LGAA, §10 (1)–(3).

⁴⁵ Supreme Court en banc decision 3-1-1-86-07, of 16.5.2008. English text available at <http://www.nc.ee/?id=908&print=1> (most recently accessed on 6.4.2013).

⁴⁶ Riigikontrolör Mihkel Oviiri ettekanne Riigikogus 7. novembril 2012 riigi majanduse ja haldamisega seotud probleemide kohta (see Note 22), pp. 8–9.

by the legislation now in force to establish a joint administrative agency endowed with powers of public authority.

Pursuant to §159 of the CRE, an LG has the right to establish joint agencies with other LGs. Both administrative agencies endowed with powers of public authority and agencies providing public services, along with not-for-profit associations, foundations, public limited companies, and private limited companies in which LGs have controlling influence, can be understood as falling under the category 'joint agencies'. The competence of an LG unit as a territorial corporation is limited with respect to its administrative territory. To act authoritatively (*hoheitliche Verwaltung*) in cross-border capacity, an LG, also in the case of co-operation, must have a special legal foundation and—in the case of voluntary co-operation—consent of the other party/parties. Relevant legal foundations, however, have not been established yet. The issue of cross-border activities is particularly acute in the context of potential formation of catchment areas for a predetermined set of services, where the emphasis should be on common requirements set for services rather than on the effect of current administrative boundaries.

2. Some proposed legal solutions

Below, the authors elaborate on potential solution options that encroach less on the LG's autonomy (CRE, §154 (1)), local democracy (CRE, §§ 1 (1); and 156), and local identity. After this, more radical variants are dealt with. Solutions by which LGs' autonomy – a basic principle of the ECLSG—is spared more can also be assessed as being in better accordance with basic constitutional theory of LG. Nevertheless, the CRE does not exclude mandatory co-operation of LGs (including compulsory mergers), if certain formal and substantial criteria are met.

Horizontal co-operation of LGs is the primary mechanism for building of scale and, thereby, capacity, as well as to share good practices.^{*47} Also a possibility of achievement of more cost-effectiveness is essential (to overcome problems resulting from disadvantageous administrative boundaries, so as to achieve economies of scale (e.g., via shared waste management) and appropriate division of costs).

First, a set of legal measures needs to be applied by legislative and executive powers. It is necessary 1) to stipulate which of the obligations imposed on LGs by law are of a local character and which are of a national character and 2) to distinguish between the funds allocated to LGs for deciding on and organising handling of local issues from the funds allocated for performance of national obligations and provide for funding of national obligations imposed on LGs by law out of the state budget. In other words, Supreme Court (*en banc*) decision of 16 March 2010 3-4-1-8-09 needs to be implemented.

Sufficient revenue basis should be provided to LGs for performing of the public tasks assigned to them. Transformation of an income tax paid by resident natural persons and land tax into local taxes (LGs would have authority to change tax rates, within prescribed limits, and to establish tax allowances) is worthy of consideration. As a whole, however, the level of financing of LGs before the financial crisis of 2009 should be restored.

Procedural regulation of voluntary mergers (in the PLGM and LGOA) should have clear targets to be reached by means of voluntary mergers, concrete deadlines, and specification of the measures to be applied by the state if the process is not completed in due time. Acceleration of the process of voluntary mergers presupposes also merger grants larger than the existing ones, differentiation among their rates in line with the time of merger, and revision of the requirements related to the public services that the LGs should be capable of providing after they merge.

Substantial revision needs to be made to Chapter 10 of the LGOA with respect to co-operation of LGs. The forms of co-operation—'to co-operate'; 'to grant authority to another rural municipality or city for this purpose' (LGOA, §62 (1) 1) and 2)—are formulated too declaratively and need specification. Also, a right for several LG units to establish a joint administrative agency to exercise powers of public authority cross-border is in need of legislative establishment. Relevant provisions should link establishment of such an agency with corresponding decisions of the LG councils concerned as well as with entering into contract under public law, in which management functions (particularly supervision and proceedings in cases of misdemeanours), financing, personnel arrangements, and other matters essential to normal functioning

⁴⁷ OECD Public Governance Reviews: Estonia: Towards a single government approach (see Note 6), pp. 50, 295.

of an agency would be regulated. Authorisation rules in special laws addressing various domains should be added to the norm of general competence in the LGOA.

Standards pertaining to the public services to be provided by LGs are in need of complex revision and amendment in terms of substantial criteria—requirements as to the accessibility of a service (the period, periodicity, and distance involved in provision of service), the qualifications of its provider (the public servant), and the technical equipment used in provision of a particular service. The purpose of the improvement of public services is—as has been the case in much of Europe for several decades now⁴⁸—to bring the assumptions and expectations of citizens and offices closer to each other. Therefore, laws, rules, and other documents regulating local and state tasks performed by LGs (including documents from LGs themselves) need to be amended and supplemented in large numbers. Not all LGs must necessarily perform the same functions. Rural municipalities and cities can be assigned to separate groups legally (i.e., divided into various categories) on the basis of their ability to provide public services, and, accordingly, their competence could be different (Tallinn as the capital city should be regulated by means of a special law to take its largeness and other specifics into consideration). LGs that are unable to reach the legally required level of public service independently should be obliged by law to perform the relevant tasks through the joint administrative agency (as an alternative, these tasks could legislatively be transferred to the county association). Also a matter for consideration is whether county boundaries should be observed in the establishment and activity of joint administrative agencies. In the legal regulation, one must take into account that 1) any restriction of the LG's right of self-management must have a legitimate objective and must be in proportion to that objective (appropriate, necessary, and reasonable for the achievement of the objective), 2) the possibilities for voluntary co-operation should remain (CRE, §159; ECLSG, Art. 10), and 3) the decisive role in performance of local tasks should remain with the local community and its representative body—the LG council (CRE, §156; ECLSG, Art. 3); in other words, performing of tasks through any given form of co-operation must not lead to a situation in which an LG council as a representative body has lost its leading position in decision-making over performance of public tasks in the relevant rural municipality or city.

The existing model of regional administration is in need of substantial reorganisation. Several alternatives are conceivable: 1) attribution to the county of the status of a legal person under public law; 2) attribution to the county association of LGs of the status of a legal person in public law, along with foreseeing of the mandatory membership of rural municipalities and cities in it, and delegation of public tasks of a county-level character to the bodies of the county association along with fixation of a stable model of financing; and 3) formation of a full-fledged county self-government at the regional level. Similar options for a solution have been proposed by the General Meeting of Estonian Cities and Rural Municipalities (incorporating various county associations of LGs).⁴⁹

As for the second possible option mentioned above, some additional considerations (besides those noted in critical remarks already made on the present legal status of the county associations of LGs as not-for-profit associations: inability to perform supervision etc.) can be highlighted. First of all, in the case of legislative shifting of responsibility for certain public tasks currently performed by rural municipalities and cities to the level of county associations, the restrictive nature of this measure with regard to the right of self-management of LGs (CRE, §154 (1)) should be taken into account. Consequently, precise standard—i.e., detail-level characteristics of public tasks—for the respective public services to be rendered by LGs are essential here if one is to provide justifiability of such a transfer of responsibility: abstract reference to improvement of the level of quality is insufficient in this respect. It should also be noted that legislative transfer of certain public tasks to the county associations of LGs as legal persons in public law can be characterised as a milder measure than top-down amalgamation of LGs; it also maintains local democracy, provides local-level government with a more stable revenue basis, etc. Mandatory membership of rural municipalities and cities in the county associations as legal persons in public law should not impair the right of LGs to form unions and joint agencies with other LGs (CRE, §159) and must conform with legal reservation (CRE, §160).

⁴⁸ See, for example, M. Kiviniemi. *The Improvement of the Public Services: Quality, Conditions and Development As Factors of Evaluation*. Helsinki: Administrative Development Agency, Government Printing Centre 1988, p. 9.

⁴⁹ Eestimaa Linnade ja Valdade Üldkogu. Tallinn 2012 [*'General Meeting of Estonian Cities and Rural Municipalities, Tallinn, 2012'*], p. 7. Available at http://www.emovl.ee/files/Linnade_valdade_ildkogu/Linnade_ja_Valdade_Yldkogu_31.03.2012_Tooryhmade_materjalid_Yldkogule.pdf (most recently accessed on 2.4.2013) (in Estonian).

Whatever the concrete solution(s) may be, it is obvious that the hitherto existing state management model at regional level is unbalanced on account of lack of an influential self-governmental counterpart. Purely voluntary forms of co-operation need to be complemented with certain forms of a mandatory co-operation. Putting regional management in order should begin with answering the principal question on the position of the self-governmental ordering of the affairs of life in it and its relationship with state management.

Recently (in October 2012), the Minister of Regional Affairs (within whose area of administration matters of LG belong) announced an initiative on LG reform, in which six potential models of self-government organisation were proposed: 1) an Estonia of very small rural municipalities, 2) an Estonia of LG associations, 3) a two-level Estonia, 4) an Estonia of parishes, 5) an Estonia of 'pull centres', and 6) an Estonia of counties. After this, the minister informed of his intention to apply option 5 (a 'pull centre' is a densely populated settlement that is an important destination in pendulum migration for the residents of its hinterlands, within the radius of a 30-minute automobile trip for residents of other settlements) as a starting point for his further activity, to result in the appearance of 30 to 50 new LG units instead of the current 226. During a transitional period, formation of rural-municipality districts managed by administrative boards might be considered.^{*50}

Mandatory merger of LGs separately from the legal specification of tasks (local mandatory tasks or national obligations) assigned to them, without establishment of requirements related to public services and revision of the financing model for rural municipalities and cities, cannot be considered an adequate response to the problems that are already evident. Rather, it has to do with carrying on 'traditions' of undertakings of a similar kind, which has reduced the substance of reform to pure merger of existing LG units while functional problems, though inseparably linked to territorial factors, have been given no notice.

3. Conclusions

Estonian LG law is in need of further substantial development if the administrative capability of rural municipalities and cities is to be raised to the level required by the Constitution. To this end, a number of measures closely connected with one another should be applied. Existing problems cannot be resolved through purely mechanical consolidation of current LG units: both territorial and functional aspects should be dealt with as a whole. Voluntary co-operation of LGs has considerable potential to enable LGs' better protection of the fundamental rights and freedoms (CRE, §14) and provision of public services with appropriate quality and access (CRE, §4 (1)). For making use of this potential, it is necessary to clarify through specification and amend the legislative provisions for voluntary co-operation (e.g., regulation of joint administrative agencies), on the one hand, and to complement voluntary forms of co-operation with forms of mandatory co-operation, on the other. Public tasks assigned to LGs through laws should be legally defined (mandatory self-government tasks or national obligations), and funds allocated to LGs for deciding on and organising the handling of local issues should be distinguished from the funds assigned for performance of national obligations.

⁵⁰ Omavalitsusreformi elluviimise kava. Koostatud regionaalministri valitsemisalas 06.03.2013 ['Implementation plan for local government reform, drafted within the governmental purview of the Minister of Regional Affairs on 6.3.2013']. Available at https://www.siseministeerium.ee/public/OMAVALITSUSREFORMI_KAVA_LUHIKOKKUVOTE_06032013.pdf (most recently accessed on 3.4.2013) (in Estonian).



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Operators' General Obligations as an Environmental Duty of Care

1. Introduction

In Estonia, the codification of environmental law was started in 2007. In February 2011, the first result to materialise from the codification project—the General Part of the Environmental Code Act^{*1} (GPECA)—was adopted. This defines, alongside many other fundamentals of environmental law, the general (fundamental) environmental obligations as expression of an environmental duty of care. Although the GPECA addresses both general obligations and operators' obligations, the present paper deals with only the latter.

The essence of operators' general environmental obligations lies in taking measures to avoid environmental hazards and taking reasonable precautionary measures with regard to environmental risks at their own initiative and expense. General obligations are likely to be specified in environmental-sector-specific legislation as well.

One of the main reasons for the codification is the overly casuistic style of the legislation in force. There is clear lack of provisions with a greater level of abstraction. The other noteworthy trigger for the codification is the wholly fragmented character of the legislation, which considers individual environmental domains (water, air, nature, etc.), deals with them as isolated from each other, and thus does not provide for holistic environmental protection as well. General environmental obligations as a 'safety net' address both of the above-mentioned issues: they are abstract—leaving considerable room for interpretation and being subject to weighing of interests—and also cross-sector in nature, taking care of the holistic protection of environment-related goods.

While environmental law belongs to the realm of administrative law, general environmental obligations of operators serve a dual purpose. On the one hand, these obligations are enforced by administrative bodies, for instance, in the granting of environmental permits. On the other hand, general environmental obligations should be considered on the operator's own initiative to a reasonable extent, taking into account first and foremost the rights and interests of the private individuals who are likely to be affected and their potential private-law claims.

As general environmental obligations are a new phenomenon not only in Estonian environmental law but also in many other jurisdictions, there is little practical experience with their application overall and a complete lack in Estonia. The goal of this paper is to highlight the main grounds for recognition of general environmental obligations of operators. The present paper also is aimed at pointing out key characteristics of general environmental obligations and considerations that must be taken into account in their application.

¹ Keskkonnaseadustiku üldosa seadus. – RT I, 28.2.2011, 1 (in Estonian).

2. Sources of general environmental obligations

2.1. Anchorage in the Constitution

The fundamental sources of general environmental obligations can be found in the Estonian Constitution. There are three provisions in the Constitution that could be, at least indirectly, relevant. Section 5 of the Constitution stipulates that '[t]he natural wealth and resources of Estonia are national richness which shall be used sustainably'. This section of the Constitution is frequently interpreted as a provision that places the obligation on the state to supply legislative instruments ensuring the sustainable use of the natural environment in the public interest and where necessary by restricting the rights of private persons.^{*2} This provision mandates and directs state environmental policy and pushes the state institutions to take effective environmental protection measures, an example of which is the placing of general environmental obligations on private persons. However, as §5 of the Constitution is formulated in a rather imprecise manner, it leaves very wide discretionary power to the state institutions.

Environmental regulations are likely to be challenged for any infringement of fundamental rights, first of all property rights and the right of free enterprise. Environmental law's regulatory tools are very often indeed various limitations, prohibitions, and other direct or indirect legal prescriptions affecting a person's rights. In such cases, §5 of the Constitution could be referred to as the legitimate aim, serving as a yardstick for a proportionality test.

Section 53 of the Constitution stipulates: 'Everyone has a duty to preserve the human and natural environment and to compensate for damage caused to the environment by him or her.'

It could be argued that this provision can be interpreted such that a certain environment-related 'duty of care' must be integrated into all activities affecting the environment. However, §53 of the Constitution contains many uncertainties and undefined terms whose clarification is necessary. The duty to preserve the human and natural environment cannot be absolute. What constitutes the threshold beyond which we need to consider §53 of the Constitution is at times almost a philosophical question, but it is also a legal issue.^{*3} The need to clarify the content of §53 of the Constitution Act was one of the main elements that triggered the stipulation of general environmental obligations in the GPECA.

Section 19 of the Constitution states: 'Everyone has the right to free self-realisation. Everyone shall honour and consider the rights and freedoms of others, and shall observe the law, in exercising his or her rights and freedoms and in fulfilling his or her duties.'

A referred constitutional provision is another expression of a sort of 'duty of care' in the sphere of self-realisation, wherein rights and freedoms of others should be honestly considered. Environmental protection largely coincides with the protection of fundamental rights. Many of these rights are dependent upon the state of the environment—for example, air and water quality. It follows from §19 of the Constitution that all other persons' environmental-related rights should also be taken into account in initiation of private persons' activities affecting the state of the environment. This is yet another source of general environmental obligations.

2.2. Principles of environmental law as a source of inspiration for general environmental obligations

2.2.1. The principle of a high level of protection

According to Article 191 (2) of the Treaty on the Functioning of the European Union and §8 of the GPECA, environment protection measures must ensure a high level of protection. The content of the above-mentioned principle is that the measures for protecting the environment must provide effective protection against environmental nuisance, and it is not allowed to favour economic considerations automatically over the necessity of protecting the environment and human health and well-being. However, a high level is not to be confused with the highest possible level; accordingly, determining the level of protection presupposes

² See Eesti Vabariigi Põhiseadus: kommenteeritud väljaanne ['Constitution of the Republic of Estonia: Commentary'], p. 88. Available online at http://www.pohiseadus.ee/public/EVPS_kommeteeritud_valjaanne_2012.pdf (most recently accessed on 11.4.2013) (in Estonian).

³ See Eesti Vabariigi Põhiseadus: kommenteeritud väljaanne (Note 2), p. 490.

taking into account economic and political factors.^{*4} With regard to general environmental obligations, this statement highlights the necessity of a proportionality test when one is implementing and enforcing these obligations.

The principle of a high level of protection is associated with the obligation to take into account any new development based on scientific facts.^{*5} This principle also applies to general environmental obligations and renders them continuous and changing with time in tandem with the development of knowledge and technology.

One of the sub-principles associated with a high level of protection is the principle of integrated environmental protection, which takes into consideration the possibility of environmental impact carrying over from one environmental 'medium' to another. Traditionally in environmental law, a sector-based approach has been dominant. In various areas of environmental law—water law, waste law, nature protection law, etc.—sector-specific general obligations were laid down. The results of such a fragmented approach were gaps. Different approaches to controlling emissions into the air, water, or soil separately may encourage the shifting of pollution between the various environmental media rather than protecting the environment as a whole. General environmental obligations are cross-sector in nature and based on an integrated approach.

Nevertheless, the primary EU law does not refer to integrated protection *expressis verbis*; there is a noticeable trend of such an approach in secondary law. In this respect, one may recall the Industrial Emissions Directive^{*6}, whose Recital 12 proclaims that Member States should take the necessary steps to ensure that the operator is complying with the general principles of certain basic obligations. In a more precise manner, Article 3 (1) stipulates as general principles that Member States must ensure that operators take all of the appropriate preventive measures against pollution, particularly through application of the best available techniques; no significant pollution is caused; energy is used efficiently; etc. These goals can be reached in principle by imposing corresponding directly applicable legal obligations on operators. As can be seen, the principles of Article 3 (1) of the Industrial Emissions Directive are very similar to those general environmental obligations stipulated in the GPECA.

2.2.2. Principles of prevention and precaution

One of the rather specific elements of Estonian environmental law is the relatively strict distinguishing of the prevention principle and the precautionary principle. The prevention principle is applied in the case of environmental hazards, when the occurrence of a significant adverse environmental impact is obvious. The implementation of the prevention principle is quite straightforward. When the occurrence of a significant environmental impact is obvious or sufficiently probable, actualisation of the associated hazard must be prevented. The precautionary principle is implemented for the reduction of environmental risks, in terms of scientific uncertainty. In application of the latter principle and the selection of precautionary measures, taking into account the principle of proportionality is of decisive importance: environmental risks have to be minimised as much as possible through reasonable measures.

The prevention and precautionary principles have been 'translated' into general environmental obligations by means of putting a private person (operator) under the obligation to apply the necessary measures for preventing environmental hazards and to take reasonable precautionary measures for reducing environmental risks on said person's own initiative (see Subsection 4.2. of this paper).

2.2.3. The 'polluter pays' principle

In §12 of the GPECA, the principle that the polluter pays is put into words. The GPECA has followed the traditional understanding of the 'polluter pays' principle, according to which the polluter should bear the cost of the measures necessary to reduce pollution in line with the extent of either the damage done to society or the exceeding of an acceptable level (standard) of pollution.^{*7} Polluters are in many cases persons under

⁴ A. Epiney. *Environmental Principles*. – R. Macrory (ed.). *Reflections on 30 Years of EU Environmental Law: A High Level of Protection?* Groningen, Netherlands: Europa Law Publishing 2006, p. 26.

⁵ Treaty on the Functioning of the European Union, Article 114 (3).

⁶ Directive 2010/75/EU. – OJ L 334, 17.12.2010, pp. 17–119.

⁷ For more, see H.C. Bugge. *The polluter pays principle: Dilemmas of justice in national and international context*. – J. Ebbesson, P. Okowa (eds). *Environmental Law and Justice in Context*. Cambridge: Cambridge University Press 2009, pp. 411–428.

private law who use environmental resources in order to gain profit or other benefits. Therefore, it is right to expect that the polluter also take care of reducing the environmental nuisance associated with his or her activity and bear the relevant costs.

3. The inherent characteristics of general environmental obligations

3.1. The functions of general obligations—the resemblance to civil law

One of the traditional goals of environmental law is to transfer possible private-law claims related to activities affecting the environment and a private person's rights to the realm of public law.⁸ For example, environmental permit procedures are aimed at excluding as far as possible the potential for future private-law defence claims by affected third parties. The idea is to induce the affected third parties to assert any potential defence claims already within the context of the permit procedure and, from the opposite perspective, also safeguard the operator, at least to some extent, against such claims in the course of the commencement of the permitted activity. Therefore, there is reason to expect environmental law's regulatory schemes to be broadly comparable to those of private law.

'Duty of care' is a legal and a moral concept that departs from the fundamental ethics principle of non-maleficence originating from the Hippocratic maxim '*primum nil nocere*'—paraphrased as 'do no harm'.

In short, a duty of care refers to the responsibility of each and every person to take all reasonable steps to prevent harm to another person or to property of another. The concept of the duty of care is firmly embedded in civil law, wherein an individual is considered to be responsible and accountable for having breached a duty of care if acting negligently.

Usually law assigns a person responsibility to avoid negative impact on another person or his or her health or property. Here, it is relevant to recall that environmental protection largely coincides with the protection of people's health, well-being, and property rights. But modern environmental law might recognise also that a person may owe a duty of care to the environment *per se*.

In civil law, the concept of liability for damage caused by a major source of danger has been recognised for a long time. If damage is caused as a result of danger characteristic to the given activity or a thing constituting a major source of danger or on account of an extremely dangerous activity, the person who manages the source of danger shall be liable for the causing of damage regardless of said person's culpability. Such persons are deemed to be liable for the negative consequences proceeding from their activities, and bear the relevant risks at their own expense.

The above-mentioned ethical and legal approaches also underlie the concept of general environmental obligations, and they declare the recognition of a general environmental duty of care that could be expected of operators within a reasonably expected scope.

3.2. Obligations for operators' own initiative

General environmental obligations as an expression of the environmental duty of care are under Estonian law essentially binding on all operators, even those whose activities are not to be authorised via environmental permits. In this respect, Estonia's law differs from that of Germany, where according to Article 5 of the BImSchG⁹, general environmental duties of operators are linked with the operation of installations subject to permit-related requirements. Accordingly, fulfilment of general environmental obligations of operators in Estonia should essentially be guaranteed by the operators on their own initiative, as this follows in large part from the polluter-pays principle with its insistence on internalisation of environmental externalities. In other words, since the particularities and extent of these obligations are not specified

⁸ H. Schlemminger, C.-P. Martens (eds). *German Environmental Law for Practitioners*. 2nd edition. The Hague: Kluwer Law International 2004, pp. 45–46.

⁹ Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigungen, Geräusche, Erschütterungen und ähnliche Vorgänge (Bundes-Immissionsschutzgesetz, BImSchG). – (neugefasst) 17.05.2013 BGBl. I S. 1274; 02.07.2013 BGBl. I S. 1943.

exhaustively in the legislation, the operators are inherently under the burden of the obligation to assess the possible impact of their particular activities on the environment, human health, and well-being in addition to property and to choose their course of conduct in view of what could be reasonably expected from them by other persons and the public in general.

Such an innovative approach may bring with it truly substantial changes in the basic framework of environmental law. Within the traditional legal framework, an operator might be reproached for violation of requirements specifically set forth in the legislation, a permit, or an administrative act but charging the operator with any further action was ruled out. Ultimately, it could be argued that general environmental obligations perform the role of a subsidiary 'safety net' in cases wherein legislation or administrative acts do not guarantee adequate and reasonable protection of the environment and a person's environment-related rights—e.g., to health, well-being, and property. Of course, the ultimate role of the proportionality test should not be forgotten in this connection.

Here another connection with civil law must be pointed out. Under neighbourhood rights (regulated in Estonia in the Property Act¹⁰), owners of property near the activity may claim illegal infringement of their property rights, demand to prevent or pre-empt the conduct of the operator, or at least seek compensation. This option also prompts operators to take hazard-prevention and risk-reduction measures on their own initiative in order to eliminate the potential for civil-law claims.

3.3. The supervisory and enforcement role of public authorities

Despite the fact that general obligations should be complied with on the operator's own initiative, it is still likely that these might not always be self-executive. Accordingly, the supervisory and enforcement role of public authorities is essential. One of the reasons for this may be the operators' lack of expert knowledge about environmental impacts, which in many cases are subject to scientific uncertainty. In most cases, the role of public authorities is tied to permit-linked requirements, because, even though the 'operator' concept is not always linked in theory with permit-related requirements, this link still exists in practice, for the most part.

The links between general obligations and permit-linked requirements in the GPECA are obvious and deliberate. Only a few of them are pointed out here. According to §42 of the GPECA, as early as in the stage of filing of the application for a permit, the operator is obliged to state data about the possible environmental nuisance, together with the measures planned for reducing the environmental risks (e.g., fulfilment of general obligations). Clause 52 (1) 4) of the GPECA stipulates that the permit-issuer shall refuse to grant an environmental permit in, among other cases, the event of the planned activity not complying with the requirements prescribed by legislation—for example, showing manifest disregard for general obligations to prevent hazards and reduce environmental risks. According to §§59 and 62 of the GPECA, it is possible to suspend or even revoke the permit on grounds of the operator's obvious and unreasonable disregard for the general obligation.

3.4. Continuous and changing nature

One of the inherent characteristics of operators' general environmental obligations is their continuous nature and changing substance. While most of the general obligations have to be fulfilled already in the inception or planning stage of the activity, the content of these obligations does not constitute a permanent yardstick for the entire duration of the activity. The general obligations imposed on the operator shall constantly be observed in their most up-to-date form, following the development of scientific knowledge and technology, changes in environmental conditions, and the current and possible future land-use purpose specified for the location of the activity. An operator is under the obligation to obtain knowledge about these new developments to a reasonable extent in order to adjust the activity to said developments. Furthermore, the threshold for the general obligations and their content, especially with respect to the obligation to prevent hazards and minimise environmental risks, may depend not purely on the emissions generated by the activity in question. For example, also the overall pollution load in the area of influence of the activity may be decisive for the observance of these obligations.

¹⁰ Asjaõigusseadus. – RT I 1993, 39, 590; RT I, 23.4.2012, 1 (in Estonian).

All of the above-mentioned circumstances may outweigh the operator's trust that the environmental obligations (and also the permit conditions) will remain valid in unchanged form and content for the full duration of the activity.

4. Content of the general obligations of operators

4.1. An operator's obligations according to the GPECA

Operators' general obligations are listed in §§16 to 21 of the GPECA. Under those sections, operators are obliged to:

- apply the measures necessary to prevent hazards to the environment and take appropriate precautionary measures to reduce risks to the environment (§16 (1));
- acquire the knowledge necessary for preventing hazard to the environment and taking precautionary measures to reduce risks to the environment before commencing with the activity (§16 (2));
- avoid the use of substances, mixtures, or organisms that may be replaced by such as present less extensive risk to the environment (§16 (3));
- use raw materials, natural resources, and energy in an efficient and sustainable way, giving preference to renewable sources of energy (§17);
- choose the location of any new installation with the aim of reducing environmental nuisances and consider them when expanding or changing the installation (§18);
- ensure that the workers at the relevant installation receive reasonable training related to environmental protection (§19);
- notify the Environmental Inspectorate or other competent state authorities of significant environmental nuisances resulting from the installation (§20); and
- ensure that no significant environmental nuisances are going to be created during and after the closure of the installation (§21).

All of the obligations listed reflect the principles of prevention and precaution. Those principles, defined in §§10 and 11 of the GPECA, serve as guidelines to administrative bodies that enforce environmental law. Operators' obligations support their realisation by requiring operators to follow these principles on their own initiative and specify the content of obligations in more specific spheres of activity.

In fact, an operator's obligations can be divided into three groups in line with their level of generalisation. The obligations listed in §16 (1) of the GPECA are the most general in nature, being applicable only in cases wherein no more specific provisions have been set forth.

Other general operator obligations, found in §§16 (2) to 21 of the GPECA (referred to above), form the intermediate group, being somewhat more specific in nature. However, they too are applicable only if there are no more specific requirements that the operator is obliged to follow in a given situation.

Alongside general obligations imposed on operators, many more specific requirements are found, in several sector-specific acts. Although the principle of *lex specialis derogat legi generali* and the fact that sector-specific laws contain many specific obligations mean that general obligations found in the GPECA will not be applied very often in practice, one should not undervalue their role as a safety net in cases not anticipated by legislators.

The operator obligations set forth in the GPECA are quite similar to those found in other European countries, including in Swedish and German law. As previously brought out (see part 3.2 of this paper), the obligations found in Article 5 of the German BImSchG differ from operators' obligations under Estonian law in that the former apply to operators requiring a permit only. There are also differences in the precise content of the obligations. Obligations in German law are more general; in addition to obligation to prevent nuisances and hazards and to take precautionary measures, only two more specific obligations have been laid out. One of them—for sustainable and efficient use of energy—is also found in the GPECA (§17). The fourth obligation in the BImSchG—to follow the waste hierarchy (avoiding waste to the greatest extent possible and giving preference to reuse, recycling, and recovery over other disposal)—is not set forth as a general obligation in the GPECA.

4.2. Measures for prevention of hazards and reduction of risks to the environment

As stated above, operators' general obligations are all aimed at specifying the principles of prevention and precaution (elaborated upon in part 2.2.2 of this article). The clearest manifestation of this is the most general of the obligations found in §16 (1) of the GPECA. Said section stipulates: 'An operator is obliged to apply necessary measures for avoiding hazards to the environment and appropriate precautionary measures for reducing risks to the environment.'

For full understanding of the content of the obligation, the concepts 'hazards to the environment' and 'risks to the environment' must be explained.

A hazard to the environment is defined by the GPECA as 'sufficient likelihood of significant environmental nuisances'^{*11}; such hazard should, as a rule, be avoided according to the principle of prevention set forth in §10 of the GPECA. The definition of 'environmental nuisances', in turn, is very wide in the GPECA, including all direct or indirect impacts on the environment related to human activities, encompassing effects on human health, well-being, property, or cultural heritage.^{*12} What constitutes a 'significant' environmental nuisance is not clearly stated. However, significance of nuisance is presumed in some cases according to the GPECA—when limits set for environment quality are exceeded, environmental damage as defined in the Environmental Liability Act is caused, etc.

Risks to the environment, on the other hand, are defined in the GPECA as 'likelihood of causing environmental nuisances that require reduction'. Such risks, as a rule, do not need to be avoided totally but should be reduced as much as possible under §11 of the GPECA (with its precaution principle).

As can be seen, risks and hazards to the environment differ in two respects:

- 1) Likelihood—risks to the environment are only 'likely', whereas hazards must be 'sufficiently likely' if the requirements are to apply. It should be noted in this context that 'sufficiently likely' does not refer to a constant degree of probability but depends on the 'legal good' that is threatened by the possible nuisance. The more valuable this 'legal good' is considered, the lower the level of probability of occurrence is permitted to be. If the good is human life, the degree of probability needed is lower than in the case of property;
- 2) Significance of nuisances—risks to the environment are related to nuisances that are not significant but still require reduction, whereas hazards are related to 'significant nuisance', which should, as a rule, be prevented.

Therefore, in both respects, the threshold for definition of potential negative consequences of operators' activities as 'risk to the environment' is lower than for their definition as 'hazard to the environment'.

This underlying difference between hazards and risks is also reflected in the most general of operators' general obligations. Subsection 16 (1), in line with the principles of prevention and precaution, requires measures to be taken to prevent hazards; at the same time, only reduction is required for risks.

Two of the more specific obligations are only related to 'significant nuisances'—namely, the obligation to notify the authorities and that to prevent nuisances after the installation is closed. This means that these obligations are not applicable if a lesser level of nuisances is created. Other of the more specific obligations apply without prejudice to the potential negative consequences of operators' activities.

4.3. General obligations' relationship with other regulations

General operators' obligations do not form a separate, closed system of norms; rather, they are interlinked with other norms and regulations. Therefore, they contribute not only to realisation of the principles of prevention and precaution but toward reaching of other goals and aims of the environmental law just as well.

According to §3 (2), the environmental nuisance is presumably significant if environmental quality limit values (limit values for pollutants in the air and water, environmental noise limit values, etc.) will be exceeded. These values are often rooted in EU-level legislation aimed at the protection of human health. The obligation to prevent environmental hazards (i.e., prevent a certain ('sufficient') likelihood of exceeding

¹¹ Section 5 of the GPECA.

¹² Section 3 (1) of the GPECA.

limit values) is therefore also aimed at remaining within the environmental limit values specified in various (medium-specific) legal acts.

Being obliged to avoid the use of substances, mixtures, or organisms that may be replaced by such as present a lesser degree of risk to the environment directly coincides with the EU legislation on chemicals, most notably the REACH Regulation.^{*13} According to Article 55, the aim of the requirement of authorisation for dangerous chemicals found in Annex XIV of said regulation (carcinogens, mutagens, substances toxic for reproduction and other toxins, and persistent and bioaccumulative substances) is that these substances be progressively replaced. Subsection 16 (3) of the GPECA goes one step further and widens the 'substitution principle' to encompass all chemicals, not just the most dangerous.

The obligation to use energy in an efficient and sustainable manner and prefer renewable sources of energy also is aimed at reaching more goals than just fulfilment of the principle of precaution. Fulfilment of this obligation also contributes to reducing greenhouse gases' emission and increasing energy-efficiency, both required under the EU Climate Package. Use of fossil fuels for energy also causes other pollutants besides CO₂ to be emitted into the air, most notably SO₂ and NOx. Because these compounds cause trans-boundary pollution and acidification of the soil, their emission is regulated under the EU National Emissions Ceilings Directive.^{*14} Efficient use of energy and preference for renewable sources is, therefore, also compatible with the aims of the latter directive.

Obligation to choose the location for a new installation on the basis of its impacts is closely linked with regulation of spatial planning. According to §1 (2) of the Estonian Spatial Planning Act^{*15}, the aim of spatial planning is to create conditions for sustainable and balanced land use. The operators' obligation as stated in §18 of the GPECA is one of the measures found outside the Spatial Planning Act that are aimed at achievement of this aim.

The obligation to notify state authorities is closely linked with Estonian authorities' obligations under the Aarhus Convention^{*16}'s Article 5 (1) c) and under Article 7 (4) of the EU Environmental Information Directive. According to these provisions, state authorities are obliged to disseminate information held by them in the event of environmental emergencies resulting from, *inter alia*, installations. This obligation is transposed into the national legislation by the Public Information Act^{*17}'s §30 (3) and §25 of the GPECA.

5. Proportionality and reasonability

According to §22 of the GPECA, operators' general obligations must be applied only to a 'reasonable extent'. According to the wording here, this condition is principally aimed at the administrative bodies enforcing general obligations (see the discussion of enforcement of obligations in Subsection 3.4 of this paper), but it also affects operators, specifying the minimal effort required from them on their own initiative. The provision has an explanatory rather than normative character where its relevance in the realm of administrative law is concerned. The principle of proportionality referred to by this provision is a general legal principle guiding the activities of administrative bodies. Formulated in the Administrative Procedure Act^{*18}, the principle of proportionality means that the administrative act or activity in question must be suitable, necessary, and proportional (in the narrow sense) with regard to the goals set.

Operators' general obligations may thus be enforced by administrative authorities if and only to the extent that they are firstly aimed at some legitimate goal. The goals that justify application of operators' general obligations are, among others, those that are listed as goals of the GPECA in its §1. In more general

¹³ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 Concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), Establishing a European Chemicals Agency, Amending Directive 1999/45/EC and Repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 As Well As Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.

¹⁴ Directive 2001/81/EC of the European Parliament and the Council of 23 October 2001 on National Emission Ceilings for Certain Pollutants.

¹⁵ Planeerimisestadus. – RT I 2002, 99, 579; RT I, 14.2.2013, 3 (in Estonian).

¹⁶ United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

¹⁷ Avaliku teabe seadus. – RT I 2000, 92, 597; RT I, 19.12.2012, 5 (in Estonian).

¹⁸ Haldusmenetluse seadus. – RT I 2001, 58, 354; RT I, 23.2.2011, 8 (in Estonian).

terms, legitimate goals refer to the protection of human health, well-being, and property, and to the natural environment in itself (biodiversity).

All administrative measures that are aimed at some legitimate goal must pass a three-stage test if they are to be considered proportional.^{*19} They must be:

- suitable—i.e., they must ensure the achievement of promotion of the goal set (an activity or decision of the administrative authority is not suitable if there can be no cause–effect relationship between the measure and the goal; in the case of an activity for which an environmental impact assessment (EIA) must be carried out, the suitability of the measures can be easily assessed in the context of the EIA);
- necessary—i.e., the measure is to be the least burdensome to its addressee (burdens associated with measures may be strictly financial, as when one is choosing between technical measures, such as filtering systems, or take the form of wider restrictions to the scope or allowed impact of the activity, as in the case of lower emission thresholds); and
- proportional in the narrow sense—i.e., the positive effects gained (such as an increase in air quality) from applying a measure must outweigh the negative consequences (e.g., costs to the operator or loss of profit).

As a consequence of general obligations as a safety net, operators are required to take hazard-prevention and risk-reduction measures also on their own initiative (without external pressure from the authorities). However, they are thus obliged only to the extent that can be reasonably expected from them.

What is proportional or reasonable should be decided on a case-by-case basis; therefore, it is hard to cite general guidelines on this matter. Certain elements may still be considered important in most cases, including:

- the nature of the (potential) environmental nuisance (geographical extent, intensity, and duration);
- the rights and values threatened by the (potential) environmental nuisance;
- the degree of certainty of the (potential) environmental nuisance arising, and its predictability; and
- negative impacts for the operator (amount of direct costs, delays in commencement of the operation of an installation, etc.).

As the operators' obligations not only are tied to administrative law and proceedings but also have relevance for possible private-law claims, §22 of the GPECA makes it clear in addition that operators' duty of care in terms of private law is not an absolute one but is limited by 'reasonability'. What is considered reasonable is a matter of common practice among operators of similar facilities. Therefore, it is subject to changes over time with the development and commercialisation of new knowledge and technologies.

6. Conclusions

General environmental obligations of operators should not be considered an arbitrary burden to economic freedoms; instead, they are firmly anchored in the Constitution of Estonia, most importantly in §5, §19, and §53. These sections constitute the framework for the general environmental duty of care. Firstly, they authorise and direct the state in taking measures that affect persons' rights and obligations in order to protect the environment. Secondly, they set limits to persons' freedom of self-realisation for purposes of guaranteeing sustainable use of the environment.

General obligations are also directly derived from basic principles of environmental law and policy, such as high-level and integrated environmental protection and the principles of prevention and precaution. These principles, which in most cases stem from EU environmental law, are framed by the concept that the polluter—that is, the person using the environment to gain personal benefits—should pay for necessary and reasonable protection measures.

The underlying rationale for operators' obligations can be found in bringing potential civil-law claims into the sphere of administrative proceedings and thereby, to a certain extent, avoiding unpredictable and costly civil litigation. Although these obligations are realised mainly through supervision and enforcement

¹⁹ The three-stage proportionality test has been continuously applied by the Supreme Court of the Republic of Estonia since the landmark decision in case 3-4-1-1-02 (decision, in Estonian, available via <http://www.nc.ee/>).

by public authorities, the fulfilment of general obligations must be undertaken also by operators on their own initiative. Therefore, they serve as a safety net in cases wherein legislative or administrative acts do not guarantee adequate protection of the environment and persons' rights, including those with civil-law origin. By nature, these obligations are continuous and changing in character, obliging the operator to update its knowledge and adjust its activities to new developments affecting environmental conditions and technology.

Operators' general obligations can be classified into a hierarchy in accordance with their level of abstraction. Most universal are the fundamental obligations to prevent environmental hazards and to reduce risks.

General environmental obligations are discretionary by their very nature. Public authorities may enforce them only as far as this is proportional, taking into account the aim of the environmental regulation—a high level of protection of the environment and individuals' rights related to it (e.g., to their health and property). Operators should also take measures on their own initiative; however, these are also subject to the test of reasonableness. Neither proportionality nor reasonableness can be universally defined; they should be determined on a case-specific basis.



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Principles of Debt Restructuring and Restrictions on Initiation of Debt Restructuring Proceedings

The purpose of this article is to determine the basic principles of debt restructuring proceedings and the content thereof and how these are applied and to research what the basic principles should be for debt restructuring proceedings, alongside what the rules and restrictions should be on the initiation of debt restructuring proceedings. The article compares the regulations enacted in other countries pertaining to release from debt and contrasts these against the Debt Restructuring and Debt Protection Act^{*1} (DRDPA) in force in Estonia and current judicial practice.

1. The basic principles of debt restructuring— what they are and what they should be

According to the views expressed in legal literature^{*2}, the basic principles of debt restructuring can be encapsulated in three tenets:

1. Debt restructuring proceedings shall provide fair and equitable, efficient and cost-effective, accessible and transparent settlement and discharge of consumer debts.
2. They shall propose some form of ‘fresh start’ for the debtor.
3. There shall be equally available options of extra-judicial and judicial proceedings.

In the case of the second and third principle, the consumer may be offered a choice between a payment schedule and immediate release. In both cases, an extended period of insolvency proceedings has no benefit for a debtor without a portion of income against which a claim for payment cannot be made or without prospects for reaching a better financial position within reasonable time. Legislators should offer consumer

¹ Võlgade ümberkujundamise ja võlakaitse seadus [‘Debt Restructuring and Debt Protection Act’], entering into force on 5.4.2011. – RT I, 6.12.2010, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 30.5.2013).

² U. Reifner, J. Niemi-Kiesiläinen, N. Huls, H. Springeneer. *Overindebtedness in European Consumer Law: Principles from 15 European States*. Norderstedt: Books on Demand GmbH 2010, pp. 34–47; INSOL International Consumer Debt Report—report on findings and recommendations (May 2001), pp. 1–31. Available at www.insol.org/pdf/consdebt.pdf (most recently accessed on 30.5.2013).

debtors a discharge of indebtedness as a tailpiece of a liquidation or rehabilitation procedure, yet this should not become an easy way out. For this purpose, some preconditions should be established, but, again for balance, these must not be so high that the debtor loses the courage to enter into the proceedings.^{*3} According to the model set forth by Huls, the debtor and creditors should go to their best efforts to find extra-judicial solutions for the debts and the law should be reformed accordingly to facilitate and strengthen voluntary agreements for the payment of debts, along with official court proceedings that offer a means of escalation in order to encourage extra-judicial arrangements.^{*4} The third principle invites legislators to encourage extra-judicial proceedings for resolution of consumers' debt problems and to support it by offering competent and independent debt-counselling services. The primary advantages of extra-judicial proceedings over court proceedings are decreased costs and duration. Indeed, costs should never prevent a debtor from resolving the debt problems through extra-judicial proceedings.^{*5} Exceptions to this should be established: debts from which release shall not be granted, such as alimony or child support, fines and debts arising from criminal or grossly negligent activities, and accumulation of national taxes and utility costs.^{*6}

According to the legal literature^{*7*8}, there are three primary issues that can be resolved on the basis of the fundamental principles of debt restructuring laid out above. The first issue is that of conflicting incentives—the less a debtor foresees his solvency improving later, the less motivated he will be to look for a better job in order to earn a larger income or to engage in business and take business-related risks. The reason for this is that the income or profit gained will go to the creditors, whereas it is still unknown whether the debtor will be relieved from the unpaid debts. In this case, the debtor becomes less interested in remaining a productive member of society and may engage in illegal business in order to avoid creditors. The second issue is financial hardship—the debtor may have sufficient income to live and provide for his basic needs, but it is likely that the debtor cannot put all of his income toward paying the debt incurred. Creditors will attempt to impose various statutory measures to seize assets, including income, and this often until the debtor is impoverished. Moreover, frequent meetings between the debtor and creditors demanding the payment of debts may be psychologically oppressive and cause a significant decrease in quality of life. The third issue is financial uncertainty: In societies where the public sense of security stemming from a state of well-being has decreased, the availability of credit has become a means for replacing social insurance. However, a consumer with excessive debt has little or no chance of receiving additional credit. Unforeseen events such as illness or becoming unemployed are followed by financial hardship, and the debtor may have nowhere to turn for help. Even if an unforeseen event does not take place, the uncertainty is greater precisely because of the knowledge that an opportunity to receive additional credit does not exist, and this uncertainty decreases one's quality of life.^{*9}

Access to debt restructuring proceedings should be broad, avoiding obstacles such as minimum levels that exclude the poor and strict application of the test of good faith to the debtor, which eliminates some debtors from consideration in view of subjective normative decisions about their lifestyle. If the legislation provides for termination of the debtor's obligations, there is always a risk of release from debts being too readily accessible to a debtor and of this reducing the debtor's attempts to avoid the occurrence of permanent insolvency in the first place.^{*10}

Western European regulations are based on the principle of attempting to preserve everyone's general moral obligation to pay his debts. It is important to honour agreements and respect the obligation to do so. The objective is to reconcile this principle with the debtor's actual capacity to pay his debts. Western European regulations on release from debt generally do not grant the debtor free access to proceedings for the release from one's debts. This is provided only for natural persons who truly deserve it. A debtor who has irresponsibly created debt is not deemed worthy of being released from that debt.^{*11}

³ INSOL International (see Note 2), pp. 6, 18, 22–24.

⁴ N. Huls *et al.* *Overindebtedness of Consumers in the EC Member States: Facts and Search for Solutions*. Louvain-la-Neuve: Centre de Droit de la Consommation; Diegem: E. Story-Scientia 1994, pp. 218, 224–225, 229–232, 246, 250, 258–262.

⁵ INSOL International (see Note 2), pp. 25–27.

⁶ N. Huls *et al.* (see Note 4), p. 229.

⁷ *Ibid.*, pp. 220–223.

⁸ U. Reifner, J. Niemi-Kiesiläinen, N. Huls, H. Springeneer (see Note 2); INSOL International (see Note 2).

⁹ J. Niemi-Kiesiläinen, I. Ramsay, W.C. Whitford. *Consumer Bankruptcy in Global Perspective*. Oxford: Hart 2003, p. 4.

¹⁰ *Ibid.*

¹¹ U. Reifner, J. Niemi-Kiesiläinen, N. Huls, H. Springeneer (see Note 2); INSOL International (see Note 2).

If a debtor is released from debt, the process of that release should ensure that he has learned his lesson for the whole of his life. The purpose is to educate the debtor in the course of the proceedings such that this constitutes the first and only instance of being in such a situation in his entire life. In Western Europe, normally the release from debts is either conditional or not applied before a payment schedule has been honoured in full. This is to ensure that debt restructuring proceedings do not form an easy way out for the debtor and an opportunity to avoid the obligations undertaken.^{*12} For example, in the Netherlands, very poor debtors, whose situation would not enable them to contribute to meeting a normal payment schedule, have been technically shown to complete the scheduled payments but just over several years. As of 2008, one of the preconditions for admission to the proceedings in the Netherlands is that the debtor prove having acted in good faith for the five years prior to filing of the application.^{*13} In Belgium and Luxembourg, debtors who have knowingly caused their own insolvency are excluded from proceedings for release from debt. In contrast, the laws of England, Wales, Germany, and the USA do not set forth conditions precluding the admission of a debtor's application. Since 2005, the USA has used the so-called income test in order to assess the debtor's insolvency and to determine whether the debtor may file an application for directly entering Chapter 7 proceedings under the U.S. Bankruptcy code, as a result of which he is released from debt, or instead must first go through the proceedings for release from debt arising from Chapter 13.^{*14}

The purpose of the DRDPA (as set forth in §1 (1)) is to 'facilitate the restructuring of the debts of a natural person having solvency problems (debtor), in order to overcome the solvency problems and avoid bankruptcy proceedings'. The natural person must himself propose solutions for achieving this. The proceedings may not involve a zero rate; that is, the debtor is required to have an income and actually pay the debts. According to the DRDPA's §2 (1), in debt restructuring proceedings the restructuring of the financial obligations of a debtor is made possible by way of extension of the term for performance of an obligation, by way of agreement on performance of the obligation in instalments, or by way of reduction of the obligation. The above-mentioned conditions are assessed by the creditors and the court both upon initiation of proceedings and upon release from obligations. Through adherence to such criteria, a natural person can avoid permanent insolvency in the meaning of §1 (2) of the Bankruptcy Act. The general principle of debt restructuring proceedings is that creditors should not end up in a significantly worse situation than that in which they would find themselves upon the disposal of the debtor's existing assets in the course of bankruptcy proceedings and in view of the opportunities for gains before any possible release of the debtor from the debt.^{*15}

The author finds that, for resolution of natural persons' debt problems, a balance is needed between the avoidance of over-indebtedness of natural persons and the rehabilitation of their financial position. One possibility for achieving this balance is the writing off of debts, which may be considered the best and most radical way of improving the situation. For this method, it is important to ensure that the release from obligations is not too easily available, since otherwise the debtor is not sufficiently motivated to avoid debt in the first place. Secondly, over-indebtedness may be addressed through education and counselling of the debtor, with the purpose being to inform the debtor of how to avoid debts and consider the limits when taking out credit. The objective must be the rehabilitation of the situation when one focuses on the strategy for handling the case-specific situation of the debtor. In the education and counselling, attention should be paid not only to financial education and improvement of the current situation of the debtor but also to considering the future. From the practice of other countries (mainly Germany and Finland), it is evident that the importance of the social objective related to debt restructuring and release from obligations lies in debt counselling, which exists as a direct legal precondition to the proceedings or a factually unavoidable requirement for them.^{*16} Free debt counselling and its organisation must be considered important, as it is clear that a debtor without assets does not have funds available to pay for procedural

¹² *Ibid.*

¹³ A. Noordam's doctoral thesis, defended at Vrije University in Amsterdam in 2007, *Schuldsanering en goede trouw* ['Debt Restructuring and Good Faith']. Available at <http://bobwessels.nl/wordpress/wp-content/uploads/2007/11/summary.pdf> (most recently accessed on 30.5.2013).

¹⁴ J.J. Kilborn. *Still Chasing Chimeras But Finally Slaying Some Dragons in the Quest for Consumer Bankruptcy Reform*. Available at <http://ssrn.com/abstract=1701212> (most recently accessed on 30.5.2013).

¹⁵ Debt Restructuring and Debt Protection Act (see Note 1), p. 15.

¹⁶ J.J. Kilborn. *Expert Recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984–2010*. Available at <http://ssrn.com/abstract=1663108> (most recently accessed on 30.5.2013).

expenses, pay for counselling, and/or pay legal fees. Debt restructuring and release from obligations both shall be seen as a part of practical and public social objectives. In the author's opinion, counselling for the debtor should be considered especially important if only for the purpose of supporting him in initiating extra-judicial negotiations with creditors. The debtor would come to an accurate understanding of the obligations involved and the possibilities for fulfilling these obligations within the appropriate constraints of time and place.

In the author's opinion, the objective of the proceedings should be to enable a natural person who is having solvency problems to restructure his debts in order to overcome the solvency problems and avoid bankruptcy proceedings. Access to the proceedings shall be granted to a debtor who has the resources to perform the obligations or the opportunity to earn such resources and who has the knowledge to argue credibly before the creditors that proceedings pursuant to the DRDPA¹⁷ are the best option for both the creditors and himself. The author finds that imposing restrictions on access to debt restructuring proceedings that take place on the initiative of a debtor with the intent to avoid bankruptcy proceedings and the undesirable restrictions related thereto is justified. Imposition of restrictions to access to the proceedings is precisely what enables creditors and the court to ascertain that the natural person wanting to restructure his debt can propose a solution for performance of the obligations and consider the interests of the creditors when doing so. Given the purpose of the act, the initiation of debt restructuring proceedings should signal that the debtor has come to the right conclusions from the solvency problems that have occurred and wishes to learn to cope with the financial obligations that are going to be created in the future and learn to restore his solvency. In this regard, the author finds that pre-trial negotiations should not be imperative but the initiation of negotiations shows the debtor's real intent to find extra-judicial solutions.

2. Restrictions on initiating debt restructuring proceedings

If one is to explain and assess the need for restrictions on initiation of debt restructuring proceedings, it is necessary to be guided by the basic principles of debt restructuring. The legislator has established specification of conditions upon the existence of which it is not permissible to be admitted to debt restructuring proceedings. These restrictions have been set forth in §17 (1) and 17 (2) of the DRDPA. The provisions specified in §17 (1) 1–4) of the DRDPA prohibit the court from accepting the application to be admitted to proceedings on the basis of the circumstances set forth in said provisions. Additionally, the court has been granted a right of discretion pursuant to §17 (2) of the DRDPA (additional grounds for restriction of admission). Pursuant to §10 (1) of the DRDPA, before submitting an application for debt restructuring to a court, a debtor shall take active steps to achieve extra-judicial restructuring of the debt. The debtor is obliged to do everything in his power to come to an extra-judicial agreement with the creditors before submitting an application to the court. As the court has the opportunity to refuse to admit the application for proceedings (pursuant to §17 (2) 2) of the DRDPA) if this provision is not fulfilled, both of these sections shall be discussed jointly in the next part of the article.

2.1. Debt counselling and pre-trial negotiations as a restriction on the initiation of proceedings

Although the debtor has an obligation to do everything in his power to reach extra-judicial agreements with creditors before filing the application, the law does not define the point at which the debtor is deemed to have gone to sufficient efforts to make such agreements, nor does it specify the form for the negotiations or what constitutes 'reasonable time' for attempting to reach agreements with creditors. Uncertainty as to the extent of fulfilment of the provision is evident in judicial practice also. Even if debtors have taken part in (unsuccessful) negotiations prior to filing of the application, their applications have not been admitted

¹⁷ Debt Restructuring and Debt Protection Act, §§2, 8, 10.

for proceedings. The reasons stated in the court decisions^{*18} have indicated that, in reality, the sending of a few ambiguous e-mail messages or holding a few meetings is not enough and the debtor must present to the creditors all argument on the basis of which the creditor should agree with the debtor's proposal to enter into an agreement for extra-judicially restructuring the debt.

When establishing the prerequisite of pre-trial negotiations, the legislator has considered Western European practice, wherein the emphasis is on the debt-counselling service. The purpose of counselling is the economic education of the debtor, including advisory assistance in discharging the debts, adjusting one's lifestyle, and ensuring rehabilitation of the debtor. Ways of achieving this vary in Western European countries, but generally it is required that the debtor participate in debt counselling and in negotiations with creditors to attempt to resolve the problems extra-judicially before being permitted to file the application. There are various opinions as to the necessity of the stage of negotiations and debt counselling. In Scandinavia, the debt-counselling service is organised by the state or the local government; in Germany, however, this is done by the private sector, receiving support from the state^{*19}. In Estonia, a not-for-profit organisation (Eesti Võlanõustajate Liit, the Estonian Association of Debt Counsellors) has been established to this end, but there is no information as to the success of its activities, so it is impossible to provide an assessment of the functioning of the debt-counselling system. In the author's opinion, the current system is not transparent and its effectiveness cannot be assessed. The author finds that debt counselling should be a social service ensured by the state, in order that effective extra-judicial agreements can be concluded between debtor and creditor.^{*20} In a parallel to the Finnish practice, debt counselling could be organised at the local government level either by creating the respective positions or by outsourcing the service.^{*21}

The debt restructuring regulation is meant to rehabilitate natural persons who are fighting debts and to offer reasonable and realistic reductions of claims to the creditors, not for facilitating the achievement of consensual solutions. The absence of a counselling and negotiation requirement in Denmark is also related to the fact that there is no debt-counselling system with extensive state support in place and no support to facilitate negotiations. Also, J.J. Kilborn has admitted to negative development of counselling and negotiations in the case of the USA, stating that the counselling and negotiations have become pointless.^{*22} In Germany, the attempts at reaching extra-judicial settlements are criticised and called a farce, as debt counselling fails to provide the required help, on account of excessive work loads.^{*23} A court-approved agreement provides a sense of security to the creditor, as enforcement proceedings can be initiated under a court decision if the debtor does not perform his obligation.

It has been ascertained in Western European countries' practice of release from obligations that creditors prefer to act under the supervision of the court, which is why the creditor ends up refusing the debtor's proposals: primarily because the debtor cannot offer them sufficient credibly on conditions favourable to the creditor. In 2007, Sweden abolished the requirement for negotiation, thus following the example of Denmark, because it only protracted the admission to proceedings for release from debt and was a useless waste of labour, one that even the representatives of creditors considered 'almost pointless'^{*24}. Extra-judicial processes may save time and money in cases wherein the creditor can be convinced to accept the compromise, but, as the vast majority of cases reach court in the end, the delays and expenses of the required stage of negotiations are not only useless but also harmful. The purpose should be to reach a solution wherein it would be possible to hold extra-judicial negotiations in cases in which it is suitable and to include

¹⁸ Regulation of the Tartu County Court (TCCr) 7.11.2011, 2-11-51962; regulation of the Harju County Court (HCCr) 5.1.2012, 2-11-63782; TCCr 21.9.2011, 2-11-38724; HCCr 30.8.2011, 2-11-32099; TCCr 10.6.2011, 2-11-21804.

¹⁹ J. Niemi-Kiesiläinen, A.-S. Henrikson. Report on Legal Solutions to Debt Problems in Credit Societies. Strasbourg 11.10.2005. Available at http://www.coe.int/t/dghl/standardsetting/cdcj/2005/CDCJ-BU%20_2005_%2011EREV.pdf (most recently accessed on 30.5.2013).

²⁰ P. Gottwald *et al.* *Insolvenzrechts-Handbuch* ['Handbook of Insolvency Law']. Fourth edition. Munich: C.H. Beck 2010, p. 1241.

²¹ R. Koulu, E. Havansi, E. Korkea-Aho, H. Lindfors, J. Niemi. *Insolvenssioikeus* ['Insolvency Law']. Third edition. Helsinki: WSOYpro 2009, p. 869.

²² J.J. Kilborn. *Comparative Consumer Bankruptcy*. Durham, North Carolina: Carolina Academic Press 2007, pp. 20–48; J.J. Kilborn. Twenty-five years of consumer bankruptcy in continental Europe: Internalizing negative externalities and humanizing justice in Denmark. – *International Insolvency Review* 2009/18, pp. 155–186.

²³ P. Gottwald *et al.* (see Note 20).

²⁴ J.J. Kilborn (see Note 16).

a counsellor in such cases who would assist the parties in reaching an extra-judicial agreement. In the course of debt restructuring proceedings, existence of a commensurate body should be ensured for debt counselling so that the debtor could receive assistance in resolving the current issues before proceedings commence and also during the proceedings.^{*25} The first obligatory stage in Sweden had been one-on-one negotiations with creditors in co-operation with a counsellor, a system quite similar to that under Dutch regulations. In the second stage, once the negotiations had failed, in the name of co-operating with creditors and finding individual solutions, the creditors applied to the national Executive Office (*Kronofogdemyndigheten*, or KFM) for official release. In this stage, the KFM was also responsible for preparing a payment schedule, which was submitted to the creditors for a vote. Normally, the creditors refused the schedule, which is why in the third stage the Executive Office included the court, to review the schedule and to confirm the debtor's binding payment schedule with the creditors. This is why the compulsory stage of seeking a consensual compromise with the creditors (Stage 1) that applied in Sweden was abolished. Also, the court stage (Stage 3) was removed from the system. The KFM schedules prepared in the second stage were in most cases approved by the court, which made the engagement of the court to approve the schedule a mere formality. The elimination of the court's review obligation has definitely made the system more efficient.^{*26}

All regulations in European practice thus far (except in Denmark and in Sweden as of 2007) demand that the debtors proceed through the negotiations phase with a significant right of discretion. The right of discretion is applied in the proceedings only by the debtor and creditors. Extra-judicial agreements concluded through the assistance of debt counselling are preferred, since the purpose of this approach is to find simpler, faster, and less expensive solutions and to avoid placing a greater burden on the courts.^{*27} The legislators of most European countries have shared the experts' opinion that assistance in getting out of debt should commence at the first opportunity, when moderate intervention and financial counselling may be sufficient for directing the debtor back to the right path. Most European countries offer debt counselling to debtors even though the sources of funding and the possibilities may vary from one country to another. In Southern and Eastern Europe, debt-counselling networks are either non-existent or less developed.^{*28}

The author is of the opinion that a debtor should have access to counselling and that this should not be selective. The debtor should be obliged to include a counsellor who would help the debtor and creditors to focus on finding solutions and direct the parties toward practical solutions, in order to avoid excessive emotions. The same position has been expressed by Kilborn, who finds that this also justifies the debtor bearing the costs related to professional debt counselling, which would help to save the parties' time and eliminate the possibility of later court disputes related to the costs. The counsellor must encourage the debtor and creditors to find solutions also in more complicated cases and this especially for the purpose of the debt counsellor engaged in assessing the case at hand not being hindered by restrictions arising from the law in offering solutions that could result in the court refusing to satisfy the application.^{*29}

The author sees two significant problems. Firstly, too much attention is paid to legal issues in the course of negotiation, while the economic possibilities are neglected. Secondly, the author considers it unreasonable to force debtors into emotional compulsory negotiations, since extra-judicial negotiation should also fulfil procedural purposes—i.e., direct the parties toward extra-judicial agreements. On the other hand, the negotiations may be difficult for the debtor, as the attitudes of one party to another may become an obstacle to finding positive solutions. Accordingly, establishing negotiations as an absolute obligation is not purposeful and the focus should be rather more on the debtor's debt counselling.

²⁵ *Ibid.*

²⁶ J.J. Kilborn (see Note 14).

²⁷ Council of Europe Committee of Ministers. Recommendation CM/Rec(2007)8 of the Committee of Ministers to member states on legal solutions to debt problems. Explanatory Memorandum. Available at <https://wcd.coe.int/ViewDoc.jsp?id=1155927> (most recently accessed on 30.5.2013).

²⁸ Johannes Gutenberg University. *Debt Advice in Europe*. Available at <http://www.sfz.uni-mainz.de/2626.php> (most recently accessed on 30.5.2013).

²⁹ J.J. Kilborn (see Note 16).

2.2. Grounds for refusal to initiate court proceedings as additional restrictions on initiating proceedings

Subsection 17 (2) of the DRDPA provides seven additional grounds on which the court may refuse to initiate debt restructuring proceedings. In addition, there is another restriction to admission to these proceedings: failure to pay the state fee (DRDPA, §17 (1) 4)). Each of these seven supplementary grounds in itself constitutes sufficient reason for restriction to admission to debt restructuring proceedings; that is, the failure to meet even one of the conditions for admission provides the court with a legal basis for refusing to admit the application. In judicial practice, the supplementary restrictions (DRDPA, §17 (2) 1) and 2)) have become the primary grounds for not initiating proceedings.

The court may refuse to admit an application for proceedings pursuant to §17 (2) 1) of the DRDPA if the approval or implementation of the debt restructuring plan offered by the debtor is unlikely in view of, among other factors, the debtor's solvency status over a period of three years preceding the submission of the debt restructuring application and the debtor's ability to engage in reasonably profitable activity during the term of validity of the debt restructuring plan, in consideration of the debtor's age, profession, and education. In this case, a person requesting admission to proceedings must convince the court that he is suitable for it. This means the debtor making efforts to resolve the debt problems and putting his debts in order (there are no fines, the debtor has not undertaken new obligations irresponsibly, there are no obligations arising from profligate consumption, the debtor does not gamble, etc.).³⁰

In Estonia, one obstacle for debtors has been the fact that their income, including income that might be earned in the future, is insufficient to satisfy the creditors' claims in an extent that would be satisfactory for them. The debtors' proposals thus far have mostly been unacceptable to the creditors (especially pledgees). Debtors have made proposals under which they would perform their obligations in such a small extent that this would constitute not restructuring of the debts but, in essence, writing off of the debts. The other extreme is debtors filing application according to the data of which they wish to give the whole of their income to satisfy the creditors' claims while not considering their day-to-day expenses.³¹ Applications of the latter sort indicate that the debtor is incapable of evaluating his income and possibly available resources that could be used for making payments to creditors. Therefore, it would be unreasonable to process debt restructuring applications that are clearly going to fail. The debtor must consider that the payment schedules submitted should ensure that the payment amounts and the duration of the timetable do not eliminate the ability of the debtor and his family, if any, to cater for their basic needs in a manner showing respect for human dignity.³² Finding a solution to the problem comes down to debt counselling that would give the debtor a clear idea of his capacity to perform certain obligations and enable him to judge which proceedings are most suitable for the debtor and creditors for reaching the objectives. In the course of this, it can be determined whether debt restructuring, bankruptcy proceedings, and the subsequent proceedings for release from obligations are suitable or if it is instead possible for the debtor to reach an extra-judicial agreement with the creditors and thus overcome the solvency problems. The author's position is supported by the practice in Finland, where it was clear already in the process of drafting of the debt restructuring act that debtors need competent assistance both with court proceedings and with determining, improving, and planning their financial position in a broader sense and in finding and implementing other solutions than debt restructuring.

Clause §17 (2) 2) of the DRDPA sets forth the obligation of the debtor to hold negotiations with creditors. In the author's opinion, the imperativeness of these negotiations should be lifted at least somewhat and this requirement must not become an obstacle to admission to proceedings. It is difficult to determine when sufficient negotiations have taken place between the debtor and creditor; sometimes a single e-mail message is enough, while in other cases several meetings take place. A study by INSOL International has noted that a debtor who is a natural person must have easy access to the proceedings for release from debts

³⁰ J.J. Kilborn (see Note 14).

³¹ HCCr 5.1.2012, 2-11-63782; Regulation of the Viru County Court 26.11.2011, 2-11-38844; HCCr 21.6.2011, 2-11-27890; HCCr 11.5.2011, 2-11-18767.

³² Council of Europe Committee of Ministers. Final Activity Report of the Group of Specialist [sic] for Legal Solutions to Debt Problems (CJ-S-DEBT). Available at http://www.coe.int/t/dghl/standardsetting/cdcj/CJSDEBT/CJ-S-DEBT%20_2006_%206%20e%20Final%20-%20web%20version.pdf (most recently accessed on 30.5.2013).

without numerous or complicated formalities.^{*33} The above-mentioned problem could again be resolved by means of professional and continuous debt counselling. The debtor should be able to obtain assistance from a counsellor, who could also advise the debtor before and during the proceedings in order to achieve the best result for both the debtor and the creditors. Similarly to what is enshrined in the legislation in force in Finland, the debt counsellor's duties should extend beyond the scope of court proceedings. In Finland, a debt counsellor's tasks also include general guidance in managing and handling debt and attempts have been made to emphasise and improve precisely this aspect.^{*34}

A third obstacle to admission to proceedings is the distribution of costs (DRDPA, §17 (1) 4)). According to the INSOL International study, the costs should not hinder access to the proceedings for release from debt. Kilborn also confirms the existence of a problem related to the costs, noting that they have been a direct problem in some Eastern European systems, as these laws generally demand that the debtors pay the costs or prove that they will be able to bear the court expenses and/or fees out of their future income. If this is not the case, the proceedings will be terminated immediately.^{*35} The laws of most Western European countries, however, do not require a debtor to pay fees upon filing the application for being released from debt. In some of the Scandinavian countries, France, Belgium, and Luxembourg, general procedural costs are considered to be a part of the general system of social benefits that shall be borne from the budgets of social services and the relevant court. In Germany, the insolvency act in its first form prescribed an obligation to refuse application to debtors who lacked sufficient assets or had no income from which to pay the court expenses.^{*36} The law reform of 2001 made the conditions more favourable for the debtor by providing an opportunity to postpone the court expenses for the entire duration of the proceedings.^{*37}

Because of the above-mentioned restrictions to entry into debt restructuring, the circle of persons for whom debt restructuring proceedings are a way out is limited. Proper efficiency of access to such proceedings means not only that such proceedings should be free (or at least low-cost) and impartial but also that they should be easily accessible on a practical level.^{*38} Debt restructuring must be seen as part of the set of communal and public social objectives. Debt restructuring proceedings do not exist to raise creditors' risk-awareness; they are meant for debtors who have encountered solvency problems largely for reasons independent of their own actions (illness, accidents, disasters, and other such social circumstances).

The author must take the position that the proceedings for release from debt are meant for debtors who acknowledge their debt problems and try to find solutions to them, who have sufficient knowledge and financial resources to cover expenses related to the proceedings, and who are able to make payments to creditors for the full duration of the payment timetable. In the author's opinion, the debtor should be afforded procedural assistance, primarily with the payment of procedural expenses and state fees to be paid upon initiation of proceedings, which would ease the debtor's burden of payment in the initial phase of the proceedings and would enable the making of payments to creditors already in the early stages of the proceedings.

³³ U. Reifner, J. Niemi-Kiesiläinen, N. Huls, H. Springeneer (see Note 2); INSOL International (see Note 2).

³⁴ R. Koulu, E. Havansi, E. Korkea-Aho, H. Lindfors, J. Niemi (see Note 21), p. 869.

³⁵ J.J. Kilborn (see Note 16).

³⁶ J.J. Kilborn. The innovative German approach to consumer debt relief: Revolutionary changes in German law, and surprising lessons for the U.S. – *Northwestern Journal of International Law & Business* 2004/24, pp. 257–298. Available at <http://scholarlycommons.law.northwestern.edu/njilb/vol24/iss2/13> (most recently accessed on 30.5.2013).

³⁷ Insolvenzordnung ['Insolvency Statute'], §§4a–4d, 26 (1), 298, 305.

³⁸ Council of Europe Committee of Ministers (see Note 32).

3. Conclusions

Restrictions on initiation of debt restructuring proceedings shall be guided by the basic principles of debt restructuring. Under those basic principles, firstly, the debt restructuring proceedings shall provide fair and equitable, efficient and cost-effective, accessible and transparent settlement and discharge of consumer debts; secondly, they shall propose some form of ‘fresh start’ for the debtor; and, thirdly, there shall be equally available options of extra-judicial and judicial proceedings. Establishing restrictions to admission to debt restructuring proceedings, with the assistance of creditors and the court, filters debtors who have a realistic chance of restructuring their debts from those who do not. On the other hand, the restrictions must not become an impediment that no-one can overcome. Establishing an immutable obligation (such as the negotiation obligation) does not achieve that purpose, for it creates a psychological barrier between the debtor and the creditor and results in failure to meet the debt-restructuring-related preconditions that are set for initiation of proceedings. Therefore, the debtor’s opportunity to restructure his debt is inherently precluded. Instead of negotiation, the primary focus should be on debt counselling, and the legislator should make significant contributions to establishing and developing a state debt-counselling system or a debt-counselling system operating in the private sector with state guarantees. Inclusion of a debt counsellor prior to court proceedings could ensure the successful admission of a greater proportion of applications to proceedings and approval of the payment schedules. The role of the counsellor is no less important during the court proceedings. If the debtor has not included a debt counsellor prior to the proceedings, the court should do this, similarly to appointing a reorganisation adviser pursuant to the Reorganisation Act. Restrictions on admission to proceedings must not become too burdensome for the debtor, mentally or financially. The aim of the proceedings is to overcome the solvency problems in order to avoid bankruptcy proceedings while considering the creditors’ justified interests.



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Does Commission Proposed Financial Transaction Tax Comply With European Union Law?

1. The proposal

On 14 February 2013, the European Commission adopted the proposal¹ for a Council Directive implementing enhanced co-operation in the area of financial transaction tax. It's not clear how the tax on financial transactions will be implemented as many stakeholders have acknowledged its detrimental impact. Thus, it remains to be seen by whom and how exactly it will be done. However, since 11 Member States have joined the cooperation and consequently indicated interest in proceeding with discussions on issues of application of the tax, it is most appropriate to analyse whether there are legal consequences to this initiative. After all there are less than half Member States participating in it. And there is widespread negative feedback from interested parties.

Most certainly this is largely a political matter that clearly has economic impact² as well. Whether planned or otherwise remains to be seen. However, the legal issues associated with the Proposal are fascinating as well. Intriguingly enough, the Proposal is based on enhanced co-operation of a sort that has been applied only a few times. Also its aim is to harmonise legislation pertaining to indirect taxation in order to ensure proper functioning of the market, while only part of the internal market supports it. This most certainly raises the question of whether the aims of the Proposal, including avoiding distortion of competition while at the same time creating a level playing field with other sectors from a taxation point of view, can indeed be reached. These legal concerns cannot be ignored.

¹ See the European Commission proposal for a Council Directive implementing enhanced co-operation in the area of financial transaction tax (COM/2013/71) (hereinafter 'Proposal'). Available at http://ec.europa.eu/taxation_customs/resources/documents/taxation/com_2013_71_en.pdf (most recently accessed on 14.4.2013).

² Impact assessment accompanying the document 'Proposal for a Council Directive Implementing Enhanced Cooperation in the Area of Financial Transaction Tax': Analysis of policy options and impacts' (SWD/2013/28). Available at http://ec.europa.eu/taxation_customs/resources/documents/taxation/swd_2013_28_en.pdf (most recently accessed on 14.4.2013).

2. The legal basis

According to the Proposal, the legal basis for the proposed Council Directive is Article 113 of the Treaty on the Functioning of the European Union³ (TFEU). Said article gives the Council the right to adopt provisions for the harmonisation of legislation on turnover taxes, excise duties, and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and functioning of the internal market and to avoid distortion of competition.

It is evident that, for one to rely on Article 113 of the TFEU for adoption of provisions for harmonisation, a number of requirements must be met. Firstly, it seems that this article can be relied on for harmonisation only. Secondly, any action undertaken has to apply to indirect taxation such as tax on turnover; a common tax of this nature in the European Union is the value added tax.⁴ Thirdly, it has to ensure establishment and functioning of the market. Fourthly, it must not distort competition. If those requirements are not met, reliance on Article 113 of the TFEU as the basis for the Proposal becomes highly questionable. Without this basis, this Proposal for a directive can hardly exist.

2.1. Harmonisation

Harmonisation is, in essence, a measure to unify practice in a particular part of the internal market. Notwithstanding whether the intention is total or only partial unification, it still means fundamentally that the whole market is or should be affected by it. Otherwise, it would not be possible to talk about unifying anything. However, enhanced co-operation, by definition, also can affect only participating Member States. Otherwise, it would simply not make sense to proceed with enhanced co-operation in the stead of some other legislative procedure. This means that enhanced co-operation is not intended for unification. Thus actions taken under the enhanced co-operation can hardly be regarded as attempts at harmonisation, by its very nature.

Even if this were an actual attempt at harmonisation, it would be easy to argue that it is nevertheless built on incorrect assumptions. The TFEU directly states that measures need to bear the aim of harmonising of legislation. Therefore, there has to exist something that is to be harmonised in the first place. However, according to the impact assessment⁵ in this case, not all Member States have imposed a tax on financial transactions similar to that in the Proposal. Therefore, it is impossible to refer to any kind of harmonisation of legislation. At least in part—i.e., with reference to those Member States that do not have anything similar already enacted—it would just be drafting of new legislation.

Another issue with harmonisation is that Article 113 of the TFEU only pertains to the field of indirect taxation. The impact assessment, on the other hand, leads one to believe that the measures already imposed by Member States are not necessarily examples of indirect taxation. Rather, they—with exceptions, of course—often resemble more of a levy or a state fee. Therefore, the harmonisation could not cover all of those so-called taxes. This means that a European-Commission-proposed financial transaction tax would not actually harmonise existing legislation in that sense either, because those monetary obligations that differ in nature from the proposed financial transaction tax would still remain effective.

2.2. A new tax

Since harmonisation in the meaning of Article 113 of the TFEU can only apply to the area of indirect taxation, it is of utmost importance to establish whether the proposed financial transaction tax indeed is an indirect tax. Notwithstanding the object of an indirect tax, an indirect tax is by its very nature a tax that essentially comes about through the consumer of goods or services.⁶ In addition, the tax cannot depend on who the taxpayer is.⁷ Otherwise, it would lack neutrality, another essential element of an indirect tax.⁸

³ Treaty on the Functioning of the European Union. – OJ C 326, 26.10.2012.

⁴ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. – OJ L 347.

⁵ See the impact assessment (Note 2), pp. 57–63.

⁶ L. Lehis. *Maksuõigus* [‘Tax Law’]. Tallinn: Juura 2004, p. 46 (in Estonian).

⁷ *Ibid.*, p. 353.

⁸ *Ibid.*, p. 358.

In the case of the proposed tax, however, that criterion is not met. According to the Proposal, the tax is imposed on certain financial transactions to ensure that financial institutions make a so-called fair and substantial contribution to covering the costs of the crisis. This could not occur in the case of an indirect tax, wherein the burden is essentially born by the consumer. Imposing the financial transaction tax in this manner would ultimately, in one way or the other, only increase the costs for the consumer of services, but it would still not be a tax that is passed on to them as indirect taxes are.

This position is supported by Recital 14 of the Proposal, which states that the taxation should concentrate on the financial sector as such rather than on citizens. This makes the passing of the tax on to citizens highly questionable, whatever means might be chosen for this by financial institutions. On the other hand, passing on the costs that a financial institution bears in those transactions through, for example, fees and commissions to citizens would not ultimately lead to establishment of the proposed tax as an indirect tax that is borne by the consumer of services.

In addition, it cannot be left unnoticed that this proposed tax depends on the nature of the taxpayer. It is levied only on the financial institution specified in Article 1 (8) of the Proposal. Therefore, it is not objective; however, objectivity is, as is stated above, an essential feature of an indirect tax.

On this basis, it is fair to state that the tax is not an indirect tax because it is borne not by the consumer but, rather, by a financial institution. Even if one concedes that financial institutions conclude financial transactions, it cannot be left unnoticed that they are concluded also for and on behalf of their clients, and not just for their own purposes. These clients again are not necessarily financial institutions. Again, transactions of citizens and certain other bodies covered by the Proposal should not be subject to this tax. It becomes even more evident here that the tax is dependent on the taxpayer.

Moreover, the proposed financial transaction tax seems to bear the aim of taxing the profits of the financial sector. This can be concluded on the basis of one of the aims of the Proposal, that of ensuring that financial institutions contribute to covering the costs of the crisis. It is true that, on the other hand, it lacks certain elements that would identify it directly as a tax on income. This is so because in the case of the proposed tax everything received as consideration for the transaction is taxed, not merely the profit.⁹

Also, the proposed tax cannot be considered some kind of existing indirect tax either. At least there is no analysis to support this view. The impact assessment¹⁰ itself declares that this tax is not a value added tax or an excise duty. If this is so, it remains utterly unclear what other kind of indirect tax this proposed financial transaction tax could be. Therefore, it seems that the Proposal would create a whole new tax. That too, however, is not within the scope of Article 113 of the TFEU, since imposing a new tax and doing so for a limited number of Member States cannot be considered harmonisation in the meaning of the TFEU.

2.3. Competition

There is more than one way to look at the issue of competition. The fact is that imposing the proposed financial transaction tax in some Member States only would evidently give others an advantage: for example, their tax environment would be less complex, and it would also be easier to attract additional funding. The same applies to financial instruments—and ultimately to the issuers thereof—that are deemed issued in a participating Member State.

In the case of the latter financial instruments, issuers from a participating Member State would have difficulties in competing with issuers of financial instruments who are considered established in a non-participating Member State, because, for example, they, unlike others, would be more expensive to purchase. Therefore, it is evident that the tax provides seeds for distortion of competition and not the opposite—i.e., what should be the aim of measures taken under Article 113 of the TFEU. It also conflicts with Article 326 of the TFEU, which states that enhanced co-operation shall not distort collaboration among Member States.

Another way to look at the issue of competition is that expressed by the Supreme Court of Estonia.¹¹ According to the judgement in question, the value added tax is a tax on value that has been added. The essential feature of such a tax is the right to deduct input VAT, which assures that VAT does not accumulate.

⁹ See L. Lehis (Note 6), pp. 44–47.

¹⁰ See the impact assessment (Note 2), p. 54.

¹¹ Supreme Court of Estonia 28.05.2002, 3-3-1-21-02, *AS Balti Investeeringute Grupp v. Tartu Linna Maksuamet*, para. 18. Available at <http://www.nc.ee/?id=11&tekst=RK/3-3-1-21-02> (in Estonian).

Therefore, as long as goods and services are provided to business, tax will, in essence, not be collected. Proceeds will be generated only if the buyer is a person who does not have the right to deduct VAT. Any deviation from that principle is not allowed, because it would distort competition and prevent free movement of goods and services through increase in production costs.

This reasoning stated by the Court should, overall, be applicable to the proposed financial transaction tax as well. If this indeed is a tax on turnover or any other form of indirect taxation, as can be assumed from the legal basis, it must follow the principle laid down in connection with the above argument; i.e., it may not be accumulating and most certainly is not to be imposed on business, which it nevertheless is. Otherwise, certain service providers would have an unfair advantage over others in essentially the same market—i.e., within the European Union. If one holds that the proposed tax actually is not a form of indirect taxation, thus not raising the issue of competition, the issue of the legal basis of the Proposal still must be resolved.

Yet another way would be to state that in relations between participating and non-participating Member States, the implementation of FTT legislation and recovery of taxes due are facilitated by the obligations of non-participating Member States *vis-à-vis* participating Member States pursuant to primary and secondary Union legislation. The same facilities do not exist for the implementation of FTT *vis-à-vis* financial institutions established in third countries. This may result in distortions of competition and of capital movement between financial institutions established in non-participating Member States and financial institutions in third countries.^{*12}

3. The effect of the tax

Article 326 of the TFEU states that enhanced co-operation should not, among other things, undermine the internal market or economic cohesion. It should also not distort competition between Member States. Therefore, the admissibility of enhanced co-operation depends on its effects. Although that is partly more of an economic issue, it determines whether enhanced co-operation is admissible at all. Therefore, this cannot be ignored and certainly should be considered.

The response of the Swedish National Debt Office^{*13} indicates that the proposed tax would have a serious effect on the functioning of the Swedish financial market, especially on government securities markets, where basic conditions for secondary trading would disappear, and, in turn, that it would diminish the possibilities for financing the central government debt at a reasonable cost. It would also have similar effects on the market for mortgage bonds, which would, in turn, increase the cost of borrowing and thereby the cost of mortgages.

The impact assessment^{*14} addresses these concerns only partly and even where doing so is based on unfounded assumptions as to, for example, mitigating effects. This leaves the Proposal very poorly motivated and leads one to believe that the proposed tax would actually undermine the internal market and economic cohesion. Moreover, if negative effects were to arise only in the case of Sweden, which does not seem to be likely, the Proposal would still distort competition between Member States. That again is not admissible.

Further proof that the proposed tax would distort competition between Member States is that a similar tax was imposed in Sweden in the 1980s and considerably decreased trading in Sweden, a decline caused first and foremost by wishes to avoid the tax.^{*15} Therefore, even if efficient and legitimate anti-relocation measures are applied, the tax would distort competition between those Member States that are in the financial transaction tax zone and those that are not.

¹² Opinion of the legal service. Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax (FTT). Legality of the counterparty-based deemed establishment of financial institutions (Article 4 (1) f) of the Proposal) (JUR 448/FISC 163/ECOFIN 771), p. 13.

¹³ Response: European Commission Proposal for a Directive on a Common System of Taxation on Financial Transactions, pp. 1–9. Available at <https://www.riksdagen.se/PageFiles/11583/European%20Commission%20proposal%20for%20a%20directive%20on%20a%20common%20system%20of%20taxation%20on%20financial%20transactions.pdf> (most recently accessed on 14.4.2013).

¹⁴ See the impact assessment (Note 2), pp. 25–26.

¹⁵ S.R. Umlauf. Transaction taxes and the behavior of the Swedish stock market. – *Journal of Financial Economics* 1993 (33), p. 228.

4. Issuance and residence principles

The proposed directive foresees certain measures to avoid relocation of financial transactions. Accordingly, a financial instrument is considered issued in the participating Member State if an entity has a registered seat in the said participating Member State that issues it.^{*16} This means that, no matter where financial instruments are actually issued, they are always considered to be issued in the participating Member State.

In addition to that, the tax is imposed on transactions if at least one party is established in the territory of a participating Member State.^{*17} The fact of establishment, however, is not determined solely by the location of the domicile of the financial institution. The financial institution is deemed to have been established in the territory of the participating Member State if, for example, it has been authorised by authorities of that Member State to act in that capacity, in respect of transactions covered by that authorisation.^{*18}

That raises questions of free movement of capital and freedom of establishment. It is obvious that these rules certainly limit issuing of financial instruments by a party from a participating Member States in non-participating Member States, because transactions with those instruments would clearly have a disadvantage in that market, as they would be subject to taxation with the proposed tax, in clear contrast to transactions to which the tax does not apply.

It is clear from *Sandoz*^{*19} that building a barrier to investment in other Member States is a restriction on free movement of capital. Through imposition of a tax on transactions concluded in another Member State, residents of a Member State are deprived of the possibility of benefiting from the absence of taxation, which may be obtained outside the territory of that Member State. This is likely to deter concerned parties from issuing financial instruments in the non-participating Member State. Article 63 (1) of the TFEU clearly states that all restrictions on the movement of capital between Member States are prohibited.

Even though direct taxation lies within the competence of Member States, discrimination on grounds of nationality is, according to *Baars*^{*20}, not allowed. There can be no argument about this not applying to legal entities as well. Also, it is evident from *Royal Bank of Scotland*^{*21} that principles of European Union law apply fundamentally to individuals and entities.

It is true that Article 65 (1) of the TFEU states that Member States have the right to apply relevant provisions of their tax law that distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to where their capital is invested. Such a situation could arise also in the case of the proposed financial transaction tax. However, Article 65 (3) of the TFEU specifies that these measures cannot constitute a means of arbitrary discrimination or disguised restriction on free movement of capital.

According to *Verkoojen*^{*22}, in order for the restriction to be admissible, it has to be objectively justifiable through overriding reason in the general interest. Purely economic reasons, however, cannot constitute overriding reason in the general interest such as to justify restriction of a fundamental freedom.^{*23} Therefore, it seems that the restriction imposed by the proposed directive is not justified. It would be if justified on grounds of public policy or security and to prevent infringements of national law and regulations, but it still is not to constitute a means of arbitrary discrimination or disguised restriction on free movement of capital.

In speaking about preventing infringements of national law and regulations, it is clear that this refers to effective administration and enforcement of the tax system but not matters of economic policy.^{*24} And, on the other hand, public policy and security are interpreted narrowly and in accordance with other freedoms.^{*25}

¹⁶ See Proposal, Article 2.1 (11).

¹⁷ Proposal, Article 3.1.

¹⁸ Proposal, Article 4.1 (b).

¹⁹ Case C-439/97, *Sandoz GmbH v. Finanzlandesdirektion für Wien, Niederösterreich und Burgenland*, para. 19. – ECR 1999, p. I-7041.

²⁰ Case C-251/98, *Baars v. Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem*, para. 17. – ECR 2000, p. I-2787.

²¹ Case C-311/97, *Royal Bank of Scotland v. Greece*, para. 23. – ECR 1999, p. I-2651.

²² Case C-35/98, *Staatssecretaris van Financiën v. Verkoojen*, para. 46. – ECR 2000, p. I-4071.

²³ Case C-311/97, *Royal Bank of Scotland v. Greece*, para. 48.

²⁴ P. Craig, C. de Burca. *EU Law: Text, Cases, and Materials*. Third edition. Oxford: Oxford University Press 2003, p. 683.

²⁵ See Case C-311/97, *Royal Bank of Scotland v. Greece*, p. 684.

In addition to restriction on free movement of capital, the measures foreseen with the Proposal could also constitute restriction on freedom of establishment. Namely, Article 49 of the TFEU states that restrictions on freedom of establishment are prohibited. This means also that restrictions on moving one's business to another Member State are prohibited. That also applies to setting up agencies, branches, or subsidiaries, including setting up and managing undertakings. According to the *Factortame*^{*26} judgement, the concept of establishment refers to actual pursuit of economic activity through a fixed establishment in another Member State for an indefinite period.

When discussing a financial institution deemed to have been established in the territory of a participating Member State, Article 6 (3) of Directive 2004/39 states that any valid authorisation allowing an investment firm to provide investment services is valid throughout the European Union, either through establishment of a branch or via the free provision of services. Additionally, Article 31 (1) of said directive states that an investment firm authorised in another Member State may freely perform investment services or perform other activities within any of the Member States and that no additional requirements may be imposed.

A situation wherein a financial institution of a Member State is considered to be established in another Member State purely on the basis of the fact that it has authorisation to pursue economic activity there—i.e., that it is authorised to do so—could therefore be regarded as restriction to the freedom of establishment. The restriction in question is the actual barrier on moving to another Member State. It simply renders relocating to another Member State pointless. On the other hand, this, in effect, deems every financial institution to be established in the participating Member State, which most certainly conflicts with the requirement that enhanced co-operation not be binding on other than participating Member States.

5. Double taxation

The impact analysis^{*27} states that part of the nature of a process of enhanced co-operation in the field of taxation is that it cannot succeed in avoiding all occurrences of double taxation within the European Union, as long as not all Member States participate in the co-operation. This means that double taxation can be eliminated and avoided only if there is only a single system of taxing financial transactions—i.e., if all Member States participate in the enhanced co-operation.

In fact, even then double taxation would, in theory, not be avoided, because the Proposal imposes the tax on certain financial transactions only, leaving others outside its scope or, on account of their nature (i.e., monetary obligations other than tax), not including them at all. This would create a situation wherein either even participating Member States could impose a tax on another type of financial transaction or taxable transactions would be taxed with the tax as adopted in line with the Proposal and, in addition, for example, a levy beyond the scope of the Proposal.

Although the impact analysis claims otherwise, double-taxation agreements would not constitute a possible solution for avoidance of double taxation. These agreements apply to taxes on income and capital only, while the Proposal itself is built on the assumption that the tax on financial transactions is a means of indirect taxation and therefore not a tax on income or capital—even though the latter may be the actual intent. Since treaties on double taxation do not cover indirect taxes, double taxation remains an issue.

Even if one were to consider the tax on financial transactions to be a tax to which treaties on double taxation somehow would apply, the problem remains. According to the OECD model tax convention^{*28}, the taxes covered can be regarded as taxes on total income, on total capital, or on elements of income or capital. However, the taxable amount according to Article 6 of the proposed directive is everything that constitutes consideration paid or owed in return for the transfer. Thus it becomes clear that the tax is not levied on income or capital.

Additionally, it cannot be ignored that this proposed tax is not covered by any of the current double-taxation agreements. Although the list of taxes to which agreements apply is not exhaustive, it is, according to the model convention, nevertheless a complete list of taxes imposed and covered and only a similar subsequent tax will be included.^{*29} The proposed tax is not, however, that kind of tax.

^{*26} Case C-221/89, *R. v. Secretary of State for Transport, ex p. Factortame*, para. 20. – ECR 1991, p. I-3905.

^{*27} See the impact assessment (Note 2), p. 15.

^{*28} Model tax convention on income and on capital, condensed version, 15 July 2005. OECD Committee on Fiscal Affairs.

^{*29} *Ibid.*, pp. 70–71.

6. Avoidance

There is no doubt that the financial transaction tax would induce relocation of activity. The Commission has even gone as far as to state that it was clear from the beginning that taxing financial transactions could only be meaningful if internationally co-ordinated.^{*30} The reason for this is that global mobility of financial transactions is very high. Naturally, this would pose a risk of tax-induced relocation of financial activities and services. As a means to avoid this, participating Member States have to adopt measures preventing tax fraud and evasion.^{*31} Naturally, the question arises of what fraud and evasion mean in this context.

To address this issue, Article 13 of the Proposal introduces a number of measures that must be introduced if circumvention is to be avoided. Among other arrangements, participating Member States need to make sure that artificial arrangements—i.e., those without economic substance, put in place essentially for the purpose of avoiding tax—are not honoured. This includes transactions that would ordinarily not be employed in what is expected to be reasonable business conduct. However, it would be surprising if expected reasonable business conduct would not entail tax planning.

As long as the legal substance of the transaction matches the economic reality, tax planning should be considered legitimate.^{*32} Therefore, it should not be construed as avoidance. It's as simple as that. If, on the other hand, the taxpayer chooses a form that is inconsistent with the legal substance, it is impossible to consider the behaviour to be fraud, because the taxpayer has not submitted incorrect information or in any way concealed the transaction.^{*33} And so it becomes difficult to establish what exactly constitutes fraud. It is even more difficult to say what constitutes illegal tax planning.^{*34} When one considers the differences that must be honoured between national legal systems in determination of this, the problems are multiplied.

Leaving the issue of fraud and returning to tax evasion, we find that the Supreme Court of Estonia^{*35} has stated that the taxpayer is entitled to conclude transactions in consideration of tax implications as well and that no-one is obliged to structure business in the manner that imposes the greatest tax burden. There is no obligation to maximise the tax revenues of the state. To establish that a transaction is concluded with the aim of avoiding tax because of inconsistency of the transaction with the legal substance, it has to be clear that the main aim is to gain advantage and that there is no commercial substance.^{*36} So it seems that business planning cannot be considered to be avoiding tax.

In order to state that a transaction is concluded to avoid tax, one must establish that said transaction is inconsistent with the legal substance.^{*37} In the opinion of the European Court of Justice in *Kefalas*^{*38}, Community law cannot be relied on for abusive or fraudulent ends. According to *Halifax*^{*39}, this means that the Community legislation cannot be extended to cover abusive practices—i.e., to transactions carried out not in the context of normal commercial operations but solely for the purpose of wrongfully obtaining advantages provided by Community law. Then again, it is hard to imagine how issuing financial instruments in another Member State or relocating one's business would be inconsistent with the legal substance.

In *Halifax*, the European Court of Justice went even further, saying that it is clear that the choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations related to tax systems, and where a taxable person chooses one of two transactions, there is no requirement to choose the one that involves paying higher taxes. Quite to the contrary, taxpayers may choose to structure their business so as to limit their tax liability.^{*40} With that in mind, one clearly cannot see moving actual business activities to another Member State solely for tax purposes as avoiding tax.

³⁰ See the impact assessment (Note 2), p. 7.

³¹ See 'Proposal' (Note 1), Article 12.

³² See L. Lehis (Note 6), p. 189.

³³ T. Grauberg. Õiguse kuritarvitamise doktriin maksuõigussuhte tõlgendamisel ja maksude vältimise tõkestamisel [‘The doctrine of abuse of rights in the interpretation of taxation law relationships and in the prevention of tax evasion’]. – *Juridica* 2008/10, p. 664 (in Estonian).

³⁴ *Ibid.*, p. 665.

³⁵ Supreme Court of Estonia 4.11.2009, 3-3-1-59-09, *Ilvest v. Maksu- ja Tolliamet Põhja maksu- ja tollikeskus*, para. 13. Available at <http://www.nc.ee/?id=11&tekst=RK/3-3-1-59-09> (in Estonian).

³⁶ *Ibid.*, para. 18.

³⁷ *Ibid.*, para. 19.

³⁸ Case C-367/96, *Kefalas and Others v. Greece*, para. 20. – ECR 1998, p. I-02843.

³⁹ Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v. Commissioners of Customs & Excise*, para. 69. – ECR 2006, p. I-01609.

⁴⁰ *Ibid.*, para. 73.

For one to establish that an abusive practice exists, the transaction must result in a tax advantage the granting of which is contrary to the purpose of national and Community legislation and it must be apparent from a number of objective factors that the fundamental aim of the relevant transaction is to obtain a tax advantage.^{*41} However, the purpose of the national legislation cannot be the elimination of more tax-advantageous transactions. According to *Centros*^{*42}, a taxpayer choosing to carry on its business in a location that allows evading the application of more restrictive rules is not in itself an abusive practice. In the case of the proposed financial transaction tax, avoidance will never be the only aim, so the essence of the abuse would not be established under the *Cadbury Schweppes*^{*43} ruling. Therefore, it most likely would not be an abusive practice.

7. Liability

It has to be borne in mind that this proposed tax, should it have negative economic effects on non-participating Member States, may also prompt actions related to damages and monetary claims. This is because of Article 340 of the TFEU, which states that in cases of non-contractual liability the European Union will, in accordance with general principles common to the laws of the Member States, make good the damages caused by its institutions.

According to *Dubois*^{*44}, Community liability in the case of a legislative measure can be incurred only if there is breach of a rule of law with greater precedence for the protection of individuals. From the above it is evident that restrictions on the movement of capital between Member States are prohibited. This applies to restrictions on the freedom of establishment as well. The TFEU is undisputedly a higher-ranking rule than the proposed directive. Therefore, it seems that, should damage occur because of the enhanced co-operation, a Member State would be eligible to claim damages.

It is clear from the *Van Gend en Loos*^{*45} case that a levy too can be illegal. If a levy imposed by a Member State can be considered illegal, a levy imposed by European Union law most certainly can be considered illegal. In addition, as is stated in the *Wollast*^{*46} judgement, the European Union can apply restitutionary principles in a situation wherein an individual has been unjustly enriched on account of the European Union. Therefore, the same principle should apply if the European Union unjustly enriched, e.g. on the account of a Member State. If this illegal levy is received by a Member State, then in principle it should be recoverable from that Member State. As can be seen from *Sofrimport*^{*47}, the damages need not be limited to the amount of the illegal levy alone. Accordingly, it is all the more possible that claims against the European Union will be submitted and perhaps even claims against participating Member States.

Of course, causality needs to be established. According to *Sucres*^{*48}, the European Union cannot be held responsible if damage is incurred through an autonomous act by the Member State in question. On the one hand, this Proposal does not involve an autonomous act of a Member State. Rather it is sanctioned by the European Union. On the other, it seems that, for this reason, a Member State that has decided to engage in the enhanced co-operation should not be entitled to claim for damages as it is the participating Member State that will incur damage to itself. According to the *Adams*^{*49} decision, nor is a Member State that has failed to act to prevent the Proposal from being adopted by at least indicating the possible inconsistencies, since that could perhaps be considered negligence. However, at least those openly opposed to the tax should be entitled to claim damages.

⁴¹ *Ibid.*, para. 86.

⁴² Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, para. 27. – ECR 1999, p. I-01459.

⁴³ Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, para. 75. – ECR 2006, p. I-07995.

⁴⁴ Case T-113/96, *Edouard Dubois et Fils v. Council & Commission*, para. 59. – ECR 1998, p. II-125.

⁴⁵ Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*. – ECR 1963, p. I.

⁴⁶ Case 18/63, *Mrs Estelle Wollast (née Schmitz) v. European Economic Community*. – ECR 1964, p. 85.

⁴⁷ Case C-152/88, *Sofrimport Sarl v. Commission*, para. 1. – ECR 1990, p. I-2477.

⁴⁸ Case 132/77, *Societe pour l'Exportation des Sucres SA v. Commission*, para. 27. – ECR 1978, p. 1061.

⁴⁹ Case 145/83, *Adams v. Commission*, para. 53. – ECR 1985, p. 3539.

8. Conclusions

This piece has only scratched the surface as to the legal issues associated with the proposed financial transaction tax. Then again, they still illustrate eloquently that not all effects of the tax are addressed with the attention they deserve, and far-reaching implications may arise here. One of them is that the tax is based on the wrong legal foundation. Another involves the possible effect of the tax: in the name of protecting the tax base, the system may breach underlying rules of the European Union. This could lead to harm being incurred by those Member States that do not participate in the enhanced co-operation and a situation wherein one may be able to claim for that damage.

Already the Council has through its legal service expressed concerns that the proposed tax perhaps may be in conflict with norms of international customary law as they are understood by the Union, since the tax does not have a relevant link between the State that exercises jurisdiction and the person or situation over which jurisdiction is exercised. It also infringes the taxing competences of non-participating Member States and is thus incompatible with Article 327 of the TFEU as the latter requires that any enhanced cooperation has to respect competences, rights and obligations of non-participating Member States. Plus, the legal service of the Council has pointed out that this proposed tax is discriminatory and likely to lead to distortion of competition to the detriment of non-participating Member States.^{*50} And that is an opinion on just one single criterion of the proposed tax.

⁵⁰ See Opinion of the legal service. Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax (FTT). Legality of the counterparty-based deemed establishment of financial institutions (Note 12), p. 14.



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Estonian Law-enforcement Law as Danger-prevention Law

1. Introduction

The reform of law-enforcement law has planned Estonia's new Order Protection Act^{*1} (OPA) mostly on the basis of the dogmatics of German law-enforcement law. Although the fundamental choice to use foreign patterns has sparked some controversy^{*2}, the author of the present paper does not intend to reopen the discussion on the model of law-enforcement law most appropriate for Estonia; rather, the intent is to examine the developments that the new direction has brought about in a narrower branch of law-enforcement law—namely, danger-prevention law. The fact that danger-prevention law has been perhaps the most rapidly developing part of German law-enforcement law in recent decades, its legal-theoretical nature and practical implementation having generated a great many problems in comparison to traditional danger-countering law and having fundamentally altered the dogmatic form of law-enforcement law, can be considered sufficient justification for focused analysis of this area.^{*3} It is clear that if we are to accept the main features of the German model of law-enforcement law, the Estonian legislator cannot ignore the changes that occur within this model over time. Hence, it is also relevant to analyse the nature of the danger-prevention part of Estonia's new law-enforcement law.

2. The theoretical bases of danger-prevention law and its difference from danger-aversion law

Historically, the most characteristic feature of the Germanic legal tradition's law-enforcement law model has been the fact that it proceeds from the concept of danger^{*4} as sufficient grounds for probable occurrence of damage.^{*5} Sufficient grounds means (if we simplify a little) that upon assessing the situation an objective observer becomes convinced that damage is inevitable if the causal chain runs its course unchecked. The

¹ Korrakaitseadus. – RT I, 22.3.2011, 4 (in Estonian).

² See for instance V. Linde, Korrakaitseaduse eelnõu probleemidest ['About the problems of Order Protection Act']. – *Rüügikogu Toimetised* 2008 (17), pp. 45 ff. (in Estonian).

³ See, for example, M. Möstl, Die neue dogmatische Gestalt des Polizeirechts. – DVBl 2007, Heft 10, pp. 581 ff. Such developments have been described in numerous ways in German legal-theoretical literature—e.g., as a shifting of the focus of security policy to the preliminary territory (of danger); the erosion of the danger threshold; prevention II (see Note 7, below); or, more broadly, the development of a 'new' police law.

⁴ More accurately, this is defined in the legal theory as a specific danger.

⁵ See about the concept of specific danger in German law-enforcement law for instance F. Schoch, Polizei- und Ordnungsrecht. – E. Schmidt-Aßmann (ed.), *Besonderes Verwaltungsrecht*, 14. Ausgabe, Berlin: De Gruyter 2008, p. 156.

task of countering a danger links the legal rights protected by law-enforcement law to the options of restricting the fundamental rights of the originator of danger (the disturber or the person liable for public order), thereby providing a balance between the two clusters of good. Law enforcement, therefore, consists primarily in averting danger—i.e., countering a threat that endangers public security and order by restricting the rights of the disturber. This main dogmatic scheme based on the liberal rule-of-law ideology, in place since the late nineteenth century, has also been accepted by the Estonian OPA, as well as the Police and Border Guard Act^{*6} (PBGA).

However, contemporary law-enforcement law also has another aspect, in taking it upon itself to deal with danger potentials that have not yet become **sufficiently** probable and to eliminate them at the onset, before the development of any real danger. In other words, while the purpose of danger-aversion is to prevent any damage to the right of protection, danger-prevention law is an attempt to prevent even any threat to the right of protection as embodying sufficient likelihood of the occurrence of damage. In both cases, this means law-enforcement-related prevention, but that prevention proceeds from somewhat different concerns and can be expressed in different legal-dogmatic form.^{*7}

Here we might want to limit ourselves to bringing out three features that a law-enforcement law concerned with infringement management, as contrasted with danger-aversion law, definitely needs to have, although these are by no means the only relevant features of danger-prevention law.

Firstly, abandoning the concept of danger when assessing the probability of the occurrence of damage means that it must be replaced with some other probabilistic thresholds (lower than that for danger) that express the likelihood of damage. Risk^{*8} is the concept most commonly used in legal theory in this connection.

Secondly, the lower probabilistic threshold of prevention also means that the target of a law-enforcement measure that restricts fundamental rights needs a different definition. The connection between possible damage and its originator is more ambiguous in the case of prevention, and one cannot speak of a person liable for public order (the disturber) in the meaning of danger-averting law. The further into pre-danger territory the threshold of intervention is drawn, the larger the circle of the potential targets of measures becomes.^{*9}

Thirdly, when the threshold for intervention is shifted, the specifics of the application of a rule-of-law safeguard—the principle of proportionality—which has a central role in law enforcement law, also changes. This is mainly because the more ambiguous the possibility of damage, the more difficult it becomes to weigh the right that is to be protected against the one to be restricted.^{*10}

3. Danger prevention in Estonian law-enforcement law

Against the theoretical background described above, it is interesting, and indeed necessary, to analyse whether and how the issues of law-enforcement-related prevention law have been resolved in Estonian law-enforcement law.

However, obtaining an overview is made more difficult by the fact that the reform of Estonian law-enforcement law is not yet entirely complete, as of this article's writing. The PBGA based on the new grounds of the concept of danger entered into force on 1.1.2010. The OPA^{*11} proceeding from the same principles was approved by Parliament on 23.2.2011 but is not subject to enforcement yet, on account of

⁶ Politsei ja piirivalve seadus. – RT I, 2009, 26, 159; RT I 26.03.2013, 2 (in Estonian).

⁷ To draw a distinction, German legal scientist E. Denninger has proposed the concepts of prevention I and prevention II. See E. Denninger, F. Rächor (Hrsg.), *Handbuch des Polizeirechts*. 5. Aufl. Verlag C.H. Beck 2012, pp. 67 ff.

⁸ Various other concepts describing the likelihood of damage in pre-danger territory are tied to prevention law in the legal literature, but there is no consensus on their mutual relations (abstract danger, suspicion of abstract danger, general situation of danger, etc.; see, for example, R. Poscher. *Eingriffsschwellen im Recht der inneren Sicherheit*. – VERW 2008, Bd 41, Heft 3, p. 348).

⁹ So-called erosion of the concept of disturber. See, for example, R. Poscher (see Note 8), p. 348.

¹⁰ For discussion of the problems of proportionality in the pre-danger area, see, for example, E. Denninger. *Prävention und Freiheit*. Nomos 2008, p. 25.

¹¹ The OPA for the future is supposed to constitute a general part of the Estonian law-enforcement law that encompasses the general principles and most common measures of law-enforcement law.

delays in the preparation of the implementing act.^{*12} A number of specific laws from earlier times regulating the law-enforcement sphere are enforced concurrently in individual areas of supervision. Hence, our law-enforcement law currently consists in two rather different aspects. There are grounds for believing that the OPA's implementing act may amend the OPA itself; among other things, the parts pertaining to prevention law might still change before enforcement of the act begins.

3.1. Constitutional bases

The text of the Constitution of Estonia^{*13} is too general in nature to allow for clear conclusions as to how a fitting proportion of danger-prevention law and danger-averting law should be understood in our legal order. The *preamble*, the principle of the rule of law, and the fundamental rights to protection (in particular, the general fundamental right to protection set forth in §13 (1) of the Constitution) entail the obligation of the state to defend internal security^{*14}, yet much room is reserved for the legislator with respect to how exactly this obligation is to be met.

Although the Constitution mentions the concept of danger^{*15} on several occasions (e.g., in §§20 (5) and 129 (1)) and theoretical literature on the Estonian Constitution too has opined that the identification of an infringement of the fundamental right to protection is related to a (specific) danger as a sufficient likelihood of damage inflicted on the right to protection^{*16}, the author does not think it justified to conclude that the concept of danger is the only threshold for intervention that can be used in building of prevention-based law-enforcement law.

The concept of danger as an intervention threshold incorporates a point of balance between the goods to be restricted and those to be protected. As a universal and quite clear criterion, it serves its purpose well in so-called typical situations of law enforcement, wherein there is enough information on the causal relationships (or at least the acquisition of this information is objectively possible) and in which the goods to be protected and the rights to be restricted can be weighed against each other and are not characterised by a vast disproportion of value. However, upon accumulation of various circumstances—above all, the complexity and obscurity of causal relationships, the possibility of the shift from the pre-danger-probability phase to the damage-occurrence phase taking place within a very short time, and the potential that the goods to be protected may strongly outweigh the restriction to fundamental rights resulting from the application of measures—gathering information on the situation or even interfering with the causal chain directly in the pre-danger phase might prove to be a serious alternative to the protection of the relevant types of good.

The duty to ensure a country's internal peace, especially within the minimal scope of protecting the fundamental rights, is not set in stone; in contrast, it requires assessment in light of the changing legal and social circumstances.^{*17} Without a doubt, social relations have changed significantly since the time when classical law-enforcement law emerged. Rapid advances of technology, especially in the IT field, and the waning importance of international borders can be considered the major developments here. These new possibilities shape new behaviour patterns and create new opportunities for organised-crime organisations, terrorists, and other entities to commit serious criminal offences; make it easier for potential dangers to

¹² At the time of this article's completion (on 31.3.2013), the Government of the Republic has yet to submit the application act for the OPA to Parliament (the Riigikogu).

¹³ Eesti Vabariigi põhiseadus. – RT 1992, 26, 349; RT I, 27.4.2011, 2 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 31.3.2013).

¹⁴ The same obligation of the state can be inferred from EU primary law and the international human-rights agreements that are binding for Estonia—in particular, the European Convention on Human Rights. The European Court of Human Rights (ECtHR) has especially emphasised the state's preventive duty of protection in connection with the protection of life (e.g., *Osman v. the UK*, 28.10.1998, 87/1997/871/1083) but also in relation to other fundamental rights.

¹⁵ In addition to the averting of dangers, the Constitution speaks of blocking offences and other activities of the state in relation to the preventive protection of legal rights. It is not entirely clear whether the concept of danger and the related concepts are used in the same sense in the Constitution as in ordinary laws, such as the OPA.

¹⁶ Ü. Madise et al. (eds). *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. Kolmas, täiendatud väljaanne* ['Constitution of the Republic of Estonia, Commented Edition, Third, Revised Edition']. Tallinn: Juura 2012, p. 183 (in Estonian).

¹⁷ The Supreme Court too has in several cases considered the conformity of legal provisions to the Constitution in specific legal and social circumstances to be important when assessing their constitutionality—e.g., a Supreme Court Constitutional Review Chamber decision of 15.7.2002, 3-4-1-7-02, in its para. 15 (in Estonian).

materialise^{*18} and for people to prepare for crimes and conceal a criminal infrastructure; and complicate the causal relationships leading to the occurrence of damage. The large-scale terrorist attacks of the early 2000s are the most clearly expressed and probably the most frequently discussed aspect of the new behaviour patterns, one that has significantly hastened the development of prevention law in many states.

From this perspective, law-enforcement-related danger-prevention law is a general legal response to the development of a welfare society into a risk society^{*19}, where the question of the assessment and distribution of risks becomes more important than the distribution of material values. Further, the preconditions for these developments are not absent from Estonian society.

All this considered, interference within pre-danger territory (including the restriction of fundamental rights) might turn out to be not only constitutional but, on limited occasions, even obligatory when the fundamental rights to protection are taken into account. The relevance of preventive defence is testified to also by the indisputable importance of the prevention principle as a constitutional principle of environmental law in addition to the principle of avoidance, which is equivalent to the principle of averting danger in law enforcement.^{*20}

Of course, the application of preventive measures (so-called preventive state logic), especially when done to a wider extent, also involves some serious dangers for a state based on the rule of law.^{*21} The aim in a prevention law infringing on the fundamental rights is to interfere with the fundamental rights before the damage potential of the behaviour of the target of the measure is fully revealed; hence, the activity of the target of the measure that is carried out in pre-danger territory is still constitutionally protected^{*22} and interference with it requires especially strong justification. It must be shown why danger-based law enforcement is not effective in the particular case in question. Furthermore, prevention law, at least a large part of it, requires mechanisms compensating for its rule-of-law deficiencies—above all, rules for application of measures that meet stricter requirements of legal clarity and definition, along with procedural safeguards, in such forms as permission from higher-ranking agencies or set procedures for informing the person involved. As is evident from the practice of the European Court of Human Rights (ECtHR) just as much as from that of the Estonian Supreme Court, a certain core area of rights to freedom that probably cannot be restricted by prevention-law measures also exists in our legal order.^{*23}

3.2. Law-enforcement-related prevention law in Estonia before the reform of law-enforcement law

Before the reform, Estonian law-enforcement law did not use the concept of danger as a key interference threshold. Although preventive measures of administrative law were not absent *per se* from the range of measures employed by the police and other law-enforcement agencies, the grounds for their application had been formulated according to inconsistent legal logic, usually either very casuistically or, on the contrary, in a way that allowed for extensive interference.

¹⁸ As a result, the line between a danger and pre-danger territory also becomes more blurred and quicker to cross.

¹⁹ The concept of a risk society was first used by German sociologist Ulrich Beck, in his book *Risk Society*. In Estonian: U. Beck. *Riskiühiskond. Teel uue modernsuse poole* [‘Risk Society. Towards a New Modernity’]. Tartu Ülikooli kirjastus 2005.

²⁰ The commented edition of the Constitution of the Republic of Estonia addresses this (see Note 16), on pp. 90 ff. See also H. Veinla. *Ettevaatusprintsip keskkonnaõiguses* [‘Precautionary Principle in Environmental Law’]. Doctoral thesis. Tartu Ülikooli kirjastus 2004 (in Estonian).

²¹ This is also shown by the practice of the ECtHR: for example, in the case *Gillan and Quinton v. the UK* (12.1.2010, 4158/05), the court has analysed the legal permissibility of the measure of stopping and searching persons for purposes of prevention of terrorism and has determined that it is clearly in conflict with Article 8 of the ECHR; the measure allowed too much discretion to the police officers and did not provide enough security to ensure the protection of the rights of the persons concerned. See also Note 23.

²² S. Kral. *Die polizeilichen Vorfeldbefugnisse als Herausforderung für Dogmatik und Gesetzgebung des Polizeirechts*. Berlin: Duncker & Humblot 2012, p. 180.

²³ Taking into account the practice of the ECtHR, the Supreme Court has, upon analysis of, for example, the restriction of personal freedom (see §20 of the Constitution), found that this may be applied only ‘as an acute response to the threat of a specific crime’ and cannot be considered constitutional when applied ‘for vague preventive [...] purposes’. Supreme Court *en banc* decision 3-4-1-16-10, of 21.6.2011, para. 89 (in Estonian). See also the recent decision of the ECtHR in the case *Ostendorf v. Germany* (7.3.2013, 15598/08), together with references to earlier practice.

Hence, a clear distinction between use of the probabilistic levels of danger and danger prevention as the state's two preventive activities could not have existed in such law-enforcement law either.^{*24} Offence-prevention (crime prevention)—which lacked a legal definition stemming from the legislation—was understood in a broad sense; it could mean the prevention of offences in the longer term but also the prevention (blocking) of an already existing but not yet punishable offence. More than any specific police measures, however, prevention was taken to include, in the author's opinion, various social and educational measures, as well as those intended to deal with the consequences of offences—i.e., strategic work on the causes of crime.^{*25}

As an area wherein the duty to prevent dangers (in the meaning of the OPA) was most likely accomplished at least in part through employing of measures that restricted fundamental rights even in Estonia's earlier law-enforcement law, surveillance of a law-enforcement-related nature can first be pointed out. The Surveillance Act^{*26} provided for an option of applying various data-collection measures that restricted fundamental rights in order to **prevent and hinder crime**. Although some have expressed the opinion that this formulation should be understood more narrowly than the prevention of offences in its broader (criminal preventive) sense^{*27}, there is no reason to claim that prevention in the sense of surveillance measures only applied to crime threat in the sense of a specific danger. Another area of action that can be classified as danger-prevention activity has been inspection-type state supervision^{*28}, or (mostly random) surveillance in various potentially dangerous spheres of social life that is independent of a suspicion of danger (see Subsection 3.3).

No single tendency that would point to increasing relevance of a prevention right and the extension of prevention measures to lower-probability areas can be pointed to in Estonia's earlier law-enforcement law. Rather, the dubiousness—from the perspective of the principle of legal definition—of law-enforcement measures that have been formulated in a disproportionately broad fashion and thus enable interference also in pre-danger territory has become understood over time.

3.3. Danger-prevention law and the reform of law-enforcement law

The reform of law-enforcement law raised the question of the relationship between repression and prevention in state activity in general with regard to Estonia's legal order. Preventive administration began to be discussed as the ideological basis for the new law-enforcement law.^{*29} As a side effect of the introduction of the danger criterion, a clear distinction between danger-aversion and the pre-danger territory became evident. Judging the earlier law by the new criteria, one finds that a good proportion of the law-enforcement powers hitherto exercised had set the interference threshold lower than sufficient probability of the occurrence of damage for an objective observer.

Both the PBGA and the OPA distinguish clearly between danger-prevention and averting danger already on the level of describing the tasks of law-enforcement agencies.^{*30}

²⁴ Paradoxically, the concept of danger was first adopted in legal theory in a meaning similar to that applied in the OPA by other legal fields, such as penal law in determining the meaning of the concept of self-defence. See CLCSCd 3-1-17-04, paras 10–11 (in Estonian). The Administrative Law Chamber of the Supreme Court has used the concept of danger and danger assessment in a sense similar to the OPA's in addressing the coercive measures employed in imprisonment law since 2009; see, for example, ALCSCd 13.11.2009, 3-3-1-63-09, para. 16 (in Estonian).

²⁵ For an overview of the emergence and nature of offence prevention in Estonian law, see Korrakaitseaduse eelnõu (eelnõu nr 49 SE I) seletuskiri ['the explanatory memorandum on the draft Act of Order Protection (draft 49 E I')], pp. 42ff. Available at <http://www.riigikogu.ee/?page=eelnou&op=ems&emshelp=true&eid=93502&u=20120331103845> (most recently accessed on 31.3.2013) (in Estonian).

²⁶ Jälitustegevuse seadus. – RT I 1994, 16, 290; RT I 21.3.2011, 2 (in Estonian).

²⁷ S. Laos. Jälitustegevuse eesmärgid ja kontroll ['Aims and supervision of surveillance activities']. – *Akadeemia* 2008/11, p. 2430 (in Estonian).

²⁸ On this concept, see the OPA explanatory memorandum (see Note 25), p. 48.

²⁹ M. Ernits. Preventiivhaldus kui tulevikumudel ['Proactive administration as a future model']. – *Riigikogu Toimetised* 2008 (17), pp. 156 ff. (in Estonian).

³⁰ In the material that follows, only the contents of the OPA draft have been taken into account, on account of the limited scope of the article.

Pursuant to §2 (1) of the OPA, law enforcement consists in the prevention of a danger to the public order, the identification of danger in a case of suspicion of danger, countering of danger, and elimination of disturbance to public order. A (specific) danger, in the sense of §5 (2) of the OPA is a situation wherein, from an objective assessment of the circumstances that have arisen, it can be considered sufficiently probable that a breach of public order is about to take place, whereas danger prevention, pursuant to §5 (7), is defined as the collection, exchange, and analysis of information and the planning and implementation of activities to counter any future dangers to public order, including the prevention of offences. The fact that suspicion of a danger (§5 (6)) has been defined separately lends itself to the assumption that the prevention of a danger was something clearly prior to the suspicion of a particular danger for the authors of the draft OPA.

In the prevention of a danger, law-enforcement agencies are bound by the same principles (proportionality, effectiveness, protection of rights, and co-operation among agencies) as they are in the danger-aversion phase, pursuant to the OPA.

The importance of the prevention of offences as an area of danger prevention is demonstrated in the OPA by the fact that the act contains a separate chapter on offence prevention (Chapter 2, from §17 onward). At the same time, it should be noted that the definition of the prevention of offences as given in §17 does not directly link prevention to the pre-danger territory; rather, it speaks of the prevention of offences and of ensuring public order in a broader sense. This raises the question of whether it refers to pre-danger activity only or to the prevention of offences at any stage before the occurrence of the action. In general, it must be said that the chapter on the prevention of offences does not add anything substantial to the working logic of the OPA and, in fact, seems alien to the act. For example, the division of preventive measures into social ones, measures directed at circumstances, and measures designed to eliminate the consequences (§18) seems more appropriate for legal theory and entirely useless with regard to regulation of legal relationships, at least in this act. In particular, it adds nothing to the state supervision measures described in the later chapters. If anything, it creates confusion by extending the concept of a law-enforcement measure considerably in comparison to how it has been used elsewhere in the act. Other sections too (on the duties of the state in prevention of offences, offence-prevention council, financing of prevention of offences, etc.) regulate the administrative planning process of prevention without addressing any specific activities of a direct offence-preventing effect.

The danger-prevention part of the new law-enforcement law is much more complex and multi-layered with regard to law-enforcement powers (that is, law-enforcement measures).

A distinction must be drawn between preventive measures that restrict fundamental rights and those that do not. The application of non-restrictive preventive measures may be, as other law-enforcement measures can be, directly based on the prevention task. A large amount of the preventive activities that consist in the collection of data from publicly available sources can be accomplished by means of non-infringing measures also in our legal order. However, the fact that the grouping of a measure with those infringing or not infringing on the fundamental rights can prove controversial may cause problems in practice.

The concept of a danger-prevention measure that infringes on the fundamental rights is ambiguous, as it can be given several meanings.^{*31} Preventive measures probably should not be taken to include only the law-enforcement measures explicitly defined as measures for the prevention of dangers; rather, the content and purpose of any given measure should be taken into account. From the standpoint of logic, all measures whose application is not based on suspicion of a specific danger, a specific danger, or damage that has already occurred are applied to the 'preliminary territory' of danger. However, at least one other criterion must be added to this—namely, the dogmatics of the German law-enforcement law take the pre-danger measures to include inevitably also those that lack a clearly definable range of targets (i.e., measures whose target is not clearly a person liable for preservation of public order). This holds even in cases wherein the presence of a specific danger is deemed necessary grounds for the application of the measure.^{*32}

On the basis of such a material definition of the preventive measures, at least three groups of preventive measures that admit the infringement of fundamental rights can be distinguished within the structure of the OPA.

³¹ Accordingly, the concept of a prevention measure can, in principle, be defined on the basis of both the legal consequence of the measure and the composition of the measure. S. Kral (see Note 22), pp. 71–72.

³² S. Kral too considers the range of undefined targets to be an important feature of the danger-prevention measures. See S. Kral (see Note 22), p. 78. This is also affirmed by the practice of the German Federal Constitutional Court, as described by E. Denninger (see Note 7), p. 72.

Firstly, §24 of the OPA includes, *expressis verbis*, measures to be applied by a law-enforcement agency for prevention of danger.

This is an area that is referred to in the dogmatics of Estonian law-enforcement law^{*33} as inspection-type state supervision and is typically not addressed by German general police laws, in which its regulation is instead left to the specific laws of the law-enforcement field.^{*34} Inspection-type supervision is exerted over areas of social life that involve potential danger (and that therefore usually require prior permission or at least notification) and hence require preventive control in addition to averting of danger. Classic examples include supervision of economic activity of various kinds, traffic supervision, health protection, supervision of migration, supervision of adherence to the Weapons Act, etc.

The act enumerates certain law-enforcement measures directed at preventive gathering of information (entering premises, carrying out questioning, requesting documents, etc.), allowing the law-enforcement agencies to apply these ‘for prevention of danger’. As a further condition, the right to employ the measure must also be provided for by a specific law regulating supervision of the respective field (e.g., the Weapons Act, the Technical Supervision Act, or the Traffic Act).

One differentiating feature of such preventive measures, as compared to measures for countering a danger, lies in the fact that their application does not allow for the possibility of applying direct coercion of the target of the measure (see §24 (3) of the OPA).

The second type of measures—no longer explicitly called preventive but essentially of a preventive nature if one judges by the criteria mentioned above—is rooted in §25 of the OPA. Pursuant to §25 (1), certain law-enforcement measures may also be applied in cases of ‘a danger or for the ascertainment of a serious danger’ with regard to a person there is no reason to deem a person liable for public order. Although it is not clear from the text of the act or the explanatory memorandum, the legislator probably had in mind the scenario of conducting a police operation motivated by a specific danger or suspicion of a danger while the originator of the threat remains unknown or has not been captured. The application of measures is possible only with the permission of the relevant minister (or, in urgent cases, with that of the head of a law-enforcement agency) and within specified territorial and time limits.

Thirdly, upon closer analysis of the rest of the OPA measures, they can be seen to include those that may by their nature be applied with regard to persons whom there is no reason to deem liable for public order, or whose grounds for application do not include the criterion of a specific danger, suspicion of a danger, or any corresponding level of probability. These are, above all, the measures listed in §23 (2) of the OPA—questioning, so-called video surveillance, and prohibition on stay, along with some cases of security-check application, such as the application of a security check to everybody entering the premises or territory of a public authority, regardless of a suspicion of a danger. Subsection 23 (2) of the OPA explicitly allows the application of such measures with respect to persons not liable for public order. However, the list given in the article is not exhaustive—for example, the checking of a movable for purposes of ‘ensuring the safety of a safeguarded person or object’ provided for by §49 (1) 6, which is not included in the list, must in its essence be classified under the same category.

The present overview would be incomplete if we failed to mention that, in addition to these three groups of preventive measures included in the OPA, some essentially preventive law enforcement measures will be regulated outside the OPA also in the future. One important subset of these measures includes law-enforcement-directed secretive data-collection measures or so-called law-enforcement-related surveillance, which is currently regulated in connection with criminal-procedure-related surveillance pursuant to a legal-political decision by the legislator^{*35}, although the legal theory situates these within the purview of law-enforcement law.^{*36}

³³ See Note 28, above.

³⁴ This largely coincides with the concept of *Gefahrenabwehr durch Ordnungsverwaltung*, which is used, for example, in the German police-law handbook. See E. Denninger (see Note 7), pp. 970 ff.

³⁵ Initially, the regulation of law-enforcement-related surveillance was also planned in conjunction with other law-enforcement-related measures in the OPA. The redaction of the Code of Criminal Procedure that has been in effect since 1.1.2013 provides detailed regulation of surveillance in its Chapter 3¹.

³⁶ Clause 126² (1) 1) of the Code of Criminal Procedure addresses the need to gather information on the preparation of a crime for the purpose of its detection or blocking. For description of the law-enforcement-related nature of this basis, see *Kriminaalmenetuse seadustik. Kommenteeritud väljaanne* [‘Code of Criminal Procedure, Commented Edition’]. Juura 2012, pp. 305–306 (Chapter 11.2.1) (in Estonian).

If we are to draw conclusions from the grouping of preventive measures that is sketched out above, we must first acknowledge the heterogeneity of the preventive measures, like that of the preventive tasks, just as much as the lack of consistent logic of legal regulation. Some of the preventive measures could be called ‘horizontal’, as their danger-preventive nature is evident from the formulation of the measure itself and they are mixed up with measures for countering a danger, whereas other preventive measures might be called ‘vertical’—i.e., their preventive quality is due to the supplementation of threat-countering measures with the additional conditions set forth in §§24 and 25 of the general part of the OPA. Vertical preventive measures reduce the OPA’s clarity of arrangement. The group of preventive measures provided for by §25 is, in the opinion of this author, especially unwieldy with regard to both formulation and regulating logic. The possibility of conducting so-called police operations against an undefined range of persons is certainly necessary in some situations, but the same purpose could be achieved by means of other legal-technical solutions (comparison with the police checkpoint regulation used in the German police law might be of help, for instance). However, the fact that the legislator has sensed a need for a further administrative check in cases of police operations, as a mechanism balancing the infringement of fundamental rights occurring on probabilistically uncertain grounds, can nevertheless be considered positive. Furthermore, an attempt has been made to specify the circumstances of acceptable infringement with great accuracy.

With §25 of the OPA too, it must be acknowledged that preventive inspection-type supervision in some areas is constitutional in principle and also definitely necessary; however, problems arise from the large number and variety of areas of application of inspection-type surveillance. The aspiration with the OPA is to constitute a general part for all of them, but this leads to a high level of abstraction of the regulation and to the result that several acts (the OPA and the specific law applying to the particular area of inspection-type supervision in question) must be read in combination if one is to understand the regulation fully.

The Ministry of Justice, who prepared the OPA, has acknowledged that defining the measures of inspection-type supervision only by reference to the general goal of danger prevention may not conform to the principle of legal determination and, therefore, has proposed its amendment such that inspection-type supervision would be carried out on the basis of periodically compiled danger projections that specify the conditions for conducting of the supervision.^{*37}

The view taken in the act with regard to inspection-type supervision—that the forced execution of such measures in the form of direct coercion is ruled out—is also not without its problems. This solution is based on the legislator’s assessment that probabilistic grounds that have not yet condensed into a specific danger cannot outweigh the concern about infringement of fundamental rights resulting from direct coercion as a means of coercion that very strongly restricts the fundamental rights. On the other hand, however, this is cast into doubt by concerns over the effectiveness of law enforcement^{*38} and also by the question of why the legislator has not followed the same lines in cases of other groups of preventive measures.

4. Conclusions

In view of the foregoing considerations, it would be an exaggeration to say that a strong tendency to emphasise prevention over the averting of a danger can be observed in Estonian law-enforcement law, which is still only adapting to the concept of danger as an intervention threshold. The bulk of the weight of the law-enforcement task will rest with danger-averting law also in the future. However, danger-prevention law that conforms to the characteristics brought out above (see Section 2) also has an undisputed role (mainly as law-enforcement-related information law) in our law-enforcement law. At present, law-enforcement-related

³⁷ Korrakaitseaduse muutmise ja rakendamise seaduse eelnõu [‘the draft act for the amendment and application of the OPA’], clause 8. Available at <http://eelnou.valitsus.ee/main#xRMTDO2Z> (most recently accessed on 31.3.2013) (in Estonian).

³⁸ See the opinion of the Chancellor of Justice on the draft act for the amendment and application of the OPA, p. 3. Available at http://oiguskantsler.ee/sites/default/files/field_document2/6iguskantsleri_arvamus_eelnoule_korrakaitseaduse_muutmise_ja_rakendamise_seaduse_eelnou.pdf (most recently accessed on 31.3.2013) (in Estonian).

prevention law has been only weakly worked through in Estonia, both theoretically and with regard to legislative practice.^{*39} However, the developments of the globalising world and the fact that we belong to Europe's unified security area are likely to force our legal scientists to pay more attention to the issues of prevention law. In the process of adopting the traditions of Germanic-family law-enforcement law as danger-averting law, the prevention law being developed in Germany could also provide a source of comparison and ideas for the further shaping of Estonian law-enforcement law.

³⁹ However, it is still interesting to note that the concept of law-enforcement-related danger prevention has recently been mentioned in more detail for the first time also in the practice of the Administrative Law Chamber of the Supreme Court. ALCSCd 25.4.2012, 3-3-1-10-12 (in Estonian), para. 9 says this, among other things: 'The prison has justified the application of handcuffs also with the prevention of danger. The Law Chamber would like to note that in the stage of danger prevention no danger has yet emerged but a danger is considered possible in the future [...].'



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Freiwilligkeit – gleichzeitig der Eckstein und der Stolperstein bei der Behandlung des Rücktritts vom Versuch

Die Bestimmung des Begriffes der Freiwilligkeit
und die Abgrenzung vom misslungenen Versuch

1. Freiwilligkeit als Voraussetzung und Begründung des Rücktritts vom Versuch

Die Frage nach dem freien Willen des Menschen hat den Philosophen und den Psychologen schon seit der Entstehung dieser Disziplinen Untersuchungsmaterial geliefert. Man hat es nicht fertiggebracht, eine eindeutige Antwort zu finden, ob und inwieweit die Entscheidungen und das Verhalten eines Menschen seinen freien Willen ausdrücken oder von unterschiedlichen Faktoren beeinflusst sind. Das Strafrecht lässt den Disput zwischen dem Determinismus und dem Indeterminismus beiseite, weil keines von den beiden beweisbar ist. Man geht von der Voraussetzung aus, dass das Verhalten eines Menschen zwar von den von ihm unabhängigen Faktoren wie Instinkte, Herkunft, Charakter, Aufbringung, Fähigkeiten usw. beeinflusst ist, der Mensch jedoch imstande ist, die Wirkung dieser Faktoren einzuschätzen und sein Verhalten zu kontrollieren.^{*1} Der Mensch hat also die Möglichkeit zu entscheiden, eine Straftat zu begehen oder nicht. Tatsächlich wird dem normativen Schuldbegriff zufolge dem Täter vorgeworfen, eine Entscheidung zugunsten des Unrechts getroffen zu haben, obwohl er die Möglichkeit hatte, das rechtmäßige Verhalten zu wählen.

Außer der Thematik des strafrechtlichen Schuldbegriffes ist die Freiwilligkeit eine Voraussetzung des Rücktritts von versuchter Straftat. Gemäß § 40 (3) StGB Estlands (eStGB) ist der Täter schuldfrei, wenn er freiwillig von dem Versuch einer Straftat zurücktritt. Freiwilligkeit als die Voraussetzung des Rücktritts vom Versuch ist auch in Strafgesetzbüchern anderer Staaten, z.B. Deutschlands^{*2}, Österreichs^{*3} und

¹ J. Sootak. *Karistusõigus. Üldosa* [‘Strafrecht. Allgemeiner Teil’]. Tallinn: Juura 2010, S. 438.

² Strafgesetzbuch. Internet: www.gesetze-im-internet.de/stgb/index.html.

³ Strafgesetzbuch (StGB). Internet: [www.jusline.at/Strafgesetzbuch_\(StGB\).html](http://www.jusline.at/Strafgesetzbuch_(StGB).html).

Finnlands^{*4} vorgeschrieben. Anders als in der Regulation Estlands wird in jenen europäischen Staaten der freiwillige Rücktritt vom Versuch nicht als Schuldausschließungsgrund, sondern als Strafflosigkeitsgrund betrachtet.

Der Unterschied zwischen den Rücktrittsregulationen Estlands und anderer Staaten beeinflusst auch die Bedeutung der Freiwilligkeit als eines von den Rücktrittsmerkmalen. Die Freiwilligkeit charakterisiert den Entscheidungsprozess des Täters, dessen Ergebnis der Entschluss ist, die Straftat nicht zu Ende zu führen. Die Freiwilligkeit ist das Element, das dem Rücktritt die relevante Dimension gibt, ihn zum Täter verbindet und dadurch zeigt, warum es angebracht ist, beim Rücktritt vom Versuch gegenüber dem Täter mildere Rechtsfolgen anzuwenden.

Bei der Betrachtung des Rücktritts vom Versuch als Schuldausschließungsgrund, so wie das estnische Strafgesetzbuch es tut, ergibt die Freiwilligkeit eine Grundlage, von der Erhebung eines Schuldvorwurfs gegen den Täter abzusehen. Wenn beim Begehen einer versuchten Straftat dem Täter vorgeworfen wird, dass er sich für das Unrecht entschieden hat, zeigt der Täter beim freiwilligen Rücktritt, dass er trotz seines unsprünglichen Entschlusses, den rechtswidrigen Weg zu wählen, noch vor einer Schädigung des Rechtsgutes zum Erkenntnis gelang, dass er die Straftat nicht vollzubringen wünscht, und das rechtmäßige Verhalten anstatt des rechtswidrigen wählte.

Im Strafrecht von Deutschland und anderer Staaten, wo der freiwillige Rücktritt als ein Strafflosigkeitsgrund gilt, weist die Freiwilligkeit darauf hin, dass beim Täter die Strafzwecke erfüllt worden sind. Verwirklicht hat sich der spzialpräventive Zweck der Strafe, denn mit dem freiwilligen Verzicht auf die Vollendung der Tat hat der Täter gezeigt, dass er in seinem Verhalten von gültigen Rechtsnormen ausgeht und das Abweichen von denselben vermeidet. Genauso erfüllt ist der Zweck positiver Generalprävention: mit seinem freiwilligen Rücktritt zeigt der Täter, dass die Normen gelten und dass dem Rechtsgut schadenendes Verhalten falsch ist, und dadurch wird das Vertrauen der Gemeinschaft in die Rechtsnormen bestätigt.^{*5}

2. Problemstellung

Gemäß der Formulierung in § 40 (3) eStGB liegt ein freiwilliger Rücktritt vom Versuch dann vor, wenn gemäß der Vorstellung des Täters der Erfolg einer Straftat noch eintreten kann, der Täter sich aber ohne den Zwang den von ihm unabhängigen Umständen entscheidet, auf die Vollendung der Straftat zu verzichten. Die Voraussetzung der Freiwilligkeit ist gemäß eStGB die Möglichkeit der Tatvollendung. Durch dieses Kriterium ist in der Strafrechtstheorie der misslungene Versuch definiert. Um einen misslungenen Versuch handelt es sich dann, wenn der Täter die Sinnlosigkeit, die Zwecklosigkeit weiterer Handlungen einsieht. Der Versuch kann misslingen entweder weil die Fortsetzung der Tat unmöglich und der Taterfolg damit unerreichbar ist, oder weil es zwar möglich ist, die Tat fortzusetzen, das zu erzielende Ergebnis jedoch im Vergleich zum erhofften Ergebnis unbedeutend ist.^{*6} Gemäß der h.M. in der Strafrechtsdogmatik ist es nicht möglich, vom misslungenen Versuch zurückzutreten, weswegen auch die Frage der Freiwilligkeit nicht aufkommt.^{*7} Bei der Ermittlung der Möglichkeit der Tatvollendung soll gemäß eStGB festgestellt werden, ob die Entscheidung des Täters erzwungen war und somit die Freiwilligkeit ausgeschlossen ist. Vorgreifend kann man konstatieren, dass sich in der Strafrechtsdogmatik keine klare Antwort zur Bestimmung der die Freiwilligkeit definierenden Umstände findet.

Der Zweck des vorliegenden Artikels ist es, die Definitionskriterien der Freiwilligkeit als eines Elements der Rücktritt vom Versuch zu analysieren und den Rücktritt vom misslungenen Versuch abzugrenzen. Ebenso wird untersucht, ob und inwieweit die Bestimmung des Freiwilligkeitsbegriffes dadurch beeinflusst wird, ob man den Rücktritt als Schuldausschließungsgrund oder Strafflosigkeitsgrund betrachtet.

⁴ Criminal codes. Internet: legislationline.org/documents/section/criminal-codes.

⁵ K. Amelung, Zur Theorie der Freiwilligkeit eines strafbefreienden Rücktritts vom Versuch. – ZstW 2008/H 2, S. 219.

⁶ J. Sootak (Fn. 1), S. 487.

⁷ *Ibid.*, S. 490.

3. Dogmatische Lösungen für die Bestimmung des Freiwilligkeitsbegriffes

In der Strafrechtstheorie gibt es zwei unterschiedliche Auffassungen von der Feststellung der Freiwilligkeit – normative und psychologische.

3.1. Die psychologische Auffassung – der Täter ist „der Herr seiner Entscheidung“

Gemäß der psychologischen Auffassung muss man empirisch die Einstellung des Täters zu seiner Tat und zur Möglichkeit deren Vollendung feststellen. Die Freiwilligkeit bedeutet die Entscheidungsfreiheit des Menschen: der Täter erkennt, dass es möglich ist, die Straftat zu Ende zu führen, entschließt sich aber, es doch nicht zu tun. Der Täter erkennt, dass er der „Herrscher“ seiner Entscheidung ist. Die Inhalt, Löblichkeit und Verwerflichkeit des Rücktrittsmotivs sind irrelevant, denn die Rücktrittsentscheidung des Täters wird nicht beurteilt.

Nach der „Frank-Regel“, genannt nach ihrem Autor, ist bei der Prüfung der Freiwilligkeit festzustellen, ob der Täter seiner Vorstellung nach die Möglichkeit hatte, den Tatbestand zu verwirklichen oder nicht. Beim unfreiwilligen Rücktritt dagegen wünscht der Täter den Taterfolg zu erreichen, dies ist aber nicht möglich.^{*8} In der Rechtsliteratur wird dieser Auffassung jedoch vorgeworfen, dass mit Hilfe dieses Merkmals nicht die Freiwilligkeit, sondern der misslungene Versuch geprüft wird.^{*9} Nämlich setzt die Freiwilligkeit voraus, dass die Vollendung der Tat möglich ist, der Täter aber gerade in jener Situation sich entschließt, umzudenken.

Nach der psychologischen Auffassung von Willensfreiheit wird die Freiwilligkeit auch als *Quasi-Unmöglichkeit* der Ausführung bezeichnet. Um einen misslungenen Versuch handelt es sich dann, wenn der Täter wegen äußerer Umstände oder psychischer oder physischer Faktoren nicht imstande ist, die Tat zu vollenden. Um die *Quasi-Unmöglichkeit*, die Tat zu Ende zu führen, und damit um die Unfreiwilligkeit handelt es sich dann, wenn die Handlungsunfähigkeit des Täters nicht von den sich ergebenden Umständen verursacht ist, sondern er findet, dass die Vollendung der Tat nicht sinnvoll ist. Die Sinnvolligkeit der Tatvollendung wird geprüft aufgrund des Umstandes, ob es für den Täter gemäß der normalen Lebenserfahrung noch vernünftig und zweckmäßig ist, den Taterfolg anzustreben oder nicht. Auch die Anwendung dieser Methode verstrickt sich in Schwierigkeiten, weil es unklar bleibt, wie man die Vernünftigkeit und die Zweckmäßigkeit der Tatvollendung feststellen sollte.^{*10}

H. Schröder hat versucht, die Willensfreiheit durch die Motive zu erklären, die die Entscheidung des Täters beeinflussen. Die Entscheidung eines Menschen ist dann freiwillig, wenn sie von autonomen Motiven, d.h. nicht von Umständen, die die Straftat objektiv verhindern oder unmöglich machen, bedingt ist. Unfreiwillig ist die Entscheidung des Täters im Fall heteronomer Motiven, d.h. wenn der Täter gezwungen war, die Vollendung der Tat zu unterlassen.^{*11} Diese Erklärung ist zwar mit der im Strafgesetzbuch verwendeten Formulierung im Einklang, gibt aber keine konkreten Zusatzkriterien zur Prüfung der Willensfreiheit. Trotzdem hat die deutsche Gerichtspraxis die Unterscheidung der Entscheidung des Täters unterliegenden autonomer und heteronomer Motiven als den Ausgangspunkt der Prüfung der Willensfreiheit angenommen.

Zusammenfassend kann man konstatieren, dass die psychologische Betrachtungsweise der Willensfreiheit zwar im Einklang mit der Formulierung des Strafgesetzbuches ist, es aber schwer zu bestimmen ist, was die Freiwilligkeit genauer bedeutet und wie sie in der Praxis geprüft werden soll, weil der Entscheidungsprozess des Täters und die Umstände, die ihn beeinflussen, empirisch schwer zu ermitteln sind. Eben deshalb wird der psychologischen Theorie in der Rechtsliteratur das Folgende vorgeworfen: da es

⁸ C. Jäger. Der Rücktritt vom Versuch als zurechenbare Gefährdungsumkehr (zugleich Dissertation). München: Beck 1996, S. 21.

⁹ H.-J. Rudolphi, E. Horn, E. Samson. Systematischer Kommentar zum Strafgesetzbuch (SK-StGB). Losebl.-Ausg. Köln: Heymann, § 24/19.

¹⁰ K. Ulsenheimer. Grundfragen des Rücktritts vom Versuch in Theorie und Praxis. Berlin: de Gruyter 1976, S. 287–288.

¹¹ A. Schönke, H. Schröder. Strafgesetzbuch. Kommentar. 27. Aufl. München: Beck 2006, § 24.

häufig fast unmöglich ist, die Freiwilligkeit der Entscheidung des Täters festzustellen, wird der Urteil von der Perspektive des sog. vernünftigen Durchschnittsmenschen gefällt, womit die empirische Prüfung oft eine bloße Fiktion bleibt.^{*12} In der Strafrechtsliteratur hat man die Meinung geäußert, dass bei der Prüfung der Freiwilligkeit neben psychologischen Kriterien auch normative zu berücksichtigen sind.^{*13} Obwohl das deutsche Bundesgerichtshof den Standpunkt vertritt, dass die Ethik des Rücktrittsmotivs bei der Prüfung der Freiwilligkeit keine Bedeutung hat, muss man bei der Prüfung der der Rücktrittsentscheidung der Täters unterliegenden Umständen feststellen, ob es für ihn in der konkreten Situation vernünftig war, die Ausführung der Tat fortzusetzen oder nicht.^{*14} Diese Auffassung beinhaltet eine beurteilende, nicht bloß eine empirische Dimension.

Zusätzlich ist die psychologische Auffassung der Willensfreiheit deswegen kritisiert worden, weil sie mit den Begründungstheorien des Rücktritts unvereinbar ist, und das vor Allem im Kontext der Strafzweckstheorie, die besagt, dass der Täter mit dem Rücktritt vom Versuch zeigt, dass bei ihm die Strafzwecke erfüllt sind.^{*15} Das Kriterium der Freiwilligkeit ist gemäß der psychologischen Theorie auch dann erfüllt, wenn der Täter sich entschließt, auf eine Straftat zu verzichten, um eine schwerere zu begehen, denn die Inhalt und Löblichkeit oder Verwerflichkeit des Rücktrittsmotivs hat keine Bedeutung. Im vorher genannten Fall ist es sehr schwer, zu behaupten, dass bei dem Täter die Strafzwecke erfüllt sind, denn er hat ja seine Bereitschaft gezeigt, rechtswidriges Verhalten durch Begehung von Straftaten fortzusetzen. Bei der Betrachtung des Rücktritts als Schuldausschließungsgrund entsteht so ein Problem aber nicht, denn auf der dritten Prüfungsebene „Schuld“ der Deliktstruktur geht es um die Frage, ob es gerecht ist, dem Täter den konkreten Straftatversuch vorzuwerfen oder nicht. In solchem Fall ist nur die Entscheidung des Täters bezüglich der konkreten Tat wichtig – die Entscheidung, die Schädigung des Rechtsgutes zu Ende zu führen oder nicht. Das darauffolgende Verhalten des Täters und der Einklang der diesem unterliegenden Motive mit der Rechtsordnung haben keine Bedeutung, denn sie gehören nicht zu den Prüfungsobjekten der Schuldebene des Deliktstrukturs.

3.2. Die normative Konzeption der Willensfreiheit – die Rückkehr auf den „Zug des Rechts“

Gemäß normativer Auffassung wird die Willensfreiheit durch eine Beurteilung geprüft, ob der Täter zum gesetzestreuen Verhalten zurückgekehrt ist. Zur Prüfung der Freiwilligkeit des Rücktritts muss der Motiv des Täters, weswegen er die Straftat nicht zu Ende führte, festgestellt werden. R. Schmidt hat es folgenderweise zusammengefasst: „Der Umstand, der den Täter veranlasste, den Versuch der Straftat zu beginnen, war sein böser Wille, und somit ist die Befreiung von der für den Versuch vorgesehenen Strafe nicht angebracht, wenn er aus einem verwerflichen Motiv stattfand.“^{*16}

Als Maßstab, wonach die Löblichkeit oder Verwerflichkeit des Motivs zu beurteilen ist, soll nach P. Bockelmanns Meinung „das allgemeine Verständnis vom richtigen Verhalten“, mit anderen Worten, der in der Gesellschaft geltende kategorische Imperativ dienen. Da dieses allgemeine Verständnis vom Recht nicht eindeutig bestimmbar ist und man daher mit der Bestimmtheitsforderung des Strafrechts in Widerspruch treten kann, wenn man es bei der Entscheidung über die Strafbarkeit zugrunde legt, haben die Vertreter der normativen Theorie der Willensfreiheit gefunden, dass der Rücktrittsmotiv mit geltenden Rechtsnormen im Einklang sein muss und es nicht nötig ist, die außerhalb des geschriebenen Rechts bleibende Ethik des Täters zu prüfen. Das Zeichen der Freiwilligkeit des Rücktritts ist die Rückkehr des Täters auf den „Zug des Rechts“. Dabei wird aber nicht ausgeführt, wie und aufgrund wessen der Einklang des Rücktrittsmotivs mit der Rechtsordnung festzustellen ist.^{*17}

Nach der Willensfreiheitskonzeption von C. Roxin ist die Rückkehr des Täters zum gesetzestreuen Verhalten durch die Vernünftigkeit seiner Entscheidung nach Regeln der Verbrecherwelt zu prüfen. Beim

¹² K. Ulsenheimer (Fn. 10), S. 300.

¹³ W. Laufhütte, R. Rissing-van Saan, K. Tiedemann (Hrsg.). Strafgesetzbuch. Leipziger Kommentar. Großkommentar. Bd. 1. Einleitung §§ 1–31. Berlin: de Gruyter 2007, § 24/157.

¹⁴ BGH 28.02.1956 (StR 352/55). Internet: www.jurion.de/de/document/show/o:78660,o/.

¹⁵ C. Roxin. Strafrecht AT. Bd II. 4. Aufl. München: Beck 2006, S. 594.

¹⁶ K. Ulsenheimer (Fn. 10), S. 291.

¹⁷ C. Jäger (Fn. 8), S. 25.

freiwilligen Rücktritt erkennt der Täter, dass gemäß „verbrecherischer Vernunft“ es sinnvoll wäre, die Straftat zu Ende zu führen, jedoch tut er dies nicht und weist durch diese Entscheidung seine Rückkehr zum gesetzestreuen Verhalten nach.^{*18} Die Konzeption C. Roxins wird aber deswegen kritisiert, weil die Kriterien solches Urteils nicht definierbar sind.

Als Zusammenfassung kann man konstatieren, dass während die Vertreter der normativen Theorie der Willensfreiheit der psychologischen Auffassung vorwerfen, dass sie undefinierbar und schwer in der Praxis anzuwenden ist, steht eigentlich auch die normative Auffassung vor demselben Problem, denn auch diese Theorie vermag nicht, eindeutige und praktische Regeln anzubieten, um festzustellen, wann die Rückkehr zum gesetzestreuen Verhalten stattgefunden hat. Außerdem wird den normativen Theorien vorgeworfen, dass sie den Begriff der Willensfreiheit durch ein im Gesetz nicht vorhandenes Zusatzmerkmal – Einklang des Rücktrittsmotivs mit der Rechtsordnung – definieren. Andererseits erschafft gerade dieses Zusatzkriterium – die Rückkehr des Täters zum gesetzestreuen Verhalten – eine Grundlage, zu behaupten, dass die Strafzwecke erfüllt sind, und ist dadurch im Einklang mit der Theorie, die die Rücktrittsregulation damit begründet, dass es beim Verzicht auf die Vollendung nicht nötig ist, den Täter zu bestrafen.^{*19}

3.3. Zusammenfassung der psychologischen und normativen Theorie

Die psychologische und die normative Auffassung von Willensfreiheit waren ursprünglich sowohl nach ihrer Prüfungsmethode als auch des Prüfungsgegenstands gegensätzlich, aber ihre Weiterentwicklungen und Anwendungspraxis haben gemeinsame Züge herausgebracht. Nämlich haben die Vertreter der psychologischen Theorie darin eingewilligt, dass wenn bei der empirischen Prüfung des Entscheidungsprozesses des Täters Schwierigkeiten auftreten, es notwendig werden kann, zur Feststellung der Freiwilligkeit Werturteile anzuwenden. Nach neueren Auffassungen der normativen Theorie folgt der Einklang des Rücktrittsmotivs mit der Rechtsordnung bereits aus der Tatsache, dass der Täter sich freiwillig entschlossen hat, die konkrete Straftat nicht zu Ende zu führen; sein darauffolgendes Verhalten und das mögliche Begehen neuer Straftaten in der Zukunft hat keine Bedeutung.^{*20} Der Unterschied zwischen der normativen und der psychologischen Theorie besteht vor allem im Ausgangspunkt, d.h. ob die gesetzestreue Gesinnung des Täters oder die Unbeeinflusstheit der konkreten Entscheidung vom Zwang maßgebend ist.^{*21} Meistens gelangen die beiden Theorien an dasselbe Ergebnis, nicht aber in allen Fällen, wie die folgende Erörterung zeigt. Bei der Feststellung der Willensfreiheit ist die psychologische Auffassung herrschend. Trotzdem bleibt es der Rechtsprechung zu entscheiden, was es bedeutet, dass der Täter der Herr seiner Entscheidung ist und dass diese nicht durch Zwang bedingt ist.

4. Zwang als Ausschlussgrund der Willensfreiheit des Menschen

Bei der Lösung der Frage nach der Willensfreiheit ist zuerst zu prüfen, ob überhaupt Faktoren vorhanden waren, die die Entscheidung des Täters beeinflussten, und danach, welche Wirkung sie auf diese Entscheidung hatten.^{*22} Wenn der Täter wegen solcher Umstände einsieht, dass die Vollendung der Tat unmöglich oder zwecklos geworden ist, handelt es sich um einen misslungenen Versuch und die Frage der Freiwilligkeit des Rücktritts vom Versuch tritt gar nicht auf. Die Feststellung der Freiwilligkeit wird aktuell in den Fällen, wenn der Täter erkennt, dass er grundsätzlich zwischen unterschiedlichen Verhaltensweisen wählen kann. Wesentlich ist gerade die subjektive Einsicht des Täters bezüglich der Möglichkeit der Tatvollendung, nicht deren objektive Erreichbarkeit. Bei der Prüfung der Freiwilligkeit ist festzustellen, warum der Täter

¹⁸ C. Roxin (Fn. 15), S. 600.

¹⁹ C. Jäger (Fn. 8), S. 21.

²⁰ C. Roxin (Fn. 25), S. 599.

²¹ K. Ulsenheimer (Fn. 10), S. 299.

²² K. Amelung (Fn. 5), S. 238.

sich zugunsten der konkreten Verhaltensalternative entschlossen hat – ob er vom Zwang beeinflusst wurde oder der Herr seiner Entscheidung war. Eine eindeutige Definition, welcher Maß von Zwang die Freiwilligkeit der Entscheidung des Täters ausschließt, findet sich in der Rechtsliteratur nicht und auch das Strafgesetzbuch gibt darauf keine Antwort.

Nach K. Amelungs Auffassung ist die Entscheidung des Täters dann freiwillig, wenn sie unbeeinflusst ist von der realen Gefahr, dass er in den Rechtsakten vorgeschriebenen Maßnahmen unterzogen wird, die seine Rechte einschränken oder ihm Pflichten auferlegen. Zusätzlich wird die Willensfreiheit dann wesentlich beeinflusst, wenn es sich zwar nicht um eine in Rechtsakten vorgeschriebene negative Folge handelt, wohl aber um einen Umstand, der ein gesetzlich geschütztes Rechtsgut des Täters auf vergleichbare Weise beeinflusst. Als vergleichbarer Zwang wäre demnach etwa die Situation anzusehen, wo nach dem Versuchsbeginn das Vermögen oder die Gesundheit des Täters durch eine Naturgewalt wesentlich geschädigt werden kann, und er, um dies zu vermeiden, die Ausführung der Straftat abbrechen muss. Weiter kann der Zwang sich aus dem psychischen oder physischen Zustand des Täters ergeben, wenn dies die Tatvollendung erschwert. Dabei weist K. Amelung darauf hin, dass es beim Vorhandensein von Faktoren, die für den Täter unbeherrschbar sind, sich bereits um einen misslungenen Versuch handelt.^{*23}

K. Amelungs Definition gibt uns zwar einen Ausgangspunkt zum Definieren möglicher Zwangsfaktoren, erklärt aber nicht deren Zusammenhang mit der konkreten Rücktrittsentscheidung des Täters. Maßgebend ist nicht, das Maß von Zwinglichkeit eines oder anderen Umstands festzustellen, sondern deren Einwirkung auf die Entscheidung eines konkreten Täters, eine Straftat zu Ende zu führen.

In der Rechtsliteratur ist ausgesagt worden, dass man die Regelung des entschuldigenden Notstandes in § 35 dStGB anwenden könnte, um das Maß des Zwanges zu definieren, das die Freiwilligkeit der Entscheidung ausschließt. Der Vorschlag, von jener Regulation auszugehen, wird damit begründet, dass diese ebenfalls eine Situation regelt, wo die Entscheidung des Täters so stark beeinflusst wird, dass es nicht angebracht ist, ihm eine rechtswidrige Tat vorzuwerfen. Als Zwang, die die Verantwortlichkeit des Täters ausschließt, gilt gemäß § 35 dStGB eine Gefahr auf Leben, Leib oder Freiheit des Täters oder einer ihm nahestehenden Person. Die deutsche Rechtspraxis hat dieses Kriterium nicht zur Prüfung der Willensfreiheit angewendet. Es ist ja nicht sachgerecht, den Zwang in einer Notstandssituation mit dem in einer Rücktrittssituation zu vergleichen, denn diese Situationen sind unterschiedlich. Im Notstand ist es zulässig, die Rechte einer dritten, tatfremden Person zu verletzen, also muss das Maß des Zwanges, der einen zu einer solchen Tat berechtigt, wesentlich höher sein als beim Rücktritt von versuchter Straftat, wo der Täter selbst ohne irgendwelche Berechtigung eine rechtswidrige Situation herbeigeführt hat. Beim Rücktritt vom Versuch sollte für die Ausschließung der Freiwilligkeit die Art des Zwanges genügen, die den Täter wesentlich weniger beeinflusst als beim entschuldigenden Notstand.^{*24}

Aufgrund obiger Definitionen von Zwang kann man zusammenfassend konstatieren, dass die Freiwilligkeit durch einen Umstand ausgeschlossen wird, der die Entscheidung des Täters, die Straftat nicht zu Ende zu führen, wesentlich beeinflusst. Die Wesentlichkeit des Umstands wird durch seine Bedeutung für den Täter bestimmt – im Einzelnen dadurch, ob er für den konkreten Täter wichtiger ist als die Verwirklichung des Tatbestandes und das Erreichen des tatbestandsmäßigen Zieles und Erfolges dadurch. Die Bedingung der Freiwilligkeit ist dann erfüllt, wenn der Täter sich entschließt, die Straftat nicht zu Ende zu führen, obwohl er faktisch die Möglichkeit hat, die Tat zu vollenden und den erwünschten tatbestandsmäßigen Erfolg zu erreichen, ohne die für ihn wichtige Rechtsgüter zu beschädigen oder zu gefährden, deren Wert für ihn den Straftaterfolg überwiegen, wie etwa Leben, Gesundheit, Freiheit oder Vermögen von ihm selbst oder eines ihm nahestehenden Menschen. Die Freiwilligkeit ist ausgeschlossen, wenn es für den Täter wichtiger ist, seine in der Straftatsituation in Gefahr geratenen Rechtsgüter zu beschützen.

²³ *Ibid.*, S. 215–237.

²⁴ W. Joecks, K. Miebach (Hrsg.). Münchener Kommentar zum Strafgesetzbuch. Band. 1: §§ 1–37 StGB. 2. Aufl. München: Beck 2011, § 24/130–136.

5. Der Einfluss konkreter Umstände auf die Freiwilligkeit der Entscheidung des Täters und auf die Abgrenzung vom misslungenen Versuch

Obwohl die Freiwilligkeit der Entscheidung des Täters, vom Versuch einer Straftat zurückzutreten in jeden Einzelfall unter Berücksichtigung der Sachlage und des Täters zu prüfen ist, kann man konkrete Umstände ausführen, die bei der Prüfung der Freiwilligkeit und bei der Abgrenzung vom misslungenen Versuch von Bedeutung sind. Im Folgenden betrachte ich diese Umstände und erörtere deren Bedeutung im Zusammenhang mit der normativen und der psychologischen Theorie.

Die Freiwilligkeit der Rücktrittsentscheidung wird z.B. dadurch beeinflusst, dass der Täter die Erhöhung des Entdeckungsrisikos seiner Straftat erkennt und somit die Anwendung von strafrechtlichen Maßnahmen fürchtet. Der abstrakte Gedanke des Täters, dass die Straftat entdeckt werden und er bestraft werden kann, schließt die Freiwilligkeit nicht aus, sondern der Gedanke muss konkret sein und in der Situation der Straftatbegehung in Erscheinung treten.

Das Risiko der Entdeckung der Straftat kann dann erhöht sein, wenn dritte Personen, z.B. Polizeibeamte, zufällige Passanten oder Bekannte des Täters die Begehung der Straftat sehen und nach der Vorstellung des Täters Maßnahmen ergreifen, die zur Bestrafung des Täters führen können. Wenn der Täter erkennt, dass sich eine Situation ergeben hat, wo er nicht mehr die Möglichkeit hat, sich zu überlegen, ob er die Straftat zu Ende führen sollte oder nicht, weil er sofort festgenommen wird, geht es nicht um die Freiwilligkeit des Rücktritts, sondern es handelt sich um einen misslungenen Versuch.^{*25} Wenn aber ein Augenzeuge zwar die Polizei benachrichtigt, der Täter aber gemäß seiner Vorstellung noch bevor der Ankunft der Polizei die Tat vollenden und von dem Tatort fliehen könnte, jedoch sich entschließt, die Straftat nicht zu vollenden, handelt es sich um einen freiwilligen Rücktritt.^{*26} Falls der Täter in einer solchen Situation die Vollendung der Tat zwar für möglich, aber für ihn zu gefährlich hält, ist die Freiwilligkeit ausgeschlossen. Eine einheitliche Regel dafür, in welchen Fällen die Entscheidung erzwungen ist, vermag die Strafrechtstheorie nicht zu geben. Die Erhöhung des Entdeckungsrisikos muss sich nicht unbedingt aus der Beobachtung durch konkrete Personen ergeben, sondern kann auch von einer Änderung der Umstände bedingt sein – z.B. der Wohnungseinbruch verursacht mehr Lärm als erwartet, oder die Vollendung der Straftat würde eine frühere strafbare Tätigkeit des Täters entblößen. Die Erhöhung des Entdeckungsrisikos und sich daraus ergebende konkrete Furcht vor einer Strafe schließen sowohl gemäß der normativen als auch der psychologischen Auffassung die Freiwilligkeit des Rücktritts aus.

Ein Versuch der Straftat kann unterbrochen werden, weil die Situation sich im Vergleich mit der ursprünglichen Vorstellung des Täters geändert hat, wodurch die Verwirklichung von Tatbestandsmerkmalen verhindert wird. Wenn die Änderung der Tatbegehungssituation die Vollendung der Straftat unmöglich gemacht hat, etwa weil dem Täter ein Werkzeug fehlt, um die Ausführung der Tat unter geänderten Umständen fortzusetzen, oder weil dies von ihm übermäßige oder unvernünftige Anstrengung fordern würde, handelt es sich um einen misslungenen Versuch. Nach der psychologischen Auffassung handelt es sich um einen freiwilligen Rücktritt dann, wenn der Täter erkennt, dass er mit sofort unternehmbaren zusätzlichen Anstrengungen das ursprünglich vorgestellte Ziel erreichen kann. Die normative Theorie betrachtet die Freiwilligkeit unter solchen Umständen etwas enger und findet, dass es nicht ausreichend ist, dass der Täter bloß die Zusatzanstrengung für machbar und das Ziel für erreichbar hält, sondern es ist zu prüfen, ob er das Ziel für sich vernünftig hält und glaubt, dass es die Anstrengung wert ist.^{*27}

Die Vollendung einer Straftat kann auch wegen des psychischen Zustands des Täters unterbleiben. Die Handlungsfähigkeit des Täters kann von Angst, Panik und anderen psychisch bedingten Umständen beeinflusst werden.^{*28} Wenn der Täter von einem psychischen Zustand ergriffen wird, der ihn handlungsunfähig macht, z.B. er verliert das Bewusstsein oder sich einfach wie gelähmt fühlt, wenn er Blut sieht, stellt sich die Frage nach der Freiwilligkeit des Rücktritts überhaupt nicht, sondern es handelt sich um einen misslungenen Versuch, weil die Fortsetzung der Tathandlungen für den Täter unmöglich geworden ist.

²⁵ K. Ulsenheimer (Fn. 10), S. 338.

²⁶ H. W. Laufhütte, R. Rissing-van Saan, K. Tiedemann (Hrsg.) (Fn. 13), § 24/174.

²⁷ C. Roxin (Fn. 15), S. 606.

²⁸ H. W. Laufhütte, R. Rissing-van Saan, K. Tiedemann (Hrsg.) (Fn. 13), § 24/170.

Daraus kann man aber nicht folgern, dass jedwede Änderung des psychischen Zustands des Täters während der Begehung der Straftat einen Rücktritt ausschließt. Wenn der Täter etwa das Leiden des Opfers sieht und deswegen Scham und Widerlichkeit bezüglich seines Verhaltens empfindet und sich entschließt, auf das weitere Handeln zu verzichten, schließt dies die Freiwilligkeit nicht aus, weil es für den Täter möglich ist, zu wählen, diese, im Augenblick für ihn verwerflich gewordene Tat zu Ende zu führen oder nicht. Ebenfalls ist es unwichtig, welcher Umstand in dem Täter das genannte Gefühl auflöst und von wem und auf welche Weise die Anregung kam – durch das erwachte Gewissen des Täters oder eine Bitte des Opfers. Gemäß psychologischer Theorie ist für die Feststellung der Freiwilligkeit maßgebend, ob und welche Wirkung der psychische Zustand des Täters auf seine Einschätzung der Möglichkeit der Tatvollendung hatte: ob er diese dermaßen erschwerte, dass der Täter sich entschied, die Tatausführung abubrechen, oder fühlte der Täter, dass der genannte Umstand ihn zwar stört, nicht aber ihn daran hindert, die Straftat gemäß seiner Vorstellung zu Ende zu führen. Die normative Theorie betrachtet die den psychischen Zustand des Täters beeinflussenden Umstände im Zusammenhang mit der Freiwilligkeit etwas breiter: um einen freiwilligen Rücktritt handelt es sich in allen jenen Fällen, wo die Vollendung der Tat nicht unmöglich geworden ist, weil der Täter wegen eines Umstands, der von ihm selbst abhängt, zum gesetzestreu Verhalten zurückgekehrt ist.^{*29}

Weiter kann die Vollendung der Straftat aus dem Grund unterbleiben, weil es dem Täter in der Begehungssituation klar wird, dass das Ziel, wegen dessen er zur Begehung der Tat ansetzte, nicht erreichbar ist. Zum Beispiel hat der Täter vor, ein kostbares Gemälde zu stehlen, entdeckt aber nach dem Einbruch, dass dieses sich nicht in der Wohnung befindet, oder erkennt bei näherer Betrachtung, dass es sich um eine relativ amateurhaft gefertigte Kopie handelt, und verzichtet deswegen auf weitere Tathandlungen. Wenn ein Tatbestandsmerkmal nach der Vorstellung des Täters unverwirklichbar ist oder ist der Unterschied zwischen dem angestrebten und dem reell erreichbaren Ziel so groß, dass die Vollendung der Tat sinnlos geworden ist, handelt es sich um einen misslungenen Versuch.

Die Vollendung der Straftat kann für den Täter auch deswegen sinnlos werden, weil ein nichttatbestandsmäßiger Erfolg entfällt. Zum Beispiel hat A sich entschlossen, B mit kleinen Giftdosen zu töten, weil er glaubt, dass B vorhat, sich um eine gleiche Stelle wie A zu bewerben. Die neue Stelle ist ein großer Traum von A und er weiß, dass B für ihn ein starker Konkurrent wäre. Jedoch erfährt A noch vor der Vollendung seiner Tat, dass B vorhat, ins Ausland zu ziehen und eine Tätigkeit in einem ganz anderen Gebiet aufzunehmen. Danach verzichtet A auf weitere Vergiftung von B, weil der Tod von B für ihn keinen Wert mehr hat und es für das Erreichen des von ihm erstrebten Zieles nicht nötig ist, diese Straftat fortzusetzen. Dennoch wird dieser Fall nicht als ein misslungener Versuch betrachtet, denn dieser kommt nur dann in Frage, wenn der tatbestandsmäßige Erfolg oder ein anderes Tatbestandsmerkmal unerreichbar ist, in diesem Fall gibt es jedoch keinerlei Hindernisse zur Vollendung des Totschlags.^{*30} In diesem Fall haben der Gegenstand der Straftat und seine Merkmale sich nicht geändert, geändert hat sich bloß der Wunsch des Täters, diese zu verwirklichen.

Nach der psychologischen Auffassung ist in dem zuletzt betrachteten Beispiel die Rücktrittsentscheidung des Täters freiwillig, weil in der Straftatsituation sich keine Umstände ergaben, die als Zwang interpretierbar wären, die dem Täter die Wahl zwischen mehreren Verhaltensalternativen weggenommen hätten. Nach der normativen Theorie der Willensfreiheit ist das Kriterium der Freiwilligkeit hier jedoch nicht erfüllt, denn die Vollendung der Tat war gemäß „verbrecherischer Logik“ nicht sinnvoll und somit hat der Täter nicht gezeigt, dass er zum gesetzestreu Verhalten zurückgekehrt ist.^{*31} In den Fällen, wo das Rücktrittsmotiv des Täters entscheidend ist, können die normative und die psychologische Auffassung zu unterschiedlichen Lösungen gelangen, denn gemäß der psychologischen Auffassung hat der Inhalt des Motivs des Täters und dessen ethische Verwerflichkeit oder auch Löblichkeit keine Bedeutung. Dasselbe gilt in Situationen, wo der Täter auf das Begehen der ursprünglich geplanten Straftat verzichtet, um später eine vorteilhaftere Straftat zu begehen, oder er sieht ein, dass seine Ziele in diesem Fall auch ohne eine Straftat erreichbar sind.

Die Straftat kann deswegen im Versuchsstadium bleiben, weil bei ihrer Vollendung die für den Täter wichtigen Rechtsgüter beschädigt werden oder andere unerwünschte Folgen auftreten könnten, und der Täter deswegen nicht wünscht, die Tat zu Ende zu führen, obwohl ihn an sich nichts dabei hindert. Z.B. wenn der Täter eine Kirche sprengen will, dies aber unterlässt, weil er unmittelbar vor der letzten

²⁹ C. Roxin (Fn. 15), S. 594.

³⁰ H. W. Laufhütte, R. Rissing-van Saan, K. Tiedemann (Hrsg.) (Fn. 13), § 24/168.

³¹ C. Roxin (Fn. 15), S. 608.

Tathandlung erfährt, dass sich auch seine Eltern im Gebäude befinden, und das macht die ganze Situation für ihn unerwünscht.^{*32} Ähnlich ist die Lage im Fall, wo der Täter deswegen zurücktritt, weil er sieht, dass sein eigenes Haus in Brand geraten ist und der Löschung bedarf. In diesen Beispielen gibt es keine faktische Hindernisse zur Verwirklichung von Tatbestandsmerkmalen, aber es stellt sich die Frage, ob die bei der Straftatbegehung aufgetretenen Umstände, die sich unmittelbar auf die Entscheidung des Täters über die Vollendung der Straftat einwirken, als die Freiwilligkeit ausschließender Zwang zu betrachten sind. Über die Lösungen dieser Fälle gibt es in der Rechtsliteratur keine Einigkeit. Nach der normativen Theorie handelt es sich um keinen freiwilligen Rücktritt, denn die Entscheidung des Täters, die Straftat nicht zu Ende zu führen, ist nicht von der Rückkehr zum gesetzestreuen Verhalten bedingt, sondern von dem Umstand, dass es situationsbedingt für den Täter wichtiger ist, das für ihn wertvollere Rechtsgut zu retten.

Die Vertreter der psychologischen Theorie sind bezüglich der Einwirkung solcher Umstände auf die Freiwilligkeit unterschiedlicher Meinung. Ein Teil der Autoren findet, dass die Kriterien der Freiwilligkeit erfüllt sind, wenn es für die Vollendung der Tat deswegen keine Hindernisse gibt, weil es keine faktische Umstände gibt, weswegen es für den Täter unmöglich wäre, den Tatbestand zu verwirklichen, der Täter aber trotzdem entscheidet, die Straftat nicht zu Ende zu führen. Vom freiwilligen Rücktritt kann aber dann keine Rede sein, wenn der Täter etwa den in Brand geratenen Wagen für die Begehung der Straftat benötigt hätte; dann wäre die Begehung der Straftat ja unmittelbar verhindert. Dennoch wird der Standpunkt vertreten, dass wenn es eine Gefahr für die wesentlichsten Rechtsgüter des Täters wie Leben, Gesundheit und Freiheit gibt, die Freiwilligkeit ausgeschlossen ist, denn in einer solchen Situation kann der Täter nicht als der Herr seiner Entscheidung angesehen werden.^{*33}

Mit dieser Lösung sind allerdings nicht alle Vertreter der psychologischen Theorie einverstanden, sondern sie finden, dass es den Zwang zu sehr einschränkt, wenn er bloß zu den für den Täter wichtigsten Rechtsgütern verbunden wird. Nach dieser Ansicht ist der Täter auch in den vorher beschriebenen Fällen in seiner Entscheidung nicht frei, denn im Vergleich zu seiner ursprünglichen Vorstellung hat sich in der Straftatbegehungssituation ein neuer Umstand erwiesen – die Beschädigung der dem Täter wichtigen Rechtsgüter, deren Rettung auf die Psyche des Täters dermaßen einwirkt, dass seine Entscheidung nicht als freiwillig betrachtet werden kann.^{*34} So eine negative Folge ist für den Täter vergleichbar mit der Erhöhung des Risikos der Entdeckung seiner Straftat und der darauffolgenden Strafe, und somit ist die Freiwilligkeit ausgeschlossen.

Falls es mehrere Gründe gibt, weswegen der Täter auf die Vollendung der Straftat verzichtet, ist festzustellen, welcher Grund der wichtigste war, der den Täter dazu leitete, die Straftat nicht zu Ende zu führen, und aufgrund dessen zu prüfen, ob der Rücktritt freiwillig war oder nicht.^{*35}

6. Fazit

Freiwilligkeit als Element des Rücktritts von der versuchten Straftat verbindet das Nichtzuendeführen der Straftat mit der konkreten Entscheidung des Täters und schafft dadurch die Grundlage, von dem Schuldvorwurf gegen den Täter für den begangenen Versuch abzusehen. Auf die Frage, wann die Entscheidung des Täters, die Straftat nicht zu Ende zu führen, seinen freien Willen ausdrückt, vermögen die Strafrechtstheorie und -Praxis keine klare Antwort zu geben. Nur im Fall, wenn dem Täter die tatsächliche Möglichkeit fehlt, die Straftat zu vollenden oder das von ihm erwünschte Ziel zu erreichen, wird erkannt, dass die Frage um die Freiwilligkeit ausgeschlossen ist und es sich um einen misslungenen Versuch handelt. Die Frage nach der Freiwilligkeit ergibt sich dann, wenn es dem Täter faktisch möglich ist, die Tat zu Ende zu führen, er aber entscheidet, darauf zu verzichten. Eine genauere Definition des Inhalts und der Grenzen des Begriffes der Freiwilligkeit dieser Entscheidung hat die Strafrechtswissenschaft noch zu leisten. Also kann man zusammenfassend konstatieren, dass die Freiwilligkeit für den Rücktritt vom Versuch sowohl der Eck- als auch der Stolperstein ist: ohne des Begriffes der Freiwilligkeit ist es unmöglich, den Rücktritt vom Versuch zu begründen, eine klare Antwort auf ihre Bestimmung gibt es aber nicht.

³² *Ibid.*, S. 606–607.

³³ U. Kindhäuser. Strafesetzbuch. NomosKommentar. 3. Aufl. Baden-Baden: Nomos 2006, § 24/70.

³⁴ A. Schönke, H. Schröder (Fn. 11), § 24/49.

³⁵ U. Kindhäuser (Fn. 33), § 24/75.



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State Fees: Is the Legislator Free in Setting the Rates of State Fees?

An Estonian Example

1. Introduction

The fundamental principles of a fair trial that are largely accepted across national legal systems stipulate that everyone is entitled to a fair trial within reasonable time by means of an impartial tribunal that has been established by law.^{*1} The same principles are stipulated in the Constitution of the Republic of Estonia.^{*2} Effective access to justice constitutes a part of these fundamental rights. The right to a fair trial is worthless if one cannot access the judicial system; hence, one of the core obligations of a state is to provide a justice system that is available to those who need it. Constitutional rights, in German legal tradition and according to the European Court of Human Rights (ECtHR) itself, operate vertically, restricting a state's actions and obliging the state to ensure that individuals' basic human rights are honoured.^{*3}

The right to a fair trial and access to justice as a fundamental right can, however, be regulated or otherwise restricted by law. However, the legal boundaries must be reasonable, because the civil procedure has many functions. In the Nordic countries, it is seen mostly as a format for conflict resolution, but a fairly wide perspective is adopted, and the procedure has social aspects too.^{*4} It is not only used for conflicts between parties; it is applied also for wider legal disputes, and the aim of any proceedings is to strengthen substantive law, giving the parties and the whole of society a complete guide to behaving correctly in certain legal situations. In light of this approach, the right and opportunity for an individual to defend his or her own rights and freedoms in court have a much wider value.^{*5} Accordingly, the state has an even stronger obligation to provide legal options for obtaining access to justice.

Restrictions on exercising the right to be able to access the justice system may be administrative in nature. State fees are one of the ways in which the number of cases, and the workload of the courts, can be reduced.

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 6.

² The Constitution of Estonia ['Eesti Vabariigi põhiseadus'], §§15, 24, and 146. – RT 1992, 26, 349; RT I, 2007, 43, 311 (in Estonian).

³ A. Barak. Constitutional rights and private law. – D. Friedman (ed.). *Human Rights in Private Law*. Oxford and Portland, Oregon: Hart Publishing 2001, p. 24.

⁴ B. Lindell. *Partsautonoomins gränser*. Hallsberg: Iustus, 1988, p. 87.

⁵ L. Ervo (ed.). *The Europeanisation of Procedural Law and the New Challenge to Fair Trial*. Groningen: Europa Law Publishing 2009, p. 24.

Administrative restrictions such as state fees have several goals, one of these being to direct conflicting parties to compromise. Most private legal disputes can be resolved by means of a settlement^{*6}, so it is not seen as unfair to require those parties who are involved in civil litigation to pay for access to the courts. However, it should never lead to a situation wherein only private justice can be carried out for civil matters. The rule of law and access to one's constitutional rights have to be ensured through state justice,^{*7} and the fees should be only so great as is necessary for covering the direct costs of the conflict resolution and to avoid so-called empty cases. Both options—private justice and state justice—have to be free of charge for the parties involved. At the very least, the choice must not be made merely because one system is economically more accessible than the other. The state fee system can serve as a limit to unreasonable, empty cases wherein there is no right that must be defended, but the fees must not instead be a way of topping up the state budget. The ECtHR has clearly established in its judgments that a person's economic status shall not constitute an impediment to that person's access to the courts.^{*8} This is where the state has an obligation to provide assurance that court fees are at a reasonable level. The Supreme Court of Estonia has ruled^{*9} that the higher the rates of the state fees are, the more intensively a person's fundamental rights are restricted.

2. The legislative process: Radical changes in the rates of state fees in 2008

A new version of the Code of Civil Procedure entered into force on 1.1.2006^{*10}, and major changes were made after nearly three years of practice, in 2008. Amendments prepared by the Ministry of Justice were presented to Parliament on 11.2.2008. According to the explanatory letter^{*11}, the aim with the amended form of the regulation was to lower the costs of civil litigation for the state, reduce the average length of proceedings, and give economically disadvantaged people better options for access to civil litigation.^{*12} The explanatory letter stated that neither the increase in the national budget nor the rise in income for it were foreseen when the amendments were drawn up.^{*13}

The original version of the draft did not include provisions for changing the rates for state fees for the courts.^{*14} Amendments for the draft were presented to the parliamentary Legal Affairs Commission^{*15}, while the draft was being deliberated in Parliament. The leading commission, which was the Legal Affairs Commission, held three meetings in which the draft was discussed, and the minutes of those meetings^{*16} indicate that the matter of state fees was not discussed at all. An amended draft, which included the new Annex 1 to the State Fees Act, radically increasing the rates at which state fees were to be set^{*17}, was passed by Parliament on 18.11.2008 between its first and second reading. From the transcripts of the parliamentary

⁶ Under the principle of private autonomy.

⁷ L. Ervo (see Note 5), p. 24.

⁸ See, for example, the ECtHR judgment of 9 October 1979 on Application 6289/73, *Airey v. Ireland*; ECtHR judgment of 21 February 1975, Application 4451/70, *Golder v. Great Britain*.

⁹ Judgement of the constitutional review chamber, 15.12.2009, 3-4-1-25-09.

¹⁰ Tsiviilkohtumenetluse seadustik, adopted on 20.4.2005, as entering into force on 1.1.2006. – RT I 2005, 26,197 (in Estonian). Available in English at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90041&keel=en&pg=1&ptyyp=RT&tyyp=X&query=tsiviilkohtu>.

¹¹ Tsiviilkohtumenetluse seadustiku ja sellega seotud seaduste muutmise seaduse eelnõu ['Draft Amending the Code of Civil Procedure and Related Acts'], 194 SE III. Available at <http://www.riigikogu.ee/?page=eelnou&op=ems2&emshelp=true&eid=240492&u=20130318132921> (in Estonian).

¹² *Ibid.*, p. 65.

¹³ *Ibid.*, p. 66.

¹⁴ The rates for the state fees in court depend on the value of the claim and are stipulated in the State Fees Act's §57 and Annex 1. The principles for the levying of state fees are identical to those stipulated in the current State Fees Act ['Riigilõivuseadus'], passed on 22.4.2010 and entering into force on 1.1.2011. – RT I 2011, 21, 23 (in Estonian). Available in English at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=2012X05K2&keel=en&pg=1&ptyyp=RT&tyyp=X&query=riigil%F5ivuseadus>.

¹⁵ The Legal Affairs Commission is one of the standing commissions of the Riigikogu. For information about the Legal Affairs Commission, see <http://riigikogu.ee/index.php?id=34639>.

¹⁶ Minutes are available at <http://www.riigikogu.ee/?page=eelnou&op=ems2&emshelp=true&eid=240492&u=20130808151013> (in Estonian).

¹⁷ Riigilõivuseadus, adopted on 7.12.2006, which entered into force on 1.1.2007. – RT I 2006, 58, 439 (in Estonian).

session on 3.12.2008¹⁸, a member of the opposition, Ain Seppik, pointed out that during discussions by the Legal Affairs Commission, the reasons cited in favour of any increase in state fees were the following: fees were unreasonably low, and civil litigation must be cost-based. Also, an increase is a way of reducing the quantity of malicious and unreasoned claims. According to the transcripts of the parliamentary session, the issue was thoroughly discussed by the Legal Affairs Commission, although neither the minutes of the sessions of said commission nor the explanatory letter accompanying the draft referred to this. The transcripts for the 9.4.2008 session of Parliament reveal that costs in *ex officio* proceedings or proceedings on petitions were under discussion.¹⁹ The bill was passed by Parliament on 10.12.2008 and was published in *Riigi Teataja* on 31.12.2008. It entered into force on 1.1.2009, thus standing out as a unique example of a new law that entered into force literally overnight. This is something of which a state should not be proud.

To give the reader the chance to compare the rates, an example may be of use: a claim with a value of 200,000 euros would have cost a party 4,761.42 euros in 2008 but 8,308.51 euros in 2010.

An impact assessment for the draft law was not included to the explanatory letter, nor was one supplied to Parliament later. A verbal discussion in a parliamentary commission or a 15-minute speech from the opposition just before voting in the Riigikogu cannot serve as a substitute for an impact assessment. The primary starting point for the bill—the fact that civil litigation must be cost-based and fully paid for by the parties to the litigation—is contrary to the fundamental principles of receiving a fair trial in general. Access to justice is a strong element of this fundamental principle. As has been explained above, the civil procedure has a social dimension; it does not just resolve the conflict between parties. Hence, the development of the case law cannot be placed only on the shoulders of private individuals.

3. The judicial process: The results of the changes

Have the new legal conditions created an impediment to access to justice? It is difficult to assess the indirect impact of the above-mentioned amendments. All possible effects should have been assessed during the legislative process. Let us point out some facts and figures for determination of the results and formulate the hypothesis that raised state fees became a serious impediment to access to justice. No research has come to any conclusion on the question of how many claims, on account of lack of monetary resources, were not put before the courts or whether the reliability of the judicial system diminished because of the issue. The number of civil claims and payment orders sent to the courts increased from 2008 to 2010 and has fallen since then.²⁰ For the true picture, one has to dig more deeply into the statistics. The total number of claims has grown, but the statistics show²¹ that it has done so because the number of maintenance cases and labour cases has grown considerably, and so has the number of consumer credit claims. Both labour and maintenance claims are free of state fees, and with consumer credit claims the claimant is the person who has given the loan. It can be concluded here that even if the general number of claims has increased, the number of cases of claims in which one has had to pay a state fee has decreased.

To balance the potential obstacle to access to justice created by economic status, the law provides for asking the state to grant procedural assistance when bearing procedural costs is an issue.²² Statistics help a little here.²³ It is possible to apply for state assistance either before or after a claim has been filed with the courts. Before filing, an application for state assistance is considered to be a separate procedure, and it qualifies as a 'procedure' on the petition.²⁴ There are no specific statistics on how much the rate of application for such grants grew after the adoption of the amendments. In the statistics that have been collected, the procedure for granting procedural assistance before filing a claim is mentioned as 'other proceedings'

¹⁸ Transcript of the session of the Riigikogu of 3.12.2008: <http://www.riigikogu.ee/?page=eelnou&op=ems2&emshelp=true&eid=240492&u=20130318132921> (in Estonian).

¹⁹ Again, Ain Seppik, member of the opposition, in the first reading of the draft in the parliamentary session of 9.4.2008. Available at <http://www.riigikogu.ee/?op=steno&stcommand=stenogramm&pkpkaupa=1&toimetatud=1&toimetamata=0&date=1207752870&paeakord=1908#pk1908> (in Estonian).

²⁰ Judicial statistics at <http://www.kohus.ee/10925> (in Estonian).

²¹ Here the comparison is between statistics for 2008 and 2009.

²² Code of Civil Procedure, §180.

²³ Judicial statistics at <http://www.kohus.ee/10925> (in Estonian).

²⁴ The Ministry of Justice, responsible for the administration of the court system, has only general statistics for the various proceedings that take place within its purview. For more details, see <http://www.just.ee/7729>.

on the petition. In 2008, the number of non-specific petitions was 2,536; in 2009, it was higher, at 4,216; and there were 6,070 cases in 2011. The growth factor in 2009 was 66.5%. More applications means more proceedings, court clerks, manpower, and time and money spent by the parties involved. Though the average length of proceedings has diminished^{*25}, this is due to other changes in procedural law.^{*26} On the other hand, these cases are resolved by assistant judges and the duration of processing of all civil matters that have been resolved by assistant judges grew at the same time.^{*27} There are no statistics collected on the amount of procedural assistance given by the state over the years.

It can be concluded that the state fees became an impediment to justice because the number of claims entailing payment of the state fee has gone down and the number and length of the various proceedings one must go through before one may present one's case before the court have grown. That is a direct impact of the changes.

The indirect impact and the real economic outcome for society are difficult to measure in any real way. Has the justice system maintained its reputation? Has the workload for the police grown on account of complaints that would normally fall within the sphere of civil litigation? How has the country's civil turnover decreased because of it? These questions cannot be answered here. Through work to even out the activities of the constitutional review chamber of the Supreme Court, the radical changes that were put in place have greatly increased the workload for the judicial system. A quick look at the Supreme Court's Web site shows that in 2008 the Supreme Court's constitutional review chamber dealt with no cases that were related to the matter of state fees. In 2009, that chamber issued two judgements declaring that state fees that were too high were unconstitutional, while in 2011 five judgements were handed down and for 2012 the number grew to 11 cases. In just the first three months of 2013, six judgements were issued on state fees and state assistance.^{*28}

4. The judicial process: The solution from the judicial system

One of the purposes for the separation of powers is the judicial review of legislative activities. In cases wherein the legislative power has failed to keep secure the fundamental rights of the parties involved, the Constitution provides a safety net for an individual in its §15, stipulating that the judiciary has an obligation to declare unconstitutional an act, legislative instrument, or measure that violates fundamental rights or freedoms provided for in the Constitution or that contravenes the Constitution.

The separation of powers as a limitation to constitutional legislature protects the decision-making independence of the judiciary, and this is a common foundation for democracy in the modern world. Here we are talking about decision-making^{*29} and not institutional independence.^{*30} The principle behind the separation of powers—namely, one of judicial power—is to protect judicial independence with regard to decision-making.^{*31} While the principle is of great constitutional value, the limitations to it are vague. There would seem to be a limit somewhere, and this may be defined through the definition of judicial power itself. It is the conclusive adjudication of any controversy between the parties who are involved in litigation that results in an authoritative and binding declaration of their respective rights and obligations according to

²⁵ According to the judicial statistics, the average length of processing of a civil case in 2009 and 2011 was 206 days and in 2012 was 197 days. Judicial statistics are available in Estonian at <http://www.kohus.ee/orb.aw/class=file/action=preview/id=58463/Kohtute+menetlusstatistika.2012.a.pdf>.

²⁶ Primarily because of the electronic filing system and other electronic and technical changes that regulate the service for procedural documents. See Chapter 33 of the Code of Civil Procedure.

²⁷ Statistics are not available, and the source of this information is the court information system.

²⁸ The total number of constitutional review cases in 2008 is 23. The figure for 2009 is 36, for 2010 is 14, for 2011 is 29, and for 2012 is 21. See <http://www.riigikohus.ee/?id=79> (in Estonian).

²⁹ P. Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations*. Oxford and Portland, Oregon: Hart Publishing 2009, p. 16.

³⁰ For more details, see M.H. Redish, *Federal judicial independence: Constitutional and political perspectives*. – *Mercer Law Review* 1995/46, p. 697.

³¹ P. Gerangelos (see Note 29), p. 311.

existing law.^{*32} It also has to ensure the decision-making independence of judicial power in any pending case, with protection from intervention by the legislative power. The judiciary has an obligation to resolve a pending case, and for just such a reason judicial activism is widely accepted in the European Union legal system. Judicial law-making in the European court context is something to which we are all accustomed.^{*33} Nonetheless, it is not always clear what the definition and substance of judicial activism should be^{*34}, and this article does not delve deeply into the various theories behind judicial activism.^{*35} Continental judges especially, who are seen for the most part as civil servants, rarely tend to strike down legislation that has been adopted by the national parliament. The judicial system is very conservative in character and tends to maintain stability and traditions.^{*36} Thanks to this, the law-making process that is a judge's purview and the outcome of this process can also be described with reference to these values.

The Constitution stipulates the separation of powers, so when a judge has to act as a legislator it is a matter of last resort. The problem of judicial law-making is that it has never been subjected to any democratic control in the way that the law-making process of a legislator usually is.^{*37}

The solution that was put force by the Supreme Court was conservative, and, as the boundaries for constitutional review are strict, it had little choice or option enabling it to assess the outcome. A recent case brought to resolution by the Supreme Court's *en banc* panel illustrates the problems related to limited assessment and the faults that are inherent in judicial law-making.^{*38} In declaring that the unconstitutional element was the rates rather than the principle that the parties have to cover the direct costs of the litigation by paying a state fee, the Supreme Court had to replace those unconstitutional rates. Limited time and resources played their part, and the Supreme Court decided to plug the gap in the applicable law by turning the clock back to 2006, to the previous redaction of the State Fees Act.^{*39} Within the process of judicial law-making, it is not possible to draft enforcement provisions, which is what would happen in the usual legislative procedure. In its judgements the Supreme Court was not able to explain that no retroactive power was given to the decisions. A direct consequence of this was the referred case wherein a party that had lost its case wanted to claim state fees back from the state, fees that had been paid by said party during the appeal. The Supreme Court stated that, as the party had been able to pay the state fee during the course of the action, the state fee's rate had not been an impediment and the party had missed its opportunity when the final judgement came into force.^{*40}

In brief conclusion, the judicial law-making process is not designed to replace the legislative law-making procedure; rather, it is only intended to repair its mistakes by declaring an act unconstitutional and fill in the gaps in the legal system. This kind of law-making process resolves only that individual issue that is being argued before the panel, not the systematic unconstitutional approach itself. According to the law,^{*41} the Supreme Court may decide only on the relevant provision of the act at hand. The Supreme Court has to declare the State Fees Act and its Annex 1 unconstitutional only provision by provision.

³² *Ibid.*, p. 314.

³³ A. Grimm. Judicial interpretation or judicial activism?: The legacy of rationalism in the studies of the European Court of Justice. – *European Law Journal* 2012 (18)/4, p. 520.

³⁴ G. Green. An intellectual history of judicial activism. – *Emory Law Journal* 2009 (58)/5, p. 1197.

³⁵ See also the debate between Hart and Dworkin.

³⁶ A. Tsoussi, E. Zervogianni. Judges as satisficers: A law and economics perspectives on judicial liability. – *European Journal of Law and Economics* 2010 (29), p. 335.

³⁷ A. Grimm (see Note 33), p. 523.

³⁸ Order of the Supreme Court *en banc*, 2.4.2013, case 3-2-1-140-12.

³⁹ The State Fees Act was changed in conjunction with the passage of the new Code of Civil Procedure in 2006.

⁴⁰ In its judgement of 28.2.2013, No. 3-4-1-13-12, the Supreme Court *en banc* stated that a party is allowed to claim back paid state fees but that the claim must be applied for with the court before the end of the process.

⁴¹ Põhiseaduslikkuse järelevalve kohtumenetluse seadus ['Constitutional Review Court Procedure Act'], §14 (2), adopted on 13.3.2002 and entering into force on 1.7.2002. – RT I 2002, 29, 174 (in Estonian).

5. The reaction: Lowering state fees and raising the value of the claim

In reaction to the rulings, the Ministry of Justice prepared a draft for a new version of the State Fees Act, along with provisions for addition to the Code of Civil Procedure that stipulated the value of an action, all of which were introduced in July 2012.^{*42} According to the explanatory letter^{*43}, the Ministry of Justice had compiled information and analysed state fee rates from EU countries that operate a similar system of state fees.^{*44} The final outcome was predictably depressing. For small claims, the difference in state fees between Estonia and other EU countries was minimal. For example, when it came to state fees for a claim of up to 639.11 euros, the average difference was nine per cent. The greater the amount being claimed, the greater was the difference. In the case of a claim for 28,760.24 euros, the state fee in Estonia was 2,876.02 euros, and the average rate of state fees for those countries analysed was 745.10 euros.^{*45} The greatest difference between the state fees in Estonia and those of other countries was a whopping 413%, and the average difference was a still hefty 334.93%. The question of how it had not been possible to perform a study or read one three years earlier remains.^{*46} The Supreme Court reached its first judgement on the matter in December 2009, and the draft had only reached the point of being submitted to Parliament in April 2012.

With a rare spirit of near-unanimity, Parliament voted to support the draft.^{*47} The amendments to the State Fees Act and the Code of Civil Procedure were adopted on 6.6.2012, and the bill entered into force on 1.7.2012. The draft changed §133 of the Code of Civil Procedure, specifically a provision stipulating that the value of an action shall be calculated with respect to the principal claim, with collateral claims not being taken into account in determination of the value of an action. The new regulation imposed through the draft calculates collateral claims as part of the value of an action, and surely one has to pay the state fee for that.

The best intentions may end up with a mess, and this is just what happened to the new regulation, as it was contrary to the EU regulation on small claims.^{*48} The preamble to the latter regulation clearly stipulates that, for the purpose of facilitating calculation of the value of a claim, all interest, expenses, and disbursements should be disregarded.^{*49}

The *jura novit curia* principle applies here, but the truth is that the majority of judges do not take European elements into consideration when they are judging a case. In their role as European judges, Estonian judges find themselves overruling legislation once again. The only possible outcome is not to apply the Civil Procedure Act's §133 and to decide on the value of an action against the main claim itself in cases involving the European small-claims procedure. The legislator has put the citizens of other EU member states in a better position than Estonian citizens, and this may constitute unfair treatment. A difference in the value of an action may be justified, and any cross-border element may constitute justification for claims of unfair treatment. Besides unequal treatment and the infringement of legal clarity, the consequences of the regulation may include forum-hunting. The model for the Estonian small-claims procedure was European regulation, which makes it hard for the author to see the justification for the new regulation in the Code of Civil Procedure. The European court has indicated, in its case law^{*50}, that even in purely internal cases a preliminary ruling may be issued and the opinion of the European court may be used in implementation of

⁴² The Ministry of Justice presented the draft act to the Riigikogu on 2.4.2012.

⁴³ Explanatory letter associated with Draft Law 206 SE. Available at <http://www.riigikogu.ee/?op=ems&page=eelnou&eid=66ff74e2-679c-4088-9d57-f404ba313b4a&> (in Estonian).

⁴⁴ In Estonia, the rate for state fees depends on the value associated with the action in question. The situation is similar in other EU states: Poland, Portugal, Austria, Great Britain, Latvia, Italy, and Slovenia.

⁴⁵ The difference is 285.99%.

⁴⁶ A6-0387/2006 final.

⁴⁷ According to the transcript of the Riigikogu session, 83 members voted for this. See <http://www.riigikogu.ee/?op=steno&stcommand=stenogramm&date=1338980700#pk10558> (in Estonian).

⁴⁸ Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007, establishing a European Small Claims Procedure. – OJ L 199, 31.7.2007.

⁴⁹ Recital 10.

⁵⁰ C-448/98, *Guimont*, para. 23. – ECR 2000, p. I-10663; Case C-451/03, *Servizi Ausiliari Dottori Commercialisti*, para. 29. – ECR 2006, p. I-2941; Joined Cases C-94/04 and C-202/04, *Cipolla and Others*, para. 30. – ECR 2006, p. I-11421; Joined Cases C-570/07 and C-571/07, *Blanco Pérez and Chao Gómez*, para. 36. – ECR 2010, p. I-0000.

national law. In particular, if the rights granted by national law to a national of a given Member State differ from those that a national of another Member State who is in the same situation may enjoy, those rights derive from European Union law.

6. Conclusions

The subject of state fees seems to be a source of constant and never-ending discussion for lawyers and a valuable stage for politicians. It is also a huge burden for the average person on the street who has a difficult problem that could be solved very easily through the courts if only he or she were able to pass through the doors of justice in the first place. Lack of a general impact assessment and the miscalculation of the state's obligations can lead to years of disputes and violations of basic rights. The Estonian courts have shown their ability to adjudicate fairly in cases in which the legislator has failed to fulfil its own duties. This article, in explaining the extent of the latter process and the consequences that may be involved therein, also advocates strongly for the legislator's attention to the primary meaning of state fees in civil procedures. They are meant not to satisfy the needs of the state (or the state budget) but to provide balanced access to justice. Non-existent or incorrectly focused impact assessment and an incorrect understanding of the state's obligations can lead to a greater administrative burden for all parties involved, including the state itself. Although the judiciary may act as a legislator in order that the fundamental rights of an individual may be protected, the space for manoeuvring is limited and in the long run judicial law-making is not meant to act as a substitute for the legislative process.



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Das römischrechtliche *precarium* im deutsch-baltischen und estnischen Recht:

eine Besonderheit aus der estnischen Rechtsgeschichte^{*1}

Einleitung

Das antike römische Recht kannte einen vermögensrechtlichen Vertrag, der für die heutigen Privatrechtsordnungen kaum noch bekannt erscheint: *precarium*. Die Hauptquelle für unsere Kenntnisse über das römische *precarium* sind die Digesten, die auf Befehl des Kaisers Justinian in den Jahren 530–533 zusammengestellt sind und die die Fragmente der Juristenschriften aus der klassischen Zeit (27 v Chr – 283 n Chr) enthalten. Der 26. Titel des 43. Buches der Digesten heißt *de precario* und behandelt in 22 Fragmenten die unentgeltliche Überlassung zum freien Gebrauch. Zum *precarium* konnten sowohl körperliche Sachen als auch die Rechte wie die Wegedienstbarkeit (Dig. 43.26.3) gegeben werden. Von körperlichen Sachen werden in den Quellen Sklaven und Sklavinnen und auch Land genannt (Dig. 43.26.2.3; 43.26.6.2; 43.26.10.). Die Überlassung des Landes zum freien Gebrauch von Patronen an Klienten hat ihren Ursprung wahrscheinlich auch im *precarium*.^{*2} Viel mehr weiß man über den Anwendungsbereich dieses Vertrages im antiken Rom nicht.

Auch im Mittelalter hat das gemeineuropäische *ius commune* das antike römische *precarium* beibehalten. Helmut Coing bleibt in seiner Gesamtdarstellung des älteren *ius commune* in dem Punkt dieses Nachlebens von *precarium* allerdings sehr knapp und sagt nur, dass es ebenso verwendet wurde „wie es im *Corpus Iuris* erscheint”.^{*3} Etwas näher behandelt Coing den Schwestervertrag des kanonischen Rechts, *precaria*, der von der Kirche verwendet wurde, um ihr Land für die willigen Leute auf deren Bitte zur Nutzung zu geben. Insoweit war der Vertrag damals ähnlich etwa der Bittleihe oder der Erbleihe oder dem Erbzins^{*4}

¹ Diese Untersuchung ist durch den Forschungsgrant ETF 9209 der estnischen Wissenschaftsstiftung unterstützt worden.

² M. Kaser. Das römische Privatrecht. Abschnitt 1, Das altrömische, das vorklassische und klassische Recht. 2. Aufl. München: Beck 1971, S. 388.

³ H. Coing. Europäisches Privatrecht. Band I: Älteres Gemeines Recht (1500 bis 1800). München: Beck 1985, S. 371.

⁴ S. F. Klein-Bruckschweiger. Art. Erbleihe. – Handwörterbuch zur deutschen Rechtsgeschichte. 1. Aufl. Bd. 1. A. Erler, E. Kaufmann (Hrsg.). Berlin: Schmidt 1971, Sp. 986–987; C. Neschwara. Art. Erbzins. – Handwörterbuch zur deutschen Rechtsgeschichte. 2. Aufl. Lief. 6. A. Cordes et al. (Hrsg.). Berlin: Schmidt 2007, Sp. 1392–1393.

oder noch weiteren vielfältigen Rechtsfiguren, die alle für die Übertragung der Nutzungsrechte an Boden dienten, ohne den Übergang des Eigentums herbeizuführen. Es war die Welt des geteilten Eigentums,^{*5} wie dies im ständisch konstituierten und gebundenen *ancien régime* charakteristisch war.^{*6} Wir kennen diese vor allem von der Beziehung zwischen dem Gutsherr und den (leibeigenen) Bauern. Dass die (katholische) Kirche Großgrundbesitzer war und neue Rechtsinstitute erfunden hat, um seine Besitzungen zu bewirtschaften, ist heutzutage vielfach in Vergessenheit geraten, vor allem in ehemals reformierten und später tiefgreifend säkularisierten Nordeuropa.

Die Abschaffung des geteilten Eigentums und Vereinheitlichung jenes zum sogenannten absoluten Eigentum gilt als einer der wichtigsten Ecksteine der juristischen Modernisierung.^{*7} In der zweiten Hälfte des 19. Jahrhunderts, als in Europa die ständischen Schranken meistens schon abgebaut waren, das geteilte Eigentum an dem Boden darunter, haben die Territorien des heutigen Estland und Lettland, damals der baltischen Ostseeprovinzen des russischen Reichs eine neue Privatrechtskodifikation bekommen. Jener dritter Band des „Provinzialrechts der Ostsee-Gouvernements“ oder „Liv-, Est- und Curlaendisches Privatrecht“ (hier weiterhin LECP) wurde 1864 vom russischen Zaren Alexander dem II. bestätigt und 1865 in Kraft gesetzt.^{*8} Obwohl das Gesetzbuch in der europäischen Modernisierungszeit verfasst war, kann man es nicht als eine Kodifikation des modernen Privatrechts bezeichnen. Dies nicht nur, weil da die mittelalterlichen Rechtskreise und Rechtspartikularismus beibehalten und sorgfältig geregelt sind, sondern auch, weil man im LECP eine Reihe der Rechtsinstitute gesetzlich festgelegt hat, die dem Inhalt und grundsätzlicher Struktur nach dem vormodernen *ancien régime* angehören.^{*9} Es gehört darunter auch etwa die gesetzliche Festlegung des geteilten Eigentums sowohl im Allgemeinen^{*10} als in den einzelnen Rechtsinstituten und Vertragstypen. Dazu gehören etwa der schon erwähnte Erbzins, ebenso das *precarium*, dessen römischrechtliche Charakter im LECP, die Bedeutung in der Rechtspraxis der Ostseeprovinzen der Zarenzeit wie auch sein späteres Nachleben in der Privatrechtsentwicklung der Republik Estland wir hier näher betrachten werden. Es gibt einen berühmten estnischen Spruch: „Wer die Vergangenheit vergisst, lebt ohne Zukunft“. Auch für die Rechtswissenschaft ist es von Nutzen, sich an die Vergangenheit zu erinnern, um nicht zufällig in die Fallen der Geschichte zu geraten.

1. Das römischrechtliche *precarium* im LECP

LECP gilt als eine Privatrechtskodifikation, die zwar im russischen Reich in deutscher Sprache verfasst war, dem Inhalt nach aber vor allem vom römischen Recht beeinflusst sein sollte. Vor allem die jüngere estnische Forschung hat die These der römischrechtlichen Prägung von LECP in der letzten Zeit wenn auch nicht in Frage gestellt, dann doch zu den erheblichen Differenzierungen in diesem Zusammenhang gezwungen.^{*11}

⁵ S. H.-R. Hagemann. Art. Eigentum. – Handwörterbuch zur deutschen Rechtsgeschichte. 2. Aufl. Lief. 6. A. Cordes *et al.* (Hrsg.). Berlin: Schmidt 2007, Sp. 1274 ff.; A. Thier. Art. Geteiltes Eigentum. – Enzyklopädie der Neuzeit. Bd. 4. F. Jaeger (Hrsg.). Stuttgart: Metzler 2006, Sp. 769–771.

⁶ In der jüngsten Literatur hat vor allem Joachim Rückert den grundlegenden Unterschied zwischen dem vormodernen – oder wie er es nennt: „gebundenen“ – und modernen, „freien“ Privatrecht präsentiert. Zusammenfassend dazu: J. Rückert. Das BGB und seine Prinzipien: Aufgabe, Lösung, Erfolg. – Historisch-kritischer Kommentar zum BGB. Bd. 1. M. Schmoeckel, J. Rückert, R. Zimmermann (Hrsg.). Tübingen: Mohr Siebeck 2003, Rn. 69 ff., S. 76 ff.

⁷ S. dazu immer noch grundlegend J. W. Hedemann. Die Fortschritte des Zivilrechts im XIX. Jahrhundert: Ein Überblick über die Entfaltung des Privatrechts in Deutschland, Österreich, Frankreich und Schweiz. Zweiter Teil: Die Entwicklung des Bodenrechts von der französischen Revolution bis zur Gegenwart. 1. Hälfte: Das materielle Bodenrecht. Frankfurt/Main: Sauer & Auvermann 1968 (Neudr. der Ausg. Berlin 1930), S. 2 ff.

⁸ Einen guten Überblick, auch zur älteren Literatur dazu, bietet B. Dölemeyer. Das Privatrecht Liv-, Est- und Kurlands von 1864 (Teil III des Provinzialrechts der Ostseeprovinzen des Russischen Reichs). – Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte. Bd. 3, Teilbd. 2. H. Coing (Hrsg.). München: Beck 1982, S. 2076–2090.

⁹ Zu den rechtspolitischen Lösungen bei der Kodifikation der baltischen Privatrechte: M. Luts. Privatrecht im Dienste eines 'vaterländischen' provinzialrechtlichen Partikularismus. – Rechtstheorie 2000/31, S. 383–393; eine ausgedehntere Version: *Idem*. Private Law of the Baltic Provinces as a Patriotic Act. – Juridica International: Law Review of Tartu University 2000 (V), S. 157–167.

¹⁰ Eingehend über das geteilte Eigentum und Erbzins im LECP: M. Luts-Sootak. Die baltischen Privatrechte in den Händen der russischen Reichsjustiz. – Rechtsprechung in Osteuropa. Studien zum 19. und frühen 20. Jahrhundert. Z. Pokrovac (Hrsg.). Frankfurt/M: Klostermann 2012, S. 304 ff.

¹¹ Grundlegend zuletzt H. Siimets-Gross. Das „Liv-, Est- und Curlaendische Privatrecht“ (1864/65) und das römische Recht im Baltikum (= Dissertationes iuridicae universitatis Tartuensis 33). Tartu: Tartu University Press 2011; zugänglich auch:

Beim *precarium* sollen wir allerdings gleich zugeben, dass es ein durchaus römischrechtlicher Vertragstyp war und dass es ohne Zweifel im LECP steht. Im Art. 3765–3776 LECP gibt es zwischen dem „Leihcontract“ (Art. 3743–3764) und dem „Depositum oder Verwahrungsvertrag“ (Art. 3777–3814) den in zwölf Artikeln (2765–3776) geregelten Vertrag namens „Precarium oder Gunstrechtsvertrag“. Die Legaldefinition in LECP lautet wie folgend:

„3765: Durch das Precarium oder den Gunstrechtsvertrag wird von dem einen Paciscenten auf den andern der Besitz und freie Gebrauch einer Sache unentgeltlich unter der Verbindlichkeit übertragen, dieselbe zu jeder Zeit, auf Verlangen des Gebers, wieder zurückzugeben.“

Es war also eine Art Leihvertrag, der sich von dem eigentlichen Leihvertrag wie es im LECP geregelt war, durch die Merkmale wie Unentgeltlichkeit, freier Gebrauch, Ziehung der Früchte und vor allem jederzeitige Widerrufbarkeit unterschied. Vor allem das Prinzip der Bestimmtheit der Dauer oder des Zwecks der Nutzung bei dem gewöhnlichen Leihvertrag wurde von den zeitgenössischen Autoren als entscheidend für das Bedürfnis nach einem separaten Precarium-Vertrag daneben angegeben.^{*12}

Anders als bei den westeuropäischen aber ähnlich wie bei den russischen Kodifikationen des 19. Jahrhunderts sollte im LECP nach der Vorgabe des Zaren auf die Quellen der Artikeltexte verwiesen werden.^{*13} Unter dem Art. 3765 stehen z.B. Quellenverweise auf Dig. 43.26.1 und 43.26.2.3. Das Precarium des LECP war ein römischrechtliches Institut auch äußerlich – bei allen Artikeln zum Precarium wurde in LECP ausschließlich auf die römischen Quellen verwiesen. Die bisherigen Erfahrungen bei der Forschung der Stimmigkeit der Quellenverweise im LECP haben gezeigt, dass es durchaus auch Fehlverweise gab – bis dahin, dass die verwiesene Quelle gar keinen Zusammenhang mit dem Artikeltext in LECP hatte.^{*14} Bei den sachenrechtlichen Artikeln konnten sogar alle Quellenverweise bei einem LECP-Artikel falsch sein. Bei den Artikeln über den Kaufvertrag waren die Verweise allerdings mehrheitlich richtig.^{*15} Dies gilt auch für das hier zu untersuchende schuldrechtliche Institut, Precarium. Die zwölf Artikel in LECP sind alle mit mindestens einem richtigen Quellenverweis versorgt, wenn auch nicht ganz übereindeckend. Bei dem hier oben zitierten Art. 3765 z.B. ist der erste Verweis im LECP-Text eigentlich sehr allgemein ausgedrückt. So ein Vorgehen ist bei diesem Gesetzbuch eher ungewöhnlich – meistens sind die Quellenverweise mit einer höheren Präzisionsebene angegeben. Dig. 43.26.1 hat nämlich vier Fragmente. Einige Merkmale wie etwa die Verpflichtung, die Sache jederzeit zurückzugeben, und die Vorschrift, dass der Prekarist den Besitz der Sache bekommt (Dig. 43.26.2.3.), sind auch in den verwiesenen Quellen auffindbar. Die Unentgeltlichkeit und freier Gebrauch sind aber nur indirekt aus den Quellen zu entnehmen. So basiert der Art. 3765 grob genommen in der Tat auf den verwiesenen römischrechtlichen Quellen, von einer wörtlichen oder auch inhaltlichen Übereindeckung kann man aber nicht sprechen. Es bleiben von Dig. 43.26.1. nämlich noch weitere zwei Fragmente übrig, die den Unterschied zu Schenkungs- und Leihvertrag behandeln. Es wäre also stimmiger gewesen, wenn der Redakteur von LECP seinen Quellenverweis noch um eine Ebene präzisiert hätte.

Ebenso wie die früheren Untersuchungen, ergibt auch die nähere Betrachtung der Regelung des Precariums im LECP das Ergebnis, dass die Quellenverweise sich manchmal nur auf einen Teil des Artikeltextes bezogen. So z.B. Art. 3772, wo dem Prekaristen das Recht auf die Früchte zugesprochen ist. Dieser Teil hat keine Bestätigung in verwiesenen römischen Quellen Dig. 43.26.1.1; 43.26.8.3.-4 und 43.26.14 Vom Recht des Prekaristen auf das Kind der Sklavin, die er als *precarium* besaß, hätte aber Dig. 43.26.10, nicht weit von den eigentlich verwiesenen Quellen, gesprochen – im LECP ist diese Quelle aber nicht erwähnt.

http://dspace.utlib.ee/dspace/bitstream/handle/10062/17524/siimets_gross_hesi.pdf (benutzt am 21.03.2013); auf das Untergehen der unmittelbaren Geltung des römischen Rechts nach dem Inkrafttreten der Kodifikation zugespitzt M. Luts-Sootak. Das Baltische Privatrecht von 1864/65 – Triumphbogen oder Grabmal für das römische Recht im Baltikum? – Zeitschrift für Ostmitteleuropa-Forschung 2009/58, S. 357–379; auf die umstrittene Weitergeltung des römischen Rechts im Fall der Gesetzeslücke konzentrierend H. Siimets-Gross. Das Liv-, Esth- und Curlaendische Privatrecht (1864/1865) – die einzige Quelle des Privatrechts? – Einheit und Vielfalt in der Rechtsgechichte im Ostseeraum. Sechster Rechtshistorikertag im Ostseeraum, 3.–5. Juni 2010 Tartu (Estland)/Riga (Lettland). M. Luts-Sootak, S. Osipova, F. L. Schäfer (Hrsg.). Frankfurt/M.: Lang 2012, S. 275–285.

¹² Näher dazu M. Luts-Sootak (Fn. 10), S. 325 ff. Die römischen Quellen haben zwar auch ein *precarium* auf Zeit gekannt (D. 43.26.4.4.–43.26.6.pr), das ebenfalls jederzeit widerrufbar war.

¹³ Eingehend zu diesen Quellenverweisen und deren Funktionen im LECP: H. Siimets-Gross 2011 (Fn. 11), S. 11–15, 83–117.

¹⁴ Näher H. Siimets-Gross. Das „Liv-, Est- und Curlaendische Privatrecht“ (1864/65) und das römische Recht im Baltikum (Fn. 11), S. 83–117, insbesondere S. 93.

¹⁵ *Ibid.*, S. 86–88.

Genau so war es auch mit der Regelung in LECP 3768, dass der Empfänger „nicht bloss Inhaber, sondern auch Besitzer der Sache [ist]; nur wird er in seinem Besitze bloß Dritten, nicht auch dem Geber gegenüber geschützt“. Die verwiesenen römischen Quellen betrafen nur den ersten Teil des Artikeltextes. Für den zweiten Teil über die Uneingeschränktheit des Rückforderungsrechts des Precariumgebers wäre Dig. 43.26.17 einschlägig gewesen, in LECP wird es aber auf dieser Stelle nicht erwähnt.

In einigen Fällen haben sich die römischen Quellentexte wiederholt, so dass nicht alle angeführten Verweise eigentlich nötig sind (LECP Art. 3772, 3769, 3768, 3767, 3773). Auch dieser Befund bestätigt die früheren Ergebnisse zu der Frage nach dem Verhältnis der Vorschriften in LECP zu den verwiesenen ursprünglichen Quellen des römischen Rechts. Immerhin, auch wenn manche Verweise überflüssig und manche nicht ganz richtig waren, wird der römischrechtliche Ursprung des Precarium-Vertrags in LECP dadurch nicht in Frage gestellt.

Die Treue der Kodifikation gegenüber dem Vorbild aus dem antiken römischen Recht hat bei dem Provinzialrechtsprofessor Carl Eduard Erdmann^{*16} etwas Irritation hervorgerufen^{*17}, wie übrigens auch die Einbeziehung des Begriffs des geteilten Eigentums in das Gesetzbuch.^{*18} Erdmann hat auch darauf hingewiesen, dass das Precarium schon im antiken Rom „den Charakter einer weniger von den Gesetzen als von dem guten Willen des Gebers abhängigen Vergünstigung“ hatte.^{*19} Da dieser Vertrag aber in der Kodifikation stand und damit zum geltenden Recht zählte, sollte Erdmann diesen doch in seinem großen „System“ mitbehandeln.^{*20} Es betrifft auch die späteren Verfasser im Bereich des ostseeprovinziellen Privatrechts: Vladimir Bukovskij^{*21} war in seinem Kommentar naturgemäß durch die Vorgaben der Kodifikation gebunden^{*22} und Igor Tjutrumov^{*23} hat in seinem Lehrbuch das baltische Precarium ebenfalls mitbehandelt.^{*24} In diesen russischsprachigen Werken wird der Vertrag als *dogovor ustupki* genannt, der wiederum als „Abtrittsvertrag“ ins Deutsche übersetzt werden könnte.

2. Das Precarium in der baltischen Gerichtspraxis

In wieweit der im Gesetzbuch geregelte Precarium oder mit anderen Namen Gunstrechtsvertrag in der ostseeprovinziellen Lebens- und Rechtspraxis relevant war, ist schwer zu sagen. Die Gerichtsentscheidungen sind meistens nicht veröffentlicht und es gibt auch keine Archivuntersuchungen zu dieser Fragestellung. In der kommentierten Ausgabe von LECP aus dem Ende der Zarenzeit gibt es keine höchstrichterliche

¹⁶ Erdmann (1841–1898) begann 1858 an der Universität Dorpat das Studium der Philosophie, 1859–1862 studierte er Rechtswissenschaft in Dorpat und Heidelberg und erwarb den Grad des Kandidaten. 1864–1869 war er Sekretärgehilfe und Ratssekretär in Mitau, 1869–1872 Universitätssyndikus in Dorpat. 1870 wurde er *mag. iur.* in Dorpat. 1870–1872 war er Privatdozent in Dorpat, 1872 erwarb er den Grad *dr. iur.* in Dorpat, 1872 wurde er außerordentlicher, 1873 ordentlicher Professor. 1893 wurde er im Zuge der Russifizierung der Universität entlassen und lebte bis 1898 im Ruhestand.

¹⁷ Vgl. C. E. Erdmann. System des Privatrechts der Ostseeprovinzen Liv-, Est- und Curland. Bd. 4: Obligationenrecht. Riga: Kymmell 1894, S. 276: „In Bezug auf die Rechte des Precaristen an der empfangenen Sache schließt sich die Codification – wohl ohne wirkliches Bedürfnis – dem Satze des römischen Rechts an [...]“.

¹⁸ C. E. Erdmann. System des Privatrechts der Ostseeprovinzen Liv-, Est- und Curland. Bd. 2: Sachenrecht. Riga: Kymmell 1891, S. 16 f und 19 f.

¹⁹ C. E. Erdmann (Fn. 17), S. 275.

²⁰ *Ibid.*, S. 275–277.

²¹ Bukovskij (1867–1937) hat 1894 die Rechtsfakultät der Universität zu St.-Petersburg absolviert und danach an verschiedenen Gerichten in St.-Petersburg, Mitau und Riga bis 1914 gearbeitet. Die Gerichtsbehörden wurden evakuiert und 1914–18 war er im Dienst des Höchsten Gesetzgebenden Rats. 1919 kehrte er zurück nach Riga. 1920–1937 gehörte er zur Redaktionskommission für das Zivilgesetzbuch Lettlands. 1921 hat er als Dozent an der Universität Lettland Zivilprozess- und Notariatsrecht gelehrt. 1931 seine Doktorarbeit verteidigt und konnte zum Professor ernannt werden. Seit 1934 war er Mitglied Zivilabteilung des Senats der Republik Lettland.

²² V. Bukovskij. Svod graždanskikh uzakonenij gubernij Pribaltijskikh [Sammlung der Zivilgesetze der Ostseegouvernements]. Bd. 2. Riga: Gempell 1914, S. 1607 ff.

²³ Tjutrumov (1865–1943) hat 1878 das Jurastudium an der Universität St.-Petersburg beendet. 1878–1881 blieb er an der Fakultät für die Vorbereitung zur Professur im Zivilrecht. 1881–1897 arbeitete er in verschiedenen Gerichten in Ljublin, Reval und am Dirigierenden Senat in der Abteilung für Bauersachen. 1903–1918 war er Privatdozent für Zivil- und Zivilprozessrecht an der Universität St.-Petersburg, hat daneben verschiedene Kurse gehalten und gleichzeitig 1905–1917 als oberster Staatsanwalt im Senat gewirkt bis er nach der Oktoberrevolution entlassen wurde. 1919 ist er nach Estland emigriert und wurde 1920 zum ordentlichen Professor für Zivilrecht und -prozess an der Universität zu Tartu.

²⁴ I. Tjutrumov. Graždanskoje pravo [Zivilrecht]. 2. Aufl. Tartu: Laakman 1927, S. 391.

Entscheidungen, obwohl es sonst in diesem Kommentar üblich ist.^{*25} Vom gedruckten Material kennen wir allerdings eine Entscheidung zum Precarium und vom ungedruckten Material eine weitere. Anhand des Registers zur Sammlung der Zivilrechtlichen Entscheidungen der rigaschen Magistratsgerichte lässt sich ein Fall zum Stichwort „Precarium oder Gunstrechtsvertrag“ ermitteln.^{*26} Es ging um die Verlangung „der Rückgabe von 50 Prämienbilleten I. Emission“, welche ein geisteskranker „G. aus Freundschaft dem F. zum Versatze bei einer Bank geliehen habe“. Nun war F. gestorben und die Kuratoren von G. haben diese Wertpapiere aus dem Nachlass des F. zurückverlangt. Die Beklagten Nachlasskuratoren behaupteten, es sei ein Precariumvertrag gewesen, wonach F. die Wertpapiere zum „freien Gebrauch“ bekommen hätte. F. habe diese auch frei gebraucht oder gar verbraucht, indem er sie schon zu Lebzeiten bei der Bank ausgelöst und anderweitig veräußert habe. Das Gericht fand dagegen, dass die Wertpapiere ausdrücklich „zum Versatz bei einer Bank“ geliehen waren. Das Erfordernis der Bestimmtheit des Zweckes sei also erfüllt und deshalb war der Vertrag als ein Leihvertrag, nicht als ein Precarium zu behandeln.

Obwohl das Gericht das Vorhandensein eines Precariumverhältnisses in diesem Fall verneint hatte, ist die Regelung als solche anerkannt worden. Es bleibt allerdings etwas unklar, was für Vorteil die Beklagten von dieser Berufung auf das Precarium erhofft haben – zur Rückgabe der Wertpapiere wären sie auch nach diesem Vertrag ebenfalls verpflichtet gewesen. Die Gerichtsentscheidungen in Zwingmanns Sammlung sind leider nur exzerptenweise publiziert^{*27} und so bleibt hier die eigentliche Abwehrstrategie der Beklagten anhand des Precariumvertrages ohne weiteren Archivrecherchen verborgen.

Die zweite uns bekannte Entscheidung wurde nicht von den provinziellen Gerichten gefällt, sondern vom obersten Gerichtshof des Zarenreichs, vom Dirigierenden Senat. Die Precarium-Entscheidung des Senats ist eine von insgesamt 71 grundstücksrechtlichen Entscheidungen, die im Zeitraum 1877–1889 aus dem Gouvernement Estland an den Senat gelangten. Der Fall ist als ein wichtiger Beispielsfall für die Fragestellung nach der Modernisierung des geltenden Gesetzesrechts durch den Senat eingehend behandelt worden mit dem Ergebnis, dass Senat auch in Bezug der grundsätzlich vormodernen Institute im LECP ganz gesetzestreu geblieben war und keine Modernisierungen *contra legem* vorgenommen hatte.^{*28}

Der Fall selbst kam aus der estländischen Grenzstadt Narva, wo der Magistrat im Jahr 1861 einen Raum in dem der Stadt gehörenden Börsenhaus der Großen Gilde „für die Einrichtung der Gildenstube in die unentgeltliche Benutzung“ gegeben hatte. Jener Beschluss sollte „bis zur Abänderung durch die Anordnung der höheren Obrigkeiten“ in Kraft bleiben.^{*29} Zu einer solchen Anordnung kam es nach 1877, als die allgemeine russische Städteordnung von 1870 auch an die baltischen Provinzen ausgedehnt wurde. Damit hat man die von Mittelalter stammende Rats- und Zunftverfassung der baltischen Städte abgeschafft. Die frühere Grosse Gilde hieß danach Bürgerverein „Grosse Gilde“. Die neue Stadtverwaltung von Narva hat von den ehemaligen Gildenbrüdern und nunmehr Vereinsmitgliedern entweder die Räumung des Raumes oder die Bezahlung der entsprechenden Miete verlangt und zwar auch nachträglich für die Zeit seit 1861. Der Bürgerverein seinerseits wollte im Fall der Räumung die verwendeten Renovierungskosten von der Stadt ersetzt bekommen.

Bei der Entscheidung, welchen Ansprüchen stattzugeben ist, hat sich mehrfach die Frage nach der Rechtsgrundlage des Nutzungsrechts gestellt. In verschiedenen provinziellen Instanzen wurde es z.B. als ein Wohnungsnutzungsrecht, d.h. als ein persönliches Servitut behandelt. Als die Sache aber zum zweiten Mal und zwar auf der Vollversammlung des Senats zur Entscheidung kam, ist jenes Gremium bei der Bestimmung des Vertragstyps dazu gekommen, dass zwischen den Parteien ein Gunstrechtsvertrag oder Precarium geschlossen sei. Durch das Zurückgreifen auf den Precariumvertrag hat sich die Vollversammlung von der

²⁵ V. Bukovskij (Fn. 22), S. 1607 ff.

²⁶ Nr. 1117. Querelbescheid des Raths vom 3. März 1882, Nr. 1529. – Zivilrechtliche Entscheidungen der Riga'schen Stadtgerichte. Bd. 6. V. Zwingmann (Hrsg.). Riga: Betz 1883, S. 266–268. Von dem Assessor des Landvogteigerichts Victor Zwingmann in den Jahren 1871–1888 herausgegebene 8-bändige Entscheidungssammlung ist die einzige größere publizierte Sammlung der Gerichtsentscheidungen der baltischen Gerichte. Näher zu der Bedeutung der Praxis im Allgemeinen und zu der Publikation der baltischen Gerichtsurteile M. Luts-Sootak (Fn 10), S. 343 ff.

²⁷ Dass Zwingmann nur Auszüge und keine volle Entscheidungen publiziert hatte, wurde schon zeitgenössisch als ein Nachteil seiner Sammlung empfunden. Vgl. S. [Rezension:] Zivilrechtliche Entscheidungen der Rigaschen Stadtgerichte. Band VIII. V. Zwingmann (Hrsg.). Riga 1888. 368 S. 8°. – Zeitschrift für Rechtswissenschaft, Dorpat 1891/10, S. 69.

²⁸ M. Luts-Sootak (Fn. 11), S. 324 ff.

²⁹ Senatsukas der Vollversammlung der 1. und 3. und Heraldikdepartements in der Sache der Stadtverwaltung von Narva gegen das Bürgerverein Große Gilde von Narva wegen des Raums im Börsenhaus, 14 April 1880. – Estnisches Historisches Archiv 858–1–88, Bl. 64.

Prüfung der Frage befreit, ob die verwendeten Renovierungskosten notwendig oder nützlich waren, wie es bei der Qualifikation des Rechtsverhältnisses als Servitut oder auch von dem Appellanten nun behaupteten Leihvertrag notwendig gewesen wäre. Das Precarium hatte eben ein unentgeltliches, aber auch sehr schwaches Nutzungsrecht begründet und die verwendeten Kosten waren danach nicht zu ersetzen (LECP 3772). Bei diesem Fall war aber merkwürdig, dass der Senat, ganz entgegen seinen sonst eingehaltenen und öfters betonten Grundsätzen, aus eigener Initiative heraus die Rahmen der Appellation überschritten hatte. Der Streit war damit zugunsten der russisch geprägten Stadtverwaltung und zu Ungunsten der wesentlich deutschen Gilde entschieden. Hier ist allerdings von Bedeutung, dass die Anerkennung des gesetzlichen Angebots eines Precariums nicht von den ostseeprovinziellen Streitparteien kam, sondern von der hohen russischen Reichsbehörde auf das Rechtsverhältnis aus der eigenen Initiative aufgezwungen wurde. Es bleibt damit nur der von Zwingmann mitgeteilte Fall vor dem Rigaschen Waisengericht und Rat übrig, wo wir mit Sicherheit wissen, dass in der baltischen Gerichtspraxis jemand auf den gesetzlich geregelten Precariumvertrag berufen hatte. Wie schon gesagt, wissen wir leider nicht, was man von dieser Berufung eigentlich erhofft hatte.

3. Das Nachleben des Precariums in der Republik Estland in der Zwischenkriegszeit des 20. Jahrhunderts

Im Wirren des Ersten Weltkriegs und der Revolutionen hatten sich mehrere kleinere Nationalstaaten von den ehemaligen großen Imperien emanzipiert, so auch Estland im Jahr 1918. Zum eigentlichen Aufbau des neuen Staates konnte man allerdings erst nach dem Eintritt des Friedens im Jahr 1920 schreiten. Im Jahr 1920 hat man durch das Gesetz über die Abschaffung der Stände^{*30} in Estland die Geltung des LECP für die ganze Bevölkerung ausgedehnt.^{*31} Die darin kodifizierten ständischen Unterschiede und Besonderheiten hat man durch eine Generalklausel für ungültig erklärt.^{*32} Die vormodernen Rechtsinstitute der Ständegesellschaft blieben aber im LECP unangetastet und somit auch in der Republik Estland, wie übrigens auch in dem ebenfalls verselbständigten Nachbarstaat – in der Republik Lettland – in Geltung.^{*33} So auch der Gunstrechtsvertrag oder Precarium, ebenso wie die Regelungen zum geteilten Eigentum im Allgemeinen und in seinen verschiedenen einzelnen Erscheinungsformen.

Bald nach der Etablierung der Republik begannen schon in den 1920-er die Vorarbeiten zu einem neuen, einheitlichen und modernisierten Zivilgesetzbuch Estlands. Die Ausdehnung des personalen Geltungsbereichs von LECP sollte also nur ein Provisorium sein. Zum Jahr 1936 war der umfassende Entwurf der Kodifikation fertig, man hat den aber noch gründlich umgearbeitet und verändert. Der Entwurf sollte im Herbst 1940 von der Staatsversammlung verabschiedet werden. Der Einmarsch der sowjetischen Truppen im Sommer 1940 hat es verhindert und damit wurde Estlands Zivilgesetzbuch vom 1936/40 nie zu einem geltenden Gesetz. Es galt also das baltisch-zarenrussische LECP in der Republik Estland bis 1940. Das sowjetische Besatzungsjahr 1940/41 hat hier schon etwas geändert, aber die deutschen Besatzungsmächte haben LECP wie auch sonst die Gesetze der ehemaligen Republik Estland wieder in Kraft gesetzt. Somit sollte man behaupten, dass das antikrömisches geprägte Precarium in Estland bis 1944 in Geltung war. Man könnte die Geschichte des Precariums in Estland damit auch enden, wenn es keine weitere, nun schon genuin estnische Geschichte Precariums in der Kodifikation gäbe.

³⁰ Seisuste kaotamise seadus. – Riigi Teataja [Staatsanzeiger] 1920, 129/130, 254.

³¹ Bis dahin galt das LECP eigentlich nur für die zahlenmäßige Minderheit der Bevölkerung, d. h. für die Adlige, Stadtbürger, evangelische Geistliche und andere seit jeher freie Leute von Ostseeprovinzen. Die privatrechtlichen Verhältnisse der Mehrheit der Bevölkerung, der estnischen und lettischen Bauern wurden durch die sog. Agrargesetzgebung oder Bauernverordnungen geregelt. 1920 wurden diese außer Kraft gesetzt.

³² Gesetz über die Abschaffung der Stände, P. II: „Mit dem vorliegenden Gesetz verlieren in der Republik Estland ihre Geltung alle Gesetze und Erlasse, die die ständischen Rechte, Vorrechte, Pflichten und Rechtsbeschränkungen oder überhaupt ständische Besonderheiten beinhalten.“

³³ Zu den Rechtsentwicklungen in den baltischen Staaten in der Zwischenkriegszeit T. Anepaio. Die rechtliche Entwicklung der baltischen Staaten 1918 – 1940. – Modernisierung durch Transfer zwischen den Weltkriegen, Rechtskulturen des modernen Osteuropa. T. Giaro (Hrsg.). Frankfurt/M: Klostermann 2007, S. 7–30.

Der Gunstrechtsvertrag wurde nämlich auch von den Redakteuren des erwähnten estnischen Entwurfs übernommen. An dieser Stelle wird die (Rechts-)Geschichtsgemeinschaft mit den Letten wieder wichtig. Es wird gewöhnlich behauptet, dass vor allem das lettische Zivilgesetzbuch von 1937 (lett. *Civillikums*) sich auf das Vorbild LECP stützte.^{*34} Dagegen gilt der estnische Entwurf des Zivilgesetzbuchs als weniger vom LECP und mehr von den ausländischen, d. u. vom deutschen BGB und insbesondere vom schweizerischen ZGB beeinflusst.^{*35} Gerade im Fall des baltischen Precariums sollte man allerdings das Gegenteil behaupten. Die Redakteure des lettischen Zivilgesetzbuches haben auf den Gunstrechtsvertrag verzichtet.^{*36} Dagegen ist im estnischen Entwurf der Vertrag unter dem Namen „soosing“ (von der Bedeutung her ganz ähnlich mit dem deutschen Wort „Gunst“) in §§ 1818–1824 geregelt. Die im Parlament im Jahr 1940 verhandelte, aber wegen der sowjetischen Besatzung unverabschiedet gebliebene Redaktion beinhaltet den Vertrag ebenfalls (§§ 1827–1833),^{*37} nunmehr allerdings unter dem Namen „soodang“. Es gibt eine handschriftliche Variante des Entwurfs von dem ehemaligen Rechtsanwalt Elmar Lani aus Tartu, wo auch die Hinweise auf die Vorbildgesetze angegeben sind.^{*38} Bei dem Gunstvertrag wird LECP als ursprüngliche und einzige Quelle angegeben. Es ist übrigens auch beim Leihvertrag die Lösung von LECP, d.h. das Prinzip der Bestimmtheit in Bezug auf die Zeit, Art oder Zweck der Nutzung übernommen worden. LECP hat also den estnischen Entwurf doch mehr beeinflusst, als in der bisherigen Literatur angenommen, und zwar gerade in dem für das moderne Privatrecht so entscheidenden Teil, im Schuldrecht. Man könnte auch hier einen Schlusspunkt unter die Geschichte des Precariums in Estland setzen und sagen, dass die sowjetische Besatzung und Annexion diese Gefahr der Übernahme des altrömischen Rechtsinstitut *precarium* in ein modernes Gesetzbuch beseitigt hatte. Es gibt aber noch eine Nachgeschichte, wo die Gefahr wieder durchaus aktuell wurde. Die wollen wir ebenfalls zum Schluss noch erzählen.

4. Die Vorbilder des Privatrechts nach der Wiedererlangung der Unabhängigkeit am Ende des 20. Jahrhunderts

Sogar bevor die Republik Estland 1991 wieder die Selbständigkeit und staatliche Unabhängigkeit erreichte, stellte sich die Aufgabe einer grundlegender Rechtsreform und Abschaffung des geltenden sowjetischen Rechts.^{*39} Das erste demokratisch gewählte Parlament Estlands hat in einem für die ganze Reform des Rechtssystems als grundlegend gedachten rechtspolitischen Beschluss vom 1. Dezember 1992 ausdrücklich, wenn nicht sogar ausschließlich auf die Gesetzgebung der Estnischen Republik der Zwischenkriegszeit hingewiesen: „Ausgehend von der Parlamentsdeklaration vom 7. Oktober 1992 über die Wiederherstellung der Verfassungsmäßigen Staatsmacht sind bei der Vorbereitung der Gesetzesentwürfe die in der Republik Estland vor dem 16. Juni 1940 gegoltenen Gesetze zu berücksichtigen.“^{*40}

Das Parlament hat damit seine Unterstützung der Idee von *innovatio per restitutio* gegeben. Der Restitutionsgedanke wird zwar etwas abgeschwächt durch den Ausdruck der ‘Berücksichtigung’—die vor dem

³⁴ Vgl. z. B. D. A. Loeber. Kontinuität im Zivilrecht nach Wiederherstellung staatlicher Unabhängigkeit – Zu den Zivilgesetzbüchern von Lettland (1937), Estland (1993) und Litauen (2000). – Aufbruch nach Europa: 75 Jahre Max-Planck-Institut für Privatrecht. J. Basedow *et al.* (Hrsg.). Tübingen: Mohr 2001, S. 950: „In das Zivilgesetzbuch von 1937 sind die römisch-rechtlichen Grundlagen voll eingegangen, auf den das Baltische Privatrecht von 1864 beruhte.“

³⁵ *Ibid.*, S. 948.

³⁶ Vgl. Zivilgesetzbuch vom 28. Januar 1937, hg. vom lettischen Justizministerium. Riga 1937.

³⁷ Im unveränderter Abdruck des Entwurfs vom Stand 12. März 1940: Eesti Vabariigi Tsiviilseadustik [Das Zivilgesetzbuch der Republik Estland]. Tartu 1992, S. 217 f.

³⁸ Über den Lehrstuhl der Rechtsgeschichte der Universität Tartu zugänglich.

³⁹ Dazu näher M. Luts-Sootak. Der Fall Estland: Abrechnung als Nebensache der (Wieder-) Herstellung des Nationalstaates. – Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung 2008/125, S. 276–294. Der Beitrag war einer von insgesamt vier Länderberichte in der Sektion „Abrechnen, aber wie? – Die rechtlichen Transformationen europäischer Diktaturen“ auf dem deutschen Rechtshistorikertag in Halle im 2006. Es sind daselbst auch die Berichte von P. Fiedrzyk zu Polen (S. 295–312), A. Somma zu Italien (S. 313–346) und F. Muñoz-Conde zu Spanien (S. 347–365) abgedruckt, eingeleitet von einem strukturvergleichenden Einleitung von J. Rückert (S. 256–275).

⁴⁰ Riigikogu otsus nr. 651 seadusloome järjepidevusest [Beschluss der Staatsversammlung Nr. 651 über die Kontinuität der Gesetzgebung]. – Riigi Teataja [Staatsanzeiger] 1992, 52, 651. Als Staatsversammlung wird in Estland das Parlament bezeichnet.

16. Juni 1940 gegoltenen Gesetze wollte man also doch nicht ohne weiteres und *in toto* wieder in Kraft setzen. Dennoch war die Idee der Restitution der Republik und derer Rechtsordnung ein wichtiges Topos in den Anfangsjahren der 1990-er.

Vor dem 16. Juni 1940 galt in Estland immer noch das LECP, wie oben schon gesagt. Man hätte also den ganzen Rechtspartikularismus der Stadt- und Landrechte, unterschiedliche Regelungen für Nord-Estland (während der Zarenzeit das Gouvernement Estland) und Süd-Estland (in der Zarenzeit zusammen mit Nord-Lettland das Gouvernement Livland) wieder auf dem Tisch gehabt. Darüber hinaus ist es bis heute nicht ganz klar, in welcher Textfassung das LECP im Jahr 1940 in Geltung war.^{*41} Es ist auch niemals der Volltext des ursprünglich auf Deutsch verfassten und dann doch offiziell in der russischen Übersetzung gegoltenen Gesetzbuches ins Estnische übersetzt worden. Damit soll hier nur angedeutet werden, auf welche Schwierigkeiten man gleich gestoßen wäre, wenn man die vom Parlament geforderte „Berücksichtigung“ als eine wirkliche *restitutio* der im Jahre 1940 gegoltenen Gesetzesvorschriften gedeutet hätte. Ganz geschwiegen von der inhaltlichen Zugehörigkeit der rechtlichen Lösungen in LECP zum vormodernen Privatrecht.

In der Wirklichkeit hatte sogar der restitutionsgesinnte Teil des estnischen Parlaments im Jahr 1992 eigentlich nicht das LECP als das im Jahr 1940 gegoltene Gesetz in Rücksicht gehabt. Man dachte vielmehr an den Entwurf des estnischen Zivilgesetzbuches vom 1936/40. Die mittelalterlichen Rechtskreise sollten also doch zurück in das Jahr 1940 bzw. 1944 bleiben. Dass der Entwurf der Vorkriegszeit aber Manches vom LECP übernommen hatte, darunter auch die vormodernen Institute oder Vertragstypen – wie auch das hier betrachtete Precarium – haben wir hier oben gerade gesehen.

Vor diesem Hintergrund und zurückblickend erscheint die Eigensinnigkeit der estnischen Reformkräfte, die sich von der Vorgaben des Parlaments und der Geschichte befreit hatten, als rechtspolitisch klug und zukunftsweisend. Man hat bei der Schaffung der estnischen Reformgesetze eine ganze Menge Vorbilder einbezogen.^{*42} Je weiter aber die Reformarbeiten geschritten sind, je mehr hat man sich vor allem von den historischen Vorbildern emanzipiert. Die estnische Privatrechtsreform ist gesetzgeberisch nämlich Novel-lenweise durchgeführt worden: Sachenrechtsgesetz 1993, das Gesetz des Allgemeinen Teils des Zivilgesetzbuches 1994, Familiengesetz 1994/95, Handelsgesetzbuch (eigentlich Gesellschaftsrecht) 1995, Erbgesetz 1996/97 und als letztes Schuldrechtsgesetz vom 2001/2. Generell soll der Entwurf der Vorkriegszeit und dadurch auch die technischen und inhaltlichen Lösungen von LECP das Sachenrechtsgesetz vom Jahr 1993 noch ziemlich stark beeinflusst haben^{*43}, obwohl auch andere Meinung vertreten ist. So hat M. Käerdi – ohne es jedoch mit Quellen zu belegen, gesagt: „Inoffiziell liegt so die Vermutung nahe, dass beim Sachenrecht das „politisch korrekte“ historische Argument als Alibi oder auch Tarnkappe benutzt wurde, hinter denen sich eigentlich der Import fremder Rechtskonzeptionen verborgen hat“.^{*44} Als Hauptquelle zu Sachenrechtsgesetz hat er das deutsche BGB genannt.^{*45} Alle Autoren sind aber damit einverstanden, dass das Schuldrechtsgesetz sich von diesen historischen Vorbildern entscheidend entfernt hat, auch wenn diese am Anfang berücksichtigt werden sollten. Da der Entwurf von 1940 aber zu „archaisch“ schien^{*46}, wurden statt dessen das deutsche BGB und der Entwurf des deutschen Schuldrechtsmodernisierungsgesetzes vom

⁴¹ Zu den verschiedenen Ausgaben des Baltischen Privatrechts in der Zarenzeit und in den Republiken Estland und Lettland zwischen zwei Weltkriegen: T. Anepaio. Tuntud tundmatu seadustik. Balti Eraseaduse väljaanded [Das bekannte unbekannte Gesetzbuch: Die Ausgaben des Baltischen Privatrechts]. – Annales litterarum societatis Esthonicae 1994–1999. Tartu: Õpetatud Eesti Selts 2002, S. 302–324; die deutsche Zusammenfassung S. 323 f.

⁴² Eingehend zu den Vorbildern M. Luts. Die estnische Privatrechtsreform zwischen den Vorbildern aus der Geschichte, aus Deutschland und aus der europäischen Zukunft. – Deutsch-Estnische Rechtsvergleichung und Europa. S. I. Oksaar, N. Redecker (Hrsg.). Frankfurt/M *et al.*: Lang 2004, S. 51–68; rechtshistorisch mehr vertiefend M. Luts. Die neue estnische Privatrechtskodifikation zwischen Geschichte und Zukunft von Europa. – Die Kodifikation und die Juristen. C. Peterson (Hrsg.). Stockholm: Olin-Stiftelse 2008, S. 133–156.

⁴³ Am Beispiel der Regelung der einzelnen Arten der Grunddienstbarkeiten im Gesetz M. Luts. Textbook of Pandects or New Style of Legislation in Estonia? – *Juridica International* 2001/6, S. 152–158; zu Werdegang der estnischen Privatrechts-gesetzgebung näher und *expressis verbis* den Entwurf der Vorkriegszeit nennend: H. Mikk. Über die Zivilrechtsreform in Estland im Lichte der Entwürfe des Schuldrechtsgesetzes, des allgemeinen Teils des Zivilgesetzbuches und des Gesetzes über Internationales Privatrecht. – Referate. Grundbuch- und Notartage. 13.–15. Mai 1999. Tallinn: Justizministerium der Republik Estland 2000, S. 288 ff.

⁴⁴ Die Vermutung solle eigentlich keine bloße Vermutung sein. M. Käerdi. Westliche Rechtskonzepte für post-sozialistische Gesellschaften: Gesetzgeberische Erfahrungen in Estland. – Brückenschlag zwischen den Rechtskulturen des Ostseeraums. H. Heiss (Hrsg.). Tübingen: Mohr-Siebeck 2001, S. 80.

⁴⁵ M. Käerdi (Fn. 44), S. 80.

⁴⁶ So H. Mikk (Fn. 43), S. 296, siehe ebenfalls S. 295–298.

2002, das niederländische Schuldrecht, aber sehr oft auch die sog. Modellgesetze zum Vorbild gezogen. Bei der Regelung des Leihvertrags sind vor allem die Lösungen des BGB berücksichtigt, meist auch übernommen worden. Daneben gab es noch einen Vertrag zur unentgeltlichen Gebrauch: ein *Precarium* oder *soodang* benötigte man nicht.

Damit ist auch der Gunstrechtsvertrag oder das Precarium in Estland, wo jenes Erbstück des antiken Roms erstaunlich lange aufbewahrt wurde, der Geschichte überlassen worden.



Evgeny Krasheninnikov

9 May 1951 – 13 October 2013

Jevgeni Krašeninnikov, a distinguished Russian researcher holding the position Associate Professor of Civil Law at Yaroslavl State University, has passed away unexpectedly. The last article he wrote was 'Agreements and decisions', published in the current issue of *Juridica International*.

Jevgeni graduated from Yaroslavl State University in 1978, after which he carried out his postgraduate studies in Leningrad and successfully defended his dissertation on civil procedural law in 1983. From 1980 until his final days, he worked at Yaroslavl State University, teaching mainly Roman private law and civil law but also giving special courses on securities law and bill of exchange law. Jevgeni was a dedicated researcher; he penned more than two hundred academic publications, among them three monographs. His scientific interests were diverse – he studied many general issues related to civil law, including subjective rights, representation and authorisation, legal succession, transactions, assignment of claims, and civil liability. He was also active in civil procedural law, studying problems related to actions. At the same time, he was one of the most well-known experts on securities law and matters related to bills of exchange in Russia. He contributed to practice and scholarship involving the Civil Code of the Russian Federation that were published in 2010 by writing commentaries to the chapters on securities, gifts, and unjustified enrichment.

Collections of legal research works on civil and commercial law that have become well-known in Russia have been published in Yaroslavl for 20 years under the leadership of Jevgeni. As the collections' editor, Jevgeni always wrote at least one article to be published in every single collection and inspired other experts in jurisprudence, from Russia and abroad, to do the same. Jevgeni saw the regular publishing of those collections as his life's work, and indeed it is a most remarkable and unique life's work. Many ideas and concepts from Western law found their way to Russian readers through the collections that Jevgeni edited and articles that he wrote. Jevgeni was especially fascinated by German law, and he did a lot to make its concepts known in Russia.

Jevgeni was a good friend to the Faculty of Law of the University of Tartu. He participated in conferences held in Tartu; published articles in the Estonian law journals *Juridica* and *Juridica International*; and, at the same time, offered Estonian authors the possibility to publish their articles in the Yaroslavl collections. Thus, he played an important role in keeping alive the solid co-operation between the University of Tartu and Yaroslavl State University.

We shall remember Jevgeni Krašeninnikov as a brilliant individual, as a relentless fighter for his beliefs and opinions, as a person who dedicated his life to jurisprudence.

Abbreviations

RT	<i>Riigi Teataja</i> ['State Gazette']
ALCSCd	Decision of the Administrative Law Chamber of the Supreme Court
CCSCd	Decision of the Civil Chamber of the Supreme Court
CCSCr	Regulation of the Civil Chamber of the Supreme Court
CRCSCd	Decision of the Constitutional Review Chamber of the Supreme Court