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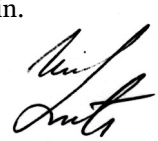
Dear reader,

The number of legal journals published in Estonia has always been limited. On the one hand, the reasons for such scarcity have always rested with the small population, which limits the size of the Estonian legal audience and thus the potential number of readers. On the other hand, the twists and turns of (recent) history have always meant interruptions in the publication of legal journals. Publishing two, three or even four journals at the same time has proven possible only in a very limited number of years. There is usually no reason to talk about decades in this context. All the more reason for us, as the publishers and authors of this journal, to be proud of the publication of yet another issue of our magazine. The first issue of Juridica International – the foreign language companion to the Estonian language journal Juridica, which has been published since 1993 – appeared twenty years ago, in 1996. Professor Paul Varul, Editor-in-Chief of Juridica International from 1996–2015, took a look back at these first twenty years in the editor's column of our last issue. Juridica International has acted like a seismograph when it comes to reflecting reforms in Estonian law and legal education. When Estonia joined the European Union in 2004, new and significantly more international challenges already came along during the preparatory stage, not to mention the subsequent active participation in the harmonisation processes of European Union law. The foreign language journal, published at and with the means of the Faculty of Law of Estonia's own national university, the University of Tartu, has given our legal practitioners a chance to express their views among an international community of scholars in a highly visible manner. Juridica International has also played an important part in publishing materials from legal conferences and seminars held in Estonia. Juridica International has become an attractive international journal that reaches well beyond the borders of Estonia and the European Union. This widespread circulation has been assisted by free access online – a decision made by Juridica International years before "open access" became a keyword of global research policy.

In the span of only a couple of decades, the journal that first started as the "calling card" of the Faculty of Law at the University of Tartu, mainly introducing and analysing Estonia's own legal developments, has become an internationally open, peer-reviewed legal journal that is represented in the most acknowledged databases. Since Juridica International is a universal legal journal by its very essence, and this number is not a topically focused conference issue, the geography of both the authors and the topics covered reflect points of interest and concern in the legal science of our region. A special place is reserved for the principal foundations of the European Union and European legal culture in general, and the latest developments in the law of Europe, Estonia, and other countries are addressed as always. One of the obvious causes for concern is Russia's legal concept, and the legal situation of both it and its neighbours deserves an observant analysis.

As the new Editor-in-Chief of the journal, I thank all the editors, colleagues at the editorial board, and the technical team for their continued energy and hard work. For our readers, as well as current and future authors, I hope this issue will be thought-provoking, give you topics to reflect on, and a reason to join us time and again.



Marju Luts-Sootak

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Julia Laffranque

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Europäische Identität und Ethik

Überlegungen zu ethischen Grundlagen der europäischen Rechtsprechung[*1]

Die europäische Identität und Ethik sind eng verbunden mit dem Zustand Europas heute, mit dem was man unter „Europäer sein" versteht. Eigentlich verspiegeln sich die ethischen und Identitätsfragen Europas deutlich in der Rechtsprechung des Europäischen Gerichtshofes für Menschenrechte (EuGMR, Straßburger Gerichtshof) in Strasbourg. Es gibt kaum Probleme, die im Leben vorkommen und die nicht von den Entscheidungen des EuGMR umfasst sind.

Über 800 Millionen Menschen aus den 47 Staaten des Europarates können sich potentiell vor dem Straßburger Gerichtshof klagen, wenn sie in ihrem Land keine Hilfe bekommen haben. In der ersten Hälfte des Jahres 2016 sind vor dem EuGMR etwa 65 000 Rechtssachen anhängig, die meisten aus der Ukraine, Russland, der Türkei, aber auch aus Italien.

Beim Entscheiden stützt sich der EuGMR vor allem auf die Europäische Menschenrechtskonvention (EMRK). Gewisse ethische Grundlagen sind in den Menschenrechten innewohnend. Manchmal stellt sich aber die Frage, ob die Staaten ein Menschenrecht aus ethischen, sittlichen oder moralischen Gründen einschränken können oder gibt es einen gewissen europäischen Konsensus zur bestimmten Problematik, nehmen wir z.B. gleichgeschlechtliche Ehe oder die künstliche Befruchtung? Der europäische Konsensus ermöglicht dem EuGMR gewisse europaweite ethisch-moralische Standards durchzusetzen, ohne diese selbst vorzugeben und sich dadurch dem Vorwurf auszusetzen, die Identität der Mitgliedstaaten zu missachten.[*2] Es ist allerdings schwierig, die europäische Identität und Ethik zu definieren.

Was versteht man unter der europäischen Identität und Ethik und in welchem Zusammenhang steht das mit ethischen Grundlagen der europäischen Rechtsprechung? Dieser Artikel versucht auf diese Fragen zu antworten und setzt sich zuerst mit den europäischen Identitätsfragen auseinander und danach analysiert er die ausgewählten Aspekte der Ethik in der Rechtsprechung vom EuGMR.

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1 Der Artikel beschränkt sich nur auf die Meinungen des Europäischen Gerichtshofes für Menschenrechte und geht nicht in die Rechtsprechung des Gerichtshofes der Europäischen Union in Luxembourg ein.

2 Jan Christian Urban, Freiheitsbeschränkungen aus Gründen von Ethik und Moral in Europa, Tectum: 2015, siehe auch: http://www.schleyer-stiftung.de/pdf/pdf_2012/leipzig_2012/Urban_Jan.pdfS. (28.03.2016), S. 2.

I. Europa – von Begeisterung zur Enttäuschung. Eine fragliche Identitätsfrage

Es wird gefragt, ob wir uns überhaupt darüber einig sind, wo sich die Grenzen Europas befinden, was wir unter Europa verstehen? Neben der Europäischen Union (EU) mit derzeitig noch 28 Mitgliedern gibt es auch den Europarat, dem 47 Staaten gehören. [*3]

In der griechischen Mythologie stellte Europa die Tochter des phönizischen Königs Agenor und der Telephassa dar. Zeus verliebte sich in sie und verwandelte sich in einen Stier und brachte Europa nach Kreta. Nach der Interpretation der deutschen Historikerin und Frauenforscherin Annette Kuhn konnte Zeus überhaupt erst in Verkleidung sich Europa annähern: „Liebe, so lautet die einfache Botschaft, kann nicht erzwungen werden. Da helfen alle männliche Verwandlungs- und Verstellungskünste nicht weiter.“[*4] Vielleicht gilt es auch für die Liebe, die wir heute für Europa haben, verschiedene Wahlsprüche und Werbeaktionen helfen nicht, wenn Leute sich innerlich nicht europäisch fühlen, wenn zum Beispiel die Esten oder Letten unter Patriotismus etwas ganz anderes verstehen als die Franzosen oder Deutsche.

In der Antike betrachtete Griechenland sich als Zentrum der Welt, weder zum Europa, noch zum Asien gehörend.

Später haben sich die Römer in den Mittelpunkt der Welt gesetzt, Europa und Asien waren für sie unwichtig im Vergleich zum Römischen Imperium. Prof. für Alte Geschichte Géza Alföldy hat im 2005 an der Universität Heidelberg zum Abschluss seiner Vorlesungstätigkeit gehaltenen Vortrag auf die Ähnlichkeiten aber gleichzeitig auch auf die Unterschiede zwischen dem modernen Europa und dem alten Rom angedeutet.[*5] Dabei hat er sich auf fünf Hauptgründe konzentriert: die ökonomischen Grundlagen; die supranationale politische Ordnung; die Verwaltungskultur; die Fähigkeit, die Völker für sich zu gewinnen ohne dass sie ihre eigene Identität aufgeben; die Kultur generell. Als Juristin wird es schwierig, der Einführung der Bedeutung des Rechts und der Rechtskultur in diese Liste der entscheidenden Komponenten einer Integration zu widerstehen. Man könnte dem europäischen Recht aus dem Vorbild des römischen Rechts sogar provokativ den Titel – *ius publicum europaeum* – geben. Nach Alföldy war im alten Rom die ökonomische Integration kein Motor, sondern eine Folge des politischen Zusammenschlusses, ein wichtiges Merkmal war die Verwaltungskultur. Die Mitglieder der römischen Elite waren zwar keine Visionäre, aber auch keine geistlosen Technokraten. Sie studierten Recht, Rhetorik, Griechisch und gehobenes Latein, Literatur, Geschichte, Philosophie. Jedoch kennen wir den Untergang des römischen Imperiums. Welches Schicksal wartet aber auf Europa?

Der estnische Diplomat und Außenminister Kaarel Robert Pusta hat bereits im 1926 sich folgend geäußert: “Das Glück unserer jungen Freiheit wäre erst dann vollendet, wenn aus Europa eine große demokratische Union entstehen würde und wenn die Staatsangehörigkeit Estlands gleichzeitig das Zeugnis eines Europäers wäre, das dem Rat, Hilfe und Schutz in jedem Ort von Europa ermöglicht.“[*6]

Die visionsreichen Väter der heutigen Europäischen Union, vor allem Jean Monnet, Robert Schuman und Walter Hallstein, hatten schon zwei Weltkriege durchgemacht und fanden das Wiederherstellen des Friedens und der Annäherung vor allem Frankreich-Deutschland als Grundstein der europäischen Identität. Die weiteren Generationen sahen den kalten Krieg als schreckendes Beispiel vor den Augen und haben deswegen nach dem Zerfall der eisernen Vorhang die schnelle Wiedervereinigung der alten Familienmitglieder: Ost- und West-Europa stark befürwortet. Heute hat Europa Angst vor dem Terrorismus, auch die Gefahr eines Cyber-Krieges ist nicht auszuschließen und nicht zuletzt erschreckt sich Europa vor den Ereignissen in Krim und Ost-Ukraine. Brauchen wir jedes Mal tatsächlich eine Gefahr, um uns zu mobilisieren oder hilft sogar das nicht mehr?

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3 Der Artikel wurde hauptsächlic vor dem Ausgang des Brexit –Referendums geschrieben, viele Probleme sind aber bereits angedeutet und werden sich mit Brexit weiter noch deutlicher.

4 Annette Kuhn, Warum sitzt Europa auf dem Stier? Matriarchale Grundlagen von Europa, Kapitel II Würdigung, Kritik, Visionen, Frauen verändern EUROPA verändert Frauen, Ministerium für Generationen, Familie, Frauen und Integration des Landes NRW: 2009, http://www.hdfg.de/pdf/Europa-Handbuch-08_Kuhn.pdf (28.03.2016).

5 Den Text der von prof. *Géza Alföldy*, am 16. Februar 2005 an der Universität Heidelberg vorgetragenen Abhandlung:" Das alte Rom und das moderne Europa. Gibt es Lehren aus der Geschichte" siehe: http://www.forum-classicum.de/artikel105-holkalfoeldy.htm (28.03.2006, heute nicht mehr zugänglich). Der Text stützt sich stark auf eine frühere Schrift des Verf.: Géza Alföldy, Das Imperium Romanum – ein Vorbild für das vereinte Europa? Jacob Burckhardt-Gespräche auf Castelen 9, Basel 1999.

6 Kaarel Robert Pusta, Kontrastide aasta, Ilmamaa : 2000.

Gegenwärtig steckt Griechenland wieder im Mittelpunkt, jedoch leider im Mittelpunkt der europäischen Wirtschaftskrise. Griechenland und Italien können nicht mehr alle Flüchtlingen aufnehmen, so dass das Thema der Asylquoten in der Europäischen Union brennend geworden ist.

Allerdings vor 10 bis 20 Jahren haben sich die Leute in Estland darauf gefreut, endlich wieder ein Teil Europas zu werden. Wir waren wieder frei, nach jahrelangen Überleben, wo unser einziger Trost und unsere Stärke das Beibehalten unserer Kultur, Sprache, Sängerfesttraditionen waren. Wie große Hoffnungen und Träume wir hatten, dass die europäische Integration gleichzeitig mit der Erweiterung tatsächlich möglich ist. Ich selber habe mit einem großen Interesse das Europarecht in Deutschland studiert, alle Wege waren für Jugendliche offen dem wieder-selbstständigen Staat weiterzuhelfen, am Wiederaufbau teilzunehmen. Sicherlich waren wir auch pragmatisch, aber wir wollten nur als Rechtsstaat und aus freiem Willen der estnischen Bevölkerung der Europäischen Union beitreten, nur zu einer solchen Union gehören, die auch selbst an die Demokratie und Rechtsstaatlichkeit glaubt und diese Prinzipien respektiert.

Der ehemalige Präsident Frankreichs, Mitglied des Verfassungsrates und Präsident des Europäischen Konvents Valerie Giscard d'Estaign hat noch im Jahre 2006 in seiner Humboldt-Rede zu Europa gesagt, dass sich europäisch zu fühlen auch das bedeutet, was man an Europa gibt, nicht nur was man davon bekommt.[*7] Er führte fort: Niemand hat je von uns gefordert, in öffentlichen Einrichtungen die Europafahne aufzuhängen. Und trotzdem weht sie nun über den Dächern Berlins, Paris oder Roms.

Sieben Jahre später, Ende 2013 Anfang 2014 hat in Kiew auf dem Maidan Platz auch die Europäische Fahne geweht und die Freiheit, Wohlstand und Rechtsstaatlichkeit symbolisiert, man hat gehofft, dass Europa die Ukrainer nicht im Stich lässt. Aber in der Europäischen Union selbst war zu dieser Zeit bereits die Europa-Begeisterung fast gestorben. Immer mehr enttäuschen sich die Leute in Europa. In Europa mangelt es sich an Leidenschaft, es gibt kein Enthusiasmus mehr.[*8] Was fehlt ist eine Vision. Leider existiert wieder ein „ich, ein Ego", statt „uns", statt „wir gemeinsam." Der französische Wirtschaftsexperte Robert Salais hat in einer europäischen Debatte in Strasbourg im 2014 gemeint, dass das europäische Projekt nicht als etwas Selbständiges betrachtet wird, sondern nur als etwas, das den eigenen Interessen jedes einzelnen Staates dienen soll.[*9] Die EU leidet nicht nur unter der Wirtschaftskrise, aber auch unter einer sozialen und Identitätskrise. Europa gibt nicht mehr Antworte auf Probleme, sondern ist nicht selten selbst die Ursache von Problemen. Es gibt nicht mehr das alte Europa, die europäischen Völker bestehen längst nicht mehr aus traditionellen Nationen und Glauben, es gibt die Frage der Kopftücher, des Extremismus, man will die Nation-Staaten verstärken, die Bevölkerung veraltet, damit vertieft sich auch das Problem der Demographie in Europa. Viele Aspekte haben sich geändert. Dabei hat sich aber leider die Europäische Union von den Bürgern entfernt, die Bürger nehmen zu wenig an das Entscheiden teil, die Entscheidungen sind sehr kompliziert, meistens fremd und unverständlich für die Allgemeinheit. Das Europa-Projekt hat sich nicht an die veränderten Umstände und Dynamik angepasst. Das Handeln von EU ist fragmentarisch, es gibt zu wenig Disziplin, um die Probleme zu lösen, die Verantwortung ist gestreut, die führenden Personen sind entweder nicht charismatisch genug oder haben keine eigentliche Vollmacht zum Handeln, die wirklichen Akteure bleiben weiterhin die Staatsoberhaupter der mächtigsten Ländern Europas.

Es sind die Lüsternheit, die Oberflächlichkeit die mich persönlich besonders stören. Der Papst Franziskus hat während seines Besuchs beim Europaparlament in Strasbourg im November 2014 es die globale Gleichgültigkeit genannt und uns alle davor gewarnt.[*10] Besonders bedauerlich ist, dass Europa, anstatt sich an die höchsten gemeinsamen Nenner zu orientieren, auf das niedrigste Niveau ihres Durchschnitts als Maßstabe nimmt, sei es z.B. im Schutz der Menschenrechte oder der Umwelt.

Wir wohnen hier und jetzt ohne Vergangenheit, aber auch ohne Zukunft. Jedoch eure Vergangenheit ist unsere Vergangenheit und unsere Vergangenheit Eure. Wir dürfen die Vergangenheit nicht vergessen, aber

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7 Valery Giscard d'Estaing «Peut-on créer un patriotisme européen?» Humboldt-Reden zu Europa, 9.11.2006 Berlin, in: Angelegentlich.Reden und Vorträge des Präsidenten Christoph Markschies aus den Jahren 2006 bis 2009, Humboldt-Universität zu Berlin, S.41-44.

8 Mikk Salu, Aaasta eurooplane 2013 Julia Laffranque: Euroopas pole kirge (Europäer des Jahres 2013 Julia Laffranque: In Europa mangelt es an Leidenschaft), Postimees, 11. Mai 2013. http://www.postimees.ee/1232006/julia-laffranque-euroopas-pole-kirge (28.03.2016).

9 Robert Salais, L'identité européenne, un passé en attente d'un avenir, ébats sur l'identité européenne du Conseil de l'Europe, janvier 2014 : https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046e76f (28.03.2016).

10 'Pope Francis: Address to European Parliament – full text', Vatican Radio, November 25 2014, http://www.news.va/en/news/pope-francis-address-to-european-parliament (28.03.2016).

müssen auch daran denken, dass wir für die künftigen Generationen den Weg vorbereiten. Deswegen ist es wichtig, die Zukunft ohne Nostalgie und Furcht global und systematisch zu begegnen.

Als ich in Deutschland studierte und da auch andere Studenten, unter anderem aus Russland kennenlernte, war es für mich sehr erstaunlich zu erfahren, wie unterschiedlich die Jugendlichen aus Deutschland und Russland die Vergangenheit betrachteten, was sie unter Vergangenheitsbewältigung verstanden haben. Ich hatte das Gefühl, dass man den russischen Studenten zu Hause gar nicht beigebracht hat, das viele Russen auch selbst unter dem Regime von Stalin und seinen Nachfolgen gelitten haben, dass das System trotz des Kriegsgewinnes die Verantwortung von Deportationen und Unmenschlichkeiten tragen sollte.

Anderseits hat mich vor kurzem die Reaktion von einem russisch stämmigen Mann aus Ost-Estland, Narwa, bewundert: der ehemalige Aktivist, der Anfang 1990er Jahren ein Referendum um den Austritt von Narwa aus Estland und die Annäherung an Russland befürwortete, hat mehr als zwanzig Jahre später seine Meinung völlig geändert und vor kurzem im März 2015 dem Economist vertraut, dass er heute an sowas nie denken würde und die Hoffnung ausgedrückt, dass auf Narwa nie das Krim-Schicksal wartet.[*11] Weil heute in Estland einfach das Lebensstandard so viel besser sei und das Land dem NATO und der EU gehört. Kann man daraus schließen, dass wenn nicht Pathos, zumindest Pragmatik sich für Europa durchgesetzt hat?

Es ist allerdings zu fürchten, dass generell die europäische Identitätsfrage sich gewissermaßen gescheitert hat, es ist zumindest fraglich geworden. Eine europäische Wertegemeinschaft bedeutet so zusammen zu leben, dass man unter der Identität versteht, auch die Diversität anzuerkennen, dass man mit der Diversität zu leben versucht, um daraus und aus einer Multiidentität einen Vorteil zu schaffen. Am Besten sollten wir versuchen zu vermeiden, dass die europäische Identität mit dem Nationalen im Widerspruch steht. Die Europäische Union ist das Ding an sich geworden.

Diejenige, die bereits das Ende der Sowjetunion gesehen und erlebt haben, obwohl die Europäische Union gar nicht mit der Sowjetischen vergleichbar ist, können durchaus vermuten, dass heute der Kollaps der EU vielleicht doch nicht ganz unwahrscheinlich ist. Wo es einen Zusammenschluss gegebenenfalls Beitritt gibt, sei es freiwillig oder gewaltig, gibt es, wenn es nicht mehr richtig funktioniert, auch früher oder wenn auch viel später einen Austritt, wenn nicht sogar einen Zusammenbruch, sei es *de facto* oder *de jure*. Die Zeitung Frankfurter Allgemeine hat ja auch bereits im Oktober 2014 über Europas Endspiel geschrieben.[*12] Die Gefahr ist durch die Ergebnissen der Volksabstimmung in Großbritannien am 23. Juni 2016 viel größer geworden. Unglaublich, wie sich alles geändert hat, wenn wir denken, dass Ende achtziger Jahren selbst der letzte Chef der Sowjetunion, Mikhail Gorbatschow das Konzept „des gemeinsamen europäischen Heimes“ benutzt hat.[*13]

Nachdem man die Diagnose festgestellt hat, das Europa Probleme hat, braucht man dringend ein Heilmittel und auch etwas Präventives. Wie könnte man in Europa einen neuen Schwung finden? Sollte man ganz von einem weißen Blatt anfangen, so wie z.B. derselbe Giscard d‘Estaign heute vorschlägt, jedoch, für ihn nur mit West-Europa mit Ausnahme einiger weniger Staaten aus Osten und Norden? [*14]

Allerdings, die Europäische Union als *sui generis*, als unikales Modell, sollte keinen Anspruch haben, etwas zu werden, was den bereits existierenden Staatsstrukturen oder den internationalen Organisationen ähnlich ist. Die Europäische Union sollte anstreben, nicht nur auf Papier, sondern vor allem in der Wirklichkeit einen Raum der Freiheit, der Sicherheit und des Rechts darzustellen. Daran gibt es aber noch viel zu arbeiten. Als Beispiele helfen uns Ausgewählte Aspekte der Ethik.

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11 “There simply couldn’t be a repeat of Crimea here,” says Vladislav Ponjatovski, head of a local trade union. Mr Ponjatovski, an ethnic Russian, helped launch a Narva autonomy referendum in 1993. Now he would never consider it. Today’s Estonia offers higher living standards and membership of NATO and the European Union. Nobody in Narva longs to be in Ivangorod, the Russian town over the river, in: Estonia’s election On the border. How nervousness over Russia affects daily life and politics, Economist: Mar 7th 2015 | NARVA | From the print edition.

12 Christian Schubert, Tobias Piller, Johannes Pennekamp, Endspiel für Europa. Italien und Frankreich sitzen in der Schuldenfalle, die Konjunktur schwächelt, und die Geldpolitik ist am Ende. Jetzt geht es für Europa um alles, FAZ, 2.10.2014: http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/ezb-sitzung-endspiel-fuer-europa-13184985.html (28.03.2016).

13 Christian Schmidt-Häuer, Gorbachev: The Path to Power. London: I.B. Tauris. S. 144 und Jim Hoagland, “Europe’s Destiny.” Foreign Affairs. 1989/1990. – DOI: http://dx.doi.org/10.2307/20044286.

14 Valéry Giscard d'Estaing, Europa, La dernière chance de l’Europe, Broché : 2014 : http://www.europa-vge.com/livre/ (28.03.2016).

II. Ausgewählte Aspekte der Ethik. Menschenrechte als Rettungsring

Bei den Sachverhalten die vor dem Europäischen Gerichtshof der Menschenrechte landen, habe ich beobachtet, wie Gefährlich die Doppelzüngigkeit, sei es in der Politik, Wirtschaft oder Medien, sein kann. Nehmen wir drei große Bereiche: Politik, Wirtschaft, Medien.

2.1. Ethik und Politik

In der Politik scheint es plausibel, wie sehr Europa sich für den Frieden und die Demokratie einsetzten will, jedoch hören wir gleichzeitig vom Bestehen des Risikos, dass einige Staaten den undemokratischen Machten der Welt mit Militärausrüstung unterstützen. Ist es ethisch?

Es tut weh, dass der Europäische Gerichtshof für Menschenrechte die Aufgabe übernehmen muss, über die Konflikte zwischen Zypern und der Türkei, Georgien und Russland, Ukraine und Russland, Moldova und Russland, den Konflikt zwischen Armenien und Aserbaidschan über Berg-Karabach, sowie über die Fälle mit Bezug zum Krieg in Kroatien und in Bosnien und Herzegowina in den 1990ger Jahren, aber auch über die Fälle mit Bezug zum internationalen Militäreinsatz in Irak zu entscheiden.*[15] Im Zusammenhang mit dem Tschetschenienkonflikt wenden sich an EuGMR regelmäßig hunderte Angehörige der in Tschetschenien Verschwundenen.*[16] Es tut weh, weil es diese Konflikte gab und gibt und weil man viele mit diesen Konflikten und Kriege verbunde Fragen unter anderem ohne EuGMR nicht lösen kann.

Genauso traurig ist es, wenn man einerseits in Europa spricht, wie wichtig es ist, den Flüchtlingen aus Drittstaaten zu helfen und andererseits, sie in Flüchtlingsheime in sehr schlechtem Zustand verlässt, wobei Extremismus zuständig wächst. Unter Flüchtlingen gibt es Asylbewerber, die in die Länder zurückgesandt werden, in denen ihr Leben in die Gefahr kommt. Der Europäische Gerichtshof für Menschenrechte hat bereits über das sogenannte „Dublin System" der Europäischen Union entschieden.*[17] Die Dublin Verordnung etabliert den Grundsatz, dass nur ein einziger Mitgliedstaat für die Prüfung eines Asylantrages zuständig ist. Das Ziel ist, zu verhindern, dass Asylbewerber von einem Land in das Nächste geschickt werden und, dass ein Missbrauch des Systems stattfindet, indem eine einzige Person mehrere Asylanträge stellt. Der Mitgliedstaat, in den der Asylbewerber als erstes eingereist wird, muss den Asylbewerber aufnehmen und den Asylantrag prüfen, die anderen Staaten, in die der Bewerber sich inzwischen eventuell bewegt hat, müssen ihn in das erste Land, in dem er den Antrag gestellt hat, zurückschicken. Es geht vor allem um

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15 Rechtssachen, die Militäreinsatz der Türkei in Nord-Zypern betreffen: *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV; *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, ECHR 2014). Die Klagen der Georgien gegen Russland: *Georgia v. Russia* (I) [GC], no. 13255/07, ECHR 2014 (extracts), über die Haft und Deportation der Bürger von Georgien aus Russland im September 2006 bis Januar 2007; *Georgia v. Russia* (II) (dec.), no. 38263/08, 13 Dezember 2011, zur Zeit vor dem Großen Kammer des EuGMR über den Konflikt in Süd-Osseten und Abchasien (die dritte Klage von Georgien gegen Russland über die Haft der minderjährigen aus Georgien in Süd-Osseten wurde zurückgenommen, nachdem die Minderjährigen im Dezember 2009 entlassen wurden); *Ukraine v. Russia* (no. 20958/14), Klage, am 13. März 2014 eingereicht, betrifft den Krim und Ost-Ukraine Konflikt vom März 2014 bis September 2014; *Ukraine v. Russia* (II) (no. 43800/14) betrifft vermutliche Entführung von Kindern in Ost-Ukraine und ihren Transfer nach Russland drei Mal zwischen Juni und August 2014; die Rechtssache *Ukraine v. Russia* (IV) (no. 42410/15) betrifft die Ereignisse in Krim und Ost-Ukraine seit September 2014; die Rechtssache *Ukraine v. Russia* (III) (dec.), no. 49537/14 vom 1. September 2015 wurde gestrichen, weil Ukraine nicht mehr als Staat die Klage erhalten wollte, denn es gab bereits Einzelklagen von Personen vor dem EuGMR. z.B. über den Konflikt von Georgien und Russland sind derzeitig ca. 2000 Individualbeschwärde anhängig; und bezüglich Ukraine/ Russland ca. 1500. Bezüglich Transdnistrien: *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII; *Catan and Others v. the Republic of Moldova and Russia* [GC] nos. 43370/04, 8252/05 and 18454/06, ECHR 2012 (extracts); and *Mozer v. the Republic of Moldova and Russia,* no. 11138/10, zur Zeit vor dem Grossem Kammer anhängig; über Armenien und Aserbaidschan Konflikt (Berg-Karabach), *Chiragov and Others v. Armenia* [GC], no. 13216/05, ECHR 2015; and *Sargsyan v. Azerbaijan* [GC], no. 40167/06, ECHR 2015) in der die betreffenden Staaten jeweils als Dritte in die Rechtssache gegen den anderen Staat eingetreten sind; über Krieg in ehemaligen Jugoslawien, siehe z.B. *Palić v. Bosnia and Herzegovina*, no. 4704/04, 15 February 2011*; Jelić v. Croatia*, no. 57856/11, 12 June 2014.

16 Siehe z.B. eine führende Entscheidung: *Aslakhanova and Others v. Russia*, nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, § 122, 18 December 2012. In generell, siehe, Disappearance cases before the European Court of Human Rights and the UN Human Rights Committee: Convergences and Divergences, Helen Keller, Olga Chernishova, vol. 32, no. 7-12 (2012), S. 237- 249.

17 z. B. *M.S.S. v. Belgium and Greece* [GC] no. 30696/09, 21. Januar 2011; *Tarakhel v. Switzerland* [GC] no. 29217/12, 4.11.2014.

das Vertrauen zwischen den Mitgliedstaaten der EU. Der Europäische Gerichtshof für Menschenrechte hat jedoch gewarnt: vertraue, aber überprüfe – die Menschenrechte dürfen nicht wegen Automatismus und das Funktionieren des Systems vernachlässigt werden. Auch die Staaten mit einer großen Demokratieerfahrung können Fehler machen, insbesondere wenn sie sich in einer Krise befinden. Das darf man auch bei der Anwendung des Prinzips der gegenseitigen Anerkennung in Europa nicht vergessen, das blinde Vertrauen berücksichtigt leider die konkrete Situation nicht. Die Rechte auf menschenwürdige Bedingungen und – wenn es sich um Kinder handelt – auch auf die beste Befolgung von Interessen der Kinder müssen gewährleistet werden. So hat der EuGMR z.B. in einem Fall entschieden, dass die Mängel des Asylverfahrens und die Schwierigkeiten bei der Anwendung des Dublin Systems in Griechenland hätten den belgischen Behörden bekannt sein müssen, als sie die Übersiedlung des Asylbewerbers anordneten.[*18] Die belgischen Behörden hätten überprüfen müssen, wie die griechischen Behörden die maßgebliche Asylgesetzgebung in der Praxis anwenden. Dies aber hatten sie unterlassen. Deswegen stellte der EuGMR eine Doppel-Verletzung des Verbotes einer erniedrigenden Behandlung fest: Griechenland wurde wegen den Bedingungen der Flüchtlinge verurteilt und Belgien, weil es die Flüchtlinge an Griechenland zurückschicken wollte.

In einem anderen Fall hat der EUGMR wieder die Verletzung vom Verbot der unmenschlichen oder erniedrigenden Behandlung festgestellt, als die schweizer Behörden die Beschwerdeführer in Anwendung der Dublin Verordnung nach Italien zurückschickten.[*19] Die schweizer Behörden müssen angesichts der aktuellen Situation hinsichtlich des Aufnahmesystems in Italien, zunächst von den italienischen Behörden individuelle Garantien einfordern, dass die Beschwerdeführer als Familie zusammenbleiben können und dass die Kinder altersgemäß versorgt werden.

Zweifellos gibt das Thema der Flüchtlingen viel Grund für ethische Überlegungen. Aber wie kann ein Staat die Opfer der Zwangsarbeit und des Menschenhandels oder der Familiengewalt schützen und den Vätern oder Müttern helfen, derer Kinder entführt wurden? Welche Politik muss ein Staat treiben, um zu vermeiden, dass die Leute, die an friedlichen Demonstrationen teilgenommen haben, von der Staatsgewalt brutal behandelt werden.

Mit der Ethik sind auch die Fragen der Religionsfreiheit, der Nicht-Diskriminierung aus ethnischen Gründen und Rechte der Homosexuellen eng verbunden. Haben die Staaten einen Ermessensspielraum, um aus ethisch-religiösen-kunsthistorischen Gründen das Kruzifix in der öffentlichen Schule zu erlauben – Italien?[*20] Oder umgekehrt, das Ermessen aus weltlichen Gründen die Burka zu verbieten – Frankreich?[*21] Der Europäische Gerichtshof für Menschenrechte hat in konkreten Fällen bis jetzt beides bejaht. Zurzeit steht vor dem EuGMR die Frage, ob in der Türkei, die offiziell keine Amtsreligion hat, die Aleviten im Vergleich zu Sunniten diskriminiert werden, die Letzten bilden die mehrheitliche islamische Glaubensrichtung in der Türkei und bekommen finanzielle Unterstützung des Staates, die Aleviten dagegen sind bis heute nicht als religiöse Minderheit anerkannt. [*22]

Kann Griechenland aus der eingetragenen Partnerschaft/Lebenspartnerschaft die Gleichgeschlechtlichen ausschließen?[*23] Der EuGMR hat es verneint und eine Verletzung aufgrund der Diskriminierung festgestellt, obwohl er sich noch nicht über gleichgeschlechtliche Ehe geäußert hat. Es gibt noch Fälle, wo die Staaten, z.B. Russland und Griechenland, den Homosexuellen auf der Arbeitsmarkt diskriminiert haben oder wo z.B. in Russland die HIV-Infizierte diskriminiert werden, z.B. bekommen Ausländer kein Aufenthaltserlaubnis, weil sie HIV infiziert sind.[*24]

Weitere, besonders wichtige ethische Fragen betreffen den Anfang und das Ende des Lebens. Der Europäische Gerichtshof für Menschenrechte ist gerufen, über die Klagen der Beschwerdeführer, die ihr Leben freiwillig durch Euthanasie beenden wollen, zu entscheiden[*25], aber auch über die Klagen von denen, die über das Schicksal ihres Embryos selbst entscheiden möchten.[*26]

18 *M.S.S. v. Belgium and Greece* [GC] no. 30696/09, 21. Januar 2011.

19 *Tarakhel v. Switzerland* [GC] no. 29217/12, 4.11.2014.

20 *Lautsi and Others v. Italy* [GC], no. 30814/06,18.03.2011.

21 *S.A.S. v. France* [GC], no. 43835/11, 1. 07. 2014.

22 *Doğan and Others v. Turkey* [GC], no. 62649/10 (anhängig).

23 *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09 7 November 2013.

24 *Novruk and Others v. Russia*, nos. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14, 15.03.2016.

25 Z.B. *Koch v. Germany*, no. 497/09, 19.07.2012.

26 *Parrillo v. Italy* [GC], no. 46470/11, 27.08.2015.

Andere, äußerst kontroverse Themen für die Regierungen der Mitgliedstaaten sind die Strafgefangenen und der Kampf gegen den Terrorismus. Auch hier wird oft eines gesagt und anders gemacht. An den Europäischen Gerichtshof für Menschenrechte wenden sich sowohl diejenigen, die ihre Familien in Terroranschlägen verloren haben, als auch die im Terrorismus Verdächtigten wegen des unmenschlichen Behandelns durch die Rechtsvollzugsorganen, aber auch die Gefangenen, die in unmenschlichen Zuständen ihre Strafe verbüßen. Der Ansicht, dass auch Kriminelle Menschenrechte haben, wird nur sehr langsam akzeptiert, es ist in Gesellschaften meistens ein besonders unpopuläres Thema. So hat z.B. das Vereinigte Königreich seine Gesetzgebung fortwährend nicht geändert, die den automatischen Wahlrechtsentzug der Strafgefangenen vorsieht und den Gefangenen verbietet, auf der nationalen und europäischen Ebene zu wählen, obwohl der Europäische Gerichtshof für Menschenrechte bereits mehrmals eine Verletzung des Wahlrechtes der Gefangenen festgestellt hat.[*27] Unter dem Vorwand des Terrorismuskampfes versuchen die Staaten oft ihre Macht zu verstärken, z.B. durch das unbegrenzte Abhören der Bevölkerung. Auch über dieses Thema hat EuGMR z.B. gegen Russland sich geäussert.[*28]

2.2. Ethik und Wirtschaft

Ein weiteres Beispiel von der Doppelzüngigkeit ist, dass oft hinter den Kulissen die Wirtschaft die endgültigen Entscheidungen trifft: man darf nicht vergessen, dass neben der Staatsgewalt oft die großen Unternehmen und Korporationen die Menschenrechte verletzen können. So entstehen Kreise, in denen die wirtschaftlichen Interessen wichtiger sind als der Schutz der Menschenrechte und Umwelt. Ist das ethisch?

Der Papst Franziskus hat in seiner Rede in Straßburg uns darauf Aufmerksam gemacht, dass es wichtig ist, die eigene Identität zu kennen, bevor man mit anderen Dialoge aufnimmt, dass die Zeit reif ist, zusammen ein Europa zu bilden, wo es nicht nur um die Wirtschaft geht, sondern um die unverzichtbaren Werte.[*29] Österreichische Philosophin und Wissenschaftsjournalistin Ursula Baatz hat sehr präzise über diese Situation geschrieben: „Gefährlich sind nicht die „Anderen", sondern jene, die ein System der Gewalt durch „Wirtschaftlichkeit" errichten. Wenn nicht Menschen, sondern Banken geschützt werden, und sich alles nur um Wirtschaft und Wachstum dreht, dann ist da kein Platz für Beziehungen, Menschenrechte, Bildung. Dann hat Europa seine Seele verloren."[*30]

Die privatwirtschaftlichen Fälle kommen nur indirekt vor den EuGMR, da es nach der Konvention hauptsächlich um die Verantwortung für die Handlungen der öffentlichen Gewalt geht. Jedoch kann der Staat auch verpflichtet sein, ihre Bürger und Bewohner vor der Verletzung der Menschenrechte und Willkür durch die Dritten, darunter durch die Privatunternehmen zu schützen. So hat der EuGMR über mehrere Fälle aus z.B. Spanien, Russland, Italien, der Türkei, Rumänien und Belgien entschieden, wegen der Umweltverschmutzungen durch Fabrik-; Stahlwerk und andere Industrieanlagen, welche Abgase, Gestank und Verunreinigungen verursacht haben, die zu Gesundheitsproblemen bei den in der Umgebung lebenden Menschen geführt haben.[*31] Der EuGMR hat meistens eine Verletzung des Rechtes auf Achtung des Privatlebens festgestellt, weil die Regierungen nicht vermocht hatten, einen Ausgleich zwischen den wirtschaftlichen Interessen und dem Recht der Beschwerdeführer auf Achtung der Wohnung und ihres Privat- und Familienlebens herzustellen. Eine andere Möglichkeit, wie die Großunternehmen die Menschenrechte einschränken, ist das sie das Recht auf Beitritt oder Nichtbeitritt zu einer Gewerkschaft verletzen, auch dazu hat sich der Europäische Gerichtshof für Menschenrechte geäußert.

Andererseits hat der Europäische Gerichtshof für Menschenrechte über zahllose Fälle entschieden, die den Schutz des Privateigentums betreffen. Auch da können oft ethische Probleme auftauchen, z.B. wandten sich die deutschen Grundeigentümer an EuGMR, die aus ethischen Gründen nicht verpflichtet sein wollten, gegen ihren Willen die Jagdausübung auf eigenen Grundstücken zu dulden.[*32]

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27 *Hirst v. the United Kingdom (No. 2)* [GC], no. 74025/01, 6.10.2005.

28 *Roman Zakharov v. Russia*, [GC], no. 47143/06), 4.12.2015.

29 Francis, 'Pope Francis: Address to European Parliament – full text', Vatican Radio, November 25 2014, http://www.news.va/en/news/pope-francis-address-to-european-parliament (29.03.2016).

30 *Ursula Baatz*, Europa beginnt im Orient, „Brennstoff", Heft 39 in 2015: http://ethik-heute.org/europa-beginnt-im-orient/

31 Siehe, z.B., *Smaltini v. Italy,* no. 43961/09, 16.04.2015; *Guerra and others v. Italy*, [GC], no 116/1996/735/932, 19.02.1998; *Vilnes and Others v. Norway*, no. 52806/09, 5.12.2013; *Lopez Ostra v. Spain*, no. 16798/90, 9.12.1994.

32 *Herrmann v. Germany*, no 9300/07, 26.06.2016.

2.3. Ethik und Medien

Als der dritte Anwendungsbereich der Beispiele der Doppelzüngigkeit neben dem Handeln der Staatspolitik und Wirtschaft sind die Medien zu erwähnen. Sicherlich sind hier ethische Probleme besonders auf Schau gestellt. Einerseits gibt es Journalisten, die dafür bestraft worden sind, dass sie frei ihre Meinung geäußert haben, andererseits gibt es diejenigen, deren Privatleben wegen des Missbrauchs der Journalistenethik gegen ihren Willen vor der Öffentlichkeit gebracht worden ist oder die sogar unter Hassrede leiden.

Der Europäische Gerichtshof für Menschenrechte hat die Meinungsfreiheit als Stütze der demokratischen Gesellschaft bezeichnet und der Presse die unverzichtbare Rolle als „Wachhund" der Öffentlichkeit verliehen.[*33] Die Meinungsfreiheit schützt nicht nur den Inhalt von Informationen und Ideen, sondern auch die Mittel ihrer Verbreitung und auch solche Informationen und Ideen, die verletzen, schockieren oder beunruhigen.[*34] Die Ausnahmen der Meinungsfreiheit müssen besonders eng ausgelegt werden und gründlich motiviert sein.

Dennoch ist auch die Ausübung der Meinungsfreiheit mit Pflichten und Verantwortung verbunden, sie kann daher Einschränkungen oder sogar Strafdrohungen unterworfen werden, die gesetzlich vorgesehen und in einer demokratischen Gesellschaft wegen nationaler Sicherheit, der territorialen Unversehrtheit oder der öffentlichen Sicherheit notwendig sind. Die Einschränkungen der Meinungsfreiheit können auch zur Aufrechterhaltung der Ordnung oder zur Verhütung von Straftaten, zum Schutz der Gesundheit oder der Moral, zum Schutz des guten Rufes oder der Rechte anderer, zur Verhinderung der Verbreitung vertraulicher Informationen oder zur Wahrung der Autorität und der Unparteilichkeit der Rechtsprechung erlaubt sein.[*35] In der heutigen Gesellschaft haben sich die Medien zu einer tatsächlichen vierten Gewalt entwickelt. Die Medien fabrizieren oft Nachrichten, sie haben enorme Macht zu selektieren, was sie für interessant, wichtig oder eben skandalös und Berichtenswert finden, was zu einer Nachricht wird oder nicht. Deswegen ist es sehr wichtig, dass die Journalisten ethisch bleiben. Der Europäische Gerichtshof für Menschenrechte hat entschieden, dass selbst die Personen des öffentlichen Lebens das Recht den Schutz des Privatlebens genießen, wenn der veröffentlichte Artikel und die Fotos nicht zur öffentlichen Diskussion beitragen und nur Klatsch und Skandal dienen, z.B. in den Fällen über die Prinzessin Caroline aus Monako. [*36]

Dazu kommt noch das Phänomen der sogenannten Sozialmedien im Internet, wo ein anonymer Kommentar, der mit Sekunden kolossal verbreitet werden kann, ein ganzes Leben ruinieren kann. Der EuGMR hat bereits in einem finnischen Fall eine Verletzung des Rechtes auf Achtung des Privatlebens infolge mangelnden Schutzes vor diffamierenden Kontaktanzeigen im Internet festgestellt.[*37] Eine unbekannte Person hat im Internet eine Annonce geschaltet, in welcher der damals 12-jährige Beschwerdeführer intime Beziehungen zu einem gleichaltrigen oder älteren Knaben suchen soll. Aufgrund einer Kontaktaufnahme wurden die Polizei und das Gericht eingeschaltet, um den Täter zu identifizieren; das finnische Gericht hat es aber abgelehnt, den Provider zur Bekanntgabe der IP-Adresse dieser Person zu verpflichten, weil das Delikt der üblen Nachrede dies nicht erlaube. Der Europäische Gerichtshof für Menschenrechte hat jedoch eine positive Verpflichtung des Staates vorgeschrieben und gemeint, dass ein praktischer und wirksamer Schutz wirksame Schritte zur Identifizierung und Strafverfolgung des Täters erfordert. Es ist die Aufgabe des Gesetzgebers, Rahmenbedingung für die Schlichtung solcher Ansprüche zu schaffen. Im Fall *Delfi gegen Estland* hat der Europäische Gerichtshof für Menschenrechte die Verantwortung eines Internetportals für anonyme beleidigende Kommentare (insb. Hassrede) seiner Nutzer bekräftigt.[*38]

Die Problematik der Meinungsfreiheit, Ausgleich zwischen allgemeinen/öffentlichen Interessen und dem Schutzes des Privatlebens der Anderen ist besonders delikat und benötigt meistens eine sehr zarte Abwägung von beiden Rechte und hängt viel vom konkreten Fall ab. Deshalb sind die nationalen Gerichte in erster Linie am besten platziert um diese delikate Konflikte zu lösen.

Andererseits wenn die umstrittene Information der Verbesserung dient, z.B. das Funktionieren des Rechtssystems, hat der Europäische Gerichtshof für Menschenrechte das anwaltliche Recht auf die

33 *Goodwin v. the United Kingdom*, no. 17488/90, 27.03.1996.

34 *Handyside v. the United Kingdom*, Series A no. 24, 7.12.1976, *Stoll v. Switzerland* ([GC] no. 69698/01, ECHR 2007-V; *Animal Defenders International v. the United Kingdom* ([GC], no. 48876/08,ECHR 2013.

35 Siehe Art 10, EMRK.

36 *Von Hannover v. Germany (2),* [GC], no 40660/08 and 60641/08, 7.02.2012.

37 *K.U. v. Finland*, no. 2872/02, 02.12.2008.

38 *Delfi v. Estonia* [GC], no. 64569/09, 16.06.2015.

Justizkritik geschützt.[*39] In diesem französischem Fall ging es um einen versteckten Brief zwischen dem Richter und Staatsanwalt/Ermittler, der veröffentlicht wurde und dem der Rechtsanwalt in der Zeitung kommentiert hat, um daraus zu schliessen, dass das Verhalten der Untersuchungsrichterin "völlig unvereinbar mit den Prinzipien der Unparteilichkeit und Fairness" sei, und der Brief ein "empörendes" Maß der Nähe zwischen den französischen Richtern und Ermittlern offenbare.

Die richterliche Unabhängigkeit und Unparteilichkeit sind besonders wichtige Merkmale, bei denen man ebenfalls ohne professionelle Ethik nicht weiter kommt. Die Gerichte und Vollzugsbehörden müssen schnell, effektiv, aber auch hochwertig arbeiten, um zu vermeiden, dass die Leute jahrelang darauf warten, dass die Gerichte in ihrem Land über ihr Schicksal entscheiden oder dass die für sie günstige Urteile auch vollgezogen werden.

Interamerikanischer Gerichtshof hat in einem Fall gegen Peru angedeutet, dass die Gerechtigkeit nicht wegen Formalitäten geopfert werden darf, solange ein passendes Gleichgewicht zwischen der Gerechtigkeit und der Rechtssicherheit bewahrt ist.[*40] Es ist besonders wichtig, dass der Europäische Gerichtshof für Menschenrechte selbst auf hohe ethische Kriterien beruht und das Vorbild für die nationale Gerichte, mit denen er einen faszinierenden Dialog führt, darstellt.

Die obenerwähnten Beispiele haben uns gezeigt, dass die Menschenrechte und Achtung und Schutz der Menschenrechte den wichtigsten, wenn nicht den einzigen Rettungsring Europas bilden.

Meines Erachtens sollte man die Zukunft Europas durch das Prisma eines hohen Niveaus des Menschenrechtsschutzes sehen und hier spielen der in der europäischen Politik inzwischen ins Hintergrund gerutschte Europarat, vor allem aber der Europäische Gerichtshof für Menschenrechte eine entscheidende Rolle. Es sind die Werte der Menschenrechte, die uns in vielfältigen Europa verbinden, obwohl die gleichen Rechte manchmal in verschiedenen Staaten etwas anders ausgelegt werden können. Die Menschenrechte sind längst nicht mehr ausschließende Domain der Innenpolitik, sie sind universal und auf jeden Fall europäisch.

Der geistige Vater der Einigung Europas, der internationale Beamte aus Frankreich, Jean Monnet hat gesagt, dass wir in Europa keine Staaten einigen, sondern Menschen verbinden.[*41]

Was verbindet aber die Menschen? Es sind ausgerechnet ihre Rechte und Pflichten, ihre Grundrechte und Freiheiten, die Menschenrechte, ihre eigenen Probleme, aber auch ihr eigenes Behagen, mit denen sie sich identifizieren.

Der deutsch-französische Politiker, ehemaliges langfristiges Mitglied des Europäischen Parlamentes, Daniel Cohn-Bendit meint, dass die Demokratie und Menschenrechte zwei integrierende Elemente Europas sind.[*42] Auch der US-Präsident Barack Obama hat in seiner Rede im September 2014 in Tallinn die wichtige Rolle der Menschenrechte unter anderem auch Menschenwürde betont: *„Not just in the Baltics, but throughout Europe, we must acknowledge the inherent dignity and human rights of every person – because our democracies cannot truly succeed until we root out bias and prejudice, both from our institutions and from our hearts."* [*43]

Am Besten fasst aber man die Menschenrechte und die Identität zusammen, in den man die Menschenrechte als das Wichtigste für die europäische Identität bezeichnet.[*44]

Wie können wir es aber schaffen, die Menschenrechte in den Vordergrund zu bringen?

Erstens: Als allererste sehe ich hier in diesem Kontext eine entscheidende Rolle der Familie, Schule und Ausbildung, Wissenschaft und Kultur. Nehmen wir pauschale Beispiele: Kunst, Rechtswissenschaft, auch

39 *Morice v. France* [GC], no. 29369/10, 23.04.2015.

40 *Cayara v. Peru*, 3.02.1993, IACHR Series C No 14, IHRL 1395 (IACHR 1993),§ 42.

41 *Jean Monnet*, Rede in Washington, 30.04.1952, Association Jean Monnet: http://www.ajmonnet.eu/index.php?option=com_content&view=article&id=4&Itemid=78&lang=en (29.03.2016)

42 *Daniel Cohn-Bendit*, Quo Vadis Europa? We need to talk about Europe – European Identity Debates at the Council of Europe 2013-14 (2014), S.63 *ff*.

43 Siehe im Internet estnische Übersetzung: http://uudised.err.ee/v/arvamus/cdcaab04-50c3-4932-90aa-813dbf18239b und auf Englisch: http://www.delfi.ee/archive/barack-obama-tallinn-speech-in-full-nato-will-defend-estonia-latvia-lithuania?id=69666267 (29.03.2016).

44 Siehe Thomas Meyer, Johanna Eisenberg (Hrsg.), Europäische Identität als Projekt, Innen und AußensichtenVS Verlag für Sozialwissenschaften, 2009, S.99, mit Bezug auf Jürgen Habermas und auf das Kopenhagener Dokument von der EG „über die europäische Identität", 1973 in dem die Menschenrechte als Grundelement der europäischen Identität bezeichnet werden. Wobei für den deutschen Philosophen Jürgen Habermas die Europäische Konvention für Menschenrechte und die Grundrechtscharta der Europäischen Union die wesentlichsten Grundsätze für Europäische Identität und Gemeinsamkeit bilden.

Theater und was sie mit der Ethik verbindet, wie die Ethik sich durch die Kunst äußert, wie die Kunst als eine Therapie wirkt, z.B. ein Theater im Gefängnis, ein Gefangenentheater kann sehr viel den Reintegration in das Leben nach dem Gefängnis der einst Kriminellen beibringen.

Einer der berühmtesten estnischen Schriftsteller, ausgebildeter Jurist, Jaan Kross hat geschrieben, dass man nicht das Wissen lehren sollte, das vergisst man ja sowieso, sondern die Fähigkeit, wie das Wissen zu erlangen und die Prinzipien des Lernens, aber auch Charakter muss man lehren.[*45]

In diesem Zusammenhang ist es interessant zu bemerken, dass der Europäische Gerichtshof für Menschenrechte in einer Entscheidung vom 2009 eine Beschwerde gegen die Einführung der Ethik als Pflichtfach an Berliner Schulen als unzulässig zurückgewiesen hat.[*46] Die Klägerin, eine Schülerin und ihre Eltern, hatten der Änderung des Berliner Schulgesetzes und der Einführung eines Pflichtfachs Ethik für Schüler der 7. bis 10. Klassen widersprochen. Die Familie begründete ihren Widerspruch mit dem laizistischen Charakter des Unterrichts, der gegen ihre evangelische Überzeugung verstoße und mit dem staatlichen Neutralitätsgebot nicht vereinbar sei. Der EuGMR lehnte die Beschwerde als nicht ausreichend fundiert und daher unzulässig ab. In der Begründung hieß es: Das Ziel des Berliner Ethik-Unterrichts, die von der kulturellen, ethnischen, religiösen oder ideologischen Herkunft der Schüler unabhängige Betrachtung von grundsätzlichen ethischen Fragen, verstößt nicht gegen das Recht der Eltern, die Erziehung ihrer Kinder gemäß der eigenen religiösen Überzeugung auszuüben und gewahrt die staatliche Neutralität. Zum einen stehe es den Mitgliedstaaten frei, darüber zu entscheiden, ob „ein Rahmenplan einen größeren Platz den Kenntnissen über eine besondere Religion gewähren muss". Zum anderen sei es kein Rechtsverstoß, wenn Schüler auch mit religiösen oder weltanschaulichen Überzeugungen konfrontiert werden, die den eigenen widersprechen.

Zweitens: Man muss einen neuen Impetus an die Menschenrechte geben. Einen einheitlichen Menschenrechtsraum für ganz Europa bilden. Dabei würde der Situation der Beitritt der Europäischen Union zur Europäischen Menschenrechtskonvention viel helfen, da dann die Institutionen der Europäischen Union selbst auch unter einer Außen-Kontrolle des Europäischen Gerichtshofes für Menschenrechte stehen würden. Das wäre sehr wichtig, denn vieles der staatlichen Handels direkt aus dem Recht der Europäischen Union stammt und solange der EU selbst der Europäischen Menschenrechtskonvention nicht beigetreten ist, die Mitgliedstaaten die Verantwortung tragen. Leider hat der Gerichtshof für die Europäische Union in seinem Gutachten 2/2013 den Beitrittsvertrag als mit dem EU Recht unvereinbar gewertet.[*47] Aber man kann diese Ablehnung auch als eine Herausforderung nehmen, eine grundbrechende Lösung zu finden, die die EU endlich aus dieser Krise hilft, denn die EU selbst braucht den Beitritt mehr als jemals.

Drittens: Was sehr wichtig ist und worüber man selten ehrlich spricht, ist zu vermeiden, dass die Menschenrechte missbraucht werden. D.h. man sollte die Menschenrechte nicht als Flaggschiff der extremen Gruppen nehmen, die ihrerseits unter ihren Gegnern Extremismus kultivieren.

Der Generalsekretär des Europarates, Thorbjørn Jagland hat in seiner Rede im September 2014 vor dem Ministerrat des Europarates Folgendes betont: *„I have always been committed to Europe – with its many nation states, diversity in culture, ethnicity and religion. Europe will never function with one centralized power. The continent's diversity has to be taken into account. But we also know that Europe needs some common values and standards that hold the continent together. The Council of Europe is the epicentre for this value-based Europe. We can only be successful if we are able to strike the right balance between the need to have common standards and the respect for national, ethnic and religious identity. If the epicentre goes too far in imposing new standards, the surroundings will strike back.*"[*48]

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45 *Lehte Hainsalu*, Pöördtoolitund midrimajas, Edasi 30.11.1975 (valik Jaan Krossi tsitaate ja teda iseloomustavaid portreekilde): http://epl.delfi.ee/news/kultuur/jaan-krossi-tsitaate-ja-portreekilde?id=51113643

46 *Appel-Irrgang vs. Germany*, no 45216/07, 6.10.2009.

47 Europäischer Gerichtshof, „Gutachten 2/13: Antrag der Europäischen Kommission auf ein Gutachten nach Art. 218 Abs. 11 AEUV", Entwurf eines internationalen Übereinkommens – Beitritt der Europäischen Union zur Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten – Vereinbarkeit des Entwurfs mit dem EU-Vertrag und dem AEU-Vertrag"18.12.2014.

48 Information Documents SG/Inf(2014)34, 16. 09.2014, Speaking Notes of the Secretary General to the 1206bis meeting of the Ministers' Deputies (16 September 2014) : https://wcd.coe.int/ViewDoc.jsp?id=2235537&Site=CM (30.03.2016).

Zusammenfassung

Es ist schade, dass die Bewunderung der europäischen Integration sich langsam zur Enttäuschung und Identitätskrise Europas umgewandelt hat. Vielleicht sollte man aufgeben, mit Kraft eine europäische Identität durchsetzen und stattdessen die wiedererwachende nationale Identität ernst nehmen, ehrlich über Probleme reden, keine Scheinunion kultivieren. Die Identität lieber mit den Menschenrechten verbinden, denn die Letzten sind das Wichtigste für eine Identität.

Europa sollte sich aus der Doppelzüngigkeit, Oberflächlichkeit und niedrige, statt hohe Gesamtstandards befreien und nach Menschenrechte als Rettungsring greifen und sich zu einem Wertegemeinschaft entwickeln.

Die Doppelzüngigkeit z.B. in der Politik, Wirtschaft und Medien, sollten nicht eine weitere europäische Scheinunion unterstützen. Was für den Menschen wichtig ist, ist nicht das System als solche, auch nicht die automatische Anerkennung und blindes Vertrauen, sondern dass man mit ihnen ehrlich ist und dass man ihre Probleme versteht, sie individuell betrachtet. Europa muss verständlich und menschlich sein. Die Ethik spielt hier eine bedeutsame Rolle, es kann beides: ein Grund einer Ausnahme der Anwendung eines Rechtes, aber auch ein Grundstein einer europäischen Norm sein.

Was ist wichtig, ist eine gute Ausbildung, eine „*open mind*“ zu haben, eine innerlich gewachsene Kultur und Ethik in der Familie, in der Schule, es muss nicht unbedingt „europäische Ethik“ als solches geben. Hauptsache ist, dass die Ethik ein Teil der Ausbildung ist, dass man über die Vergangenheit und Traditionen redet und gleichzeitig zukunftsorientiert ist. Jemand, der gute eigene Wurzel hat und die nicht vergisst, den ein gutes starkes Zuhause und eine Familie umgeben, aber gleichzeitig offen für Andere ist, egal wo in Europa, wird vor allem ein guter Mensch und dann früher oder später irgendwann automatisch ein guter Europäer. Es ist wichtig, Europa im globalen Bild zu sehen, auch Realismus und Selbstkritik gehören dazu, am besten Kritik durch eine Außenkontrolle, die von einer bereits existierenden Institution, sowie z.B. vom Europäischen Menschenrechtsgerichtshof ausgeübt wird. Aber man muss darauf achten, dass man die Menschenrechte nicht missbraucht, sowie die ethische Gründe ein neues Recht zu schaffen oder ein Bestehendes einzuschränken nicht missbraucht. Sonst besteht die Gefahr, dass die Menschenrechte devalviert werden und keiner von ihnen etwas hören will.

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Enforcing the Judgments of the ECtHR in Russia in Light of the Amendments to the Law on the Constitutional Court

1. Introduction

This article discusses problems related to implementing the judgments of the European Court of Human Rights (ECtHR) in Russia. Although the contracting parties are obliged to execute the judgments of the ECtHR and are required to take all measures necessary to advance implementation[*1], there are serious problems with enforcing the judgments in several member states. The binding role of the ECtHR's judgments 'is subject to doubts and questioning and, occasionally, an outright rejection'[*2]. Russia is one of nine countries highlighted in the report of the Parliamentary Assembly of the Council of Europe (the PACE report) on implementing the judgments of the ECtHR as having the highest number of non-implemented judgments.[*3] As many as 1,474 cases were waiting for execution in Russia as of the beginning of 2015[*4], and it takes, on average, 9.7 years to implement a judgment of the ECtHR in Russia.[*5] Russia has a 'long list of outstanding issues concerning implementation of judgments of the European Court of Human Rights, most of which concern particularly serious human rights violations', according to the PACE report.[*6] Several structural problems contribute to the high number of Russian cases discussed by the ECtHR and the unsatisfactory implementation of judgments. These include non-enforcement of domestic judicial decisions, violation of the principle of legal certainty, a 'supervisory review procedure' (*надзор*) that allows reopening of the final and enforceable judgments, poor conditions in detention on remand, torture and ill treatment in police custody, the actions of the security forces in the North Caucasus, various violations related to secret extradition

1 See the Parliamentary Assembly's report 'Implementation of Judgments of the European Court of Human Rights', doc. 13864, 9.9.2015, para. 53. Available at http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=22005 (most recently accessed on 1.7.2016).

2 W. Sadurski. Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the accession of Central and East European States to the Council of Europe, and the idea of pilot judgments. – *Human Rights Law Review* 2009 (9) / 3, p. 405.

3 Other countries include Bulgaria, Greece, Hungary, Italy, Poland, Romania, Turkey, and Ukraine. For further information, see the PACE report (Note 1), p. 3.

4 According to the data of the Committee of Ministers report 'Supervision of the execution of judgments of the European Court of Human Rights – Annual Report 2014', the countries with the largest numbers of unimplemented ECtHR judgments are Italy (2,622 cases), Turkey (1,500 cases), and the Russian Federation (1,474 cases).

5 PACE report (see Note 1), para. 31.

6 *Ibid*., para. 17.

to former Soviet republics in central Asia, and prohibition of LGBT assemblies.[*7] As is argued by Klaas de Vries, a rapporteur with the PACE Committee on Legal Affairs and Human Rights, persisting problems with implementation of various judgments demonstrate 'a clear lack of political will to execute the Court's judgments and to follow the Committee of Ministers' recommendations'.[*8] The relationship between Russia and the Council of Europe (hereinafter 'CoE') has always been 'marked by a profound contradiction'[*9]. It can be agreed that, on account of the multi-layered legal order that exists in Europe today, tensions between individual layers of the European legal order are unavoidable[*10]. Most probably, the tensions between the ECtHR and Russia reached their peak when, in December 2015, Russia adopted a law[*11] ('The Amended Law on the Constitutional Court') refusing to acknowledge the binding force of the ECtHR's judgments and empowering the Constitutional Court of the Russian Federation to declare said judgments unenforceable when implementation would be in conflict with the Constitution of Russia. The aim of the current paper is to analyse the enforceability of the judgments of the ECtHR in Russia, considering certain amendments to the Law on the Constitutional Court and relevant case law of the Constitutional Court, and to assess the regulatory changes and court practice from the perspective of obligations Russia has undertaken as a member of the CoE.

2. Enforceable judgments as the ECtHR's main strength

The ECtHR has been praised as the strongest and the most efficient oversight system in international human rights law[*12], 'a crown jewel of the world's most advanced international system for protecting civil and political liberties'[*13]. The associated supranational enforcement mechanism, which enables citizens, often disadvantaged in their home countries, to enforce their rights at the international level, is regarded as the main strength of the European Convention on Human Rights (ECHR[*14]).[*15] From the perspective of citizens, the ECtHR is often 'a last chance of securing redress for abuses they have suffered at the hands of their government'[*16]. The mechanism for individual petitioning is supposed to help 'bridge the gap between the lofty goals of international human rights law and the imperfect execution of human rights norms at the national and local levels'[*17]. Successful and expeditious implementation of the judgments of the ECtHR on the national level is vital for the ECtHR, as both the credibility and the legitimacy of the system depend on it.[*18] However, co-operation within the CoE in accordance with its goals and standards and also implementation of the rights under the Convention and the decisions of the ECtHR remain the duty and opportunity of governments. For its effectiveness, the CoE system ultimately relies on 'the good will of nation-states whose commitment to the ECHR system is based on traditional, international-law type of obligations'.[*19]

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7 *Ibid*., para. 13.3.

8 *Ibid*., para. 17.

9 J.-P. Massias. Russia and the Council of Europe: Ten years wasted? – *Russie. Nei. Visions* 2008/15 (translated from French by Nicola Bigwood), p. 4.

10 European Commission for Democracy through Law (the Venice Commission). Opinion No. 832/2015: Interim opinion on the amendments to the Federal Constitutional Law 'On the Constitutional Court' of the Russian Federation. CDL-AD(2016)005. 15.3.2016, Strasbourg, para. 59 (hereinafter 'the Venice Commission').

11 Federal constitutional law from 14 December 2015, No. 7-FKZ, 'On amending the federal constitutional law "On [the] Constitutional Court of the Russian Federation"'.

12 S. Sweet. A cosmopolitan legal order: Constitutional pluralism and rights adjudication in Europe. – *Global Constitutionalism* 2012/1, p. 53. – DOI: http://dx.doi.org/10.1017/S2045381711000062.

13 L.R. Helfer. Redesigning the European Court of Human Rights: Embeddedness as a deep structural principle of the European human rights regime. – *European Journal of International Law* 2008 (19) / 1, p. 125.

14 In this article also referred to as 'the Convention'.

15 R.A. Cichowski. Civil society and the European Court of Human Rights. – J. Christoffersen, M.R. Madsen (eds). *The European Court of Human Rights between Law and Politics*. Oxford: Oxford University Press 2011, p. 79. See also C. Hillebrecht. Implementing international human rights law at home: Domestic politics and the European Court of Human Rights. – *Human Rights Review* 2012/13, pp. 279–301. – DOI: http://dx.doi.org/10.1093/acprof:oso/9780199694495.003.0005.

16 C. Schreck. Russian Law on rejecting human rights courts violates Constitution, experts say. Radio Free Europe, 16.12.2015. Available at http://www.rferl.org/content/russian-law-on-rejecting-human-rights-courts-violates-constitution-experts-say/27432125.html (most recently accessed on 1.7.2016).

17 C. Hillebrecht. (see Note 15), p. 279.

18 D. Anagnostou, A. Mungiu-Pippidi. Domestic implementation of human rights judgments in Europe: Legal infrastructure and government effectiveness matter. – *European Journal of International Law* 2014 (25) / 1, p. 206.

19 W. Sadurski (see Note 2), p. 399.

Under Article 46 (1) of the ECHR, the contracting parties undertake to abide by the final judgment of the ECtHR in any case to which they are parties. State bodies have an obligation to 'comply with the legal situation under the ECHR but also to remove all obstacles in their domestic legal system that might prevent an adequate redress of the applicant's situation'*[20]. States can choose among the means of execution they consider to be appropriate; however, 'the State does not have the choice to execute or not to execute, [and] that choice is limited only to the means of execution'.*[21] Compliance with the final judgment covers redress in the individual case at hand, but, in addition, the state may be required to revise its legislation or to reform its administrative or judicial practice in order to render its legal system in conformity with the ECHR.*[22] Notwithstanding the flexibility granted to the states in choosing appropriate means of execution, problems with implementation remain in several member states, including Russia.

3. The position of the ECHR and the judgments of the ECtHR in the Russian legal system

3.1. Changing interpretation by the Constitutional Court

Pursuant to Article 15 (4) of the Russian Constitution, the universally recognised norms of international law and the international treaties and agreements of the Russian Federation shall be a component part of the country's legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, those rules of the international agreement shall be applied. Since Russia ratified the ECHR in 1998, it has been an integral part of the Russian legal system. However, as the interpretation of Article 15 (4) has differed considerably from one time period to another, also the position of the ECHR in Russia's legal system has been a highly disputed question among Russian legal scholars and in the practice of the Constitutional Court.

In the first years following the ratification of the ECHR, the approach to the Convention was generally favourable. In 2001, the Constitution Court established that the decisions of Russia's institutions must be in accordance with the ECtHR.*[23] However, according to an interpretation by the Constitutional Court in 2007, the words 'are part of its legal system' in Article 15 (4) of the Constitution mean simply that 'international agreements, including the Convention and decisions of the ECtHR, should only be *taken into account* in passing decisions' (italics in the original).*[24] This indicates a negative turn with regard to the role of the Convention and the ECtHR in the Russian legal system. Russian human rights lawyer Kirill Koroteev explains: 'In Russian law, the words *take into account* have a clear meaning: that which should be taken into account is *not obligatory*' (italics in the original).*[25]

Over the past few years, the ECtHR has issued several judgments against Russia in politically sensitive cases, which have received strong disapproval in Russia*[26] and have resulted in an increasing reluctance to execute of judgments of the ECtHR. The president of the Constitutional Court, Valery Zorkin, has criticised the ECtHR for exhibiting more and more pronounced judicial activism and orientation toward revealing structural defects of national legal systems.*[27] According to Zorkin, the ECtHR does not give sufficient recognition to the socio-historical context of the various individual countries. He argues:

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20 Judgment of the European Court of Human Rights in *Maestri v. Italy*, Application 39748/98 from 17 February 2004, para. 47.

21 Venice Commission (see Note 10), para. 57.

22 *Ibid*., para. 55.

23 K. Koroteev. The European factor in Russian justice. Open Democracy News Analysis, 26 June 2008. Available at https://www.opendemocracy.net/node/45245/pdf (most recently accessed on 1.7.2016).

24 *Ibid*.

25 *Ibid*.

26 For example, the Grand Chamber's judgment of October 2010 in *Markin v. Russia* triggered a strong backlash within Russia. See, e.g., L. Mälksoo. Markin v Russia. – *The American Journal of International Law* 2012 (106) / 4, pp. 836–842. Controversial cases also include the ECtHR's *Anchugov and Gladkov v. Russia*, of 4 July 2013 (applications 11157/04 and 15162/05), involving prisoners' right to vote, and *OAO Neftyanaya Kompaniya Yukos v. Russia*, of 24 June 2014 (application No. 14902/04).

27 V.D. Zorkin. Challenges of implementation of the Convention on Human Rights. Presentation at the international conference on 'enhancing national mechanisms for effective implementation of the European Convention on Human Rights', held

> The significance of more full consideration of a particular socio-historical (socio-cultural) context of the Convention's realization by the European Court can be demonstrated by the widely known case 'Konstantin Markin v Russia'[*28], which became an impulse for Russia for elaboration of the role of the Constitutional Court of the Russian Federation in the mechanism of implementation of the Convention.[*29]

On 6 December 2013, considering the implementation of the judgment in the controversial case *Konstantin Markin v. Russia*, the Constitutional Court held that when a judgment of the ECtHR contradicts a prior ruling of the Constitutional Court on the case in question, the Russian Constitutional Court should have the final say in the execution of the relevant judgment by the ECtHR. The Constitutional Court explained that when a court of general jurisdiction has reopened proceedings in order to implement the judgment of the ECtHR and it cannot enforce that judgment of the ECtHR without at the same time disregarding provisions of domestic law, the court must suspend the proceedings and request the Constitutional Court to assess the constitutionality of such provisions. The Constitutional Court did not directly assess the place of the ECHR and judgments of the ECtHR in the Russian legal order; however, it held that when finding the challenged legal provisions to be in accordance with the Constitution, the Constitutional Court would determine possible constitutional means of implementation of the relevant judgment of the ECtHR within the limits of its competence.[*30]

In June 2015, when Russia had missed the deadline for submitting an action plan for just satisfaction awarded to shareholders of Yukos[*31], the issue of the relationship between international law and national law was raised in the State Duma. Ninety-three Russian deputies asked the Constitutional Court for a clarification as to the constitutionality of several pieces of legislation, including the federal law titled 'On Ratification of the ECHR' and the federal law 'On International Treaties'. The deputies claimed that the contested regulations included provisions unconstitutionally obliging Russian authorities to implement the judgments of the ECtHR even when they are in conflict with the Russian Constitution.[*32] According to Valery Zorkin, one of the reasons for this request was the judgment of the ECtHR in the case *Anchugov and Gladkov v. Russia*.[*33] In its judgment of 14 July 2015, the Constitutional Court[*34] held that the contested provisions were not actually unconstitutional. The Constitutional Court also explained that, in accordance with Article 46 of the ECHR, Russia 'recognized *ipso facto* and without special agreement the jurisdiction of the European Court of Human Rights as obligatory'[*35]and that the ECHR was an integral part of the Russian legal system.[*36] However, despite those statements, the Constitutional Court concluded that, although the Russian Constitution and the ECHR are based on the same basic values, in the event of a contradiction between the two with respect to the rights and freedoms of man and citizen, preference should be given to the Constitution and therefore Russia is not obliged to follow the judgments of the ECtHR literally when the enforcement of the judgment would be contrary to Russia's constitutional values.[*37] The Constitutional Court also stressed that the participation of the Russian Federation in any international treaty relationship does not mean giving up national sovereignty, that neither the ECHR nor the legal positions of the ECtHR based on it can cancel the priority of the Constitution, and that the implementation of international treaties and judgments of international organs is conditional upon these being in accordance with the Russian Constitution[*38] According to the Constitutional Court, when the ECtHR's interpretation of the provisions of the

in St Petersburg on 22–23 October 2015. Written notes available at http://www.ksrf.ru/en/News/Documents/Report%20for%2022%20October.docx (most recently accessed on 1.7.2016), pp. 2–3.

28 Grand Chamber's judgment of October 2010 in *Markin v. Russia* (application No. 30078/06).

29 V.D. Zorkin (See note 27), pp. 6–7.

30 Judgment of the Russian Constitutional Court of 6 December 2013, No. 27-P.

31 See Committee of Ministers. Case against the Russian Federation (Case No. 18, 1230th meeting), 11 June 2015. Available at https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Del/Dec%282015%291230/18&Language=lanFrench&Ver=original&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true (most recently accessed on 1.7.2016).

32 See Section 1, para. 5 of Judgment of the Russian Constitutional Court No. 21-P/2015, of 14 July 2015 (hereinafter 'Judgment No. 21-P/2015').

33 V.D. Zorkin (see Note 27), p. 11.

34 Judgment No. 21-P/2015

35 *Ibid*., Section 1, para. 1.

36 *Ibid*., Section 2.

37 *Ibid*., Section 4, para. 2.

38 *Ibid*., Section 2.2, paras 2 and 3.

ECHR is not in accordance with the principles and norms of the Russian Constitution, Russia may in exceptional cases 'withdraw from the implementation of the obligations imposed on it, when such derogation is the only possible way to avoid violations of the fundamental principles and norms of the Constitution of the Russian Federation'*[39]. According to Zorkin in his capacity as president of the Constitutional Court, the latter ruling, 'as the previous judgment of 6 December, 2013 [...] is not sensational, because it only reproduces and develops the legal position on the supremacy of the Constitution of the Russian Federation when executing the ECtHR decisions'.*[40] However, an expert on Russian constitutional law, Maria Smirnova, argues that the ruling of the Constitutional Court 'clearly signifies a change in the political attitude towards the implementation of decisions of the European Court'*[41].

Placing the Russian Constitution at the apex of the hierarchy of norms within the Russian legal system was viewed by the Venice Commission as an internal rationale for the decision taken.*[42] At the same time, the external rationale is reflected in the position of the Constitutional Court according to which

> [a]n international treaty is binding for its participants in the meaning which can be elucidated with the help of the adduced rule of interpretation [...] if the ECtHR, interpreting a provision of the ECHR [...] gives to a notion used in the Convention a meaning other than the ordinary one or carries out interpretation contrary to the object and purpose of the Convention, the state, in respect of which the judgment has been passed on this case, has the right to refuse to execute it as it goes beyond the obligations, voluntarily taken by this state upon itself when ratifying the Convention.*[43]

The Constitutional Court also stressed that, from the principles of interpretation set forth in the Vienna Convention on the Law on Treaties, when the interpretation of the ECtHR diverges from the imperative norms of customary international law (*jus cogens*), including the principle of sovereignty and the principle of non-interference with internal affairs of states, one can derive the conclusion that execution of the judgment is not obligatory.*[44] The Constitutional Court concluded that decisions of an authorised interstate body, including judgments of the European Court of Human Rights, cannot be executed 'if the interpretation of the provisions of an international treaty, that this decision is based on, violates relevant provisions of the Constitution of the Russian Federation'.*[45] Therefore, proceeding from the positions of the Constitutional Court, one can conclude that, although Russia has voluntarily become a member of the CoE and has subjected herself to the jurisdiction of the ECtHR, whenever a judgment of the ECtHR infringes the principle of sovereignty or is in conflict with the Constitution of the Russian Federation, Russia may refuse to implement that judgment.

It should be noted that the executive branch has a very important role in the process of refusing to implement the judgments of the ECtHR. Namely, when the government or the President of the Russian Federation consider a judgment of the ECtHR impossible to enforce for reason of a conflict with the Russian Constitution, at the request of these authorities the Constitutional Court should provide its interpretation. When the Constitutional Court concludes that the judgment of the ECtHR is incompatible with the Constitution, it shall not be implemented. The Constitutional Court also proposed that a special legal mechanism be created in order to ensure the supremacy of the Constitution in the implementation of ECtHR rulings.*[46] It is remarkable that the main conclusions of the Constitutional Court directly mirrored the position taken by the President's representative to the Constitutional Court, Mikhail Krotov. Although the presence of a President's representative on the Constitutional Court is highly questionable in terms of the principle of separation of powers, this has been the reality of Russia since 1996.*[47]

Valery Zorkin has emphasised that '[t]he main problem, which the Constitutional Court of Russia has faced within its work, is the need of simultaneous fulfilment of two not always well-combined tasks: harmonizing Russia's legal system with the all-European legal expanse, on the one hand, and protection of its

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39 *Ibid.,* Section 2.2, para. 4.

40 V.D. Zorkin (see Note 27), p. 12.

41 M. Smirnova. Russian Constitutional Court affirms Russian Constitution's supremacy over ECtHR decisions, 15 July 2016. EJIL Talk!: Blog of the European Journal of International Law. Available at http://www.ejiltalk.org/russian-constitutional-court-affirms-russian-constitutions-supremacy-over-ecthr-decisions/ (most recently accessed on 1.7.2016).

42 Venice Commission (see Note 10), para. 18.

43 Translation of this section of the Judgment No. 21-P/2015 is taken from the report of Venice Commission (see Note 10), para. 22. For original text, see Section 3, para. 3 of Judgment No. 21-P/2015.

44 Section 3, para. 3 of Judgment No. 21-P/2015.

45 *Ibid.,* Section 3, para. 9.

46 Section 1, paras 4 and 5 of the resolution part of Judgment No. 21-P/2015.

47 For further information, see M. Smirnova (see Note 41).

own constitutional identity, on the other'.[*48] Recent case law demonstrates that the Constitutional Court has found the necessary equilibrium in building its constitutional identity on the principle of sovereignty, overriding that part of its constitution declaring the supremacy of international law and thereby violating the international obligations that Russia has undertaken.

3.2. Amendments to the Law on the Constitutional Court

The decision of the Constitutional Court issued on 14 June 2015, analysed above, is also significant because mirroring this judgment almost point for point, in December 2015, the State Duma and the Federation Council approved the Amended Law on the Constitutional Court. Accordingly, the new legislation gives insight into how the Constitutional Court is likely to interpret the key terms of the law in the future.[*49] Pursuant to the Amended Law on the Constitutional Court, the Constitutional Court may consider the possibility of enforcement of the decision of an interstate body for the protection of human rights and freedoms at the request of the federal executive authority that is competent to operate in the field of protecting Russia's sovereign interests[*50]. The regulation allows the Constitutional Court to decide whether the decision of an international court, such as the European Court of Human Rights, should or should not be enforced in Russia. Neither the ECtHR nor any other specific court is explicitly mentioned in the law; instead, the term 'an interstate body for the protection of the rights and freedoms of a person' (*межгосударственный орган по защите прав и свобод человека*) is used. The Constitutional Court can consider the relevant case in order to resolve uncertainties as to the possibility of enforcing judgments of interstate bodies for the protection of human rights and freedoms when the interpretation of relevant treaties issued by these bodies is presumably in conflict with the Constitution of the Russian Federation[*51]. The Constitutional Court shall consider the case from the point of view of the constitutional order of the Russian Federation and the legal regulation of the rights and freedoms of man and citizen established by the Constitution of the Russian Federation.[*52] If the Constitutional Court recognises the interstate body's ruling to be unenforceable, any action aimed at the satisfaction under the relevant decision cannot be performed[*53]; hence, the decision will not be enforced in practice.

A report published by the Venice Commission is highly critical of the amended Law on the Constitutional Court, especially regarding its strict 'black or white approach'. They argue:

> If the Constitutional Court cannot 'remove the uncertainty' about the contradiction between the Constitution and the international decision [...] no measures (acts) aimed at the enforcement of it may be taken (adopted) within the territory of the Russian Federation. The amendments thus adopt an 'all or nothing' solution: they move from the premise that possible conflicts have to be settled either through refusing the implementation of ECtHR judgments – which is inadmissible – or through declaring that there is no conflict between these judgments and the Russian Constitution, a 'black or white' alternative.[*54]

On one hand, states are by no means obliged to use measures of execution that are unconstitutional in the respective country.[*55] According to the position of the Venice Commission, contradictions between national systems and rulings of the ECtHR are possible, but state bodies must find appropriate solutions for reconciling the provisions of the ECHR with the national constitution. This can be done effectively via means of dialogue, which has been successfully used between Germany and the ECtHR; through interpretation; or by means of reforms to national legislation.[*56] However, the Amended Law on the Constitutional Court does not provide for the option that if a certain measure is not in accordance with the Russian Constitution, another measure should be chosen in order to reconcile the domestic law and the judgment of the ECtHR and enable implementation the relevant judgment. The law is 'very strict in firmly stipulating that the execution as a whole is blocked'.[*57]

48 V.D. Zorkin (see Note 27), p. 1.

49 Venice Commission (see Note 10), paras 13, 25.

50 See Article 3^2 of the Amended Law on the Constitutional Court.

51 See Article 36 (2) of the Amended Law on the Constitutional Court.

52 See Article 104^3 of the Amended Law on the Constitutional Court.

53 See Article 104^4 of the Amended Law on the Constitutional Court.

54 Venice Commission (see Note 10), para. 73.

55 *Ibid*., para. 83.

56 *Ibid*., paras 97, 100.

57 *Ibid*., para. 83.

Another highly problematic aspect is that the amendments have weakened the position of Russian citizens in defending their rights. The possibility of declaring a judgment of the ECtHR unenforceable means also that the state can refuse payment of the just satisfaction rewarded to an applicant. Moreover, according to the amended Article 47 of the Law on the Constitutional Court, the Constitutional Court can reach its decision without holding a hearing. This means that the applicant is not able to present his or her arguments, even though being clearly affected by the decision to enforce or not to enforce the judgment of the ECtHR. This approach violates the principle of a fair trial.*[58] As was observed by the Venice Commission, '[o]nly the position of the federal authority which submitted the complaint appears to be relevant, while the position of the people concerned may be formally disregarded'.*[59]

An important criticism of the Amended Law on the Constitutional Court has been that, because the Russian Constitution clearly acknowledges the binding nature of international law and treaty obligations in its Article 15 (4), implementing the amended Law on the Constitutional Court is itself in conflict with Russia's constitution while also violating Russia's international treaty obligations. European Union constitutional law professor Dmitry Kochenov, at the University of Groningen, argues that, under Russia's constitution, treaties signed by Russia, the ECHR among them, are the 'supreme force in the land'. It is controversial that when, on one hand, the objective of the law is defending Russia's constitution, applying it would itself constitute a violation the Constitution.*[60] Bill Bowring, a professor of international human rights law at the University of London's Birkbeck College, agrees that the law contradicts the Russian Constitution, along with the country's 1998 law ratifying the European Convention on Human Rights.*[61]

Andrei Klishas, the head of the Committee on Constitutional Legislation of the Federation Council, claims that the aim behind the law is to stimulate the government to implement the judgments of international courts, since under the new legislation they cannot independently decide whether or not to implement the decision and instead have to turn to the Constitutional Court.*[62] This statement obviously has no basis in either domestic Russian or international law, because the government itself does not have any grounds to refuse implementation; on the contrary, the government is obliged to secure implementation of the ECtHR judgments. Under Article 26 of the Vienna Convention on the Law on Treaties, states are bound to respect ratified international agreements.*[63] The Venice Commission takes the following position:

> A possible declaration of unenforceability of a judgment of the European Court of Human Rights violates Article 46 of the European Convention on Human Rights, which is an unequivocal legal obligation and includes the obligation for the State to abide by the interpretation and the application of the Convention made by the Court in cases brought against it.*[64]

An argument according to which judgments of the ECtHR should not be executed when the interpretation provided by the ECtHR is not in accordance with Russian constitutional principles is clearly not valid from the perspective of international law. Under Article 27 of the Vienna Convention on the Law on Treaties, the provisions of a state's internal law cannot be invoked to justify failure to perform the state's duties, and this is applicable in the context of the ECHR*[65].

Head of the Russian Constitutional Court Zorkin has argued that the Constitutional Court exercises the opportunity provided by the Amended Law on the Constitutional Court only when the Russian Constitution protects the rights of the citizens to a greater extent than the ECtHR does.*[66] According to the report of the Venice Commission, it is very unlikely that the ECtHR would find a violation to exist if the domestic legal order indeed provided for a higher level of protection.*[67] The ECHR sets forth minimum standards, and countries are free to provide for a higher level of protection if they so wish. According to Article 53 of the

58 *Ibid*., paras 85, 101.

59 *Ibid*., para. 85.

60 As cited by C. Schreck (see Note 16).

61 *Ibid*.

62 Совет Федерации утвердил приоритет КС над решениями международных судов. 9.12.2015. Pravo.ru. Available at http://pravo.ru/news/view/124757/ (most recently accessed on 1.7.2016).

63 Venice Commission (see Note 10), para. 97.

64 *Ibid*., para. 99.

65 *Ibid*., para. 97.

66 Президент объяснил необходимость приоритета Конституционного суда над ЕСПЧ. Pravo.ru. 14.12.2015. Available at http://pravo.ru/news/view/124886/ (most recently accessed on 30.3.2016).

67 Venice Commission (see Note 10), para. 76.

ECHR, '[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party'. Therefore, when Russian standards are higher than the standards of the ECHR, minimum standards must be followed and there should not be any grounds for the ECtHR to find a violation of the Convention.

3.3. The ideas behind the Amended Law on the Constitutional Court

The sovereignty of Russia can be seen as the guiding principle behind the new legislation and preceding judgments of the Constitutional Court. Alexander Manov, an assistant professor at Kutafin Moscow State Law University, has argued that '[i]ndeed, human rights are sovereign, but the state is sovereign too'.*[68] He views the Amended Law on the Constitutional Court as a precaution in case there are attempts to exert external pressure on Russia*[69]. Also Valery Zorkin has stressed that 'interaction of the European and national legal orders is impossible in conditions of subordination'*[70] and that the steps taken by the Constitutional Court are

> based on the aspiration to safeguard ourselves from situations, fraught with serious complication of the relations of Russia with the ECtHR and with the Council of Europe as a whole. The question regards the situations when the ECtHR decisions, intruding into the sphere of the national sovereignty of Russia, are fraught with more substantial violations of rights of Russian citizens than those, which the Strasbourg Court is objecting to.*[71]

The political relevance of the Amended Law on the Constitutional Court is 'underlined by the fact that the submission of the complaint of the federal authority before the Constitutional Court is seen as an aspect of the competence of that authority "for protecting the interests of the Russian Federation"'.*[72]

The Amended Law on the Constitutional Court meshes well with the Russian concept of 'sovereign democracy', a creation of Vladislav Surkov*[73]. In a nutshell, such a Russian approach to democracy means that

> democratic values are neither contested nor rejected [,] but subordinated to national interests. This logic is based on the refusal to undergo foreign supervision and meddling. Yet the decisions of the CoE are seen as such in Russia, and are thus a source of irritation and misunderstanding.*[74]

3.5. Implementation of the amended Law on the Constitutional Court

On 2 February 2016, the Ministry of Justice lodged an appeal with the Constitutional Court in connection with the ruling of the ECtHR in the case *Anchugov and Gladkov v. Russia*, of 3 July 2013*[75]. This case is the first one in which the Constitutional Court will decide whether the execution of the decision of the ECtHR is in accordance with the Russian Constitution or not and, therefore, whether it shall be executed or not. The case pertains to the question of prisoners' voting rights. Applicants Sergey Anchugov and Vladimir Gladkov turned to the ECtHR with the claim that their right to vote had been violated. Both applicants were convicted of murder and other criminal offences and barred from voting in elections to the State Duma and in presidential elections, under Article 32 (3) of the Russian Constitution. The ECtHR held that the blanket ban on allowing prisoners to vote violated Article 3 of Protocol 1 of the ECHR, which provides for the right to free elections.

The case brought along extensive discussion among the legal scholars and practitioners in the field of human rights protection and as a novel step, several *amicus curiae* briefs were submitted to the

68 As cited by Yekaterina Sinelschikova. International courts' rulings no longer enforceable in Russia. Russia Direct, 10.12.2015. Available at http://www.russia-direct.org/russian-media/international-courts-rulings-no-longer-enforceable-russia (most recently accessed on 30.3.2016).

69 *Ibid*.

70 *Ibid*.

71 V.D. Zorkin (see Note 27), p. 14.

72 Venice Commission (see Note 10), para. 86.

73 See, e.g., В. Сурков. Национализация будущего: параграфы про суверенную демократию. – *Эксперт*. 2006 (12) / 6.

74 J.-P. Massias (see Note 9), p. 14.

75 *Anchugov and Gladkov v. Russia* [2013] ECtHR, applications 11157/04 and 15162/05 (4 July 2013).

Constitutional Court by distinguished experts[*76]. The legal scholars advised in their *amicus curiae* brief[*77] that the Constitutional Court should decide not whether compliance of the Russian Federation with its obligation to execute judgments of the ECtHR is possible or impossible but, instead, whether a particular method of execution of the judgments is possible or impossible from the perspective of the Constitution. They argued that the conflict between the provisions of Article 3 of Protocol 1 of the Convention and Article 32 (3) of the Constitution can and should be resolved by the Constitutional Court by means of interpretation of this constitutional provision allowing the establishment of a higher standard of human rights and freedoms in harmony with the requirements of the Convention. Experts explained that such an approach is dominant in European legal systems and, additionally, is well established in the practice of the Constitutional Court. For example, the Constitutional Court followed this approach when discussing the issue of carrying out the death penalty in Russia and decided to establish a moratorium on the death penalty, taking into account the special nature of international obligations Russia has undertaken and, secondly, the evolution of international legal standards of human rights. They advise taking similar factors into account in the consideration of *Anchugov and Gladkov v. Russia*. As can be seen, the experts' recommendations to overcome the conflict between Russian domestic law and the provisions of Protocol 1 of the ECHR are very much in line with the positions of the Venice Commission discussed above.

4. Conclusions

Although Article 46 of the ECHR does not leave room for 'cherry-picking' in enforcing the judgments, the Constitutional Court has suggested that Russian authorities should indeed engage in cherry-picking and enforce only those judgments that are proved to be in accordance with the Russian Constitution as interpreted by the Constitutional Court. The Constitutional Court has clearly expressed its view of the role and meaning of the ECHR and ECtHR in the Russian legal system as being contingent on approval by the Constitutional Court. Instead of this all-or-nothing approach, conflicts between the domestic legislation and the ECHR could be resolved through interpretation and dialogue, as advised by the Venice Commission and also by Russian legal experts. Although at the time of writing, the Constitutional Court has not yet declared any ECtHR judgments unenforceable, when deciding that, for reasons of conflict with Russian constitutional principles, the *Anchugov and Gladkov v. Russia* judgment or any other judgment is impossible to implement, Russia would clearly violate its obligations under the ECHR. Such conduct is unprecedented in the CoE, but it might be a threatening example for other countries to follow. The amended Law on the Constitutional Court poses a threat to the effectiveness of the ECtHR and creates an even greater stumbling block to dialogue between Russia and the ECtHR. It can severely harm the protection of rights and freedoms of Russian citizens and access to the protection provided via the ECHR. Still, as the majority of the ECtHR's judgments are not politically sensitive, there is a great chance that the authorities in Russia will not apply the mechanisms provided by the amended Law on the Constitutional Court in a substantial number of cases and will continue to enforce the international judgments.

[76] One *amicus curiae* brief was submitted by experts of Institute for Law and Public Policy (http://ilpp.ru/en/), a Moscow based independent NGO, one of the leading Russian think tanks conducting research, educational activities and publishing in the sphere of constitutional law and another by group of legal scholars: G.I. Bogush, an assistant professor of criminal law and criminology at the law department of Lomonosov Moscow State University; K.I. Degtyarev, lecturer at the School of Law and Social Justice of Liverpool University (United Kingdom); G.A. Esakov, a professor and head of department of criminal law at Higher School of Economics; M.T. Timofeev, lecturer at the law faculty of the European Humanities University (Lithuania). See, for further information: Институт права и публичной политики. Заключение о толковании статьи 32 (часть 3) Конституции Российской Федерации для целей определения возможности исполнения постановления Европейского Суда по правам человека от 4 июля 2013 года по делу «Анчугов и Гладков против Российской Федерации». 28.03.2016. Available: http://www.ilpp.ru/netcat_files/userfiles/Litigation_Treinings/2016%20Amicus%20Curiae%20Brief%20(Anchugov%20i%20Gladkov).pdf (most recently accessed on 1.7.2016) and Г.И. Богуш, К.И.Дегтярёв, Г.А Есаков, М.Т.Тимофеев. Письменные соображения по существу дела, касающегося запроса Министерства юстиции Российской Федерации о разрешении вопроса о возможности исполнения Постановления Европейского Суда по правам человека от 4 июля 2013 года по жалобам №№ 11157/04 и 15162/05 «Анчугов и Гладков против Российской Федерации». 23.03.2016. Available at http://chr-centre.org/wp-content/uploads/2016/03/Anchugov-and-Gladkov-Amicus-Brief.pdf (most recently accessed on 1.7.2016).

[77] Г.И. Богуш *et al*. (See note 76.)

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The Forthcoming General Data Protection Regulation in the EU

Higher Compliance Costs Might Slow Down Small and Medium-sized Enterprises' Adoption of Infrastructure as a Service[*1]

1. Introduction

Infrastructure as a Service (IaaS) accounts for a significant proportion of cloud computing services overall, and, according to Gartner, in 2014 'the absolute growth of public cloud IaaS workloads surpassed the growth of on-premises workloads for the first time'[*2]. A recent report from RightScale[*3] showed that 95% of the organisations surveyed were already using or experimenting with IaaS[*4], with 89% of respondents using public cloud services[*5]. Moreover, 32% of small and medium-sized businesses (enterprises with fewer than 1,000 employees for the purpose of the report) were already using cloud infrastructure heavily at that time, as compared to 25% of enterprises in general[*6].

The widespread adoption of cloud-based technologies among these companies does not come as a surprise: small and medium-sized enterprises are more likely to seek a less expensive option for maintaining their IT infrastructure and to have a smaller budget at their disposal. Neither is their interest in IaaS, which is usually the first step in adoption of cloud-based solutions, as it requires less preparation and integration than do Platform as a Service (PaaS) and Software as a Service (SaaS) options. Indeed, IaaS provides several benefits when compared to traditional computing infrastructure provision[*7]. Nevertheless, it has to be noted that the resources a client acquires under IaaS are pretty much the same ones it can obtain from a traditional IT outsourcing (ITO) provider. Aspects that differ are the process of obtaining and expanding the resources; the nature of business relations between the parties; and, finally, the contractual arrangements.

1 The author would like to thank Dr Idir Laurent Khiar, Dr Elia Ambrosio, Prof. Karin Sein, Prof. Aleksei Kelli, and Prof. Katrin Nyman-Metcalf for their feedback that contributed to improving the text of the article.

2 Gartner says worldwide cloud infrastructure-as-a-service spending to grow 32.8% in 2015. 18.5.2015. Available at http://www.gartner.com/newsroom/id/3055225 (most recently accessed on 4.7.2016).

3 RightScale is one of the leading providers of cloud management solutions, conducting an annual survey of technical professionals to assess the state of the cloud computing market.

4 RightScale State of the Cloud Report 2016. Available at https://www.rightscale.com/lp/state-of-the-cloud (most recently accessed on 4.7.2016), p. 2.

5 *Ibid*., p. 9.

6 *Ibid*., p. 7.

7 S. Leimeister, M. Böhm, C. Riedl, H. Krcmar. The business perspective of cloud computing: Actors, roles, and value networks. ECIS 2010 Proceedings. Available at http://home.in.tum.de/~riedlc/res/LeimeisterEtAl2010-preprint.pdf (most recently accessed on 4.7.2016), p. 7.

A few years ago, the European Commission (EC) recognised the potential of cloud computing and certain advantages of promoting its adoption within the EU. Small and medium-sized enterprises[*8] (SMEs) have often been given the focus in the EC's efforts to promote competitiveness of European businesses. The aim with the first comprehensive cloud computing strategy[*9], calling for unleashing the potential of cloud computing in Europe, was to address the factors hindering businesses, especially SMEs, from adopting cloud services. In its turn, the Horizon 2020 programme[*10] includes cloud computing on its list of priority areas each year. The Work Programme for 2016–2017[*11], for example, is intended to foster competitive, innovative, and reliable cloud computing for small and medium-sized enterprises and for public institutions.

These extensive efforts on the part of the EC notwithstanding, adoption of cloud-based solutions is not a clear-cut choice for a business. Compliance is listed among the top three challenges for clients adopting cloud-based solutions[*12] and is unlikely to disappear from the list. Aside from there being the issues of compliance related to operation in a heavily regulated industry (alongside finance, health care, etc.), there is the matter of data protection compliance, which is becoming highly topical in light of the recent adoption of the General Data Protection Regulation[*13] (GDPR). As a fair percentage of businesses process personal data of their customers in one or another way and offer their services in the EU, it is highly likely that numerous individual SMEs are going to have to comply with the data protection legislation in the EU.

This article provides an overview of the changes wrought in the data protection legislation by the GDPR and discusses how the reform might reshape the data protection compliance requirements for SMEs using IaaS to process personal data. In particular, the article addresses the questions of whether SMEs will still opt for IaaS under the new regulation and whether the GDPR interferes with one of the other EC goals – wider adoption of cloud computing by SMEs. The author uses qualitative methods to analyse the provisions of the GDPR, identify which of them are going to influence the data protection compliance of SMEs using IaaS, and establish whether the reform will impede achievement of wider cloud adoption.

2. Infrastructure as a Service as a cloud service model

Infrastructure as a Service is one of several cloud service models. In this approach, the cloud provider supplies basic computer resources (processing power, storage, routers, etc.) on which clients can run software. The cloud provider owns the infrastructure (or hires it from a third party) and maintains it, while the customer pays for it on a pay-as-you-go basis. It is worth noting at this juncture that, while some scholars use alternative terms for this particular cloud service model[*14], 'IaaS' is a widely used term throughout the IT industry[*15].

8 SMEs are enterprises that 'employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million', according to Article 2 of the Annex to the Commission Recommendation on the definition of micro, small, and medium-sized enterprises, 6.5.2003, C(2003) 1422.

9 Unleashing the potential of cloud computing in Europe. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 27.9.2012, COM(2012) 529. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0529:FIN:EN:PDF (most recently accessed on 4.7.2016).

10 The EU Framework Programme for Research and Innovation, a financial instrument to drive economic growth and create jobs. For more information, see https://ec.europa.eu/programmes/horizon2020/en/what-horizon-2020 (most recently accessed on 4.7.2016).

11 Horizon 2020 Work Programme 2016–2017, 5i. Information and communication technologies, 2015. Available at http://ec.europa.eu/research/participants/data/ref/h2020/wp/2016_2017/main/h2020-wp1617-leit-ict_en.pdf (most recently accessed on 4.7.2016).

12 RightScale State of the Cloud Report 2016 (see Note 4), p. 20.

13 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016.

14 See M. Armbrust, A. Fox, R. Griffith, A. D. Joseph, R. H. Katz, A. Konwinski, G. Lee, D. A. Patterson, A. Rabkin, I. Stoica, M. Zaharia. Above the clouds: A Berkeley view of cloud computing. Technical report, EECS Department, University of California at Berkeley, 2009, p 3; L. Wang, J. Tao, M. Kunze, A. C. Castellanos, D. Kramer, W. Karl. Scientific cloud computing: Early definition and experience. 10th IEEE International Conference on HPCC, 2008, p. 3; L. Youseff, M. Butrico, D. Da Silva. Toward a unified ontology of cloud computing. Grid Computing Environments Workshop, 2008, p. 3.

15 The most widely used definition is the one by the National Institute of Standards and Technology (NIST). See P. Mell, T. Grance. The NIST definition of cloud computing. National Institute of Standards and Technology, Information Technology Laboratory, 2011. Available at http://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-145.pdf (most recently accessed on 4.7.2016), p. 3.

Some examples of IaaS are Amazon's Simple Storage Service (S3)[*16] and Elastic Compute Cloud (EC2)[*17], which was a pioneer in the field and leads the way in IaaS public-cloud operations[*18], with a share of about half of the market[*19].

Since, after all, cloud computing is a result of IT outsourcing's evolution,[*20] IaaS is just an alternative way to obtain infrastructure resources by outsourcing its provision to an external provider. There are a few clear benefits to cloud services, with the most significant of these for a business being the absence of substantial up-front investments. With IaaS, clients get infrastructure resources without negotiating complex outsourcing agreements or engaging in time-consuming negotiations every time they find themselves in need of additional resources. Consequently, what constitutes the difference between IaaS and the traditional outsourcing option is not the resource itself but the way of delivering it, along with the cost and effort necessary to obtain and maintain it.

Companies using traditional ITO services happily adopt IaaS in accordance with their needs. A PwC survey showed that 22% of ITO customers used a public cloud in 2011.[*21] However, the percentage using an external or internal private[*22] cloud was substantially higher.[*23] Despite the many benefits of IaaS, companies using traditional ITO services will not automatically want to switch to IaaS. There are a few reasons for which a company may want to stick with ITO, but this article goes into only one of these – compliance with the EU data protection rules.

Increasing adoption of cloud computing encourages traditional ITO providers to enter the cloud computing market. The competitiveness of a particular provider in the market is influenced not only by specific characteristics of its service but also by that provider's ability to meet clients' expectations and flexibility in satisfying clients' compliance needs. Consequently, changes that complicate specific vendors' ability to meet data protection compliance requirements may reshape the market as a whole.

3. SMEs and external service providers under the legislation currently in force

The data protection legislation currently in force, the Data Protection Directive[*24], protects the rights of persons whose personal data are being processed. It does so by defining roles and obligations of the parties involved in the processing. The specific roles involved are data controller and data processor, where the former is defined as determining the purposes and means of the processing[*25] and the latter as processing personal data on behalf of the controller[*26]. The data controller has a variety of obligations with regard to personal data and ability to allocate responsibilities to third parties[*27]. The data processor, on the other hand, does not have specific obligations except to act only upon instructions from the controller;[*28] to ensure fair

16 Amazon Webservices launches. Amazon, 14.3.2006. Available at http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=830816 (most recently accessed on 4.7.2016).

17 J. Barr. Amazon EC2 Beta. Amazon, 25.8.2006. Available at https://aws.amazon.com/blogs/aws/amazon_ec2_beta/ (most recently accessed on 4.7.2016).

18 The term 'public cloud' is used to refer to a model wherein resources can be purchased by any potential client; i.e., the service is publicly available.

19 RightScale State of the Cloud Report 2016 (see Note 4), p. 31.

20 O. Yigitbasioglu, K. Mackenzie, R. Low. Cloud computing: How does it differ from IT outsourcing and what are the implications for practice and research? – *The International Journal of Digital Accounting Research* 2013 (13), p. 102.

21 The future of IT outsourcing and cloud computing: A PwC study. 2011. Available at https://www.pwcaccelerator.com//pwcsaccelerator/docs/future-it-outsourcing-cloud-computing.pdf (most recently accessed on 4.7.2016), p. 29.

22 A private cloud is built for use by a single client. It may be managed by an external service provider (as an 'external cloud') or operate on the premises of a client (in what is called an internal cloud).

23 Roughly 41% of respondents used an external private cloud, and 31% of them used an internal private cloud. See Note 21.

24 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995, No. 281, 23.11.1995.

25 *Ibid*., Article 2 (d).

26 *Ibid*., Article 2 (e).

27 Opinion 1/2010 on the concepts of 'controller' and 'processor'. Article 29 Working Party, WP 169, 00264/10/EN, Brussels, 16 February 2010, p. 4.

28 Directive 95/46/EC (see Note 24), Article 17 (2).

and lawful processing of data, compatible with specific purposes[*29]; and to implement appropriate technical and organisational measures to protect personal data against threats[*30].

SMEs collecting personal data of their customers and processing said data for a specific purpose in the course of their business are data controllers within the meaning of the Directive and will have to comply with the relevant provisions. As long as SMEs process the data themselves without involving third parties, they will retain sole responsibility for the compliance with the EU data protection rules. However, if SMEs delegate the processing to an external party or use third-party infrastructure to process the data, the external provider becomes a data processor and, in turn, influences the controller's data protection compliance. Consequently, SMEs' data protection compliance is affected by whether they process data themselves via the infrastructure they own or rent or instead outsource the whole process or particular stages of it to an external party.

While there is no doubt that SMEs in those circumstances are data controllers, the question of whether an external provider automatically becomes a data processor is problematic. External providers can be involved in the processing in a number of ways, but should every provider of infrastructure resources be deemed a data processor? In essence, should an IaaS provider supplying merely means of processing and without actual knowledge of the data be considered equal to an ITO provider carrying out certain stages of processing in full awareness of the nature of the data?

Assigning the data processor role to a cloud service provider has, accordingly, been questioned and debated. Nonetheless, the Article 29 Working Party[*31] declared that a cloud computing provider becomes a data processor by providing the data controller with the means and the platform for the processing of personal data.[*32] Hence, whether SMEs obtain infrastructure resources from an ITO provider or instead use IaaS, the external provider will be regarded as a data processor. It is of great relevance that entrusting a third party with provision of underlying infrastructure influences SMEs' compliance, specifically the obligations of a controller related to the performance of the data processor.

Firstly, the controller has to choose a processor that provides sufficient guarantees in respect of the technical security and organisational measures governing the processing of data and must ensure that processor's compliance.[*33] Whilst in the process of choosing between IaaS and a traditional outsourcing service or even between individual IaaS vendors SMEs certainly take into account the technical specifications and security features of each service, closer analysis or inspection may not be possible in the case of IaaS. The nature of public IaaS and cloud-based services in general does not afford or entail much integration or co-operation between the parties; rather, it takes a form in which a service provider supplies ready tools available for use by the client for whatever purposes. Reaching the legally prescribed goal is problematic unless the IaaS provider makes the service available for examination.

Secondly, there must be a legally binding contract between controller and processor, under which the obligation to ensure appropriate technical and organisational measures to protect the data must be binding for the processor too.[*34] The obligation to conclude a binding agreement serves the purpose of providing the data controller with complete control over the processing of personal data and eases ensuring of data protection compliance. While ITO agreements serve this purpose – to define the relationship between the parties and meet their expectation[*35] – IaaS is different in this respect. Cloud service providers supply cloud services on the basis of terms of service[*36] specified on a Web page, which in most cases are decided upon unilaterally (especially with public IaaS) and do not provide assurance that the service to be delivered suits the client's purposes. While large enterprises might have the bargaining power to negotiate a tailored contract as IaaS clients, the same certainly is not true for SMEs.

29 *Ibid*., Article 6 (1b).

30 *Ibid*., Article 17.

31 The Article 29 Working Party was set up in accordance with Article 29 of the Data Protection Directive to provide, *inter alia*, advice on uniform application of the Data Protection Directive.

32 Opinion 05/2012 on Cloud Computing. Article 29 Working Party, WP 196, 01037/12/EN, Brussels, 1 July 2012, p. 4.

33 Directive 95/46/EC (see Note 24), Article 17 (2).

34 *Ibid*., Article 17 (3).

35 A. Kavaleff. Successful outsourcing through proactive contracting – strategy, risk assessment and implementation. – *Scandinavian Studies in Law* 2006/49, p. 222.

36 'Terms of service', 'terms and conditions', and also 'terms of use' are common names that providers of online services use to refer to an agreement governing usage of their service. The author uses 'terms of service' to refer to agreements of this type.

Therefore, even with the legislation currently in place, opting for a traditional ITO service (provision of the infrastructure, owned and managed by the provider on the SME's premises or in a remote location) will be beneficial in terms of SMEs' compliance with the data protection rules. The outsourcing provider still becomes a processor of personal data; however, SMEs will have a lot more control over the process, by negotiating an agreement and meeting their compliance needs. On the other hand, this will require more effort in the stage of entering into a contract and maintaining it, so the agreement will come at a higher transaction cost.

4. Forthcoming changes and challenges for data protection compliance

The forthcoming changes to the data protection framework, in the form of the recently adopted General Data Protection Regulation[*37], do not provide a completely new system to protect the interests of data subjects whose personal data are being processed. These changes are, however, going to influence the cloud computing industry in general and SMEs obtaining cloud services in particular. Although the roles associated with the processing of personal data remain the same, obligations will be substantially widened, especially those of a data processor.

The data processor will now be obliged not to engage other processors in the processing of data without prior specific or written consent from the data controller.[*38] On the data controller's side, it will be difficult to ensure meeting of this requirement in the context of IaaS, as the nature of cloud computing services is geared fundamentally toward service composed of elements delivered by various vendors. In the likely event of planning to switch vendor or approach new vendors, cloud service providers are unlikely to inform their clients in advance or, even more improbable, to obtain consent for doing so. In addition, another obligation of the data processor – to maintain a record of all the data processing activities[*39] – might be difficult to fulfil in the context of cloud agreements. It requires adoption of additional organisational and technical measures. These measures have to be negotiated in each and every case or, alternatively, be part of functionality built into the service itself. Once again, the cost of entering into agreement is going to increase.

The obligation to notify the controller of any personal-data breach without undue delay[*40] will result in additional substantial changes. Unlike with ITO services wherein the provider actively reports to the clients, the burden of detecting and communicating violations of the service level agreement[*41] (SLA) in IaaS usually rests with the client[*42] and not the provider. Currently, SMEs not only have to monitor availability of the cloud service but also must report any violations of the SLA in time if they are to receive compensation.[*43] Therefore, this obligation requires considerable changes in the respective SLAs.

Perhaps the most problematic aspect of the GDPR for SMEs using IaaS is that a contract between controller and processor will have to stipulate the nature and the purpose of the processing of personal data, categories of data subjects, etc.[*44] This is customary in outsourcing agreements, wherein the provider and client typically seek long and lasting partnership and share more information on the nature of the activities to be performed, so as to meet the objectives of the outsourcing better. However, in the absence of a specific connection between a public IaaS provider and its client, it is unlikely that the client will be willing to share such information; that the provider will be interested in it; and, finally, that doing so is absolutely necessary. Hence, standard IaaS contracts will have to be modified, just as SLAs will. At present, the practice is

37 The GDPR (see Note 13).

38 *Ibid*., Article 28 (2).

39 *Ibid*., Article 30.

40 *Ibid*., Article 33 (2).

41 A service level agreement is an agreement between a service provider and a client stipulating concrete metrics according to which service has to be delivered and evaluated. These agreements are widely used within the IT industry.

42 S. Baset. Cloud SLAs: Present and future. – *CM SIGOPS Operating Systems Review* 2012 (46) / 2, p. 63. – DOI: http://dx.doi.org/10.1145/2331576.2331586

43 For example, Amazon's EC2 SLA states that any claim has to be submitted in accordance with a sample form and include logs supporting the claimed outage before the end of the second billing cycle from when the incident occurred. Amazon EC2 Service Level Agreement, 2013. Available at http://aws.amazon.com/ec2/sla (most recently accessed on 4.7.2016).

44 The GDPR (see Note 13, Article 28 (3).

slightly different, to put it mildly. In 2010, 31 cloud services, offered by 27 cloud providers, were subjects in a study of terms of service[*45]. The results, while somehow expected, were still surprising: 18 agreements had been modified during the previous half-year period and the change was reported (the last revision date was available), 28 agreements remained unchanged and there was notification of this fact, a further 19 were unchanged without that being reported (no revision date was available), and four agreements had been changed without notification.[*46]

In light of what is stated above, it becomes apparent that, to comply with the GDPR, SMEs will need to invest more in IaaS in the stage of negotiations and entering into an agreement than before. The business model behind IaaS provides a cost-saving approach by eliminating costs associated with infrastructure maintenance and entering into a contract, thereby enabling clients to access and expand the resources without undue delay. In consequence, the current advantages of IaaS over traditional ITO will be diminished by the upcoming changes.

Setting aside the fact that, because of differences in bargaining power, it could well be problematic to force an IaaS provider to negotiate all the terms, we can see that compliance will also substantially increase transaction costs[*47]. Various hidden costs have been attributed to IT outsourcing in the past[*48]; however, these will become a reality for cloud computing services too. Companies consider cloud computing to be a way to reduce transaction costs[*49]; therefore, increases in these costs will also influence SMEs' intention to adopt cloud computing[*50].

Ironically, the GDPR excludes SMEs from the application of the data portability right, as it serves solely the data subjects[*51]. The wording of the relevant clause allows only the data subject to receive the data in a widely used format and does not grant the SME (as a data controller and not the subject) the right to request the same from the data processor. In the case of SMEs using IaaS, the SME would be obliged to provide the data to its clients (data subjects) in a widely used format while the IaaS provider would have no obligations whatsoever to the SME in this regard.

This is by no means an exhaustive list of the changes that will directly influence relations between SMEs and IaaS providers. The upcoming reform threatens cloud service as such or, more precisely, its provision by cloud providers established in the EU or offering services to European customers[*52]. Even if cloud providers proactively adapt to the forthcoming changes, opting for a cloud service will not be as beneficial as it was before, so whether SMEs would still consider IaaS an option at the end of the day is questionable. In the absence of clear indications of readiness to adapt, the scale of the impact remains to be seen.

45 S. Bradshaw, C. Millard, I. Walden. Contracts for clouds: Comparison and analysis of the terms and conditions of cloud computing services. – *International Journal of Law and Information Technology* 2011 (19) / 3, pp. 187–223.

46 *Ibid*., pp. 215–216.

47 The cost associated with exchange of the goods or services between the parties. For more on the transaction-cost approach, see O. Williamson. The economics of organization: The transaction cost approach. – *The American Journal of Sociology* 1981 (87) / 3, pp. 548–577. – DOI: http://dx.doi.org/10.1086/227496.

48 For discussion of vendor search, contract, transition, and management costs, see J. Barthélemy. The hidden costs of IT outsourcing. – *MIT Sloan Management Review* 2001 (42) / 3, p. 61.

49 G. Garrison, S. Kim, R. Wakefield. Success factors for deploying cloud computing. – *Communications of the ACM* 2012 (55) / 9, pp. 62–68. – DOI: http://dx.doi.org/10.1145/2330667.2330685.

50 H. Hamilton. An examination of service level agreement attributes that influence cloud computing adoption. Doctoral dissertation for Nova Southeastern University, 2015. Available at http://nsuworks.nova.edu/gscis_etd/53 (most recently accessed on 4.7.2016), p. 90.

51 The GDPR (see Note 13, Article 20).

52 Processing of personal data is subject to the GDPR if the controller or processor is established in the EU or offers services to data subjects in the EU or monitors their behaviour. See Article 3 of the GDPR.

5. European Commission initiatives aimed at fostering cloud computing

On the other hand, wider adoption of cloud computing by SMEs is an objective set by the European Commission in the context of its Digital Single Market Strategy*[53]. A number of European Commission initiatives have looked specifically at the contractual aspect of relations between clients and cloud providers. Three of them are of particular relevance for SMEs' compliance with data protection legislation: The Data Protection Code of Conduct for Cloud Computing, the Cloud Service Level Agreement Standardisation Guidelines, and the Report on Standards Terms and Performance Criteria in Service Level Agreements for Cloud Computing Services.

In early 2015, the Cloud Select Industry Group (C-SIG) presented the first draft of the Data Protection Code of Conduct*[54], which is a voluntary instrument for cloud service providers' use in proactively demonstrating their compliance with the data protection principles, via adherence to the code by either self-evaluation or a third-party audit. Notwithstanding its potential, it faced criticism from the Article 29 Working Party*[55] for failure to acknowledge the forthcoming changes, to clarify the notion of personal data, and to prevent terms of service that favour the service provider. When updated in response to the concerns raised, the code can become an instrument that cloud providers would rely on to attract SMEs as IaaS clients. However, the balance has to be maintained in order for the code to remain appealing for adherence, since indicating support for it does not automatically mean compliance. Rather, it indicates recognition of clients' demands.

C-SIG also presented the Cloud Service Level Agreement Standardisation Guidelines*[56], which cover B2B relations (relations between service providers and clients who are not consumers). The aim with these guidelines was to contribute to the development of relevant ISO standards and to list basic principles to be borne in mind in drafting of SLAs for cloud services. Among other things, they address data protection compliance and provide a tool for a controller's use to evaluate a particular service. Nonetheless, they do not take into account the forthcoming changes. If updated accordingly, however, the guidelines can be useful for both SMEs and IaaS providers who are willing to enter into an agreement compliant with data protection rules.

The objective for the final report 'Standards Terms and Performance Criteria in Service Level Agreements for Cloud Computing Services'*[57] was to summarise existing rules with respect to SLAs in the Member States and to create a model SLA that could be used by cloud service providers. The study for that report showed that it is uncommon to have cloud- and SLA-specific legislation in place and that global providers offer standard, non-negotiable SLAs, whereas small national providers may allow clients to negotiate the terms. The model SLA developed in the report is not a standalone contract but a cloud-oriented set of elements to be addressed in SLAs, comprising only measurable and technology-neutral metrics. It targets B2B contracts and is not comprehensive, but it could complement existing guidelines if the results of the separate initiatives for these were to be revised, codified, and developed further.

One of the most recent proposals made by the European Commission in the context of the Digital Single Market Strategy is the Digital Content Directive*[58], designed to harmonise some facets of contracts for

53 A Digital Single Market Strategy for Europe. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 6.5.2015, COM(2015) 192. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192 (most recently accessed on 4.7.2016).

54 Data protection code of conduct for cloud service providers. Available at http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=11194 (most recently accessed on 4.7.2016).

55 Opinion 02/2015 on C-SIG Code of Conduct on Cloud Computing, Article 29. Working Party, 2588/15/EN WP 232, 2015. Available at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2015/wp232_en.pdf (most recently accessed on 4.7.2016).

56 Cloud service level agreement standardisation guidelines, 2014. Available at http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?action=display&doc_id=6138 (most recently accessed on 4.7.2016).

57 Standards terms and performance criteria in service level agreements for cloud computing services. Final Report, time.lex and Spark Ltd, 2015. Available at http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=10860 (most recently accessed on 4.7.2016).

58 Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM(2015) 634 final. Available at http://ec.europa.eu/justice/contract/files/digital_contracts/dsm_digital_content_en.pdf (most recently accessed on 4.7.2016).

supply of digital content[*59]. Cloud services are within the scope of the proposed Directive because the notion of digital content (the subject of the Directive) encompasses services that allow creation of the data at issue[*60]. However, it excludes SMEs from the scope of application by defining a consumer as a natural person acting outside the connection of said person's trade or business[*61]. Hence, SMEs will not be eligible to enjoy certain rights in respect of contracts for the supply of cloud services, in contrast to private consumers.

In summary, it can be stated that the European Commission sees SMEs' adoption of cloud computing as beneficial for the Digital Single Market and has initiated various studies in this context. Still, most of the reports addressing data protection compliance are no longer accurate, because of the forthcoming changes. Furthermore, some of the related legislative initiatives fail to acknowledge B2B relations, by being consumer-centric – namely, the Digital Content Directive.

6. Conclusions on how the new regulation is likely to affect SMEs' use of IaaS

When we return to the initial questions – that is, whether SMEs will be equally interested in adopting IaaS when the GDPR comes into force and whether the GDPR interferes with the objective of wider adoption of cloud computing by SMEs – it is apparent that the former is to be answered in the negative and the latter in the affirmative. The coming changes will diminish the main benefits that IaaS offers today, which are low transaction cost and rapid access to easily scalable resources. To remain compliant with the data protection rules, SMEs will have to invest heavily in negotiations with the providers (if providers will actually be willing to negotiate) or consider alternative options – namely, traditional outsourcing services.

Data controllers' and data processors' compliance under the forthcoming data protection regime can be effectively secured through an appropriate agreement and co-operation when SMEs obtain traditional outsourcing services. However, cloud computing does not anticipate the same level of co-operation between the parties; the services are offered on a take-it-or-leave-it basis. A sensible choice for SMEs seeking to obtain infrastructure resources would be to co-operate with a traditional IT outsourcing provider (possibly previously known) rather than approach an external cloud provider and use a public IaaS solution. Consequently, the GDPR interferes with another EC objective, wider adoption of cloud computing by SMEs.

While interest in cloud services is currently growing, the proposed data protection regime will either slow it down or considerably change the state of the market. As data protection rules better suit outsourcing relations, long-established ITO providers with a large customer base will certainly benefit. By catching up with recent technological developments, they will be able to offer more flexible solutions and provide comprehensive guarantees as to data protection compliance. Obtaining outsourcing services does still have its dangers;[*62] nevertheless, some of them may soon be addressed by the European Commission proposals.[*63]

Despite a considerable number of initiatives to promote cloud adoption by SMEs, the results of most of them are going to become obsolete – firstly, because they do not refer to the GDPR; secondly, because they assume the parties to have equal bargaining power; and, finally, because they lack provision for incentives for the service providers. The cloud computing market is largely self-regulated right now, and, although there are competition concerns at the moment, they will be overshadowed by compliance concerns and increases in transaction cost.

While large enterprises may be able to address these compliance concerns effectively by allocating the necessary resources, SMEs will not be able to do the same and will need to reconsider their options. Those SMEs that are planning to adopt IaaS may want to think twice about whether to entrust the provision of resources to an external cloud provider and opt for a public cloud option or instead turn to an outsourcing

59 *Ibid*., Recital 2.

60 *Ibid*., Article 2 (1a).

61 *Ibid*., Article 2 (4).

62 Such as 'data hostage' terms – clauses allowing the service provider to retain the data until certain conditions are met (the provider being paid for the service, a termination fee being paid, etc.). See R.H. Carpenter. Walking from cloud to cloud: The portability issues in cloud computing. – *Washington Journal of Law, Technology and Arts* 2010 (6) / 1, p. 4.

63 The data hostage issue could be addressed by a proposal on data ownership and the free flow of data. See Note 53 (A Digital Single Market Strategy for Europe), p. 20.

provider and purchase a private-cloud or even non-cloud solution. Those SMEs already taking advantage of public-cloud IaaS will have to either negotiate new terms with the provider (which might prove difficult) or turn to an outsourcing provider.

One could avoid such consequences by developing a data protection framework that is more suitable for today's realities. Rather than assume that similar business relations exist between each company processing personal data and the respective subcontractor(s), the data protection scheme should acknowledge diversity of business models and consider whether it is necessary to make the same demands of each and every actor. Secondly, the EC may want to consider making data protection rules less data-subject-oriented. As was shown above, the EC, in an attempt to serve data subjects, misses an opportunity to address B2B relations too and provide further benefit to data subjects. Thirdly, it could be advantageous to look for an alternative notion of personal data. There have been discussions about what that could be, with proposals ranging from abolishing the controller–processor concept and vesting data controller obligations in anyone processing the data[*64] to not treating encrypted data as personal data in the absence of an encryption key[*65].

Although the Commission 'does not tend to be overly intrusive, in order to avoid hampering the technological development of the ICT sector in the EU, which is perceived to be a key sector of the EU economy'[*66], it remains to be seen how the forthcoming changes are going to affect competition in the market for computer infrastructure resources. A transaction cost that has become so high that it exceeds the perceived benefit could hinder the intended impact of the legislation.[*67] Forcing an ill-suited framework into place may harm competition without achieving substantial results in protecting data subjects' rights and could hamper further development of technology, not to mention interfering with the efforts to promote cloud computing's adoption.

64 P. Hert, V. Papakonstantinou, D. Wright. The proposed data protection regulation replacing Directive 95/46/EC: A sound system for the protection of individuals. – *Computer Law & Security Review* 2012 (28) / 2, pp. 133–134.

65 W. Hon, C. Millard, I. Walden. Who is responsible for 'personal data' in cloud computing? – The cloud of unknowing, Part 2. – *International Data Privacy Law* 2012 (2) / 1, p. 14.

66 L. Luciano, I. Walden. Ensuring competition in the Clouds: The role of competition law? – *ERA Forum* 2011 (12) / 2, p. 271. – DOI: http://dx.doi.org/10.2139/ssrn.1840547.

67 S. Romanosky, A. Acquisti. Privacy costs and personal data protection: Economic and legal perspectives. –*Berkeley Technology Law Journal* 2009 (24) / 3, p. 1096.

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The Subjective Right to Environment in the General Part of the Environmental Code Act

Human existence and quality of life depend on the environment. It is evident that everyone has an interest in using the environment and protecting him- or herself from risks or harm to the environment. However, it is not clear how this interest has to be guaranteed by rights. One possibility is the recognition of an independent material enforceable subjective right to environment. In June 2010, the Supreme Court held that such a right cannot be derived from the Constitution of the Republic of Estonia and can emerge only if criteria for the quality of the environment and everyone's obligation to tolerate environmental impacts can be fixed in the law. The General Part of the Environmental Code Act (GPECA)[*1] entered into force on 1 August 2014, and its §23 sets out a subjective right to environment. The purpose behind this paper is to examine the basis for that right and analyse its scope and contents to determine whether it satisfies the criteria outlined by the Supreme Court.

1. The basis for the subjective environmental right in the GPECA

1.1. The framework of international and EU law

The Universal Declaration of Human Rights (1948) does not feature a subjective environmental right and does not emphasise the importance of a supportive environment for enjoyment of the rights enshrined in the declaration. The environmental aspects of human rights are also not reflected in other classical human rights instruments. At the time of their codification, knowledge of environmental problems was limited and other issues were at the centre of concern. For instance, the European Convention on Human Rights (1950) was adopted as a response to the atrocities committed by Nazi Germany and the rise of communism.[*2]

Awareness of environmental issues rapidly increased in the decades following the Second World War. This led to the adoption of the Stockholm Declaration (1972), whose first principle stipulates: 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that

1 Keskkonnaseadustiku üldosa seadus. – RT I, 28.2.2011,1 (in Estonian). English text available at https://www.riigiteataja.ee/en/eli/517062015001/consolide (most recently accessed on 31.3.2016).

2 S. Kravchenko, J.E. Bonine. Interpretation of human rights for the protection of the environment in the European Court of Human Rights. – *Pacific McGeorge Global Business & Development Law Journal* 2012 (25) / 1, p. 248.

permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.'*[3]

Regional human rights conventions and national constitutions adopted after the Stockholm Declaration usually mention a right to environment.*[4] An exceptional reference to the right is found in the Århus Convention, which was drafted under the auspices of the United Nations Economic Commission for Europe.*[5] Article 1 of that convention stipulates that each party thereto has to guarantee certain procedural rights to the public in order to contribute to protection of the right of every person of present and future generations to live in an environment adequate for his or her health and well-being. In other words, the Århus Convention does not expressly state that the right exists but does refer to it as an accepted fact. However, it is doubtful that there is consensus on the existence of such a material right, let alone on its precise contents.*[6] International attention has been directed primarily at the relationship of the environment with already recognised human rights rather than proclamation of a new right.*[7]

This process of 'greening of rights' is also evident in the practice of the European Court of Human Rights. The text of the European Convention on Human Rights does not reflect environmental concerns. However, the Court considers that convention to be a 'living instrument, to be interpreted in the light of present-day conditions'.*[8] It has found violations of several articles of the conventions in connection with environmental matters, most notably Article 8, which sets out the right to respect for private and family life. Nonetheless, the Court has stressed that there is no explicit right referred to in the convention to a clean and quiet environment and that environmental human rights are not given special status in weighing of interests under Article 8.*[9] Also, Article 8 does not protect against general deterioration of the environment if there is no harmful effect on a person's private or family sphere.*[10]

The EU treaties and the EU Charter of Fundamental Rights do not recognise a subjective material right to environment. However, the EU is party to the Århus Convention and environmental procedural rights are provided for under EU directives and regulations. Substantive environmental issues are also extensively regulated in EU secondary law, primarily by directives. The directives set out requirements for Member States in order to protect the environment and public health and to ensure the functioning of the internal market. The directives do not explicitly confer material rights upon individuals, but, according to the doctrine of direct effect, a person in a dispute with a public body of a Member State may rely directly on only those provisions of directives that are unconditional and sufficiently precise.*[11] Many environmental requirements fail this test because they set out general obligations that leave significant discretion to Member States in implementing them. However, certain environmental quality provisions are directly effective. The Court has held that whenever the failure to observe the measures required by the directives that are related to air quality and drinking water, where these are designed to protect public health, could endanger human health, the persons concerned must be in such a position that they can rely on the mandatory rules included in those directives.*[12] It is not clear which members of the public (if any) could rely on other

3 Declaration of the United Nations Conference on the Human Environment. Available at http://www.unep.org/documents.multilingual/default.asp?documentid=97&articleid=1503 (most recently accessed on 30.3.2016).

4 UN Human Rights Council. Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. J. H. Knox. 24.12.2012 (A/HRC/22/43), p. 5.

5 The UN Convention on Accession to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was opened for signature at the 4th Conference of Ministers of Environment in Århus on 25 June 1998. The convention entered into force on 30 October 2001. It is available at http://www.unece.org/env/pp/treatytext.htm (most recently accessed on 31.3.2016). The EU and all its member states have acceded to the convention. Information on the status of ratification is available at http://www.unece.org/env/pp/ratification.html (most recently accessed on 30.3.2016).

6 For instance, the United Kingdom made a declaration upon signature of the Århus Convention that, while it understands the references to the right to express an aspiration that motivated the negotiation of that convention, the legal rights that each party thereto undertakes to guarantee under Article 1 are limited to procedural rights. Declarations and reservations are available at http://www.unece.org/env/pp/ratification.html (most recently accessed on 30.3.2016).

7 Report by J.H. Knox (see Note 4), p. 7.

8 See, e.g., ECHR 25.4.1978, *Tyrer v. The United Kingdom* (application 5856/72), para. 31.

9 See, e.g., ECHR [Grand Chamber] 8.7.2003, *Hatton and others v. The United Kingdom* (application No. 36022/97), paras 96 and 122.

10 ECHR 22.5.2003, *Kyrtatos v. Greece* (application 41666/98), paras 52–53.

11 See, e.g., ECJ 23.2.1994, C-236/92, *Comitato di Coordinamento per la Difesa della Cava and others v. Regione Lombardia and others*, para. 8.

12 See ECJ 30.5.1991, C-361/88, *Commission v. Germany*; 30.5.1991, C-59/89, *Commission v. Germany*; 17.10.1991, C-58/89, *Commission v. Germany*; 25.7.2008, C-237/07, *Janecek v. Freistaat Bayern*.

unconditional and sufficiently precise environmental protection requirements, especially the nature protection provisions. However, it seems unlikely that the criterion of 'being concerned' would be interpreted restrictively by the Court.[*13]

The direct applicability of certain environmental quality requirements set forth in the directives does not mean that the Court has recognised a subjective material environmental right. The aim behind the doctrine of direct effect of directives is to ensure legal integration and effectiveness of EU law, which also underpinned the Court's original articulation of the direct effect of treaty provisions. However, EU law would certainly play an important role in any national attempt to define a material environmental right, by setting out the minimum requirements for many aspects of environmental quality.

1.2. Constitutional provisions for the environment

Unlike the majority of modern constitutions in this respect[*14], the Constitution of the Estonian Republic[*15] does not explicitly recognise a subjective right to environment. Section 5 sets out that the natural wealth and resources of Estonia are national riches that must be used sustainably. This is a general provision that underscores the value of the environment and is considered to form the basis for a duty of the state to protect the environment.[*16] The first sentence of §53 stipulates that everyone has a duty to preserve the human and natural environment and to compensate for harm that he or she has caused to the environment. Whilst this is a provision for a fundamental duty, its ambiguous wording casts doubt on whether it has any direct effect.[*17]

The lack of explicit reference to an environmental right does not mean that the drafters of the Constitution were not concerned about environmental impacts on human life. In the final year of existence of the Soviet Union (1991), the Constitutional Assembly (also 'the Assembly' below) was formed and tasked with drafting of the Constitution.[*18] An environmental right was debated on several occasions during the discussions by the Assembly[*19], and the first 'final' draft that was made public, in late 1991, explicitly recognised the right to a healthy environment.[*20] That right was later edited out. The reasons for this decision are not clear, because the minutes of the meetings are incomplete. In the earlier discussions, some drafters voiced a concern that the right was too ambiguous.[*21] The decision may also have been influenced by somewhat naïve thinking (in retrospect) that the emphasis must instead be on the fundamental environmental duty, because after privatisation of industry the state no longer has an important role in controlling environmental pollution.[*22] Although the reference to a healthy environment was deleted, the right to health protection was retained in the Constitution as adopted: the first sentence of §28 states that **e**veryone is entitled to protection of his or her health.

The Århus Convention, which Estonia ratified in 2001, had a significant impact on Estonian legal thinking about environmental rights, including the basic environmental right. Some authors proposed that the

13 The court is clearly in favour of enabling the public to play an active role in environmental protection in disputes with Member States, as can be seen from the decisions on interpretation of provisions of directives that implement access to justice requirements of the Århus Convention. For examples, see ECJ 11.4.2013, C-260/11, *David Edwards, Lilian Pallikaropoulos v. Environment Agency, First Secretary of State, Secretary of State for Environment, Food and Rural Affairs*; ECJ 16.4.2015, C-570/13, *Karoline Gruber v Unabhängiger Verwaltungssenat für Kärnten, EMA Beratungs- und Handels GmbH, Bundesminister für Wirtschaft, Familie und Jugend*.

14 D.R. Boyd. *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment*. Vancouver: UBC Press 2012, pp. 47, 59.

15 Eesti Vabariigi Põhiseadus. – RT I, 15.5.2015, 2 (in Estonian). English text available at https://www.riigiteataja.ee/en/eli/521052015001/consolide (most recently accessed on 31.3.2016).

16 Ü. Madise *et al*. *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne* ['Commentary on the Constitution of the Estonian Republic']. Tallinn: Juura 2012, pp. 88–89.

17 *Ibid*., p. 489.

18 For an overview of the formation of the assembly and the drafting process, see I. Hallaste. Eesti Vabariigi põhiseaduse sünd ['The birth of the Constitution of the Republic of Estonia']. – *Juridica* 1996 (IX), pp. 438–442.

19 Põhiseadus ja Põhiseaduse Assamblee. Koguteos ['The Constitution and Constitutional Assembly, Unabridged Edition']. Tallinn: Juura, Õigusteabe AS 1997. See, e.g., pp. 427, 430, 434, 483–489.

20 Section 36 of the draft set out that '[e]veryone has a right to health protection and to a healthy work and living environment. Every person, agency, undertaking, and organisation has the duty to compensate for harm done to the natural and living environment by illegal acts'. Draft Constitution of 13th December 1991 of the Constitutional Assembly. *Ibid*., p. 1207.

21 See, e.g., the statements of V. Rumessen, J. Adams, and I. Hallaste. *Ibid.* (on pages 470, 486, and 487, respectively).

22 For examples, see the statements of T. Käbin and A. Tarand. *Ibid.* (on p. 433 and pp. 483–484, respectively).

basic right can be derived from the Constitution even in the absence of express reference to such a right. According to one of the more articulate opinions, the duty set out in §53 of the Constitution includes the state and, also, a state duty that serves individuals' interests and is formulated in the chapter on basic rights has to give rise to a subjective right.[*23] I too am of the opinion that it is possible to derive the right from the state duty and that recognising that right would be in the spirit of the Constitution. The enforceability of the right would probably be limited in consequence of its indeterminate nature; nonetheless, recognition of the basic right would have important symbolic value and it would influence the interpretation of provisions of ordinary laws, especially procedural requirements.[*24] However, there is no general agreement as to the existence or the exact constitutional basis of the right.[*25]

The lack of explicit reference to an environmental right in the Constitution did not deter some administrative courts from recognising that right in order to allow standing before the court. According to §15 of the Constitution and §44 of the Code of Administrative Court Procedure[*26], the right of action is based on the protection of subjective rights. Violation of subjective rights is understood in light of the protective norm theory. According to that theory, a violation of a provision of public law results in violation of a person's subjective right only when the violated provision protects the person's interest. In the decision on whether a person has a subjective right, both the aim with the violated norm and the weight of the person's interest must be considered.[*27]

In legal practice, it would have been difficult for the complainant to demonstrate a violation of a traditional subjective right, such as a right to ownership. Therefore, some courts, especially the Tallinn Circuit Court, took the position that standing can stem directly from a violation of the basic environmental right.[*28] The Tallinn Circuit Court has held that, on account of §5 of the Constitution, 'there is no real reason to doubt that the Constitution imposes a duty to protect the environment on the state and on the agencies of a local municipality. The duty not just is objective but creates a subjective right to demand from the public authority the preservation of the environment at least in the event that it affects one's living environment'. The Court reasoned that it is evident from the Constitution that the state duty is imposed for the benefit of every inhabitant of Estonia. Also, §10 of the Constitution encourages recognition of new rights,[*29] especially if those rights are generally accepted in the European region, such as the right referred to in Article 1 of the Århus Convention. It should be noted also that the right is recognised in many other national constitutions and that the EU Charter of Fundamental Rights requires a high level of environmental protection.[*30]

The subjective basic right was not recognised by all courts.[*31] It is important to note that the Supreme Court neither acknowledged nor denied the existence of the right for a long time. Instead, the Supreme Court extended standing in connection with environmental matters in 2007 by allowing filing of complaints not only on the basis of a violation of a subjective right but also on the basis of being directly concerned – i.e., on the basis of certain interests.[*32] The legal basis for the exceptional standing and its extent were not

23 A. Andersson, T. Kolk. The role of basic rights in environmental protection: Basic right to environment *de lege ferenda* in the Estonian Constitution. – *Juridica International* 2003 (VIII), pp. 147–148.

24 I have expressed my views on the matter in a now somewhat outdated article written in Estonian: K. Relve. Füüsiliste isikute subjektiivne õigus ja põhjendatud huvi keskkonnasjades ['The subjective right and legitimate interests of natural persons in environmental matters']. – *Juridica* 2004 (I), pp. 20–31.

25 For instance, the notion that a subjective right can simply arise from a state duty has been criticised. L Kanger. Kas EV põhiseaduses sisaldub õigus puhtale keskkonnale ['Does the Estonian Constitution include a right to a healthy environment?']. – *Akadeemia* 2007/11.

26 Halduskohtumenetluse seadustik. – RT I, 23.2.2011, 3 (in Estonian). English text available at https://www.riigiteataja.ee/en/eli/506042016001/consolide (most recently accessed on 31.3.2016).

27 SCSCd 20.12. 2000, 3-3-1-15-01, para. 22.

28 See, e.g., Tallinn CCd 15.12.2004, 2-3/140/04; Tallinn CCr 13.8.2007, 3-07-102; Tallinn CCd 18.3.2008, 3-06-1136; Tallinn CCd 26.6.2008, 3-06-188.

29 Section 10 of the Constitution stipulates: 'The rights, freedoms and duties set out in the chapter of basic rights and obligations do not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and which are in conformity with the principles of human dignity, social justice and democratic government founded on the rule of law.'

30 Tallinn CCd 18.3.2008, 3-06-1136, paras 8–10.

31 See, e.g., the overview of the relevant practice of administrative courts until 2006 offered by K. Vaarmari. Keskkonnaalane subjektiivne õigus Eesti kohtupraktikas ['The subjective environmental right in Estonian court practice']. – *Juridica* 2007 (VII).

32 ALCSCd 28.2.2007, 3-3-1-86-06, para. 16.

clear, although the Court explicitly denied *actio popularis*.[*33] However, in 2010 the Supreme Court finally tackled the question of the existence of a basic environmental right. The Court held that the environment is an important value for everyone but that an enforceable independent subjective environmental right cannot be derived directly from §§ 5 and 55. In the Court's opinion, a right to a clean environment can emerge as an independent subjective right if the criteria for such an environment and everyone's obligation to tolerate environmental impacts can be fixed in the law. Currently the legal criteria are manifestly inadequate for determining the extent to which the right can be protected.[*34]

1.3. The relationship of the GPECA's §23 with the legal framework and court practice

Estonian environmental law has been in the process of codification since 2007. The process involves not just the consolidation and systematisation of existing law but also a critical review of the law, tackling of contradictions, and bridging of gaps; in other words, the codification is substantive.[*35] The General Part of the Environmental Code was adopted in 2011; however, the special part of the code has not been completed yet.[*36]

The subjective right to environment is set out in the GPECA's §23. The link with the Århus Convention is obvious from the wording of the name of the right – referring to a right to an environment that meets health and well-being needs – which is almost identical to the formulation of the right in the Estonian translation of the convention. However, according to the explanatory memorandum accompanying the draft GPECA, the intention was to set out a material right[*37] rather than provide only procedural guarantees.

The explanatory memorandum states that the aim in stipulating the GPECA's §23 is to specify the basic right that has been recognised in court practice.[*38] This statement may appear puzzling since the Supreme Court had rejected the right in 2010. The apparent contradiction can be explained through examination of the timeline of codification. Initially the code was intended to be adopted as a unified entity; however, because of the approaching 2011 general elections, consultations on the draft GPECA began on 13 May 2010.[*39] The Supreme Court delivered the judgement in June after the consultation process. Parliamentary proceedings were initiated on 13 September 2010.[*40] The Parliament was aware of the decision; however, it did not alter the wording of §23. It should be noted that the Parliament too was under time pressure because of the impending elections. The GPECA was adopted on 28 February 2011, and the general election was held in March.

2. Elements of the subjective environment right in the GPECA

2.1. The concept of environment

The GPECA's §23 entitles everyone to a certain environment but does not define the concept of 'environment'. No universal legal definition of this concept exists; the elements of conventional definitions depend on the aims of the legislator.[*41] In the broadest sense, the term signifies surroundings, including social

33 *Ibid*. Note that the practice was discontinued in 2015 on account of the entry into force of the GPECA's §23. See ALCSCr 13.5.2015, 3-3-1-8-15, paras 19–21.

34 ALCSCr 18.6.2010, 3-3-1-101-09, para. 13.

35 See the explanatory memorandum to the GPECA, p. 2. Available at http://www.riigikogu.ee/?page=eelnou&op=ems&emshelp=true&eid=1147282&u=20110616182716 (most recently accessed on 31.3.2016) (in Estonian).

36 At the time of writing of this article, in March 2016, the majority of the codified specific laws, such as the Water Act, are still in the draft stage. The deadline for the completion of the Special Part has been postponed several times.

37 See the memorandum referred to in Note 35, p. 29.

38 *Ibid*., pp. 29–30.

39 Letter of the Minister of Justice of 13.5.2010, No. 10.2-1/7346. Available at http://eelnoud.valitsus.ee/main#ICKKooSf (most recently accessed on 31.3.2016) (in Estonian).

40 Information on the parliamentary proceedings for the draft is available at http://www.riigikogu.ee/tegevus/eelnoud/eelnou/a1cafc27-2f02-448d-8509-8e9fa312a129/ (most recently accessed on 30.3.2016) (in Estonian).

41 See, e.g., F. Fracchia. The legal definition of environment: From rights to duties. Bocconi Legal Studies Research Paper No. 06-09, 2005. – DOI: http://dx.doi.org/10.2139/ssrn.850488.

and psychological elements. The focus of the GPECA is not so broad, which is evident from several of the act's provisions, especially the definitions of 'environmental information' and 'environmental organisation'. The definitions indicate that the term 'environment' has to be interpreted broadly but is limited to physical phenomena. The term undoubtedly encompasses natural environment, such as forests or ambient air. More controversial, in contrast, is the extent to which it covers the built environment. According to the explanatory memorandum, the term should be taken to encompass the elements of human-created environment that are similar to the natural environment, such as city parks[*42] but the extent of the right should be clarified in the process of codification of building and planning law. Codification of these areas of law was completed in 2015[*43], but, regrettably, this has not resulted in any significant clarification of the scope of the GPECA's §23.[*44]

2.2. The concept of health and well-being needs

The GPECA's §23 is titled 'Right to environment that meets health and well-being needs'. These needs are not defined in the GPECA. The concept is vaguely outlined in the explanatory memorandum, which emphasises that the Parliament ought to discuss its limits.[*45] It appears that no such discussion took place. In any case, the wording of the provision was not altered.

The question of which needs are worthy of protection is not easy to answer. *Inter alia*, this can be seen in the discontinued practice of the Supreme Court by which standing was allowed on the basis of certain interest. The last relevant case pertained to the potential impacts of extracting sand from the seabed. The person who brought the action lived about two kilometres from the planned extraction site and was a fisherman. The court panel was divided on the question of whether an important interest was at stake for this person.[*46]

In this context it may be useful to consider which kinds of environmental interests are protected by environmental law in general. Brennan van Dyke has divided such interests into three categories: 1) the right to inviolable integrity of the person, including the person's physical being and the person's property; 2) aesthetic sensibilities and recreation interests of humans; and 3) the interests of future generations and well-being of non-human life.[*47] If only the first category is included, what the GPECA's §23 provides for would resemble a traditional basic right. The problem is that it would be difficult to distinguish this from other traditional rights, such as the right to life, health, property, or one's home. If, on the other hand, all three categories are included, then the right would encompass some interests that clearly are not subjective interests of the person. Therefore, I suggest that an independent subjective right should cover the first two categories of interests but not the third. Moreover, it should be recalled that the drafters of the GPECA sought to codify the existing court practice, which allowed extensive standing in relation to environmental matters while rejecting the idea of *actio popularis*. If the GPECA's §23 encompassed only the first category of interests, it would probably not lead to a liberal approach to standing, while including all the categories would allow *actio popularis*.

According to the commentaries on the GPECA,[*48] the understanding as to which 'well-being needs' are worthy of protection changes over time and depends on the development of the relevant society and the means available to it. In principle, a person should be protected from environmental nuisances that do not

42 Memorandum (see Note 35), p. 30. Note that the earlier practice of the Circuit Court of Tallinn was focused on the issue of whether members of the public have standing in relation to a matter to do with construction in a 'green space' within a built-up area, such as a city park. See, for instance, Tallinn CCd, 26.6.2008, 3-06-188.

43 Planeerimisseadus (the Planning Act) was adopted on 28 January 2015. – RT I, 26.2.2015, 3. Ehitusseadustik (the Building Code) was adopted on 11 February 2015. – RT I, 5.3.2015, 1.

44 For instance, the Planning Act's §8 stipulates the principle of improving the living environment, which could be relevant in interpreting GPECA's section. However, the act and its explanatory memorandum (at 200 pages) do not directly refer to GPECA's §23.

45 Memorandum (see Note 35), p. 30.

46 ALCSCr 13.5.2015, 3-3-1-8-15, para. 16. Dissenting opinion of judges I. Pilving and J. Põld.

47 B. van Dyke. Proposal to introduce the right to a healthy environment into the European Convention regime. – *Virginia Environmental Law Journal*, 1994/2, p. 330.

48 O. Kask *et al*. Keskkonnaseadustiku üldosa seaduse kommentaarid. 2., täiendatud väljaanne ['Commentaries on the General Part of the Environmental Code Act., 2nd Updated Edition'), 2015. Available at http://media.voog.com/0000/0036/5677/files/KeYS_kommentaarid_2015.pdf (most recently accessed on 31.3.2016).

result in damage to health but are nonetheless disturbing even if the relevant limit values are not exceeded. Impairment in respect of a 'well-being need' may also consist in deprivation of something, such as light (due to the height of neighbouring buildings), water (as in the case of drying up of a well in consequence of mining activities), or access to green areas or the environment in general on the basis of 'everyman's right'.*[49] The cautious position taken in the commentary allows interpreting the GPECA's §23 in terms of the first category of interests: most of the examples consider issues that would be within the scope of traditional rights if the rights were interpreted broadly. In my view, the concept of 'health and well-being needs' should also include individuals' recreation- and aesthetics-related environmental interests. For instance, a birdwatcher, a hiker, a nature photographer, or a botanist studying particular plants should be able to rely on the right in principle.

The very limited court practice of application of the GPECA's §23 appears to indicate that the notion of 'health and well-being needs' is interpreted broadly. The Tallinn Circuit Court has taken the position that cutting down five trees and building a car park in a yard may, in principle, affect the right of a city resident living in the house to which the yard belongs.*[50] In another case, that court seemed to accept that using a recreation area in a forest near a town is a health and well-being need of the residents of the town.*[51]

2.3. The criterion of significant connection

The first paragraph of the GPECA's §23 stipulates that a person has the relevant right only if he or she has a significant connection with the affected environment. According to the second paragraph, a person has a significant connection with the environment if that person often stays in the affected environment, often uses the affected natural resource, or otherwise has a special connection with the affected environment.

The provision is formulated on the basis of the earlier court practice.*[52] In several decisions, the Tallinn Circuit Court has used the following formula: 'Environmental impact has personal scope, whether or not other basic rights are affected, if the relevant person has used the affected environmental resource habitually, if that person often stays in said environment, or if the person has a stronger connection with the environment than the rest of the public or the well-being of that person is otherwise significantly affected by the environmental impact.'*[53] In these cases, the court had to determine which members of the public had standing in relation to an act that affected public green areas, such as a public city park. In the court's view, the living environment of a person includes at least the public space close to that person's home, especially parks and green areas, and also areas where the person habitually spends his or her leisure time. The formula was meant to allow broad standing but avoid *actio popularis*. In other words, when the concept of 'health and well-being needs' is interpreted broadly, many people may have an interest in the matter. The requirement of significant connection should be understood as a filter for determination of which persons are more affected than others.

A person is more affected if using the environment often. The GPECA does not specify how frequent or intense the use must be. In any case, the person must prove that he or she uses the relevant environment frequently. In the pre-GPECA court practice, living close to the affected environment was considered sufficient proof.*[54] This seems to be the case also in the limited court practice of application of the GPECA's §23.*[55] 'Additionally, 'significant connection' can be established on a basis other than use: any 'special connection' would be enough. The GPECA does not specify the meaning of 'special connection'. According to commentary on the act, it could consist of scientific interest, religious views, or ownership of the affected environment.*[56]

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49 *Ibid.*, pp. 125–126. The terms of this right are set out primarily in the GPECA's §§ 32–39 and, in principle, allow every person to use private land and water. This includes use for certain economic activities, such as berry-picking.

50 Tallinn CCr 25.6.2015, 3-15-1266, para. 11.

51 Tallinn CCr 16.12.2015, 3-15-2342, para. 9.

52 Memorandum (see Note 35), p. 31.

53 Tallinn CCr 13.8.2007, 3-07-102, para. 15; Tallinn CCd 18.3.2008, 3-06-1136, para. 10; Tallinn CCd 26.6.2008, 3-06-188, para. 15.

54 *Ibid.*, in paras 17, 12, and 16, respectively.

55 Judgements of Tallinn Circuit Court (see notes 50 and 51), in paras 11 and 9, respectively.

56 See the commentary on the GPECA (see Note 48), p. 127.

The wording of the GPECA's §23 raises the question of whether it is enough simply to prove the existence of a significant connection without demonstrating impairment in relation to meeting a particular health and well-being need. In my opinion, the second element has to be demonstrated in principle but its existence can often be presumed. If a link to needs need not be made, individuals could effectively protect any interest, not merely personal interests. For example, if a person habitually walks in a park, his or her right may be affected if the walking paths are rendered inaccessible by building of a drainage system, whereas the right cannot be affected if the drainage system does not affect walking but destroys a habitat of a protected plant species. The effect on health and well-being needs also has to be taken into account in the decision on what constitutes a significant connection. For instance, the more severe air pollution is, the less time a person has to stay in the affected area before being considered to have a significant connection with the affected environment.

In summary, the criterion of significant connection means that impairment of meeting of a need can be generally presumed if the person proves frequent use of the affected environment. In the event of doubt, a link must be established with a health and well-being need; however, there is no requirement set forth in the GPECA for demonstrating that the impairment is serious, obvious, etc.

2.4. The concept of affected environment

According to the second and third paragraph of the GPECA's §23, a person must have a significant connection with an affected environment or one likely to be affected. The concept is related primarily to the causal relationship of an administrative act or measure with negative consequences. The wording is problematic for two reasons: it does not expressly provide *ex ante* protection, and it may be misleading with respect to the negative effects of the act or measure.

The causal relationships can be complicated in environmental matters. Disputes often revolve about the existence or extent of negative impacts that may result from an administrative act, such as granting of an environmental permit. The wording of the GPECA's §23 may give an impression that the right affords protection only if the environment has actually been affected and not in cases of potential negative impacts. However, the provision needs to be read in conjunction with other provisions of the GPECA, such as its statement of the precautionary principle (§11), which stipulates that in environmental decision-making the impacts of the decisions have to be identified and the risks have to be reduced to the maximum extent possible by means of appropriate precautionary measures.

The negative effects of an administrative act or measure also do not necessarily have to manifest themselves in changes to nature, but this fact is not clearly reflected in the wording of the GPECA's §23. For example, the courts have had to rule on whether a restriction to the use of a recreational area in a forest may affect the right to an environment that meets health and well-being needs. Access to one such area was going to be restricted on as many as 90 days a year in order to ensure that nearby military exercises did not pose a threat to the public. The Tallinn Circuit Court was of the opinion that only actual extensive destruction of the forest could result in infringement of the right and that such destruction was very unlikely.[*57] In my opinion, the court was misled by the wording of the GPECA's §23, which requires significant connection with the affected environment. While the forest was not affected in the sense that it would be destroyed, the court did not consider that restrictions on the use of such a recreation area are similar to destruction of the forest in their consequence with regard to health and well-being needs: in both cases, the persons concerned cannot use the area for recreational purposes. It is my opinion that the right was affected and the court ought to have determined whether the restrictions to the use of the area were justified.

2.5. The required quality of the environment

According to the fourth paragraph of the GPECA's §23, the rights of other persons, public interests, and the characteristics of the region are to be taken into account in assessment of how well the environment meets health and well-being needs. The non-compliance of the environment with health and well-being needs is presumed if a limit value set for the quality of the environment has been exceeded.

The wording of the paragraph is confusing: it is unclear whether it addresses the scope of the right or instead its limitations. One must assume that the first sentence lists the general criteria to be taken into

[57] See the judgement referred to in Note 30, para. 9.

account in limiting of the right, because the rights of other persons or public interest cannot directly determine the scope of another right.

The paragraph offers very little guidance as to the contents of the right: the provision refers only to limit values for the quality of the environment. The definition of this term is provided in the third paragraph of the GPECA's §7: 'Limit value of the quality of the environment' means a limit value established for a chemical, physical, or biological indicator where, for the purpose of protecting human health and the environment, that value must not be exceeded. In other words, the quality of the environment is considered to be inadequate in the case of exceeding of a binding quality-limit value that is relevant for protection of meeting of a health or well-being need. We are unfortunate in that it is not necessarily obvious which indicators are limit values for the quality of the environment. Even if an indicator can be associated with health and well-being needs, it may not qualify because it is not strictly binding. Consider, for instance, the long-term objectives for ozone. There is no definitive date for achieving the objectives; what is stated in the Air Framework Directive is that if the long-term objectives are met, the Member States must, in principle, 'maintain those levels below the long-term objectives and shall preserve through proportionate measures the best ambient air quality compatible with sustainable development and a high level of environmental and human health protection'.*[58] Also, while there are numerous limit values, many aspects of environmental quality are not covered by limit values and some elements of it cannot be regulated by way of limit values, such as odours or access to green areas.

The inadequacy of an environment that exceeds limit values is only presumed. It is not clear under what circumstances higher environmental quality has to be guaranteed or lower quality has to be accepted. It could be argued that the provision allows taking an individual person's special needs into account. For instance, if a small percentage of the human population is less tolerant of noise, it could be argued that the persons belonging to this segment of the population have a need for reduction in nightly noise. However, this does not seem to be supported by the wording of the name given to the right. Unlike Article 1 of the Århus Convention, the GPECA's §23 refers to an environment that is adequate not for meeting the needs of the rights-holder but for meeting of needs in general. This implies that the environment must meet the needs of an average person.

It is apparent from the relevant draft materials that the GPECA's §23 was not intended to be so ambiguous. According to the notes on the conception of the GPECA, the right was to be formulated in broad terms but integrated with the specific regulation in the special part of the code.*[59] When the GPECA was adopted, in 2011, it was intended to enter into force at the same time as the special part (see §63). However, with the completion of the special part taking much longer than expected, a decision was taken in 2014 to bring the GPECA into force *[60] before the next general election, in 2015. Consequently, the GPECA's §23 is not integrated with specific regulation in sector-specific environmental law, although such a link can be established in the future.

In my view, the vagueness of the GPECA's §23 does not necessarily mean that it is devoid of content and unenforceable beyond the terms on certain quality-limit values. Any legal provision that sets out a requirement related to the environment could be considered to define an acceptable level for the environment. Consider the case of a building permit being issued for construction of a manure-storage facility within the water-protection zone. It could be argued that the provisions of the Water Act and the Nature Protection Act that clearly forbid such construction dictate that this is not an acceptable change in the environment. Any person who intensively uses the river for fishing or recreational purposes could contest the permit on the basis that it violates his or her right to environment. In cases wherein a public authority has discretion – e.g., that of a decision on whether a building may be constructed in a green area of a city – it could be argued that the GPECA's §23 requires such decisions to take into account the potential uses of the environment by the public and balance them against other interests. If such consideration is not carried out, this omission could be grounds for annulling the decision. However, by dint of the ambiguity of the right and the principle of separation of powers, the courts should quash the decision only if the error in the application of discretion is evident. This was the approach taken by the Tallinn Circuit Court in its earlier practice. That court

58 Article 18 of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008, OJ L 152/1.

59 Keskkonnaseadustiku üldosa seaduse kontseptsioon ['Concept of the General Part of the Environmental Code'], Tallinn 2008 (in Estonian). Available at http://www.just.ee/sites/www.just.ee/files/elfinder/article_files/keskkonnaseadustiku_uldosa_seaduse_kontseptsioon_2008_1.pdf (most recently accessed on 31.3.2016), p. 60.

60 See the explanatory memorandum to the implementing act for the GPECA. Available at http://eelnoud.valitsus.ee/main#6f5UGrFg (most recently accessed on 30.3.2016), p. 1.

held that the basic right does not preclude changes in the environment. However, in making the relevant decisions, the public authority has to involve persons whose living environment is affected, must specify the motivation for the decision, and may allow adverse changes only for imperative reasons.[*61]

2.6. Remedies

A right that in theory is extensive has little practical value if its enforceability is limited. The fifth paragraph of the GPECA's §23 stipulates that to uphold the right one can demand that the administrative authority preserve the environment and take reasonable measures to ensure that the environment is in line with the health and well-being needs. The provision clearly indicates that the right is meant to be enforceable. This is evident also from the first paragraph of §30, which states that the violation of the right is subject to administrative review and administrative court review.

The articulation of the right to demand preservation of the environment resembles the wording for the fundamental duty set out in §53 of the Constitution, which requires avoiding harmful action.[*62] It is not fully clear whether the demand for preservation in the context of GPECA's §23 may include measures by public authorities to prevent or mitigate damage arising through actions of third parties. In general, the demand to take active measures, such as improvement of access to green areas, is limited to reasonable measures. The reference could be understood as dealing with the necessity of giving special consideration to the burden of action on the public authority and the effectiveness of the action in ensuring the right.[*63] It reflects the need for caution in requiring positive action in a situation in which it is unclear what quality of environment is acceptable in ensuring the right.

The GPECA's §23 does not allow directly contesting the actions of private persons, because demands may be addressed only to public authorities.[*64] However, actions of public authorities often have immediate consequences for third parties – e.g., contesting the decision to issue an environmental permit affects the holder of the permit. Also, measures for improving the environment may entail obligations of private individuals. For instance, in order to reduce nightly noise in a neighbourhood, the local government may amend the regulations on night clubs or require actions from certain individual pub-owners. According to the commentary on the GPECA, the right of a public authority to demand actions by third parties cannot be based on the GPECA's §23 and has to be derived from other provisions.[*65] Consequently the public authority may effectively be rendered unable to take measures that are considered reasonable for ensuring the right.

2.7. The Supreme Court's criteria for an environmental right and the GPECA's §23

According to the Supreme Court, an independent subjective environmental right can emerge when criteria for such an environment and everyone's obligation to tolerate environmental impacts can be fixed in the law. Currently the legal criteria are manifestly inadequate for determining the extent to which the right may be protected.[*66]

The scope and contents of the GPECA's §23 are remarkably ambiguous and do not clarify the relevant legal criteria; i.e., the provision fails the test of the Supreme Court. A possible exception is to be found in certain quality-limit values that are designed for the protection of public health. It would be difficult to argue that with these values too the aim is not the protection of individual-level interests or that none of the values are sufficiently detailed. However, the values are set out not in the GPECA but in specific environmental acts, which existed at the time of the decision of the Supreme Court. In my view, this probably means that the Supreme Court considers the values not to be encompassed by an **independent** right to environment but, rather, to be one aspect of the right to health protection, which is specified in §28 of the Constitution.

61 See the judgement referred to in Note 30, para. 11.

62 See the commentary on the Constitution (Note 16), p. 490.

63 See the commentary on the GPECA (Note 48), p. 135.

64 Actions against private persons can be brought to a limited extent under private law. For instance, according to §143 of the Law of Property Act, one could, in principle, prohibit neighbours from causing non-material environmental nuisances.

65 See the commentary on the GPECA (Note 48), p. 135.

66 ALCSCr 18.6.2010, 3-3-1-101-09, para. 13.

This right, as are other social and economic rights, is often viewed as amounting to little more than aspirational rhetoric.[*67] The Estonian Supreme Court has rejected this view but has emphasised that judicial protection of the right to health protection is limited to the core of the right. The extent of the right depends, *inter alia*, on the economic capability of the state, and the judiciary shall not replace the legislative or executive powers in exercising of social policy.[*68] So far, the focus of the court review by the Supreme Court has been on the right to health care and state assistance, not environmental aspects of the right. However, it is commonly held that the right includes underlying determinants for health, such as environmental conditions.[*69] Also, the Supreme Court has been innovative in interpreting basic rights so as to accommodate environmental concerns, although this has met with resistance from more conservative judges.[*70]

3. Conclusions

The purpose with this article has been to examine the basis of the subjective right to environment set out in the GPECA's §23 and analyse its scope and contents to determine whether it satisfies the criteria outlined by the Supreme Court for an independent subjective environmental right.

The conclusion is that the right has no explicit basis in international, EU, or constitutional law. However, some courts, especially the Circuit Court of Tallinn, have recognised a subjective basic right to environment. The GPECA's §23 was intended to codify and expand the existing court practice surrounding the basic environmental right. Court practice changed as the legislative proceedings progressed, but the Parliament did not alter the formulation of the provision.

The scope and contents of the right set out in the GPECA's §23 are noteworthy for their ambiguity. This is a consequence of the regrettable wording for some elements of the right, the Parliament's lack of initiative to discuss the extent of the right, and also the fact that the GPECA was initially designed to be not adopted ahead of the special part but integrated with it. Consequently, the GPECA's §23 fails the Supreme Court's test for an independent subjective environmental right, which requires fixing the scope and content of the right in the law.

The GPECA's §23 relies on several undefined legal concepts. It is proposed that that term 'environment' encompasses the natural environment and elements of the built environment that are similar to the natural environment, such as city parks. The concept of 'health and well-being needs' should essentially encompass all individual-level environmental interests; otherwise, it cannot be distinguished from traditional rights or public interests. The criterion of 'significant connection' should be understood as a filter for singling out persons whose abilities to meet their health and well-being needs are more affected. In general, it is sufficient to prove the existence of this 'significant connection', but a link must be established with a health and well-being need when some doubt exists. The concept of 'affected environment' should not be understood as limiting the scope of the right to cases wherein an actual significant physical change has occurred in the environment.

The only express guidance as to the contents of the right comes in the somewhat vague reference to exceeding of a quality-limit value. However, arguably any legal provision that sets out a requirement with regard to the environment could be considered to define the level acceptable for the environment. Also, it could be argued that the GPECA's §23 requires a balancing-of-interests test in connection with any public environmental decision and that this use of discretion is, in principle, subject to court review. Depending on the viewpoint, one could consider the right therefore to be empty and unenforceable or, conversely, to allow enforcement of any environmental requirement that could affect the environment that the relevant person extensively uses. It remains to be seen how the Supreme Court will construe the GPECA's §23.

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67 See, e.g., C. O'Cinneide. Constitutionalization of social and economic rights. – H.A. Garcia, K. Klare, L.A. Williams (eds). *Social and Economic Rights in Theory and Practice: Critical Inquiries*. London: Routledge 2015, p. 265.

68 See, e.g., ALCSCd 10.11.2003, 3-3-1-65-03, para. 14; Judgement of the Supreme Court *in rem* 7.6.2011, 3-4-1-12-10, para. 58.

69 See the commentary on the Constitution (see Note 16), pp. 365–366.

70 In a landmark decision, the court found that the right of land-ownership encompasses the interest in preserving a favourable status for the protected habitat of a plant species on the grounds that all plants are part of the immovable. The decision was not unanimous, as one of the justices considered such expansion of the right contrary to the nature of the right. ALCSCd 6.12.2012, 3-3-1-56-12, para. 11; dissenting opinion of I. Koolmeister, paras 1–4.

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Enforcement of Ineffectiveness of Unlawfully Modified Public Contracts[*1]

Introduction

Originating from the general principles of the EU public procurement law, the restrictions on modifying public contracts have been developed further by the EU legislator in the 2014 public and utilities procurement directives.[*2] The directives follow the rationale of the CJEU case law,[*3] prohibiting any substantial modification of public contracts, and introduce detailed criteria for distinguishing acceptable contract modifications from unacceptable (substantial) ones.

While the criterion of materiality as a measure of an amendment's lawfulness has received a good amount of attention in legal literature,[*4] equal attention has not been paid to wider legal implications and possible contradictions that can accompany the enforcement of these rules, particularly when the interaction with national legal systems of the EU is taken into account.

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1 This work is supported by Estonian Research Council grant PUT639.

2 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28/03/2014, pp. 1–64 (the Concessions Directive); Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; OJ L 94, 28/3/2014, pp. 65–242 (the Public Procurement Directive); Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC OJ L 94, 28/3/2014, pp. 243–374 (the Utilities Directive).

3 Commission of the European Communities v. CAS Succhi di Frutta SpA, case C-469/99 P, ECLI:EU:C:2004:236; pressetext Nachrichtenagentur GmbH v. Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung, case C-454/06, ECLI:EU:C:2008:351; Wall AG v. La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH, case C-91/08, ECLI:EU:C:2010:182.

4 A. Brown. When do changes to an existing public contract amount to the award of a new contract for the purpose of the EU procurement rules? Guidance at last in case C-454/06. – *Public Procurement Law Review 6*, 2008, pp. NA253–267; K. Hartlev, M.W. Liljenbøl. Changes to existing contracts under the EU public procurement rules and the drafting of review clauses to avoid the need for a new tender. – *Public Procurement Law Review 2*, 2013; S. Treumer. Regulation of contract changes leading to a duty to retender the contract: The European Commission's proposals of December 2011. – *Public Procurement Law Review 5*, 2012; S. Treumer. Contract changes and the duty to retender under the new EU public procurement Directive. – *Public Procurement Law Review 3*, 2014; M.A. Simovart. Lepinguvabaduse piirid riigihankes: Euroopa Liidu hankeõiguse mõju Eesti eraõigusele ['Limits to Freedom of Contract: the Influence of EC Public Procurement Law on Estonian Private Law'], doctoral thesis], 2010, available at https://dspace.utlib.ee/dspace/bitstream/handle/10062/15148/simovart_mari_ann.pdf?sequence=5 (most recently accessed on 16.3.2016); M.A. Simovart. Amendments to procurement contracts: Estonian law in the light of the *Pressetext* ruling. – Juridica International 2010, No. 1, pp. 151–160, available at http://www.juridicainternational.eu/index.php?id=14581 (most recently accessed on 16.3.2016); Hankelepingu lubatud ja keelatud muudatused uute riigihankedirektiivide ülevõtmise järel ['Permitted and Prohibited Amendments After Transposition of the New Public Procurement Directives']. Juridica 2016/I, pp. 52–60.

The primary remedy that interested parties can rely on when learning of a possibly unlawful modification is ineffectiveness of the public contract.[*5] However, because the contract performance phase is subject to the unharmonised private law of the Member States, enforcement of ineffectiveness as a result of unlawful contract modifications might be prone to specific fundamental difficulties. This article intends to 'map' such difficulties by looking at the access to the remedy of ineffectiveness in cases of unlawful public contract modification as well as the collateral implications following the ineffectiveness.

1. *Locus standi* in claims of ineffectiveness due to unlawful public contract modification

1.1. The criteria for standing

Any substantial modification of a public contract needs a new award procedure,[*6] the failure to conduct which can lead to ineffectiveness of the contract. Depending on the national law, ineffectiveness can be either retroactive cancellation of contractual obligations (ineffectiveness *ex tunc*) or cancellation of obligations that are still to be performed (ineffectiveness *ex nunc*) together with the application of other penalties.[*7] When a third party learns of a possibly unlawful modification of a public contract, it can submit a claim to either the court or another review body (as designated by the Member State) with the aim of establishing ineffectiveness of the contract.

For the purpose of creating an efficient review system, a relatively wide circle of third parties should have reasonable access to and be encouraged to make active use of the remedies available under the national review systems.[*8] The remedies directives oblige the Member States to make review procedures available to at least any and all concerned persons who fulfil the following two conditions: (i) the person must have or have had an ***interest*** in obtaining the concerned public contract and (ii) the person must have been or must risk being ***harmed*** by the alleged infringement.[*9]

While the remedies directives do not seek to harmonise the national legislation completely with regard to *locus standi*,[*10] the national legislators are not free to give the established criteria any interpretation that could limit the effectiveness of the directive either.[*11] Thus, at minimum, review procedures in public procurement have to be available to parties who are interested in the concerned contract and are, or can be, harmed by the challenged breach.

The Member States may grant access to review more freely; however, the remedies system is not intended for availing stakeholders with indirect or general interest with the option to claim review of allegedly unlawful decisions or acts. For that purpose, the Member States can provide alternative options of review or allow for interests of the society to be considered or indirectly interested stakeholders to be involved otherwise. The possibility is mentioned in Recital 122 of the Public Procurement Directive (2014/24/EU)[*12]: 'citi-

5 M.A. Simovart. Old remedies for new violations? The deficit of remedies for enforcing public contract modification rules. *Upphandlingsrättslig Tidskrift* 2015/1, available at http://urt.cc/sites/default/files/UrT%202015-1_Simovert.pdf (most recently accessed on 14.3.2016), p. 35.

6 Article 43 (5) of the Concessions Directive; Article 72 (5) of the Public Procurement Directive; Article 89 (5) of the Utilities Directive.

7 Article 2d (1) (a) and (2) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, amended by Council Directive 92/50/EEC of 18 June 1992 L 209 and Directive 2007/66/EC of the European Parliament and of the Council; Article 2 d (1) (a) and (2) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, amended by Council Directive 2006/97/EC of 20 November 2006 and Directive 2007/66/EC of the European Parliament and of the Council.

8 X. Zhang. Supplier review as a mechanism for securing compliance with government public procurement rules: A critical perspective. – *Public Procurement Law Review 5*, 2007, pp. 334–336, 340, 351.

9 Directive 89/665 and Directive 92/13, Article 1 (3), hereinafter: the remedies directives.

10 Case C-570/08, *Symvoulio Apochetefseon Lefkosias v. Anatheoritiki Archi Prosforon*, ECLI:EU:C:2010:621, para. 37.

11 Case 230/02, *Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG v. Republik Österreich*. ECLI:EU:C:2004:93, para. 42.

12 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28/3/2014, pp. 65–242.

zens, concerned stakeholders, […] and other persons or bodies which do not have access to review procedures pursuant to Directive 89/665/EEC do nevertheless have a legitimate interest, as taxpayers, in sound procurement procedures. They should therefore be given a possibility, otherwise than through the review system pursuant to Directive 89/665/EEC and without it necessarily involving them being given standing before courts and tribunals, to indicate possible violations of this Directive to a competent authority or structure. So as not to duplicate existing authorities or structures, Member States should be able to provide for recourse to general monitoring authorities or structures, sectorial oversight bodies, municipal oversight authorities, competition authorities, the ombudsman or national auditing authorities.' In addition, Article 3 of Directive 89/665 provides for the Commission having a general power to intervene in matters where a serious infringement of EU law needs correction but has not been challenged.[*13]

In this light, questions arise with regard to cases like the recent UK decision in the matter of Winchester City Council[*14] where a councillor successfully applied for review of a decision by the City Council to modify a contract for the development of real estate without conducting a proper procurement for the modification. The applicant, Mr. Gottlieb, was neither an actual nor a potential bidder but instead a person clearly representing a general interest ('a resident, council tax payer, and City Councilor […] seeking to ensure that the elected authority […] complies with the law, spends public funds wisely, and secures through open competition the most appropriate development scheme for the City'[*15]). Despite that, he was found to have standing to challenge the City's decision to modify a contract with a developer, on the grounds that it breached the EU rules on public contract modification.

While it may be 'uplifting'[*16] to see such a defender of indirect interests receive the standing and a doubtless just decision be awarded in the particular matter, the implications of giving standing overly generously in public contract cases in general can have a significant downside. Mainly, the risk of public contracts' validity being too easily challenged reduces legal certainty and counteracts the principle of *pacta sunt servanda*. Besides, fundamental differences in the national practice of allowing access to review could be argued to lead to lack of uniformity of the EU public procurement law with regard to remedies. Even though the CJEU has denied that national laws including contracting authorities within the class of persons to whom the review action is available would lead to a lack of uniformity in the application of the EU law,[*17] Recital 122 of Directive 2014/24/EU can be understood to indicate that the class of persons entitled to review should nevertheless not be extended to include persons protecting the general interests. The case of Winchester could therefore be treated rather as an exception justified by the accumulation of specific circumstances (the applicant being a council member, the subject matter of the contract pertaining to city planning and development – an area subject to very high public interest – etc.), as opposed to a routine example of finding standing in unlawful contract modification matters.

It is noteworthy that the rationale underlying government contract modification rules in the US is very close to the EU approach[*18]: any modification changing the purpose or nature of a contract so substantially that the original and the modified contract are materially different is subject to the statutory requirement for full and open competition[*19] as provided under the Competition in Contracting Act (CICA).[*20] Not unlike

13 Case C-570/08, *Symvoulio Apochetefseon Lefkosias v. Anatheoritiki Archi Prosforon*, paras 26, 34.

14 *R. Gottlieb (On the Application Of) v. Winchester City Council* [2015] EWHC 231 (Admin); [2015] A.C.D. 74. See also R. Ashmore. Variations on a theme (Pressetext in action) / changes to development plans in favor of commercial developer successfully challenged: *R (on app. Gottlieb) v. Winchester City Council*. – *Public Procurement Law Review 3*, 2015, NA81–NA87; S.H. Bailey. Reflections on standing for judicial review in procurement cases. – *Public Procurement Law Review* 4, 2015, pp. 122–132.

15 R. Gottlieb (On the Application Of) v. Winchester City Council [2015] EWHC 231 (Admin), p. 151.

16 Ashmore, p. NA87, commending that decision as well as the overall modern liberal approach to standing in the public law of the UK; see Bailey, pp. 125, 129, 132.

17 Case C-570/08, *Symvoulio Apochetefseon Lefkosias v. Anatheoritiki Archi Prosforon*, paras 36–37.

18 See also C.R. Yukins. The European procurement directives and the Transatlantic Trade & Investment Partnership (T-TIP): Advancing U.S. – European trade and cooperation in procurement (2014). GWU Law School Public Law Research Paper No. 2014–15; GWU Legal Studies Research Paper No. 204-15. Available at http://ssrn.com/abstract=2433219 or http://dx.doi.org/10.2139/ssrn.2433219 (most recently accessed on 15.3.2016), p. 15. There are some significant differences in the details of applying the general prohibition of material changes, though. E.g., while the US approach seems to favour broadly defined and general contracts for the purpose of accepting rather large-scale modifications, the EU's newly established contract-modification rules denounce overly wide discretion, standing clearly for specific and precisely drafted changes clauses. These differences do not, however, affect the suitability of comparing the practices with regard to standing requirements.

19 AT&T Commc'ns, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1204 (1993); CCL, Inc., 39 Fed. Cl. 180, 191–92 (1997).

20 41 USCA §3301 (a).

the EU law are also the basic criteria for establishing standing in procurement protests: actual or prospective bidders whose direct interest would be affected towards such award or failure are entitled to protest the decisions.[*21] The case law concerning unlawful contract modification in the USA's federal procurement has been accumulating already since 1880.[*22] Given the shared policy goals of the EU and US public procurement systems, the more 'experienced' case law of the US provides a valuable basis for comparison. A brief look at the US practice is therefore included in the following analysis.

1.2. Sufficient interest in the modified public contract

Mostly, procurement claims concern steps of the award procedure where the criterion of interest is satisfied when the person participates in the award procedure, even though a possibility or likelihood of winning the contract is not a required criterion for establishing standing.[*23] As a rule, it is difficult for a person who has not participated in the award procedure to demonstrate such an interest.[*24] The situation is different, however, in challenging of a contracting authority's decision to (not) advertise a contract[*25] – for instance, in the case of unlawful contract modification. In such cases, potential contractors must be entitled to bring a claim.

In the US, multiple fora for raising government-contract-related protests have developed historically: at present, parties are able to submit protests either to the United States Court of Federal Claims or to the Government Accountability Office (GAO).[*26] The extensive case law accumulated by the GAO as the main venue for protest action generally follows the line of reasoning that a party does not have a sufficient interest when said party would not be ineligible to compete for the contract if the protest were resolved in its favour.[*27] Parties who could not act as bidders even potentially are not considered to be interested parties in procurement protests in general,[*28] and not in contract modification cases in particular.[*29] Under the same rationale, subcontractors are refused standing in contract modification protests,[*30] even though individual exceptions to that understanding have been mentioned.[*31] As a rule, for purposes of a protest alleging that changes to a government contract are so substantial that the contract should be terminated and a new

21 31 U.S.C. §3551(2), 4 C.F.R. §21.0(a) (1).

22 C.D. Swan. Lessons from across the pond: Comparable approaches to balancing contractual efficiency and accountability in the U.S. bid protest and European procurement review systems. – *Public Contract Law Journal* 43.1 (Fall 2013), p. 35.

23 D. Pachnou. The Effectiveness of Bidder Remedies for Enforcing the EC Public Procurement Rules: A Case Study of the Public Works Sector in the United Kingdom and Greece. University of Nottingham 2003, p. 106.

24 Dischendorfer. Challenging discriminatory technical specifications under the Remedies Directives: The Grossmann case. P.P.L.R. 2004, 4, NA98–102 , p. NA102.

25 S. Arrowsmith. The Law of Public and Utilities Procurement, 2005, para. 21.6; R. Caranta. Damages for breaches of EU public procurement law: Issues of causation and recoverable losses. – D. Fairgrieve, F. Lichere, editors. Public Procurement Law: Damages As an Effective Remedy. Oxford and Portland, Oregon, 2011, pp. 167–168.

26 On controversies in applying the standing rules in government contract disputes, see B.M. Byrd. Contractors stand strong: Those 'adversely affected or aggrieved by agency action' should have standing to expose government procurement regulation violations to mitigate waste in contingency contracting. – Federal Circuit Bar Journal 22, 2013, *passim*; F.W. Claybrook, Jr. Standing, prejudice, and prejudging in bid protest cases. – Public Contract Law Journal 33, Spring 2004, *passim*; F.W. Claybrook, Jr. Please check your crystal ball at the courtroom door – a call for the judiciary in bid protest actions to let agencies do their job. – Public Contract Law Journal 38, Winter 2009, *passim*; W. N. Keyes. Government Contracts under the Federal Acquisition Regulation. Thomson West 2003, pp. 736, 738, 761; P.H. Polling. The Federal Circuit's folly: Misconstruing government contractor standing rules in the Court of Federal Claims. – Public Contract Law Journal 36, Fall 2006, *passim*.

27 R. Prevost. Contract modification vs. new procurement: An analysis of General Accounting Office decisions. – *Public Contract Law Journal*, 15.71985, p. 454.

28 There have been exceptions to that rule. E.g., a proposed or possible subcontractor can be an interested party 'where no other immediate party had a greater interest concerning the issue raised and where there was a possibility that the subcontractor's interest would be inadequately protested if our bid protest forum were restricted solely to potential awardees' (California Microwave, Inc., 54 Comp. Gen. 231 (1974), 74–2 CPD 181; Abbott Power Corporation, B–186568, December 21, 1976, 76–2 CPD 509). Also, 'a subcontractor whose product was mentioned by name in the specifications was sufficiently interested to protest the solicitation's "brand name or equal" provisions' (Mosler Systems Division, American Standard Company, B–204316, March 23, 1982, 82–1 CPD 273). An electrician-subcontractor was considered to have a standing to challenge 'the wage rates for electricians set forth in the solicitation' (Rosendin Electric, Inc., 60 Comp. Gen. 271 (1981), 81–1 CPD 119 (most recently accessed on 9.3.2016)).

29 Prevost 1985, p. 455.

30 *International Genomics Consortium v. the United States*, 104 Fed. Cl. 669 (2012), 669, 674.

31 Keyes 2003, p. 746; Prevost 1985, pp. 455, 462.

competition conducted, only a party who can participate as a potential offeror has a direct and established interest in the opportunity to compete for the award.*[32]

The case of Onix Networking Corporation*[33] provides an example: The Peace Corps solicited a contract to renew its existing software licences for Microsoft products and to acquire technical services, limiting the original competition to authorised Microsoft resellers only and awarding the contract to En Pointe, a reseller of Microsoft products and services. Later, the Peace Corps decided to acquire 'cloud-based' e-mail as a service (EaaS) as opposed to its existing e-mail functionality and for that purpose conducted a pilot programme to test both Microsoft and Google EaaS products. Even though the test users praised both products as appealing, the Microsoft EaaS product was ordered from En Pointe via a contract modification eventually. The modification was protested by Onix, an authorised reseller of Google products, and ruled to be improper by the GAO.*[34] Even though the Peace Corps claimed Onix not to be an interested party, as it could not meet the requirements set for the modification, the GAO found otherwise. Because the contracting agency had never issued any actual definitive requirements as to delivering the desired product, there was no basis for finding the protestor incapable of meeting the (non-existent) requirements and no reason to not consider them to be an interested party, *inter alia*, the GAO took into account that some of the desired features as referred to by the agency were allegedly restrictive of competition and if officially stated in a competition would be challenged by the protestor.*[35]

In some cases pertaining to public contract modifications, it has been argued that the circle of interested parties should be limited to the participants in the initial tender, when there was one. The reason this argument is not justified relies firstly on the very logic prohibiting substantial contract changes. As established in the landmark case *Pressetext* as well as the 2014 directives, it is, namely, the hypothetical implication of the amendment for the results of the original award procedure that serves as a criterion for finding an amendment unacceptable. Had the change been made to the terms of the initial award procedure, the contract might have attracted different bidders or could have been awarded to a different entity. The party disputing the amendment can very well belong to the group of such potentially attracted different bidders. Secondly, the initial procedure may have taken place a relatively long time ago, in which case there might not be a real correlation between any previous and present interests. Thirdly, should a modification truly appear to be a significant one, it creates a *de facto* new contract that has actually never been subject to an award procedure at all. Such situations must be regarded as not unlike other cases of failure to advertise and must allow any *potential* contractors to challenge the unlawful decision, without the need to show actual participation in the initial contract award procedure.

This conclusion is supported by the US case law as well. For instance, in a case of a government contract for the lease and the recycling of acrylic plastic media, awarded by the Department of the Air Force, Poly-Pacific Technologies, Inc., the protester, did not submit a proposal in the original competition because it was not on the list of qualified providers of the required type of plastic media at the time when proposals were due. However, it later became approved as a qualified provider. In a protest concerning contract modification, Poly-Pacific were found to be a prospective offeror with direct economic interest affected by the failure to award the contract properly.*[36] The mere fact that the protester could not or did not participate in the award procedure preceding the initial contract award does not take away its chances of challenging unlawful amendment of that contract.*[37]

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32 E.g., Memorex Corporation, B-200722, Oct. 23, 1981, 61 Comp.Gen. 42, pp. 1, 4.

33 Onix Networking Corporation, B-411841, Nov. 9, 2015, http://gao.gov/assets/680/673620.pdf (most recently accessed on 7.2.2016).

34 The ruling pointed to 'a fundamental flaw in the agency's logic': while the original competition had been limited to Microsoft resellers only, indicating that only Microsoft products would meet the agency's requirements, subsequent actions such as the pilot programme 'explicitly recognize that there are firms other than Microsoft authorized resellers, and products other than Microsoft's EaaS product, that are available to meet the agency's requirement'. Furthermore, the original competition never contemplated the acquisition of cloud-based EaaS or of any other entirely new product or service but was, on the contrary, limited to a specific list of products and services. Onix Networking Corporation, B-411841, pp. 1–3, 6–9.

35 Onix Networking Corporation, B-411841, pp. 4–5 (most recently accessed on 7.2.2016).

36 Poly-Pacific Technologies, Inc., B-296029, June 1, 2015, http://gao.gov/assets/380/374466.pdf, p. 2 (most recently accessed on 8.2.2016).

37 *Ibid*., p. 2; see also Memorex Corporation, B-200722, p. 4.

1.3. Prejudice caused by the unlawful modification

Prejudice, or suffering of harm through the challenged breach, is an essential element of standing in the US.[*38] However, there is some controversy with regard to establishing the prejudice as a part of the protestor's standing.[*39]

On the one hand, cases like *Myers* suggest a protestor must show that it would be a qualified bidder, regarding the mere fact that it might have submitted a bid as insufficient.[*40] On the other hand, judgements like the one in the above-referred-to *Poly-Pacific* regard the loss of a chance to participate in a competition for a federal contract as sufficient to find the protester prejudiced by the improper modification.[*41] Similarly, in the case of Distributed Solutions, Inc., the Court established that the plaintiffs suffered a loss of an opportunity to compete fully and fairly for a federal procurement opportunity and therefore suffered a 'non-trivial competitive injury sufficient to satisfy the jurisdictional standing requirement'.[*42] (Even more confusingly, some GAO rulings point out that the protestor, in order to show the prejudice, must show how the challenged modification would have influenced the *original* competition.[*43] This approach cannot be justified. While it is right to compare the original and the modified contracts in order to establish whether the modification is a substantial one, there is no reason to compare the chances of the protestor in the actual and hypothetical past competitions for the purpose of establishing the suffering of loss through a contract modification.)

The protests based on unlawful contract modification are aimed at opening a new competition, the exact terms of which are unknown at the time of the dispute. It's therefore the chance of bidding in such hypothetical competition that should be looked at when establishing the presence of a prejudice. A protestor should be able to show that it *could* reasonably be awarded the new contract and is suffering from harm by way of missing that chance. The protestor does not have to convince the court that it *would* have been awarded the contract had the procedure been lawfully undertaken.[*44]

Not unlike the US requirement of prejudice, the EU remedies directives allow the Member States to make the review procedures subject to the claimant being or risking being harmed by the alleged infringement.[*45] The CJEU has never actually had a chance to articulate its position on this issue. The question of establishing 'harm' was posed to the CJEU in the *Pressetext* case: 'Is "harmed" in Article 1 (3) of Directive 89/665 [...] and in Article 2 (1) (c) of that directive to be interpreted as meaning that an undertaking [...] is harmed [...] simply where he has been deprived of the opportunity to participate in a procurement procedure because the contracting authority did not, prior to making the award, publish a contract notice, on the basis of which the undertaking could have tendered for the contract to be awarded, could have submitted an offer or could have had the claim that exclusive rights were involved reviewed by the competent procurement review body?'. The question was presented conditionally, depending on the court's answer to the first questions, and in light of these, the Court did not have to answer it.[*46]

However, the opinion of Advocate General Kokott in the case of *Pressetext* offers a good insight into the matter of establishing harm as a part of the *locus standi* test. It suggests that application of the standards of *locus standi* and restriction of access to review options must 'not affect the practical effectiveness of the directive'.[*47] Therefore, the right to bring an action in procurement review proceedings may not be restricted

38 *Myers Investigative and Security Services, Inc. v. United States*, 275 F.3d 1366 (2002), 1366.

39 See Byrd 2013, *passim*; Claybrook 2004, *passim*; Claybrook 2009, *passim*.

40 *Myers Investigative and Security Services, Inc. v. United States*, 1366.

41 Poly-Pacific Technologies, Inc., B-296029, p. 6.

42 *Distributed Solutions, Inc., and STR, L.L.C. v. the United States*, 104 Fed. Cl. 368 (2012), 368, 377, 380. See also Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1362 (Fed. Cir. 2009).

43 E.g.: Armed Forces Hospitality, LLC, B-298978.2, B-298978.3, Oct. 1, 2009, http://gao.gov/assets/390/386896.pdf, pp. 9–10; Emergent BioSolutions Inc., B-402576, June 8, 2010, http://gao.gov/assets/390/389187.pdf, p. 14 (most recently accessed on 16.3.2016).

44 Claybrook 2009, pp. 384, 386, 389.

45 Case 249/01, *Werner Hackermüller v. Bundesimmobiliengesellschaft mbH (BIG) and Wiener Entwicklungsgesellschaft mbH für den Donauraum AG (WED),* ECLI:EU:C:2003:359, para. 19.

46 *Pressetext*, paras 27, 89.

47 The Opinion of Advocate General Kokott delivered on 13 March 2008. Case C-454/06, *Pressetext Nachrichtenagentur GmbH v. Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung*. ECLI:EU:C:2008:167, para. 144; reference to the following: Case C-410/01, *Fritsch, Chiari & Partner and Others*, paras 31, 34; Case C-470/99, *Universale-Bau*, para. 72; and Case C-230/02, *Grossmann Air Service*, para. 42.

disproportionately. With regard to the standard of 'harm', asserting that there is a possibility of the occurrence of damage must be sufficient. Furthermore, the possibility of harm 'must be presumed where it is not manifestly excluded that the applicant would have received the award if the legal infringement alleged had not occurred'.[*48] This way, the requirement of harm is applied so as to open review procedures to a wider rather than a smaller circle of interested parties,[*49] as the essence of the review system demands.

Decisions on contract modification should be open to review on flexible grounds, rejecting as inadmissible *ab initio* by reference to a lack of standing only the cases where the lack of standing is so plainly obvious as to require no further examination.[*50] An example of a 'plainly obvious' impossibility of competing would be present in the case of a company that conducts business in an area different from that expected under the concerned contract (a shoemaking factory challenging a construction contract). Also, any person who would be excluded from the procurement under the mandatory clauses of exclusion[*51] (e.g., due to participation in terrorist offences, money-laundering, child labour, etc.) shouldn't have standing, perhaps with possible exceptions where they demonstrate reasonable grounds for applying the self-cleaning exception[*52] or an exception for overriding reasons related to the public interest[*53].

In conclusion, in cases of illegal direct contracting, both the party's interest towards the modified contract and suffering of loss must be considered to be present whenever the company could be able to bid in the hypothetical award procedure that should be conducted instead of modification of the concerned contract. Only when it is 'plainly obvious' that the person is not capable of competing for the contract should they have no standing. Otherwise, overly restricted access to the proceedings would render any effective review excessively difficult, possibly limiting the effective enforcement of the directive and counteracting the purposes of the whole remedies system.

2. Indirect implications of public contract ineffectiveness

2.1. Scope of ineffectiveness

While the basic essence of ineffectiveness is well defined as exclusion of the continued legal force of a public contract, the directives leave some room for different interpretations regarding the scope of the impact of ineffectiveness. Namely, it is not clear whether the resulting ineffectiveness must concern the whole modified contract or can apply to the unlawful amendment only. Both possibilities can be deduced from the language in the famous case *Pressetext*[*54] where the Court describes substantial amendments as renegotiations of the initial contract as well as *de facto* new awards. Here, the references to the use of negotiated procedure without publication seem to support the understanding that a new award of additional or repeated services, if necessary, can be isolated from the rest of the contract (e.g., para. 36). On the other hand, description of an amendment as *renegotiation* of the initial contract looks at the modified contract as a whole (e.g., para. 34).

Similarly, both the duty to retender the initial (renegotiated) contract and the obligation to conduct a new tender for the amendment have been referred to in the literature.[*55] S.T. Poulsen has openly acknowledged that a new tendering procedure can be necessary either for *a whole new contract or for a supplementary contract dealing with the amendment*.[*56] That approach seems to correspond to the traditional

48 The Opinion of Advocate General Kokott, Case C-454/06, para. 148.

49 Case 249/01, *Hackermüller*, paras 22, 24–29. Also Case 100/12, *Fastweb SpA v. Azienda Sanitaria Locale di Alessandria*. ECLI:EU:C:2013:448, paras 26–29.

50 The Opinion of Advocate General Kokott, Case C-454/06, paras 146–150.

51 The Concessions Directive, Article 38; the Public Procurement Directive, Article 56; the Utilities Directive, Article 80.

52 The Concessions Directive, Article 38 (9); the Public Procurement Directive, Article 56, Section 6; the Utilities Directive, Article 80.

53 The Concessions Directive, Article 38 (6) the Public Procurement Directive, Article 56, Section 3; the Utilities Directive, Article 80.

54 *Pressetext Nachrichtenagentur GmbH v. Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung*. ECLI:EU:C:2008:351.

55 Most references have been made to the duty to retender the modified contract (i.e., the whole contract as opposed to just the modified part of it) – e.g., K. Hartlev, M.W. Liljenbøl 2013, pp. 51, 54; Treumer 2012, pp. 154, 155, 165; Treumer 2014, p. 148. However, the requirement of a new tender for *additional works* only is mentioned in Treumer, 2014, p. 150.

56 S.T. Poulsen. The possibilities of amending a public contract without a new competitive tendering procedure under EU law. – *Public Procurement Law Review 5*, 2012, pp. 167–187 (on pp. 167, 168, 170).

civil-law rule: when a part of a contract appears to be illegal, the rest of the contract can continue to be in force if the illegal part is separable from the rest, unless entry into the contract was conditional on the illegal part to begin with.[*57] By the same rationale, an unlawfully modified public contract can remain in force without the modified part when the modification can be separated out – presuming that making the modification was not a precondition for entering into the public contract.

Among the cases of substantial modifications listed in the directives, additional works (supplies and services) that overstep the limits provided in Section 1 (b) could perhaps be examples of separable modifications. The same could apply to modifications that considerably extend the scope of a contract (Section 4 (c)), particularly extensions in time – an additional contract period for services, for example. On the other hand, an unlawful change of contracting partner could serve as an example of change that probably cannot be separated from the rest of the contract, unless the substitution is clearly intended for a part of the contract only.

Any specific difficulties seem largely attributable to cases where the *whole* contract should have been put out for a new tender, as opposed to modifications separable from the initial contract that do not influence the validity of the initial contract and thus provide no particular difficulties in comparison to random cases of contract ineffectiveness.

2.2. Negative influence on contractors (suppliers)

For obvious reasons, a breach of contract-modification rules always occurs within a framework of valid contractual relations and may possibly happen in an advanced stage of contract performance. In a situation where the contractor (service provider) has already devoted significant efforts and costs to preparing and in anticipation of the performance, as well as in the course of actual performance, public contract ineffectiveness can subject the contractor to major negative consequences financially.[*58]

This can be particularly true when the contract terms provide for no payments by the contracting authority until the last phases of delivery, demand expensive warranties from the contractor, or make the contractor enter into costly agreements with subcontractors or suppliers which agreements ineffectiveness renders it unable to fulfil. Moreover, in the outcome, ineffectiveness can have especially serious consequences with regard to arrangements of financing.[*59] Although all of that can also apply in cases of ineffective initial contracting, the difference lies, firstly, in the fact that an unlawfully modified contract started out as a perfectly legitimate contractual relationship. Secondly, while the term for claiming ineffectiveness of an illegally awarded contract starts to run from the beginning of the contract period, the same term for an illegal modification proceeds from the moment of making the illegal amendment, which itself can follow an already extensive contract period. In comparison, the implication of ineffectiveness of modified contracts therefore carries the possibility of somewhat more complications.

In addition to immediate financial implications, agreeing to an unlawful public contract modification may subject the contractor to collateral consequences in future procurements. Namely, under the new directives, contracting bodies will be entitled or – depending on the Member State's law – even obliged to exclude a tenderer from an award procedure if the latter 'has shown significant […] deficiencies in the performance of a substantive requirement under a prior public contract […] which led to early termination of that prior contract, damages or other comparable sanctions'.[*60] It is not clear whether unlawful modifications of public contracts can be regarded as such significant deficiencies in the performance of a substantive requirement under a public contract.

The answer may be positive when one considers the contract-modification rules to be an implicit part of the contract, or if the public contract incorporates the rules on modification by reference or expressly lists

57 See also K. Struckmann, P. Hodal. Private enforcement of contract ineffectiveness: A practitioner's point of view. – *European Procurement & Public Private Partnership Law Review 9*, 2014, p. 32.

58 A decision of ineffectiveness can cause 'considerable upset and financial losses' to all parties concerned, including the successful tenderer – Case C-166/14, MedEval – Qualitäts-, Leistungs- und Struktur-Evaluierung im Gesundheitswesen GmbH. ECLI:EU:C:2015:779, p. 40.

59 Struckmann, Hodal 2014, pp. 32–33.

60 Article 38 (7) (f) of the Concessions Directive; Article 57 (4) (g) of the Public Procurement Directive. The Utilities Directive refers to the possibility of using the same grounds established under the Public Procurement Directive – Utilities Directive, Article 80 (1).

the same rules. In the latter case, the breach of modification rules really would equate to a 'deficiency in the performance'. It also clearly leads to sanctions comparable to those for early termination, as the directive requires as the second precondition for exclusion.

The recitals of the directive explain the necessity for such a clause, referring, *inter alia*, to the contracting authority's need to 'be able to exclude candidates or tenderers whose performance in earlier public contracts has shown [...] misbehavior that casts serious doubts as to the reliability of the economic operator'. Can participation in a prior unacceptable contract modification cast serious doubts on the contractor's reliability? The language of the recitals can well be interpreted to support that conclusion and to allow exclusion of any tenderer for having participated in a prior unlawful contract modification.

The above examples seem to indicate that, as a result of unlawful contract modification, the remedy of ineffectiveness can *de facto* seriously penalise the concerned contractors (suppliers and service providers).*[61] In this regard, the influence of the contract-modification rules and the remedy of ineffectiveness can be said to be fundamentally distinct from the rationale of the rest of the EU public procurement law. While, generally, following EU public procurement rules is understood to be mandatory for the contracting authorities as addressees of the legislation, here, the suppliers (contractors) can be subjected to significant costs, deprived of the expected profit, and perhaps excluded from future procurements as a result of breach of EU public procurement rules. Notably, such consequences depend largely on the choices of national legislators, possibly reducing the uniformity of EU public procurement law.

A question may be asked as to whether the result of *de facto* penalising suppliers for a breach of public contract modification rules is in harmony with the purpose and the general principles of the public procurement law. On one hand, the birth of the concept of ineffectiveness itself seems to lead to the conclusion that, next to contracting authorities, suppliers bear part of the responsibility for following EU public procurement law. For instance, in the case *Commission v. Germany* (C-503/04), the Court refused to uphold the arguments of the participating Member States in protection of the continued effect of the wrongfully awarded contract with reference to, *inter alia*, the principles of legal certainty and the protection of legitimate expectations.*[62] Disregarding possible legitimate expectations of the other contracting party or any 'provisions, practices or situations prevailing' in Member States' domestic legal order, the Court asserted that no private-law interest could 'justify the failure to observe obligations arising under Community law'.*[63] Therefore, contracting parties cannot be exempted from suffering the consequences of being a party to an illegal award, even if the party subject to the regulation and therefore technically the only one in breach is actually the contracting authority.

A similar example of rationale submitting otherwise 'innocent' parties to regulation not directly addressed to them can be found in the CJEU case law with regard to the state-aid law. Here, an undertaking is presumed to have a duty of diligence to determine whether the required procedure for granting aid has been followed. By analogy, suppliers (contractors) under public contracts can be subjected to a certain duty of diligence to know and to follow the main rules of EU public procurement law, incl. the fundamental rules on contract modification.*[64]

On the other hand, the Court in *Pressetext* acknowledged the possibility of the contractor having a rightful claim of damages against the contracting authority under the domestic law (para. 36). Such acknowledgement indicates the opposite – any negative consequences can be compensated for and made good later, confirming the status of suppliers as innocent bystanders.

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61 See, on this subject, J. Arnould. Damages for performing an illegal contract: The other side of the mirror – comments on the three recent judgments of the French Council of State. – *Public Procurement Law Review 6*, 2008, p. NA275: 'the nullity of the contract [...] makes another "victim" of the infringement of the public procurement rules: the supplier, service provider or contractor with which the contract was concluded.'

62 Case C-503/04, *Commission of the European Communities v. Federal Republic of Germany*, ECLI:EU:C:2007:432, para. 31.

63 Paras 32, 33, 38.

64 M.A. Simovart. Limits to freedom of contract... 2010, pp. 201–202. On the matter of contractors' diligence in public contracting situation, see also K.-M. Halonen. Hankintasopimuksen tehottomuus: hankinta- ja velvoiteoikeudekkinen tutkimus hankintasopimuksen tehottomuudesta ja hankintayksikön vahingonkorvausvastuusta sen entiselle sopimuskumppanille. Turku: Turun yliopisto 2015, pp. 191–200; K.-M. Halonen. Shielding against damages for ineffectiveness: The limitations of liability available for contracting authorities – a Finnish approach. – *Public Procurement Law Review 4*, 2015, pp. 115–117.

2.3. Damage claims of contractors (suppliers) based on contract ineffectiveness

Following the declaration of ineffectiveness of a partially performed modified contract and having suffered financial harm as a result, the former contracting partner may resort to claiming damages or restitution from the contracting authority as the party generally regarded as liable for following the EU procurement rules.[*65]

Such claims are subject to unharmonised private-law rules of the Member States and can lead to controversial results and significant legal uncertainty.[*66] Under some legal regimes, ex-contractors may be awarded generous compensation as a result of contract ineffectiveness, while the situation may be the opposite and successful claims of damages very problematic in other jurisdictions – often because of hardship related to the required burden of proof.[*67] When the contract has been declared ineffective *ex tunc*, or void, the contract's clauses cease to carry any legal force. In such a situation, most civil-law jurisdictions prescribe restitution and return of receivables under unjustified enrichment law.[*68] These rules prescribe the return of, or compensation for, everything received under the void contract and may even oblige the contractor to pay interest on the sums received for performance in advance (if any).

With a view to possible differences in national approaches, J. Arnould has referred to the need for the EU law to find solutions to conflicting rules on compensating for damages.[*69] National rules on unjustified enrichment and/or damage claims that are overly restrictive towards ex-contractors' claims against contracting authorities, and demand too high a level of diligence from contractors, may inhibit fair competition in public procurement. Accordingly, the law would not be in harmony with the rationale of the EU public procurement law. On the contrary, regulations unreasonably generous to ex-contractors under ineffective public contracts tend to eliminate the economic operators' incentive to ensure a modification's lawfulness, and can undermine the remedy's efficacy.[*70]

At present, acknowledgement of such considerations and the drawing of a reasonable balance are left solely to the national legislators. However, application of EU public procurement law would benefit from a levelled approach to the rights ex-contractors have in cases of ineffectiveness following unlawful contract modifications. When the extent of reimbursement allowed for contractors in such cases differs significantly from Member State to Member State, the enforcement of the new public contract modification rules leads to significant divergence in the EU-wide legal situation and might work against the actual purpose of establishing the common rules on contract modification.

3. Access to information as a prerequisite to review[*71]

Under the peer-review (supplier-initiated) remedies system, any genuine opportunity for timely challenge of a contracting authority's failure to follow the rules on public contract modification presumes the competitors' knowledge of the making of a modification. The lack of publicly available or disclosed information about amendments creates an obstacle to submitting claims of unlawful contract modifications.[*72]

At present, the (mostly) private-law contracts awarded in public procurement can be subject to unfounded confidentiality agreements. Typically, competitors do not have any information about a

65 Struckmann, Hodal 2013, p. 34; Halonen. Shielding against damages… 2015, p. 112.

66 On the subject of damages as a remedy in different Member States generally, see, e.g., D. Fairgrieve, F. Lichere, editors. Public Procurement Law: Damages as an Effective Remedy. Oxford and Portland, Oregon, 2011.

67 E. Fels. Euroopa Liidu riigihankeõiguse normide rikkumise mõju hankelepingu kehtivusele. Magistritöö. Juhendaja: M.A. Simovart ['Contract validity in the case of infringement of European Union public procurement rules', a master's thesis; supervisor: M.A. Simovart]. Tallinn, 2015, p. 56; Halonen. Shielding against damages… 2015, pp. 112–113.

68 Struckmann, Hodal 2014, p. 35.

69 Arnould, p. NA275.

70 Arnould, p. NA278.

71 See, on this subject, Ginter, Parrest, Simovart. Access to the content of public procurement contracts: The case for a general EU-law duty of disclosure. – *Public Procurement Law Review 4*, 2013, pp. 154–164; Ginter, Parrest, Simovart. Ärisaladuse kaitse ja hankelepingute avalikustamise nõue riigihankeõiguses. Juridica 2013, No. 9, pp. 658–665.

72 M.A. Simovart. Old remedies for new violations? UrT 2015/1, p. 45. The difficulty of bringing a timely action of ineffectiveness when there has been no prior publication of contract notice has been recognised in Case C-166/14, MedEval, para. 42.

modification being made, or about its content, and are thus not aware of any possibly occurring breach.[*73] In effect, substantial modifications may easily go unchallenged and remain in force for the mere reason of lack of information about them.

Even though a default requirement of disclosure about public contracts and their modifications can be argued to follow from the EU procurement law's general principle of transparency, a duty to provide access to public contracts is not yet a clearly established or universally followed rule in all Member States. An explicit default right of access to information about the performance stage of public contracts would facilitate actual information about contract modifications. Under the new directives, some contract modifications are subject to reporting by contracting authorities and entities,[*74] but these obligations do not apply to all cases of modifications.

The default disclosure rule has, *inter alia*, been recommended with the purpose of improving anti-corruption policies in public procurement[*75] as implementing high transparency standards and strengthening control mechanisms during the contract performance period. Establishing reasonable restrictions on drafting and enforcing confidentiality clauses in public procurement contracts under the national laws is therefore advisable.

In addition to the lack of information, procedural issues and lack of motivation may lessen third-party initiative to review contract modifications. Breaches of contract modification rules have been described as falling into the category of cases that do not benefit from the advantages normally applicable to the supplier review system: the competitors are not able to monitor the making of the modifications and to detect breaches in a timely manner, the process of contract performance is not closely related to the competitors' direct interests, and the suppliers do not have the strongest incentive to monitor and claim review of possible breaches.[*76] In addition, the burden of proof may be unreasonably heavy for competitors.[*77] Therefore, instead of subjecting the cases of unlawful contract modification to supplier review, an additional or alternative system of outside review in the way of disciplinary, administrative, or criminal sanctions could be considered by national legislators. That may appear to be a more effective way of enforcing the rules on public contract modification.[*78]

Such alternative or additional outside review options could have the specific benefit of discovering and imposing sanctions for breaches of public contract modification rules that could go undetected or unchallenged under the peer-review system. Detection and enforcement through an external national system of sanctions could be worth considering especially if the external review body will be able to practise a proactive approach to detecting and expeditiously sanctioning breaches.[*79] While the reactive review procedures currently practised in accordance with the remedies directives remain available to persons with a direct interest and incentive to initiate review proceedings, persons with no standing for the purpose of review proceedings could be able to refer breaches to such competent authority. The alternative means of involvement would guarantee 'sound procurement procedures' as indicated in the recitals to the new directives.[*80] Accordingly, the outside review can better serve the need of effective enforcement of the new rules on contract modification.

4. Conclusions

Enforcement of the rules on public contract modification can lead to ineffectiveness of the unlawfully modified contract or a part of it. In public procurement cases, parties must be given standing before the court or the review body at least if they can show sufficient interest in the concerned contract and the presence

73 S. Treumer 2012, p. 153.

74 Article 72 (1) of the Public Procurement Directive; Article 89 (1) of the Utilities Directive; Article 43 (1) of the Concessions Directive.

75 R. Williams. Anti-corruption measures in the EU as they affect public procurement. – *Public Procurement Law Review* 4, 2014, p. NA99.

76 Zhang 2007, p. 329.

77 *Ibid*., p. 334.

78 *Ibid*., pp. 341–343.

79 Zhang 2007, p. 345. Arrowsmith, Linarelli, Wallace. Regulating Public Procurement: National and International Perspectives. Kluwer Law International 2000, p. 825.

80 Recital 122 of the Public Procurement Directive; Recital 128 of the Utilities Directive.

of prejudice caused by the breach. In matters of contract modification, any potential bidder should satisfy these requirements. Only when it is 'plainly obvious' that they have no potential for competing for the contract should the person be found to have no standing. As a rule, parties protecting general or indirect interests should not have standing for the purpose of using public procurement remedies.

Wider legal implications of contract ineffectiveness under national jurisdictions can be controversial, particularly with regard to financial rights of contractors (suppliers) in relation to contracting authorities, following ineffectiveness. Moreover, the new directives can be interpreted to allow exclusion from future procurements of contractors (suppliers) who have been parties to agreements providing unlawful modification. Thereby, in some jurisdictions, contractors become *de facto* duty-holders bearing actual liability for upholding the public contract modification rules, while in others they would suffer a much lesser burden.

A genuine opportunity to effectively challenge unlawful contract modifications by means of peer review requires third-party access to information about the contract performance, incl. modifications. The lack of clear rules on access to information on public contracts can discourage effective review practices. Either as alternatives to contract ineffectiveness or as additional review options, sanctions enforceable through external (administrative) review could benefit the purpose of upholding the rules on contract modification.

In order to provide a uniform system of remedies for interested third parties, to level the regime of enforcing public contract modification rules, and to allow for efficient enforcement of EU public procurement law, the current system of remedies in public procurement might benefit from review.

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The Concept of Beneficial Owner in Application of the Ukrainian Double Taxation Treaties

1. Introduction

The provisions on beneficial owner status in the national legislation of Ukraine appeared at the dawn of the country's independence. According to Article 7 of the Law on Succession (1991), Ukraine is a successor taking on rights and obligations under international treaties of the USSR unless they contradict its constitution and the interests of the republic.[*1] Such a position of national legislator determined the inclusion of the double taxation treaties of the former USSR in the Ukrainian legal system in 1991. Most of these treaties contained provisions on beneficial ownership pertaining to the taxation of passive income at the moment of their recognition as a part of the Ukrainian legal system. Nevertheless, the provisions on beneficial owners in double taxation treaties had not been referred to in tax disputes until the moment of the Tax Code of Ukraine taking effect, in 2011. They allow the use of provisions related to the status of beneficial owner in the process of giving access to treaty benefits.

The changing nature of the concept of beneficial owner, its importance as an instrument for counteraction of treaty shopping, and the necessity of improvement of its application in the Ukrainian reality are the main factors that have a strong impact on the development of the concept of beneficial owner in Ukraine. This article focuses on the issues of normative basis and court interpretation of 'beneficial owner' in tax treaty disputes. The objective for the article is to characterise modern tendencies and the main obstacles in application of the national provisions on beneficial owners since the adoption of the Tax Code of Ukraine.

2. The appearance of the concept of beneficial owner in the Tax Code of Ukraine

Article 103 (2) of the Tax Code of Ukraine states that a person (tax agent) has a right to use tax exemption or to lower his or her tax rate in accordance with the provisions of a double taxation treaty of Ukraine in

[1] Про правонаступництво України ['Law on succession of Ukraine']. – *Закон України* No. 1543-XII, 12.9.1991. Available at http://zakon2.rada.gov.ua/laws/show/1543-12 (most recently accessed on 17.7.2015) (in Ukrainian).

the case of paying income to a non-resident only if the latter is the beneficial owner of that income and the resident of a state that has entered into a double taxation treaty with Ukraine.[*2] This provision is unique in the tax legislation of Ukraine because it marked the first time when the national legislator prescribed the application of the provisions on beneficial owners in tax relations, at the moment of adoption of the Tax Code of Ukraine. It also determines further development of the concept of beneficial owner in the practice of tax authorities and courts.

The Ukrainian experience with application of the concept of beneficial owner in taxation of foreign income is developing in line with the necessity of limiting widespread usage of treaty shopping by taxpayers. For example, an expert with *VoxUkraine*, Zoya Milovanova, states that Ukraine loses about 6 billion hryvnas every year from the existence of a double taxation treaty with Cyprus, which is only one of the 70 double taxation treaties signed by Ukraine.[*3] It is worth mentioning that Cyprus is the biggest investor in the national economy of Ukraine (direct foreign investments from Cyprus were equivalent to 13,710.6 million US dollars in 2014[*4]).

The attempt to decrease the level of treaty shopping by Ukrainian taxpayers with the aid of the concept of beneficial owner was inspired by that concept's widespread usage in the modern world. Inclusion of norms on beneficial ownership in double taxation treaties dates back to the 1940s.[*5] The main impulse for their active application in tax treaty practice was given by the introduction of analogous provisions in the OECD Model Double Taxation Convention on Income and Capital (1977). Treaty provisions on beneficial owners have the long history of application notwithstanding there is no uniform and stable understanding of their key elements proceeding from the general and limited approach that is covered in commentary to Articles 10, 11, and 12 of the OECD Model Tax Convention on Income and on Capital (2014). It has to be mentioned that even these articles 'illustrate the (negative) meaning of the term' and do not 'define it exhaustively'.[*6] The situation seems even more complicated if one takes into account periodic changes in the interpretation of the concept of beneficial owner. For example, the last one was made in accordance with the 2014 Update to the OECD Model Tax Convention.[*7]

3. The normative basis of the concept of beneficial owner in the Ukrainian tax legislation

The Ukrainian legislator has included the meaning of the term 'beneficial owner' in Article 103 (3) of the Tax Code of Ukraine. It prescribes that the term 'beneficial owner' in connection with gaining access to double taxation treaty benefits could be interpreted as referring to a person with a right to receive income from sources in Ukraine. There is also a list of persons that may not be deemed beneficial owners of income in any case. These are agents, nominees, or mere intermediaries with respect to the income to which the lowered rate of tax is potentially applicable under the rules of the double taxation treaty.[*8]

The approach of the Ukrainian legislator is not very special in the context of the general and widespread interpretation of the term 'beneficial owner' in accordance with the commentaries considering Articles 10,

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2 Податковий кодекс України (Tax Code of Ukraine), No. 2755-VI, 2.12.2010. Available at http://zakon4.rada.gov.ua/laws/show/2755-17 (most recently accessed on 17.7.2015) (in Ukrainian).

3 З. Мілованова (Z. Milovanova). Кіпрське питання. Боротьба з офшором чи з інвестиціями? ['The issue of Cyprus: Is it a fight with the offshore or with investments?']. Available at http://www.eurointegration.com.ua/articles/2014/12/30/7029262/view_print/ (most recently accessed on 17.7.2015) (in Ukrainian).

4 *Інвестиції зовнішньоекономічної діяльності України. Статистичний збірник* ['Investments of Foreign Economic Activity of Ukraine: Statistical Volume']. Kiev: State Service of Statistics of Ukraine 2015, p. 14. Available at https://ukrstat.org/uk/druk/publicat/kat_u/2015/zb/04/zb_izd_pdf.zip (most recently accessed on 17.7.2015) (in Ukrainian).

5 R. Vann. Beneficial ownership: What does history (and maybe policy) tell us. Sydney Law School Research Paper No. 12/66, September 2012, p. 5. Available at http://ssrn.com/abstract=2144038 (most recently accessed on 17.7.2015).

6 L. de Broe. *International Tax Planning and Prevention of Abuse under Domestic Tax Law, Tax Treaties and EC law: A Study of the Use of Conduit and Base Companies* (thesis submitted to the K.U. Leuven Faculty of Law, in fulfillment of the requirements for the degree of Doctor in de Rechten). Leuven, Belgium: Katholieke Universiteit Leuven 2007, p. 501.

7 2014 Update to the OECD Model Tax Convention, OECD (77 p.). Available at http://www.oecd.org/ctp/treaties/2014-update-model-tax-concention.pdf (most recently accessed on 17.7.2015).

8 Податковий кодекс України (see Note 2).

11, and 12 of the OECD Model Tax Convention on Income and on Capital.[*9] Nevertheless, there are a few traits characteristic of interpretation of the term 'beneficial owner' in the Tax Code of Ukraine. These are connected with:

- the scope of the demand for beneficial ownership of the income;
- applicability of the demand that one be the beneficial owner of the income in relation to double taxation treaties that are in effect in accordance with the fact of succession in respect of international treaty obligations of the USSR; and
- application of the modern meaning of the term 'beneficial owner' in relation to treaties entered into earlier.

3.1. The scope of the demand for beneficial ownership of the income

Under Article 103 (3) of the Tax Code of Ukraine, the demand pertaining to being the beneficial owner of the income is applicable to payments in the form of dividends, interest, royalties, remuneration, etc. It is worthwhile to mention the openness of the list of kinds of income to which the demand for beneficial ownership of the income could be applicable. It is unusual in the context of international experience and the rules of double taxation treaties.

According to the provisions of Articles 10, 11, and 12 of the OECD Model Tax Convention on Income and on Capital, the scope of the demand of beneficial ownership of income is limited to those situations in which the payments are made only in the form of dividends, interest, and royalties. There are no provisions in the text of the OECD Model Tax Convention on Income and on Capital that prescribe the application of the requirement of beneficial ownership to other kinds of income. This is the approach that most countries follow in their double taxation treaties, Ukraine included. Exceptions from this rule are rare in treaty practice (with India representing one of them [*10]).

According to Philip Baker, from a conceptual point of view, 'there is no reason in principle why the beneficial ownership concept should be limited' to articles on taxation of dividends, interest, and royalties. He explains that if other treaty provisions allow access to treaty benefits in the form of taxation in only one of the contracting states, they could 'attract treaty shopping, particularly if the item of income, income gain or capital is subject to a low level of taxation, or no taxation, in the other Contracting State'.[*11] The Ukrainian legislator was following the same logic when deciding to extend the scope of the demand for beneficial ownership to other types of income.

Application of the demand for beneficial ownership in situations of paying income other than dividends, interest, or royalties could be problematic under the Vienna Convention on the Law of Treaties (1969) if such application is not determined by the treaty norms themselves. This implication is connected with the obligations under Article 27 of the Vienna Convention on the Law of Treaties, according to which 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.[*12] Even if, for reason of non-participation in the Vienna Convention on the Law of Treaties, the countries are not obliged to apply its terms, they have the same obligations because Article 27 reflects 'well-established customary rule'.[*13] In consequence, the approach of the Ukrainian legislator to the scope of the demand for beneficial ownership of the income is not justifiable, because it is contrary to the obligations under the Vienna Convention on the Law of Treaties, to which Ukraine is a party.

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9 *Model Tax Convention on Income and on Capital: Condensed Version 2014*. Paris: OECD Publishing 2014, pp. 188?191, 213?215, 224?227. Available at http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2014_mtc_cond-2014-en (most recently accessed on 17.7.2015).

10 E. Reimer, A. Rust (eds). *Klaus Vogel on Double Taxation Conventions*. 4th ed., Vol. 1. Alphen aan den Rijn, Netherlands: Wolters Kluwer 2015, p. 740.

11 Note by the Coordinator of the Subcommittee on Improper Use of Treaties: Proposed amendments, UN Committee of Experts on International Cooperation, E/C.18/2008/CRP.2/Add.1, 17.10.2008, p. 17. Available at http://www.un.org/esa/ffd/wp-content/uploads/2014/10/4STM_EC18_2008_CRP2.pdf (most recently accessed on 20.7.2015).

12 Vienna Convention on the Law of Treaties. Vienna, 23.5.1969. Available at https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (most recently accessed on 20.7.2015).

13 See the Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), judgment, I.C.J. Reports 2010, p. 14, para. 121. Available at http://www.icj-cij.org/docket/files/135/15877.pdf (most recently accessed on 20.7.2015).

3.2. Applicability of the demand for beneficial ownership of the income in relation to double taxation treaties of the ex-USSR still in effect

As is mentioned above, Ukraine is one of the successors to rights and obligations under international treaties of the USSR where these do not contradict its constitution and the interests of the republic. The status of these treaties is not comprehensively defined, either by the Constitution of Ukraine or by its national legislation. There are three double taxation treaties that were entered into by the former USSR and have remained in force thus far – with Spain, Malaysia, and Japan.[*14]

The issue of succession to treaty rights and obligations of the former USSR is not highlighted in the Constitution of Ukraine. Its Article 9 regulates the legal status of international treaties of Ukraine in the national legal system but remains silent with regard to the legal status of treaties of the former Soviet Union. It states only that international treaties that are in force and agreed upon as binding by the Verkhovna Rada of Ukraine are part of the national legislation of Ukraine.[*15] It should be noted that 'the Verkhovna Rada of Ukraine has received a right to give consent to be bound by international treaty since 17th September 1991'.[*16] In consideration of the fact that the double taxation treaties of the former USSR had been ratified before that moment, it is obvious that they could not meet the requirements set in Article 9 of the Constitution of Ukraine.

The problems with the legal status of treaties of the former USSR seem to be more complicated if one tries to define the content of the term 'national legislation' as used in Article 9 of the Constitution of Ukraine. The Constitutional Court of Ukraine interprets this term as encompassing 'laws of Ukraine [and] international treaties in force that are agreed upon as binding by the Verkhovna Rada of Ukraine, resolutions of the Verkhovna Rada of Ukraine, decrees of the President of Ukraine, [and] decrees and resolutions of the Cabinet of Ministers of Ukraine'.[*17] In accordance with this position, the treaties of the former USSR that continue to be in effect in Ukraine cannot be deemed a part of its national legislation.

On the basis of detailed analysis of Article 9, A. Melnyk concludes that 'if [...] we follow the content of Article 9 of the Constitution of Ukraine, international treaties of the former USSR could not seem a part of the national legislation'.[*18]

Despite the undefined status of international treaties of the former USSR that are still in effect, the national legislator decided to use a similar approach to formulation of terms in Article 3 (2) of the Tax Code of Ukraine. This states that if an international treaty that is in force and agreed upon as binding by the Verkhovna Rada of Ukraine prescribes other rules than do provisions of the Tax Code of Ukraine, the rules of said international treaty should be applicable. As has been pointed out above, international treaties of the former USSR do not meet the criteria for having been agreed upon to be binding by the national Parliament because this was beyond its competence at the time of the Ukrainian SSR. Moreover, these treaties are not regarded as a part of national legislation according to Article 3 (1) of the Tax Code of Ukraine in the case of a formalistic approach to its interpretation.

As in the case of the scope of the demand for existence of beneficial ownership of the income, Article 27 of the Vienna Convention on the Law of Treaties helps give effect to the double taxation treaties of the former USSR in the Ukrainian legal system even if the national legislator mentions them neither in the Constitution of Ukraine nor in the Tax Code of Ukraine. Nonetheless, Article 27 does not assist in solving

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14 Лист Державної фіскальної служби України щодо міжнародних договорів про уникнення подвійного оподаткування ['Letter of the State Fiscal Service of Ukraine on double taxation treaties], No. 2809/7/99-99-12-01-03-17, 20.1.2015. Available at http://sfs.gov.ua/diyalnist-/mijnarodne-/chinni-dvostoronni-mijuryado/196979.html (most recently accessed on 20.7.2015) (in Ukrainian).

15 Constitution of Ukraine, adopted at the Fifth Session of the Verkhovna Rada of Ukraine on 28 June 1996. Available at http://www.infoukes.com/history/constitution/index-en.html (most recently accessed on 20.7.2015).

16 М. Буроменский (M. Buromenskiy). Действие международных договоров Украины во внутреннем правопорядке Украины ['Application of international treaties of Ukraine in the national legal order']. Available at http://www.judges.org.ua/article/seminar9-1.htm (most recently accessed on 20.7.2015) (in Russian).

17 Рішення Конституційного Суду України у справі про тлумачення терміну 'законодавство' ['Judgement of the Constitutional Court of Ukraine in the case on interpretation of the term "legislation"'], No. 12-рп/98, 9.7.1998, para. 1. Available at http://zakon1.rada.gov.ua/laws/show/v012p710-98 (most recently accessed on 20.7.2015) (in Ukrainian).

18 А. Мельник (A. Melnyk). Правонаступництво України щодо міжнародних договорів колишнього СРСР ['Succession of Ukraine in respect of international treaties of the former USSR'], a thesis submitted to the Legislation Institution of the Verkhovna Rada of Ukraine, in fulfillment of the requirements for the degree of Candidate of Sciences. Kiev, 2004, p. 175 (in Ukrainian).

the problem of applicability of the demand for beneficial ownership under Article 103 of the Tax Code of Ukraine in connection with double taxation treaties entered into by the former Soviet Union.

If the double taxation treaties of the former USSR are not part of the national legislation of Ukraine, one must conclude that the demand of beneficial ownership could not be applicable in a situation of gaining access to the associated treaty benefits in accordance with Article 103 of the Tax Code of Ukraine. The provisions of Article 103 of the Tax Code of Ukraine use the term 'international treaty of Ukraine'; they do not make reference to the double taxation treaties of the former USSR. This means that the application of the demand pertaining to being a beneficial owner of income in order for one to benefit from double taxation treaties of the former USSR needs additional justification.

3.3. Application of the modern meaning of the term 'beneficial owner' in relation to treaties entered into earlier

The tax authorities of Ukraine agree with the possibility of interpretation of the term 'beneficial owner' in accordance with the commentaries to the OECD Model Tax Convention on Income and on Capital and the UN Model Double Taxation Convention between Developed and Developing Countries.[*19] This position does not give a clear answer to the question of which edition of these models should be used in any concrete case. For example, the concept of beneficial owner was changed in 1986, 2003, and 2014. Is it possible to interpret the term 'beneficial owner' in accordance with the commentaries to the OECD Model Tax Convention on Income and on Capital in its 2014 edition in a case of double taxation treaties entered into previously? The answer is still open in Ukraine, because neither courts nor tax authorities make reference to this issue.

There are three main approaches to the issue among researchers. The first of them is represented by the position of K. Vogel, who has stated that 'changes in the Commentaries after the conclusion of the tax Treaty can neither amend the treaty [...] nor retroactively determine its interpretation'.[*20] This view is shared by G. Hill, with his statement that 'it would seem a difficult matter, absent any consensus of the contracting states, to regard commentary after ratification in the same way as a commentary before' because the commentary in its newer form was not taken into account by the parties to the double taxation treaty at the moment of adoption of the particular provision in question.[*21]

The second approach is supported by R. Vann. He notes that Article 31 (3) of the Vienna Convention on the Law of Treaties allows subsequent agreements and practice to be taken into account together with the context. Accordingly, he regards as justified the statement that later commentaries on the OECD Model Tax Convention on Income and on Capital should be considered to reflect a subsequent agreement or later practice of the contracting states.[*22]

The third approach is proposed by L. de Broe. His position is reflected in the statement that 'there is little or no justification to give weight to new Commentary – other than Commentary that does not go beyond a fair interpretation of the text of a particular treaty – to interpret provisions of pre-existing treaties'.[*23] He admits that a new commentary could be used as an interpretation tool if subsequent changes reflect the practice of the contracting states and are a genuine interpretation of a treaty rather than changes to its provisions.[*24]

It is worthy of mention that the introduction to the OECD Model Tax Convention on Income and on Capital states that amendments to its provisions and the commentaries are not relevant for the interpretation of

19 Лист Державної податкової адміністрації України щодо тлумачення терміну 'бенефіціарний власник' ['Letter of the State Tax Administration of Ukraine on interpretation of the term "beneficial owner"'], No. 3917/5/12-0216, 30.3.2011. Available at http://www.profiwins.com.ua/uk/letters-and-orders/gna/3097-3917.html (most recently accessed on 20.7.2015) (in Ukrainian).

20 K. Vogel. The influence of the OECD commentaries on treaty interpretation. – *Bulletin for International Taxation* 54 (2000) / 12, p. 615.

21 G. Hill. The interpretation of double taxation agreements – the Australian experience. – *Bulletin for International Taxation* 57 (2003) / 8, p. 325.

22 R. Vann. Interpretation of tax treaties in New Holland. Legal Studies Research Paper No. 10/121, November 2010, p. 8. Available at http://ssrn.com/abstract=1704890 (most recently accessed on 17.7.2015).

23 L. de Broe (see Note 6), p. 271.

24 *Ibid.*

previously entered into double taxation treaties if the provisions of these treaties are different in substance from the amendments.*[25] At the same time, additions or other changes to the commentaries might be applicable in the interpretation of previously entered into double taxation treaties. The main argument stems from the fact that these amendments reflect the consensus of the OECD member countries as to the proper interpretation of existing provisions and their application to specific situations. Nevertheless, the OECD Model Tax Convention on Income and on Capital and the commentaries are not binding instruments but can be of great assistance in the application and interpretation of double taxation treaties.*[26]

4. Tendencies in the development of the concept of beneficial owner in court practice

Neither the commentary to the OECD Model Tax Convention on Income and on Capital nor the Ukrainian tax legislation expressly defines the term 'beneficial owner'. In this situation, Ukrainian courts are challenged with the need to determine the meaning of the term in particular cases. It also has to be pointed out that the meaning of 'beneficial owner' is elusive under the domestic law of most countries and that 'civil law countries do not use this concept, creating an issue of compatibility of the transplanted treaty concept with domestic law'.*[27]

As one can see from the summary of Ukrainian courts' practice provided below, it is possible to emphasise two main traits in the approach of the courts to interpretation of provisions on beneficial ownership in double taxation treaties:

- movement from using a narrow technical meaning of the term 'beneficial owner' to its interpretation in light of the context, objects, and purposes of double taxation treaties
- uncertainty on the question of the applicability of treaty benefits in a case wherein the beneficial owner and intermediary are residents of the same contracting state

4.1. Alternative approaches to interpretation of the term 'beneficial owner' in court practice

According to Article 103 (3) of the Tax Code of Ukraine, the meaning of the term 'beneficial owner' does not include agents, nominees, or mere intermediaries. It is obvious that the provisions of the Tax Code of Ukraine do not make reference to a list of certain criteria for determining a status of beneficial owner that could be decisive. This situation has influenced the active role of judges in the development of the concept of beneficial owner in cases pertaining to double taxation treaties.

Ukrainian court practice has developed two main approaches to interpretation of the term 'beneficial owner'. As is mentioned by I. Kalnytska and O. Michaylenko, each of these approaches is based on existing world tendencies in the interpretation of the term.*[28] These approaches reflect the existence of the controversial question of whether it should have a domestic-law meaning or instead an international meaning.*[29]

In accordance with the first approach, the Ukrainian tax authorities try to apply the provisions of the Tax Code of Ukraine under which agents and intermediaries are not beneficial owners, particularly in cases of sub-licence agreements and royalties. Usually, the courts do not support the position of the tax authorities in cases involving sub-licencing agreements, for two reasons. Firstly, sub-licence agreements approve contractual rights of recipients of income from Ukraine and thereby grant these persons the status of beneficial owner of the income. Secondly, the courts do not accept the references of tax authorities to Article 103 (3) of the Tax Code of Ukraine, because grounds do not exist for these. Sub-licence agreements do not

25 *Model Tax Convention on Income and on Capital: Condensed Version 2014* (see Note 9), pp. 15–16.

26 *Ibid*., p. 14.

27 J. Li. Beneficial ownership in tax treaties: Judicial interpretation and the case for clarity – comparative research in law and political economy. Research Paper No. 4/2012, p. 189. Available at http://digitalcommons.osgoode.yorku.ca/clpe/4 (most recently accessed on 20.7.2015).

28 І. Кальницька, О. Михайленко (I. Kalnytska, O. Michaylenko). Ідентифікація бенефіціара ['Identification of beneficial owner']. – Судовий вісник 2014/9, p. 15 (in Ukrainian).

29 J. Li (see Note 24), p. 198.

regulate the activity of agents or intermediaries according to the civil law of Ukraine. For an example of this approach, one could point to the decision of the Supreme Administrative Court of Ukraine in the *Semki* case.[*30]

The other approach has been proposed as a result of wider interpretation of the term 'beneficial owner'. Its main characteristics were formulated by the Supreme Administrative Court of Ukraine in the decision on the *Donbasaero* case, from March 2014.[*31] Judges noted that the term 'beneficial owner' should not be interpreted in a narrow and technical sense, because of the necessity to take into account the object and purposes of double taxation treaties, including both avoidance of double taxation and prevention of abuses of treaty provisions. The idea is that to be a beneficial owner, one should not be a mere recipient of income but a person able to 'determine the further economic destination of the income'. This approach is supported by the Ukrainian tax authorities. The State Fiscal Service of Ukraine explains that treaty benefits could not be applied if a non-resident acts as an intermediate party on behalf of the real beneficial owner that actually enjoys the income. For example, lower rates of taxation in the country of origin could not be applicable if a non-resident receives dividends, interest, or royalties; has very limited rights in relation to such income; and directs them fully or mostly to the other non-resident, who does not have access to treaty benefits.[**32] The common position of the tax authorities and courts reassures R. Blazhko that such an approach will dominate for the near future[*33] It is worthwhile to mention that the second approach to interpretation of the term 'beneficial owner' is in accordance with the commentaries to the OECD Model Tax Convention on Income and on Capital.[*34]

4.2. Applicability of treaty benefits in cases wherein the beneficial owner and intermediary are residents of the same contracting state

According to the commentaries to the OECD Model Tax Convention on Income and on Capital, 'limitation of tax in the State of source remains available when an intermediary, such as an agent or nominee located in a Contracting State or in a third State, is interposed between the beneficiary and the payer' on the condition that the beneficial owner is a resident of the other contracting state.[*35] In other words, if the beneficial owner of the income and an intermediary are residents of the same contracting state, the treaty benefits could be available on condition of the existence of a double taxation treaty between that contracting state and the state of the source of income.

There is no clarity on this question in Ukraine. The Ukrainian courts have not considered this issue so far, but the possibility of its appearance has remained.[*36] [*37] The absence of court practice in this context does not mean that similar problem pertaining to the applicability of treaty benefits are not going to appear in the near future. The position of the beneficial owner is grounded in the status of resident of the contracting state, so it must be permissible to gain access to treaty benefits under a double taxation treaty with the country of the source of income. Otherwise, double taxation of the income of the beneficial owner rears its head because of taxation of the same income in the country of source and the country of residence. This practice is contrary to the primary purpose of double taxation treaties – to avoid double taxation.

30 Decision of the Supreme Administrative Court of Ukraine in case 2a/0470/15215/11, 21.5.2013. Available at http://www.reyestr.court.gov.ua/Review/31368171 (most recently accessed on 20.7.2015) (in Ukrainian).

31 Decision of the Supreme Administrative Court of Ukraine in case 805/7337/13-f, 24.3.2014. Available at http://reyestr.court.gov.ua/Review/38106136 (most recently accessed on 20.7.2015) (in Ukrainian).

32 Лист Державної фіскальної служби України щодо тлумачення терміну 'бенефіціарний власник' ['Letter of the State Fiscal Service of Ukraine on interpretation of the term "beneficial owner"'], No. 9033/7/99-99-10-02-02-17, 31.10.2014. Available at http://www.profiwins.com.ua/uk/letters-and-orders/gna/5296-9033.html (most recently accessed on 20.7.2015) (in Ukrainian).

33 Р. Блажко (R. Blazhko). Бенефіціарний власник: український підхід ['Beneficial owner: Ukrainian approach']. Available at http://taxua.blogspot.com/ (most recently accessed on 20.7.2015) (in Ukrainian).

34 *Model Tax Convention on Income and on Capital: Condensed Version 2014* (see Note 9), pp. 188–189, 213, 224.

35 *Ibid*., pp. 191, 215, 227.

36 Decision of the Supreme Administrative Court of Ukraine in case K/800/52155/13, 24.3.2014. Available at http://www.reyestr.court.gov.ua/Review/38106136 (most recently accessed on 20.7.2015) (in Ukrainian).

37 Decision of the Lviv Circuit Administrative Court in case 813/8083/13-a. Available at http://www.reyestr.court.gov.ua/Review/37813661 (most recently accessed on 20.7.2015) (in Ukrainian).

5. Conclusions

World experience shows that the concept of beneficial owner employed in double taxation treaties is not easy to use. There is not even uniformity with regard to views of its purpose among modern states.[*38] [*39] This means that the application of this concept could differ substantially among contracting states. In these conditions, every state should choose its own way of interpreting the term 'beneficial owner', in accordance with the demands of international and domestic law.

Ukraine has applied the concept of beneficial owner since 2011. The practice of its application is not very effective, because of complexity and the absence of previous experience. This may be exacerbated by the existence of difficult issues related to interpretation of the term 'beneficial owner' under the Tax Code of Ukraine, coupled with some uncertain elements in the development of domestic court practice. The unsatisfactory results of application of the concept of beneficial owner mean that it has to be clarified in the near future because of the task of limiting the scope of treaty shopping.

[38] S. Baum, G. Watson. Beneficial ownership as a treaty anti-avoidance tool? – *Canadian Tax Journal* 60 (2012) / 1, p. 168.

[39] K. Van Raad. Report on beneficial ownership under the OECD model convention and commentaries, pp. 3–4. Available at http://ibdt.org.br/material/arquivos/Atas/jfb_20111020093958.pdf (most recently accessed on 20.7.2015).

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Law Applicable to Consumer Contracts

Interaction of the Rome I Regulation and EU-directive-based Rules on Conflicts of Laws*

1. Introduction

Questions related to the law applicable to cross-border consumer contracts have long been subject to ongoing discussions for the European legislator and in academic circles. As is well known, Article 6 (2) of the Rome I Regulation*[1], which lays down harmonised conflict rules for the EU, provides that even if the parties to a consumer contract have agreed that a particular system of law is to be applied, such choice may not deprive consumers of the protection afforded to them by the mandatory provisions of their state of habitual residence. This means, for instance, that an owner of a web-shop wishing to sell its products in all member states has to consider the mandatory consumer protection provisions of 29 individual legal orders. It was precisely this problem that the proposal for a Common European Sales Law – now already legal history itself – was an attempt to solve.*[2]

Much less attention has been given to the conflict-of-laws provisions contained in various EU consumer directives. Article 6 (2) of the Unfair Terms Directive,*[3] for example, stipulates that member states shall take the necessary measures to ensure that the consumer does not lose the protection granted by that directive by virtue of the choice of the law of a non-EU-member country as the law applicable to the contract if the consumer has a close connection with the territory of the relevant member state. Similar rules on conflict of laws are set forth by Article 12 (2) of the Distance Marketing of Consumer Financial Services Directive,*[4] Article 7 (2) of the Consumer Sales Directive,*[5] and Article 22 (4) of the Consumer Credit Directive.*[6] Those

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1 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, p. 6 *ff*. For general commentary on Article 6 of Rome I, see, for example, F. Ragno. Article 6. – F. Ferrari (ed.). *Rome I Regulation*. Sellier European Law Publishers 2015, p. 208 *ff*. – DOI: http://dx.doi.org/10.1515/9783866539785.

2 Proposal for a Regulation on a Common European Sales Law, COM (2011) 0635 final, preamble p. 3.

3 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. – OJ L 095, 21.4.1993, p. 29 *ff*.

4 Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC. – OJ L 271, 9.10.2001, p. 16 *ff*.

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, p. 12 *ff*.

6 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, 22.5.2008, p. 66 *ff*.

provisions have been transposed into national law: in Estonia, by §53 (1), §237 (2), and §403 (6) of the Law of Obligations Act (LOA)[*7] and in Germany, by EGBGB, Article 46b[*8]. By contrast, the new Consumer Rights Directive[*9] does not contain a separate conflict-of-laws provision, referring all questions of determining whether the consumer retains the protection granted by the directive in situations wherein the law applicable to the contract is that of a third country to Rome I.[*10] It has been debated in legal writing whether the need for such directive-based conflict-of-laws rules remains at all.[*11]

What is more, Estonian directive-based conflict rules – but also Italian ones, for that matter[*12] – raise the question of whether those provisions are faithful to their European model (that is to say, whether the provisions of the directives have been correctly implemented in the national laws). In addition, further clarification is needed as to their relationship with Articles 6 and 9 of Rome I. In particular, a question arises as to whether such national conflict rules could be considered overriding mandatory provisions of Estonian law in the sense intended with Article 9 (1) of Rome I, meaning that they could be applied automatically, or whether a judge should conduct comparison in each case to determine which solution would be more advantageous to the consumer – be it the application of Article 6 (2) of Rome I or the national directive-based rule on conflict of laws.

Let us illustrate the question with the following example. Suppose that a credit provider situated in Germany advertises its credit products in Estonian media. Suppose further that a consumer residing in Estonia concludes a consumer credit agreement with the German credit provider via the Internet and accepts its standard terms. Assume that according to the standard terms, the consumer has to pay 40 euros as a contract fee and another clause of the standard terms provides that German law is applicable to the credit agreement. Under German law, such a contract-fee clause is unfair and void.[*13] This means that the consumer would not be obliged to pay the fee, and even if he had already paid it, he could reclaim it under the unjust-enrichment regime. According to the LOA,[*14] however, Estonian rules on unfair contract terms should be applied. Under Estonian law, such standard terms have never been considered unfair, and therefore the credit provider's claim for contract fees would be justified. One can see from this that the application of German law would be more advantageous to the consumer than application of Estonian law. Therefore, the question arises of which provision should prevail in efforts to determine the applicable law: Article 6 (2) of Rome I or the national directive-based conflict-of-laws rule? Or should a judge apply the preferential approach and determine firstly which law would lead to a more consumer-friendly outcome? Given that similar questions have also been raised in other member states, this article is intended to contribute to the development of European consumer conflict law.

2. Is there continuing need for conflict-of-laws rules that stem from consumer-related directives?

The question of the continuous need for conflict-of-laws rules stemming from consumer-related directives remains unclear, given that Rome I already contains a multilateral consumer-protecting rule on conflict of

7 Võlaõigusseadus. – RT I, 7.7.2015, 13.

8 Einführungsgesetz zum Bürgerlichen Gesetzbuche, 18 August 1896, BGBl. I.S. 2494, BGBl. I.S. 2010, 2012.

9 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. – OJ L 304, 22.11.2011, p. 64 *ff*. The same applies for the new proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM (2015) 634 final.

10 Recital 58 of the Consumer Rights Directive (see Note 9).

11 S. Leible. Article 6 Rome I and conflict of laws in EU Directives. – *Journal of European Consumer and Market Law* 2015/1–2, p. 39.

12 F. Ragno (see Note 1), p. 245.

13 Decision of the German Supreme Court of 13.5.2014 – XI ZR 405/12. BGH NJW 2014, 2420.

14 Subsection 36 (2) of the LOA stipulates: 'If the other party to a contract with standard terms is a consumer whose residence is in Estonia or in a member state of the European Union and the contract was entered into as a result of a public offer, advertisement or other such activity in Estonia or the contract is essentially related to the territory of Estonia for any other reason, the provisions of this Division apply even if the place of business of the party supplying the terms or, if no place of business exists, the residence or seat of such party is not in Estonia, regardless of which state's law is applicable to the contract.' For an in-depth analysis of the provision, see I. Kull. Section 36. – P. Varul, I. Kull (eds). *Võlaõigusseadus I. Kommenteeritud väljaanne*. Juura 2006.

laws in its Article 6 that, in addition to a wider scope of application in respect of the types of contracts covered as compared to its predecessor (Article 5 of the Rome Convention[*15]), also has facilitated the application of requirements related to the circumstances under which a contract is concluded.[*16] Nevertheless, as is stated in its Article 23, Rome I does not prejudice the application of provisions of Community law that lay down conflict-of-laws rules related to contractual obligations in relation to particular matters, which those consumer-related-directive-based provisions certainly constitute. It has been argued that, although Article 23 prioritises *expressis verbis* the provisions of Community law, the implementing legislation is lent its Community status by the directives those provisions are based on.[*17] Therefore, it appears that with the entry into force of Rome I, the European legislator did not intend the specific consumer conflict-of-laws rules to lose applicability, even though these rules might initially have been drawn up to complement the somewhat lesser consumer protection regime and scope of application under the Rome Convention.[*18]

It can be debated, however, whether the practical need to retain the specific consumer-oriented conflict-of-laws provisions stemming from directives side by side with the rules already incorporated in Rome I really remains. The question arises especially since Rome I already creates a coherently drafted system of protection,[*19] wherein Article 6 is complemented by non-consumer-specific Articles 3 (4) and 9 (2), which guarantee, respectively, the application of mandatory provisions of Community law for purely intra-EU cases (in which all elements relevant to the contract are located in the EU) and the application of overriding mandatory provisions of the forum state.[*20] Indeed, the protection granted to consumers under Rome I can hardly be considered unsatisfactory. On the contrary, it has even been called 'a bit too generous'.[*21] In addition to these considerations, it is noteworthy that the replacement of a specific conflict-of-laws provision with the sole reference to Rome I in the new Consumer Rights Directive seems to point to a decline in the need for incorporating specific conflict-of-laws rules into consumer directives and, thereby, enshrining them in national laws.

In order to determine whether a practical use for the specific conflict-of-laws rules proceeding from consumer-related directives remains, the question of whether these provisions really do grant consumers extended protection when compared to the general rules set forth in Rome I needs to be addressed. The answer to this seems to be in the affirmative, since, notwithstanding the expanded protection of the consumer against an adverse choice of law in Article 6 (2) of Rome I, various types of consumer contracts are still *expressis verbis* excluded from the scope of its application.[*22] In addition, the 'mobile' or 'holidaying'[*23] consumer who concludes a contract abroad with a trader, seated abroad, that does not pursue any activities in the consumer's country or direct activities to that country remains unprotected under Article 6. Consequently, it can be argued that only certain types of consumer contracts concluded under certain conditions are protected under Article 6 of Rome I.[*24] Even though Articles 3 (4) and 9 (2) may complement

15 Convention on the law applicable to contractual obligations of June 1980. The consolidated text of the convention is found in OJ C 334, 30.12.2005, p. 1 *ff*.

16 See Articles 6 (4) and 6 (1) of Rome I, respectively.

17 F. Ragno (see Note 1), pp. 245–246, L.M. van Bochove. Overriding mandatory rules as a vehicle for weaker party protection in European private international law. – *Erasmus Law Review* 7 (2014) / 3, para. 4.1. As the provisions of the directives can be viewed as provisions of Community law that lay down conflict-of-laws rules related to contractual obligations in relation to particular matters in the sense of Article 23 of Rome I, the same status can be transferred to the implementing provisions in national laws. – DOI: http://dx.doi.org/10.5553/ELR.000030.

18 See also E. Čikara. *Gegenwart und Zukunft der Verbraucherkreditverträge in der EU und in Kroatien*. Berlin: LIT Verlag 2010, p. 488.

19 See K. Thorn. Eingriffsnormen. – F. Ferrari, S. Leible (eds). *Ein neues Internationales Vertragsrecht für Europa – Der Vorschlag für eine Rom I-Verordnung*. Jenaer Wissenschaftliche Verlagsgesellschaft 2007, p. 143.

20 The role of the above-mentioned provisions in protecting consumers will be discussed further; see Section 4.

21 S.C. Symeonides. Party autonomy in Rome I and II: An outsider's perspective. – *Nederlands Internationaal Privaatrecht* 28 (2010) / 2, p. 198.

22 Article 6 (4) excludes service contracts under which the services are to be provided exclusively in a country other than that of the consumer's residence, contracts related to a right *in rem* or in a tenancy of immovable property, contracts that pertain to financial instruments, carriage contracts, and insurance contracts.

23 C. Bisping. Consumer protection and overriding mandatory rules in the Rome I Regulation. – J. Devenney, M. Kenny (eds). *European Consumer Protection: Theory and Practice*. Cambridge University Press 2012, p. 242. – DOI: http://dx.doi.org/10.1017/CBO9781139003452.016.

24 See also P. de Vareilles-Sommières. L'ordre public dans les contrats internationaux en Europe: sur quelques difficultés de mise en œuvre des articles 7 et 16 de la Convention de Rome du 19 juin 1980. – *Mélanges en l'honneur de Philippe Malaurie*. Éditions Defrénois, EJA 2005, p. 409.

the consumer protection in such excluded situations to some extent, the scope of protection granted by the conflict-of-laws rules of consumer directives in their specific areas seems wider, therefore enabling the affirmation of their justified existence. The latter is expected also since it follows from the logic of Rome I that consumer protection is to be seen as an exception to the general rule of party autonomy, whereas the consumer-related directives proceed first and foremost from the principle of consumer protection and are aimed at ensuring consumer confidence.[*25] Subsequently, it is possible to view the specific rules on conflict of laws that stem from directives as playing a gap-filling role[*26] with respect to the gaps left by the primarily party-autonomy-orientated Rome I.

An important problem with the existence of the various directive-based consumer-protecting conflict-of-laws rules exists, however: the possibility of their different transposition into internal legal orders, which is carried out by various means and often incorrectly.[*27] Unlike the targeted full harmonisation approach opted for in the new Consumer Rights Directive[*28] and the Consumer Credit Directive,[*29] the earlier consumer directives were based on the principle of minimum harmonisation, thereby making it possible for their provisions not to be uniformly implemented in national laws. This may create a 'colorful bouquet' of national conflict-of-laws rules, causing unpredictability and general difficulties in their application.[*30] It therefore would appear more reasonable to abandon the specific directive-based conflict-of-laws rules gradually in favour of a uniform set of rules along the lines of the new Consumer Rights Directive. Such an approach would be justified in light of the relatively high level of consumer protection already granted by the logic of Rome I, and its advantage would lie in the prevention of problems deriving from possible variations in the directive-based rules' transposition into national laws.

3. Do the Estonian LOA's conflict-of-laws rules comply with the consumer-related directives?

As highlighted above, it is far from guaranteed that the provisions stemming from consumer directives are uniformly implemented in national laws, especially where minimum-harmonisation directives are involved. This has been exemplified by how the Italian legislator has mishandled the implementation by stipulating the priority of Italian consumer protection provisions for all consumer contracts in which a choice of law other than Italian law has been made.[*31] Indeed, the consumer-related directives foresee an obligation for the member states to ensure that consumers, if the contract has a close link with the territory of one or more member states, do not lose the protection granted by the directives by virtue of choice of the law of a third country to be the law applicable to the contract.[*32] Therefore, the aim with the directives' provisions pertaining to conflict of laws is to prevent the possibility of escaping the protection granted to consumers by way of choice of the law of a non-member state when the contract is closely connected to the territory of at least one member state.[*33] Consequently, the directive-based conflict-of-laws provisions should not be applicable if the law of a third country is designated on the basis of an objective connection.[*34] The same should

25 See, e.g., Recital 8 of the Consumer Credit Directive (see Note 6).

26 In German, *Lückenfüllungsfunktion*; see, for instance, D. Kluth. *Die Grenzen des kollisionsrectlichen Verbraucherschutzes*. Jenaer Wissenschaftliche Verlagsgesellschaft 2009, p. 30.

27 See S. Sánchez Lorenzo. Choice of law and overriding mandatory rules in international contracts after Rome I. – *Yearbook of Private International Law* 2010/12, p. 75. See also F. Ragno (see Note 1), p. 242.

28 See Article 4 and Recital 2 of the Consumer Rights Directive (Note 9).

29 See Article 22 (1) and Recital 9 of the Consumer Credit Directive (Note 6).

30 S. Sánchez Lorenzo (see Note 27), p. 76. For more on the term (in German, *Bunter Strauss*), see E. Čikara (see Note 18), p. 488, with further references.

31 Article 143 (2) of the Italian Consumer Code establishes that if the parties choose to apply any other law than that of Italy to a contract, consumers shall still be entitled to the basic protection afforded them by said code. Available at http://www.consumatori.it/images/stories/documenti/Codice%20del%20consumo%20english%20version.pdf (most recently accessed on 1.3.2016). See also F. Ragno (see Note 1), p. 245.

32 See the Consumer Credit Directive (Note 6), Article 22 (4). Similar provisions, in a slightly different wording, are entailed by directives 2002/65, Article 12 (2), and 1999/44, Article 7 (2) (Notes 4 and 5).

33 F. Ragno (see Note 1), p. 241.

34 J.-J. Kuipers. *EU Law and Private International Law: The Interrelationship in Contractual Obligations*. Brill Nijhoff 2011, pp. 221–222. – DOI: http://dx.doi.org/10.1163/9789004206724.

apply in cases wherein a choice of law has been made in favour of the law of another member state that has correctly transposed the directive in question.

What is more, it has been argued in legal literature that the principle of minimum harmonisation applies only on a substantive level and not at the level of conflict of laws.[*35] This would imply that the conflict-of-laws rules should be fully harmonised in national legislation, leaving no leeway for the member states to determine the scope of application of their corresponding consumer-protection-related conflict rules. Therefore, it would appear that the Italian legislator has been overzealous in implementing the consumer-related directives by stretching the Community rule to an extent that distorts its purpose from the original one.[*36]

It should be noted, for that matter, that the corresponding provisions of the Estonian LOA do not seem to comply with the requirements set forth in the consumer directives either. Namely, Articles 36 (2), 53 (1), 237 (2), and 403 (6) of the LOA all stipulate that the provisions determining the rights and obligations of the consumer and of the trader apply to contracts with consumers residing in Estonia or the EU, if the contract is entered into in consequence of a public tender, advertising, or similar economic activities taking place in Estonia or if the contract is fundamentally linked to the territory of Estonia for any other reason, whichever state's law applies to the contract.[*37] The requirement foreseen in the directives of a close link with the territory of the EU has therefore been met. Nevertheless, this cannot be said for the requirement that a choice of the law of a third country have been made. In fact, the LOA's provisions do not prescribe a choice-of-law clause as a prerequisite for application of national consumer protection rules at all. Although the text's omission of a choice-of-law clause does not change the practical application criteria for the LOA provisions in cases wherein the trader pursues commercial activities in or directs them to Estonia,[*38] it nevertheless expands the application of Estonian consumer protection provisions to the – presumably rare – cases in which foreign law governs the contract on the basis of an objective connection but the contract also shows an essential link to Estonia. It appears from this that the scope of application of the Estonian law is wider than the protection required by the directives.[*39] Added to that is the fact that, according to the conflict-of-laws provisions of the LOA, national consumer protection rules should be given precedence also over a choice of law of another member state. Accordingly, it can be concluded that the Estonian conflict-of-laws rules in the LOA do not comply with the provisions of the consumer-related directives, as – similarly to the Italian Consumer Code – they unduly expand the set of cases wherein national consumer protection rules are given precedence.

From the wording of the specific directive-based conflict-of-laws provisions in the LOA, it seems that the Estonian legislator has opted for a unified approach, overlooking the differentiation in the level of protection foreseen across the various consumer directives. To be more precise, the wording of the above-mentioned provisions, as far as their mandatory nature is concerned, overlaps with Article 386 of the LOA, which was based on the previously valid Timeshare Directive.[*40] However, it must be considered that, whereas the Timeshare directive expressly obliged the member states to ensure that whatever the law applicable was, the purchaser may not be deprived of the protection afforded by the directive if the immovable property was situated within the territory of a member state,[*41] this is not the case for other consumer

35 F. Ragno (see Note 1), p. 245.

36 *Ibid*.

37 It has been noted that the aim with these provisions is to guarantee the level of protection afforded to the consumer by the consumer directives and to prevent the consumer being deprived of the backing of the consumer protection provisions through a choice of law for contracts concluded in Estonia. I. Kull (see Note 14), No. 4.2.1.

38 In such situations, Estonian law would in any case be applicable according to Article 6 (1) of Rome I when the parties have not specified their choice of law applicable to the contract.

39 According to the general remark in the explanatory note to the draft of the LOA (116 SE), all consumer protection provisions that are based on directives are in full compliance with the requirements of the consumer-related directives (p. 194). Available at http://www.riigikogu.ee/tegevus/eelnoud/eelnou/0d9390ea-974c-35ab-a6c7-cb14062c3ad3/V%C3%B5la%C3%B5igusseadus/ (most recently accessed on 1.3.2016).

40 Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis. – OJ L 280, 9.10.1994, p. 83 *ff*. This has been superseded by directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts. – OJ L 33, 3.2.2009, p. 10 *ff*.

41 Article 9 of the former Timeshare Directive. The new directive, 2008/122/EC, although referring matters of conflict of law to Rome I, also obliges the member states to ensure, when the contract is closely connected with the EU, application of the

directives. The latter, as is shown above, are designed only to prevent a choice of law in favour of the law of a third country depriving consumers of the protection afforded to them by the directives, and therefore these are not applicable in situations wherein no choice of law is made.

4. The relations between the conflict-of-laws rules stemming from consumer-related directives and Rome I

4.1. Relations to Article 6 of Rome I

The determination of the law applicable to consumer contracts that fall within the scope of the consumer-related directives may **therefore** have a different legal basis. As indicated above, the new Consumer Rights Directive does not regulate issues of conflict of laws; it refers the matter to Rome I, in a contrast to the 'old-style' consumer directives,[*42] which include specific conflict-of-laws rules to be implemented by the member states. It is obviously the latter that may give rise to the question of which conflict-of-laws rule is to be given priority where the applicable law could be determined either in line with Article 6 of Rome I or on the basis of a national conflict-of-laws rule stemming from directives. This holds especially true since the scope of application of Article 6 of Rome I is so wide as to cover all types of consumer contracts also regulated by the consumer directives. Therefore, two conceivable approaches could be proposed.

The first possibility is to take the position that the implementing conflict-of-laws provisions should prevail over the general rule of Rome I in the sense of Article 23 of Rome I. However, their precedence can be justified only if they faithfully reproduce the content of the provision of the directive. Therefore, when the domestic legislator has overly implemented the directives – that is, when an obvious difference between the domestic rule and its European model exists, as is the case with Estonia – the forum court should apply Article 6 of Rome I instead and not attribute priority to the national implementing provisions in accordance with Article 23.[*43] The latter would mean that as long as the requirements of Article 6 are met, the forum court should, under the preferential approach attributed to the provision,[*44] apply the law that provides the consumer with better protection, be it the chosen law or the *lex causae*. The rationale behind this criterion is that the excessively implemented rules should not be considered Community rules, since the aim of the European legislator was not to rule out choosing the law of another member state.[*45]

Secondly, it can be argued, on the basis of the gap-filling role of the implementing conflict-of-laws provisions, that the mere stipulation in Article 23 that specific Community conflict-of-laws rules shall prevail in relation to particular matters does not imply that also the implementing provisions should automatically be granted priority. This approach would mean that the national conflict-of-laws rules are therefore to be considered subordinately where the prerequisites of Article 6 (1) have not been met and the protection afforded by Article 6 (2) proves inadequate. To enhance application of this approach, it has even been advocated in legal writing that the conflict-of-laws rules set forth in consumer directives should be transposed into national laws only inasmuch as they extend beyond the level of protection already afforded to the consumer by Article 6 of Rome I.[*46]

In this article, we take a position in favour of the second approach. Although it would seem reasonable to primarily apply the specific conflict-of-laws provisions as *lex specialis*, the obligation for the judiciary to

protective provisions of the directive by stipulating that when the law of a third country applies to the contract, consumers shall not be deprived of the protection granted by the directive if the relevant immovable property is situated in a member state or if the trader pursues or directs commercial activities in a member state. See Article 12 (2) and Recital 17.

42 L.M. van Bochove (see Note 17), para. 4.1.

43 F. Ragno (see Note 1), pp. 245–246; L.M. van Bochove (see Note 17), para. 4.1.

44 For more on the preferential/double-protection approach (in German, *Günstigkeitsvergleich*), see, for example, S.C. Symeonides. Party autonomy in Rome I and II from a comparative perspective. – *Convergence and Divergence in Private International Law*. Liber Amicorum Kurt Siehr. Schulthess 2010, p. 532. Symeonides states that, although the double-protection rule may appear too generous, the other party may avoid it by simply not choosing a law other than the *lex causae*, as objectively determined under Rome I.

45 See also O. Remien. Variationen zum Thema Eingriffsnormen nach Art. 9 Rom I-VO und nach Art. 16 Rom II-VO unter Berücksichtigung neuerer Rechtsprechung zu Art. 7 Römer Übereinkommen. – *Grenzen überwinden – Prinzipien bewahren. Festschrift für Berndt von Hoffmann*. Bielefeld, Germany: Verlag Ernst und Werner Gieseking 2011, p. 340.

46 B. Heiderhoff. Art 6 Rom I-VO. – T. Rauscher (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR*. Munich: Sellier European Law Publishers 2011, No. 12.

prove their consistency with the directives each time they might be applicable would be excessive. Another advantage of this approach is that the specific directive-based conflict-of-laws rules do not establish a preferential approach as does Article 6 of Rome I. Finally, the second approach would also enable a gradual and, in practice, more simplified waiver of the conflict-of-laws rules stemming from consumer directives, which seems to be the trend displayed by the private international consumer contract-law directives.*[47] Therefore, we propose in this paper that the implementing rules be considered only after it has been established that the requirements for application of Article 6 of Rome I have not been met. In practice, however, the national conflict-of-laws rules stemming from the directives would remain in place, for the most part, for cases involving a mobile consumer, since Rome I covers other areas concurrently regulated by the consumer directives, and contracts exempted from the scope of Rome I are also not regulated by the directives.

Let us now return to our hypothetical case. Employment of the latter approach would mean that the law applicable to the consumer credit contract should be determined on the basis of Article 6 of Rome I, leading to the result that, according to Article 6 (1) of Rome I, German law governs the contract, apart from the Estonian law's provisions that cannot be derogated from by agreement, as set forth in Article 6 (2). Even though this would, in principle, lead to the application of Estonian unfair-contract-terms regulation as mandatory consumer protection provisions, the consumer could still be favoured on account of the preferential approach of Article 6 (2). This allows the judge to apply whichever law is more protective to the consumer and also to exploit the protection of both laws, for separate aspects of the contract, if necessary.*[48] Therefore, the Estonian consumer could still make use of the provisions of German law that are more advantageous than the Estonian rules on unfair contract terms and escape payment of the contract fee. In contrast, had we employed the first approach, such a comparison could not have been conducted and Estonian consumer protection provisions would have to have been applied notwithstanding the substantive content of the provisions.

4.2. Whether the LOA's conflict-of-laws rules are to be considered overriding mandatory provisions in the sense of Article 9 of Rome I

It is widely agreed that the simple mandatory rules must be distinguished from the internationally mandatory rules (overriding mandatory provisions in the sense of Article 9 of Rome I).*[49] Given that consumer protection provisions represent, in principle, simple mandatory rules that cannot be derogated from by agreement, the extent to which they could also be applied as overriding mandatory provisions remains unclear. In fact, the question of the possibility of placing consumer protection rules within the framework of overriding mandatory provisions is twofold.

In the first place, debate centres on the question of whether and under which circumstances the substantive consumer protection rules could be seen as embodying a public policy that is necessary for qualifying them as overriding mandatory provisions in the sense of Article 9 of Rome I.*[50] The relationship of consumer protection rules to overriding mandatory provisions is not uniformly resolved either in the legal literature or in the judicial practice of the member states. Illustrating this, the German courts and doctrine do not consider those provisions with which protection of the public interest is only a reflex of the primary purpose (protecting private interests) to be overriding mandatory provisions, whereas French courts have taken a broader approach and applied as mandatory provisions also those rules that serve to protect the weaker party.*[51] The latter also holds true for Italian and Belgian as well as British doctrine, as the abuse

47 See Section 2, above. The need to transpose conflict rules set forth in directives has been considered outdated also by B. Heiderhoff (see Note 47), No. 14.

48 See Subsection 4.1, above, and S.C. Symeonides (see Note 44), p. 532.

49 Recital 37 of Rome I clarifies that overriding mandatory provisions should both be distinguished from the expression of provisions that cannot be derogated from by agreement and be construed more restrictively.

50 Article 9 of Rome I defines overriding mandatory provisions as 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation'. For analysis of the concept of overriding mandatory provisions, see, for example, R. Piir. Eingreiffen oder nicht eingreiffen, das ist hier die Frage. Die Problematik der Bestimmung und des Anwendungbereichs der Eingriffsnormen im internationalen Privatrecht. – *Juridica International* 2010/XVII, p. 199 *ff*, Section 2.

51 C. Bisping (see Note 23), p. 245. See also A. Bonomi. Le régime des règles impératives et des lois de police dans le réglement „Rome I" sur la loi applicable aux contrats. – E.C. Ritaine, A. Bonomi (eds). *Le nouveau reglement européen „Rome I" relatif à la loi applicable aux obligations contractuelles*. Schulthess 2008, p. 228.

of weaker parties can be viewed as a threat to civil society.[52] The question therefore remains open, with further instructions awaited from the European Court of Justice. That being said, it can nevertheless be predicted that, given the widened scope of application of Article 6, the necessity of even considering Article 9 in cases involving consumer contracts should diminish in any case.[53]

Of particular importance for purposes of this article is, on the other hand, the question of whether the directive-based rules in the LOA on conflict of laws could be considered of an overriding mandatory nature, which the way they have been phrased would suggest. Indeed, the wording of a provision being one of the indications in determination of the overriding nature of a rule, theirs certainly refers to an obligatory nature by stipulating that the respective provisions apply regardless of which state's law is applicable to the contract. In contrast, it has been argued that the consumer directives do not oblige the member states to transpose the conflict-of-laws rules as overriding mandatory provisions.[54] According to some authors, the aim with these provisions, which have in similar contexts also been called scope rules, localising rules, outward conflict rules, and *Annexkollisionsnormen* (in German)[55], is not even to designate the applicable law but to ensure the effective application of secondary EU law – that is, to help the court of the forum to ascertain the sense in which a mandatory provision is mandatory.[56] This means that, in contrast to the multilateral conflict-of-laws rules set forth by Rome I, the national implementing provisions are designed simply to ensure the standard of consumer protection set forth in the directives for all cases closely related to member states. Since the wording of the LOA's conflict-of-laws rules does not seem intended to establish them as overriding mandatory provisions,[57] it is submitted here that these provisions do not constitute overriding mandatory provisions in the sense of Article 9 of Rome I.

In this respect, it should be noted that legal writing on consumer directives has not considered their conflict rules to be overriding mandatory ones either.[58] A difference from Article 12 (2) of the Timeshare Directive must, however, be emphasised: its terms have rightly been regarded as overriding mandatory rules since it assures consumers the protection offered by the directive whichever system of law is applicable.[59] Other consumer conflict-of-laws provisions should nevertheless be seen as intended to be only domestically mandatory, as they foresee that the protection offered by the directives cannot be avoided via a mere choice of law. Even the fact that the obligation to transpose the provisions addressing conflict of laws has been regulated on a European level and through directives aimed at ensuring the proper functioning of the internal market cannot suffice to tie these provisions to an overriding public interest.[60]

5. Conclusions

This paper has discussed the abundance and interaction of rules aimed at determining the law applicable to cross-border consumer contracts. It follows from the above that the level of consumer protection afforded by Rome I seems to allow for a waiver of the simultaneously existing directive-based conflict rules. Such renunciation would not only resolve the issue of inaccurate transposition to national laws – an apparent problem for the Estonian legislator as well – but also contribute to legal certainty. It has been submitted that, while the conflict-of-laws rules of Rome I and the national directive-based rules coexist, the latter are only to be considered subordinately to Rome I. The conflict rules of the LOA are also not to be viewed as overriding mandatory rules in the sense of Article 9 of Rome I; these are deemed to be only domestically mandatory.

52 A. Bonomi (see Note 51), p. 229; L.M. van Bochove (see Note 17), para. 2.1; A. Nuyts. Les lois de police et dispositions impératives dans le Règlement Rome I. – *Revue de Droit Commercial Belge 2009/6*, p. 559. See also M. Giuliano, P. Lagarde. Report on the Convention on the law applicable to contractual obligations. – OJ C 282, 31.10.1980, p. 1 *ff*, p. 28, where consumer protection provisions are cited as an example of overriding mandatory provisions.

53 Also supported by A. Bonomi (see Note 51), p. 222; O. Remien (see Note 45), pp. 336–337.

54 F. Ragno (see Note 1), p. 331

55 For the terms, see, respectively, J.-J. Kuipers (see Note 34), p. 224; L.M. van Bochove (see Note 17), para. 4; S. Sánchez Lorenzo (see Note 27), p. 75; and D. Kluth (see Note 26), p. 29.

56 J.-J. Kuipers (see Note 34), p. 224. He submits that the implementing provisions do not constitute conflict-of-laws rules in the strict sense at all.

57 See Section 3, above.

58 See, e.g., F. Ragno (see Note 1), p. 331.

59 J.-J. Kuipers (see Note 34), p. 223.

60 F. Ragno (see Note 1), p. 253.

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The Landlord's Limited Right to Terminate a Residential Lease Contract

Estonian Law in Comparative Perspective*

1. Introduction

Residential tenancy law forms a field of private law wherein the parties' autonomy has been seen as, in principle, superseded by mandatory provisions oriented toward solidarity among citizens.*1 These mandatory provisions are intended to compensate for the asymmetric power and monopoly possessed by landlords vis-à-vis sitting tenants*2 and to guarantee security in housing.*3 However, excessively high tenure security can have an adverse effect on the rental market, as it potentially reduces investments and/or encourages alternative uses of the existing stock by households.*4 On the other hand, while reduction in the level of security for the tenant facilitates investments in the rental-housing sector and supports short-term demand, it has a negative impact on long-term demand, as, for example, has arguably been experienced in Finland.*5 Therefore, rental regulations should strike a balance between landlords' and tenants' interests, create security of

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1 See, e.g., C. Schmid, J.R. Dinse. Towards a common core of residential tenancy law in Europe? The impact of the European Court of Human Rights on tenancy law. – L. Nogler, U. Reifner (eds). Life Time Contracts: Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law. The Hague: Eleven International 2014, p. 606.

2 'Asymmetry in relations between landlords and tenants' stems from 'inelastic supply of rented housing due to geographical constraints, planning restrictions, financial system etc., and [the] landlord's monopoly in relations with sitting tenants as it is', according to C. Whitehead *et al.* See The Private Rented Sector in the New Century: A Comparative Approach *(med dansk sammenfatning)*. Cambridge 2012, p. 93.

3 There are several aspects that make security in housing much more important than the property-rights perspective alone. Among others, Hulse and Milligan refer to human well-being, families' functioning, childhood development, economic and social participation, and physical and mental health. For more information, see K. Hulse, V. Milligan. Secure occupancy: A new framework for analysing security in rental housing. – *Housing Studies* 29 (2014)/5, p. 639. – DOI: http://dx.doi.org/10.1080/02673037.2013.873116 (31.3.2016).

4 See, e.g., D. Andrews *et al.* Housing markets and structural policies in OECD countries. OECD Economics Department Working Papers, No. 836. OECD Publishing 2011, p. 65. – DOI: http://dx.doi.org/10.1787/5kgk8t2k9vf3-en (31.3.2016).

5 R. de Boer, R. Bitetti. A revival of the private rental sector of the housing market? Lessons from Germany, Finland, the Czech Republic and the Netherlands. OECD Economic Department Working Papers, No 1170, 2014, p. 54. – DOI: http://dx.doi.org/10.1787/5jxv9f32j0zp-en.

tenure to support long-term demand, and avoid market segmentation between sitting and new tenants – in a way that would have adverse effects on neither the supply nor the demand side of the market.[*6]

In the context of secure tenancy[*7], the element of stability covers the presumption that the landlord has no arbitrary control over the tenant's rights to occupy the dwelling, that the tenant can make a home and stay in the dwelling as long as he wishes.[*8] This article addresses the core question of the stability issue in tenancy relations: on what conditions the landlord has a right to terminate a tenancy contract for reasons other than factors stemming from the tenant's sphere of risk. In consideration of the fact that, as has been underscored in recent comparative studies on tenancy law, security of tenure differs between countries and over time and can best be seen as a continuum rather than a dichotomy[*9], the purpose of the research is to find a position for Estonian regulation on a relative scale in comparison with Latvian, Lithuanian, German, Swiss, Finnish, and Swedish law[*10].

The authors firstly provide a general overview of legal regulation of tenancy relations in the countries compared (in Section 2), in order to lay the groundwork for a presentation of the various policy questions involved (in Section 3). For the purpose of structural clarity in the following analysis of regulatory regimes, lease contracts concluded for an unspecified and a specified term are differentiated (these are covered in Sections 4 and 5, respectively).

2. Legal regulation of tenancy relations in the countries under comparison

2.1. Estonia, Latvia, and Lithuania

The time after the 1991 regaining of independence marked a radical turning point for housing policies in the Baltics.[*11] In one result of the extensive privatisation, restitution, and general liberalisation of their housing markets over the last 25 years, the Baltics can be commonly characterised as displaying a high rate of private ownership of the housing stock and a high rate of owner-occupancy.[*12] Another typical characteristic feature is that a relatively large proportion of the population of the Baltics lives in flats.[*13]

The legislation of all three Baltic States includes special rules on residential lease contracts. In Estonia, residential lease contracts as a special kind of lease contract are regulated in §§ 271–338 of the Law of Obligations Act[*14] (LOA). In Latvia, a special law, the Law on Residential Tenancy (LRT)[*15], governs residential

6 See, e.g., D. Andrews *et al.* (Note 4), p. 52.

7 Or 'secure occupancy' as a broader concept. See K. Hulse, V. Milligan (Note 3), pp. 638–656. See also S. Nasarre. Leases as an alternative to homeownership in Europe: Some key legal aspects. – *European Review of Private Law* 6 (2014), p. 820; K. Hulse *et al.* Secure occupancy in rental housing: Conceptual foundations and comparative perspectives. AHURI Final Report No. 170. Melbourne: Australian Housing and Urban Research Institute 2011, p. 30. Available at https://www.be.unsw.edu.au/sites/default/files/upload/research/centres/cf/publications/ahuriprojectreports/AHURI_Final_Report_No170.pdf (31.3.2016).

8 A similar approach is applied by S. Nasarre (Note 7).

9 See K. Hulse, V. Milligan (Note 3), p. 22.

10 This article is based largely on country-level reports and comparative studies of housing policy and legal frameworks for residential rental markets in European countries prepared under a grant from the European 7 Framework Programme for research into tenancy law and housing policy in a multilevel Europe (TENLAW: Tenancy Law and Housing Policy in Multi-level Europe), with grant agreement 290694. Reports are available at http://www.tenlaw.uni-bremen.de/reports.html (31.3.2016). The terminology used by the authors here is based on that applied by the national reporters, and the term 'tenancy' has the same meaning as the term 'residential lease'.

11 For general discussion, see A. Hussar. National report for Estonia. Available at http://www.tenlaw.uni-bremen.de/reports/EstoniaReport_18062014.pdf; J. Kolomijceva. National report for Latvia. Available at http://www.tenlaw.uni-bremen.de/reports/LatviaReport_09052014.pdf; A. Mikelėnaitė. 'National report for Lithuania.' Available at http://www.tenlaw.uni-bremen.de/reports/LithuaniaReport_09052014.pdf (31.3.2016).

12 In Estonia, 81.5%; in Latvia, 80.9%; and in Lithuania, 89.9% of the population, with the EU average being 70.1%. Data, for 2014, are available in 'Living conditions and social protection'. Eurostat, Housing Statistics, published in 2015, online data code: ilc_lvho02 (31.3.2016).

13 In Estonia, 63.8%; in Lithuania, 58.4%. The EU average is 46.2%. Data are available in 'Living conditions and social protection'. Eurostat, Housing Statistics, published in 2013, online data code: ilc_lvho01 (31.3.2016).

14 Võlaõigusseadus. 1.7.2002. Available in English at https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/516092014001/consolide (31.3.2016).

15 Likums Par dzīvojamo telpu īri (the Law on Residential Tenancy), 16.2.1993. Available in English at http://likumi.lv/doc.php?id=56863 (31.3.2016).

tenancy agreements. As *lex generalis*, the Latvian Civil Law[*16] applies to those matters not governed by the special law. Lack of consistency between the *lex specialis* and *lex generalis* norms has been pointed to as a reason for contradictory case law and legal commentaries.[*17] In Lithuania, residential lease contracts are regulated by the Civil Code (CC)[*18], in its special Chapter XXXI ('Lease of dwellings') as *lex specialis* in relation to Chapter XXVIII ('Lease') and the General Part of the Civil Code.

2.2. Germany and Switzerland

Germany and Switzerland were selected for comparison in this paper on the basis of the choices made in Estonia during the transition period. Namely, the rules on tenancy relations found in the Estonian LOA are strongly influenced by the German civil code (BGB) and the Swiss Code of Obligations (CO).[*19] Germany and Switzerland differ from the rest of the countries under comparison in the high proportion of the population there who occupy a dwelling as a tenant at market rates.[*20] The central norms of German tenancy law can be found in BGB §§ 535–548 (on general questions related to lease contracts) and §§ 549–577 (on leasing of a dwelling). Major reforms took place in 2001 (regulation of contract length, reasons for termination, rent levels) and in 2013 (energy-efficient maintenance and modernization measures, simplified enforcement of an eviction title).[*21] In Switzerland, general questions of tenancy relations are regulated in Articles 253–304 of the CO[*22]. Swiss tenancy law was substantially reformed in July 1990.

2.3. Finland and Sweden

Finnish and Swedish law deserve attention firstly because of Estonia's close socio-economic ties with those countries, which, in a way, influence the social perceptions of tenancy also in Estonia. Moreover, as the regulation in those countries is positioned at opposite ends of the spectrum of tenancy protection – the Finnish system, after the reforms in the mid-1990s, being one of the most liberal systems in Europe[*23] and the Swedish system among the most protective – comparison with those countries aids in ascertaining the scale of that spectrum. Rental housing accounts for about 30% of the housing stock in Finland, where it is fairly evenly divided between private rental housing (about 16%)[*24] and 'social housing' (14%)[*25], and about

16 Civillikums ['Civil Law of the Republic of Latvia'], 28.1.1937. Available in English at http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN018388.pdf (31.3.2016).

17 More details about the inconsistency of the court practice can be found in I. Kull *et al.* Comparative remarks on residential tenancy law in Latvia and Estonia. – *Law Journal of the University of Latvia* 8, pp. 5–21. See also J. Kolomijceva (Note 11), p. 175.

18 Lietuvos Respublikos civilinis kodeksas ['Lithuanian Civil Code'], 18.7.2000, No. VIII-1864. Available in English at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=245495 (31.3.2016).

19 For more information, see V. Kõve. Applicable Law in the Light of Modern Law of Obligations and Bases for the Preparation of the Law of Obligations Act. – *Juridical International* 6 (2001), pp. 30–36. Available at http://www.juridicainternational.eu/?id=12551 (31.3.2016); P. Varul. Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia.' – *Juridica International* 2000/5, pp. 104–118. Available at http://www.juridicainternational.eu/index/2000/vol-v/legal-policy-decisions-and-choices-in-the-creation-of-new-private-law-in-estonia/ (31.3.2016); the Swiss Code of obligations is said to be "Part Five" of the Swiss Civil Code, but is indeed a separate code in the Systematic Collection (SC 220), an English "unofficial" translation might be found on the official site of the "Confederation" (Federal State): https://www.admin.ch/opc/en/classified-compilation/19110009/index.html (17.7.2016). Since 1 January 2016, the electronic version prevails over the paper version.

20 In Germany, 39.6% (in 2014) and in Switzerland, 51.8% (in 2013), according to Eurostat, online data code: ilc_lvho02 (current as of 31.3.2016). For further details, see Santos Silva, 'Intra-team Comparison Report for Austria, Germany, Luxembourg and Switzerland.' Available at http://www.tenlaw.uni-bremen.de/intrateamcom/AT-DE-LU-CH%20comparison%20report%2020151218.pdf (31.3.2016), p. 3.

21 Gesetz zur Neugliederung, Vereinfachung und Reform des Mietrechts vom 19. Juni 2001. BGBl. I 1149. Gesetz über die energetische Modernisierung von vermietetem Wohnraum und über die vereinfachte Durchsetzung von Räumungstiteln vom 18.03.2013. BGB I 434.

22 *Cf.* special regulations such as an Ordinance on adaptation of rent exist, see (no English version available, but German, French or Italian official versions), Verordnung vom 9. Mai 1990 über die Miete und Pacht von Wohn- und Geschäftsräumen (VMWG, SC 221.213.11). Available at https://www.admin.ch/opc/de/classified-compilation/19900092/index.html (17.7.2016).

23 C. Whitehead (Note 2), p. 122.

24 T. Ralli. National report for Finland, 2014, p. 31. Available at http://www.tenlaw.uni-bremen.de/reports/FinlandReport_09052014.pdf (31.3.2016); R. de Boer, R. Bitetti (Note 5), p. 11.

25 State-subsidised rental dwellings (in the so-called ARAVA system).

40% of the housing stock in Sweden.[*26] In both countries, residential lease contracts in the private rental market are regulated with special legislation: the Act on Residential Leases (ARL)[*27] in Finland and the Land Code[*28] and Rent Negotiation Act[*29] in Sweden. As *lex generalis*, the Contracts Act[*30] applies.

3. The landlord's limited right to terminate the lease contract as the guarantee for stability

In the analysis that follows, the focus is on the question: on what conditions could a tenancy contract be terminated by the landlord when the tenant fulfils the contractual obligations and the dwelling itself is in sound condition? The fundamental elements of this question involve 1) suitable grounds for notice, 2) the term for advance notice, and 3) possible damage claims. With respect to suitable grounds, the need for the landlord to accommodate himself or a family member and the landlord's interest in increasing the rent or intention to sell the property such that it is free from the tenant's possession are more particularly under scrutiny. Questions of the duration and extension of the contract, along with the issue of expectations of continuation of the contractual relationship in the event of transfer of ownership, as other important aspects of tenancy stability, are dealt with only to the extent necessary for providing context.

In all countries under comparison here, tenancy contracts, in principle, can be concluded for either a specified or an unspecified term.[*31] Only in Germany, where contracts for an unspecified term are the norm, is a contract deemed to be for a specified term only if the landlord 1) wishes to use the premises as a dwelling for himself, members of his family, or members of his household; 2) wishes, admissibly, to eliminate the premises or change or repair them so substantially that the measures entailed by this would be rendered significantly more difficult by continuation of the lease; or 3) wishes to lease the premises to a person obliged to perform services, where any of those reasons is reported to the tenant by the landlord in writing and these conditions are stated when the agreement is entered into.[*32]

As for contracts for an unspecified term, it is argued[*33] that the 'good-cause eviction' condition already keeps the harm to the landlord's property rights to a minimum. Analogously the employer should not terminate a contract (even one for an unspecified term) without good cause, while the employee has no obligation to supply reasoning for giving notice.[*34] The landlord's property interests are protected on account of the existing right to evict the tenant for breach of contract or to improve the property or substantially alter the nature of the property. As is elegantly stated by Salzberg and Zibelman[*35], the only property interest the landlord is losing is the ability to assert control over another individual's right to live where that individual desires.

As to contracts for a specified term, in principle, once the term has been agreed upon, there should be very limited options for terminating the contract before its term has elapsed. A further question is this: if there are circumstances within the terminating party's sphere of risk that render the contract unreasonably

26 O. Bååth. National report for Sweden, 2014, p. 22. Available at http://www.tenlaw.uni-bremen.de/reports/SwedenReport_18052015.pdf (31.3.2016).

27 Laki asuinhuoneiston vuokrauksesta, 31.3.1995/481. Unofficial translation into English available at http://www.finlex.fi/en/laki/kaannokset/1995/en19950481.pdf (31.3.2016).

28 Tenancy contracts are regulated in Chapter 12 of the Swedish Land Code of 1970, SFS 1970:994. Available at https://www.kth.se/polopoly_fs/1.476821!/Land_Code.pdf (31.3.2016).

29 Hyresförhandlingslagen ['Rent Negotiation Act'], of 6.1.1978, SFS 1978:304. Available in Swedish at http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Hyresforhandlingslag-1978304_sfs-1978-304/?bet=1978:304 (31.3.2016).

30 Lag (SFS 1915:218.) om avtal och andra rättshandlingar på förmögenhetsrättens område ['Contract Act'], SFS 1994:1513, of 6.11.1915.

31 For comparison: In Spain, open-ended lease contracts are not allowed, as lease contracts require a time limit, with the minimum duration being three years. Greece too requires a three-year minimum duration, for first-residence leases. In Malta, while open-ended contracts are not permitted, there is no minimum duration set by law. For more information, see S. Nasarre (Note 7), p. 852.

32 BGB's §575 (I).

33 K. Salzberg, A. Zibelman. 'Good cause eviction.' – *Willamette Law Review* 21 (1985), p. 71. Electronic copy available at http://ssrn.com/abstract=1973710 (31.3.2016).

34 More details surrounding the concept of a 'lifetime contract' can be found in the collection of articles edited by L. Nogler and U. Reifner. Life Time Contracts: Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law (see Note 1).

35 *Ibid*., p. 71.

burdensome or expensive for the obligor[*36] (e.g., urgent personal need on the side of the landlord or the necessity of moving for personal or professional reasons from the side of the tenant), would it then be possible to substitute performance in kind for the right to claim damages? This would, however, be an option only in cases in which the damages would compensate for the loss adequately.

The question of stability of tenancy relations cannot be assessed in isolation. The regulation dealing with termination of a contract for an unspecified term directly addresses the question of the right to increase the rent periodically. Strict rules to protect the stability of a contract for the tenant may be in place, but if rent regulation is prohibitive – i.e., if the landlord may not increase the rent even in a contractual relationship that extends for an indefinite period – incentive would be created for the landlord to get rid of the tenant in an abusive manner. This question will be addressed further in the following parts of the article.

4. The landlord's limited right to terminate a lease contract concluded for an unspecified term

4.1. Germany, Switzerland, Finland, Sweden, Latvia, and Lithuania

The landlord's right to terminate the contract for an unspecified term for reasons that do not proceed from the tenant's sphere of risk can be examined as one element in classification of the level of security of the tenure in the countries subject to comparison from strong to weak. The greatest security of tenure, as defined by Hulse and Milligan, is based on the presupposition that tenants can use the housing under the lease contract as long as they wish and that they can transfer tenancy to their heirs or even become owners.[*37] In contrast, a 'weak' level of security in tenure is described as following from a regulatory regime wherein the owner has a right to require the tenant to leave the dwelling in certain circumstances – for instance, on account of his intention to use the property for his own needs, to sell it, or to undertake major renovations or redevelopment. Some legal systems guarantee the landlord a right to terminate a lease contract without stating any reasons, so long as the relevant term of notice is honoured.[*38]

Let us start with the strongest protection. Under Swedish law, the landlord's right to terminate the contract is very limited and there are strict procedural rules to be followed. For example, the validity of the termination notice depends on its approval by a rent tribunal. If the landlord does not apply to the rent tribunal within one month after the lease expires, the notice of termination is void. However, for the purpose of the current analysis, it is important to note that, insofar as the tenant fulfils his obligations, the landlord cannot terminate a lease contract for an unspecified term.[*39]

The outcome is similar under Latvian law, which neither formally distinguishes between ordinary and extra-ordinary termination nor provides specific rules for contracts of a specified or unspecified term in the case of the landlord giving notice.[*40] Contracts for an unspecified term may be terminated at the initiative of the landlord on only the grounds set forth in the LRT, most particularly in the event of breach of contract on the part of the tenant.[*41] The grounds for a contract's termination by the landlord that are specified in Articles 28–28[6] of the LRT are exhaustive and completely supersede the corresponding regulation in the Civil Law.[*42]

Also in Germany, the starting point is that if the landlord is interested in getting back his property after some time, he should conclude the contract for a specified time[*43], and the landlord's right to terminate a lease contract concluded for an unspecified term (in the case of ordinary termination with notice)

36 Compare with §108 (2) 2) of the LOA.

37 K. Hulse, V. Milligan (Note 3), p. 22.

38 *Ibid*.

39 A landlord may terminate the contract only under Section 42 or 46 of the Tenancy Act. O. Bååth (Note 26) provides details, on pp. 95–99.

40 See J. Kolomijceva (Note 11), p. 156.

41 A practically non-existent right to terminate an open-ended contract could lead to law evasion. That is also a reason that landlords in Latvia prefer to conclude time-limited contracts. *Ibid*., pp. 157, 174.

42 Article 2166 of the Civil Law stipulates that a lease or rental contract pertaining to immovable property, when entered into for an indefinite time, shall be terminated, unless agreement is made otherwise, only after six months' prior notice, which may be given by either party of its own volition.

43 J. Bieber. Münchener Kommentar zum BGB. 6th ed., 2012, §573, para. 3.

is predicated upon the existence of a **justified interest**.[*44] This condition is absolute. A justified interest exists, without limitation, in cases wherein the landlord needs the premises as a dwelling for himself, members of his family, or members of his household.[*45] Cornelius and Rzeznik have stated that German case law has applied a broad definition in its interpretation of family and household; however, the landlord should always be able to prove genuine need for the dwelling. There is an obligation to offer the tenant replacement accommodation if suitable dwellings with comparable rent are available in the same building. Finally, and most importantly, termination for reason of personal needs is ultimately regarded as an abuse of rights if the landlord could have foreseen his needs at the time of concluding the tenancy contract. However, these protective rules are available to the tenant for only the first three years of the tenancy.[*46] Since 2001, the notice period for landlords has been linked to the duration of tenancy, ranging from three to nine months.[*47]

It is, nonetheless, important to note that the requirement to present a justified interest does not apply if the landlord terminates a lease for a dwelling in a building inhabited by himself when said landlord has up to two dwellings[*48] (i.e., in cases in which the landlord has physical closeness to the lessee). To compensate for the easier termination, the notice period is extended by three months in this situation.

According to BGB §573 (I) 2, notice of termination for the purpose of increasing the rent is explicitly excluded. At the same time, BGB §558 (I) does give a landlord the right to increase the rent to the market level after a certain interval. This rule guarantees the sitting tenant a right to choose (as he may terminate the contract at any time) while offering an option of reasonable return for the landlord.

Yet, in Germany, even if the landlord's termination of the contract is legitimate, the tenant may object and demand continuation of the lease if its termination would, for the lessee, his family, or another member of his household, be a hardship that is not justifiable even when the justified interests of the lessor are taken into account.[*49] The reasons can be as varied as pregnancy, advanced age, serious diseases, a low income, disability, infirmity, and upcoming exams. Hardship also exists if appropriate substitute residential space cannot be procured on reasonable terms.[*50]

In Switzerland, for leases for an unspecified term, the landlord can, in principle, terminate a lease without giving any reason, as long as he respects the appropriate notice period the specific termination dates.[*51] However, such notice is open to challenge if it contravenes the principle of good faith.[*52] In order to be able to judge whether he should challenge the notice or not, the tenant may request that the landlord state the reasons for giving notice.[*53] For the purpose of this analysis, most importantly, termination of a tenancy contract by the landlord is considered to contravene the principle of good faith if, in fact, the landlord has given notice because he wishes to impose unilateral amendment of the lease to the tenant's detriment or to change the rent[*54]. The purpose of this regulation is to free the tenant from pressure during the process of negotiating with the landlord over rent increases.[*55] Nevertheless, according to the – controversial – case law of the Supreme Court (Swiss Federal Tribunal)[*56], the landlord is allowed to terminate a tenancy contract for the purpose of renting the flat out to a new tenant a higher rent, provided that the latter rent would not be unfair under an absolute rent calculation method.[*57] The same result could not (at least to the same

44 BGB's §573.

45 BGB's §573, 2 (2).

46 J. Cornelius, J. Rzeznik. National report for Germany, p. 166. Available at http://www.tenlaw.uni-bremen.de/reports/GermanyReport_09052014.pdf (31.3.2016).

47 BGB's §573c. J. Cornelius, J. Rzeznik (Note 46), pp. 93, 164.

48 BGB's §573a.

49 BGB's §574.

50 J. Cornelius, J. Rzeznik (Note 46), p. 170.

51 CO's Article 266a.

52 CO's Articles 271, item 1 and 271a. See A. Wehrmüller. National report for Switzerland, p. 132. Available at http://www.tenlaw.uni-bremen.de/reports/SwitzerlandReport_24072014.pdf (31.3.2016).

53 CO's Article 271, item 2.

54 CO's Article 271a, item 1 (b).

55 R. Weber. Basler Kommentar. 5th ed., 2011, on Article 271/271a, para. 15.

56 *Ibid*., para. 16; DSFT 120/*1994* II 105/110, nr 3b/bb, confirmed later in DSFT 136/*2010* III 74/75 nr 2.1; for other economic reasons also DSFT 136 III 190/194, nr 3.

57 *Ibid*. With the *absolute calculation method* (*absolute Berechnungsmethode*), a rent is assessed independently from previous contractual terms. It is applied to assess the fairness of rent which are agreed on using net return (CO's Article 269), gross return (CO's Article 269a c)) and the range of rents customary in the locality or district (CO's Article 269a a)) as criteria.

extent) be achieved by rent increases in the existing tenancy, since even though Swiss landlord has a right to increase the rent any time for the next termination date,[*58] he or she may, and herein lies a difference from the German law (see above), basically do so only according to relative rent calculation method, i.e., in line with increase in costs or in connection with additional services provided by the landlord.[*59] Indeed, the increase of the rent for adapting it to the market level can be challenged by the tenant as unfair if that would give permit the landlord to derive excessive income from the leased property.[*60] In any case, where the termination of the lease would cause a hardship for the tenant or his family in a degree that cannot be justified by the interests of the landlord, the tenant may request and extension of the lease up to four years in one or two requests.[*61]

In Finland, landlords may terminate a contract for an unspecified term providing justified reason. However, since the tenancy-law reform of 1995, in the main, any grounds, inclusive of an intention to sell the property, satisfies the requirement to state the grounds in the notice, as long as it is not contrary to good rental practice.[*62] The landlord may also terminate the contract if he intends to increase the rent to a (otherwise reasonable) level that is not acceptable to the sitting tenant.[*63] In the latter case, according to the 'Fair Rental Practices'[*64], negotiations on a rent increase must be initiated at least six months prior to the intended increase. If negotiations do not lead to agreement, the lessor is entitled to give notice of termination of the lease agreement. According to the cited guidelines, it is advisable, in conjunction with giving notice to inform the tenant of the rent level with which the agreement could be continued. Simultaneously, the tenant should be informed of the deadline for accepting this change in rent if he is to avoid termination of the lease. The acceptance period should end one month before the end of the period of notice.[*65] Term of notice is to be minimum of six months if the lease agreement has lasted for at least one year; otherwise, it is minimum of three months, calculated from the last day of the calendar month in which notice is given, unless otherwise agreed. The courts shall, at the tenant's request, declare the notice given by the lessor ineffective if the requested rent or stipulation on determining the rent would be considered unreasonable or if it is unreasonable or unjustified on other grounds when the specific circumstances of the case are taken into account.[*66] In sum, for the Finnish landlord the means of seeking rent increase in private tenancies are an agreement, notice for termination (increasing the rent to a reasonable level is a justifiable reason), and action in court.[*67]

Under Lithuanian law, the landlord may initiate ordinary termination, without stating any reason, for a lease contract for a dwelling that has an unspecified term by giving notice six months in advance, unless a longer term has been agreed upon. There are no specific objections to termination of the contract that are deemed valid for exercising by the tenant – good faith, hardship, etc. However, the tenant has a limited opportunity to raise subjective objections in the course of the eviction process.[*68]

58 CO's Article 269d.

59 CO's Article 269a.

60 CO's Article 269. Tenant may legitimately expect that the previously agreed rent gives the landlord a sufficient income. A further rent increase can therefore only be based on changes which have occurred after the previous one; the new rent increase will be assessed according to the relative method compared to the situation after the previous rent increase. In other words, a rent increase which is unfair according to the 'relative method' cannot be justified by invoking that according to the 'absolute method' the new rent was not unfair. On the other hand, where a rent increase would not be unfair according to the relative method, the tenant can still invoke that the increased rent is unfair according to the absolute method. BGE 121 III 163 E. 2c; R. Weber (Note 55), Article 269d, para. 4; A. Wehrmüller (Note 52), pp. 87, 93 *ff*; See also DSFT 140/*2014* III 433/435 nr 3.1.

61 CO's Articles 272, item 1 and 272b.

62 Under Article 54, paras 1 and 5 of the Finnish Act on Residential Leases.

63 R. de Boer and R. Bitetti (Note 5), p. 20.

64 Mutually agreed upon by the organisations for tenants and for landlords in 2003. Available at http://www.vuokranantajat.fi/attachements/2008-09-22T17-05-1515.pdf (31.3.2016).

65 *Ibid*., pp. 3–4.

66 Specific circumstances might be, for example, difficulties in finding a comparable flat in the region. If the notice is not in conformity with good leasing practice, the tenant may, alternatively, claim damages, including compensation for the costs of removal and, at most, three months' rent for the inconvenience. See Article 56 of the Finnish Act on Residential Leases.

67 T. Ralli (Note 24), p .132.

68 Article 6.614 of the Lithuanian CC. More details are provided by A. Mikelėnaitė (Note 11), p. 156.

4.2. Position of Estonian law in the context of analysed regulatory systems

In sum, there are, in essence, three types of regulation that address 'ordinary termination' of a contract for an unspecified term by the landlord. The majority of the regulatory regimes examined here acknowledge a landlord's right to give notice without stating any reason or to state 'any old reason', though this is subject to some form of control under the good-faith principle on the initiative of the tenant (as in Lithuania, Finland, and Switzerland), while in Germany, the landlord should prove justified interest if the notice is to be considered valid, and, furthermore, in Sweden and Latvia, the landlord principally does not have a right to give notice insofar as the tenant fulfils his obligations. If the right to terminate exists, the terms for advance notice range from one to nine months. It can be concluded that, except in Sweden and Latvia, it is possible for a landlord to terminate a tenancy contract concluded for an unspecified term for reason of needing to accommodate himself or his family. Except in those two countries and Germany, it is possible for the landlord to terminate the contract with the (hidden) motivation of freeing the property before sale.

As to the landlord's dilemma surrounding a rent increase for the sitting tenant *v.* termination of the contract with the aim of concluding a new contract, with higher rent, it should be asked, firstly, whether there is a possibility of increasing the rent up to market level within the framework of the existing contract and, secondly, whether the tenant has the last word in the decision on continuation of the contract.

A unilateral rent increase is out of the question for Swedish as well as for Latvian, Lithuanian and Finnish landlords. In Sweden, the rent increase is often subject to negotiations between associations representing tenants, on one side, and landlords, on the other[*69], while in Latvian, Lithuanian and Finnish law, rent increases are possible only in accordance with the initial agreement.[*70] In simple terms, Swedish and Latvian landlords have neither statutory right to neither increase the rent nor terminate the contract freely, while landlords in Lithuania and Finland may not increase the rent but may freely terminate a contract that has an unspecified term.[*71] Under Swiss law, increasing the rent to market levels is difficult; it is only possible if based on a relative rent calculation method, i.e., change of costs factors, or an absolute rent calculation method based on the market level of the locality or district as long as it does not provide for an excessive benefit for the landlord (see above section 4.1.). A termination motivated by an intention to increase the rent may be contested if it consists of pressure on the tenant to accept the rent increase[*72]. However, the case law indicates that it is still possible to terminate a tenancy contract for the purpose of obtaining higher rent from another tenant if that higher rent level is fair according to the absolute rent calculation method.[*73] A clear-cut solution can be found in German law: the right to increase rent levels to the market level, as foreseen by the German legislator (BGB §558), should compensate for the prohibition of termination of a contract with the intention of raising the rent (BGB §573 (I) 2). While §561 of BGB prescribes a special right of termination for the lessee after a rent increase, the tenant also has the last word in deciding on continuation of the contract.

Under Estonian law, rules on ordinary termination of residential lease contracts provide that either party may terminate a lease contract entered into for an unspecified term by giving at least three months' advance notice.[*74] Even though, according to §325 (1) of the LOA, the notice of termination should state, *inter alia*, the basis for the termination, if, in the framework of tenancy relationships for an unspecified term, said notice has been delivered to the other party without stating any particular reason for the termination, it is presumed to be a notice of ordinary termination.[*75] As a protective measure, the Estonian law has

69 If the landlord has a principal bargaining agreement (*förhandlingsordning*) in place with the Swedish Union of Tenants, the increase in rent has to be negotiated with that union. If there is no such agreement between the landlord and the union, the rent must be negotiated with each tenant individually. If agreement cannot be reached, the landlord is entitled to apply to the regional rent tribunal. More details are provided by O. Bååth (Note 26), pp. 55–56.

70 See J. Kolomijceva (Note 11), p. 128; also, see A. Mikelėnaitė (Note 11), p. 124.

71 Schmid and Dinse rightly argue that such restrictions to the landlord's property rights manifestly disturb the economic balance of the contractual exchange and, accordingly, may possibly be challenged before the European Court of Human Rights. See C. Schmid, J.R. Dinse (Note 1), p. 622.

72 See DSFT 4A_547/2015 (14 April 2016), nr 2.1.1.

73 See A. Wehrmüller (Note 52), pp. 85 ff.; DSFT 136/2010 III 74/76 nr 2.1.

74 LOA's §§ 311, 312 (1).

75 K. Paal. Commentary to §312, p. 3. In: P. Varul *et al.* Võlaõigusseadus II. Kommenteeritud väljaanne ['Law of Obligations Act II. Commented Edition']. Tallinn: Juura 2007 (in Estonian).

also adopted terms on hardship, which allow the tenant to ask for dismissal protection and for extension of the contract for up to three years if termination of the contract would result in serious consequences for the lessee or his or her family.[*76]

In Estonian law, it is presumed that the lessor may raise the rent after each six months as of entry into the contract for an unspecified term.[*77] A lessee may contest an excessive increase in the amount of the rent.[*78] The rent for a dwelling is excessive if unreasonable benefit is received from the lease of the dwelling.[*79] It is further specified that the amount of the rent for a dwelling is not excessive if it does not exceed the usual market rent, or an increase in the rent is not excessive if it is based on an increase in the expenses.[*80] Thus, while there is no direct rule similar to BGB's §558, explicitly allowing rent increases to the market level, and there are rules similar to the Swiss one regarding challenging a rent increase as unreasonable, Estonian case law[*81], however, does confirm the landlord's right to raise the rent to market levels.

Further, there are two protective provisions to ensure that the tenant is not placed under pressure in the event that the landlord has increased the rent or intends to do so. Firstly, the increase in rent is void if the lessor warns the lessee that the lessor will terminate the lease contract if the rent increase is contested.[*82] Secondly, in a parallel to the Swiss law, the tenant has a right to challenge the termination through being heard by a lease committee or court if the termination runs counter to the principle of good faith: *inter alia*, the landlord gives notice of reasons for wishing to amend the contract (inclusive of increasing the rent) that are to the detriment of the tenant and the latter does not consent thereto.[*83] Thus, in the case of the rent increase being valid in its own right (in substance, if no illegal warning about termination is involved, its validity is dependent only on formal requirements, since there is no limit to the increases possible; see above) and the landlord terminating the contract (e.g., for non-payment of the higher rent), termination may still be contested as conflicting the principle of good faith.[*84] However, in that case, the tenant should have first formally contested the rent increase in due time (by application to the court).[*85] If the rent increase remains valid, the tenant's only option is to terminate the contract ordinarily, with three month' notice, since Estonian law lacks a provision similar to BGB §561 that confers a special right for the tenant to terminate the contract in the case of raising of the rent to market rates (§284 (2) and (3) of the LOA associate the special right to termination only with an increase in rent that is due to improvements and alterations).

In sum, Estonian landlord has a right to increase the rent up to market rent after certain intervals (as in Germany) as well as terminate the contract without stating any (real) reason. The latter means that termination is also possible for the purpose of concluding another contract for market rent (this matches Swiss, Finnish and Lithuanian law but diverges from German law). Yet it is possible to argue, following the line of argumentation in Finnish law, that termination without offering the intended new (higher, but still reasonable) rent level first to the sitting tenant would be against the good-faith principle. However, exactly this practice, 'offering' a rent increase while threating with termination after refusal would contravene the principle of good faith under Estonian and Swiss law and render termination invalid in Germany.

76 LOA's §326 (2).

77 LOA's §299 (1)

78 LOA's §303 (1).

79 LOA's §301 (1). This disposition is comparable to Article 269 of CO.

80 LOA's §301 (2). Should be noted that non-excessiveness of the market rent is formulated in affirmative and not as a rebuttable presumption as in Article 269a a) of CO: 'rents are not generally held to be unfair if... '(see section 4.2.).

81 For example, in CCSCd 19.9.2005, 3-2-1-76-05, para. 16.

82 LOA's §299 (3).

83 LOA's §§ 326 (1) and 327.

84 As is explained in a number of judgements of the Estonian Supreme Court. See CCSCd 22.10.2008, 3-2-1-81-08, para. 10 and CCSCd 29.10.2004, 3-2-1-100-04, para. 17.

85 There are several judgements from district courts of Estonia on this subject. See the judgements of the Tallinn District Court of 12.5.2006, No. 2-03-824, 24.3.2010, No. 2-04-2168, and 28.2.2007, No. 2-03-219.

5. The landlord's limited right to terminate a lease contract concluded for a specified term

5.1. Germany, Switzerland, Finland, Sweden, Latvia, and Lithuania

This part of the paper elaborates on the matter of how to determine the conditions under which a landlord may terminate a contract for a specified term for reasons originating within his sphere of risk.

We begin with the systems that offer the strongest protection. The regulation in Latvia[*86] and Lithuania does not foresee a right to give notice of termination for any reason other than one stemming from the tenant's breach of contract.[*87] The outcome under Swedish law is similar. If the parties have a fixed-term agreement in place, the landlord is bound by the term specified and cannot give notice of early termination (while the tenant has a right to terminate even this type of contract with three months' notice and has right to demand prolongation).[*88]

Under German law, the landlord (as well as the tenant) may terminate a contract concluded for a specified term only for **compelling reason** (*ein wichtiger Grund*), as indicated in BGB §543(1). A reason is deemed to be compelling 'if the party giving notice, with all circumstances of the individual case taken into account, including, without limitation, fault of the parties to the contract, and after weighing of the interests of the parties, cannot be reasonably expected to continue the lease to the end of the notice period or until the lease relationship ends in another way'.[*89] 'The compelling reason leading to termination must be stated in the notice of termination.'[*90] Application of this general rule presupposes, in principle, that the compelling reason originates from the other party's sphere of risk, as in the case of breach of contract by that party.[*91] Compelling reasons on the part of the landlord might be serious insults against him or his employees or consist of criminal acts, threats, or wilful making of false reports of offences by him.[*92] Hence, mere intention to use the dwelling for themselves may well be classified as **justified interest** in the context of giving notice with respect to a contract for an unspecified term but is not, in principle, considered to constitute compelling reason in the context of extraordinary termination of a contract for a specified term. Tenants in Germany have also a right to object on subjective grounds to termination (hardship clause).[*93]

According to Article 266g of the Swiss CO, where performance of the contract becomes unconscionable for the parties, they may, with **compelling reason** (*aus wichtigen Gründen*), terminate the lease by giving the legally prescribed notice (of three month).[*94] Qualifying compelling reason is an extraordinary grave circumstance that neither was known nor could have been foreseen at the time of conclusion of the contract, where said reason may arise because of external factors or internal ones.[*95] External factors are elements such as a war or severe economic crisis. Internal factors are factors in the sphere of the landlord or tenant. These factors are, in reported Swiss court practice, sickness, being an invalid, economic ruin or changes in family circumstances, death threats against the landlord by the tenant, and repeated breach of contract that constitutes a serious infringement on account of the frequency of the violations.[*96] Differently from German law, it is for the court to determine the financial consequences of early termination (i.e., address the claim

86 The landlord may terminate the rental contract only in the cases specified in Section 28 of the LRT – breach of contract by the tenant, the necessity of capital repairs, and demolition of the building. See J. Kolomijceva (Note 11), p. 158.

87 Grounds for termination of a lease contract in general can be found in Article 6.497 of the CC and those for lease contracts for dwellings specifically in Article 6.611 of the CC. See A. Mikelėnaitė (Note 11), pp. 83, 156.

88 Section 4 of the Swedish Tenancy Act. See O. Bååth (Note 26), pp. 77, 96.

89 BGB's §543.

90 BGB's §569 (4).

91 J. Bieber (Note 45), §543, para. 10.

92 For details, see J. Cornelius, J. Rzeznik (Note 46), p. 166. Relevant case law can be found in Beck'scher Online-Kommentar Mietrecht, Schach/Schultz. 3rd ed., §543 paras 1–9.1.

93 In German, Sozialklausel. See BGB's §§ 574 and 574a. J. Cornelius, J. Rzeznik (Note 46), p. 95.

94 CO's Article 266g, item 1.

95 See R. Weber (Note 55), Article 266g, para. 5.

96 More details are provided by A. Wehrmüller (Note 52), p. 127. The report refers to the case law cited by M. Blumer. Gebrauchsüberlassungsverträge (Miete/Pacht). Vol. VII/3. Basel, Switzerland: Helbing Lichtenhahn Verlag 2012, p. 911 and U. Hulliger. Kündigung aus wichtigen Gründen, Überblick über Lehre und Rechtsprechung (Termination for compelling reason. Overview of the doctrine and case law). – MRA 2011/1, p. 1 *ff*.

for damages), taking due account of all the circumstances.[*97] When assessing the damage claim by the tenant, the court takes account of the obligation to mitigate damages.[*98] Nonetheless, notice of termination by the landlord, also in cases of a contract for a specified term, is open to challenge if, in certain specified condition, it contravenes the principle of good faith (see section 4.1 of the article above).[*99]

In Finland, the parties are, in principle, bound by the agreed time period and cannot give notice unless agreement has been made otherwise. However, exceptionally, under Section 55 of the ARL, the court may grant a landlord the right to terminate 1) if he needs the flat for his own use or for use by a member of his family for reasons of which he could not have been aware at the time when the agreement was made or 2) if, for some comparable reason, the agreement's remaining in force until the agreed date would be patently unreasonable from the landlord's point of view. It is noteworthy that the tenant is entitled to reasonable compensation for any loss incurred as a result of premature termination of the agreement by the landlord and shall in any case be given an opportunity to be heard before court in connection with these matters.[*100]

5.2. Position of Estonian law in the context of analysed regulatory systems

In summary, where contracts for an unspecified term are involved, the regulatory systems under scrutiny can be divided into three groups. Firstly, in one group of countries (Latvia, Lithuania, and Sweden, for example), the tenant's protection is relatively strong: it is practically impossible for the landlord to terminate a contract for a specified term for reasons other than fundamental breach of contract by the tenant or the condition of the dwelling posing a hazard.

The second group consists of those countries that acknowledge a general clause on 'compelling reason' (of the countries considered here, Germany and Switzerland), which should be related to an unforeseeable circumstance and should not be caused by the terminating party. If the reason originates from the landlord's own sphere of risk, termination by the landlord would be valid but subject to a damage claim by the tenant, so long as the circumstances still satisfy the condition, necessary for application of the general clause, that the landlord cannot reasonably be expected to continue performing the contract due to unforeseeable circumstance.

Adopting a third type of approach, Finland has developed special regulation that differs from the abovementioned systems in a procedure – application to the court instead of notice to the tenant (the latter is still the procedure employed if the termination is related to breach of contract by the tenant) – that puts emphasis on the landlord's point of view (thereby deviating from German and Swiss law) and that involves the possibility of a damage claim (comparable with the terms of Swiss law).

In Estonian law, a lease contract entered into for a specified term ends upon expiry of the term unless the contract is extraordinarily terminated (see §309 (1) of the LOA).The general clause on extraordinary termination set forth in §313 (1) of the LOA resembles §543 (I) of BGB in German law and Article 266g of CO in Swiss law. Accordingly, a lease contract (with either a specified or an unspecified term) may be terminated extraordinarily (i.e., without prior notice) only when there is **compelling reason**. A reason is compelling if, when it arises, the party seeking termination cannot, in light of all the circumstances and the interests of both parties, be reasonably expected to continue performing the contract. Example grounds for extraordinary termination, mainly involving reasons originating outside the sphere of risk of the party wishing to terminate, are referred to in §§ 314–319 of the LOA.[*101]

According to the guidance given by the Supreme Court,[*102] application of §313 (1) of the LOA requires the court's application of discretionary authority whereby the court is required to consider whether the interest of the party wishing to terminate the contract is more significant and would be more severely dam-

97 CO's Article 266g, item 2.

98 R. Weber (Note 55), on the CO's Article 266g, paras 8–9.

99 CO's Articles 271, item 1 and 271a.

100 ARL's Article 55.

101 For the landlord, the following is a non-exhaustive list of admissible grounds: 1) the object of the lease being used for non-stipulated purposes (see the LOA's §315), 2) payment of rent having been delayed (see the LOA's §316), 3) the property being a health hazard (see the LOA's §317), and 4) the lessee is declared bankrupt (see the LOA's §319).

102 E.g., CCSCd 21.5.2004, 3-2-1-62-04, para. 14; CCSCd 29.10.2004, 3-2-1-100-04, para. 13; CCSCd 9.11.2010, 3-2-1-84-10, paras 10.

aged if the contractual relationship were to continue. In any case, the reason is 'compelling' only if it is unexpected by the parties. If those conditions are fulfilled, the terminating party has no duty to cover any damages claimed by the other party. However, a compelling reason for terminating the contract under the article referred to above may be attributable to the party applying for termination, in which case the termination is considered a breach of contract that entitles the other party to demand compensation for damage under §115 (1) of the LOA.*[103] But even in the cases encompassed by the latter terms, the interests of both parties must be considered. For example, the landlord returning from abroad a year earlier than expected most probably would not justify extraordinary termination before the end of the specified term but may, subject to conditions of the 'unexpected change of circumstances' and 'more severly damaged interests', still be qualified as termination by breach of contract if the damages provide adequate compensation to the tenant. However, the courts in practice seldom consider this approach.

That said, a residential lease contract may be entered into with a resolutive condition – in case, for example, the landlord should return from abroad early. Upon fulfilment of such a condition, the lease contract is deemed to have been entered into for an unspecified term and the landlord may terminate the contract 'ordinarily' by giving at least three months' notice (under the LOA's §309 (4)). In addition, it should be noted that the parties are free to agree on special grounds for termination if the object of the lease is a dwelling used by the lessor and the greater part of it is furnished by the lessor (see the LOA's §272 (4) 3)).

As a protective measures in contracts both for specified and unspecified terms, the tenant may contest valid termination if that termination runs counter to the principle of good faith (see also section 4.2. above)*[104] or may demand the extension of the lease contract for up to three years if termination of the contract would result in serious negative consequences for the lessee or his family (hardship clause)*[105].

6. Conclusions

The aim with this article was to develop a relative scale for the various regulatory regimes and finally evaluate how well Estonian law, in comparison to Latvian, Lithuanian, German, Swiss, Finnish, and Swedish law, has managed to strike a balance between landlords' and tenants' interests in placing limits on the landlord's right to terminate a tenancy contract for reasons other than factors stemming from the tenant's sphere of risk.

It is clear from the foregoing analysis that the most protective regime is to be found in Sweden. In essence, a Swedish landlord offers a lifetime product of secure tenure whereby the decision to terminate the contract (i.e., in the case of a contract for a specified term, not to prolong it or, in the case of a contract for an unspecified term, to give notice) is in the hands of the tenant. Latvia too belongs to the group of countries where tenants can feel secure with contracts for a specified and an unspecified term alike, because the right to terminate the contract is non-existent or strongly limited.

In Germany also, the level of tenancy protection is relatively high.*[106] The large proportion of private rental housing, however, shows that it supports stable demand for a long-term relationship as almost all rental agreements in Germany are concluded for an unspecified term, keeping tenants flexible, yet protected from arbitrary unilateral termination by the landlord. Termination of a contract for a specified term is limited to rare cases of unforeseeable compelling reason.

Less protection is provided by Estonian, Finnish, and Swiss law, under which a tenant who is party to a contract for an unspecified term is not protected from notice of termination, except in a few cases wherein the notice proves to contravene the good-faith principle or good practice. In cases of contracts for a specified term, Finnish and Swiss law provide a degree of protection higher than that under Estonian law, by placing the burden of initiating court review on the landlord and guaranteeing compensation for damage in the event of termination for reasons originating within landlords' sphere of risk.

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103 E.g., CCSCd 29.5.2004, 3-2-1-100-04, para. 13, CCSCd 21.5.2004, 3-2-1-62-04, para. 18; CCSCd 9.11.2010, 3-2-1-84-10, paras 12–13.

104 LOA's §327 (1).

105 LOA's §326 (2).

106 For general information, see also S. Nasarre (Note 7); C. Schmid. Tenancy law and procedure in the EU. General Report, 2003. Available at http://www.eui.eu/DepartmentsAndCentres/Law/ResearchAndTeaching/ResearchThemes/ProjectTenancyLaw.aspx (31.3.2016); see also R. de Boer and R. Bitetti (Note 5) and C. Whitehead (Note 2).

It is worth noting in the case of Lithuania that the distinction between contracts for a specified and an unspecified term is set forth in black and white: a landlord has no right to terminate the first (i.e., there is strong protection) but has an unlimited right to terminate the latter (here, protection is weak). Hence, it is difficult to position Lithuania on the general continuum outlined in this paper.

Admittedly, only one aspect of secure tenancy has been analysed here. There are several other factors – among them automatic renewal of a contract for a specified term, faithfulness to the contract in the case of sale of the property, and a statutory pre-emption right – that have an influence on perceptions of the security of the tenure. Additionally, a certain degree of flexibility is important for guaranteeing the tenant's right to free movement and facilitating mobility in the labour market; i.e., the tenant enjoys a right to terminate the tenancy relationship (at least for good cause) without extensive adverse consequences. Analysis of these questions, however, is a subject best left for another article.

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Development of Company Law in Kazakhstan

Main Issues and Trends

1. Introduction

This article is focused on a brief analysis of development of the legislation of the Republic of Kazakhstan in relation to corporate forms for business entities during the period after collapse of the Soviet Union. Comparing it with the notion of company law in European jurisdictions, the author notes the absence of a clear concept of company law and of a legal term 'corporation' in the law of Kazakhstan and also claims that a company (or corporate) law of Kazakhstan has not been adequately institutionalised yet within the national legal system.

Nevertheless, it is shown that special legislation to regulate corporate forms for entrepreneurial activity (apart from forms for non-commercial activities) has been developed in Kazakhstan since the 1990s. The most important stages of such development are highlighted with special emphasis on an influence of Russian legal developments. The article also includes description of the current structure, content, and specifics of Kazakhstan's legislation on corporate forms for economic activity as well as identifying main trends in development of company / corporate law in Kazakhstan and concerns related to it.

2. Meaning of company law in European jurisdictions

Our studies show that within the European legal environment the notions of 'company law' and 'corporate law' are used mostly as synonyms in identifying the legal background for: (i) creation of legal entities formed on the basis of an association of persons with the purpose of earning profit and (ii) conduct of economic activity by such legal entities observing adequate balance in protecting rights of a company, its members (shareholders) and creditors, and public interest. The company law is called on to become a 'special private law' combining laws on capital companies, general partnerships, and limited partnerships.[*1]

Depending on the terms of such association, all respective commercial legal entities are classified into two groups – partnerships (also sometimes called associations of persons) and companies (entities formed on the basis of joint capital contributions of their members / shareholders). This classification of business entities was also known in Soviet-time civil law.[*2] Formation of a partnership allows its members (partners

1 P. Hommelhoff. Corporate and business law in the European Union: Status and perspectives 1997. – Towards a European Civil Code. 2nd revised and expanded ed. Nijmegen: Ars Aeque Libri 1998 (652 p.), pp. 602–603.

2 Гражданское и торговое право капиталистических государств ['Civil and Commercial Law of Capitalist States']. Р.Л. Нарышкина [R. Naryshkina] (ed.). Москва: Издательство 'Международные отношения', 1983 [Moscow: International Relations, 1983] (Volume I, 286 p.), p. 148 (in Russian).

or participants) to conduct their entrepreneurial activity on the basis of joint property, common management, and unlimited liability of members of the partnership, who often are required to have or acknowledged as having a status of entrepreneurs. In turn, a company is set up, and performs its activities, on the basis of a separation of participation in the company's capital from the company's management and on limited liability of its members (shareholders), who, in general, can be considered investors in the company, not entrepreneurs. As a formal criterion for such distinction between companies and partnerships Varul mentions existence of a corporate structure: the corporate structure shall be established in any company, but it does not exist in a partnership.[*3]

There is a conclusion drawn in scientific publications that in some states partnerships are not recognised as having a separate legal personality but capital companies always have the status of legal entities.[*4] However, there are jurisdictions where, like in France, partnerships have been recognised as legal entities together with joint-stock companies and companies with limited liability. Varul also indicates that in Germany only certain types of partnerships are not considered to be legal entities and in the UK and Estonia they are.[*5]

In some European jurisdictions, the term 'company law' applies to regulate both partnerships and companies; in the others, it is related to regulation of companies only. For example, in English law, companies are treated as distinct from partnerships and also a distinction exists between partnership law and company law. Although it is said that 'the distinction between partnership and companies is often merely the one of machinery and not of function', nevertheless it entails separate regulation of legally significant specifics of these two types of corporations and relevant legal provisions have been largely codified in different acts – in the Partnership Act 1890 and the Companies Act 1985, respectively.[*6]

In most jurisdictions in continental Europe (in the civil-code countries particularly), company law includes regulation of both types of business entities: partnerships and companies. All the business entities formed on the basis of association of persons for common objectives are combined under the term 'company', and all the entities are classified as being either partnerships or companies. For instance, that is true in German law.[*7] A similar approach can be found in the French Code du Commerce 2000: all forms of business entities with separate legal personality have been united under a single term for a commercial company (*societe*) regulated in Book II of the Code, including general and limited partnerships; companies with limited liability; and various types of joint-stock companies (*societe par actions*), such as ordinary JSC (SA), simplified JSC (SAS), and limited partnership issuing shares (SCA).[*8] The same is obviously true for the Estonian Commercial Code 1995: §2 of Chapter 1 applies the general term 'company' with respect to general partnerships, limited partnerships, private limited companies, public limited companies, or commercial associations, as well as to other companies if prescribed by law.[*9]

Nevertheless, there is one detail that can be noted when the terms 'company law' and 'corporate law' are compared. When a company law is referred to, it mostly applies to the law surrounding organisational forms and activity of business entities.[*10] However, the notion 'corporate law' embraces both commercial

3 П. Варул. Место корпоративного права в правовой системе [P. Varul. 'The Place of Corporate Law within a Legal System']. – Гражданское право и корпоративные отношения: Материалы междунар. науч.-практ. конф. в рамках ежегодных цивилистических чтений, посвященной 90-летию видного казахстанского ученого-цивилиста Юрия Григорьевича Басина ['Civil Law and Corporate Relations: Materials of the International Scientific and Practical Conference…] (Almaty, 13–14 May 2013). М.К. Сулейменов [M. Suleimenov] (ed.). Алматы [Almaty], 2013 (736 p.), p. 108 (in Russian).

4 Civil and commercial law of capitalist states (Note 2), pp. 148–150; Е.А.Суханов. Очерк сравнительного корпоративного права [Ye. Sukhanov. 'Essay on comparative Corporate Law']. – Е.А.Суханов. Проблемы реформирования Гражданского кодекса России: Избранные труды 2008 – 2013 гг. Москва: Статут, 2013 [Ye. Sukhanov. 'Problems of Reforming the Civil Code of Russia: Selected works 2008–2013'. Moscow: Statut, 2013] (494 p.), pp. 155–163 (in Russian).

5 P. Varul (Note 3).

6 P. Davies. Gower's Principles of Modern Company Law. 6th ed. London: Sweet & Maxwell, 1997 (867 p.), pp. 3 – 5.

7 Х.-Й.Шмидт-Тренц. Ю.Плате, М.Пашке и др. Основы германского и международного экономического права / Grundlagen des Deutschen und internationalen wirtschasrecht. Учебное пособие. ['Basics of German and International Economic Law']. Санкт-Петербург: Издательский дом С.-Петерб. гос. ун-та, Издательство юридического факультета СПбГУ, 2007 [Sankt-Peterburg: Publishing house of the St. Peterburg's state university, and publishing office of its law faculty, 2007] (736 p.), pp. 296–297 (in Russian).

8 Коммерческий кодекс Франции [French Code du Commerce] 2000 / предисловие, перевод с французского, дополнение, словарь-справочник и комментарии В.Н. Захватаева. [Commercial Code of France 2000 / introduction, translation, amendments, dictionary and commentaries by V. Zakhvatayev]. Москва: Волтерс Клувер, 2008 [Moscow: Wolters Kluver, 2008] (1272 p.), pp. 144–346 (in Russian).

9 Estonian Commercial Code. – RT I 1995, 26, 355. Available in English at https://www.riigiteataja.ee/en/eli/504042014002/consolide (3.2.2016).

10 P. Hommelhoff (Note 1), pp. 602–601.

and non-commercial corporations (i.e., all organisations formed on the basis of association of persons).*[11] This view has become reflected in the Russian Civil Code, which now includes legal classification of commercial and non-commercial corporations, as well as general provisions applicable to all commercial corporations and to non-commercial corporate organisations.*[12]

3. Development of corporate law in Russia

During the era before 1917, the concept of corporation was fully recognised in Russian law. In Article 13 of Chapter II of the draft of the Russian Civil Code (*Grazhdanskoye Ulozheniye*) it was proposed that private partnerships be acknowledged as private-law legal entities. In explanations to Articles 13 and 14 the following statements were included: (i) both partnerships (*tovarischestvo*) and societies (*obschestvo*) were defined as types of private-law corporations; (ii) joint conduct of an enterprise with the purpose of gaining profit was established as the subject-matter of partnerships' activities, while societies could be created only for non-commercial purposes of social development; and (iii) decisions of a general meeting of its members were acknowledged to be the form for expression of the will of each corporation.*[13]

The *Grazhdanskoye Ulozheniye* has never been adopted as a law. However, the legislation of that time regulated the following forms of private corporations for a trade business: a type of co-operative (*artel'noye tovarischestvo*), general partnership (*polnoye tovarischestvo*), limited partnership (*toverischestvo na vere*), and joint-stock partnership (*aktsionernoye tovarischestvo*). The core difference between those forms was based on whether the personal participation by efforts of members of a corporation represented an essential element of its existence or the members only participated in formation of its capital – e.g., in a co-operative, participation with personal efforts was mandatory, and in general and limited partnerships it was implied on the side of their general partners, whereas investors in limited partnerships and shareholders in joint-stock partnerships were required to pay their shares in the capital of the respective partnership.*[14]

The Soviet-time law practically rejected acknowledgement of entrepreneurship and corporate relations; no corporate law was developed in the USSR. However, today the law of the Russian Federation fully operates with the legal terms 'corporation' and 'corporate legislation'. In particular, creation of corporate law as a 'full-weighted branch of civil legislation' has been declared as one of two main goals in the process now being implemented of modernisation of the acting Civil Code of the Russian Federation. And as a starting point there was a proposal made to classify all legal entities as either corporations (i.e., those 'created on the basis of the principle of membership') or non-corporate legal entities.*[15] The recently amended Russian Civil Code now declares that civil legislation regulates, among other elements, 'relations pertaining to participation in corporate organisations or their managing', which relations have been clearly defined as corporate ones (§1 of Article 2). Corporate organisations – as such 'legal entities where their members implement corporate rights with respect to an organisation' – have been acknowledged as a separate type of legal entities (§2 of Article 48). Their classification, including both commercial and non-commercial corporate organisations, has been established in Article 65.1. And, finally, corporate rights (as rights of members of a corporation) have been recognised and defined in Article 65.2. In addition, Articles 66 through 123.16-2

11 P. Varul (Note 3).

12 Е.А. Суханов. Проблемы кодификации законодательства о юридических лицах [Ye. Sukhanov. Problems of codification of legislation concerning legal entities]. – Кодификация российского частного права 2015 [Codification of Russian private law 2015]. П.В. Крашенинников [P. Krasheninnikov] (Ed.). Москва: Статут, 2015 [Moscow: Statut, 2015] (447 p.), p. 56 (in Russian).

13 Гражданское уложение. Кн. 1. Положения общие: проект Высочайше учрежденной Редакционной комиссии по составлению Гражданского уложения (с объяснениями, извлеченными из трудов Редакционной комиссии) / под ред. И.М. Тютрюмова; сост. А.Л. Саатчиан. [*Grazhdanskoye Ulozhenie*, Civil Code. Book I. General provisions: the draft of the appointed editorial comission for preparation of the Civil Code (with explanations extracted from works of the editorial comission. I. Tyutryumov (Ed.), A. Saatchian (compiler)]. Москва: Волтерс Клувер, 2007 [Moscow: Wolters Kluwer, 2007] (288 p.), pp. 70–74 (in Russian).

14 Г.Ф. Шершеневич. Учебник торгового права / по изданию 1914 г. / Вступительная статья Е.А. Суханова. [G. Shershenevich. Textbook on commercial law / according to edition of 1914 /. Introductory article by Ye. Sukhanov]. Москва: Фирма 'СПАРК', 1994 [Moscow: SPARK, 1994] (335 p.), pp. 104–166 (in Russian).

15 Концепция развития гражданского законодательства Российской Федерации. Вступ. ст. А.Л. Маковского. [The concept paper concerning development of civil legislation of the Russian Federation. Introductory article by A. Makovskii]. Москва: Статут, 2009 [Moscow: Statut, 2009] (159 p.), pp. 7, 48–49 (in Russian).

now contain general provisions and specific norms applicable for each and every type of commercial corporations (including economic partnerships and companies) and non-commercial corporations regulated by acting Russian law.[*16]

4. Inadequate institutionalisation of company / corporate law in Kazakhstan

Since for a long time Kazakhstan was a part of the Russian Empire and the Soviet Union, Kazakhstan's law has to a great extent inherited a legal culture and traditions, as well as legal concepts and instruments, from Russian and Soviet-era law. And currently close economic and social co-operation exists between our countries. Therefore, the process and results of the legal development in the Russian Federation matter for the development of modern law in Kazakhstan.

Nevertheless, such terms as 'company law' and 'corporate law' do not have their legal definitions in the law of Kazakhstan. The phrase 'company law' is not used at all in the legislation or in either official or unofficial communications.

However, the concept of corporate law has been widely referred to in scientific and informal discussions and has also been included in certain programming or conceptual documents addressing legal development and improvement of the regulatory framework for entrepreneurial activity and practice of corporate governance. Nonetheless, in the concept paper on development of the corporate legislation of Kazakhstan adopted in 2011 (the '*Corporate Law Development Paper*')[*17] clear statements were made that no legal definition of the notion of 'corporation' exists in Kazakhstani legislation, nor are the terms 'corporate law' and 'corporate legislation' fixed and widely accepted in the law and practice. Also, no place for corporate law has been determined in the legal system of Kazakhstan.

These conclusions remain true today. But one should note that there was an attempt made to define corporate law in the aforementioned Corporate Law Development Paper. In particular, in the preamble to the Corporate Law Development Paper it was stated that 'corporate law is represented by a set of general and special provisions of private law and corporate norms intermediating corporate relations, and corporate legislation means an aggregate of normative legal acts that include rules of different branches of law (both private and public) that regulate relationships within a corporation and outside'. However, this attempt appeared to be unsuccessful, because there: (i) no legal definition of a corporation has been proposed and (ii) no nature of corporate relations as an object of legal regulation has been clearly identified, either in the Corporate Law Development Paper or in the law of Kazakhstan.

In the modern civil-law doctrine of Kazakhstan, however, only one position with respect to the essence of corporate law has been clearly expressed as of this moment. Namely, according to Suleimenov, corporate law shall be considered a part of civil law and as such it shall develop as a separate institution of civil law focused on regulation of relations pertaining to participation in corporate organisations and managing their activity. He specifically mentions that it is the most common view that corporate law should be treated as part of law concerning legal entities. However, he argues that the institution of legal entities has been developed to regulate legal entities in civil relations with third parties ('existing outside a legal entity'), whereas corporate relations exist as so-called internal organisational relations within a corporate organisation.[*18]

16 The Civil Code of the Russian Federation. Available at http://www.consultant.ru/popular/gkrf1/ (15.10.2015) (in Russian).

17 Концепция развития корпоративного законодательства Республики Казахстан, утвержденная Министерством юстиции Республики Казахстан 28 марта 2011 г. [The concept paper concerning development of corporate legislation of the Republic of Kazakhstan dated 28 March 2011]. Available at http://online.zakon.kz/?doc_id=30956110 (9.3.2016) (in Russian).

18 М.К. Сулейменов. Гражданское право и корпоративные отношения: проблемы теории и практики [M. Suleimenov. Civil law and corporate relations: Problems of theory and practice]. – Гражданское право и корпоративные отношения: Материалы междунар. науч.-практ. конф. в рамках ежегодных цивилистических чтений, посвященной 90-летию видного казахстанского ученого-цивилиста Юрия Григорьевича Басина (Алматы, 13–14 мая 2013) ['Civil Law and Corporate Relations: Materials of the International Scientific and Practical Conference (Almaty, 13–14 May, 2013)]. М.К. Сулейменов [M. Suleimenov] (Ed.). Алматы [Almaty], 2013 (736 p.), pp. 43–44 (in Russian).

5. Regardless of no legal term 'corporation' existing, recognition of the existence of corporate relations in the law of Kazakhstan

Unlike the law of the Russian Federation, Kazakhstani legislation fails to define what the term 'corporation' means and what type of social relations can be identified as corporate relations, and, in addition, it does not refer to the term 'corporation' at all. No specific legal provisions addressing the notions of corporate organisations and corporate relations can be found in the Civil Code or other legislative acts of the Republic of Kazakhstan. This situation has existed since the very start of development of the law of independent Kazakhstan: Basin mentioned in 2000 that Kazakhstani law does not operate with the term 'corporation' for indication and characterisation of a certain type of legal entities.[*19]

Nevertheless, this does not mean that there is no a legislative framework for foundation of corporations and their activities existing in Kazakhstan.

First of all, as described below, there are specific corporate forms regulated in the law and thousands of corporations are active in Kazakhstan. This fact allows claiming existence of corporate (or company) law in Kazakhstan.

In addition, certain legal terms that include the word 'corporate' have been established in the law. For example, all legal entities (whether they are corporations or instead non-corporate organisations) pay 'corporate income tax' under the Tax Code 2008.[*20] In accordance with the Law on Joint-Stock Companies 2003 (the '*JSC Law*'),[*21] each joint-stock company is required to adopt its 'corporate governance code', maintain its 'corporate web site', disclose certain 'corporate events', and appoint its 'corporate secretary' to perform prescribed functions. The Civil Procedure Code (the previous one, of 1999,[*22] as well as the new code, of 2015[*23]) (the '*CPC*') invests courts with the competence to solve 'corporate disputes', while the JSC Law and the Law on Partnerships with Limited and Additional Liability of 1998 (the '*LLP Law*')[*24] require JSCs and LLPs to disclose information about a company's involvement in a corporate dispute, as well as about other facts specified as so-called corporate events.

Moreover, not provisions of the Civil Code (General Part of 1994[*25] and Special Part of 1999[*26]) but norms of other laws allow respective qualification of corporate relations and understanding of what forms

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19 Ю.Г. Басин. Коммерческие корпоративные отношения и юридическая ответственность [Yu. Basin. 'Commercial Corporate Relations and Legal Liability']. – Ю.Г. Басин. Избранные труды по гражданскому праву. Предисловие М.К. Сулейменов, Е.У. Ихсанов. Сост. М.К. Сулейменов. Алматы: АЮ – ВШП 'Адилет', НИИ частного права КазГЮУ, 2003 [Yu. Basin. 'Selected Works on Civil Law. Introduction by M. Suleimenov and Ye. Ikhsanov. Compiled by M. Suleimenov. Almaty: Law School 'Adilet', 2003] (734 p.), p. 135 (in Russian).

20 Кодекс Республики Казахстан «О налогах и других обязательных платежах в бюджет (Налоговый кодекс)» ['Tax Code'], 10 December 2008, №99-IV (as amended). Available at http://online.zakon.kz/Document/?doc_id=30366217 (most recently accessed on 29.2.2016) (in Russian). Also available in English (unofficial translation), at http://adilet.zan.kz/eng/docs/K080000099 (most recently accessed on 29.2.2016).

21 Закон Республики Казахстан «Об акционерных обществах» '[Law on Joint-Stock Companies'], 13 May 2003, №415-II (as amended). Available at http://online.zakon.kz/Document/?doc_id=1039594 (most recently accessed on 29.2.2016) (in Russian). Also available in English (unofficial translation), at http://adilet.zan.kz/eng/docs/Z0300000415_ (most recently accessed on 29.2.2016).

22 Гражданский процессуальный кодекс Республики Казахстан ['Civil Procedure Code'], 13 July 1999, №401-I (now no longer in effect as of 1 January 2016). Available at http://online.zakon.kz/Document/?doc_id=34329053&doc_id2=1013921 (most recently accessed on 29.2.2016) (in Russian). Also available in English (unofficial translation), at http://adilet.zan.kz/eng/docs/K990000411_(most recently accessed on 29.2.2016).

23 Кодекс Республики Казахстан «Гражданский процессуальный кодекс Республики Казахстан» ['Civil Procedure Code'], 31 October 2015, №377-V (in force as of 1 January 2016). Available at http://online.zakon.kz/Document/?doc_id=34329053 (most recently accessed on 29.2.2016) (in Russian).

24 Закон Республики Казахстан «О товариществах с ограниченной и дополнительной ответственностью» ['Law on Partnerships with Limited and Additional Liability'], 22 April 1998, №220-I (as amended). Available at http://online.zakon.kz/Document/?doc_id=1009179 (most recently accessed on 29.2.2016) (in Russian). Also available in English (unofficial translation), at http://invest.gov.kz/uploads//files/2015/12/03/law-of-the-republic-of-kazakhstan-on-limited-liability-companies-and-additional-liability-companies.pdf (most recently accessed on 29.2.2016).

25 Гражданский кодекс Республики Казахстан (Общая часть) ['Civil Code (General Part')], 27 December 1994 (as amended). Available at http://online.zakon.kz/Document/?doc_id=1006061 (most recently accessed on 29.2.2016) (in Russian). Also available in English (unofficial translation), at http://adilet.zan.kz/eng/docs/K940001000 (most recently accessed on 29.2.2016).

26 Гражданский кодекс Республики Казахстан (Особенная часть) ['Civil Code (Special Part)'], 1 July 1999 (as amended). Available at http://online.zakon.kz/Document/?doc_id=1013880 (most recently accessed on 29.2.2016) (in Russian). Also

the sphere of corporate relations. Particularly, during the last 15 years there have been certain categories of legal acts (mainly regulations of the National Bank and enactments of the Government but also some laws) adopted on implementation of measures to introduce a system of 'corporate governance' in commercial organisations and improve it. Practically all of them have been focused on regulation of corporate governance in joint-stock companies. Thus, Kazakhstan's legislation certainly considers JSCs to be corporations, and existence of corporate-law norms in its legal system (even if they are not sufficiently developed) can be confirmed.

However, not only a JSC is a corporation under Kazakhstan's law. According to Basin, the term 'corporation' has been well-known in the legal theory and legal practice. In the law of many foreign states, this has a clear meaning as a 'self-organised legal entity where its founders, being at the same its members, act jointly and on equal legal ground'.[*27] The common understanding has always existed between Kazakhstan's researchers in the field of civil law that a corporation means an economic or business entity with its separate legal personality founded by its members who either (i) joined their property and efforts for participation in the business environment or (ii) combined their investments to set up the business entity in exchange for receiving respective membership rights. In addition to JSCs, the Civil Code also regulates other forms of commercial (and non-commercial) organisations based on membership, though without qualifying them expressly as corporations.

At the same time, in 2008 the old CPC was amended with the notion of corporate disputes and clear specification of corporate disputes as a type of disputes under civil law. The amendment included a definition of 'corporate dispute' according to which initially the dispute could be between commercial legal entities or a dispute related to specified matters wherein a legal entity and/or its shareholders (participants or members) participated. Since 2011, not only commercial organisations but also individual entrepreneurs and non-commercial organisations of any allowed organisational forms as well as current or former members of an organisation have been able to be parties to corporate disputes. Additionally, the list of grounds for the acknowledgement of a corporate dispute has been significantly extended. Similar provisions have been reproduced in the new version of the CPC (2015), which has been in effect since 1 January 2016.

6. Development of corporate legislation in Kazakhstan, beginning in 1990

The following most important periods of development of Kazakhstani legislation concerning business corporations can be identified (although this description is very simplified, it seems to be sufficiently illustrative):

1) The time before adoption of the Civil Code (General Part) in 1994, including the following stages:
   - Until the beginning of the 1990s: There was no corporate legislation or corporate law recognised as existing (we disregard the Civil Code of the *RSFSR* of 1922,[*28] as well as legislative provisions of the Civil Code of the *Kazakh SSR* of 1963[*29] concerning *kolkhozes*, various types of consumer co-operatives, and other non-profit social membership organisations).
   - Starting on 31 May 1991: The new Basics of Civil Legislation of the USSR and the Union Republics (*Osnovy grazhdanskogo zakonodatel'stva Soyuza SSR i soyuznykh respublik*) defined the notion of a commercial organisation, distinguished economic partnerships from economic societies / companies, and made provision for regulation of the legal status of separate types of economic partnerships and companies by special legislative acts;[*30] also, certain enactments

available in English (unofficial translation), at http://cis-legislation.com/document.fwx?rgn=1167 (most recently accessed on 29.2.2016).

27 Yu. Basin (Note 19).

28 Гражданский кодекс РСФСР: официальный текст с изменениями на 1 января 1952 г. ['Civil Code of the RSFSR: Official Text with Amendments as of 1 January 1952']. Москва: Государственное издательство юридической литературы, 1952 [Moscow: publishing house of law texts, 1952] (159 p.) (in Russian).

29 Гражданский кодекс Казахской ССР (Официальный текст с изменениями и дополнениями по состоянию законодательства на 1 января 1988 г. ['Civil Code of the Kazakh SSR (Official Text with Changes and Amendments as of 1 January 1988)]. Алма-Ата: Казахстан, 1989 [Alma-Ata: Kazakhstan, 1989] (256 p.) (in Russian).

30 Основы гражданского законодательства Союза ССР и союзных республик, утверждены Постановлением Верховного Совета СССР от 31 мая 1991 г. ['Basic of Civil Legislation of the USSR and Union Republics Approved by the Supreme

and regulations by the USSR's Council of Ministers concerning joint-stock companies, economic partnerships, and some other specific forms of associations for commercial purposes were in effect.*[31]

- After 21 June 1991: The Law of the *Kazakh SSR* on Economic Partnerships and Joint-Stock Companies*[32] was adopted, and very important concepts were introduced as a start for formation of corporate legislation in Kazakhstan; a joint-stock company was recognised as one of the allowed forms of economic partnerships; payment for shares was established as the only obligation of a shareholder; mandatory real-value asset contributions to the capital of a company were required; a guarantee function of the authorised capital was fixed for the first time as a precondition to later regulation of capital maintenance obligations; and regulation of directors' and managers' liability, along with a requirement for adoption of a code of conduct for directors and managers of a JSC, and other important provisions were established.

2) The time after adoption of the new Civil Code as the basis for development of modern corporate legislation in Kazakhstan:
   - 27 December 1994: The Civil Code (General Part) was adopted to regulate (among many other aspects of private law) the notion of economic partnership as the legal organisational form for commercial entities.
   - 2 May 1995: The Law on Economic Partnerships was enacted to regulate general partnerships, limited partnerships, partnerships with limited liability (LLP), and partnerships with additional liability (ALP) and the JSC as special forms of economic partnerships.*[33]
   - 5 October 1995: The Law on Production Co-operatives was adopted.*[34]
3) The time after separate regulation of the status of JSC and LLP / ALP was introduced in the law of Kazakhstan:
   - 28 April 1998: The LLP Law was adopted, and special provisions regarding LLPs and ALPs were excluded from the Law on Economic Partnerships of 2 May 1995, although the latter remains restrictedly in effect with respect to LLPs and ALPs since it regulates general principles applicable to all forms of economic partnerships, including LLPs and ALPs.
   - 10 July 1998: The Law on Joint-Stock Companies (no longer in effect) and the law on amendments to a number of legislative acts on matters related to the legal status of JSCs were adopted, and the JSC was recognised as a separate organisational form and it no longer remains a type of economic partnerships.*[35] That was a start for development of an independent (joint-stock) company law.

Council of the USSR on 31 May 1991], №2211.–Ведомости Съезда народных депутатов СССР и Верховного Совета СССР, 1991, №26, ст.733 [the Bulletin of the Congress of Peoples Representatives of the USSR and the Supreme Council of the USSR, 1991, #26, Art. 733] (in Russian).

31 For example, Положение об акционерных обществах и обществах с ограниченной ответственностью, утвержденное Постановлением Совета Министров СССР от 19 июня 1990 г. ['Regulations Concerning Joint-stock Companies and Companies with Limited Liability, Approved by the Resolution of the Council of Ministers of the USSR dated 19 June 1990']. – Собрание постановлений правительства СССР, 1990, №15, ст.821 ['Collection of Resolutions of the Government of the USSR, 1990', #15, Article 821] (in Russian).

32 Закон Казахской ССР «О хозяйственных товариществах и акционерных обществах» ['Law on Economic Partnerships and Joint-stock Companies], 21 June 1991 (now no longer in effect). – Ведомости Верховного Совета Казахской ССР, 1991, №26, ст. 343 [Bulletin of the Supreme Council of the Kazakh SSR, 1991, #26, Article 343]. Available at http://online.zakon.kz/Document/?doc_id=1000574 (most recently accessed on 9.3.2016) (in Russian).

33 Закон Республики Казахстан «О хозяйственных товариществах» ['Law on Economic Partnerships'], 2 May 1995, №2255 (as amended). Available at http://online.zakon.kz/Document/?doc_id=1003646 (most recently accessed on 29.2.2016) (in Russian). Also available in English (unofficial translation), at http://adilet.zan.kz/eng/docs/U950002255_(most recently accessed on 29.2.2016).

34 Закон Республики Казахстан «О производственном кооперативе» ['Law on Production Cooperatives'], 5 October 1995, №2486 (as amended). Available at http://online.zakon.kz/Document/?doc_id=1003955 (most recently accessed on 29.2.2016) (in Russian). Also available in English (unofficial translation), at http://adilet.zan.kz/eng/docs/Z950002486 (most recently accessed on 29.2.2016).

35 Закон Республики Казахстан «Об акционерных обществах» ['Law on Joint-Stock Companies'], 10 July 1998, №282 (now no longer in effect). Available at http://nationalbank.kz/cont/publish234665_240.pdf (most recently accessed on 29.2.2016) (in Russian). Also available in English (unofficial translation), at http://online.zakon.kz/Document/?doc_id=1017168 (most recently accessed on 29.2.2016); Закон Республики Казахстан «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам акционерных обществ» ['Amending Law Concerning Joint-stock Companies'], 10 July 1998, №282. Available at http://online.zakon.kz/Document/?doc_id=1009824 (most recently accessed on 29.2.2016) (in Russian).

4) The time since May 2003, in which significant changes in the status of joint-stock companies have been introduced:
   - 13 May 2003: The JSC Law was adopted, and the previous law, of 10 July 1998, concerning joint-stock companies was terminated, which fact caused numerous and significant amendments being introduced to the legislation – *e.g.*, classification of JSCs into closed-type and open-type JSCs was cancelled, rules on the structure of capital of a JSC and its maintenance were changed, the figure of corporate secretary and a requirement for independent directors were introduced, protection of shareholders' rights has been improved and directors' and managers' liability has been increased, the requirement of a corporate governance code and for disclosure of major corporate events/disputes were established, etc.
   - Later: Significant amendments have been introduced in the 2003 JSC Law, from its adoption until the present day.

7. Current structure of Kazakhstan's legislation on corporate forms for business

The structure of Kazakhstan's legislation concerning corporations rests on the following important approaches.

First of all, the Civil Code (in its General Part) defines the basic concept of a legal entity and establishes various classifications of legal entities, depending on such different criteria as: (i) whether the entity is a commercial or non-commercial organisation and (ii) who are the founders of the legal entity and what the legal nature of the relations between the entity and its founder(s) is.

A legal entity shall be recognised as a commercial organisation if it is founded for the purpose of earning profits and its profit is distributable to its founders / members. A non-commercial organisation cannot pursue profit-earning as its main goal, and its profit cannot be distributed among its founders / members under any circumstances.

Legal entities of corporate type can be set up by one or more persons by way of cash or other property contributions to the capital or assets of a company in exchange for membership rights with respect to the company and its profit. There are also other types of legal entities (both commercial and non-commercial), which can be founded by a single founder who transfers property to the legal entity but remains the owner of the property transferred, and such entities cannot be considered corporations.

There is no classification of legal entities in Kazakhstani law analogous to that in Germany or Estonia wherein an organisation can be either a private-law company or a public-law company.

Secondly, each legal entity can be founded and perform its activities in one of the organisational forms allowed by the law, in a manner depending on the commercial or non-commercial nature of the entity and on specifics of its foundation. The *numerus clausus* principle applies to regulate legal forms of commercial organisations.

The founders of a legal entity decide whether it is to be a commercial or non-commercial organisation, and whether they want to be its members or choose to remain the owner of its property. This decision is a precondition for the founders' decision on the organisational form of the legal entity. For each type of legal entities (commercial and non-commercial), the Civil Code proposes allowed organisational forms. For entrepreneurial activity, if the founder is the State (either the Republic of Kazakhstan or a local state authority) and if the law allows this, it may choose to found a state enterprise and remain the owner of the property transferred to the entity while the enterprise would exercise the so-called right of economic management (*pravo khozyaistvennogo vedeniya*) with respect to the property.[*36] This legal construction has been inherited from the system of Soviet times, and this is the reason there is such a specific legislative system for regulation of legal forms for business activities in Kazakhstan.

Nevertheless, the vast majority of commercial legal entities in Kazakhstan perform in organisational forms based on principles of association and membership. The Civil Code allows the following organisational forms for such commercial entities: economic partnership (*khozyaistvennoye tovarischestvo*), production

[36] Субъекты гражданского права ['Persons in Civil Law']. М.К. Сулейменов [M. Suleimenov] (ED.). Алматы: НИИ частного права КазГЮУ, 2004 [Almaty: Institute of private law, 2004] (538 p.), pp. 172–178 (in Russian).

co-operative (*proizvodstvennyi kooperativ*), and joint-stock company (*aktcionernoye obschestvo*). In turn, economic partnerships can be set up in any of the following four organisational forms, depending on the intention and personality of their founders and expected members: general partnership (*polnoye tovarischestvo*), limited partnership (*kommanditnoye tovarischestvo*), partnership with limited liability (*tovarischestvo s ogranichennoy otvetstvennos'u*), and partnership with additional liability (*tovarischestvo s dopolnitel'noy otvetstvennost'u*).

Private persons (legal entities and individuals) as well as the State or a local state authority may be shareholders / members in a JSC or LLP, while only individuals can be general partners in general and limited partnerships.

More detailed description and explanation of all of the aforementioned organisational forms of commercial legal entities (including economic partnerships, joint-stock companies, state enterprises, and production co-operatives) can be found in our previous publications.[*37] With the exception of the form of state enterprise (*gosudarstvennoye predpriyatiye*), all of them can be identified as corporations.

8. Main trends in the development of company / corporate law in Kazakhstan

Although the corporate legislation (or company law) of most European countries is acknowledged as developed, our study reveals that there are a lot of aspects wherein our European colleagues see the potential for its further development. A range of key issues under consideration for such development has usually been identified in relevant publications (though mostly in the context of harmonisation and/or unification).[*38]

Similar issues related to development of corporate law are urgent in Kazakhstan. But, besides these, there are many other problems awaiting an adequate legislative solution. In particular, we need corporate relations to be clearly recognised and the term 'corporation' to find its legal definition in the law. Reclassification of corporations is also required, to differentiate between regulation of partnerships and of capital companies. Reconsideration of the legal framework for general and limited partnerships, as well as for LLPs, is necessary. Also, significant modernisation of the legislation concerning joint-stock companies is on the agenda. And there is also the important topic of harmonisation or even unification of corporate legislation, which remains relevant in the context of Kazakhstan's participation in the Customs Union (*Tamozhennii Soyuz*) alongside the Russian Federation and the Republic of Belarus, as well as in the Eurasian Economic Union.

As a separate challenge there is a task to eliminate such types of property rights as the right of economic management (*pravo khozyaistvennogo vedeniya*) from the law of Kazakhstan and cease to use the form of a state enterprise (*gosudarstvennoye predpriyatiye*) for legal entities performing business activities.[*39] The following understanding is becoming more common among legal scholars: that corporate forms of legal entities represent the most appropriate choice for business purposes, and that developed corporate legislation serves the purpose of economic progress.

The following can be considered to be important tasks on the route of development of corporate law in Kazakhstan:

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37 Ф.С. Карагусов. Правовое положение коммерческих организаций по законодательству Республики Казахстан [F. Karagussov. 'Legal Status of Commercial Organisations under the Laws of the Republic of Kazakhstan]. Алматы [Almaty], 2012 (333 p.) (in Russian); Ф.С. Карагусов. Основы корпоративного права и корпоративное законодательство Республики Казахстан [F. Karagussov. 'Basics of Corporate Law and Corporate Legislation of the Republic of Kazakhstan]. 2nd ed. amended. Алматы: Издательство «Бастау», 2011 [Almaty: Bastau, 2011] (368 p.) (in Russian); F. Karagussov and S. Tynybekov. Development of corporate law in the Republic of Kazakhstan. –KazNU Bulletin (Law series), 2015, №1(73) (537 p.), pp. 158 – 163.

38 G. Roth, P. Kindler. The Spirit of Corporate Law: Core Principles of Corporate Law in Continental Europe. Germany: C.H. Beck, Hart, Nomos, 2013 (190 p.), pp. 1–26; P. Davies (Note 6), pp. 61–71; P. Hommelhoff (Note 1), pp. 585–603.

39 М.К. Сулейменов. Гражданское право как наука: проблемы теории и практики [M. Suleimenov. 'Civil Law as the Science: Problems of the Theory and Practice']. – Гражданское право как наука: проблемы истории, теории и практики: Материалы междунар. науч.-практ. конф. в рамках ежегодных цивилистических чтений, посвященной 70-летию М.К. Сулейменова (Алматы, 29-30 сентября 2011 г.) ['Civil Law as the Science: Problems of the History, Theory and Practice: Materials of the International Scientific and Practical Conference' (Almaty, 29–30 September 2011)]. М.К.Сулейменов [M. Suleimenov] (Ed.). Алматы [Almaty], 2012 (800 p.), p. 34 (in Russian).

• Development of the legal framework for use of a joint-stock company as an organisational form to conduct large-scale business and qualified types of business activities (mostly in the fields of finance, banking, and capital markets) could be carried out. The legal framework for formation and activities of JSCs shall be based on imperative legal regulations and companies' professional management allowing a guarantee of transparent corporate governance and efficient control of the financial performance of the company, better protection of shareholders' rights and creditors' interests, effective achievements of business goals of the company, and correlation of its activities with public interests.

Since 2001, the National Bank of Kazakhstan has concentrated on creation of a proper corporate governance and financial reporting system and their improvements in joint-stock companies acting in the jurisdiction of Kazakhstan. Enactment of the current JSC Law, in 2003, has been implemented as a major step in this regard. And in this context the JSC Law has been amended to a significant extent numerous times. For example, in 2007 an amending law was passed to improve protection of rights of minority shareholders and new concepts were introduced into the legal environment – 'minority shareholders', 'corporate web site', 'corporate secretary', and some others – together with introduction of the disclosure and information access mechanisms ensuring heeding of interests of shareholders in JSCs and members of LLPs. In 2008, a new set of amendments to the JSC Law were made, to ensure sustainability of the financial system in Kazakhstan by way of increasing the role of the board of directors alongside the management board in managing a company, as well as restricting possibilities for major shareholders to interfere in the functioning of the corporate governance bodies of a JSC. Later, in 2011–2014, other amendments were made to the JSC Law and other legislative acts of Kazakhstan, to regulate JSCs and LLPs with the State's direct or indirect participation in their capital, to provide better protection of investors' rights by strengthening provisions related to responsibilities and liability of JSC directors and managers, to promote development of the securities market, etc.

However, the idea of a better legal framework for corporate governance practice and organisational structure in JSCs still remains important. The work focused on creation of a legislative basis harmonised with modern patterns of legal regulation for corporate relations in the EU and worldwide is ongoing.

• Improvement of legislation related to economic partnerships is necessary. This is needed to exclude inconsistency in current legislation addressing the status and activity of different types of economic partnership, as well as to increase investment-attractiveness of Kazakhstani business. The need for such reform is obvious in Kazakhstan, and it has great significance in terms of both legal development in the field of private law and economic growth in Kazakhstan.

• Harmonisation or unification of corporate legislation in the space of the Eurasian Economic Union has been inevitable, and an attempt at harmonisation of private law within the EurazEC has taken place already. This work remains unfinished for various reasons, of different nature. One of them was the failure to agree on the role and significance of the proposed EurazEC civil code: (i) whether it should serve as a binding legal instrument or as a set of recommendations to improve national legislation and (ii) whether such improvement should be made with a view to unification or harmonisation, or as something else.

Nevertheless, this co-operation had a very positive impact on creation of common approaches to regulate corporate relations and improve national laws on private-law corporations. Particularly, this gave rise to discussions of whether only commercial organisations having members can be considered to be corporations or, instead, such entities as non-commercial organisations can also be subject to corporate law.

The approach adopted to amend the Russian Civil Code by direct indication that corporate relations shall be regulated by civil legislation and that most of the legal entities performing business activities in a market economy are corporations[*40] has been shared in Kazakhstan.

However, even with the recent modernisation of the Russian Civil Code, a certain inconsistency remains in separating commercial entities and non-commercial organisations. The newly introduced classification into corporations and non-corporate organisations has been carried out in addition to the existing separation between commercial and non-commercial organisation.[*41] And this seems to cause unnecessary

[40] The concept paper concerning development of civil legislation of the Russian Federation (Note 15), p. 25; Ye. Sukhanov (Note 4), p.147 – 187; Г.Е. Авилов, Е.А. Суханов. Юридические лица в современном российском гражданском праве [G. Avilov, Ye. Sukhanov. 'Legal Entities in Modern Russian Civil Law']. Москва: Вестник гражданского права, том 6, 2006, №1, [Moscow: Herald of Civil Law, Volume 6, 2006, #1], pp. 17–18 (in Russian).

[41] Е.А. Суханов. О концепции развития законодательства о юридических лицах [Ye. Sukhanov. 'About the Concept of Development of Legislation Concerning Legal Entities']. – Е.А. Суханов. Проблемы реформирования Гражданского

complication in the legislative structure for the following reasons: (i) non-commercial organisations have a different organisational structure, and no membership rights exist in non-commercial membership organisations similar to those existing in business corporations, and (ii) as Basin indicated, there are some commercial organisations (like state enterprises) as well as non-commercial organisations (like public unions and funds, along with religious organisations) that are not corporate organisations, and totally different rules apply to these types of legal entities.[*42] Finally, there are more common legal characteristics for all types of non-commercial organisations than for non-commercial and commercial corporations, which makes it more reasonable to avoid extension of any general regulation to both commercial and non-commercial corporations (other than that common for all types of legal entities).

Therefore, it appears to be more practicable if corporate law (or company law) were institutionalised in Kazakhstan primarily (or only) as the law regulating relations pertaining to implementation of the material interest and property rights of private persons in connection with their participation in business entities of any corporate form. In turn, any membership in non-commercial organisations and their activities would be regulated by a separate set of rules because the primary goal for such regulation is to provide adherence to public and/or non-property interests, and not to protect property rights of a private person (whether it be a private-law corporation, a member of one, or a creditor). It has been the traditional approach in Kazakhstani law to regulate commercial and non-commercial organisations separately,[*43] and this has been reflected in the legislation: (i) the law on non-commercial organisations has been separated from the legislation dealing with organisational forms for commercial organisations (though regulation of both types of legal entities is based on the Civil Code's concept of a legal entity and its general provisions applicable to all legal entities) and (ii) the notion of corporation has been applied with respect to commercial organisations based on membership (though often limited to joint-stock companies) only and not to non-commercial organisations. Such an approach differs from the one reflected in Russian law wherein the distinction between commercial and non-commercial organisations has not been made so clear.[*44]

9. Conclusions

The Civil Code of Kazakhstan establishes the most important provisions for regulation of organisational corporate forms for economic activities. These provisions include the legal definition of the concept of a legal entity, classifications of legal entities and their organisational forms, and general regulation applicable to each separate form of legal entities. All the detailed regulation of each of the allowed organisational forms of commercial legal entities is done on the level of separate legislative acts supported (in certain situations) by lower-level regulations.

In relation to business entities, all the types (forms) of corporate organisations under the laws of Kazakhstan in their basic features can be compared with types of companies provided for in the European jurisdictions (e.g., by the Estonian Commercial Code), though certain jurisdiction-specific elements can certainly be found.

There are sufficient grounds to conclude that the Kazakhstani legislator acknowledges that: (i) a corporation shall be considered to be a legal entity established by its members participating in formation of the entity's assets and being entitled to participate in the process of managing the entity; (ii) the core object of corporate relations includes rights and obligations in connection with foundation of a corporate organisation, formation of its assets, managing its affairs and its representation in the process of its economic activities, and protection of rights of its members and creditors; and (iii) such corporate relations are predominantly regulated by civil law.

кодекса России: избранные труды 2008–2012 гг. [Ye. Sukhanov. 'Problems of Reforming the Civil Code of Russia: Selected Works 2008–2012]. Москва: Статут, 2013 [Moscow: Statut, 2013] (494 p.), pp. 82 – 83 (in Russian).

42 Ю.Г. Басин. Юридические лица по гражданскому праву. Понятие и общая характеристика. [Yu. Basin. 'Legal Entities in Civil Law. The Concept and General features']. – Ю.Г. Басин. Избранные труды по гражданскому праву. Предисловие М.К. Сулейменов, Е.У. Ихсанов. Сост. Сулейменов М.К. Алматы: АЮ – ВШП 'Адилет', НИИ частного права КазГЮУ. 2003 [Yu. Basin. 'Selected Works on Civil Law'. Introduction by M. Suleimenov and Ye. Ikhsanov. Compiled by M. Suleimenov. Almaty: Law School 'Adilet', 2003] (734 c.), p. 95 (in Russian).

43 Yu. Basin (Note 42), pp. 101–104.

44 Persons in Civil Law (Note 36), pp. 177–178.

Nevertheless, since the company / corporate law in Kazakhstan does not have its institutionalisation in accordance with the best patterns of developed jurisdictions, the need for its further development and improvement seems to be obvious. Certain directions for such development are of a similar nature to those existing in countries with a developed market economy, though others can be identified as Kazakhstan-specific issues. The following position seems to have more perspective for implementation: (i) the concepts of a corporation and corporate relations shall be those of 'business law', not of legislation of non-commercial organisations, and (ii) legislation pertaining to business activities should be separated from laws regulating non-commercial activities. Such a functional approach appears to have proved its practicability and efficiency in European jurisdictions.[*45] And we believe it can be effective within the legal system of Kazakhstan.

Finally, legislative solutions for all of the aforementioned tasks, as well as other, related matters, require joint efforts of the legislator, the government, businesses, and legal scholars. None of the tasks can be properly resolved in the law if there is a lack of adequate legal research (including doctrinal analysis of a national law, as well as legal historical and comparative study) proposing reasonable and well-grounded legal constructions and mechanisms.

45 P. Hommelhoff (Note 1), pp. 585–592.

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The Estonian Foundation

What is Missing for It to Be A Well-Designed Wealth-Management Vehicle for Local and Foreign High-Net-Worth Individuals?

1. Introduction

Private foundations (PFs)[*1] ensure the undivided, secure, and profitable placement of assets, thereby offering solutions for succession and inheritance issues, concerns over wealth taxes, and matters related to the global economy, which have been identified as the three main factors threatening wealth creation both over the past 10 years and for the coming decade.[*2]

While many countries[*3] have chosen implementation of the Anglo-American trust to cater for these purposes, the European PF landscape too has been evolving in recent decades[*4]. The leanings towards the PF model rather than the trust model are probably related to the PF being a more familiar and a clearer structure for civil-law countries. Many would-be settlors[*5] may be baffled to learn that trusts do not exist as separate legal entities and that the proposed estate-planning exercise consists of an assignment of valuable and hard-earned property to a stranger, who will then hold it in his own name. Also, it might seem more secure to establish a PF, the validity of which cannot be questioned as easily as the well-developed doctrine of 'sham' trusts might allow[*6].

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1 Public foundations, however, operate in the public interest (e.g., with religious, scientific, artistic, educational, cultural, or charitable aims).

2 Knight Frank Wealth Report 2016, p 10. Available at http://content.knightfrank.com/research/83/documents/en/wealth-report-2016-3579.pdf (most recently accessed on 30.3.2016)

3 These include Luxembourg, France, San Marino, Romania, Malta, and the Czech Republic in Europe, along with Quebec, Canada. One of the most recent examples is the trust model provided by Book X of the Draft Common Frame of Reference.

4 Whereas in Austria before 1993, foundations had no choice except to be charitable, the Private Foundations Law of 1993 enabled PFs. In Belgium, the PF was introduced in 2002, and the foundation sector in Belgium has been growing ever since. Malta enacted specific foundation legislation in 2007. The legal and tax landscape surrounding Dutch PFs dramatically changed with the introduction of a new tax doctrine on 'segregated private capital' as of 2010. Even before that, one specific foundation form, the so-called 'depository foundation' (*stichting administratiekantoor*, STAK) for the purpose of acquiring and administering assets (shares) was widely used. In Luxembourg, a draft act for the introduction of PFs was submitted to the Parliament in 2013, but it still seems to be under discussion for purposes of meeting the anti-money-laundering requirements.

5 The settlor is the person who sets up a trust, transfers the assets to the trustee, and determines the trust terms (the founder's equivalent).

6 The trust might be regarded as a 'sham' in a case wherein it is set up to harm existing creditors or with no actual change in the control of the property. In this case, it can be deemed to be void *ab initio* and brings with it adverse tax consequences as well as the exposure of the trust fund to claims by creditors, spouses, heirs, and other dependants.

Estonia has had its foundations' regulation – in the form of the Estonian Foundations Act[*7] (FA) – in place since 1995. As it does not impose specific restrictions on the purpose of foundations, they can be used for protecting private wealth or benefiting present or future generations of a family and not merely for public charitable purposes. Nevertheless, the local high-net-worth individuals (HNWIs)[*8] prefer to use schemes offered by other countries, and Estonia's export of the relevant service is a non-issue today. This article explores why this is so and proposes amendments to the current regulation that would give rise to a new wealth-management vehicle inspired by PF regimes introduced in other countries and that could be used by Estonians and foreign HNWIs alike.

2. The objectives of a PF

Worldwide, HNWIs use PFs for a large variety of purposes, the following chief among them:

- They can be used to prevent the dispersal of the estate (business) after one's death.
- They can ensure continuity in management. This could be useful when a founder has no children or if he considers some of his heirs not fit to run the business or they do not wish to do so.
- They can enable the reaching of a specific goal. The familial estate can be assigned to a specific purpose, such as providing for a relative in the case of incapacity or lack of financial maturity. For example, parents with a disabled or minor child may be concerned with who will manage their child's assets and how they will be managed upon their own death or perhaps when they themselves become disabled. Nowadays, people are tending to live longer, and there is an increase in the number of people who are affected by conditions such as dementia and Alzheimer's disease, which can result in restricted active legal capacity.
- Another purpose is to protect specific assets, as in the case of keeping the family home out of the reach of creditors. This could be especially attractive for businessmen or for those whose professions open them up to the risk of civil liability (e.g., doctors or lawyers), but in light of today's economic and financial instability – and, in some regions, political instability – it could be attractive for anyone. It should be kept in mind, though, that there are usually some specific rules protecting creditors in a case wherein a PF is set up to harm existing creditors or with no actual change in the control of the property.
- They can also be used to optimise tax liability.

As already noted, the FA does not impose specific restrictions on the purpose of a foundation and a foundation therefore could be used for public purposes as well as private ones (including all of those mentioned above).

It is possible for the founder to provide a series of provisions in the bylaws to ensure that the future functioning of the PF conforms to his wishes, including the objectives for the PF, the (set of) beneficiaries, and provisions for the dissolution of the PF[*9]. A foundation does not have members, and the law excludes transfer of the founder's rights to successors. The participation of the beneficiaries in a PF's management board is prohibited, and it can also be ruled out at the level of the supervisory board. In a nutshell, the PF provides a possibility of 'locking' the property in a separate vehicle on the operation of which third parties have no direct impact. Other forms of legal entity – such as private limited companies – do not provide quite the same solution.

Nevertheless, much of the regulation in the FA seems to be inspired by times when foundations were used only in the public interest, which supposedly required stricter public control options.

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7 Sihtasutuste seadus. – RT I 1995, 92, 1604; 30.12.2015 (in Estonian). English text available at https://www.riigiteataja.ee/en/eli/504022016004/consolide (most recently accessed on 30.3.2016).

8 HNWIs are defined as those persons having investable assets of US$ 1 million or more, excluding their primary residence and collectibles, consumables, and consumer durables.

9 The mandatory provisions are listed in §8 (1) of the FA, but under §8 (2) of the FA, the bylaws may prescribe other conditions that are not contrary to the law. Under §40 (2) 3) of the FA, any further changes in the bylaws must be consistent with the objectives of the PF.

3. Publicity

One of the biggest problems affecting Estonian PFs is the lack of privacy: the information on a PF is available to everyone from the register.

According to §6 (1) of the FA, the foundation resolution shall set out the data (name, address, etc.) pertaining to the foundation, along with the founders, the members of the management/supervisory board, and the assets to be transferred to the foundation by the founders.

Under §8 of the FA, other terms shall be set forth in the bylaws: the objectives; the (set of) beneficiaries; the distribution of the assets of the foundation upon dissolution of the foundation; the procedure for appointment and removal of members of the management/supervisory board, along with their term of office; the procedure for amendment of the bylaws; the conditions for dissolution of the foundation; the remuneration of the board members; the procedure for use and disposal of assets; and any other conditions provided by law or that are not contrary to the law. This also means that the conditions for how the distributions to the beneficiaries are to be made or the requirements/exclusions for board members must be laid out in the bylaws, as the FA does not foresee the possibility of a separate 'letter of wishes'*[10].

After the PF is registered, both of the above-mentioned documents (the resolution and the bylaws) are accessible to anyone (for a fee of two euros) from the register of not-for-profit associations and foundations.

In addition, the undefined terms 'interested person' and 'person with a legitimate interest' pop up here and there in the FA. For example, a 'person with a legitimate interest' may, pursuant to §39 of the FA, demand information from a foundation, including the information pertaining to fulfilment of the objectives of that foundation, the sworn auditor's report, and accounting documents. Subsection 39 (2) of the FA grants the same right to 'all interested persons' if the bylaws do not determine a set of beneficiaries. Presumably, those terms refer to persons whose rights would be affected by the activities of the foundation or its board members and are not meant to satisfy plain curiosity; nevertheless, these provisions would need a reassessment if the regulation of PFs is to be improved.

Furthermore, under §34 (4) of the FA, Estonian PFs have to submit annual accounting reports to the register, and these, too, are publicly available from the register. Hence, everybody can access all the information pertaining to the financial situation, economic performance, and cash flows of any PF. An audit of the annual accounts is compulsory on certain conditions*[11].

If we look at other countries' PF regulations, we can see that they offer more privacy.

In Austria, the declaration of establishment can be split into two documents: the statutes and the bylaws.*[12] The nomination of beneficiaries and giving directions as to distributions to be made to the beneficiaries can be settled in the bylaws, which are not open to the public for inspection.*[13] However, if the PF is to qualify for tax advantages, the documents must still be disclosed to the Austrian tax authorities.*[14]

Austrian PFs are subject to bookkeeping and financial reporting in the same manner as a corporation, but the public has no access to the reports of a PF and only the tax authorities are aware of its income, wealth, and assets.*[15] A PF is, however, subject to an annual audit by an independent professional auditor, who has to assess whether the PF's activities have been in line with its purpose as stated in the PF documents whether its funds have been managed properly and wisely, whether all housekeeping tasks have been correctly performed, and whether the PF is fully compliant with the law (including tax regulations). The auditor is also to review the PF's compliance with the anti-money-laundering (AML) rules.*[16]

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10 Which, in the case of trusts (and in some countries, PFs too), is an indication by the settlor of the manner in which he wishes the trustees to exercise their discretion in relation to a trust.

11 See §91 (2) 4) of the Auditors Activities Act (Audiitortegevuse seadus. – RT I 2010, 9, 41; 30.12.2015, 8 (in Estonian)). English text available at https://www.riigiteataja.ee/en/eli/504022016002/consolide (most recently accessed on 30.3.2016).

12 M. Petritz, A. Kampitsch. Austria: The Austrian private foundation. – *Trusts & Trustees* 20/6 (July 2014), pp. 543–544. – DOI: http://dx.doi.org/10.1093/tandt/ttu075.

13 F. Schwank. The Austrian private foundation as a holding structure for global family wealth. – *Trusts & Trustees* 20/1–2 (February–March 2014), p. 173. – DOI: http://dx.doi.org/10.1093/tandt/ttt247.

14 Hasch & Partner Anwaltsgesellschaft mbH. The Austrian private foundation: A brief guide for the investors, p. 4. Available at http://hasch.eu.dedi2098.your-server.de/files/channels/publikationen/Austrian_Private_Foundation_Brochure__E_.pdf (most recently accessed on 30.3.2016).

15 F. Schwank. The Austrian private foundation: Between transparency and bank secrecy. – *Trusts & Trustees* 16/6 (July 2010), p. 418. – DOI: http://dx.doi.org/10.1093/tandt/ttq059.

16 *Ibid*., p. 416.

In Belgium, the bylaws of a PF are public[*17], but the accounting obligations depend on the size of the foundation[*18], which also determines where the relevant information has to be filed, as there is no central database for the foundation sector[*19]. Only 'large'[*20] foundations are to be audited.

In Malta[*21], the Netherlands[*22], and Luxembourg[*23], there is no disclosure of founder or beneficiary names, the PF deeds are not public, and there is no need for annual reporting. However, the final version of Luxembourg's draft law for PFs might come with some changes to reflect the requirements of the Fourth Anti-Money Laundering Directive[*24].

The directive, which must be transposed by 26 June 2017, focuses specifically on enhancement of beneficial ownership's transparency. In short, it requires Member States to establish central registers for the information on ultimate beneficial owners (UBOs). The UBOs in the case of trusts and PFs[*25] are the settlor/founder, the trustee/administrator(s), the protector(s) (presumably, one or more members of the supervisory board in the case of PFs), the beneficiaries (or, if not determined by name, the class of persons in whose main interest the legal arrangement or entity is set up or operates), and any other natural person exercising ultimate control over the trust – whether by means of direct or indirect ownership or by other means.[*26]

This information must be accessible to competent authorities; financial intelligence units; and, as part of customer due diligence, obliged entities (such as banks or notaries). Persons who can demonstrate a legitimate interest are to have certain access rights too (Art. 30(5)). The threshold laid down by the directive on 'legitimate interest' is that that interest must be related to money laundering, terrorist financing, or the related basic offences – such as fraud and corruption. Journalists are expected to be included in this group.[*27] This has opened up a heated debate about privacy. In a PwC study addressing the impact of the UBO register, the following has been stated:

> It goes without saying that the interests of those involved may be seriously prejudiced by the careless or incompetent processing of personal details […]. [E]ntrepreneurial and high-net-worth families fear that the public information will lead to undesirable mentions on 'lists of millionaires' and the not-inconceivable risk of blackmail, violence, intimidation, kidnapping or fraud. This is particularly so in the case of minors or other vulnerable individuals.[*28]

When we bear this in mind, it seems even more unacceptable that in Estonia excessive information related to PFs is open for everyone. And it is not surprising that people are choosing other countries for private

17 A. van Zantbeek, J. Drayey. The Belgian private foundation. – *Trusts & Trustees* 16/6 (July 2010), p. 511. – DOI: http://dx.doi.org/10.1093/tandt/tts052.

18 O. Farny, *et al.* Taxation of foundations in Europe, p. 12. Available at https://media.arbeiterkammer.at/wien/PDF/studien/Studie_Stiftungsbesteuerung_in_Europa_englisch.pdf (most recently accessed on 30.3.2016).

19 V. Xhauflair, et al. Belgium Country Report, EUFORI Study, p. 10. Available at http://euforistudy.eu/wp-content/uploads/2015/07/Belgium.pdf (most recently accessed on 30.3.2016).

20 PFs that fulfil one or more of the following three criteria: 50 full-time staff, EUR 6,250,000 in annual revenue, and EUR 3,125,000 in total assets. – see Farny *et al.* (see Note 18), p. 10.

21 A. Cremona. Malta: Foundations – the new vehicle of choice? – *Trusts & Trustees* 16/6 (July 2010), p. 481. – DOI: http://dx.doi.org/10.1093/tandt/ttq046.

22 M. Vogel. The Dutch foundation: The solution in tax planning, estate planning and asset protection for high net worth individuals worldwide. – *Trusts & Trustees* 21/6 (July 2015), pp. 686–690. – DOI: http://dx.doi.org/10.1093/tandt/ttv067; M. Bergervoet, J. Starreveld. How private is the Curaçao private foundation, Curaçao trust, and the Dutch private foundation? – *Trusts & Trustees* 19/6 (July 2013), pp. 577–583. – DOI: http://dx.doi.org/10.1093/tandt/ttt080.

23 Luxembourg's draft law for introducing the PF did not require the names and details of the founder(s), the beneficiary/beneficiaries, and the assets allocated to the PF to be published or disclosed. Some changes might be visible in the final act, however, as it is being amended to reflect the requirements of AML regulations. See C.N. Kossmann. 'Luxembourg: The Luxembourg Patrimonial Foundation: what's new in Luxembourg?' – *Trusts & Trustees* 21/6 (July 2015), pp. 679–680. – DOI: http://dx.doi.org/10.1093/tandt/ttv056.

24 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC. – OJ L 141, 5 June 2015.

25 In the case of foundations the natural person(s) holding positions equivalent or similar to those referred to in the case of trusts are deemed to be the UBOs, under Article 3 (6) (b) (c) of this directive.

26 Please see Note 25 above.

27 PwC Netherlands. Finding a balance between transparency and privacy – a study of the impact of the UBO register on high-net-worth families and family businesses in twelve European countries, p. 10. Available at https://www.pwc.nl/en/assets/documents/pwc-finding-a-balance-between-transparency-and-privacy.pdf (most recently accessed on 30.3.2016).

28 *Ibid.*, p. 16.

wealth-management purposes. Publicity on that level could be explained in the case of foundations with a public purpose (charities) that have external donors or maybe in cases in which a foundation has engaged heavily in business activities (to protect possible creditors), but in cases of a classical family foundation with an objective of holding property, it raises the question of whether there are third parties actually needing that kind of protection.

The third parties' rights might come under discussion when a transfer of assets is made to the PF to defraud or prejudice creditors, is made within a specified period before the transferor becomes bankrupt, is made with intent to defeat a claim for financial relief upon divorce, or is made for purposes of getting around fixed or discretionary family-protection rules pertaining to a donor's family and dependants after his or her death. But even in those cases, there is probably no need for everyone to access the PF's terms and documents, income details, and asset information – it would be enough if certain public authorities and interested persons (in a narrower sense) were to have the right. What might need reconsidering in updating of the PF regulations is whether the current regulations and rules on conflict of laws pertaining to the above-mentioned situations are sufficient: the provisions regulating recovery (or 'clawback') in bankruptcy law, gifts made to a third party with the purpose of causing damage to a person entitled to claim a compulsory portion in succession law, setting aside of transfers on the grounds of ostensibility or conflict with good morals or public order (see §89 and §86 of the General Part of the Civil Code Act[*29], or GPCCA), and grounds for the compulsory dissolution of a foundation (see §40 of the GPCCA and §46 of the FA).

4. Bodies of a foundation: Two boards, four people

Another thing that needs reconsideration is the number of persons and organs required to run a PF. At the moment, §16 of the FA foresees two mandatory organs: the management and the supervisory board. According to §17 (7) and §18 (3) of the FA, the management board manages and represents the foundation but has to adhere to the lawful orders of the supervisory board. The management board may consist of one or several members, who must be natural persons. Subsection 17 (5) of the FA prohibits beneficiaries or persons with an equivalent economic interest from being members of the management board. Also, a member of the supervisory board shall not be a member of the management board (under §17 (6) of the FA).

According to §24 of the FA, the supervisory board plans the activities of the foundation, organises the management of the foundation, and supervises the foundation's activities. Subsection 26 (1) of the FA foresees that the supervisory board must have at least three members (again, natural persons). The founder and the beneficiaries can be members of the supervisory board (if this is not prohibited by the bylaws).

Consequently, the founder has to find at least three trustworthy persons (in addition to himself) – one to be a member of the management board and three for the supervisory board – to set up a PF. For a small family-wealth-protection vehicle, this might be too much.

In Malta, only the board of administrators is mandatory. The founder is the one who may exercise supervision over the administration of the PF. He is also entitled to intervene in the appointment of administrators or in the disposal of the assets, when a court is dealing with these issues. Administrators of a PF may be either natural or legal persons. In the latter case, there must be at least three directors. Administrators do not need a licence to act as such. A founder may be an administrator of a foundation and may also be a PF's beneficiary within his lifetime: if the founder is a beneficiary, that founder may not, at the same time, act as the sole administrator of the PF. The terms for the PF may provide for the establishment of a supervisory council consisting of at least one member or for the office of one or more protectors with similar functions.[*30]

In Belgium, having a supervisory board is not mandatory, but a PF must have at least three directors (either individuals or legal entities).[*31] The existence of a supervisory board is voluntary also in the Netherlands.[*32]

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29 Tsiviilseadustiku üldosa seadus. – RT I 2002, 35, 216; 01.10.2015 (in Estonian). English text available at https://www.riigiteataja.ee/en/eli/528082015004/consolide (most recently accessed on 18.6.2016).

30 J. Scerri-Diacono. Malta: A synopsis of the basic rules regulating private foundations. – *Trusts & Trustees* 14/5 (June 2008), pp. 320–333. – DOI: http://dx.doi.org/10.1093/tandt/ttn029.

31 A. van Zantbeek, J. Drayey (see Note 17), p. 510.

32 M. Vogel (see Note 22), p. 686.

In Austria, the board of directors has to consist of at least three members. The founder normally appoints the members of the board in its initial composition, and the court subsequently appoints any new members. A (current) beneficiary, a spouse or partner thereof, other relatives (as far as the third degree), and legal persons may not be members of the board. The founder is not generally excluded from membership of the board unless he is a current beneficiary. A supervisory board is mandatory only if the PF has more than a certain number of employees[*33].

Under the draft law of Luxembourg, one or several directors manage the PF. A supervisory board becomes mandatory if the PF has more than five beneficiaries or if its assets exceed 20,000,000 euros. The same person can be founder, beneficiary, and manager. A manager cannot be a member of the supervisory board.[*34]

In reconsideration of the necessity of the two-tier structure and the number of people involved, the rights and obligations of the current two boards and requirements imposed on the board members certainly need some reassessment too. For example, to ensure that the assets are managed professionally and profitably even when there is only one person to manage the PF, it is possible to foresee certain requirements as to the skills and personal qualities possessed by a board member. Different solutions can be developed for different cases: for example, that a requirement for a three-member supervisory board should apply only to a foundation whose assets exceed a certain threshold. And, as mentioned above, there already exists the notion of 'interested persons', who have several opportunities to turn to the courts to exercise control over the activities of the foundation: for instance, an interested person can request the court to decide on replacement of a member of the management/supervisory board[*35], and, according to §38 (1) of the FA, an interested person may also request conducting of a special audit to address matters related to the management or financial status of the foundation.

5. The problem of double taxation

Next, we will analyse the main problems surrounding the current taxation of PFs in Estonia and suggest solutions.

In practice, PFs are often used for holding shares of a company, exercising shareholders' rights, and passing on the dividends received to the beneficiaries.

When an Estonian company pays dividends (or makes payments from the equity of the company, liquidation proceeds, or other sources listed in §50 (2) of the Income Tax Act (ITA)), it has to pay income tax.[*36] According to §50 (1^1) and §50 (2^1) of the ITA, no income tax is to be charged if the parent company of the relevant company makes further distributions from that profit. These exemptions cannot be applied to a foundation, as it does not have owners and the payments cannot be regarded as dividends or any other type of payments from equity. There is no fundamental difference in the case of the PF owning shares of a non-Estonian legal entity, as non-resident companies also normally pay taxes in their countries of tax residency before transferring dividends to the PF. Hence, a second taxation of the relevant income takes place when the PF transfers funds to beneficiaries. It is not entirely clear how the payment should be defined under the ITA, but there are two options: it is more likely that the payment should be regarded as a gift (which under §49 (1) of the ITA is taxable if made by a legal entity). The second alternative would be to define the payment as an expense not related to business or activities specified in the bylaws and tax it accordingly (under §51 (3) of the ITA). Under both options, there is no further taxation if the beneficiary is a resident natural person (see §12 (2) and §19 (3) 6) of the ITA). When the beneficiary is a non-resident, further taxation depends on the country of residence.

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33 C. Prele (ed.). *Developments in Foundation Law in Europe*. Springer Netherlands 2014, p. 16. – DOI: http://dx.doi.org/10.1007/978-94-017-9069-7.

34 Ogier Law Firm. Luxembourg private foundation. Available at https://www.ogier.com/publications/l-luxembourg-private-foundation (most recently accessed on 30.3.2016).

35 If there is good reason – consisting, above all, in failure to perform a board member's duties to a material extent, inability to participate in the work of the supervisory board, or significant damaging of the interests of the foundation in any other manner – according to §28 (1) 3) and §20 of the FA.

36 Tulumaksuseadus, §50 (1). – RT I 1999, 101, 903; 17.12.2015, 2 (in Estonian). English text available at https://www.riigiteataja.ee/en/eli/ee/530012014003/consolide/current (most recently accessed on 30.3.2016).

When a PF sells shares of a company and subsequently distributes the gains to beneficiaries, taxation of the distribution takes place in the same way as in the example above. As the gain is already taxed at the level of the investee, double taxation takes place here also, and the same problem is applicable for companies[*37].

The solution for resolving the first issue would be to treat distributions to PF beneficiaries made in accordance with the bylaws as if they were dividends of a company. With this approach, all exemptions that are applicable to dividends would be applicable also to payments to beneficiaries from the profits. Payments to third parties or expenses not related to activities specified in the bylaws would be treated in the way they are now.

To eliminate double taxation of the gains from sales of shares or other securities of entities, another exemption should be added to §50 (1^1), stating that income tax is not to be charged on dividends if the dividend is paid out of the profit attributable to sales of shares or other securities of an entity that is not registered in a low-tax-rate territory[*38].

Another issue is the distribution of endowments to beneficiaries. Payments of this nature are currently taxed similarly to payments from dividend income, as described above. However, there is no gift or inheritance tax in transactions between natural persons[*39], and when a company decreases its share capital and distributes the funds to owners, no tax is charged on the portion not in excess of the contributions made to the equity of the company. Hence we propose clarifying that distribution of endowments to beneficiaries would not trigger tax for a PF or beneficiary.

The above-mentioned solutions are proposed in light of the current Estonian regulation under which a foundation is liable for tax in its own right. But in other European countries we can find a different approach, wherein PFs are regarded as tax-transparent and the tax liabilities are imputed to the beneficiaries (or founder). This has been called the 'look-through' approach. In that case, the PF itself is not regarded as a tax resident of the country where it is registered, and double taxation treaties do not apply to it.[*40] The tax obligations of the beneficiaries (and, in some cases, the founder) depend on the regulations of their respective home countries. This is why the 'look-through' approach seems preferable especially when the founder and/or beneficiaries are not residents of the country where the PF is registered: the taxation system might be easier to understand. When a tax-transparent PF is established, a tax-resident holding company is usually established too, in the same country, to benefit from the double taxation treaties. Usually, in application of the 'look-through' approach, the PF is not permitted to be engaged in trading and other business activities.[*41] In some countries, such as Malta[*42], it is possible for the PF to decide which approach – being considered tax-transparent or instead an opaque entity – it wants to be applied. A PF wishing to engage in normal business activities would select the company taxation approach, and a PF that would be interested mainly in focusing on family wealth-protection would choose the 'look-through' approach. The choice of one or the other option might also be informed by differences in tax consequences for founders and beneficiaries in their countries of residence.

We propose that Estonia too introduces legislation enabling PFs to select an option of tax-neutral and transparent treatment (and thereby be exempt from corporate taxation) at the moment of establishment. In this case, the income of the PF would comprise only royalties, dividends, capital gains, interest, rent, or other passive income, since the PF would be prohibited from trading or business. The decision would be irrevocable; i.e., it could not be changed within the lifetime of the PF.

37 See E. Uustalu. Põhimõtteline muudatus maksusüsteemi konkurentsivõime suurendamiseks: vabastame osaluste võõrandamise topeltmaksustamisest ['A fundamental change in the tax system to increase competitiveness: Getting rid of the double taxation of transfer of shares']. – *MaksuMaksja* 2008/4 (in Estonian). Available at http://www.maksumaksjad.ee/modules/smartsection/item.php?itemid=730 (most recently accessed on 30.3.2016).

38 For the definition of a low-tax-rate territory, see §10 of the ITA.

39 However, we need to take into account that the acquisition cost for the beneficiary is zero and there could be tax consequences at the point of sale of the asset (e.g., with respect to real estate and investments).

40 OECD Model Convention with Respect to Taxes on Income and on Capital, 2014, Article 1 and Article 4(1). Available at https://www.oecd.org/ctp/treaties/2014-model-tax-convention-articles.pdf, (most recently accessed on 31.3.2016).

41 See, e.g., M. Vogel (see Note 22), p. 689.

42 Section 27D.(1)(b) of the Maltese Income Tax Act, passed on 1.1.1949 and last amended on 15.3.2016. Available at http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8658 (most recently accessed on 31.3.2016).

In addition, the ITA needs to clarify that:

1. the PF itself is not a taxpayer[*43]
2. distributions received from a PF will be tax-exempt for resident[*44] beneficiaries (to avoid double taxation) in the event that:
   a) the payment is made on account of the founder's endowments,
   b) the payment is made on account of dividend or other income from which distributions are not (double-)taxed for companies under §50 of the ITA, and
   c) the payment is made on account of gains from sales of shares or other securities
3. in all other cases, including those of interest, rental, and royalty income that will not be taxed on PF level, the PF follows the withholding rules specified in §§ 41–43, with account taken of the income tax paid or withheld abroad in accordance with §45.

6. Economic considerations

Next, we should ask why a legislator would favour the establishment of PFs and hence make the necessary changes. If we look again at the other countries, we find that the political rationale behind PFs has been based on three ideas: promoting the flow of domestic capital back in from abroad, preventing domestic capital from becoming capital outflow, and promoting the inflow of foreign capital.[*45]

What would be the financial benefits for Estonia (the annual effect on GDP and the state budget) from non-residents starting to use Estonian PFs? We assume that most of these PFs would not be involved in trading and other active business, so a tax-neutral taxation approach would be applied and they would not pay income tax in Estonia.

The main target markets for Estonian PFs would assumedly be Europe, Russia and the other CIS states, and Turkey, and the target client group would be HNWIs with more than $10 M of investable assets (multimillionaires). Current numbers indicate that there are 145,000 multimillionaires in the countries mentioned above, and the forecast for 2025 is 192,000.[*46] In 2011, there were 725 PFs in Belgium[*47] and 2,881 in Austria[*48]. In 2009, Dutch trust firms served about 16,400 clients (though not all were related to HNWIs), who together held about 20,100 legal entities; that is, on average, 1.2 legal entities per client.[*49] Hence, it is reasonable to assume that at least 20% of PF founders also establish a holding company. Proceeding from the above, we offer the conservative estimate that Estonia can attract only 1,000 PFs and assume that 20% establish a holding company. All told, we would have 1,200 entities. Current prices for domiciliation, management, and accounting services start at 7,200, including VAT, per entity.[*50] From a survey of the Dutch trust industry examining the amount of other services (legal, auditing, etc.), these entities' needs come to around 70% of the amount for trust services.[*51] Hence, the total fees could easily be around 15,000,000 euros (7,200 × 1,200 × 1.7 = 14,688,000). To calculate the potential tax revenue for the state budget, we can use the latest officially available figure for total tax revenues as a percentage of GDP: 32.5%.[*52] That points to potential for an additional 5 million euros for the state budget.

43 Within the meaning of §2 of the ITA.

44 In the case of the beneficiary being a non-resident, further taxation depends on the country of residence.

45 H. Schneider, R. Millner, M. Meyer. Austria Country Report, EUFORI Study, p. 6. Available at http://euforistudy.eu/wp-content/uploads/2015/07/Austria.pdf (most recently accessed on 30.3.2016).

46 Knight Frank Wealth Report (see Note 2), pp. 64–65.

47 V. Xhauflair *et al.* (see Note 19), p. 7.

48 H. Schneider *et al.* (See Note 45), p. 8.

49 P. Risseeuw, R. Dosker. *Trust Matters: The Dutch Trust Industry Revisited*. Amsterdam: SEO Economic Research 2011, p. 8.

50 According to the Henley Business Service (Estonia) OÜ and Prospera Eesti OÜ price lists.

51 P. Risseeuw, R. Dosker (see Note 49), p. 12.

52 European Commission. European Statistical System (Eurostat). Tax Revenue Statistics, Table 1: Total tax revenue by country, 1995–2014 (% of GDP). Source: Eurostat (gov_10a_taxag). Available at http://ec.europa.eu/eurostat/statistics-explained/images/c/ca/Total_tax_revenue_by_country%2C_1995-2014_%28%25_of_GDP%29.png (most recently accessed on 31.3.2016).

In the calculation above, we have excluded additional service fees such as the state fee and service fees for establishing a company in Estonia and other revenue following from HNWI visits to Estonia (e.g., airport fees and costs of accommodation and restaurant services).

If all the obstacles described in this article were removed from the current legislation, would there be any additional advantages to foreign HNWIs in choosing Estonia for establishing a PF? The country's financial and political stability probably are important, as is the fact that Estonia does not have an 'offshore' reputation. The existence of e-residency*[53], which enables establishing and running a legal entity location-independently, might also be of help. Finally, in comparison to other countries, the prices of the related services are probably somewhat lower.

7. Conclusions

So, what is missing that would make the Estonian foundation a well-designed wealth-management vehicle for private purposes?

One of the biggest problems certainly is the current double taxation of PFs. Firstly, the exemptions designed for companies' use to avoid double taxation of distributions made from already taxed income (such as dividends) do not apply. Another problem is the taxation of payments made on account of gains from sales of shares or other securities (the same problem exists for companies). We have described two approaches here – a 'look-through' approach, for PFs that are not engaged in business activities, and another approach, which brings the taxation of PFs closer to that of companies – and suggested a solution under which it would be possible for each PF to choose the approach it wants to be applied.

Another major problem is the excessive accountability and publicity now involved: An Estonian foundation is registered in a public register from which the information on that foundation is accessible to everyone. This includes the data on the founder and beneficiaries; the content of the bylaws; and, through annual reports, information on the foundation's income, wealth, and assets. If we look at other countries' PF regulations, we can see that they offer more privacy and that, even though international AML regulations are moving in the direction of greater disclosure, our regulation still is disproportionate. There is no need for everyone to access a PF's terms, documents, income details, and asset information – it would be enough if certain public authorities and interested parties (in a narrower sense) were to have this right.

The authors also question the necessity of the current two-tier structure and the number of people involved in operating a PF. A general suggestion would be that whether certain elements are of a mandatory nature could be tied to the type of activities or the economic indicators of the PF.

In order to justify the necessary legislative amendments, the authors suggest some financial incentives for encouraging the establishment of PFs in Estonia by foreign founders: in the main, the estimated addition to the GDP would be 15,000,000 euros per year. For the founders, the advantages of Estonia would probably consist of our financial and political stability, the country's non-offshore reputation, the existence of e-residency, and lower establishment and management costs relative to other PF jurisdictions'.

[53] A digital identity that enables foreigners to use Estonian electronic services. For information on the concept of e-residency see, for example, T. Kotka, C. Vargas, K. Korjus. Estonian e-residency: Redefining the nation-state in the digital era. Oxford Cyber Studies Programme Working Papers Series, No. 3, Sept. 2015. More information about e-residency is available at http://e-residency.gov.ee/ (most recently accessed on 30.3.2016).

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Damages Subject to Compensation in Cases of Wrongful Birth

A Solution to Suit Estonia

1. Introduction

The scientific and medical advances of recent times have enhanced the possibilities offered by prenatal testing. This has increased parental expectations as to abilities of a health-care provider[*1] to detect foetal defects. Therefore, parents can avoid the enormous financial burden and frustration that could otherwise follow the birth of a disabled child.

This article analyses whether the health-care provider should be held liable under Estonian law for a disabled child's expenses and compensate for the non-pecuniary damage if the child was born as a result of misdiagnosis and the consequent loss of opportunity of the mother to terminate the pregnancy in a timely manner. These cases are known as cases of **wrongful birth**.[*2]

In Estonia, there is no case law on this topic. It has been proposed that compensation in these cases in Estonia would be conceivable if the damage were to arise from a breach of contract for provision of health-care services.[*3] However, the damage subject to compensation under the Estonian Law of Obligations Act (LOA) has not yet been analysed. It could be alleged that the main object of discussion in wrongful-birth cases is the question of whether and to what extent the child's maintenance costs are subject to

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1 Generally, a health-care provider is a legal person who runs a hospital or a physician. Under Estonian law, a qualified doctor, dentist, nurse, or midwife providing health-care services independently who participates in the provision of health-care services and operates on the basis of an employment contract or other, similar contract entered into with a provider of health-care services shall also be personally liable (under *võlaõigusseadus*, RT I 2001, 81, 487, RT I, 11.03.2016, 2, §758 (2)). The Law of Obligations Act and other, more important Estonian legal acts are available also in English, via http://www.riigiteataja.ee/. 'Health-care provider' is the general term used here to refer to the subject liable for the damage.

2 The birth of a disabled child also gives rise to a controversial claim of wrongful life issued by the disabled child. In the case of an unplanned pregnancy and birth of a healthy child, the parents may have a claim of wrongful conception, under which the health-care provider's negligence lies in failure to prevent or terminate the pregnancy. About these cases and the possibility of the health-care provider's liability in these cases under the Estonian Law of Obligations Act, see also D. Sõritsa, J. Lahe. The possibility of compensation for damages in cases of wrongful conception, wrongful birth and wrongful life: An Estonian perspective. – *European Journal of Health Law* 21 (2014) / 2, pp. 141–160, – DOI: http://dx.doi.org/10.1163/15718093-12341311 D; Sõritsa. The health-care provider's civil liability in cases of wrongful life: An Estonian perspective. – *Juridica International* 2015 (23), pp. 43–51. – DOI: http://dx.doi.org/10.12697/JI.2015.23.05.

3 B. Winiger *et al. Digest of European Tort Law, Volume 2: Essential Cases on Damages*. Berlin & Boston: Walter de Gruyter GmbH & Co. KG 2011, p. 954. – DOI: http://dx.doi.org/10.1515/9783110248494.

compensation. Another question is whether the parents are entitled to non-pecuniary damages as compensation for the psychological harm of having to raise a disabled child.

The courts in the US and Germany are not uniform as to whether wrongful-birth claims should be allowed and what kinds of damages should be awarded. Although the majority of US states recognise the wrongful-birth cause of action, several states have statutorily barred these claims.[*4]

The aim with this article is to propose a reasoned solution for Estonian law on the question of recoverable damages in cases of wrongful birth. The article is based on a comparative analysis: the Estonian law is compared to German and US law. German law has been chosen for comparative material because the German legal system, including German law (and also the standpoints established in case law and theoretical sources), has set an important example for the creation of Estonian civil law.[*5] United States law was selected in expectation of finding discussions of universal character – i.e., applicable, *inter alia*, in Estonian case law.[*6]

2. The legal basis for a claim of wrongful birth and the health-care provider's liability

2.1. The facts underlying the claim of wrongful birth

In a case of wrongful birth, the parents seek compensation for any damage related to birth of the disabled child, a situation that would have been prevented had the parents been correctly informed. It is necessary to emphasise that in these cases the health-care provider does not cause the disability.

There exist various invasive and non-invasive methods of prenatal testing for the detection of possible foetal defects.[*7] Although prenatal genetic testing is considered highly accurate, the potential for errors still exists.[*8] Thus it should be clear that the health-care provider cannot always prevent the birth of a disabled child even when the testing is performed 100% correctly. Accordingly, the health-care provider's negligence should be clearly shown in order for there to be a successful claim of wrongful birth.

According to the LOA's §762, the health-care provider's performance is evaluated in accordance with the general level of medical science at the time of provision of the services and the general duty of care expected from a health-care provider. Hence, the above-mentioned medical errors may also give rise to claims against the health-care provider under the Estonian LOA.

2.2. The ethical dilemma of avoiding the birth of a disabled child

In cases of wrongful birth, the major ethics-related tension is over the value to be attached to the autonomous decision of those who have been deprived of the opportunity to avoid having a child with particular traits.[*9] On one hand, the parents definitely have the right to make an informed decision on whether or not to abort a child with potential birth defects. On the other hand, the possibility of choosing and selecting the genetic make-up of a child implies the distasteful potential to create 'designer babies' and for discrimination against disabled people.[*10]

4 J.K. Mason *et al. Law and Medical Ethics*. 8th ed. Oxford University Press 2011, p. 353.

5 See P. Varul *et al.* Tsiviilõiguse üldosa (General Part of Civil Law). Juura 2012, p. 25 (in Estonian).

6 According to German case law, wrongful-birth claims are allowed only with contract-based grounds. In the US case law, wrongful birth is generally regarded as medical malpractice tort, with the following prerequisites: 1) a duty, 2) a breach of duty, and 3) an injury 4) proximately caused by the breach. See, e.g., *Keel v. Banach*, 624 So.2d 1022 (1993). However, in *Grubbs ex rel. Grubbs v. Barbourville Family Health Center*, the breach-of-contract cause of action was recognised with the statement that a physician who contracts and charges for a service, such as a prenatal ultrasound scan and consequent opinion as to the results of that scan, is liable for any breach of contract in this regard. See *Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.,* 120 S.W.3d (2003).

7 On the possibilities and risks of prenatal testing methods, see J.K. Mason *et al.* (see Note 4), pp. 215–216; D.W. Whitney, K.N. Rosenbaum. Recovery of damages for wrongful birth. – *The Journal of Legal Medicine* 32 (2011) / 2, pp. 167–204, on pp. 168–169; – DOI: http://dx.doi.org/10.1080/01947648.2011.576616 P.L. Barber. Prenatal diagnosis: An ethical and regulatory dilemma. – *Houston Journal of Health Law & Policy* 13 (2013) / 2, pp. 329–351, on pp. 330–332, 345.

8 For more information, see D.W. Whitney, K.N. Rosenbaum (see Note 7), p. 170.

9 S.D. Pattinson. *Medical Law and Ethics*. 2nd ed. Thomson Reuters (Legal) Limited 2009, p. 333.

10 P.L. Barber (see Note 7), pp. 347, 349.

The ethical dilemma linked to avoiding the birth of a disabled child arises also in the process of establishing the causation. In a wrongful-birth case, the plaintiff must, *inter alia*, prove that the child would have been aborted if the plaintiff had been made aware of the foetus's deformities.[*11] The difficulty of establishing causation has justified dismissal of wrongful-birth action in several cases in the US.[*12] Aside from the problem of causation, moral concerns as to the status of foetal life remain, alongside the fact that in absolute terms pregnancy has been actually sought in the cases at issue.[*13] Nevertheless, the majority of courts both in Germany and in the US have affirmed the existence of a claim of wrongful birth.

It has been stated that claims of wrongful birth should be permitted irrespective of apparent eugenic implications emerging. The parents have a well-recognised right to choose whether or not to terminate the pregnancy, and it would be unjust to leave the parents with the heavy burden of pecuniary and non-pecuniary damage incurred through deprivation of their right to choose due to the health-care provider's negligence.[*14] However, it should be clear that a wrongful-birth claim should not be allowable in consequence of every birth defect, no matter its significance.

The question of what conditions are 'medically relevant' and could accordingly give rise to a wrongful-birth cause of action is also complicated. P.L. Barber and W.F. Hensel agree that, at some point, a line will have to be drawn with regard to what conditions are actionable, in consideration of the child's functional limitations and the extent of his or her suffering.[*15]

In Estonia, the set of 'medically relevant' traits that give rise to a wrongful-birth cause of action should at least include those traits that would justify late-term abortion under the Estonian Termination of Pregnancy and Sterilisation Act (TPSA)[*16], §6 (2) 2) – i.e., traits with which the unborn child may have severe mental or physical damage to health.[*17] The gravity of the child's disability should be evaluated on a case-by-case basis.

2.3. Grounds for the health-care provider's contractual liability

Under the LOA's §759, the existence of a contract for provision of health-care services is presumed if the health-care provider has provided health-care services. This means that if an expectant mother undergoes prenatal testing in order to avoid the birth of a disabled child and, in consequence of that health-care provider's negligently performed testing, a disabled child is born, the health-care provider's liability could primarily be contractual in nature.[*18] The main prerequisite for contractual liability is breach of obligation. The following general prerequisites for a health-care provider's contractual liability exist under the LOA: 1) breach of obligation by the health-care provider, 2) damage caused to the patient, 3) a causal link between the breach of obligation and the damage, and 4) the health-care provider's fault.[*19]

The health-care provider's failure to diagnose or disclose actual or potential birth defects during the pregnancy deprives the parents of the opportunity to abort a genetically defective child.[*20] Therefore, the

11 *Reed v. Campagnolo*, 630 A.2d 1145 (Md. 1993); *McKenney v. Jersey City Medical Center*, 771 A.2d 1153 (2001).

12 E.g., *Wilson v. Kuenzi*, 751 S.W.2d 741 (1988). Ivo Giesen finds it doubtful that the parents could prove that, had they known about the child's disability, they would have decided to terminate the pregnancy. See I. Giesen. Of wrongful birth, wrongful life, comparative law and the politics of tort law systems. – *Utrecht Law Review* 72 (2009), pp. 257–273.

13 J.K. Mason *et al.* (see Note 4), p. 353.

14 For more information about the parents' right to procreative autonomy, see J.T. Stein. Backdoor eugenics: The troubling implications of certain damages awards in wrongful birth and wrongful life claims. – *Seton Hall Law Review*, 40 (2010), pp. 1117–1168, on pp. 1120–1128.

15 W.F. Hensel. The disabling impact of wrongful birth and wrongful life actions. – *Harvard Civil Rights – Civil Liberties Law Review* 40 (2005), pp. 141–195, on pp. 181–190; P.L. Barber (see Note 7), pp. 347–350.

16 Raseduse katkestamise ja steriliseerimise seadus, RT I 1998, 107, 1766, RT I, 20.02.2015, 11.

17 According to the TPSA's §6 (2) 2, it is permissible to terminate the pregnancy even in the 12th to 22nd weeks in the event of risk of physical or mental abnormality of the foetus.

18 German law too allows wrongful-birth claims only on a contractual basis. BGH NJW 1997, 1638, 1640; BGH NJW 2002, 886; NJW 2002, 2636, 2637; NJW 2005, 891, 892. See also BGB §823, Schadensersatzpflicht ['Liability for damages']; H.-G. Bamberger, H. Roth. *Beck'scher Online-Kommentar BGB*, 37th ed. 2013, p. 756.

19 For details about the legal grounds for the health-care provider's contractual liability under the Estonian LOA, see also D. Sõritsa, J. Lahe (see Note 2).

20 It should be noted that the author presumes that both parents have a claim for wrongful birth. Under Estonian law, the question of whether the parent who is not a party to the contract is entitled to compensation for the damages depends foremost on whether the health-care provider had to recognise that the contract was directed also at the protection of the third party's (the second parent's) interests and rights (LOA's §81, on contracts with protective effect for a third party). In the author's opinion, if the patient informs the doctor of said patient's and the partner's wish to prevent the birth of a disabled child and

health-care provider's liability may lie in misdiagnosis or the (mostly consequent) breach of obligation to inform the patient.[*21] The LOA, in §766 (1), explicitly prescribes that the health-care provider shall inform the patient of the results of the examination of the patient, the state of his or her health, etc.

The Estonian Supreme Court has explained that giving an incorrect diagnosis can be regarded as a breach of obligation arising from the contract for provision of health-care services. Consequently, the health-care provider must compensate for the damage that has evolved as a result of misdiagnosis if correct diagnosis was possible when the general level of medical science and the general duty of care at the time are taken into account.[*22]

If the prerequisites stated above for contractual liability are met, nothing stands in the way of the health-care provider's liability in wrongful-birth cases under the Estonian LOA. In every case, the central question is whether the health-care provider has breached the contractual obligation.

2.4. The possibility of the health-care provider's delictual liability

According to Estonian law, making a claim on a contractual basis does not exclude delictual liability. In principle, the patient could issue a claim on alternative grounds if the prerequisites stipulated in the LOA's §1044 (2) are met.[*23]

In cases of misdiagnosis, the Estonian Supreme Court has affirmed, in principle, the patient's claim against the health-care provider also on the basis of the law of delict.[*24] However, Estonian courts have not appraised whether misdiagnosis constitutes a delict. In the author's opinion, failing to diagnose a child's disability cannot constitute an unlawful act in the meaning of the law of delict, because there is no protective provision that entails an obligation on the part of a health-care provider to diagnose a child's disability.[*25]

As the health-care provider is not the cause of the child's disability, it is not possible to rely exclusively on the LOA's §1045 (1) 2), according to which the infliction of damage is unlawful if the damage stems from causing of bodily injury or damage to the health of the victim. Also, the Estonian Supreme Court has stated that, according to the LOA's §130 (1), only the aggrieved person (and no other person) can claim damages arising from health damage or bodily injury.[*26] Therefore, the parents cannot rely on the LOA's §1045 (1) 2) when stating that they have suffered damage due to their child's health condition.

The objective behind the obligation to inform the patient is not to prevent harm to the patient's life or health but primarily to prevent violation of personality rights.[*27] In principle, the health-care provider's

enters into the contract, it can be alleged that the health-care provider should have recognised the interests of the patient's partner and the aim of the patient to protect said partner's interests.

21 E.g., *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 17 (Minn. 1986); *Reed v. Campagnolo* (see Note 11). In *Smith v. Cote*, the court stated that the relevant standard of obligation for informing the patient does not require a physician to identify every possible birth defect without regard for the significance (*Smith v. Cote*, 128 N.H. 231 [1986]).

22 CCSCd 3-2-1-171-10, para. 14, 8.4.2011, *E. B. v. SA Põhja-Eesti Regionaalhaigla* (in Estonian).

23 According to the LOA's §1044 (2), compensation for damage arising from the violation of contractual obligations shall not be claimed on the basis of unlawful causing of damage unless otherwise provided by law. Compensation for damage arising from the violation of contractual obligations may be claimed on the basis of unlawful causing of damage if the objective of the violated contractual obligation was other than to prevent the damage for which compensation is claimed.

24 *E. B. v. SA Põhja-Eesti Regionaalhaigla* (see Note 22).

25 According to the LOA's §1045 (1), the causing of damage is unlawful if, above all, the damage is caused by 1) causing of the death of the victim; 2) causing of bodily injury to or harm to the health of the victim; 3) deprivation of the victim of his or her liberty; 4) violation of a personality right of the victim; 5) violation of the right of ownership or a similar right, or a right of possession, of the victim; 6) interference with a person's economic or professional activities; 7) behaviour that violates a duty arising from the law; or 8) intentional behaviour contrary to good morals. In the LOA's §1045 (1) 1)–5), the unlawfulness of the act is defined in terms of consequences of the tortfeasor's act or inaction. The grounds for unlawfulness under §1045 (1) 6)–8), necessitate the evaluation of the tortfeasor's act or inaction and not the consequence. For more details, see P. Varul *et al. Võlaõigusseadus III. 8. ja 10. osa (§-d 619–916 ja 1005–1067) Kommenteeritud väljaanne* ['Law of Obligations Act III, Parts 8 and 10 (§§ 619–916 and 1005–1067: A Commentary']. Tallinn: Juura 2009, p. 641 (in Estonian). About the legal grounds for the health-care provider's delictual liability under Estonia's LOA, see also D. Sõritsa, J. Lahe (see Note 2), pp. 147–148.

26 CCSCd 3-2-1-174-10, para. 12, 9.3.2011, *Nikolai Bedritski v. Osaühing KLAVESTI* (in Estonian).

27 P. Varul *et al.* (see Note 25), p. 293. Violation of personality rights in the meaning of the Estoanian Obligations Act may lie in, e.g., unlawful depriving a person of liberty, defamation, unjustified use of the person's name or image of the person, the breaching the inviolability of the private life, right to free self-realisation etc. P. Varul *et al. Võlaõigusseadus I. Üldosa (§§1–207) Kommenteeritud väljaanne* ['Law of Obligations Act I, General Part (§§ 1–207: A Commentary']. Tallinn: Juura 2006, pp. 463–464 (in Estonian).

delictual liability could follow from breach of the parents' personality right(s). However, such liability is possible only if the unlawful act results from breach of protective provisions, because the failure to inform the patient as such should not be considered unlawful according to the LOA's §1045.

In addition, relying on intervention in family planning as violation of personality rights (see the LOA's §1045 (1) 4) should not bring about delictual liability under Estonian law, because in such a case the existence of a contract supersedes the delictual liability. Besides intervention in family planning, the birth of a disabled child could, in principle, entail breach of other personality rights of the parents, as in loss of consortium.[*28] The applicability of delictual liability in these cases depends on the interpretation given to the second sentence of § 1044 (2)[*29] and evaluation as to which kind of damage the breached contractual obligation was an attempt to prevent.

In the author's opinion, the health-care provider's delictual liability does not follow in cases of wrongful birth.

3. Defining damages subject to compensation in cases of wrongful birth

3.1. Kinds of damages in cases of wrongful birth in Germany and the US

The birth of a disabled child may cause both pecuniary and non-pecuniary damage. Pecuniary damage may include medical expenses associated with pregnancy and delivery, unexpected maintenance costs due to the child's disability (i.e., costs associated with the infant's and adult's case-specific care and treatment requirements), and loss of income. Non-pecuniary loss may lie in the pain caused to the mother in the course of pregnancy and birth, the interference with one's family planning, and the mental suffering due to having to care for a disabled child.[*30] Courts in the US and Germany have not taken a uniform stance as to what kinds of damages should be awarded in cases of wrongful birth if the claim as such is allowed.

In Germany, the child's maintenance costs may be compensated for fully in cases of wrongful birth. The health-care provider is responsible not only for the additional expenses connected to the child's disability but also for the child's maintenance costs in full. Hence, maintenance costs are awarded irrespective of the state of the child.[*31] The Federal Court of Justice of Germany has stated that the health-care provider who advises a woman about the possibility of amniocentesis and dangers to the child is held liable for the subsequent maintenance costs if, for reason of lack of information, that woman gives birth to a disabled child.[*32]

In contrast, in the United States, claims by the parents for recovery of ordinary child-raising costs are rarely successful.[*33] Most jurisdictions in the US accept the recovery of extraordinary expenses, including hospital and medical costs, that are necessary for treating the birth defect, along with additional medical or educational costs attributable to the birth defect. However, the lifetime expense of caring for a disabled individual depends on the birth defect and its development, thereby making preparation of a lifetime care plan both complex and challenging.[*34]

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28 A claim for loss of consortium arises from the loss of society, affection, assistance, and conjugal fellowship suffered by the marital unit as a result of the physical injury to one spouse through the tortious conduct of a third party. For an example, see *Oaks v. Connors*, 339 Md. 24 (1995). See also D.W. Whitney, K.N. Rosenbaum (see Note 7), p. 196. In the Estonian LOA, an indicative list of personality rights is presented in §1046 (1), according to which the defamation of a person, *inter alia*, by passing undue value judgement, through the unjustified use of the name or image of a person, or by breaching the inviolability of the private life or another personality right of a person is unlawful unless the law provides otherwise. See also P. Varul *et al.* (see Note 25), pp. 646–647.

29 The second sentence of the LOA's §1044 (2) states that compensation for the damage arising from the violation of contractual obligations may be claimed on a delictual basis if the objective for the violated contractual obligation was other than to prevent the damage for which compensation is claimed.

30 B.C. Steininger. Wrongful birth and wrongful life: Basic questions. – *Journal of European Tort Law* 1 (2010) / 2, pp 125–155, on p. 128. – DOI: http://dx.doi.org/10.1515/JETL.2010.125.

31 BGHZ 89, 95, 105; BGHZ 124, 128, 145. See also N.M. Priaulx. Conceptualising harm in the case of the unwanted child. – *European Journal of Health Law* 9 (2002) / 4, pp. 337–359, on p. 349. – DOI: http://dx.doi.org/10.1163/157180902773123969.

32 BGHZ 89, 95 2923; NJW 1997, pp. 1638, 1640. Amniocentesis is a medical procedure that is regarded as the 'gold standard' in prenatal testing, with accuracy approaching 100%. It is performed through the maternal abdomen. See also D.W. Whitney, K.N. Rosenbaum (see Note 7), p. 168.

33 D.W. Whitney, K.N. Rosenbaum (see Note 7), p. 176.

34 *Ibid*., p. 174.

In German law, the mother can recover non-pecuniary damages for pain and suffering attendant on childbirth only if that pain and suffering 'exceeds the inflictions which accompany a birth without complications'.[*35] Those US courts that refuse to allow the recovery of emotional distress damages have typically relied on the assertion that emotional trauma has not been accompanied by physical injury or that the recovery of such damages is too speculative.[*36]

It has been pointed out that damages for parents' loss of the child's services and companionship are not recoverable, and neither are damages for maternal pain and suffering due to childbirth.[*37] The US courts have awarded damages for spousal loss of consortium.[*38]

3.2. The legal frames for compensation for the damage in Estonia

According to the Estonian LOA, the aim for compensation for damage is to place the aggrieved person in a situation as near as possible to that in which he or she would have been if the circumstances that are the basis for the compensation obligation had not arisen; see the LOA's §127 (1). The purpose of the breached obligation or the protective provision should be taken into account, according to §127 (2), irrespective of the legal basis for compensation for the damage. If the claim is issued on a contractual basis, the damage should also be foreseeable, under the LOA's §127 (3).

In the author's opinion, a contract for provision of health-care services that is aimed at detecting potential birth defects protects both pecuniary and non-pecuniary interests.

Under the LOA's §130 (1), compensating for the pecuniary damage associated with the patient's own health should apparently not be problematic. In the case of misdiagnosis and consequent breach of the obligation to inform the patient, the cost of unsuccessful procedures could be compensated for.[*39] Hence, the expenses for the unsuccessful prenatal testing should be compensated for, as should the medical expenses associated with pregnancy and delivery. Loss of income during pregnancy and after the birth of a disabled child that arises from the need to take care of the child could also be subject to compensation.

The LOA's §134 (1) states that compensation for non-pecuniary damage arising from non-performance of a contractual obligation may be claimed only if the purpose of the obligation was to pursue a non-pecuniary interest and, under the circumstances related to entry into the contract or to the non-performance, the obligor was aware or should have been aware that non-performance could cause non-pecuniary damage.

As is stated above, the purpose of the health-care provider's obligation in these cases is also to pursue a non-pecuniary interest. Therefore, under the LOA's §134 (2), claiming non-pecuniary damage due to the breach of personality rights is possible also. However, issuing the claim for non-pecuniary damages on grounds of breach of contractual obligation is considerably limited according to Estonian case law.[*40]

With regard to interference with the parents' personality rights, the success of a claim for non-pecuniary damages in Estonia depends on whether deciding to terminate the pregnancy, if there is a possibility of the child's disability, according to the TPSA's §6 (2) 2, should be affirmed as person's right of self-determination.[*41] Regarding the right to family planning or procreation as a personality right presumes alleging that the possibility of aborting the pregnancy within the 12th–22nd week if the unborn child may suffer severe mental or physical harm to its health[*42] is aimed at protecting the above-mentioned interests. In the author's opinion, deciding to terminate the pregnancy if there is a possibility of the child being born with a disability should be affirmed as a personal right of self-determination. Consequently, there should be compensation for the non-pecuniary damage arising from the interference with family planning.

35 BGH decision of 18 January 1983, BGHZ 86, 240 = NJW 1983, 1371 = JZ 1983, 447; N.M. Priaulx (see Note 31), p. 349.

36 D.W. Whitney, K.N. Rosenbaum (see Note 7), p. 191.

37 *Ibid*., p. 195.

38 The compensation covers the loss of society, affection, assistance, and conjugal fellowship, encompassing more than the loss or impairment of sexual relations. See, e.g., *Deems v. Western Maryland Ry*., 247 Md. 95, 231 A.2d 514 (1967); *Exxon Corp. v. Schoene*, 67 Md. App. 412, 423, 508 A.2d 142 (1986).

39 Such a standpoint has already been adopted in Estonian case law in cases of medical error. See the decision in case No. 2-09-15036, 15.2.2010, of Harju County Court.

40 Decision in case No. 3-2-1-71-14 of the Supreme Court *en banc*, 15.12.2015, para. 131.

41 Awarding compensation for interference with reproductive autonomy presupposes that the latter is classified as an interest protected by the legal order. B.C. Steininger (see Note 30), p. 150.

42 See the TPSA's §6 (2) 2). For example, US courts have held that deciding to terminate the pregnancy falls within the mother's right of self-determination (*Canesi v. Wilson*, 730 A.2d 805 [1999]).

The Estonian Supreme Court has generally allowed compensation for non-pecuniary damage arising from physical and mental pain and suffering due to misdiagnosis or medical error by the health-care provider.[*43] Accordingly, in the event of misdiagnosis of a child's disability, if the parents' emotional distress results in remarkable damage to their health, non-pecuniary damages too could be awarded. Compensation for non-pecuniary damage due to disappointment and frustration arising from the situation of unexpectedly becoming a parent of a disabled child, however, would be highly debatable in Estonian courts.

However, there are other grounds for non-pecuniary damage-compensation claims, that are not based on the parents' disappointment with having to raise a disabled child. According to J.T. Stein, compensation for non-pecuniary damage is possible on the grounds that the parents have to watch their child die. This is the case if the genetic disease suffered by the child causes him or her to die at a very young age and the parents suffer emotional distress as witnesses to this.[*44] The LOA's §134 (3) stipulates that in the case of an obligation to compensate for damage arising from the death of a person or serious bodily injury or health damage caused to that person, the persons closest to the deceased or the aggrieved person may also claim compensation for non-pecuniary damage if payment of such compensation is justified by exceptional circumstances.

The condition of exceptional circumstances in the sense of the LOA's §134 (3) is not met merely by the abstract fact of death and consequent grief and loss. The Estonian Supreme Court has explained that these exceptional circumstances are affirmed in the event of the plaintiff's spatial proximity to the deceased or severely injured close person at the time of or after the accident.[*45] Compensation under §134 (3) would, therefore, be justified only if the parents were to witness the child's death (i.e., be in spatial proximity during it) or, for example, experience emotional distress as a result of seeing their child suffer.

However, awarding pecuniary and non-pecuniary damages is not automatically justifiable in full. The Estonian LOA stipulates several possible limits to the compensation and the extent of the damages. Below, the main problematics and *pro* and *contra* arguments connected with compensation for a disabled child's maintenance costs and non-pecuniary damage are analysed.

4. Compensation for the disabled child's maintenance costs and non-pecuniary damage: *Pro* and *contra*

4.1. The child's maintenance costs: The problematic causal link

There seems to be consensus in Europe that in cases of wrongful birth, at least the additional costs of care attributable to the disability should be claimable as pecuniary damages. However, the question of whether the costs of child care should be claimable in full is still debatable.[*46]

As is emphasised above, in cases of wrongful birth there could be a presumption that the parents were ready to bear at least the maintenance costs of the expected healthy child and, hence, that only non-recoverability of the extra costs associated with disability could harm the interests of the child.[*47] However, this approach does not take into account the possibility that the parents, had they been informed in a timely manner of the child's disability, might not have decided to keep the child and so would not have had to bear the child's maintenance costs at all.[*48] It could therefore be alleged, according to the *conditio sine qua non*

43 *E. B. v. SA Põhja-Eesti Regionaalhaigla* (see Note 22), para. 15.

44 J.T. Stein (see Note 14), p. 1161.

45 CCSCd 3-2-1-19-08, 9.4.2008, *H. V v. AS Taisto Liinid*, paras 16–17 (in Estonian).

46 Confirmed in BGH, 2000, NJW 1782; see also M. Hogg. Damages for pecuniary loss in cases of wrongful birth. – *Journal of European Tort Law* 1 (2010) / 2, pp. 156–170, on p. 169. – DOI: http://dx.doi.org/10.1515/JETL.2010.156.

47 W.T. Nuninga. Wrongful testing and its lively consequences. – *European Journal of Law Reform* 16 (2014), pp. 181–206, on p. 204. Nevertheless, as shown above, the parents' readiness to bear the maintenance costs of an expected healthy child have not precluded the German courts from awarding the parents damages for the full amount of the child's maintenance costs (i.e., not only the extra costs associated with disability).

48 B.A. Koch. Comparative report. – B. Winiger *et al. Digest of European Tort Law, Volume 2: Essential Cases on Damages*. Berlin: Walter de Gruyter GmbH & Co. KG 2011, p. 960. – DOI: http://dx.doi.org/10.1515/9783110248494. The compensation for depriving the parents of the possibility to choose is similar to compensation under the principle of loss of chance. For discussion of compensation for lost chance in various European countries, see B. Winiger *et al. Digest of European Tort Law, Volume 1: Essential Cases on Natural Causation*. Mörlenbach, Germany: Springer-Verlag / Wien 2007, pp. 545–592.

rule, that were it not for the health-care provider's negligence, the child in question would not have been born at all and the parents would have avoided the expenses attendant to the birth of a child.

Nevertheless, there are several *contra* arguments with regard to the causal link, under the *conditio sine qua non* rule, between the health-care provider's negligence and the disabled child's maintenance costs. As M. Hogg has noted, notwithstanding the existence of a causal link it is generally stated that the creation of the parent's maintenance obligation as a fundamental value as a result of the third party's negligence is not sufficient for the maintenance obligation to transfer to the third party.[*49] In contrast, B.C. Steininger has pointed out that the origin of the obligation to pay maintenance under family law does not preclude a compensation claim.[*50]

Another argument *contra* awarding the child's maintenance costs is the attachment of a negative value judgement to the child and infliction of psychological harm on the child if he or she learns about the parents' claim against the health-care provider.[*51] At the same time, though, satisfying the claim for the disabled child's maintenance costs could be in the interests of the child him- or herself and the whole family.[*52]

According to the Estonian Family Law Act (FLA)[*53], §97 3), a descendant or ascendant who needs assistance and is unable to maintain him- or herself is also entitled to receive maintenance. In the author's opinion, the possible negative value judgement concurrent with the compensation for maintenance costs is outweighed by the benefits to the child. Awarding damages to the parents would only help them provide the necessary care to their child; hence, it would be favourable for the disabled child.

In principle, therefore, the disabled child's maintenance costs (i.e., both the expected costs of raising a healthy child and the additional expenses due to disability) could be compensated for under the Estonian Law of Obligations Act. The question of the limits to the compensation for damage is analysed below.

4.2. The possibility of offsetting benefits in compensation for non-pecuniary damage

In cases of wrongful birth, the issue of the possibility of benefit offset raises another intriguing question. According to the LOA's §127 (5), any gain received by the injured party shall be deducted from the compensation for the damage unless deduction is contrary to the purpose of the compensation. The prerequisites for benefits offset under the LOA's §127 (5) are, firstly, a causal link between the benefits and the infliction of damage and, secondly, that the offset is not contrary to the purpose of the compensation.

In the United States, according to Restatement (Second) of Torts, Section 920, also the value of the benefit conferred is generally considered in mitigation of damages. The US courts have applied the benefit offset rule in some cases by comparing the economic expenses of rearing a disabled child with those for a healthy child and awarded the excess to the parents as damages. However, this approach has been criticised, because the comparison should be between a disabled child and, after abortion, having no child at all.[*54] Benefit offset has been applied in Germany also. However, it has been emphasised that offset is only possible with respect to damages of the same kind: because the 'benefit' of raising a child is non-pecuniary, primarily offsetting of non-pecuniary damage could be discussed.[*55]

W.F. Hensel has pointed out that, while the courts emphasise the inherent benefits of rearing a healthy child, many courts ignore these benefits if a child is born with a genetic defect.[*56] However, in the author's

49 M. Hogg (see Note 46), pp. 156–170.

50 B.C. Steininger (see Note 30), p. 134.

51 For more information on this, see B.C. Steininger (*ibid.*), pp. 129–130.

52 *Ibid.*

53 Perekonnaseadus, RT I 2009, 60, 395, RT I, 12.03.2015, 99.

54 C.W. Leightman. *Robak v. United States*: A precedent-setting damage formula for wrongful birth. – *Chicago–Kent Law Review* 58/3 (June 1982), pp. 725–764, on p. 747.

55 B.C. Steininger (see Note 30), p. 137. On receiving a child as a non-pecuniary benefit, see also N. Priaulx. Health, disability & parental interests: Adopting a contextual approach in reproductive torts. – *European Journal of Health Law* 12 (2005), pp. 213–244, on p. 218. It should be noted that, in principle, the child's possible obligation to support his or her parents in future (see the FLA's §§ 96–97) could be regarded as a pecuniary benefit against which some of the damages could be offset. However, in the case of a disabled child, the child's own obligation to provide support is questionable, when that child's health condition is taken into account.

56 W.F. Hensel (see Note 15), p. 154. About the case law and for analysis of application of the benefit rule, see K.C. Vikingstad. The use and abuse of the tort benefit rule in wrongful parentage cases. – *Chicago–Kent Law Review* 82 (2007) / 8, p. 1087.

opinion, the grave consequences of having to raise a disabled child cannot be diminished by the fact that the parents still obtained a child (though not the child they expected). D.W. Whitney and K.N. Rosenbaum too find that the benefit offset theory should not be applicable in wrongful-birth cases.[*57] The present article argues that it is disputable whether the joy of a healthy child can be cast in parallel with the consequences of raising and caring for a disabled child. Hence, it is complicated to presume that the birth of a disabled child is accompanied by the benefits that could be offset under the LOA's §127 (5).

4.3. Reduction of the amount of compensation due to the parents' part in causing damage

According to the LOA's §139 (1), if damage is caused in part by circumstances dependent on the injured party or due to a risk borne by the injured party, the amount of compensation for the damage shall be reduced to the extent that said circumstances or risk contributed to the damage. The question of mitigation of damages has often been analysed in the context of wrongful-birth claims. One of the controversial arguments against awarding damages or for reducing the amount of damages is that the parents could have avoided the damages by terminating the pregnancy (if this course of action was still a possibility) or putting the child up for adoption.[*58]

The aggrieved person's opportunities to avoid or reduce the damage and their effect on the compensation for the damages are generally recognised in both German and US law. However, in cases of wrongful birth, German case law rejects the idea that refusal to opt for abortion or adoption should cause the claim to fail.[*59] The principle of mitigation of damages on the above-mentioned grounds in wrongful-birth cases has also not been applied by the US courts.[*60]

The controversy over the argument lies in the fact that, on one hand, it is stated that the child is unwanted and the child-rearing expenses should be allowable yet, on the other hand, the parents have chosen to keep their child.[*61] B.C. Steininger explains that the fact that the child was unplanned does not prejudice the parents' relationship to the child once it is born.[*62]

In consideration of the possibility of aborting the child, it could be stated that the existence of grounds to terminate the pregnancy does not create an obligation to undertake abortion. Affirming such an obligation (through reduction of damages in cases of wrongful birth) would constitute an enormous invasion of privacy.[*63] On a similar account, it would be highly unreasonable to state that damages could be mitigated by putting the child up for adoption.[*64]

In the author's opinion, it would be contrary to the principle of good faith (LOA's §6) to rely on the existence of parental opportunity to avoid damage in a case of wrongful birth by terminating the pregnancy or putting the child up for adoption. Therefore, the damages cannot be denied or reduced on these grounds.

5. Grounded scope of compensation in cases of wrongful birth

As is stated above, under the Estonian LOA, claims of wrongful birth could be successful primarily on a contractual basis. In the author's opinion, the contract for provision of health-care services that is aimed at detecting potential birth defects protects both pecuniary and non-pecuniary interests.

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57 D.W. Whitney, K.N. Rosenbaum (see Note 7), pp. 178–179.

58 E.g., *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514 (1974) 219 N.W.2d 242.

59 H. Oetker. Art und Umfang des Schadenersatzes ['The nature and the extent of damages']. – F.J. Säcker, R. Rixecker (eds). *Münchener Kommentar. Bürgerliches Gesetzbuch. Schuldrecht. Allgemeiner Teil. 5. Auflage* ['München Commentary on the German Civil Code: Law of Obligations, General Part, 5th Edition']. Munich: Verlag C. H. Beck 2007, p. 302.

60 See, e.g., *Cockrum v. Baumgartner*, 95 Ill.2d 193 (1983) 447 N.E.2d 385.

61 A. Jackson. Wrongful life and wrongful birth. – *Journal of Legal Medicine* 17 (1996), pp. 349–381, on p. 377. – DOI: http://dx.doi.org/10.1080/01947649609511013.

62 B.C. Steininger (see Note 30), p. 133.

63 See also *Rivera v. State of New York*, 404 N.Y.S.2d (1978).

64 See, e.g., *Troppi v. Scarf*, 187 N.W.2d 511 (Mich. App. 1971).

In cases of wrongful birth, it is reasonable under the Estonian LOA to compensate for pecuniary damage arising from the birth of a disabled child. The financial damages in question may encompass the parents' loss of income along with medical expenses (e.g., the costs of the unsuccessful prenatal testing procedure).

With regard to the disabled child's maintenance costs, in principle, that child's maintenance costs (i.e., both the expected costs of a healthy child and the additional expenses due to disability) could be compensated for under the Estonian LOA. Compensation for these expenses is not precluded by the origin of the maintenance costs in the realm of family law.

In establishment of the recoverable damages, the child's life expectancy is taken into account. Therefore, the additional expenses connected to the child's disability are recoverable beyond the age of majority if the child remains dependent on the parents for support.[*65] In German law too, the claim is not limited by the age of the child.[*66]

Compensation for the non-pecuniary damage also is possible. Firstly, the damage to the mother due to the pain and inconvenience suffered during pregnancy and childbirth is subject to compensation.[*67]

B.C. Steininger has stated that awarding compensation for non-pecuniary loss resulting from the violation of parental freedom of procreation does not entail denigration of the child and should not be in conflict with the origins of duties towards the child in the field of family law.[*68]

In this author's opinion, the possibility of terminating the pregnancy under the TPSA's §6 (2) 2), is a personal right of self-determination. Therefore, a non-pecuniary damage claim based on interference with family planning is also subject to compensation if, under the LOA's §134 (1), the aim behind the breached obligation was, *inter alia*, the protection of a non-pecuniary interest (the right to family planning).

In exceptional circumstances, compensation for non-pecuniary damage could be possible under the LOA's §134 (3) on the grounds that parents have to watch their children die. Compensation for non-pecuniary damages on this foundation would be justified only if the parents were to witness the child's death or experience emotional distress as a result of seeing their child suffer.[*69]

In Estonia, in cases of wrongful birth, the parents could, in principle, be entitled to pecuniary damages (costs of the unsuccessful medical procedure, medical expenses associated with pregnancy and delivery, loss of income, and the child's maintenance costs) along with non-pecuniary damages (emotional distress, intervention in family planning, and witnessing the child's suffering and consequent death), if the prerequisites listed above are met.

The calculation of damages recoverable in cases of wrongful birth has posed another obstacle for some courts. For example, in the cases *Gleitman v. Cosgrove* and *Terrell v. Garcia*, the court denied the claim for damages because calculating the expenses for a disabled child was impossible.[*70] However, it can be stated that similar calculations are performed in connection with other medical malpractice claims, and, therefore, the problems of calculation of damage should not preclude awarding damages in cases of wrongful birth.

6. Conclusions

Irrespective of the need to make moral judgements and to solve ethical dilemmas that is involved in wrongful-birth cases, it can be alleged that the parents should be allowed to file a wrongful-birth claim against a health-care provider if the health-care provider negligently failed to inform the parents in a timely manner of their future child's severe health condition. As long as the law protects the right to choose to have an abortion if the future child could potentially be born disabled, a wrongful-birth claim should be deemed justified.

However, the issue of recoverable damages in these cases remains contested by legal practitioners in various countries. When the foregoing analysis is generalised, it can be posited that in Germany the courts award the parents the child's maintenance costs in full, whereas US courts tend to award compensation

65 D.W. Whitney, K.N. Rosenbaum (see Note 7), p. 182.

66 BGHZ 89, 95, 105; BGHZ 124, 128, 145.

67 BGH, NJW 1995, 2407; see also B.C. Steininger (see Note 30), p. 147; J.K. Mason *et al.* (see Note 7), p. 352.

68 B.C. Steininger (see Note 24), pp. 149–150. In several European countries, the damages associated with intervention in family planning are subject to compensation. For more details, see B.A. Koch (see Note 48), p. 903.

69 See 3.2 of this article.

70 *Gleitman v. Cosgrove*, 49 N.J. 22 (1967) 227 A.2d 689; *Terrell v. Garcia*, 496 S.W.2d 124 (1973).

of only the additional costs arising from the disability. The kinds of non-pecuniary damages awarded also differ between these courts.

The Estonian courts have relatively broad discretion in specifying the recoverable damages, as well as in determining the limits of this compensation. The author concludes that it is reasonable to compensate for pecuniary damage arising from the birth of a disabled child – e.g., the parents' loss of income, along with medical expenses. The maintenance costs (both the expected costs of a healthy child and the additional expenses due to the disability) could also be compensated for under the Estonian Law of Obligations Act. A value attributable to the benefit of the birth of a child may in principle be subtracted from the amount of recoverable damages.

In principle, compensation for non-pecuniary damage is possible too. The non-pecuniary damage to the mother arising from the pain and inconvenience suffered during pregnancy and childbirth, interference with family planning – primarily under the LOA's §134 (1) – and witnessing the child's suffering and consequent death could be subject to compensation.

In this author's opinion, the courts would have the option of reducing the amount of compensation in consideration of the parents' part in causing the damage. However, it should be noted that reducing the damages on grounds of the existence of the possibility to terminate the pregnancy or put the child up for adoption would be contrary to the principle of good faith.

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Verfassungsrechtliche Grundlagen der Pflicht zur Begründung von Gerichtsurteilen

Einführung

Nach den estnischen Prozessordnungen müssen Gerichtsurteile sowohl im Straf-[*1], Zivil-[*2] als auch Verwaltungsgerichtsverfahren[*3] (§ 312 KrMS, § 434 und § 442 Abs. 1 und 8 TsMS sowie § 157 Abs. 1, § 160 Abs. 1 und § 165 Abs. 1 HMS) in der Regel schriftliche Begründungen enthalten. Das Fehlen der Begründungen wird in den Prozessordnungen (§ 339 Abs. 1 Nr. 7 KrMS; § 669 Abs. 1 Nr. 5 TsMS; § 199 Abs. 2 Nr. 2 HKMS) als wesentliche Verletzung des Prozessrechts eingeschätzt, die zur Aufhebung des Urteils führt.[*4]

Im Grundgesetz der Republik Estland[*5] wird dagegen von den Gerichten die Bekanntmachung ihrer Entscheidungen zugrundeliegenden Gründen nicht ausdrücklich gefordert. In der im zweiten Kapitel des Grundgesetzes angeführten Liste der Grundrechte ist das Recht der Person auf ein begründetes Gerichtsurteil nicht enthalten.

Auch im Kapitel XIII. des Grundgesetzes, das die wichtigeren Angelegenheiten der Gerichtsorganisation regelt, ist die Pflicht zur Begründung des Gerichtsurteils nicht festgelegt.

Ein Blick in die Verfassungen der anderen europäischen Länder zeigt, dass es Staaten gibt, in denen die Pflicht zur schriftlichen Begründung des Gerichtsurteils in der Verfassung gesondert genannt ist[*6], jedoch ist es nicht allgemein verbreitet.[*7]

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1 Kriminaalmenetluse seadustik [Strafprozessordnung] – RT I 2003, 27, 166; RT I, 06.01.2016, 19 (auf Estnisch).

2 Tsiviilkohtumenetluse seadustik [Zivilprozessordnung] – RT I 2005, 26, 197; RT I, 02.02.2016, 8 (auf Estnisch).

3 Halduskohtumenetluse seadustik [Verwaltungsgerichtsordnung] – RT I, 23.02.2011, 3; RT I, 19.03.2015, 24 (auf Estnisch)

4 Die Frage ist jedoch, was unter Fehlen der Urteilsgründe verstanden wird. Zumindest in Strafsachen hat der Oberste Gerichtshof diesen Begriff für längere Zeit breit ausgelegt: als solcher Verfahrensfehler wurden auch Urteilsgründe eingestuft, die nicht einleuchtend und schlüssig waren. Nach der neueren Rechtsprechung (StGH 30.06.2014, 3-1-1-14-14, Rn. 700) werden aber nur die grobsten Begründungsmängel als Fehlen der Urteilsgründe eingestuft. Das Ergebnis dieser Änderung der Rechtsprechung ist, dass die leichteren Begründungsmängel vom höheren Gerichtshof beseitigt werden können, ohne das Urteil aufzuheben und an den Unterinstanz zurückzuverweisen.

5 Eesti Vabariigi põhiseadus [Grundgesetz der Republik Estland] – RT 1992, 26, 349; RT I, 15.05.2015, 2 (auf Estnisch).

6 Die richterliche Begründungspflicht ist z. B. in Verfassungen der Hellenischen Republik (Art. 93 Para. 3), der Italienischen Republik (Art. 111 Para. 6) und des Königreichs Spanien (Art 120) vorgesehen. Zu Verfassung der Hellenischen Republik siehe http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf (auf Englisch); zu Verfassung der Italienischen Republik siehe http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (auf Englisch); zu Verfassung des Königreichs Spanien siehe http://www.lamoncloa.gob.es/lang/en/espana/leyfundamental/Paginas/titulo_sexto.aspx (auf Englisch).

7 G. Bergholtz hat festgestellt, dass die Verfassungen von Deutschland, Frankreich, England, den USA und den skandinavischen Staaten keine solche Pflichten enthalten. – G. Bergholtz. Ratio et Auctoritas. A Comparative Study of the Significance

Zudem werden im Schwurgerichtsverfahren, das in mehreren europäischen Staaten verwendet wird, die Verdikte des Schwurgerichts traditionell nicht motiviert.[*8] In der Wirklichkeit erkennen die estnischen Prozessordnungen eine ganze Reihe von Situationen, in denen die Gerichte nicht verpflichtet sind, eine Gerichtsentscheidung (schriftlich) zu begründen. Zum Beispiel braucht der Oberste Gerichtshof die Entscheidungen über die Nichtannahme der Revision nicht zu begründen (siehe z. B. § 349 Abs. 5 KrMS)[*9]. Auch Sachurteile können aber ohne schriftliche Begründungen bleiben. Der Staatsgerichtshof muss seine Entscheidung nicht mit schriftlichen Begründungen versehen, wenn die angefochtene Entscheidung unverändert bleibt (§ 363 Abs. 4 Nr. 2 KrMS). Keine Begründungen in der strikten Bedeutung enthalten die Urteile in Abspracheverfahren (§ 249 KrMS). In Zivilgerichtsverfahren darf man im Versäumnis- oder Anerkenntnisurteil Tatbestand und Entscheidungsgründe weglassen (§ 444 Abs. 3 TsMS).

Das Weglassen von Entscheidungsgründen hilft die Belastung der Gerichte zu reduzieren. Dieses Ziel hat seine Bedeutung nicht verloren. Laut Aktionsplan des Ministeriums für Justiz gehört die Verbesserung der Effizienz der Gerichtsbarkeit zu den wichtigen Zielen des Ministeriums. Nach dem Bestreben des Ministeriums soll das Verfahren in einem Gerichtsinstanz weniger als 100 Tage dauern.[*10] Wenn es den Gerichten erlaubt wäre, in bestimmten Fällen die Urteilsgründe wegzulassen, könnte es dazu beitragen, dieses Ziel zu erreichen. Vorhergehendes gibt Anlass zu fragen, wie frei der Gesetzgeber bei der Gestaltung der richterlichen Begründungspflicht ist. Dies hängt davon ab, ob die Verfahrensgrundrechte das Recht auf eine begründete gerichtliche Entscheidung enthalten.

1. Forderung der Begründung der gerichtlichen Entscheidung im Kontext der europäischen Menschenrechtskonvention

Neben dem Grundgesetz trägt in der estnischen Rechtspraxis bei der Definierung und Ausstattung der Grundrechte auch die Konvention zum Schutz der Menschenrechte und Grundfreiheiten[*11] (EMRK) eine wesentliche Rolle.[*12] Nach der Rechtsprechung des Obersten Gerichtshofs soll das Grundgesetz Estlands in solcher Weise ausgelegt werden, die im Einklang mit der Menschenrechtskonvention und ihr Anwendungspraxis ist. Andernfalls wäre der wirksame innerstaatliche Schutz der Rechte nicht gewährleistet.[*13]

Eine Bestätigung darüber, dass eine Person das Recht auf begründetes Urteil hätte, bietet aber auch der Text der Konvention nicht.

Neben dem Text der Konvention ist ihre bedeutendste Auslegungsquelle die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte (EGMR).[*14] Im historischen Kontext müssen darüber hinaus die Beschlüsse der bis zum Jahre 1999 tätig gewesenen Europäischen Kommission für Menschenrechte (EKMR)[*15] beachtet werden. Gerade die Letztere hat bereits früh den Standpunkt eingenommen, dass das Prinzip des fairen Gerichtsverfahrens die Forderung der Begründung des Gerichtsurteils umfasst: In

of Reasoned Decisions with Special Reference to Civil Cases. – Scandinavian Studies in Law, Vol 33. Stockholm: Almqvist & Wiksell 1989, S 19.

8 P. Roberts. Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials? – Human Rights Law Review 11:2. S. 216 – DOI: http://dx.doi.org/10.1093/hrlr/ngr003.

9 Der Staatsgerichtshof selbst hat betont, dass die Entscheidung über die Annahme des Rechtsmittels kein Sachurteil ist (StGH 16.12.2013, 3-4-1-56-13, Rn.11).

10 Tegevuskava 2016–2019. [Aktionsplan 2016–2019] Im Internet: http://www.just.ee/sites/www.just.ee/files/tegevuskava_2016-2019.pdf (auf Estnisch).

11 RT II 2010, 14, 54.

12 Ü. Madise u. a. (Hrsg). Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne. [Grundgesetz der Republik Estland. Kommentierte Ausgabe.] 3., täiendatud väljaanne. Tallinn: Juura 2012, , S. 96: II peatükk. Põhiõigused, vabadused ja kohustused. Sissejuhatus [Kapitel II. Grundrechte, Freiheiten und Pflichten. Einführung], Rn. 1.3.

13 StGH 25.03.2004, 3-4-1-1-04, Rn. 18.

14 E. Rohtmets. Euroopa Inimõiguste Kohtu praktika Riigikohtu lahendites. Kohtupraktika analüüs. [Die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte in den Entscheidungen des Obersten Gerichtshofs. Die Analyse der Rechtsprechung.] Tartu: Riigikohus 2012; S. 3. Im Internet: http://www.riigikohus.ee/vfs/1285/EIK%20praktika%20RK%20lahendites_analuus_jaan2012_E_Rohtmets.pdf (auf Estnisch).

15 Protokoll Nr. 11 zur Konvention zum Schutze der Menschenrechte und Grundfreiheiten über die Umgestaltung des durch die Konvention eingeführten Kontrollmechanismus (Protocol No. 11 to the Convention for the Protection of Human Rights and

1963 hat EKMR festgestellt, dass dem Prinzip des fairen Gerichtsverfahrens entsprechend das Gericht die Begründungen einer Entscheidung vorlegen soll, wenn es dem Angeklagten möglich ist, gegen die gerichtliche Entscheidung Rechtsmittel einzulegen.*[16]

Die angeführte Stellungnahme betraf im Strafverfahren gefassten Gerichtsurteile. Zehn Jahre später hat EKMR aber klar geäußert, dass Art. 6 der Konvention von den Gerichten das Vorlegen von Begründungen sowohl in Straf- als auch Zivilverfahren fordert.*[17] Dass die Prozessparteien das Recht auf ein motiviertes Gerichtsurteil haben, hat später der Europäische Gerichtshof für Menschenrechte wiederholt bestätigt.*[18]

Eine Ausnahme bilden die Verdikte des Schwurgerichts, die, wie schon erwähnt, traditionell nicht mit Gründen versehen werden. EGMR hat versichert, dass Art. 6 der Konvention das Schwurgerichtsverfahren nicht verbietet, obwohl die Schwurgerichte die Begründungen ihres Urteils nicht vorlegen. Zwar muss es für den Angeklagten und die Öffentlichkeit auch bei den Verdikten des Schwurgerichts möglich sein, zu verstehen, auf welche Schlussfolgerungen sich diese stützen.*[19] Bei einem Verdikt des Schwurgerichts kann das Fehlen von Begründungen durch genaue und klar verständliche Fragen des den Geschworenen vorgelegten Fragebogens kompensiert werden.*[20]

2. Recht auf begründetes Urteil als Teil des Rechts, das Urteil von einem übergeordneten Gericht nachprüfen zu lassen?

Da nach der Rechtsprechung des EGMR Art. 6 der Konvention das Begründen der Gerichtsurteile fordert, ist es klar, dass auch in der estnischen Rechtsordnung das Recht der Person auf ein begründetes Gerichtsurteil als Bestandteil des fairen Verfahrens anerkannt werden muss.

Im Grundgesetz Estlands findet man mehrere Unterprinzipien von fairen Verfahrens, das Recht auf ein faires Gerichtsverfahren selbst ist aber nicht erwähnt. Deshalb bleibt immer noch die Frage, aus welchen Norm des Grundgesetzes das Recht auf ein faires Verfahren und das Recht auf ein begründetes Urteil abgeleitet werden können.

Zu den im Grundgesetz erwähnten Unterprinzipien des fairen Verfahrens gehört auch das Recht, gegen ein Urteil in den gesetzlich vorgesehenen Verfahren ein höherstehendes Gericht anzurufen (Recht auf Rechtsmittel, § 24 Abs. 5 GG).

Gerade die Notwendigkeit, für die Prozessparteien eine effiziente Möglichkeit zu gewährleisten, gegen das Gerichtsurteil ein Rechtsmittel einzulegen, wird oftmals als Grund angeführt, warum das Begründen des Gerichtsurteils notwendig ist.*[21] Auch die Stellungnahme der EKMR in der Sache 1035/61 zeigt, dass das Recht auf ein begründetes Gerichtsurteil zunächst mit der Gewährleistung eines wirksamen Rechts, das Urteil von einem übergeordneten Gericht nachprüfen zu lassen, begründet wurde. Das Gericht muss sein Urteil erschöpfend motivieren, um das Schutzrecht des Angeklagten bei dessen Anfechtung zu gewährleisten. Die Kommission hat aber kein Problem darin gesehen, wenn eine nicht anfechtbare Gerichtsentscheidung keine Begründungen enthält.

Sowohl die EKMR als auch der EGMR*[22] haben auch später die Notwendigkeit eines motivierten Urteils vom Standpunkt der Gewährleistung der Zugang zu wirksamen Rechtsmitteln betont. Die Kommission

Fundamental Freedoms, Restructuring the Control Machinery Established thereby) trat am 1. November 1998 in Kraft. – RT II 1998, 7.

16 EKMR 17.01.1963, 1035/61, X. v. Federal Republic of Germany. – Yearbook of the European Convention on Human Rights, Vol. VI, S. 192.

17 EKMR 02.04.1973, 5460/72, The Firestone Tire and Rubber Company, Firestone Tyre & Rubber Company Ltd and The International Synthetic Rubber Co. Ltd v UK. – Yearbook of the European Convention on Human Rights: 1973. S. 152.

18 Siehe z.B. EGMR 09.12.1994, 18390/91, Ruiz Torija v. Spain; 27.09.2001, 49684/99, Hirvisaari v. Finland.

19 EGMR 16.11.2010, 926/05, Taxquet v. Belgium, Rn. 92.

20 *Ibid*., Rn. 92; diese Position hat der EGMR später mehrmals bestätigt: siehe EGMR 18.11.2014, 43305/09, Gybels v. Belgium; 17.02.2015, 23530/08, Maillard v. Belgium.

21 W. Sarstedt. Die Entscheidungsbegründung im deutschen strafrechtlichen Verfahren. – Rechtsstaat als Aufgabe. Berlin: De Gruyter 1987, S. 141.

22 Siehe z. B. EGMR 16.12.1992, 12945/87, Hadjianastassiou v. Greece, Rn.33.

hat erläutert, dass das Begründen des Gerichtsurteils vor allem aus dem Grund notwendig ist, dass die Person, die von der gerichtlichen Entscheidung betroffen ist, abwägen könnte, ob das Urteil angefochten werden sollte. Bei Einlegung des Rechtsmittels kann sie konkrete Gegenargumente zu den Standpunkten des Gerichts vorlegen.*[23]

Aus diesen Stellungnahmen wird ersichtlich, worin der wichtigste praktische Output der Pflicht zur Begründung eines Gerichtsurteils besteht. Grundsätzlich ist es zwar möglich, ein Gerichtsurteil auch nur aufgrund des Tenors anzufechten, jedoch ist es in diesem Fall lediglich möglich, von einem höherinstanzlichen Gericht die Lösung der Sache in vollem Umfang zu beantragen, um die Richtigkeit der Schlussfolgerung des Gerichts niedrigerer Instanz zu überprüfen. Ein begründetes Gerichtsurteil ermöglicht aber derjenigen, die das Gerichtsurteil anficht, konkrete Gegenargumente vorzulegen und anzuführen, wo das Gericht seiner Einschätzung nach einen Fehler begangen hat.*[24]

Auch vom Blickwinkel des höheren Gerichts hat das Vorhandensein der Begründungen des angefochtenen Urteils eine Bedeutung. Fehlende Begründungen machen es für das höhere Gericht schwierig, festzustellen, ob das Vorgericht einen Fehler gemacht hat. Das festzustellen, wo der Fehler begangen wurde und worin es bestand, wird fast unmöglich. Ohne eine Begründung ist die Kontrolle der Richtigkeit des Urteils nur in dem Sinne möglich, dass der Beurteiler sagen kann, ob die Schlussfolgerungen des Gerichts sich mit den richtigen decken.*[25] Ein motiviertes Urteil befreit das höhere Gericht vom Zwang, die Streitigkeit in vollem Umfang neu zu lösen. Anstatt dessen kann das Rechtsmittelgericht Schritt für Schritt den Gedankengang des Spruchgerichts überprüfen und sich auf konkrete Fehler konzentrieren. Somit erleichtert ein erschöpfend begründetes Urteil die Arbeit des höherinstanzlichen Gerichts, indem es einen guten Überblick über die Probleme gibt und Beschleunigung des Verfahrens der Rechtsmittelinstanz nach sich zieht.*[26]

3. Argumente gegen das Betrachten des Rechts auf ein begründetes Urteil als Teil des Rechts auf Rechtsmittel

3.1. Die Vielfalt von Funktionen der Urteilsbegründung

Die Forderung der Begründung des Gerichtsurteils ergibt sich jedoch nicht nur aus dem Erfordernis, das Recht auf einen Rechtsbehelf der Prozessparteien zu gewährleisten. Dies wird ersichtlich zum Beispiel an der Tatsache, dass die Pflicht des Höchstgerichts zur Begründung seiner Urteile nicht durch das Recht auf einen Rechtsmittel begründbar ist.

Gründe, warum das Begründen des Gerichtsurteils notwendig ist, gibt es noch mehr.

Das schriftliche Begründen des Urteils zwingt aber auch den Urteilsfasser dazu, seine Argumente abschließend abzuwägen. Darauf, dass die Gedanken unvollendet bleiben können, wenn man seine Argumente niemandem anderen bekannt geben muss, machte bereits R. Brinkmann aufmerksam. Er führte an: „Wo der Richter nur mit sich selbst zu beraten hat, da kann er leicht versucht werden, von einem unbestimmten, unklaren Gefühle sich bestimmen zu lassen…“ *[27]

Zweitens steht die Motivierung des Urteils im Dienste der Rechtssicherheit. Aus den Begründungen des Urteils erhalten die Prozessparteien, andere Gerichte und Rechtswissenschaftler Information über den Gedankengang und die Rechtsauslegungen des Gerichts. *[28] Den Rechtspraktikern gibt es die Möglichkeit, diese Stellungnahmen in der Zukunft zu berücksichtigen, sich auf diese zu stützen oder zu widersprechen. Die weitere Rechtsprechung kann aber nur durch ein gut argumentiertes Gerichtsurteil beeinflusst

23 EKMR 01.02.1971,4311/69, X. v. Denmark. – Yearbook of the European Convention on Human Rights: 1971. S. 310.

24 S. Brink. Über die richterliche Entscheidungsbegründung. Funktion-Position-Methodik. Fr.a.Main: Lang 1999, S. 39.

25 C. Schmitt. Gesetz und Urteil: Eine Untersuchung zum Problem der Rechtspraxis. Berlin 1912, S. 82.

26 S. Brink (Fn. 24), S. 39.

27 R. Brinkmann. Ueber die richterlichen Urtheilsgründe, nach ihrer Nützlichkeit und Nothwendigkeit, so wie über ihre Auffindung, Entwickelung und Anordnung: nebst Bemerkungen über den richterlichen Stil und Ton. Kiel: J. C. F. von Maack 1826, S. 136.

28 S. Brink (Fn. 24), S. 29.

werden – präjudiziell ist nicht die in Rechtskraft erwachsene Entscheidung des Einzelfalles, sondern die in der Urteilsbegründung gegebene Antwort auf eine Rechtsfrage. [*29]

Den Rechtswissenschaftlern geben die im Gerichtsurteil vorgelegten Auslegungen und Argumente die Möglichkeit zur Kritik der Gerichtsurteile, was eine Grundlage der Systematisierung und der Weiterentwicklung der Dogmatik ist. [*30]

Die in den Urteilsgründen enthaltene Information kann bei Entstehung von Fragen bei der Vollstreckung des Gerichtsurteils behilflich sein.[*31] Diese Funktion kann jedoch eher für zweitrangig gehalten werden, weil der Tenor an sich derart klar sein muss, dass dessen Vollziehung möglich ist, ohne in den Urteilsgründen nach der Klarheit zu suchen. Im Kontext des estnischen Strafverfahrens muss berücksichtigt werden, dass in dem in § 315 Abs. 7 KrMS festgelegten Fall das Gerichtsurteil auch ohne den Gründen bleiben kann, was bedeutet, dass es möglich sein muss, ein derartiges Urteil zu vollziehen.

Zwar hilft die im Hauptteil dargestellte Information (vor allem der Inhalt der Anklage) zu definieren, welche Tat die Rechtskraft des Gerichtsurteils umfasst, d. h. in Bezug auf welche Tat bezüglich der Person kein neues Verfahren durchgeführt werden darf (*ne bis in idem* Verbot). [*32]

Zum Schluss kann nicht unbemerkt bleiben, dass ein gut begründetes Gerichtsurteil die Belastung der höheren Gerichte verringert: wenn die Parteien im Urteil Antworten darüber gefunden haben, warum das Gericht in bestimmter Weise entschieden hat und von deren materiellen Richtigkeit überzeugt sind, fällt die Notwendigkeit der Einreichung eines Rechtsmittels weg. Dies wiederum verbessert die Fähigkeit der höheren Gerichte, ihre Funktionen besser zu erfüllen. [*33]

3.2. Entwicklung der richterlichen Begründungspflicht

Es kommen aber noch wichtigere, eng mit den Grundprinzipien des demokratischen Rechtstaats verbundene Funktionen dazu.

Ein gutes Bild darüber, warum das Begründen der Gerichtsentscheidung notwendig ist, ergibt sich aus dem Werdegang dieser Pflicht in den unterschiedlichen europäischen Staaten. Historisch ist zunächst nur die systeminterne Begründungspflicht entstanden.[*34] Die Prozessparteien hatten zwar bereits im Mittelalter das Recht, gegen ein Gerichtsurteil ein Rechtsmittel einzulegen, jedoch war das Gericht, das das angefochtene Urteil gefasst hatte, verpflichtet, Begründungen nur der Beschwerdeinstanz vorzulegen.[*35] Vor den Prozessparteien und der Öffentlichkeit wurden die Begründungen demgegenüber neidisch geheim gehalten. Für die französischen Gerichte war es seit dem Anfang des 14. Jahrhunderts bis zum Jahr 1810 verboten, den Parteien und der Öffentlichkeit die Begründungen ihrer Urteile vorzulegen.[*36] Auf den deutschen Gebieten herrschte diesbezüglich noch im 19. Jahrhundert Uneinheitlichkeit. In einigen deutschen Ländern entstand die Pflicht zur Vorlage der Begründungen des Urteils im 18. Jahrhundert (in Sachsen bereits in 1715, in Weimar in 1723, in Preußen in 1793) [*37], eine gängige Praxis wurde es jedoch erst in der Mitte des 19. Jahrhunderts. [*38] In der Badischen Prozessordnung war es bis zum Jahr 1831 vorgesehen, dass Begründungen nur dem höheren Gericht vorgelegt werden.[*39] In Schweden wurde die Begründungspflicht im Jahr 1734[*40], d. h. etwa zwanzig Jahre danach eingeführt, als die estnischen Gebiete vom Königreich Schweden unter die russische Herrschaft übergegangen waren (*de facto* in 1710, *de jure* mit dem Frieden von Nystad in 1721).

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29 K. Larenz, Methodenlehre der Rechtswissenschaft. 6. Aufl. Berlin, Heidelberg: Springer 1991, S. 429. – DOI: http://dx.doi.org/10.1007/978-3-662-08711-4.

30 S. Brink (Fn. 24), S. 30.

31 *Ibid*., S. 30.

32 A. Aarnio. Õiguse tõlgendamise teooria . Tallinn: Juura 1996, S. 147.

33 S. Brink (Fn. 24), S. 39.

34 *Ibid*., S. 27.

35 *Ibid*., S. 28.

36 G. Bergholtz (Fn. 7), S. 14

37 J. Lücke. Begründungszwang und Verfassung. Zur Begründungspflicht der Gerichte, Behörden und Parlamente. Mohr (Siebeck) Tübingen 1987. S. 2

38 G. Bergholtz (Fn. 7), S. 15.

39 J. Lücke (Fn. 37). S. 2.

40 G. Bergholtz (Fn. 7), S. 18.

Über die Gründe der Verheimlichung der Begründungen des Urteils vor den Prozessparteien und der Öffentlichkeit gibt die Stellungnahme des deutschen Reichskammergerichts[*41] aus dem Jahr 1556 eine gute Vorstellung. Als die Anwälte sich am Reichskammergericht über nicht begründete Urteile beschwerten, erklärte das Reichskammergericht, dass kein Richter verpflichtet ist, „den Partheyen die Ursachen seiner Erkenntnis in specie anzuzeigen". Die Bekanntgabe der Begründungen würde die Verringerung der Autorität des Gerichts nach sich ziehen und würde den Parteien eine Grundlage für Nörgelei und Nachreden liefern. [*42]

Eine ähnliche Auffassung wurde etwa ein Jahrhundert später in Schweden vom Berufungsgericht Svea (*Svea Hovrätt*) zum Ausdruck gebracht. In 1641 verkündete das Berufungsgericht Svea als Antwort auf den Wunsch der Prozessparteien, die Motive des Urteils zu bekommen, dass das, warum das Gericht sich so entschieden hat, die Prozessparteien nichts angeht; das Gericht schuldet die Begründungen nur dem König und der Regierung, die höher als das Gericht stehen. [*43]

In dieselbe Reihe fügt sich noch die Erklärung des deutschen Juristen Justus Claproth aus dem Jahre 1789. Er war gegen die Veröffentlichung der Begründungen des Gerichtsurteils an die Parteien und die Öffentlichkeit, indem er fand, dass das Begründen des Gerichtsurteils vor den Parteien die Würde des Gerichts verletzt, weil das Gericht über seine Stellungnahmen nur der Obrigkeit, nicht aber den Prozessparteien Bericht erstatten muss. [*44]

Wie aus diesen Stellungnahmen ersichtlich, wurden die Prozessparteien oder die Öffentlichkeit nicht dessen würdig erachtet, die Begründungen des Urteils zu erfahren. In dem Beifügen von Begründungen einem Urteil wurde die Gefährdung der Autorität des Gerichts gesehen, weil es die Möglichkeit gibt, das Gerichtsurteil zu kritisieren (die darin vorgelegten Stellungnahmen unter Verdacht zu stellen).[*45] Somit beruhte die Autorität des Gerichts auf der vom Herrscher erhaltenen Vollmacht, seiner Machtposition.

Einen Umbruch brachten die Aufklärungsideen. Im 18. Jahrhundert begann man die Begründungen der Gerichtsurteile zu fordern, um externe Kontrolle der Rechtsprechung zu ermöglichen.[*46] Neben dem Misstrauen gegenüber den Gerichten war diese Forderung vor allem durch die Emanzipation des Bürgers bedingt.[*47]

3.3. Urteilsbegründung als Maßnahme zur Vermeidung der Willkür der Macht

Bei den unterschiedlichen europäischen Staaten hat man bei der Erörterung der Zeit vor der großen Französischen Revolution behauptet, dass die Rechtsprechung durch die fehlende Unabhängigkeit und fehlende externe (öffentliche) Kontrolle charakterisiert war. Der Herrscher mischte sich nach seinem Belieben in die Rechtsprechung ein: der Souverän hielt es für sein Recht, die Entscheidungen seiner Gerichte sowohl in Zivil- als auch Strafsachen auf Antrag oder sogar ohne diesen aufzuheben und inhaltlich zu verändern. [*48] Unter Einwirkung der Aufklärungsideen verbreitete sich die Auffassung, dass jedes unkontrollierte Eingreifen des Herrschers den Ruf der Gerichte und das Rechtsgefühl des Volkes beeinträchtigt. [*49]

Eine Maßnahme, die hilft, willkürliche Gerichtsurteile zu verhindern, ist die Möglichkeit der Parteien und der Öffentlichkeit, die Begründungen des Gerichtsurteils kennenzulernen. Lord Denning, einer der

41 Laut F. G. von Bunge sind nicht wenige Rechtsstreiten aus dem alten Livland an das Reichskammergericht gebracht worden. Ebenso stellte der Bischof Johannes Kievel von Oesel den von dem Stiftsrathe Verurteilten zur Wahl, entweder an den Landtag oder an das Reichskammergericht zu appellieren. – F. G. von Bunge. Geschichte des Gerichtswesens und Gerichtsverfahrens in Liv-, Est- und Curland. Reval 1874, S. 22.

42 W. Sellert. Zur Geschichte der rationalen Urteilsbegründung gegenüber den Parteien insbesondere am Beispiel des Reichshofsrats und des Reichskammergerichts. – G. Dilcher, B. Diestelkamp (Hrsg.). Recht, Gericht, Genossenschaft und Policey: Studien zu Grundbegriffen der germanistischen Rechtshistorie/ Symposion für Adalbert Erler. Berlin: Erich Schmidt 1986, S. 104–105.

43 G. Bergholtz (Fn. 7), S. 17–18.

44 S. Brink (Fn. 24), S. 36.

45 So z. B. G. Bergholtz (Fn. 7), S. 18; W. Sellert (Fn. 42), S. 104–105.

46 G. Bergholtz (Fn. 7), S. 19.

47 W. Sellert (Fn. 42), S. 111.

48 C. Hillgruber. Art. 97 Rn. 11 – Grundgesetz. Kommentar (Begr. Th. Maunz, G. Dürig). Bd VI. 75. EL September 2015. München: C. H. Beck 2015.

49 *Ibid*., Rn. 12.

berühmtesten englischen Richtern des 20. Jahrhunderts, hat gesagt, dass die Begründung dies ist, was eine rechtliche Entscheidung von einer willkürlichen unterscheidet. Eine Gerichtsentscheidung soll auf rationalen Begründungen beruhen. Eine willkürliche Entscheidung dagegen kann auf Gefühlen, Launen, Belieben oder Vorurteilen beruhen.[*50] Deshalb bedürfen auch die Urteile, die nicht anfechtbar sind, d. h. Entscheidungen der höchsten Gerichtsinstanz, der Begründung. [*51] Begründungen sind ein Beweis der Rationalität des staatlichen Handelns. Erstens ermöglicht es zu kontrollieren, dass das Gericht selbst seine Macht nicht missbraucht, d. h. bei Entscheidungsfindung nicht aus unangemessenen Erwägungen ausgeht. Zweitens ist es aufgrund der Begründungen des Gerichtsurteils möglich, sich von der Unabhängigkeit und Neutralität der Gerichtsgewalt zu überzeugen.

R. Brinkmann nannte bereits in 1826, als das Begründen des Gerichtsurteils noch nicht selbstverständlich war, dass es für das menschliche Wesen charakteristisch ist, dass „der Verlierer" ein mit Begründungen nicht versehenes Urteil für unbegründet hält.[*52] R. Brinkmann stellte fest, dass das Begründen des Gerichtsurteils hilft, das Misstrauen sowohl der als Verlierer hervorgegangenen Prozesspartei als auch der Öffentlichkeit gegenüber der Gerichtsgewalt zu vermeiden und war überzeugt, dass die Öffentlichkeit der Begründungen eines Gerichtsurteils „zur Beförderung der Gerechtigkeit unendlich viel beitrage". [*53] Es muss vor allem für die im Verfahren verlorene Partei möglich sein, zu begreifen, warum ein solches Urteil gefasst wurde. Nämlich muss ein Gerichtsurteil die Streitigkeit zwischen den Prozessparteien nicht nur dadurch, dass das Urteil rechtskräftig und vollstreckbar ist, formell, sondern auch materiell beenden.[*54] Die Bekanntgabe der Begründungen des Gerichtsurteils den Parteien gegenüber braucht zwar nicht vollständig zu vermeiden, dass die im Verfahren als Verlierer hervorgegangene Partei enttäuscht ist, jedoch erhöht das Kennen der Begründungen jedoch die Akzeptanz der Urteile.[*55] In Strafsachen wird der Angeklagte für den wichtigsten Adressaten des Gerichtsurteils gehalten: der Angeklagte ist die Partei des Gerichtsverfahrens, die vom Gerichtsurteil unmittelbar betroffen ist. Das Vorlegen von für bewiesen gehaltenen faktischen Tatsachen und rechtlichen Begründungen im Urteil ermöglicht es, dem Angeklagten zu demonstrieren, dass das Gericht sich in seine Gerichtssache ausreichend vertieft hat, seine Argumente verstanden wurden und den Beweisen und vorgelegten Argumenten Aufmerksamkeit gewidmet wurde.[*56] Somit, wenn laut einem bekannten Maxim die Rechtsprechung im Rechtsstaat nicht nur gerecht sein, sondern auch gerecht erscheinen muss ("*Justice must not only be done but must manifestly and undoubtedly be seen to be done.*"[*57]), hilft das Begründen der Entscheidung, auch diese Forderung zu erfüllen.

Das Erfordernis der Gewährleistung der Transparenz und Zuverlässigkeit der Rechtsprechung hat als Ziel des Motivierens des Gerichtsurteils seine Bedeutung nicht verloren. Die Transparenz der Ausübung der Staatsmacht, darunter der Gerichtsgewalt ist ein wesentliches Merkmal des Rechtsstaates. Die Notwendigkeit der Kontrolle der Öffentlichkeit über die Rechtsprechung hat auch der Europäische Gerichtshof für Menschenrechte betont. Der Letztgenannte hat auch bestätigt, dass die Begründung deshalb notwendig ist, damit es für den Angeklagten und auch für die Öffentlichkeit möglich wäre, zu verstehen, worauf sich das Gericht beim Fällen des Urteils stützte; dies wiederum ist ein wichtiges Schutzmittel gegen die Willkür des Urteils. Der Rechtsstaat und die Vermeidung der Willkür der Macht sind die Grundlagen der Europäischen Menschenrechtskonvention.[*58] Im Bereich der Rechtsprechung helfen diese, das Vertrauen der Öffentlichkeit gegen eine objektive und transparente Gerichtsgewalt zu gewährleisten, was wiederum eine der Grundlagen der demokratischen Gesellschaft ist.

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50 A. Denning. Freedom Under the Law. London: Stevens & Sons Limited 1949, S. 91.

51 I. Puppe. Feststellen, zuschreiben, werten: semantische Überlegungen zur Begründung von Strafurteilen und deren revisionsrechtlicher Überprüfbarkeit. NStZ 8/2012, S. 409.

52 R. Brinkmann (Fn. 27), S. 51.

53 *Ibid*., S. I.

54 S. Brink (Fn. 24), S. 31.

55 M. Taggart. Should Canadian Judges Be Legally Required to Give Reasoned Decisions in Civil Cases? The University of Toronto Law Journal, Vol. 33, No. 1 (Winter, 1983), S. 5. – DOI: http://dx.doi.org/10.2307/825463.

56 W. Sarstedt (Fn. 21), S. 142.

57 Dieser oft zitierte Aphorismus wurde durch den Urteil im Fall *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233) in den allgemeinen Sprachgebrauch gebracht.

58 EGMR 16.11.2010, 926/05, Taxquet v .Belgium, Rn. 90.

3.4. Achtung der Menschenwürde als Grundlage des Begründens der gerichtlichen Entscheidung

Die Übertragung des Kontrollrechts über die Gerichtsurteile an die Öffentlichkeit und die Person, in Bezug auf die das Urteil gefasst wird, bedeutet auch die Veränderung des Status der Bürger. Wie vorstehend angeführt, wurden die Prozessparteien teilweise noch in der ersten Hälfte des 19. Jahrhunderts nicht der Begründung des Urteils würdig gehalten. Die Bürger wurden Untertanen des Staates genannt und für das Objekt der Staatsmacht gehalten. [*59] Beim Begründen tritt aber der Urteilsfasser in Dialog mit der Person, in Bezug auf die er das Urteil fasst. Dies bedeutet ihre Behandlung als Träger der Rechte, nicht als ein Objekt, das die Machtvertreter nach eigenem Willen behandeln können.[*60] Das Verbot, eine Person in ein Objekt der Staatsmacht zu verwandeln, ist der Inhalt des als Grundlage der Freiheitsgrundsätze dienenden Prinzips der Menschenwürde.

Für die Achtung der Menschenwürde ist nicht nur wichtig, dass die Begründungen den Prozessparteien vom Gericht bekannt gegeben werden. Die Prozessparteien haben das Recht, im Gerichtsverfahren ihre Beweise und Argumente vorzulegen. Es handelt sich um ein effizientes Recht nur dann, wenn das Gericht diese Beweise und Stellungnahmen zur Kenntnis nimmt und diese bei der Urteilsfassung berücksichtigt. Auch darüber, dass das Gericht dies wirklich getan hat, erhalten die Prozessparteien Information gerade aus den Begründungen des Gerichtsurteils. Der EGMR hat bestätigt, dass Art. 6 der Konvention vom Gericht eine angemessene Beurteilung der Argumente und Beweise fordert, was aus dem Gerichtsurteil ersichtlich sein muss. Dies bedeutet jedoch nicht, dass Art. 6 Abs. 1 der Konvention vom Gericht die Beantwortung aller Argumente fordern würde.[*61]

3.5. Das legitimierende Funktion der Begründung des Gerichtsurteils

Die Bedeutung keiner der vorstehend genannten Funktionen des Gerichtsurteils darf unterschätzt werden. Jedoch wird in der Rechtsliteratur keine von diesen für die Wichtigste gehalten. Als Hauptfunktion und genereller Zweck richterlicher Entscheidungsbegründung, die alle anderen Aufgaben überwölbt, wird die Rechtfertigung der Machtausübung, d. h. Legitimierung des Urteils genannt.[*62] Im demokratischen Rechtsstaat ist das Volk der Träger der höchsten Staatsmacht. Im Grundgesetz der Republik Estland hat man gleich im ersten Paragraph darauf Bezug genommen.

Der Grundsatz der Volkssouveränität verlangt, dass die ganze staatliche Gewalt auf den Volkswillen rückführbar sein soll.[*63] Alle Zweige der Staatsmacht bedürfen der demokratischen Legitimation.[*64] Zum Beispiel in Deutschland wird die Volkssouveränität auch von den Prozessordnungen betont. In diesen ist es nämlich vorgesehen, dass Gerichtsurteile "*Im Namen des Volkes*" ergehen (§ 268 Abs. 1 StPO[*65]; § 311 Abs. 1 ZPO[*66]; § 117 Abs. 1 Satz 1 VwGO[*67]; § 105 Abs. 1 Satz 1 FGO[*68]; § 132 Abs. 1 Satz 1 SGG[*69]).[*70]

Es wird zwischen den einander ergänzenden personellen und sachlich-inhaltlichen Legitimationen unterschieden. [*71] Die Erste von denen bedeutet, dass die Bestellung der Amtsträger letztlich auf die Wil-

59 E. Talvik. Legaalsuse põhimõte Eesti Vabariigi põhiseaduse tekkimises, muutmistes ja muutmiskavades [Das Legalitätsprinzip in der Entstehung, in den Veränderungen und Veränderungsplänen der Verfassung der Republik Estland]. Tartu: Tartu Ülikool 1991, S. 9.

60 P. Roberts (Fn. 8), S. 215; J. Lücke (Fn. 37), S. 48.

61 EGMR 15.02.2007, 19997/02, Boldea v. Romania, Rn. 28.

62 R. Brink (Fn. 24), S. 26.

63 Ü. Madise u. a. (Fn. 12), § 1, Rn. 3.3, S. 47; M. Herdegen. Art. 79 Rn. 127 – Maunz/Dürig GG (Fn. 48).

64 S. Huster, J. Rux. Art. 20 Rn. 93 – Beck'scher Online-Kommentar Grundgesetz (Hrsg. V. Epping, Chr. Hillgruber). 27. Ed., Stand: 01.12.2015.

65 Strafprozessordnung – Internet: https://www.gesetze-im-internet.de/stpo/.

66 Zivilprozessordnung – Internet: https://www.gesetze-im-internet.de/zpo/.

67 Verwaltungsprozessordnung – Internet: http://www.gesetze-im-internet.de/vwgo/.

68 Finanzgerichtsordnung – Internet: http://www.gesetze-im-internet.de/fgo/.

69 Sozialgerichtsgesetz – Internet: http://www.gesetze-im-internet.de/sgg/.

70 Die Prozessordnungen Estlands sehen dagegen vor, dass die Gerichtsurteile im Namen der Republik Estland ergehen (§ 311 Nr. 1 KrMS; § 434 TsMS; § 161 Nr. 1 HKMS). Also legen die estnischen Prozessordnungen den Schwerpunkt darauf, dass die Rechtsprechung zum Ausüben der Staatsmacht gehört.

71 S. Huster, J. Rux (Fn. 64), Art. 20 Rn. 94.

lenserklärung des Volkes zurückführbar sein muss.[*72] Sachlich-inhaltliche Legitimation bedeutet die Forderung, dass das Volk einen ausreichenden inhaltlichen Einfluss auf die Ausübung der Staatsmacht haben soll.[*73]

Das Begründen des Gerichtsurteils hat gerade im Kontext der sachlich-inhaltlichen Legitimation eine Bedeutung. Die Legitimierung der Staatsmacht umfasst auch die Kontrolle über die Ausübung der Staatsmacht, d. h. die Tätigkeit der Gerichte durch das Volk. Der Europäische Gerichtshof für Menschenrechte hat festgestellt, dass eine derartige Kontrolle der Öffentlichkeit über die Rechtsprechung nur aufgrund von begründeten Gerichtsurteilen möglich ist.[*74]

Im parlamentarischen System besitzt die Entscheidung des Parlaments das höchste Maß an der Legitimation. Deshalb dient als ein wesentliches Element der demokratischen Legitimation die Steuerung der staatlichen Tätigkeit durch den in der Gesetzesform ausgedrückten Willen des Parlaments als eines unmittelbar legitimierten Vertretungsorgans. Dies wird durch das Prinzip der Legalität unterstützt, von dem ausgehend die vollziehende Gewalt und Gerichtsgewalt in ihrer Tätigkeit an die sich aus den Gesetzen ergebenden Grenzen verbunden sind.[*75]

Gesonderte Maßnahmen zur Legitimierung des Gerichtsurteils wären in dem Fall nicht notwendig, wenn der Richter die Beschlüsse des demokratisch legitimierten Gesetzgebers einfach erfüllen würde. Dies könnte aber nur in dem Fall funktionieren, wenn dem Richter immer angemessene und eindeutig verständliche Normen zur Verfügung stehen würden.[*76] Es ist aber längst klar geworden, dass das Montesquieusche Ideal, nach dem der Richter „*la bouche qui prononce les paroles de la loi*" ist, nicht ausführbar ist. Sogar wenn der Gesetzgeber es wünsche, wäre er unfähig, alles so detailliert zu regulieren, dass dem Richter nichts anderes übrig bleibt, als für den festgestellten Einzelfall aus dem Gesetz eine logische Schlussfolgerung zu finden. Der Richter muss deshalb sein Urteil begründen, d. h. es vor dem Volk (Öffentlichkeit) rechtfertigen.[*77] Eben diese Rechtfertigung wird von der Begründung des Gerichtsurteils getragen, mit dessen Hilfe die Übertragung der Legitimität auf das Gerichtsurteil stattfindet. [*78] Die Begründung ist somit ein Zwischenglied zwischen dem Gesetzestext und dem Tenor des Gerichtsurteils.[*79] Daraus, dass die Begründung des Urteils im demokratischen Rechtsstaat ein Glied zwischen dem demokratisch legitimierten Normtext und dem Tenor des Urteils ist, ergibt sich das subjektive Recht des Bürgers darauf, dass der Richter nicht nur das Urteil fasst, sondern es sprachlich mit dem demokratisch legitimierten Normtext verbindet. Dieses Recht kann man unmittelbar mit Hilfe von Rechtsmitteln gegen die Entscheidung, mittelbar aber auch durch inhaltliche Kritik in der Presse oder in der Fachliteratur ausüben.[*80]

Dies, ob der Richter legitime Macht ausübt oder seine Macht missbraucht, hängt davon ab, ob das Gerichtsurteil in den Grenzen des Gesetzes bleibt oder nicht. Diese Grenzen stellt der Richter durch Auslegung klar. Somit, bis der Richter sich bei Urteilsfindung auf die Auslegung des Gesetzes stützt, ist die Ausübung seiner Macht demokratisch legitimiert. Folglich ermöglicht das Begründen des Gerichtsurteils Kontrolle darüber, dass das Gericht die Grenzen seiner Vollmachten nicht überschreitet, indem er bei Rechtsprechung die vom Gesetzgeber vorgegebenen rechtlichen Rahmen verlässt.[*81] Deshalb steht die Begründungspflicht der Gerichtsurteile auch im Dienste des Prinzips der Gewaltentrennung. [*82]

Mit dem Vorstehenden ist die Bedeutung der Begründung des Gerichtsurteils im Kontext der Gewaltenteilung und der gegenseitigen Kontrolle nicht beschränkt. Die Frage besteht nicht nur darin, ob die Gerichte

72 BVerfG Entscheidung 24.05.1995 (2 BvF 1/92): BVerfGE 93, 37.

73 B. Grzeszick. Art. 20 Rn. 122 – Maunz/Dürig GG (Fn. 48).

74 EGMR 01.07.2003, 37801/97, Suominen v. Finland, Rn. 37.

75 B. Grzeszick. Art. 20 Rn. 122 – Maunz/Dürig GG (Fn. 48); F. Eckhold-Schmidt. Legitimation durch Begründung. Eine erkenntniskritische Analyse der Drittwirkungs-Kontroverse. Berlin: Dunker & Humblot 1974, S. 17.

76 F. Eckhold-Schmidt (Fn. 75), S. 17.

77 I. Puppe (Fn. 51), S. 409.

78 R. Christensen. Die Paradoxie richterlicher Gesetzesbindung. – K. D. Lerch (Hrsg.). Die Sprache des Rechts. Bd. 2. Recht verhandeln: Argumentieren, Begründen und Entscheiden im Diskurs des Rechts, Berlin u. a.: De Gruyter 2005, S. 91.

79 *Ibid*., S. 30–31.

80 R. Christensen. Die Verständlichkeit des Rechts ergibt sich aus der gut begründeten Entscheidung. – K. D. Lerch (Hrsg.). Die Sprache des Rechts. Bd. 1. Recht verstehen. Verständlichkeit, Missverständlichkeit und Unverständlichkeit von Recht. Berlin u. a.: De Gruyter 2004, S. 31.

81 R. Christensen (Fn. 78), S. 71.

82 S. Brink (Fn. 24), S. 41.

sich aus dem Wortlaut der Norm ergebenden Grenzen nicht überschreiten, sondern wichtig ist auch, welchen Inhalt die Gerichte der Norm bei der Auslegung geben. Wenn die Gerichte bei der Rechtsanwendung zu Ergebnissen gelangen, die der Gesetzgeber missbilligt, kann durch Gesetzeskorrektur eine Änderung der Rechtslage herbeigeführt werden.[*83] Schließlich brauchen Gerichtsurteile eine demokratische Legitimation auch aus dem Grund, dass die Rechtsprechung an sich eine das Recht weiterentwickelnden Tätigkeit ist. Obwohl auch in den kontinentaleuropäischen Staaten die rechtschaffende Rolle der Gerichte immer mehr zunimmt, kommt es vor allem beim Präzedenzrecht der angloamerikanischen Rechtssysteme zum Vorschein.[*84] Obwohl in den angloamerikanischen Staaten die Begründungspflicht den Gerichten nicht immer gesetzlich auferlegt ist[*85], wird festgestellt, dass das Begründen des Urteils zum Funktionieren des Präzedenzrechts notwendig ist: wenn es keine Begründungen geben würde, wäre der Einfluss des Gerichtsurteils als Präzedenz auch beschränkt, denn in diesem Fall würde das Urteil keine Anhaltspunkte zum Lösen von anderen ähnlichen Fällen geben.[*86]

Wenn im allgemeinen über die Begründung des Gerichtsurteils als Legitimationsquelle des Urteils gesprochen wird, ohne Anforderungen zu stellen, denen diese Begründung entsprechen muss, geht A. Aarnio weiter, indem er findet, dass das Gericht verpflichtet ist, inhaltlich begründete und kritiksichere Urteile zu fällen.

Auch A. Aarnio hat als Grund, warum die Begründungen des Urteils notwendig sind, die Ermöglichung der gesellschaftlichen Kontrolle der Urteile genannt, indem er anführt, dass es für die Verwirklichung der Demokratie wesentlich ist.[*87] Die Notwendigkeit der Begründung vom Standpunkt der Legitimation des Urteils steht nach der Klassifizierung von A. Aarnio davon noch getrennt. Bei Erörterung der Legitimationsfunktion merkt er an, dass dies notwendig ist, weil der Bürger die Möglichkeit haben muss, die gefassten Beschlüsse zu verstehen und zu genehmigen. Das Urteil wird davon ausgehend nur durch angemessene Begründung legitimiert.[*88] Die Anerkennung der Urteile kommt nur dann in Frage, wenn man sich deren Objektivität, d. h. deren Unbefangenheit und Sachlichkeit sicher sein kann. [*89] Damit zusammenhängend behauptet A. Aarnio, dass das Urteil desto mehr anerkennungsfähig ist, je besser es argumentiert ist.[*90]

Auch der Staatsgerichtshof scheint eine ähnliche Konzeption angenommen zu haben. Nämlich hat die Strafkammer des Staatsgerichtshofs wiederholt betont, dass das Gerichtsurteil zur Gewährleistung der Legitimität des Gerichtsurteils eindeutig verständlich und ohne Widersprüche sein muss.[*91] Davon ausgehend reicht es auch nach der Rechtsprechung des Staatsgerichtshofs nicht aus, dass die Begründungen des Urteils den Parteien des Gerichtsverfahrens und der Öffentlichkeit bekannt gegeben werden, sondern das Gericht muss zur Gewährleistung der Legitimität des Gerichtsurteils seine Stellungnahmen sowohl im Hauptteil als im Tenor möglichst klar formulieren.[*92]

4. Recht auf begründetes Urteil als selbstständiges Recht im Rahmen des allgemeinen Rechts auf fairen Verfahren

Aus dem Vorgehenden folgt, dass man das Recht auf begründetes Urteil nicht allein als Teil der Recht auf Rechtsmittel betrachten darf. Vielmehr handelt es sich um ein selbstständiges Recht im Rahmen des allgemeinen Rechts auf fairen Verfahren. Deshalb sollte das Recht auf begründetes Urteil aus der gleichen Norm abgeleitet werden wie das Recht auf faires Verfahren selbst.

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83 J. Ipsen. Staatsrecht I (Staatsorganisationsrecht). 11., überarbeitete Aufl. Neuwied; Kriftel: Luchterhand 1999, S 196.

84 So z. B. M. Taggart (Fn. 55), S. 6; J. L. Goutal. Characteristics of Judicial Style in France, Britain and the U. S. A. – The American Journal of Comparative Law. Vol. 24, No. 1 (Winter, 1976), S. 63. – DOI: http://dx.doi.org/10.2307/839167

85 G. Bergholtz (Fn. 7), S. 15; Taggart (Fn. 55), S. 1.

86 M. Taggart (Fn. 55), S. 8.

87 A. Aarnio. Õiguse tõlgendamise teooria. Tallinn: Juura 1996, S. 146.

88 *Ibid*., S. 145.

89 *Ibid*., S. 146.

90 *Ibid*., S. 145.

91 StGH 30.06.2006, 3-1-1-55-06 Rn. 20; 04.06.2007, 3-1-1-13-07 Rn. 9; 08.06.2009, 3-1-1-48-09 Rn. 10; 24.09.2009, 3-1-1-61-09 Rn. 22; 06.03.2013, 3-1-1-15-13 Rn. 10; 20.04.2014, 3-1-1-20-14 Rn. 11.1.

92 StGH 20.04.2014, 3-1-1-20-14 Rn. 11.1.

Bei der Suche der entsprechenden Norm könnte man sich auf § 10 GG berufen, in dem festlegt ist: „Die im vorliegenden Abschnitt aufgezählten Rechte, Freiheiten und Pflichten schließen keine anderen Rechte, Freiheiten und Pflichten aus, die sich aus dem Sinn des Grundgesetzes ergeben oder mit ihr im Einklang stehen, sowie den Grundsätzen der Menschenwürde und des sozialen und demokratischen Rechtsstaates entsprechen.“ Bei einem im Kontext der Europäischen Menschenrechtskonvention anerkannten Recht handelt es sich offensichtlich auch um ein mit dem Sinn des Grundgesetzes im Einklang stehendes Grundrecht.

Die Rechtsprechung des Staatsgerichtshofs, die sich mit der Thematik des fairen Gerichtsverfahrens befasst, spricht aber zugunsten einer anderen Lösung.

Laut Rechtsprechung des Staatsgerichtshofs ergibt sich das Recht auf faires Verfahren aus § 15 GG in Verbindung mit § 14.[*93] Im § 15 Abs. 1 Satz 1 GG ist festgelegt: „Jedermann hat das Recht, sich im Falle der Verletzung seiner Rechte an ein Gericht zu wenden.” § 14 GG fügt hinzu, dass die Gewährleistung der Rechte und Freiheiten eine Pflicht der gesetzgebenden, vollziehenden und rechtsprechenden Gewalt wie auch der örtlichen Selbstverwaltungen ist.

Der Staatsgerichtshof hat unterstrichen, dass § 15 Abs. 1 Satz 1 GG den ”lückenlosen gerichtlichen Schutz der Rechte” gewährleisten muss.[*94] Daraus ergibt sich, dass es möglich sein muss, jedes subjektive Recht vor Gericht in einem effizienten und fairen Verfahren innerhalb einer angemessenen Zeit zu realisieren.[*95] Mit dem Recht der Person, im Falle der Verletzung von Rechten und Freiheiten an ein Gericht zu wenden, korrespondiert die Pflicht des Staates, zum Schutz der Grundrechte ein angemessenes Gerichtsverfahren zu schaffen. Dieses Verfahren muss den Prinzipien des fairen Verfahrens entsprechen und einen effizienten Schutz der Rechte der Person gewährleisten. Deshalb umfasst die Pflicht des Staates, ein effizientes Gerichtsverfahren zu gewährleisten, alle Aspekte des Prozessrechts, die die Rechte der Person gewährleisten.[*96] Somit ergibt sich aus der Zusammenwirkung der §§ 15 Abs. 1 und 14 GG auch das Recht der Person auf ein begründetes Gerichtsurteil.

Die Feststellung, dass das Recht auf ein begründetes Urteil nicht von § 24 Abs. 5, sondern von §§ 15 Abs. 1 und 14 GG abzuleiten ist, hat eine wichtige Konsequenz. Das im § 24 Abs. 5 GG vorgesehene Recht auf ein Rechtsmittel ist ein Grundrecht mit einfacher Gesetzesvorbehalt. In § 15 Abs. 1 GG ist aber kein Gesetzesvorbehalt vorgesehen. Ein Grundrecht mit einfacher Gesetzesvorbehalt darf aus jedem mit Verfassung vereinbarem Grund gesetzlich beschränkt werden. Die Grundrechte ohne Gesetzesvorbehalt dürfen aber nur zum Schutz anderer Grundrechte oder verfassungsrangiger Rechtsgüter beschränkt werden. Also bietet § 15 Abs. 1 GG stärkeren grundrechtlichen Schutz als § 24 Abs. 5 GG.[*97] Nur muss man berücksichtigen, dass nach der Rechtsprechung des Staatsgerichtshofs auch die Verfahrensökonomie und Schnelligkeit des Gerichtsverfahrens Rechtsgüter konstitutionellen Rangs sind[*98], so dass im Fall der möglichen Einschränkungen des richterlichen Begründungspflicht die Verfassungsmässigkeit letztendlich doch an Proportionalität ankommt.

Fazit

Obwohl im Grundgesetz unter den verfahrensbezogenen Grundrechten das Recht der Person, die Begründungen eines sie betreffenden Gerichtsurteils zu wissen, nicht genannt wird, muss das Vorhandensein eines derartigen Grundrechts bejaht werden. Eine einschlägige Auffassung ergibt sich aus der Rechtsprechung des Staatsgerichtshofs, die besagt, dass § 15 Abs. 1 GG in Verbindung mit § 14 vom Staat die Gewährleistung eines effizienten und fairen Gerichtsverfahrens fordern. Die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte sagt wiederum, dass zum fairen Gerichtsverfahren auch das Recht der Person gehört, die Begründungen des sie betreffenden Urteils zu wissen.

Dass das Recht auf ein begründetes Gerichtsurteil für ein verfahrensbezogenes Grundrecht gehalten werden muss, bestätigt auch die eingehende Erörtung der Frage, warum die Bekanntgabe der Begründungen

93 StGH 16.05.2008, 3-1-1-88-07, Rn. 41; 10.04.2012, 3-1-2-2-11, Rn. 51.

94 StGH 22.12.2000, 3-3-1-38-00, Rn. 15; 29.11.2011, 3-3-1-22-11, Rn. 23; 06.03.2012, 3-2-1-67-11, Rn. 21; 09.04.2008, 3-4-1-20-07, Rn. 18; 17.07.2009, 3-4-1-6-09, Rn. 15; 15.12.2009, 3-4-1-25-09, Rn. 20; 01.11.2011, 3-4-1-19-11, p 22.

95 Ü. Madise u. a. (Hrsg.) (Fn. 12), § 15, Rn.1.2, S. 203.

96 *Ibid*., § 15, Rn. 1.3, S. 204.

97 StGH 11.12.12, 3-4-1-20-12, Rn. 31.

98 Siehe z. B. StGH 10.05.2016, 3-4-1-31-15, Rn. 10.

des Gerichtsurteils notwendig ist. Es stellt sich heraus, dass die Notwendigkeit der Begründung des Gerichtsurteils direkter oder indirekter fast aus allen grundlegenden Prinzipien des demokratischen Rechtsstaats ableitbar ist.

Die Begründungen der gerichtlichen Entscheidung müssen vor allem den Prozessparteien, der Öffentlichkeit und einem höheren Gericht die Kontrolle über die Richtigkeit des Urteils ermöglichen. Der Kontrollbedarf geht von der Feststellung aus, dass der Richter sich auch einfach irren oder sogar die Macht missbrauchen oder ein unrichtiges Urteil unter Einfluss einer unbefugten Person fassen kann. Die Gewährleistung der Transparenz der Rechtsprechung ist desto wichtiger, dass das Vertrauen gegen Rechtsprechung nicht nur durch tatsächliche, aber auch vermeintliche Machtmissbräuche ausgehebelt wird.

Das Vorstehende bedeutet nicht, dass die Forderung der Begründung des Gerichtsurteils sich nur aus dem Misstrauen und dem Wunsch ergibt, die Richtigkeit des Gerichtsurteils in Frage zu stellen. Die Begründungen geben dem Leser zugleich die Möglichkeit, dem Urteil des Gerichts zuzustimmen. Dies bedeutet, dass das Begründen ein Mittel ist, welches es dem Richter ermöglicht, die Prozessparteien und die Öffentlichkeit von der Richtigkeit der Stellungnahmen des Gerichts zu überzeugen. Vor allem bei der Funktion der demokratischen Legitimation kommt zum Vorschein, dass die Begründungen des Gerichtsurteils sowohl den Parteien als auch der Öffentlichkeit die Möglichkeit geben müssen, die Schlussfolgerungen des Gerichts gutzuheißen.

Also darf man die Wichtigkeit der Urteilsbegründungen nicht unterschätzen und beim Einschränken der richterlichen Begründungspflicht sollte man eher zurückhaltend vorgehen. Dies sollte auch dann gelten, wenn ein verfassungsrangiges Rechtsgut wie die Effizienz der Gerichtsbarkeit als Grund zur Einschränkung gilt.

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The Significance of Recognising Domestic Violence, in Light of Estonian Legal Experts' Opinion and the Prospects for Systematising the Relevant Legislation

Domestic violence has been under public scrutiny for some time internationally as well as in Estonia. A highly negative social phenomenon, it causes considerable harm to individuals' basic rights and thereby poses an acute legal problem. Accordingly, the objective with this article is to address the attitudes of Estonian practising legal experts towards domestic violence from the perspective of recognising it and to support the idea of exploring options for further systematising the relevant legislation.

1. Awareness of domestic violence as a factor changing attitudes and mentality

The world began to pay attention to domestic violence[*1] relatively recently, in the 1960s, when the unexpectedly high frequency of violent incidents in intimate relations became apparent. Non-governmental organisations began emerging to address it: The Battered Women Movement formed in London in 1971, the first women's shelters and crisis centres were established at about this time, etc.

Awareness of domestic violence drew attention to a need for legal experts to address the problems from new angles. Martin Partington, a leading British expert on criminal law, has pointed out the issue, stating that efforts to solve domestic-violence problems at the legislative and political levels have brought considerable

[1] The term 'domestic violence' shall be used here to refer to all acts of physical, sexual, psychological, or economic violence that occur within the family / domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared a residence with the victim (this definition comes from the Council of Europe's convention on preventing and combating violence against women and domestic violence, 2011).

changes in the last 20 years. The impact on the structure of the family-law system, as well as the positions and role of individuals engaged with that system, has been significant, according to Partington. The purpose was not limited to helping the victims; rather, it emphasised preventive action and shaping the views of all strata of society in the pursuit of an understanding that violent behaviour must not be condoned[*2].

The example of the UK validates the generalisation made by Partington. The UK became one of the first countries in the world to classify domestic violence as a serious crime (in 1990). This resulted in police support for the victims. This development took place on the initiative of the Home Office even before the passing of the Domestic Violence, Crime and Victims Act.[*3] In 2000, 10 years later, domestic violence was treated as a violation of human rights in the UK, and the Domestic Violence, Crime and Victims Act was passed in 2004.

According to experts, the subject of domestic violence has also significantly influenced the positions of US legal specialists and had its effect on legal regulation. The process in that context can be divided into three main phases.[*4] During the first phase (1968–1977)[*5] – the stage of forming of public opinion – the public movement was activated by non-governmental organisations concentrating on helping women who were suffering from abuse. Telephone help lines and shelters for battered women were set up, articles and books were published, and public awareness increased significantly. New problems were highlighted, demonstrating that the issue requires a more in-depth approach while the existing legislation needed to be critically revised and, when necessary, reformed.[*6] The second phase (1978–1987) is characterised by the emergence of concepts grounded in theories. For the first time in the US, criminology began to define violence against women as a separate sphere, in the early 1980s. The introduction of the term 'gender-based violence' was a great step forward in deciphering the complicated nature of domestic violence. It proved important to understand that women and men play different roles in domestic abuse and that the main cause of violence is gender inequality. During that era, theoretical concepts for analysing gender-based violence were developed, which helped to form a new type of criminological approach.[*7] The third phase, which is still in progress, is characterised by differentiated responsibility. Various criminological research projects have been carried out in the USA in the third phase, studies have been conducted, criminal policy and its effects have been analysed,[*8] the first courts specialising in domestic-abuse cases have been established, etc. A multidisciplinary advisory committee drafted the Model Code on Domestic and Family Violence in 1994, which had a considerable influence on further development of legislation.[*9] The US has passed laws regulating domestic violence on four occasions, in 1994, 2000, 2005, and 2013.

The phase of differentiated responsibility ushered in a significantly broader idea of domestic violence. This is evidenced by laws passed in various countries, expanding the concept of domestic violence and encompassing new forms of abuse, extending protection to other classes of individuals, etc. For instance, the gender-based violence act approved in Spain in 2004[*10] stipulated a significantly extended sphere of

2 M. Partington. Introduction to the English Legal System. New York: Oxford University Press, Inc. 2008, p. 178.

3 A. Matczak et al. Review of Domestic Violence Policies in England and Wales. London: Kingston University & St George's, University of London 2011. Online address: http://eprints.kingston.ac.uk/18868/1/Matczak-A-18868.pdf (most recently accessed on 10.3.2016).

4 Encyclopedia of Crime and Justice. The Gale Group, Inc. 2002. Available at http://www.encyclopedia.com/doc/1G2-3403000124.html (most recently accessed on 10.3.2016).

5 The development of criminological and legislative thought in other countries has occurred, in principle, in a similar manner. The initiating factor has been the forming of public opinion at the initiative of non-governmental organisations, while the handling of criminological and legislative aspects of domestic violence has become increasingly academic and professional.

6 Marie-Andrée Bertrand. The myth of sexual equality before the law. – *Proceedings of the Fifth Research Conference on Delinquency and Criminality*. Montreal: Quebec Society of Criminology 1967; Del Martin. *Battered Wives*. New York: Pocket Books 1976.

7 R.W. Dobash, R.P. Dobash. Violence against Women: A Case against Patriarchy. New York: The Free Press 1979; Meda Chesney-Lind. Women and crime: The female offender. – *Signs* 12 (1986) / 1, pp. 78–96; J. Belknap. The Invisible Woman: Gender, Crime, and Justice. Belmont, California: Wadsworth 1996.

8 Ronet Bachman. Estimates of violence against women: A comparison of the National Crime Victimization Survey and the National Violence against Women Survey. – *Violence against Women* 2000/May.

9 Model code on domestic and family violence, available at http://harrellcenter.hsc.usf.edu/resources.html (most recently accessed on 10.3.2016).

10 Organic Act 1/2004 of 28 December on Integrated Protection Measures against Gender Violence, available at http://www.isotita.gr/var/uploads/NOMOTHESIA/VIOLENCE/SPANISH%20LAW%20Organic%20Act%201_28-12-04%20on%20Violence.pdf (most recently accessed on 10.3.2016).

family relations to be protected: relations with either a current or a former spouse, romantic and sexual relations, relations between generations, and relations with dependants (minors or disabled people).

The list of forms of domestic violence has been expanded too. For example, France outlawed psychological violence in 2010. In 2009, Bulgaria outlawed emotional and economic violence. Furthermore, Bulgaria deems violent acts committed in the presence of minors equivalent to violence against minors. Mexico passed a law in 2007 forbidding violence within the family as well as at work, in learning institutions, and within the civil service; it also outlawed femicide as an extreme form of violence. Several countries (France, Germany, the UK, etc.) have outlawed arranged marriages and so-called honour killings.

Analysis of various countries' legislation shows the toughening of punishments for sexual crimes, especially those committed within the family and those involving children. The legislation of many countries is paying increasing attention to the protection of women and girls, but also all children, from violence and applies special protective measures.

While the developed countries began to pay attention to domestic-violence problems in the 1960s, Estonia turned its attention to the issue 30–35 years later. Estonia was subsumed by the Soviet Union for 51 years (1940–1991), during which time the subject of domestic violence was hardly addressed in the communist bloc. All issues related to violence against the person were discussed to a minimal extent. The official ideology declared that there were no reasons or bases for violence against the person in the Soviet Union, although some individual cases occurred, since every society has a small percentage of antisocial and violent elements. Domestic violence was addressed mainly by criminologists and a few other specialists in the context of studying non-political lawbreaking. It was unthinkable that domestic violence could become a social problem in a society whose criminal-justice doctrine viewed the protection of state interests and property as a priority. Domestic abuse was treated purely as physical violence under the Soviet penal code. Almost no attention was paid to the various levels and forms of this social phenomenon.

Open discussion of domestic violence in Estonia began only in 2000. At that time, the attitude to addressing this issue was negative and sceptical rather than understanding. This emerging opposition was overcome, however, by means of raising public awareness. Several studies were carried out; articles were written; and the first Estonian book on violence against women was published[*11], containing interviews with victims and their analysis by specialists. This brought important information about domestic violence to the general public.

All of this prepared the ground for the opening of Estonia's first shelter for women, in Tartu, not much later, in 2002. At present, Estonia has 15 shelters for women and one for men. The Estonian police declared the issue one of its priorities in 2004; a victim-aid service with 28 workers was established, alongside telephone help lines for children and adults. A national strategy for the prevention of violence has been drafted twice, for the years 2010–2015 and 2015–2020 (covering violence among children, abuse of children, intimate partner and other domestic violence, sexual abuse, and human trafficking).

Domestic violence is widespread in Estonia, and the number of incidents is showing an upward trend. In total, 2,997 cases of domestic violence were registered in 2015 (the number was 2,021 in 2011). Domestic violence accounts for 38% of reported cases of physical abuse. Every fourth case involves a child as a victim of violence or as a witness. The number of rape cases too is high; 161 incidents were registered in 2015. The police received more than 12,000 reports of domestic violence in 2015 (up from 5,146 reports in 2011). Eighty-eight per cent of the abusers were men, and 82% of the victims were women. Most of the cases (75%) occur between current or former spouses or partners. Physical abuse accounts for 78% of all cases of domestic violence in Estonia, and every fifth case is a repeat offence. In 2012, there were 20 cases of manslaughter or murder related to domestic violence (in 2015, the figure was five).

The problem of violence transcends the limits of family and affects Estonian society as a whole. Evidence of this can be seen in the high cost of domestic violence, estimated at approximately 116 million euros per year, with the share of law-enforcement costs coming to roughly 15–16%.[*12]

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11 H. Kase. Vaikijate Hääled. Raamat soolisest vägivallast ['Voices of the Silent: A Book on Gender Violence']. Tallinn: Eesti Avatud Ühiskonna Instituut 2001 (in Estonian), 446 p. (reprinted in 2002, Russian translation in 2003).

12 The cost of domestic violence was calculated in 2016 on the initiative of the Estonian Institute for Open Society Research within the project Developing a Joint System for the Prevention of Intimate Partnership Violence in Estonia, supported by the Norwegian financial mechanism. The method used in cost calculations was based on British experience and methodology. There were only a few countries in Europe that had estimated the cost of domestic violence – the UK, Finland, Sweden, and Denmark – and now Estonia has joined these pioneers. The cost calculated includes the expenses for relevant activities of the police and other elements of the criminal-justice system, the health-care expenses, costs for the social system (such as

The issue of domestic violence has influenced the attitudes of legal specialists in Estonia as well. Yet we have only reached the beginning of the second phase as defined by the US analysts (equivalent to 1978–1987 in their context)[*13], with the study of gender-based violence and violence against women as a separate field of research having only started. The specifics of gender-based violence and violence against women have not yet been subject to extensive study in Estonia from a criminological standpoint, and police and crime statistics allowing more detailed analysis are sparse as well.[*14] The absence of reliable information and of analyses and generalisations based on it is certainly one of the reasons the legal regulations dealing with domestic violence are significantly less effective than those of more developed countries. Accordingly, only every fourth case of physical abuse reported to the police reaches the courts (25% of all cases), while only 13% of all cases lead to a prison sentence.[*15]

The Estonian authorities concentrate primarily on the consequences of violence rather than on preventing it. The Estonian legal norms do not provide for early intervention and efficient regulation of domestic violence. That, in effect, means tolerating violence and, to some extent, even supporting it. The main problem lies in the mentality and attitudes, which have become a serious obstruction to efficient regulation of domestic violence.

One of the problems is the failure in Estonia to view domestic violence as a human-rights violation. Instead, domestic violence is seen as a private matter between members of the family rather than a crime against society.[*16] Violence against a stranger in a public place is treated as a much greater source of public threat than violence within the family against close relatives and other family members.

According to the UN, legislation regulating general crimes does not provide for handling of domestic-violence cases that is adequate for ensuring the victims' protection and preventing abuse:[*17]

1. Laws on general criminal acts such as assault, battery, and causing serious bodily harm cannot address all of the intricate and specific aspects of domestic violence. Domestic violence manifests itself in various forms; it is not merely physical violence and might also involve sexual abuse, damage to property, intimidation, stalking, deprivation of economic support, or threats of violence. A separate law on domestic violence would allow for more integrated handling of features specific to domestic violence, along with its prevention.
2. As a rule, general crimes are viewed as individual acts, while domestic violence consisting of a single isolated incident is extremely rare. In general, the opposite tendency exists: domestic violence becomes a repeated scenario of cruel treatment, which can include physical, sexual, psychological, and other violence.
3. In general, acts of law regulating general criminal acts are useful only after the physical violence has occurred. Analyses show that punishment for assault and battery is insufficient for preventing violent individuals from committing more serious crimes.

those of shelters), civil legal aid, and other services, along with the cost of lost output. The biggest cost element is the decline in victims' quality of life, the psychological and emotional impact, which amounts to approximately 60% of the total cost.

13 Encyclopedia of Crime and Justice (see Note 4).

14 Domestic violence is a largely hidden phenomenon, as an EU Agency for Fundamental Rights (FRA) study in 2012 showed; only 10% of victims approach the police in Estonia, even after very serious violence. The overwhelming majority of domestic violence still goes unreported; it is not registered anywhere, and no agency has complete information about it. In the FRA survey, 4,200 women in the EU were interviewed in total. FRA Survey 2013, available at http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-factsheet_et.pdf (most recently accessed on 24.7.2015).

15 J. Salla, L. Surva. Perevägivallatsejate retsidiivsus ['Recidivism of Familial Perpetrators']. – Kriminaalpoliitika analüüs ['Analysis of Criminal Policy'], 2012, (in Estonian) p. 8. Available at http://www.kriminaalpo-liitika.ee/sites/www.kriminaalpoliitika.ee/files/elfinder/dokumendid/perevagivallatsejate_retsidiivsus._justiitsministeerium._2012.pdf (most recently accessed on 10.3.2016).

16 Estonia, similarly to other EU countries, has signed international agreements on human rights and European legal instruments, according to which domestic violence shall be treated as international violation of human rights. After making this statement, a country can no longer advance the argument that individuals' private life is inviolable and should not be interfered with for justification of unwillingness and inability to protect victims against violence in their own homes.

17 Handbook for Legislation on Violence against Women. New York: UN Women 2012. Available at http://www.un.org/womenwatch/daw/vaw/handbook-for-nap-on-vaw.pdf (most recently accessed on 20.7.2015).

2. Legal resources for the combating of domestic violence in Estonia

World judicial practice uses two fundamental types of regulation to address domestic violence: reconciling and punitive. Reconciling regulation is based on empathy, evoking compassion towards the victim as well as the violent individual. According to this view, the violent persons too suffer, since their spouses/partners may traumatise or provoke them, with violent behaviour resulting. The response to violence relies on a mild approach (with reconciliation, counselling, etc.), and the violent persons generally go unpunished. Attempts are made at reconciliation between them and their victims and to get them to promise never to use violence again, to address the victim in a respectful and polite manner, etc. The main purpose of reconciliation-focused regulation is to keep the family together and to strengthen it by reconciling the partners' perspectives and providing psychological counselling, anger management, etc. Milder solutions are sought in the responses to violence (reconciliation of the parties, psychological counselling, anger management, etc.). Again, the primary objective of reconciling regulation is to keep the family together.

The purpose of punitive regulation, in contrast, is to establish control over violence, to end the cycle of violence, to separate the violent person and the victim, and to punish the user of violence. The state assumes the obligation of taking the case to court and pursuing a conviction even if the victim does not want it. Regulation of this sort proceeds from the idea that intimate partner and other domestic violence is a crime and, hence, the perpetrator is to be punished. Punishing the perpetrators is considered inevitable if one is to reduce the level of violence.

According to a survey carried out among Estonia's practising lawyers in 2014[*18], legal professionals may favour either approach. Reconciling regulation was favoured by a somewhat higher number of respondents (50–62%), though a considerable percentage (20–37%) supported punitive regulation. Quite a large percentage (12–28%) remained neutral.

In Estonia, criminal proceedings can be terminated on the basis of conciliation, according to Article 203[1] of the Code of Criminal Procedure[*19]. Criminal proceedings can be terminated by the prosecutor's office during the pre-trial proceedings or by the court at the request of the prosecutor's office. Upon termination of the criminal proceedings, a written conciliation agreement shall be concluded, specifying the procedure and conditions for remedying the damage caused by the criminal offence.

The survey shows that, while reconciling regulation is somewhat more popular among practitioners, the conciliation proceedings themselves were problematic for the respondents and experts were not convinced of the procedure's efficiency. The main problem is the absence of supervision and feedback about the effect of the conciliation agreements: the ensuring of the victim's required security and the changes in the perpetrator's behaviour. Experts argue that the content of the agreements may be vague and general, failing to discipline the perpetrator.

The attitude to conciliation proceedings is increasingly critical, and Europe is moving towards reduction or even elimination of this option. The Council of Europe's convention on preventing and combating violence against women and domestic violence (the Istanbul Convention[*20]) – which was signed by Estonia's then minister of justice, Andres Anvelt, on 2 December 2014, making Estonia the 37th country to

[18] A nationwide survey of practising experts was carried out in November–December 2014 within the Developing a Joint System for the Prevention of Intimate Partnership Violence in Estonia project, supported by the Norwegian financial mechanism and the Estonian Ministry of Social Affairs. This was responded to by 203 specialists: 122 practising lawyers (prosecutors, attorneys, judges, and other legal specialists) and 81 police investigators (the article reports the views of lawyers and police investigators; attorneys could not be presented as a separate group, on account of their low representation in the sample). The methods for the survey were developed by the Estonian Institute for Open Society Research (and its Ivi Proos and Iris Pettai) in co-operation with the University of Tartu's Institute of Public Law (Silvia Kaugia, Raul Narits, and Jüri Saar in the main), with Kati Arumäe, of the Police and Border Guard Board, assisting as a consultant. While the online questionnaire portion of the survey was targeted at prosecutors, judges, attorneys, and other legal specialists, it also was aimed at police investigators, who, to a greater or lesser degree, encounter victims of domestic violence. Participation in the survey was voluntary and anonymous; the respondents did not need to state their name, and the programme did not record their personal data in its database.

[19] Kriminaalmenetluse seadustik. – RT I, 06.01.2016, p. 19.

[20] See the Council of Europe convention on preventing and combating violence against women and domestic violence, of 11.5.2011. Council of Europe Treaty Series, No. 210. Istanbul. Available at http://www.kriminaalpoliitika.ee/sites/www.kriminaalpoliitika.ee/files/elfinder/dokumendid/euroopa_noukogu_istanbuli_konventsioon_naistevastase_vagivalla_ja_perevagivalla_ennetamise_ja_tokestamise_konventsioon.pdf. (most recently accessed on 12.3.2016).

join[*21] – includes a corresponding article[*22], which obliges the signatories to take a more critical view of the practice of reconciling. According to the Istanbul Convention, the authorities must put the primary emphasis on protection of the victim and separation of the victim from the perpetrator of violence. In the absence of intervention by society (and the state), the victim cannot protect herself or free herself from the influence of the violent partner, as a rule.

A key issue connected with the prevention of domestic violence is that of ensuring the victim's safety. This pertains to the competence of the state and public organisations.

Those countries that have criminalised domestic violence (e.g., the USA, the UK, Spain, Sweden, and Austria), use the restraining order as the most significant preventive measure.

The use of a temporary restraining order in Estonia is stipulated by §141[1] of the Code of Criminal Procedure[*23]. It can be applied for the protection of the victim's private life or other personality rights and is applied to the suspect or the accused with the consent of the victim. The article on restraining orders stipulates that a person suspected or accused of a crime against the person or a crime against a minor may be prohibited from staying in the places designated by a court, approaching the persons identified by the court, or communicating with said persons at the request of a prosecutor's office and on the basis of either an order by a preliminary-investigation judge or a court ruling. According to §141[3] (1) of the same act, at the request of a victim or, alternatively, at the request of a prosecutor's office and with the consent of the victim, a preliminary-investigation judge or court may amend the conditions of a temporary restraining order or annul the temporary restraining order. According to subsection 2 of that section, in order to issue a ruling on amendment of the conditions of or annulment of a temporary restraining order, a preliminary-investigation judge or court shall examine the criminal file and interrogate the suspect or accused and the victim with a view to ascertaining whether the request is justified. The prosecutor, victim, suspect or accused, and (if requested by the suspect or accused) suspect or accused's counsel shall be summoned to appear before the preliminary-investigation judge or court.

According to §331[2] of the Penal Code[*24], the violation of a restraining ('restriction') order is a crime that is punishable by a pecuniary punishment or up to one year of imprisonment.

With respect to domestic violence, the need for a restraining order may emerge in cases wherein a person is released on parole and it is necessary to ensure the separation of the perpetrator from the victim until the victim becomes an adult. On the other hand, the use of restraining orders in cases of domestic violence can sometimes be problematic. One of the drawbacks to applying a restraining order is victims' often limited awareness or incorrect interpretation of the restraining order, which has resulted in false expectations regarding safety or victims' change of mind and appeal for lifting the temporary restraining order or even breaking of the terms of the restraining order. Other problems arise in relation to the removal of the perpetrator from the home, which require more extensive analysis and seeking of solutions. At the request of the prosecutor's office, a temporary restraining order may be applied to a perpetrator of violence, and in the event of conviction, the court can apply a civil-law restraining order for a period of up to three years. The Ministry of Justice and the Ministry of the Interior have found that problems with application of restraining orders and their extent emerge in cases in which the persons involved share the same residence: according to §32 of the Constitution, the property of every person is inviolable and exceptions are permitted only in rare circumstances.[*25]

Practising lawyers in Estonia agree that the application of restraining order results in the victim's safety. In the survey of experts, we asked the respondents to assess five distinct options for ensuring the victims' safety and providing them with aid. The lowest level of confidence was associated with conciliation with the aid of a consultant or a religious adviser, with police investigators being the most sceptical; only 7% of them expressed support for this method. Prosecutors (26%) and judges (12%) were more in favour

21 The minister of justice signed the Istanbul Convention. See http://www.just.ee/et/uudised/justiitsminister-allkirjastas-istanbuli-konventsiooni (most recently accessed on 1.3.2016).

22 Article 48, 'Prohibition of Mandatory Alternative Dispute Resolution Processes or Sentencing', paragraph 1, states: 'Parties shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention.'

23 Kriminaalmenetluse seadustik. – RT I, 06.01.2016, p. 19.

24 Karistusseadustik. – RT I, 17.12.2015, p. 9.

25 Kriminaalpoliitika arengusuunad aastani 2018. Seletuskiri ['Guidelines for Development of Criminal Policy until 2018, Covering Letter'] (in Estonian). Available at http://www.just.ee/sites/www.just.ee/files/elfinder/article_files/seletuskiri_kriminaalpoliitika_arengusuunad_aastani_2018.pdf (most recently accessed on 1.3.2016).

of conciliation. The establishment of shelters and state-funded housing found little support as aid measures: 20–30% were in favour of shelters and 16–21% of state-funded housing. Applying restraining orders was rated higher by the experts as a measure increasing victims' security (36–52% favoured this approach). The most favoured measure (44–60%) was the imposing of mandatory programmes for violent individuals to help them control their violent tendencies (anger management).

The key issue in ensuring the victim's safety and preventing domestic violence is the capability of the state to handle cases of domestic violence. Several parameters exist for assessing this capability, and the most significant of them were included in the questionnaire compiled for experts by the authors of this article.

The experts' assessment of the state's capability varies. The treatment of victims by law-enforcement agencies found the highest levels of support among respondents, and ensuring the safety of victims' children received high marks too. Yet the respondents pointed out that several key problems remain unsolved.

The majority of the respondents (58–72%) indicated that the state is incapable of preventing domestic violence, even in serious cases; they also blamed the state for failing to establish supervision of violent individuals (68–71%) and of households characterised by violence (60–68%). According to the experts, the state is utterly inefficient at providing the victims with subsistence support and other material resources for independent survival: 88% of the judges, 81% of the police investigators, and 74% of the prosecutors deemed this support inadequate. The survey shows that judges are somewhat more critical of the state's capability.[*26]

The experts' answers show that the state has the least capability with respect to the aspects related to prevention of domestic violence and has greater capability to handle the consequences of violence. It would probably be practical to concentrate more extensively on co-operation between local government and the state while increasing the share of the local level in the efforts. Item 7 of the appendix to the Estonian Parliament's resolution of 9 June 2010 (757 OE 1) refers to this element of operations by stipulating that 'crime prevention must primarily occur at the local level. The local government's task is to reduce the factors fostering crime by involving the local residents and the private and not-for-profit sector'.[*27]

Dealing with domestic violence as such was introduced for the first time in the amendments to the Penal Code that came into force on 1 January 2015. Namely, the Penal Code's §121 (2) 2) stipulates that causing harm to the health of another person and physical abuse that causes pain, if committed in a close relationship or relationship of subordination, is punishable by a pecuniary punishment or up to five years' imprisonment.[*28]

We used the survey of experts to learn the opinion of practising lawyers on the resources provided by present laws for handling cases of domestic violence.

Most of the respondents were of the opinion that, in general, the existing laws allow for adequate handling of domestic-violence cases. Opinions as to whether the existing laws definitely enable or, in contrast, generally do not enable the handling of domestic-violence cases are not so unanimous. The gap is especially noticeable from the opinions of prosecutors and police investigators: as many as 31% of the prosecutors indicated believing that the existing laws definitely allow for adequate handling of domestic-violence cases, while only 8% of the police investigators agreed with this opinion. While 30% of the police investigators claimed that the present laws do not allow for adequate handling of domestic-violence cases,

[26] Estonia has apparently failed to realise the goals set in the strategy for preventing violence for 2010–2014 (*Vägivalla vähendamise arengukava aastateks 2010–2014*) in full. This is evident from the proposal for drafting a strategy for preventing violence in 2015–2020, which lists a number of drawbacks and not just positive outcomes of the previous strategy: the prevention of violence is not consistent or systemic, specialists cannot recognise the signs of violence, services for the victims do not me*et a*l their needs, the security of underage victims is not always sufficiently ensured, law enforcement is not always capable of preventing secondary victimisation, intervention to prevent repeat offences by violent perpetrators is insufficient, and statistics on victims and perpetrators of violence are inconsistent and not readily accessible. Details are available at https://www.osale.ee/konsultatsioonid/files/consult/263_VVA%202015-2020%20ettepanek.pdf (most recently accessed on 12.3.2016).

[27] Kriminaalpoliitika arengusuunad aastani 2018 ['Guidelines for the Development of Criminal Policy until 2018'] (in Estonian). Available at http://www.just.ee/sites/www.just.ee/files/elfinder/article_files/kriminaalpoliitika_arengusuunad_aastani_2018.pdf (most recently accessed on 1.3.2016).

[28] J. Sootak. Karistusõiguse revisjon kuriteo-, väärteo- ja haldusõiguse piirimail ['Revising the Penal Law between Criminal, Misdemeanour, and Administrative law']. – *Juridica* 2013/4, pp. 242–248; J. Sootak. Karistusõiguse arengumudelid: enklaavid ja nende iseseisvumine ['Development models for Penal Law: Enclaves and Their Gaining of Independence']. – *Akadeemia* 2014/4, pp. 687–713.

only 12% of the judges and 7% of the prosecutors agreed with them. Eight per cent of the judges remained neutral and refrained from expressing their opinion on the current laws with regard to the relevant question.

No matter the practising legal experts' opinions of the existing laws' adequacy for handling cases of domestic violence or the opinion of a large number of experts responding in the survey that a separate law on domestic violence would not significantly improve the handling of domestic-violence cases[*29], there are still reasons for raising the issue of a domestic-violence prevention act.

3. Further systematisation of Estonia's legal system for preventing and combating domestic violence

Estonia has ratified the Istanbul Convention[*30]. This Council of Europe convention, referred to above, is a supranational agreement obliging the signatory countries to offer the maximum support and protection possible to victims of violence. By signing the convention, a country takes on the obligation of ensuring the necessary amendments to its legislation and all support services for victims of domestic violence, including children witnessing it. The legal ideology of this convention is highly ambitious, since the countries ratifying the convention must develop a comprehensive framework, body of policies, and set of measures for aiding and protecting all victims of domestic violence and violence against women. It is especially important to point out that Article 5 of the Istanbul Convention obliges the signatory countries to adopt the necessary legislative and other measures for preventing, investigating, punishing, and compensating for the acts of violence within the field of application of that convention that have been carried out by non-state actors. In other words, signing the Istanbul Convention places the Estonian state in a completely new position with respect to the handling of domestic violence – the state has to take a firm stand on this acute problem that reflects the seamy side of the society. This is a serious challenge for the state, one that requires both the finding of resources and their concentration.

The authors of this article hold the view that Estonia needs fairly separate regulation for preventing and combating domestic violence yet regulation integrated well into the system at large[*31]. We pointed out above that the Estonian legal specialists consulted saw no need for a separate legal act on domestic violence's prevention. However, in the rule of law, the laws cannot be the domain of only lawyers. Laws must contribute to creating a sense of security among all members of the society. From the rule-of-law standpoint, such regulation should belong to a higher level of legislation – for example, at the level of laws. The systematisation of law creates and develops the system of concepts within which the entirety of legal thought operates, including the explanation of the content of legal norms. The organisation of objective law is an important instrument in the ultimate realisation of the rule of law as an idea. This position is consistent with the Guidelines for Development of Legislative Policy until 2018 (*Õiguspoliitika arengusuunad aastani 2018*[*32]), which state that in a democratic state based on the rule of law, law is the principal means for implementing political decisions, as well as with the Better Lawmaking Programme ('Parema õigusloome programm'), which ended in 2014 and has been continued through two new programmes, titled 'Codification of Law' and 'Developing Better Lawmaking'[*33].

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29 Our survey also examined the need for a separate domestic-violence prevention act and its usefulness in daily work. Half of the police investigators and every third lawyer indicated a belief that such a law would improve the efficiency of handling domestic-violence cases. Every fifth lawyer but only seven per cent of police investigators definitely opposed the idea.

30 For details, see the text of the Council of Europe convention on preventing and combating violence against women and domestic violence (cited in Note 20).

31 See I. Pettai *et al.* Perevägivald nõuab jõulisemat juriidilist sekkumist ['Domestic Violence Requires More Vigorous Legal Interference']. – *Riigikogu Toimetised* 31 (2015), pp. 155–167; I. Pettai *et al.* Perevägivalla juriidilise regulatsiooni hetkeseis ja perspektiiv Eesti õiguspraktikute küsitluse põhjal ['The Current Status of, and Prospects for, Legal Regulation of Domestic Violence, according to a Survey of Estonia's Practising Lawyers']. *Juridica* 2015/IX, pp. 645–658.

32 Resolution of the Estonian Parliament 'Õiguspoliitika arengusuunad 2018.a' ['Guidelines for Development of Legislative Policy until 2018'], approved on 23.2.2011. See RT III 07.03.2011, p. 1.

33 These programmes are realised in Estonia primarily on the initiative of the Ministry of Justice. They currently concentrate on several concrete spheres wherein the regulations are fragmented and lack systemic organisation, which would ensure comprehension: environmental law, social law, construction and planning law, economic administration law, law of mis-

Legislative policy is understood as deliberate and purposeful shaping of the working of society by implemented legislative acts. It is important to remember that the modern theory of law also considers the guiding and forming function of law highly important[*34]. The Better Lawmaking Programme admits that fragmentation of legal acts and norms obstructs the comprehension of law. The fragmentation seen in Estonia's law has been caused by the rapid reforms of the legal system, on the one hand, and the need to bring the country's legal system into conformance with that of the European Union, on the other. Countries belonging to the legal community of Continental Europe have the tradition of using codification to overcome such fragmentation and inconsistency. Codification is what creates legal stability and clarity and provides a method for qualitative changes in law's development. It seems that countries that have passed laws on the prevention of domestic violence (Austria, the UK, the USA, Australia, Germany, Spain, Slovenia, the Netherlands, Bulgaria, Lithuania, and many others[*35]) possess certain advantages. These countries have kept in mind that the development of law and order should primarily address its systemic nature; i.e., every legal provision should have its proper place in the legal system.

The main purpose of systematisation in jurisprudence is further organisation of the basic system expressed in legal provisions. The organisation of the basic system does not emerge out of nothing – it is already based on some definite set of norms. Therefore, the new set of norms can expand, change, or elaborate upon something while the elements of reality hitherto unregulated by legal provisions form a totality in which a change to one element (or even several elements) would not change the totality.

The process of approving a domestic-violence prevention act would, however, serve as a foundation for developing a systemic approach ensuring the collection of corresponding objective statistical information, relying on scientific research and analyses, and emphasising preventive interference in violence.[*36]

We point out especially that before a truly systematic legal system can be developed, it is necessary to agree upon the meaning of the concepts it incorporates. This requirement is, in fact, not fundamentally new in any way. Referring to the ideas of F.C. von Savigny, we are aware that every concept must have its 'juridical reality' and only after clarity in concepts has been achieved can we begin organising the set of rules into an integrated system[*37].

The more developed a society is and the more its various institutions both are distinct from each other and yet co-operate, the more efficient it should be in the prevention of domestic violence and combating of the actual phenomena of domestic abuse and related problems. Therefore, the object of the domestic-violence prevention act should, in principle, encompass the regulative norms orienting various institutions

demeanour proceedings, penal law, and intellectual property law. See http://www.just.ee/et/eesmargid-tegevused/oigus-poliitika/parem-õigus (most recently accessed on 21.3.2016).

34 B. Rüthers. *Rechtstheorie*. Munich: Beck 2011, Rn. 72 *ff*., 91 unten II.

35 The number of countries where laws to prevent domestic violence have been passed has been increasing steadily. While such laws had been passed in only a single country in 1976, the number reached 76 by 2013. See R. de Silva de Alwis, J. Klugman. Freedom from violence and the law: A global perspective, an FXB Center working paper from January 2015. Available at http://wappp.hks.harvard.edu/lles/freeedom-from-violence-and-the-law.pdf (most recently accessed on 21.3.2016).

36 The situation in Lithuania before the passing of the relevant act, in 2011, was quite similar to that of Estonia, making the perpetrator and the victim equally responsible. The law-enforcement agencies had the right to interfere and initiate proceedings only in serious cases – e.g., in the event of grievous injuries to the victim. Therefore, it was quite usual before the approval of the law that violence in households, once started, continued indefinitely, and it was difficult to break the cycle. It was decided in Lithuania that the main reason for which only a few domestic-violence cases reached the courts and perpetrators tended to go unpunished was not related to victims' retraction of their statement. The primary cause was the inefficiency of legislation, and this situation could be changed only by legal regulation assigning responsibility for prevention of violence to the state and granting the law-enforcement agencies the competence to ensure immediate protection of the victims so as to prevent repeated acts of violence. It was apparently because of the intimate partnership violence prevention act that the number of intimate-partnership-related killings in Lithuania declined by 30% within a year. Furthermore, the police gained the legal right to intervene immediately, before the situation could become critical.

37 F.C. von Savigny. Juristische Methodenlehre. Nach der Ausarbeitung des Jacob Grimm. – G. Wesenberg (ed.). Stuttgart, Germany: Koehler 1951, p. 37. The problems with systematisation of the law reached Estonia's contemporary legal literature as an independent subject in 2000, with the publication of a special issue of the journal *Rechtstheorie 'Gesetzgebung und Rechtspolitik'*, titled 'Sonderheft Estland' (or 'Special issue: Estonia'). *Rechtstheorie 'Gesetzgebung und Rechtspolitik'* 31 (2000) / ¾. Berlin: Duncker & Humblot, VII–XII. E. Catta, adviser to the higher codification committee of France, wrote in the Estonian legal journal *Juridica* that the need for systematisation of law and order varies between individual eras in a state's development: it is greater in cases wherein the legal system has been developed over a long time and the body of legislation is large and partly contradictory. However, the need may be urgent also if the legal system has been arranged over a relatively short time but extensively. See E. Catta. Kodifitseerimise ja süstematiseerimise tähtsus õige seaduse leidmise lihtsustamisel ['The Importance of Codification and Systematisation for Simplifying the Search for the Right Law'] (in Estonian). – *Juridica* 2002/IX, pp. 588–592.

towards co-operation and co-ordination predominately for the prevention of domestic violence, as well as law-enforcement norms that would forbid all forms of domestic violence by threat of criminal repression and would introduce corresponding types and terms of penalties enforceable upon violation of the norms.

The strategies for the prevention of violence that have been advanced so far in Estonia have not mentioned the approval of a separate act. This is probably due to the fact that the violence-prevention programmes have been drafted so as to proceed from a generic purpose of preventing violence and secondary victimisation. But precisely such an act could become the basis for further improvement of law and order in Estonia, by bringing together the preventive regulations and also the violence-suppression regulations, both with the aid of and within the domestic-violence prevention act.

The systematisation of law requires knowledge and use of the necessary methods. As for the methods of systematising the law in present-day Estonia, it is apparently possible to rely on the tradition of systematising legislation in combination with considering, incorporating, and consolidating the existing sources of law. However, Estonia's systematisation work so far has relied considerably on France's experience, which consists of reformative and constant codification, consolidation, and compilation. Estonia's peculiarity has largely been that over the past couple of decades, the development of a new – and qualitatively new – legal system has occurred apart from codification yet the activity has been very extensive and obviously possessed a new quality. Hence, the drafting of a domestic-violence prevention act could combine the codification tradition with the use of the French doctrine[*38]. The extensive codification processes carried out in Estonia so far have been using this very methodology in combination with specific organisation of the work and its various stages.[*39]

In our opinion, the above does not contradict the plan for reduction in the volume of legislative activities, or Õigusloome mahu vähendamise kava[*40], developed on the initiative of the minister of justice of the present coalition government, which links the drafting of a new normative act with the *ultima ratio* principle, or convincing explanation of the need for the normative act and an analysis of the application practice. From among the nine steps set forth for reduction of the volume of legislative activity, we should underscore the idea that at the beginning of the legislative process, it is necessary to agree on legal policy alternatives and, **whenever possible, to combine legislative initiatives affecting the same significant sphere of problems** (our emphasis – R.N., S.K., I.P.). Considering that the Rules for Good Legislative Practice and Legislative Drafting ('Hea õigusloome ja normitehnika eeskiri'[*41]) require the drafting to specify the legislative intent for the co-ordination related to the need for the relevant bill, more effort should be exerted in the drafting of the legislative intent so as to avoid imposing unnecessary rules and targeting individual issues piecemeal and in order to assess the horizontal impact of the legislative changes.[*42] Thus the plan for reducing the volume of legislative activities is directed not against legislation as such but against creating unnecessary regulations. At the same time, improved legislation in its own right naturally remains a priority in most countries, and it is obvious that Estonia should not ignore the trend in this regard or lag behind.

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38 R. Narits. Objektiivse õiguse korrastamisest Eestis: kodifitseerimisest õiguse ümberkujundamiseni ['On the Organisation of Objective Law in Estonia: From Codification to Reorganisation of Law'] (in Estonian). – *Riigikogu Toimetised* 12(2005), pp. 71–79.

39 Codification projects in Estonia are composed of preparatory and codification stages. The preparatory stage is handled by experts and the codification stage by a working group with at least five members. Besides officials, at least half of the committee members are experts in the field, scientists, representatives of major stakeholders, or members of their representative organisations.

40 The plan for reduction in the volume of legislative activities is available at http://www.just.ee/et/eesmärgid-tegevused (most recently accessed on 21.3.2016). The plan is based on Article 4.2 of the agreement among the Reform Party, the Social Democratic Party, and the Pro Patria and Res Publica Union *Valitsuse moodustamise ja valitsusliidu tegevusprogrammi* põhialused ['Basic Principles of Forming the Government and the Ruling Coalition's Action Programme'].

41 RT I, 29.12.2011, p. 228.

42 The authors of this article participated in a two-year project (in 2014–2015) entitled 'Ühtse süsteemi ülesehitamine lähisuhtevägivalla tõkestamiseks Eestis' (meaning 'developing a joint system for the prevention of intimate partnership violence in Estonia', as noted above), supported by the Norwegian financial mechanism and the Estonian Ministry of Social Affairs, and advanced in the final report a plan for systematising Estonia's legal order so as to address domestic violence as a problem sphere by using the standards for the drafting of bills stipulated in the Rules for Good Legislative Practice and Legislative Drafting. The following requirements were listed: information and reasoning pertaining to the problematic issue; stating of the purpose; possible policy options for resolving of the issue, with comparison of the options and identification of the preferable option; policy options for resolving the issue in countries with a social order and legal system similar to Estonia's; and description and presentation of the structure of the planned legal instrument, including determination of the level of regulation entailed and outlining of the significant impact, along with the methods for assessing the impact.

Obviously, laws are unable to solve all problems related to domestic violence on their own. Yet the potential of laws should not be underestimated*[43]. It is important to determine by legal regulations the immediate and long-term services to be provided for the victims; guarantee the immediate and lasting protection of domestic-violence victims; provide for easy and free access to safe housing, advisory services, and legal aid; and, naturally, outlaw all forms of domestic violence under pain of sanctions under criminal law. We would hope that Estonia's legal system will see the emergence of a domestic-violence prevention act in the near future. A law with a clear political purpose, based on empirical and juridical analysis, a law creating benefits that outweigh the costs of its enforcement and that is efficient in achieving its purpose and expressed in clear language, would interlock with the rest of the legal system both domestically and internationally, thereby rendering it even more ordered (systemic). A true system is one wherein internal harmony creates unity. This should encompass the general content and the common purpose of jurisprudence and the entire body of legislation*[44].

[43] Separate laws for the prevention and suppression of domestic violence have now been passed in more than 70 countries.

[44] F.C. von Savigny (see Note 37), p. 15.

CHAIRMANSHIP OF ESTONIA
Council of Europe
May–November 2016
PRÉSIDENCE DE L'ESTONIE
Conseil de l'Europe

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Eesti 34 õigusteadlaste päevad

Wednesday, 12 October

19:30–22:00 Welcoming evening of the Ministry of Foreign Affairs of the Republic of Estonia
(Building of the Estonian Students' Society, Jaan Tõnissoni 1)

Thursday, 13 October

9:00–10:00 Morning coffee
(Vanemuine Concert Hall, doors will open at 8:30)

Plenary Meeting

(Vanemuine Concert Hall, simultaneous interpretation in English, webstream)

10:00–10:20 Opening/debate – Is Restriction of Liberty for Security Considerations Justified?
(instructors from debate club SpeakSmart)
Irene Kull, *Professor of Civil Law, University of Tartu, Chairman of the Estonian Academic Law Society*
Jüri Heinla, *President of the Estonian Association of Lawyers*

Does International Law Matter?

Moderator: **Lauri Mälksoo**, *Academic, Professor of International Law, University of Tartu*

10:20–12:00 Speakers: **Marina Kaljurand**; **Marie Jacobsson**, *Sweden's Ministry for Foreign Affairs, Member of the International Law Commission (ILC)*; **Rein Müllerson**, *Research Professor of International Law and Politics, Tallinn University*; **Cuno Tarfusser** *ICC judge, Italy*; **Peter Tomka**, *ICJ judge, Slovakia*

12:00–12:30 Coffee break

Human Rights – the Situation and Development in Estonia

Moderator: **Uno Lõhmus**, *Visiting Professor, University of Tartu*

12:30–14:00 Speakers: **Aino Lepik von Wirén**, *Director General of the Estonian Foreign Ministry's Department for European and Trans-Atlantic Cooperation; PhD* **Rait Maruste**; *LLM* **Madis Ernits**, *Judge, Tartu Circuit Court, Doctoral Student, University of Tartu;* **Paul Keres**, *Attorney-at-Law, Law Firm Glikman Alvin & Partnerid*

14:00–15:00 Lunch, dividing the participants into sections

Security I. Security Argument in Limitation of Fundamental Rights

(Assembly Hall of the University of Tartu, webstream)

Moderator: **Heili Sepp**, *Adviser and Head of the Department at the Chancellor of Justice, Doctoral Student, University of Tartu*

15:00–16:30 *History Doctor* **Ivo Juurvee**, *Head of the Internal Security Institute, Estonian Academy of Security Sciences*
What We Might Have Learned from the Period between 1918–1940
LLM **Madis Ernits**, *Judge, Tartu Circuit Court, Doctoral Student, University of Tartu*
Security and Fundamental Rights
PhD **Arnold Sinisalu**, *Director General of the Estonian Internal Security Service*
Security as a Prerequisite for Ensuring Fundamental Rights
16:30–16:50 Coffee break

Security II. Information as a Weapon in Internal and External Security

(Assembly Hall of the University of Tartu, webstream)

Moderator: **Janek Luts**, *Head of Communications, Chancellery of Chancellor of Justice*

16:50–18:00 *MA (National Defense University, USA)* **Mikk Marran**, *Director General, Estonian Information Board*
A View of the Force Executives
MA (King's College, London) **Merle Maigre**, *Security Policy Adviser to the President of Estonia*
Defining Aggression in a Conflict Situation
MA (US Army War College, USA) **Taimar Peterkop**, *Director General, Information System Authority*
Law and Information Systems

Working and Entrepreneurship I. Change in the Relationship between Employers and Employees

(Dorpat Conference Centre: Struve I and II Halls, webstream)

Moderator: **Indrek Niklus**, *Head of the Private Law Unit, Ministry of Justice*

15:00–16:30 **Gaabriel Tavits**, *Professor of Social Law, University of Tartu*
How Flexible Can the Legal Regulation of Employment Relationships Be Made?
Peep Peterson, *Head, Estonian Trade Union Confederation*
Changing Labour Market and the Employees' Expectations on the Legal Order
Karin Madisson, *Partner and Attorney-at-Law, SORAINEN Law Firm, Chairman of the Commercial Law Committee, Estonian Bar Association*
From a Factory Worker in Narva to a Skype Programmer. The New Forms of Modern Employment and Their Obstacles in Estonia
16:30–16:50 Coffee break

Working and Entrepreneurship II. The Future of Employment Relationships. The Need for the State to Intervene in Labour Relations and Work Conflicts

(Dorpat Conference Centre: Struve I and II Halls, webstream)

Moderator: **Tiina Saar-Veelmaa**, *Head of Staff at Proexpert and specialist in work satisfaction*

16:50–18:00 **Annika Uudelepp**, *Long-term Head of Praxis*
To Adapt to the Times or Be Left Behind? The Work of the Future Is the Reality of Today
Meeli Miidla-Vanatalu, *Deputy Director General for Labour Law, Labour Inspectorate*
Modern Employment Relationships and Monitoring of Working Conditions
Egle Käärats, *Deputy Secretary General on Labour, Ministry of Social Affairs*
Flexible Employment Relations. To Which Direction Should We Flex?

International Humanitarian Law

(Vanemuine Concert Hall)

Moderator: *Mag. iur.* **Andres Parmas**, *Judge, Tallinn Circuit Court, Lecturer of Criminal Law, University of Tartu*

15:00–16:30 *Dr. iur.* **René Värk**, *Associate Professor of International Law, University of Tartu*
Difficulties in Classifying Modern Armed Conflicts
Kalle Kirss, *Deputy Director of the Legal Department, Ministry of Defence*
Detention in Non-International Armed Conflicts
Olavi Jänes, *Legal Advisor, Baltic Defence College*
Direct Participation in Hostilities by Civilians or Under Which Circumstances Does a Civilian Become a Lawful Target
Madis Vainomaa, *Independent Expert (Human Rights and Vulnerable Groups)*
The Role of Human Rights Defenders in Documenting Violations of Law During Armed Conflicts

16:30–16:50 Coffee break

International Criminal Law

(Vanemuine Concert Hall)

Moderator: *Dr. iur.* **René Värk**, *Associate Professor of International Law, University of Tartu*

16:50–18:00 *Mag. iur.* **Andres Parmas**, *Judge, Tallinn Circuit Court, Lecturer of Criminal Law, University of Tartu*
The Limits of the Possibilities of Criminal Law
Tiina Intelmann, *former President of the Assembly of the ICC*
International Criminal Court and the Changing World Policy
Eerik Heldna, *Deputy Director General, Estonian Internal Security Service*
Foreign Fighters and the Implementation of the Penal Code

Legal History. Human and Power

(Dorpat Conference Centre: Baer Hall, webstream)

Moderator: **Marju Luts-Sootak**, *Professor of Legal History, University of Tartu*

15:00–16:30 *Dr. iur*. **Hesi Siimets-Gross**, *Associate Professor of Legal History and Roman Law, University of Tartu, Lawyer Linguist, Court of Justice*
Marelle Leppik, *Lawyer, Law Firm LMP, Doctoral Student, University of Tartu*
The 1906 Constitution of the Russian Empire – the First Document on Fundamental Rights in the History of Estonia?
Ken Ird, *Doctoral Student, University of Tartu*
"Bad Old Swedish Times" and "Russia's Humane Paragon"? On Death Sentences in the Courts of the Baltic Sea Provinces in the 18th Century
Dr. phil. **Andres Andresen**, *Associate Professor in Estonian History, University of Tartu*
Defence League – Exercise of State Authority on a Voluntary Basis

16:30–16:50 Coffee break

16:50–18:00 **Marju Luts-Sootak**, *Professor of Legal History, University of Tartu*
General Principles and Clauses in the Projects of the Civil Code of the Republic of Estonia (1925–1940). In the Interests of Individuals or the Public?
Mag. iur. **Hannes Vallikivi**, *Chairman of the Board, Estonian Bar Association, Chief Partner, Law Firm TGS*
Political Processes in the Republic of Estonia at the Beginning of the 1930s
Dr. iur. **Priidu Pärna**, *Notary in Tallinn*
Architectural and Iconographic Expressions of Historical Powers in Estonia

20.00 **Festive Evening**
(Estonian National Museum: the doors will open at 19:30 and close at 23:00)

Friday, 14 October

Security III. Broad-based National Defence

(Assembly Hall of the University of Tartu, webstream)

Moderator: *Mag. iur.* **Mari-Liis Põder-Korjagina**, *Chairman of the Foundation on International Law of War and National Defence Law; Head, Legal Section of the Estonian Reserve Officers' Association*

9:30–11:00 *MA* **Jonatan Vseviov**, *Secretary General, Ministry of Defence*

Estonian Defence Solution

Taavi Veskimägi, *Estonian Defence Industry Association*

The Role of the Defence Industry in Ensuring Defence Readiness

MD, PhD **Tiit Meren**, *Surgeon, Hospital of Reconstructive Surgery, Estonian Reserve Officers' Association*

How Volunteer Reserve Officers Working in Civil Medicine Are Providing Additional Capability to Estonian Broad-based National Defence

11:00–11:30 Coffee break

Security IV. Limits of Administrative and Offence Proceedings in the Context of Security

(Assembly Hall of the University of Tartu, webstream)

Moderator: **Inna Ombler**, *State Prosecutor*

11:30–13:00 *LLM* **Norman Aas**, *Secretary General, Ministry of Justice*

Preventive and Repressive Defence of Public Order – A Legal and Political Perspective

Kristjan Siigur, *Chairman, Tallinn Administrative Court*

Viewing the Viewers: Hidden Collection of Information as a Method of Protection of Everyone's Rights, and its Control Mechanisms

Mag. iur. **Martin Triipan**, *Attorney-at-Law and Partner, Raidla Ellex Law Firm*

Collection and Use of Data by Security Authorities. Elasticity and Limits of the Protection of Rights

Shared Economy I. Shared Economy as the Future of Entrepreneurship

(Dorpat Conference Centre: Struve I and II Halls, webstream)

Moderator: **Juhan Lepassaar**, *Head of Cabinet to Vice-President Andrus Ansip, European Commission*

9:30–11:00 *LLM* **Kilvar Kessler**, *Chairman of the Board, Estonian Financial Supervision Authority*

Shared Economy in the Financial Sector: Old Idea Rediscovered?

Andres Sooniste, *Director General, Consumer Protection Board*

Share and Answer?

Dmitri Jegorov, *Deputy Secretary General of Tax and Customs Policy, Ministry of Finance*

Taxes and Shared Economy: Complete Clarity *vs*. Total Confusion

Kaidi Ruusalepp, *Founder and Head of Funderbeam, former CEO of Tallinn Stock Exchange, one of the authors of the Digital Signatures Act*

Hacking the Articles. Journey of a Sharer

11:00–11:30 Coffee break

Shared Economy II. Participants of a Sharing Service, Their Rights and Obligations

(Dorpat Conference Centre: Struve I and II Halls, webstream)

Moderator: **Küllike Jürimäe**, *Judge in the European Court of Justice*

11:30–13:00 **Karin Sein**, *Professor of Civil Law, University of Tartu, Acting Head of the Department of Private Law*

Legal Relations Between a Seller, Platform Holder and a Consumer, and the Applicable Law

Urmas Volens, *Associate Professor of Civil Procedural Law, University of Tartu, Attorney-at-Law and Partner at Nove Law Firm*

Common Funding: Models of Contractual Relationships, Warranties, Risks

Villu Kõve, *Justice, Supreme Court, Associate Professor of Civil Law, University of Tartu*
From Whom, Where, and How to Make a Claim When Shared or Intermediated Goods or Services Do Not Meet Expectations or an Intermediated Loan Is Not Repaid?

International Law III. Development of International Law and Cyberspace

(Dorpat Conference Centre: Baer Hall, webstream)

Moderator: **Peter Pedak**, *International Law Division, Ministry of Foreign Affairs*

9:30–11:00 **Erki Kodar**, *Undersecretary for Legal and Administrative Affairs, Ministry of Defence*
National Security, Cyberspace and International Law – Are These Concepts Reconcilable?
Dr **Katrin Nyman-Metcalf**, *Head of the Chair of Law and Technology, Professor, Tallinn Law School, Head of Research, Estonian e-Governance Academy*
Use of Cyberspace for Peaceful Purposes: What Can We Learn from Outer Space?
Dr. iur. **Eneken Tikk-Ringas**, *Research Fellow, International Institute for Strategic Studies, Visiting Lecturer on IT Law, University of Tartu*
How Has the Development of Technology Impacted Interstate Relations and the Application of International Law?
Liis Vihul, *Research Fellow, NATO Cooperative Cyber Defence Centre of Excellence*
Applying International Law to Cyber Attacks. The Most Important Conclusions from the "Tallinn Manual"

11:00–11:30 Coffee break

International Law IV. Theoretical and Practical Challenges on the Universality of Human Rights

(Dorpat Conference Centre: Baer Hall, webstream)

Moderator: *Dr. iur.* **Mart Susi**, *Associate Professor of Human Rights Law, Tallinn University*

11:30–13:00 **Mari Amos**, *Member of the UN Subcommittee on the Prevention of Torture*
The Impact of the Environment on the Assessment on Upholding Human Rights
PhD **Merilin Kiviorg**, *Senior Research Fellow in International Law, University of Tartu*
Change in the Narrative: Human Rights on the Crossroads?
Peeter Roosma, *Justice, Supreme Court*
Institutional Diversity at the Service of the Universality of Human Rights?
Dr. iur. **Mart Susi**, *Associate Professor of Human Rights Law, Tallinn University*
Is the Era of Human Rights About to End?

13:00–14:00 Lunch (Dorpat Conference Centre)

Final meeting. European Court of Human Rights and Estonian Law: a Monologue or a Dialogue?

(Dorpat Conference Centre: Struve I and II halls, simultaneous interpretation, webstream)

Moderator: **Julia Laffranque**, *Judge, European Court of Human Rights, Vice-President of the Second Section, Visiting Professor, University of Tartu*

14:05–14:50 **Guido Raimondi**, *President of the European Court of Human Rights*
Legal Value of the Decisions of the European Court of Human Rights
The participants in the following podium discussion are:
Maris Kuurberg, *Representative of the Government of the Republic of Estonia, European Court of Human Rights*;
Julia Laffranque, *Judge, European Court of Human Rights, Vice-President of the Second Section, Visiting Professor, University of Tartu*;
Andres Herkel, *Member of the Riigikogu*; **Priit Pikamäe**, *Chief Justice, Supreme Court;*
Guido Raimondi, *President of the European Court of Human Rights*,
Hannes Vallikivi, *Chairman of the Board, Estonian Bar Association*

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CALL FOR ABSTRACTS

THE NEW PUBLIC PROCUREMENT LAW: SIMPLER AND MORE FLEXIBLE?

Tallinn, 19 January 2017

The purpose behind the introduction of new EU public procurement directives in 2014 was to make the law simpler and more flexible. Has this objective been reached? How much does the national law transposing these directives further influence simplification and adding of flexibility in the local procurement arena? On 19 January 2017, Tallinn will host a quest for answers to these questions, as renowned national and international procurement experts – among them representatives of the Court of Justice of the European Union and the European Commission, academics, government officials, and practitioners – discuss topics related to transposition of the 2014 directives. Among the relevant topics are the following:

- Self-cleaning, blacklisting, and other issues related to exclusion of tenderers
- Joint and central procurement, including IT procurement
- Rules for public contracts' modification and termination of unlawfully modified public contracts
- Soft values in public procurement: green and socially responsible procurement

You are warmly welcome to join the discussion! Anyone interested in making a **presentation** at the conference and/or publishing a related **research article** is kindly asked to send an **abstract** introducing the presentation or article to Monika.Vilu@cobalt.legal by **1 November 2016**.