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EUROPEAN HARMONIZATION VERSUS NATIONAL CONSTITUTIONAL SOVEREIGNITY – ON THE EXAMPLE OF THE MEASURES TO CONTAIN THE CRISIS OF THE COMMON EUROPEAN CURRENCY

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Abstract: The Eurozone Crisis is not just a monetary and economic challenge. It is as well the first tremendous challenge of the European Community and as well the national institutions and constitutions of the member states not only within the Eurozone. On one side the European Commission, the European Parliament and the ECB with its endeavours to safeguard and stabilize the single currency EURO within the Eurozone, to support the suffering countries in the south (PIIGS) with its struggle against speculative hedge funds, to render financial relief measures to those countries and its financial industry. Irrespective the fact governments and citizens within that countries, less appear to appreciate or honor that measures (Troika, Financial checks and budgetary control) as efficient help to stabilize but condemn as form of European paternalism and patronage.

On the other hand the countries and its citizenship especially in the north of the Eurozone to set a stop sign to the EU and the ECB. Therefore they stress the Maastricht criteria and cite the Art 125 of the TEU, which prohibits one nation to stand for or to be liable for the Government debts of another nation (no bail out).

Especially in the German perspective the demarcation line appears to run along between the European Commission, European Central Bank and European Court on the European side and the Bundesverfassungsgericht, the Bundesbank on the national German side.

Each of the institutions feels to be bound to its origin functions and principles and save the respective constitution and the task rendered by that constitution.

For a better understanding it is essential to get aware of and to reinforce the constitutional role which the Grundgesetz awarded to the Bundesverfassungsgericht and the Bundesbank and the German citizenship placing their confidence in these institutions.

Es soll konkret das Verhältnis zur Nichtbeistandsklausel No-Bail-out Klausel Art 125 AEU-Vertrag, den Europäischen Fiskalpakt / dem ESFS, ESM / dem OMT-Programm der EZB, möglichen Entwicklung des EU zur Haftungs- und Transferunion mit einem zukünftigen Haftungsautomatismus der Mitglieder, der Unterscheidung von gemeinsamer Währungs-politik und nationaler Wirtschaftspolitik, der drohenden Vergemeinschaftung von

Staatsschulden einzelner EU-Länder, die Budgethoheit des nationalen Parlaments als freie Entscheidung über die Verwendung des nationalen Haushaltes untersucht werden. Mit allen diesen Fragen mussten sich das höchste Deutsche und Europäische Gericht in jüngster Vergangenheit intensiv beschäftigen.

1. Die Rolle des Deutschen Bundesverfassungsgerichts im Allgemeinen

Wenn man die bundesdeutschen Wähler fragt welcher der höchsten staatlichen Institution sie am meisten Vertrauen, findet die Arbeit der Bundeskanzlerin Angela Merkel je nach politischer Großwetterlage Anerkennung oder Kritik, der Bundespräsident Joachim Gauck verdient kraft seines Amtes und seiner Vita als ehemaliger Bürgerrechtler in der DDR und Leiter der nach ihm benannten Gauck-Behörde für die Stasi Unterlagen hohen Respekt. Uneingeschränktes Vertrauen scheinen die Deutschen letztendlich nur einer Instanz entgegen zu bringen: dem Bundesverfassungsgericht in Karlsruhe.

Die Instanz Bundesverfassungsgericht scheint bisweilen den partei- und tagespolitischen Einflüssen gänzlich enthoben und losgelöst vom Tagesgeschehen, unabhängig über dem Gemeinwesen zu stehen.

Das hätte den Vätern und Müttern des Grundgesetzes, die sich 1948 in Herrenchiemsee trafen, um aus den auch rechtlichen Ruinen des Dritten Reiches eine demokratische deutsche Republik und einen effektiven Rechtstaat aufzubauen, sicher außerordentlich gefallen. Gaben Sie dem Gericht doch ausdrücklich nicht die Rolle eines Superrevision Gerichts im laufenden Instanzenzug wie z.B. dem US-amerikanischen Supreme Court, sondern die Rolle eines vom Instanzenzug losgelösten Gerichtes, dessen Prüfungsmaßstab allein die Vereinbarkeit der angegriffenen staatlichen Maßnahme mit dem Grundgesetz ist. Das Gericht ist somit die „Hüterin der Verfassung“ und wird auch als solche wahrgenommen.

Hierbei hat für die Bürger die „Verfassungsbeschwerde“ eine herausragende und populäre Bedeutung mit der Sie so die weitverbreitete Fehlvorstellung ohne den Instanzenzug beschreiten zu müssen, direkt die staatliche Maßnahme angreifen können von der sie sich in ihren Grundrechten verletzt fühlen. Dass dem nicht so ist, daher, dass der verwaltungsmäßige und gerichtliche Rechtsweg ausgeschöpft sein muss, wird vielfach verdrängt. (**siehe Merkblatt über die Verfassungsbeschwerde zum BVerfG, herausgeben von der Geschäftsstelle des Gerichts, unter: Bundesverfassungsgericht.de/ Organisation/ vb_merkblatt**).

Die Verfassungsbeschwerde war ursprünglich nicht direkt im Grundgesetz von Mai 1949 geregelt, sondern einfachgesetzlich im Durchführungsgesetz der Verfassungsgerichtsbarkeit (§§ 90 ff. BVerfGG) vom 12.03.1951. In das Grundgesetz selbst eingefügt und damit einer einfachen Gesetzesänderung entzogen, wurde die Verfassungsbeschwerde erst durch das Neunzehnte Gesetz zur Änderung des Grundgesetzes vom 29. Januar 1969 (Artikel 93 Absatz 1 Nr. 4a GG).

Andererseits gibt es gegen Gesetze keinen unmittelbaren Rechtbehelf und so werden eine Vielzahl von Verfassungsbeschwerden auf das Wahlrecht in Art 38 Abs. 1 und 2 GG gestützt, als das von Bundesverfassungsgericht als zulässig für die Einlegung einer Verfassungsbeschwerde anerkannte Recht auf Teilhabe an der demokratischen Legitimation der Staatsgewalt. Denn laut BVerfG sei das Wahlrecht nichts Wert, wenn die auf der Wahlentscheidung gestützte staatliche Legitimation nicht demokratischen Grundsätzen

entspreche, dies wird als sogenannte „Demokratiesicherungsfunktion“ bezeichnet. **siehe: BVerfG Urteil. V. 07.09.2011 – 2 BvR 987/10 Abs. Nr. 101f..**

Im Jahr 2009 wurden insgesamt 5911 Beschwerden entschieden, 111 Verfassungsbeschwerden waren erfolgreich (1,9 Prozent). Knapp 70 Prozent der Beschwerden werden innerhalb eines Jahres entschieden, weitere 20 Prozent innerhalb von zwei Jahren (alle Zahlen einschließlich der Kommunalverfassungsbeschwerden). In 2009 wurden dabei rund 99,5 Prozent der Verfassungsbeschwerden von den aus drei Verfassungsrichtern bestehenden Kammern des Bundesverfassungsgerichts vorab entschieden (Ablehnung der Annahme oder Stattgabe), nur 0,5 Prozent kommen in den Senat. Quelle: **Jahresstatistik des BVerfG 2009; s. Hopfauf, in: Schmidt-Bleibtreu/Hofmann/Hopfauf, Kommentar zum GG, 12. Aufl., 2011, Art. 93 Rn. 155, Art. 94 Rn. 89 f..**

Die Verfassungsbeschwerden sind somit „Tagesgeschäft“. Insoweit gibt es auch sog. „Masseverfahren“ mit tausenden Beschwerdeführern z.B. gegen das Volkszählungsgesetz, die Vorratsdatenspeicherung, oder jüngst gegen die EURO-Rettungsschirme. Seit dem Bestehen des Gerichts wurden über 200.000 Verfahren anhängig gemacht **Hopfau Rn. 90.**

Aufgrund der Vielzahl und Vielschichtigkeit der Verfahren ist das Bundesverfassungsgericht somit durchaus eine Institution die mitten im Leben und der Lebensrealität der Bürger steht

Man „geht“ allerdings nicht einfach nach Karlsruhe, so eine gebräuchliche Floskel um sein vermeintliches Recht zu bekommen, sondern wird dort unter sehr eingeschränkten Bedingungen zugelassen. Damit, welche Sachverhalte das Gericht zu Entscheidung annimmt, macht es, ohne es zuzugeben, auch Politik. Dies gilt insbesondere in den zahlreichen Verfahren gegen die Rettungsschirme und Programme (ESF, ESM, OMT) die auf europäischer und nationaler deutscher Ebene zur Beseitigung der Folgen der Eurokrise und Staatsschuldenkrise aufgespannt wurde. Hierüber wurden zahlreiche Verfahren sowohl bei EUGH und dem Bundesverfassungsgericht anhängig gemacht, dort sowohl als Organklagen vom im Bundestagvertretener Fraktionen (Die Linke) als auch als Verfassungsbeschwerden von einzelnen Bürgern.

2. Europäische Staatsschulden – und Bankenkrise

Die vorliegende Abhandlung beschäftigt sich somit mit den Entscheidungen des Bundesverfassungsgerichts und weitergehend des EUGH, betreffend der gesetzlichen Regelungen zur Stabilisierung im EURO Raum infolge der Krise der Gemeinschaftswährung ab 2008.

1. Der Gesamtkomplex: Die Moralische Prinzipien in der Staatsschuldenkrise Solidarität oder Moral Hazard

Moralische Prinzipien oder Solidarität zwischen Staaten sind grundsätzlich nicht Gegenstand gerichtlicher Entscheidungen, trotzdem spielen sie als Motivation bzw. Legitimation für deren Anrufung und deren Tätigkeitswerden eine gewichtige Rolle.

Unter Moral Hazard versteht man den nachvertraglichen Opportunismus und der überzogenen Risikobereitschaft einzelner Transaktionspartner eines Solidarsystems zu Lasten des Gesamtsystems (so **Definition Moral Hazard in Springer Gabler Wirtschaftslexikon**, (der Begriff kommt ursprünglich aus der Versicherungsbranche).

Das Problem des Moral Hazard ist in der Staatsschuldenkrise augenscheinlich. Bereits vor der Finanzkrise haben unsolide haushaltende EURO-Länder von soliden Haushaltländern profitiert und konnten sich aufgrund deren Stabilität zu geringen Zinsen verschulden. Die Gefahr besteht nach der Finanzkrise, dass sich Euro-Krisenstaaten ungeachtet der Maastrichtkriterien weiter ungebremst auf Kosten des EURO Gesamt-Solidarsystems verschulden, um damit die anderen noch systemkonformen Staaten unter Druck zu setzen, ihnen zu helfen und um dadurch quasi für das Gesamtsystem EURO Systemrelevanz (Prinzip von Too big to fail) zu erlangen. Dies mit dem Ergebnis, dass die bis dahin Systemkonformen Staaten irgendwann auch ihre Disziplin fallen lassen, da dies vom System nicht honoriert wird, sie es auch ihren Bürgern nicht mehr vermitteln können und damit das Gesamtsystem letztendlich kollabiert.

Würden dagegen alle EU-Staaten unmissverständlich erklären, dass sie keine Banken, keine Unternehmen und keine Staaten mehr retten werden, so würde dies bei allen Staaten, Unternehmen, Banken und generell Kapitalanlegern wohl zu einem vorsichtigeren Verhalten führen – und zu einer breiteren Streuung von Geldanlagen, womit einzelne Pleiten dann auch keine "systemischen" Rückwirkungen etwa auf die Stabilität der Eurozone insgesamt mehr hätten **(.Felix Ekardt, Europa und der falsche Weg aus der Klemme, in Legal Tribune Online am 31.03. 2011**).

2. Einzelne Aspekte in der Argumentation der Eurorettung:

(a) Das Prinzip der Freiwilligkeit der multilateralen Finanzhilfen

In einem gemeinsamen Währungsraum wie der EURO-Zone mit entsprechenden Wechselwirkungen, in dem trotz der sogen. Maastricht Kriterien zur Neu- und Gesamtverschuldung, die Haushalts- Sozial- und Wirtschaftspolitik und nicht zuletzt Finanz- und Bankenpolitik unter der nationalen Kontrolle des souveränen Staates stehen, fragt sich jedoch wie „frei“ ein anderes Mitgliedsland des EURO-Systems noch in seinen Entscheidungen ist, ob, in welchem Umfang und unter welchen Voraussetzungen es einem anderen Mitgliedsland helfen will, das sich in Schieflage befindet. Denn das eine Land ist durch die Maßnahmen oder Unterlassungen des andern Landes und insbesondere in der Reaktion der internationalen Finanzmärkte darauf, unmittelbar in seiner ureigenen nämlich der gemeinsamen Währungspolitik betroffen. Hier manifestiert sich der Geburtsfehler der EURO-Zone daher die reine Beschränkung auf eine gemeinsame Währungspolitik, ohne Berücksichtigung der Zwangsläufigkeit, dass die Währungspolitik in unmittelbarer Wechselwirkung mit den übrigen Politikfeldern steht (Prinzip der kommunizierenden Röhren). Dies bei der vollkommen unterschiedlichen volkswirtschaftlichen Leistungsfähigkeit und übrigen Ungleichgewichten der Staaten in ihren Handelsbilanzen.

Zwar glaubte man diesen zentrifugalen Kräften durch die Maastricht-Konvergenz-Kriterien Abhilfe geschaffen zu haben, deren Einhaltung Voraussetzung zur EURO-Zone waren.

Die Maastricht Kriterien besagten im Einzelnen:

- Preisniveaustabilität: Die Inflationsrate darf nicht mehr als 1,5 Prozentpunkte über derjenigen der drei preisstabilsten Mitgliedstaaten liegen.
- Finanzlage der öffentlichen Hand: (Art. 126 AEU-Vertrag) Der staatliche Schulden-stand darf nicht mehr als 60 % des Bruttoinlandsprodukts betragen.
- Das jährliche Haushaltsdefizit darf nicht mehr als 3% des Bruttoinlandsprodukts betragen.

- Wechselkursstabilität: Der Staat muss mindestens zwei Jahre lang ohne Abwertung am Wechselkursmechanismus II teilgenommen haben. Dabei darf die Währung des Landes nur in einer bestimmten Wechselkursbandbreite (meist 15 %) vom Eurokurs abweichen; bei größeren Abweichungen muss die Zentralbank des Landes intervenieren.
- Langfristige Zinssätze: Der Zinssatz langfristiger Staatsanleihen darf nicht mehr als 2% über dem Durchschnitt der drei preisstabilsten Mitgliedstaaten liegen.

Das Problem hierbei war jedoch, dass man sich bezüglich der Einhaltung der Konvergenzkriterien in der Vergangenheit auf die Eigenauskünfte der Mitglieder verlassen hatte, die sich hierbei viel Bilanzphantasie und statistischen Kniffen bedienten, was sich zumindest am Beispiel von Griechenland nachgewiesen als Fehleinschätzung erwiesen hat.

Weiterhin versäumte die EU bereits zu Anfang des EURO Sanktionen gegen Staaten/Defizitsünder durchzusetzen, welche die Kriterien verletzt hatten (so z.B. gegenüber Deutschland und Frankreich).

b) ESM Europäischer Stabilisierungs Mechanismus, EU- Wirtschafts- oder EURO-Währungspolitik, europäisch oder multinational

Der Europäische Stabilitätsmechanismus (ESM), englisch: European Stability Mechanism) ist eine internationale Finanzinstitution mit Sitz in Luxemburg. Der ESM trat am 27. September 2012 mit der Hinterlegung der deutschen Ratifikationsurkunde beim Generalsekretariat des Rates der Europäischen Union in Kraft. Der ESM ist Teil des sogenannten „Euro-Rettungsschirms“ und löste die Europäische Finanzstabilisierungsfazilität (EFSF) ab. Das anfängliche Stammkapital des ESM beträgt 700 Mrd. Euro. Aufgabe des ESM ist es, überschuldete Mitgliedstaaten der Eurozone durch Notkredite und Bürgschaften zu unterstützen, um deren Zahlungsunfähigkeit gegenüber den Gläubigern zu verhindern und zu ermöglichen, dass diese sich auch zukünftig am freien Kapitalmarkt zu akzeptablen Zinsen refinanzieren können. Laut den Bedingungen aus dem ESM-Vertrag entfallen auf Deutschland ein Eigenanteil von 190 Mrd. Euro, Eine besondere Brisanz liegt in der folgenden Regelung: Wenn ein Mitgliedsland im ESM als Zahler ausfällt, weil es selbst finanzielle Hilfen benötigt, müssen die anderen Staaten das – durch den Ausfall dieses Landes – fehlende Kapital zusätzlich aufbringen (Art. 25 Abs. 2 ESM-Vertrag. Deutschland haftet dafür anteilig mit weiteren 113 Mrd. Euro also insgesamt 303 Mrd. Euro. Der ESM ist somit nicht eine Gemeinschaft der Starken zur Solidarität der Gefährdeten, sondern eine Gemeinschaft mit derzeit unterschiedlichen Möglichkeiten und Potentialen.

Problematisch am abgestimmten Europäischen Stabilitätsmechanismus von Euro Gruppe (ESM) und EZB mit OMT-Programm früher SMP). ist sein Verhältnis zur Nichtbeistands-klausel (No Bail Out) in Art. 125 AEU-Vertrag, die eine direkte Haftung von Mitgliedstaaten oder der Europäischen Union als Ganzes für die Schulden anderer Mitgliedstaaten ausdrücklich ausschließt und die Art 122-126, Art 136 AEUV, welche Stabilitätskriterien für eine nachhaltige Haushaltwirtschaft definieren.

Zur Rechtfertigung des vorläufigen Stabilisierungsmechanismus wurde zunächst Art. 122 AEU-Vertrag als Grundlage herangezogen, der finanzielle Hilfen für einen Mitgliedstaat erlaubt, wenn dieser „aufgrund von Naturkatastrophen oder außergewöhnlichen Ereignissen, die sich seiner Kontrolle entziehen, von Schwierigkeiten betroffen oder von gravierenden

Schwierigkeiten ernstlich bedroht“ wird. Ob nun die internationale Finanzkrise eine unvorhersehbare Naturkatstrophe ist, darf kritisch hinterfragt werden.

Auf Druck des Nicht-Eurolandes Großbritannien wurde durchgesetzt, dass bei Krediten für Staaten, die Mitglieder der Eurozone sind, lediglich die übrigen Eurostaaten haften. Insoweit wurde hier eine fragwürdige Grenze gezogen bei er nicht mehr definierbar ist, wo die gemeinsame Wirtschaftspolitik im EU Raum betroffen ist und wo die Währungspolitik im EURO Raum. Ein Europa der zwei Geschwindigkeiten wurden zwar seit den Verträgen von Maastricht, mit dem Schengen Abkommen und der Einführung des EURO in 2000 etabliert, ob der Gedanke des gemeinsamen Wirtschaftsraums noch aufrechterhalten kann werden kann, ist zunehmend fraglich.

Bezüglich Unterstützungsmaßnahmen der EZB verbietet auch Art. 123 AEUV-Vertrag den unmittelbaren Erwerb von mitgliedstaatlichen Schuldtiteln durch die Zentralbank („No Bail-Out“). Dieses Verbot versuchte die EZB dadurch zu umgehen dass sie die Schuldtitel nicht direkt von den Staaten übernimmt sondern vom Zwischenhandel des allgemeinen Finanzmarktes (Sekundärmarkt outright market).

Nachdem verschiedene Vorschläge aus den Mitgliedsstaaten wie die Einführung sogenannter Eurobonds durch die EU direkt (Frankreich, EU-Kommission) einerseits oder die Einrichtung einer Staateninsolvenzordnung um die Zahlungsunfähigkeit von Staaten strukturiert abzuwickeln (durch Deutschland) andererseits politisch nicht durchsetzbar waren, beschlossen die Regierungschefs der Euro-Gruppe auf dem Gipfel des Europäischen Rates am 16./17. Dezember 2010, den Art. 136 AEU-Vertrag um einen weiteren Absatz 3 zu erweitern. Dieser lautet: wie folgt:

Die Mitgliedstaaten, deren Währung der Euro ist, können einen Stabilitätsmechanismus einrichten, der aktiviert wird, wenn dies unabdingbar ist, um die Stabilität des Euro-Währungsgebiets insgesamt zu wahren.

Die Staaten des Euro-Währungsgebiets schlossen sodann am 2. Februar 2012 den Vertrag zur Einrichtung des Europäischen Stabilitätsmechanismus (ESM), der eine eigenständige Rechtspersönlichkeit besitzt und Art 136 Abs. 3 AEUV als Stabilitätsmechanismus umsetzt.

Die Gewährung der erforderlichen Finanzhilfen im Rahmen des Mechanismus soll dabei strengen Auflagen unterliegen (Thema Kontrolle durch Troika).

Erste Erfolge die Lage zu beruhigen und die Rückkehr der Krisenstaaten an die Finanzmärkte zu ermöglichen, zeigte der ESM unter anderem bei der jüngsten Emission von Staatsanleihen durch Griechenland Mitte April 2014. Fast vier Jahre nach dem finanziellen Kollaps hat sich Griechenland erstmals wieder Kapital bei privaten Investoren beschafft. Laut dem Finanzministerium in Athen spülte die Auktion von Staatsanleihen mit fünfjähriger Laufzeit drei Milliarden Euro in die Kassen. Die Anleger erhalten dafür einen Zinssatz von 4,75 Prozent. Die Nachfrage nach den Bonds war laut griechischem Finanzministerium sehr stark. Etwa 90 Prozent der Staatsanleihen seien an institutionelle Investoren im Ausland gegangen. (Quelle: Der Spiegel vom 18.04.2014). Dass hierbei überwiegend sogenannte angelsächsische Hedgefonds zugriffen kann nicht verwundern. Über die Krise hinweg seien die Staaten wie Griechenland aber "nicht aufgrund eigener Bonität, sondern aufgrund der Rettungsschirme. Es haben letztendlich die Steuerzahler anderer Länder versprochen, die Schulden zurückzuzahlen." Solange es problemlos gehe, unter den Rettungsschirm ESM zu schlüpfen und die EZB diese Staatspapiere abkaufe und damit die Risiken trage, werde immer diese Steuerzahler mit dafür aufkommen müssen, so Hans Werner Sinn, Präsident des Ifo Institutes im Deutschlandfunk am 28.04.2014.

(c) OMT Programm der EZB, verdeckte Staatsfinanzierung oder zulässige Währungspolitik als Sicherung der Preisstabilität der gemeinsamen Währung

Parallel zu den Maßnahmen des ESM begann die Europäische Zentralbank, von Mai 2010 bis September 2012 Staatsanleihen gefährdeter Euro-Staaten vom Anleihemarkt zu kaufen Security Markets Program (SMP). So hatte die EZB zwischenzeitlich Schuldtitel auf Staatsanleihen zum Stand 31. Dezember 2012 im Gesamtvolumens von (218 Mrd. Euro nominal, Buchwert 208,7 Mrd. Euro) vom Sekundärmarkt aufgekauft. Hierbei machten italienische Papiere nominal knapp die Hälfte des Volumens aus, gefolgt von spanischen (20 %) und griechischen (16 %). (Quelle: European Central Bank: 21 February 2013 – Details on securities holdings acquired under the Securities Markets Program. Press Release, Online, März 2014).

Zum 31. Januar 2014 betrug der Bestand der im Rahmen des Programms aufgekauften Wertpapiere noch knapp 176 Mrd. Euro. Quelle: European Central Bank: Open-market operations: Ad-hoc communications. abgerufen am 7. Februar 2014

Das SMP wurde im September 2012 durch das OMT abgelöst. Das Programm soll es ermöglichen, die Zinsen für Staatstitel der betreffenden Staaten zu verringern und ihnen so die Aufnahme neuer Kredite zu erleichtern. Es ist in seinem Volumen unbeschränkt.

Mit dieser Entscheidung zum Aufkauf von Schuldtiteln auf Staatspapiere auf dem Sekundärmarkt wich die EZB von ihrem bisherigen Grundprinzip ab, niemals Staatsanleihen von Mitgliedstaaten zu kaufen, da ihre originäre Aufgabe laut AEUV die Stabilität der EURO Währung insgesamt aber nicht die Finanzierung der EURO-Länder ist. Da die jeweiligen Staatsanleihen nicht direkt beim jeweiligen Emittenten (nicht unmittelbar), sondern (nur mittelbar) auf dem Sekundärmarkt von der EZB „gekauft“ wurden und weiterhin jetzt noch werden (Outright Monetary Transactions) wird diese Umgehung von der EZB nunmehr als rechtlich legitim kommuniziert.

Als Outright Monetary Transactions (OMT) Offen-Markt Transaktionen bezeichnet man ein von der Europäischen Zentralbank (EZB) offeriertes Programm, unter dem die EZB am Sekundärmarkt Geschäfte über kurzfristige Anleihen von Staaten im Euro-Währungsgebiet durchführen kann. Technisch handelt es sich bei Transaktionen im Rahmen des OMT-Programms um Outright-Offenmarktgeschäfte. Das OMT kann von jedem Mitglied der EZB in Anspruch genommen wurde, was bisher aber tatsächlich noch nicht der Fall war. Das Programm soll es ermöglichen, die Zinsen für Staatstitel dem betroffenen Staat zu verringern und dem Staat so die Aufnahme neuer Kredite an den freien Märkten zu erleichtern. Es ist in seinem Volumen unbeschränkt.

Es wird davon ausgegangen, dass allein seine Ankündigung Spitzname (Bazooka) bereits eine beruhigende Wirkung auf die Finanzmärkte und eine abschreckende Wirkung auf Spekulanten, die gegen einzelne EURO Länder spekulieren, ausgeübt hat. Es gibt weder eine zeitliche Begrenzung des Programms noch eine summenmäßige Begrenzung der im Zuge des OMT-Programms aufgekauften Staatstitel.

OMTs können ausschließlich im Rahmen und unter den Voraussetzungen einer Inanspruchnahme der Rettungsfazilitäten des Eurosystems (ESM oder EFSF) genutzt werden, wobei nicht notwendigerweise ein volles Anpassungsprogramm durchlaufen werden muss. Erforderlich ist in jedem Fall aber, dass seitens der Fazilität auch Primärmarktankäufe der betroffenen Staatstitel durchgeführt werden können. Das OMT-Programm positioniert sich insoweit hinsichtlich der Anleihekäufe als Komplement am Sekundärmarkt.

Die Entscheidung über die Durchführung und die Beendigung von OMTs obliegt dem EZB-Rat. Infrage kommen hauptsächlich Obligationen mit einer Laufzeit zwischen einem und drei

Jahren. Die EZB reklamiert für die unter dem OMT-Programm erworbenen Papiere keinen vorrangigen Gläubigerstatus (pari passu).

Der ehemalige Deutsche Bundesbankpräsident Axel Weber und ehemaliges Mitglied des EZB Rates, der mitten in der Krise zurückgetreten war, kritisierte in einem Interview der Wochenzeitung „Die Zeit Ausgabe 52/13 v. 29.12.2013 das OMT-Programm wie folgt. „Die unorthodoxen Maßnahmen der Zentralbanken haben dazu beigetragen, die Lage kurzfristig zu stabilisieren. Das ist nicht zu leugnen, aber die langfristigen Risiken eines solchen Kurses – insbesondere für die Unabhängigkeit der Notenbanken – werden verdrängt. Die Zentralbanken sollten nicht zu einer Art Reparaturbetrieb für die Fehler der Politik werden. Darunter leidet die Glaubwürdigkeit“.

Der EZB Präsident Mario Draghi sprach im Gegenzug in einem Interview mit der Wochenzeitung „Der Spiegel“ 01/14 dass die deutsche Sorgen vor den Folgen der Euro-Rettungspolitik Ausdruck einer „perversen Angst“ seien. Die Europäische Zentralbank sieht OMT nicht als monetäre Staatsfinanzierung, welche laut Art. 123 des AEUV verboten ist.

Die Bundesbank Präsident Jens Weidemann lehnt das OMT ab, weil das Programm zu nah an einer „Staatsfinanzierung durch die Notenpresse“ sei, weil die Geldpolitik Gefahr laufe, in das „Schlepptau der Fiskalpolitik“ zu geraten, und weil die Interventionen erhebliche Risiken zwischen den Steuerzahlern verschiedener Länder umverteilen könnten, wozu die Europäische Zentralbank nicht legitimiert sei. (Quelle EZB-Staatsanleihekäufe: Bundesbank kritisiert Beschluss offen. Frankfurter Allgemeine Zeitung. 6. September 2012).

3. Das Verhältnis von Karlsruhe BVerfG zu Luxemburg - oder wer hat die Deutungshoheit über Europa

1. Die Entscheidungen der Höchsten Gerichte mit ESM und OMT

Hinsichtlich des **ESM hat der Europäische Gerichtshof in seinem Urteil in der Rechtssache C-370/12 Thomas Pringle / Government of Ireland, Ireland and the Attorney General Quelle: Gerichtshof der Europäischen Union PRESSEMITTEILUNG Nr. 154/12 Luxemburg, den 27. November 2012 (**www.curia.europa.eu) einen Verstoß gegen Art. 125 AEU verneint: "Das Verbot für die EZB und die Zentralbanken der Mitgliedstaaten, Körperschaften und Einrichtungen der Union und der Mitgliedstaaten Überziehungs- oder andere Kreditfazilitäten zu gewähren oder unmittelbar von ihnen Schuldtitel zu erwerben, wird durch den ESM nicht umgangen. Dieses Verbot richtet sich nämlich speziell an die EZB und die Zentralbanken der Mitgliedstaaten. Wenn ein oder mehrere Mitgliedstaaten einem anderen Mitgliedstaat unmittelbaren oder über den ESM finanziellen Beistand leisten, fällt dies somit nicht unter das genannte Verbot. Mit der „Nichtbeistandsklausel“, nach der die Union oder ein Mitgliedstaat nicht für die Verbindlichkeiten eines anderen Mitgliedstaats eintritt und nicht für sie haftet, soll der Union und den Mitgliedstaaten nicht jede Form der finanziellen Unterstützung eines anderen Mitgliedstaats untersagt werden. Sie soll vielmehr sicherstellen, dass die Mitgliedstaaten auf eine solide Haushaltspolitik achten, indem sie gewährleistet, dass die Mitgliedstaaten bei ihrer Verschuldung der Marktlogik unterworfen bleiben. Sie verbietet es daher nicht, dass ein oder mehrere Mitgliedstaaten einem Mitgliedstaat, der für seine eigenen Verbindlichkeiten gegenüber seinen Gläubigern haftbar bleibt, eine Finanzhilfe gewähren, vorausgesetzt, die daran geknüpften Auflagen sind geeignet, ihn zu einer soliden Haushaltspolitik zu bewegen. Der ESM und die daran teilnehmenden Mitgliedstaaten haften aber nicht für die Verbindlichkeiten

des Empfänger-mitgliedstaats einer Stabilitätshilfe und treten auch nicht im Sinne der „Nichtbeistands-klausel“ für sie ein."

1. Die streitige Änderung greift nämlich nicht in die ausschließliche Zuständigkeit der Union (Erster Teil des AEUV) im Bereich der Währungspolitik für die Mitgliedstaaten ein, deren Währung der Euro ist.

Während das vorrangige Ziel der Währungspolitik der Union die Gewährleistung der Preisstabilität ist, wird mit dem ESM ein davon klar abweichendes Ziel verfolgt, und zwar die Stabilität des Euro-Währungsgebiets insgesamt. Die bloße Tatsache, dass diese wirtschafts-politische Maßnahme mittelbare Auswirkungen auf die Stabilität des Euro haben kann, erlaubt es nicht, sie einer währungspolitischen Maßnahme gleichzustellen. Überdies gehören die zur Erreichung des mit dem ESM verfolgten Ziels, dafür zu sorgen, dass ein Mitgliedstaat eine Finanzhilfe erhält, ins Auge gefassten Mittel offenkundig nicht zur Währungspolitik.

Der ESM stellt vielmehr einen ergänzenden Teil des neuen Regelungsrahmens für die Verstärkung der wirtschaftspolitischen Steuerung der Union dar. Durch diesen Rahmen wird eine engere Koordinierung und Überwachung der Wirtschafts- und Haushaltspolitik der Mitgliedstaaten geschaffen, und er dient zur Konsolidierung der makroökonomischen Stabilität und der Tragfähigkeit der öffentlichen Finanzen. Während er insofern präventiver Art ist, als er die Gefahr von Staatsverschuldungskrisen so weit wie möglich verringern soll, dient die Einrichtung des ESM zur Bewältigung von Finanzkrisen, die trotz getroffener präventiver Maßnahmen eintreten könnten. Der ESM gehört infolgedessen zum Bereich der Wirtschaftspolitik und nicht der Währungspolitik.

2. Die streitige Änderung berührt auch nicht die Zuständigkeit der Union (Erster Teil des AEUV) im Bereich der Koordinierung der Wirtschaftspolitik der Mitgliedstaaten.

In Bezug auf die ausschließliche Zuständigkeit der Union im Bereich der Währungspolitik für die Mitgliedstaaten, deren Währung der Euro ist Art. 3 Abs. 1 Buchst. c AEUV und 127 AEUV, wiederholt der Gerichtshof, dass diese Politik die Preisstabilität gewährleisten soll. Die Tätigkeiten des ESM gehören jedoch nicht zur Währungspolitik sondern zur Wirtschaftspolitik.

Der ESM soll den Finanzierungsbedarf seiner Mitglieder decken. Zu diesem Zweck ist er weder zur Festsetzung der Leitzinssätze für das Euro-Währungsgebiet noch zur Ausgabe von Euro-Münzen oder Banknoten befugt; die von ihm gewährte Finanzhilfe muss in vollem Umfang aus eingezahltem Kapital oder durch die Begabe von Finanzinstrumenten finanziert werden.

In Bezug auf die Zuständigkeit der Union für die Koordinierung der Wirtschaftspolitik Art. 2 Abs. 3 AEUV, 119 AEUV bis 121 AEUV und 126 AEUV führt der Gerichtshof aus, dass die Mitgliedstaaten befugt sind, untereinander eine Übereinkunft über die Einrichtung eines Stabilitätsmechanismus wie den ESM-Vertrag zu schließen, sofern die von den vertrag-schließenden Mitgliedstaaten im Rahmen einer solchen Übereinkunft eingegangenen Verpflichtungen mit dem Unionsrecht im Einklang stehen. Der ESM hat aber nicht die Koordinierung der Wirtschaftspolitik der Mitgliedstaaten zum Gegenstand, sondern stellt einen Finanzierungsmechanismus dar.

Mit der „Nichtbeistandsklausel“ Art. 125 AEUV, nach der die Union oder ein Mitgliedstaat nicht für die Verbindlichkeiten eines anderen Mitgliedstaats eintritt und nicht für sie haftet, soll der Union und den Mitgliedstaaten nicht jede Form der finanziellen Unterstützung eines anderen Mitgliedstaats untersagt werden. Sie soll vielmehr sicherstellen, dass die Mitglied-staaten auf eine solide Haushaltspolitik achten, indem sie gewährleistet, dass die Mitglied-staaten bei ihrer Verschuldung der Marktlogik unterworfen bleiben. Sie verbietet es daher

nicht, dass ein oder mehrere Mitgliedstaaten einem Mitgliedstaat, der für seine eigenen Verbindlichkeiten gegenüber seinen Gläubigern haftbar bleibt, eine Finanzhilfe gewähren, vorausgesetzt, die daran geknüpften Auflagen sind geeignet, ihn zu einer soliden Haushaltspolitik zu bewegen. Der ESM und die daran teilnehmenden Mitgliedstaaten haften aber nicht für die Verbindlichkeiten des Empfängermitgliedstaats einer Stabilitätshilfe und treten auch nicht im Sinne der „Nichtbeistandsklausel“ für sie ein.

Überdies stellt der Gerichtshof fest, dass die Übertragung neuer Funktionen auf die Kommission, die EZB und den Gerichtshof durch den ESM-Vertrag mit ihren in den Verträgen festgelegten Befugnissen Vgl. hierzu Art. 13 EUV vereinbar ist. Der Gerichtshof hebt insbesondere hervor, dass die der Kommission und der EZB im Rahmen des ESM-Vertrags übertragenen Funktionen keine Entscheidungsbefugnis im eigentlichen Sinne umfassen und dass die Tätigkeiten dieser beiden Organe im Rahmen des ESM-Vertrags nur den ESM verpflichten. Der Gerichtshof stellt zudem fest, dass auch der allgemeine Grundsatz eines effektiven gerichtlichen Rechtsschutzes dem ESM nicht entgegensteht. Wenn die Mitgliedstaaten einen Stabilitätsmechanismus wie den ESM einrichten, für dessen Einrichtung der EUV und der AEUV der Union keine spezielle Zuständigkeit einräumen, führen sie nämlich nicht das Recht der Union durch, so dass die Charta der Grundrechte der Europäischen Union, die für jede Person einen effektiven gerichtlichen Rechtsschutz gewährleistet Art. 47, nicht zur Anwendung kommt.

Zum Abschluss und zur Ratifikation des ESM-Vertrags vor dem Inkrafttreten des Beschlusses 2011/199

2. Klagen vor dem deutschen Bundesverfassungsgerichts zum OMT und ESM bzw. Vorgänger EFSF.

OMT und ESM und die zur Umsetzung erlassenen jeweiligen nationalen Gesetze, das Deutsche Stabilisierungsmechanismusgesetz, durch das die Beteiligung am EFSF/ESM beschlossen wurde, sind Gegenstand mehrerer beim BVerfG anhängiger Verfahren, die Verfahren werden als Verfassungsbeschwerden weitgehend auf Verletzung des in Art 38 GG geregelten Wahlrechts zum Bundestag gestützt und darauf, dass der Bundestag seine verfassungsgemäße Budgethoheit verliert.

Mit **Entscheidung vom 7. September 2011 - 2 BvR 987/10 – Rettungsschirm verwarf das Bundesverfassungsgericht** die Verfassungsbeschwerden, die sich gegen die „Griechenland-hilfen“ vor Etablierung des ESM wandten.

1. Die Entscheidung über Einnahmen und Ausgaben der öffentlichen Hand ist grundlegender Teil der demokratischen Selbstgestaltungsfähigkeit im Verfassungsstaat (vgl. BVerfGE 123, 267 <359>). Der Deutsche Bundestag muss dem Volk gegenüber verantwortlich über Einnahmen und Ausgaben entscheiden. Das Budgetrecht stellt insofern ein zentrales Element der demokratischen Willensbildung dar (vgl. BVerfGE 70, 324 <355 f.>; 79, 311 <329>) das Parlament muss auch in einem System intergouvernementalen Regierens die Kontrolle über grundlegende haushaltspolitische Entscheidungen behalten.

2. Der Deutsche Bundestag darf seine Budgetverantwortung daher nicht durch unbestimmte haushaltspolitische Ermächtigungen auf andere Akteure übertragen. Insbesondere darf er sich, auch durch Gesetz, keinen finanzwirksamen Mechanismen ausliefern, die - sei es aufgrund ihrer Gesamtkonzeption, sei es aufgrund einer Gesamtwürdigung der Einzelmaßnahmen - zu nicht überschaubaren haushaltsbedeutsamen Belastungen ohne vorherige konstitutive Zustimmung führen können.

3. Es dürfen keine dauerhaften völkervertragsrechtlichen Mechanismen begründet werden, die auf eine Haftungsübernahme für Willensentscheidungen anderer Staaten hinauslaufen, vor allem, wenn sie mit schwer kalkulierbaren Folgewirkungen verbunden sind. Jede ausgabenwirksame solidarische Hilfsmaßnahme des Bundes größeren Umfangs im internationalen oder unionalen Bereich, muss vom Bundestag im Einzelnen bewilligt werden.

4. Darüber hinaus muss gesichert sein, dass hinreichender parlamentarischer Einfluss auf die Art und Weise des Umgangs mit den zur Verfügung gestellten Mitteln besteht.

5.Die Bestimmungen der europäischen Verträge (ESM) stehen dem Verständnis der nationalen Haushaltsautonomie als einer wesentlichen, nicht entäußerbaren Kompetenz der unmittelbar demokratisch legitimierten Parlamente der Mitgliedstaaten nicht entgegen, sondern setzen sie voraus. Ihre strikte Beachtung gewährleistet, dass die Handlungen der Organe der Europäischen Union in und für Deutschland über eine hinreichende demokratische Legitimation verfügen (BVerfGE 89, 155 <199 ff.>; 97, 350 <373>). Die vertragliche Konzeption der Währungsunion als Stabilitätsgemeinschaft ist Grundlage und Gegenstand des deutschen Zustimmungsgesetzes (BVerfGE 89, 155 <205>).

6. Hinsichtlich der Wahrscheinlichkeit, für Gewährleistungen einstehen zu müssen, kommt dem Gesetzgeber ein Einschätzungsspielraum zu, der vom Bundesverfassungsgericht zu respektieren ist. Entsprechendes gilt auch für die Abschätzung der künftigen Tragfähigkeit des Bundeshaushalts und des wirtschaftlichen Leistungsvermögens der Bundesrepublik Deutschland

7. Mit der Höhe der aktuellen Bürgschaften sei noch keine Obergrenze überschritten. Dies wäre erst der Fall, wenn die Haushaltsautonomie des Bundestags „für einen nennenswerten Zeitraum nicht nur eingeschränkt würde, sondern praktisch vollständig leerliefe“.

Am 27. Oktober 2011 erließ das Bundesverfassungsgericht eine **einstweilige Anordnung**, wonach das Parlament seine Verantwortung nicht auf ein sog. Neuner-Sondergremium delegieren darf.

In einem Organstreitverfahren entschied das **Bundesverfassungsgericht am 28. Februar 2012, - 2 BvE 8/11, „ESM I“,** dass das Umsetzungsgesetz des ESM das **Stabilisierungsmechanismusgesetzes** § 3 Absatz 3 die Bundestagsabgeordneten in ihren Rechten aus Art. 38 Absatz 1 Satz 2 GG verletzt. Dort sollten die Entscheidungen über die Hilfen in einen Unterausschuss des Parlaments den „Europausschuss“ verwiesen werden. Die Delegation von Entscheidungsbefugnissen des Deutschen Bundestages auf ein Untergremium des Parlaments verbunden mit der Befugnis zur selbständigen und plenarersetzenden Wahrnehmung dieser Zuständigkeiten, steht in einem Spannungsverhältnis zu dem die Befassung des Plenums gebietenden Grundsatz der Budgetöffentlichkeit, der als Ausprägung des die Demokratie prägenden Transparenzgebotes ebenfalls Verfassungsrang genießt. Der damit einhergehende weitgehende Entzug von Abgeordnetenrechten bedarf besonders gewichtiger Gründe, die nicht vorliegen.

Entscheidungen in den Verfahren und Beschluss vom 14. 01.2014 zum OMT

Das OMT-Programm war Gegenstand mehrerer (verbundener) Verfahren vor dem deutschen Bundesverfassungsgericht, die Maßnahmen des Eurosystems im Zusammenhang mit der Eurokrise betreffen. **Bundesverfassungsgericht: Pressemitteilung Nr. 9/2014 vom 7. Februar 2014**.

Im September 2012 erklärte das Bundesverfassungsgericht im einstweiligen Verfahren zum OMT vorab: Ein Erwerb von Staatsanleihen am Sekundärmarkt durch die EZB, der auf von den Kapitalmärkten unabhängige Finanzierung der Haushalte der Mitgliedstaaten zielte, ist als Umgehung des Verbotes monetärer Haushaltsfinanzierung (...) untersagt.

Mit Beschluss vom **17. Dezember 2013 - 2 BvR 1390/12 u.a -** trennte das Gericht die sich auf den OMT-Beschluss beziehenden Verfahrensgegenstände vom Hauptsacheverfahren ab.

Mit **Beschluss vom 14. Januar 2014 – 2 BvR 2728/13 u.a -** setzte es die abgetrennten Verfahren aus und richtete mehrere Vorlagefragen zwecks Vorabentscheidung an den Europäischen Gerichtshof (EUGH). Hauptgegenstand der Vorlage ist die Vereinbarkeit des OMT-Beschlusses mit dem Mandat der Europäischen Zentralbank. Das Bundesverfassungsgericht äußerte dabei in seinem mit 6:2 Stimmen ergangenen Beschluss, dass das OMT-Programm aus seiner Sicht nicht vom Mandat der Europäischen Zentralbank gedeckt sein dürfte, weil es sich „nicht mehr als währungspolitische, sondern als überwiegend wirtschaftspolitische Maßnahme darstellt. Damit habe die Europäischen Zentralbank ihre Zuständigkeit überschritten und handle „ultra vires".

Der Europäische Gerichtshof könne jedoch so BVerfG in einem orbiter dictum, den OMT-Beschluss in seiner Gültigkeit begrenzen oder eine primärrechtskonforme Auslegung herbeiführen, welche mit dem Grundgesetz vereinbar sei. Dies setze wohl voraus, dass ein Schuldenschnitt ausgeschlossen wird, Staatsanleihen einzelner Mitgliedstaaten nicht in unbegrenzter Höhe angekauft und Eingriffe in die Preisbildung am Markt soweit wie möglich vermieden werde. **Bundesverfassungsgericht: Pressemitteilung Nr. 9/2014 vom 7. Februar 2014**

Entscheidung des Bundesverfassungsgerichts vom 18.03. 2014 zum „ESM II"

BvR 1390/12 u.a.-, Quelle:www.juris.de, das Rechtsportal

Vorgeschichte. Am 31. August 2012 gab der Verein „Mehr Demokratie" bekannt, dass insgesamt 37.018 Menschen gemeinsam mit dem Bündnis „Europa braucht mehr Demokratie" gegen ESM und Fiskalpakt klagen, **Quelle: http://www.mehr-demokratie.de/rote-karte-fuer-eurorettung.html.** Es ist die bisher größte Massenbeschwerde in der bundesdeutschen Geschichte

Tenor der Entscheidung: Euro-Rettungsschirm und europäischer Fiskalpakt sind nach Ansicht des Verfassungsgerichts verfassungsgemäß und verstoßen nicht gegen das Grundgesetz, die Verfassungsbeschwerden wurden zurückgewiesen.

Der Entscheidung liegen die folgenden Erwägungen zugrunde:

1. Vor allem das Budgetrecht darf das Parlament nicht aufgeben. Es darf den Regierungen der Mitgliedstaaten der Europäischen Union nicht die Befugnis einräumen, über Einnahmen und Ausgaben des deutschen Staates zu entscheiden. Das wäre der Fall, wenn der Bundestag einem nicht an strikte Vorgaben gebundenen und in seinen Auswirkungen nicht begrenzten Bürgschafts- und Leistungsmechanismus zustimmen und sich damit selbst entmachten würde.

Das BVerfG betont, dass der demokratische Prozess offen bleiben muss, damit zukünftig andere demokratische Mehrheiten andere Entscheidungen treffen können. Insbesondere eine irreversible rechtliche Präjudizierung künftiger Generationen muss vermieden werden. Eine solche träte ein, wenn die Haushaltsautonomie zukünftiger Parlamente praktisch völlig leerliefe. Das befürchtet der Senat jedoch nur bei einer "evidenten Überschreitung äußerster Grenzen".

2. Laut BVerfG bleibt trotz der eingegangenen Verpflichtungen von 190 Mrd EURO die Haushaltsautonomie des Deutschen Bundestages hinreichend gewahrt. Es sei jedoch haushaltsrechtlich sicherzustellen, dass etwaige Kapitalabrufe nach dem ESM-Vertrag im Rahmen der vereinbarten Obergrenzen fristgerecht und vollständig erfüllt werden können und somit eine Aussetzung von Stimmrechten Deutschlands in den ESM-Gremien zuverlässig ausgeschlossen bleibt.

3. Vor diesem Hintergrund muss der Gesetzgeber ausreichende Vorkehrungen treffen, um seine Integrationsverantwortung dauerhaft erfüllen zu können. Er darf sich namentlich seines Budgetrechts nicht begeben, auch nicht in einem System intergouvernementalen Regierens.

4. Für die Einhaltung des Demokratiegebots kommt es entscheidend darauf an, dass der Bundestag der Ort bleibt, an dem eigenverantwortlich über Einnahmen und Ausgaben entschieden wird, auch im Hinblick auf internationale und europäische Verbindlichkeiten. Zwar ist es in erster Linie Sache des Bundestages selbst, in Abwägung aktueller Bedürfnisse mit den Risiken mittel- und langfristiger Gewährleistungen darüber zu befinden, in welcher Gesamthöhe Gewährleistungssummen noch verantwortbar sind. Aus der demokratischen Verankerung der Haushaltsautonomie folgt jedoch, dass der Bundestag einem intergouvernemental oder supranational vereinbarten, nicht an strikte Vorgaben gebundenen und in seinen Auswirkungen nicht begrenzten Bürgschafts- oder Leistungsautomatismus nicht zustimmen darf, der – einmal in Gang gesetzt – seiner Kontrolle und Einwirkung entzogen ist. Das Demokratieprinzip gebietet es zudem, dass der Bundestag an diejenigen Informationen gelangen muss, die er für eine Abschätzung der wesentlichen Grundlagen und Konsequenzen seiner Entscheidung benötigt.

5. Die Verpflichtung des Haushaltsgesetzgebers auf eine bestimmte Haushalts- und Fiskalpolitik ist nicht von vornherein demokratiewidrig. Sie kann grundsätzlich auch durch die Übertragung wesentlicher haushaltspolitischer Entscheidungen auf Organe einer supra- oder internationalen Organisation oder die Übernahme entsprechender völkerrechtlicher Verpflichtungen erfolgen. Zu entscheiden, ob und in welchem Umfang dies sinnvoll ist, obliegt in erster Linie dem Gesetzgeber. Das Bundesverfassungsgericht hat jedoch sicherzustellen, dass der demokratische Prozess offen bleibt, aufgrund anderer Mehrheitsentscheidungen rechtliche Umwertungen erfolgen können und eine irreversible rechtliche Präjudizierung künftiger Generationen vermieden wird.

6. Eine unmittelbar aus dem Demokratieprinzip folgende Obergrenze könnte allenfalls überschritten sein, wenn sich die Zahlungsverpflichtungen und Haftungszusagen im Eintrittsfall so auswirkten, dass die Haushaltsautonomie jedenfalls für einen nennenswerten Zeitraum nicht nur eingeschränkt würde, sondern praktisch vollständig leerliefe. Dies kommt nur bei einer evidenten Überschreitung äußerster Grenzen in Betracht.

Das Zustimmungsgesetz zur Änderung des Art. 136 AEUV verletzt die Beschwerdeführer und die Antragstellerin nicht in ihren Rechten aus Art. 38 Abs. 1, Art. 20 Abs. 1 und Abs. 2 i.V.m. Art. 79 Abs. 3 GG. Insbesondere führt Art. 136 Abs. 3 AEUV nicht zum Verlust der Haushaltsautonomie des Bundestages, sondern ermöglicht den Mitgliedstaaten des Euro-Währungsgebietes lediglich, einen Stabilitätsmechanismus zur Gewährung von Finanzhilfen auf völkervertraglicher Grundlage zu installieren und bestätigt insofern die fortdauernde Herrschaft der Mitgliedstaaten über die Verträge. Die Entscheidung des Gesetzgebers, die Währungsunion um die Möglichkeit aktiver Stabilisierungsmaßnahmen zu ergänzen, sowie die damit verbundene Prognose, mit solchen Maßnahmen die Stabilität der Währungsunion gewährleisten und fortentwickeln zu können, hat das BVerfG angesichts des Einschätzungsspielraums der zuständigen Verfassungsorgane grundsätzlich auch insoweit zu

respektieren, als Risiken für die Preisstabilität aufgrund dieser Entscheidung nicht auszuschließen sind.

Eine Erweiterung der bestehenden Zahlungspflichten Deutschlands im Wege der Kapitalerhöhung ist zwar möglich, bedürfte aber der Zustimmung der gesetzgebenden Körperschaften. Eine völkerrechtliche Verpflichtung zur Vornahme einer solchen Kapitalerhöhung besteht nicht.

Schließlich begründet der ESM-Vertrag auch keine unauflösbare Bindung Deutschlands.

4. Fazit / Conclusion

Der EUGH neigt im Zweifel zu einer Stärkung und Erweiterung der Kompetenzen der EU gegenüber den Mitgliedsstaaten und einer dahingehenden Auslegung des AEUV.

Das BVerfG ist ein kritischer Begleiter der EUGH Rechtsprechung. Mit den aktuellen Urteilen bleibt das BVerfG seiner bisherigen Rechtsprechungslinie treu, zwar die Befugnisse des Bundestages zu sichern und zu stärken, Regierung und Parlament aber die notwenige Freiheit zur Bewältigung der Finanzkrise und zur Stabilisierung des Euro zu geben. Mit dieser Zurückhaltung entspricht das Gericht seiner Aufgabe, für die Beachtung des Grundgesetzes zu sorgen. Die richtige Politik in Geld- und Währungsfragen müssen nach der gewaltenteiligen Ordnung der Verfassung, das demokratisch legitimierte Parlament und die Bundesregierung verantworten. **(Joachim Wieland ESM und Fiskalpakt verfassungsgemäß - Der Rettungsschirm hält, Beitrag vom 18.03.2014 in Legal Tribune Online).** Das Gericht folgt damit seinem Grundsatz der Europafreundlichkeit, gibt aber seinen Vorbehalt der Kontrolle Europäischen Rechts nicht auf, soweit es in die nationale Ordnung eingreift, so **Andreas Voßkuhle Präsident des BverfG mit dem Präsident des EuGH Vassilios Skouris bei einer Diskussion mit dem Titel. Wer hat das letzte Wort? des DAV auf dem Deutschen Anwaltstag 2011 in Straßburg, Martin Huff Verhältnis BVerFG- EUGH versöhnlich im Ton , hart in der Sache, Quelle Legal Tribune Online 10.06.2011**.

Derzeit besteht zwar kein Verfassungskonflikt zwischen nationaler Verfassung und AEUV, ein solcher könnte sich aber schon aus einer konträren Entscheidung des EUGH nach Vorlage des BVerfG zum OMT Programms ergeben.

Jegliche Übertragung nationaler Souveränität an die EU bedarf formal einer entsprechenden Rechtsgrundlage und muss auf dem Prinzip der begrenzten Einzelermächtigung Art. 5 AEUV, Art 23 GG beruhen.

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JUDICIAL COOPERATION IN CRIMINAL MATTERS AFTER THE ADOPTION OF THE TREATY OF LISBON IN THE EUROPEAN UNION

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Key words: judicial cooperation in criminal matters, the Treaty of Lisbon, European Public Prosecutor's Office, third pillar.

Abstract:

During the development of the European Communities and later the European Union has gradually expanded its field of competence. An exception was neither the area of judicial cooperation in criminal matters, which became part of the policies of the European Union since the Maastricht Treaty. The Maastricht Treaty has included this policy in the third pillar, which had an intergovernmental nature. Judicial cooperation in criminal matters since 1993 has gradually developed, but an essential milestone in its development was the adoption of the Lisbon Treaty. The Treaty of Lisbon abolished the pillar structure and thus includes judicial cooperation in criminal matters in the "classic" policies of the European Union. Judicial cooperation in criminal matters has become part of an area of freedom, security and justice. This paper therefore aims to analyze the consequences of the adoption of the Treaty of Lisbon on judicial cooperation in criminal matters. In partial, paper will be dealt with the changing the legal basis for judicial cooperation in criminal matters and the consequent change of the way of the adoption the EU legal acts in this area, the institutions of the EU in this process of adoption, the types of legal acts in this area, the jurisdiction of the Court of Justice of the European Union in relation to the EU legal acts adopted after the Treaty of Lisbon and the description of the legal acts adopted after the Treaty of Lisbon.

1. Introduction

The European Union has gone through several changes in its development, which took the form of changes to the Treaties. The third and final treaty, which has revised the founding treaties, is the Treaty of Lisbon. The Treaty of Lisbon was signed on 13 December 2007 and entered into force on 1 January 2009. The Treaty of Lisbon represented a milestone in the development of the European Union and the European Communities, and fundamentally affected the nature and functioning of the European Union.

In particular, the Treaty of Lisbon abolish the three-pillar structure of the European Union and granted the European Union legal personality under Art. 47 TEU. In this moment the European Community is replaced by the European Union, which has become his successor in accordance with Art. 1 TEU. The European Union is based on the Treaty on European Union

and on the Treaty on Functioning of the European Union. When the Treaty of Lisbon entered into force, it blurred the distinction between Community law and European Union law, because Community law becomes part of European Union law, except for special status of legal acts adopted on the basis of Art. 21 TEU - the field of common foreign and security policy.

The European Union redefined its objectives and more striking incorporated the judicial cooperation in criminal matters through the area of freedom, security and justice. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers in which the free movement of persons with appropriate measures with respect to external border controls, asylum, immigration and prevention and combating with crime. [1] In achieving this objective, the European Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental rights of the European Union of 7 December 2000, 12 December 2007 in Strasbourg, which has the same legal force as treaties. [2] Respect of human rights by the European Union and its activities is further underlined by the European Union's intention to proceed to the European Convention on Human Rights and Fundamental Freedoms and as well ensuring respect for and observance of fundamental rights under the Convention and the constitutional traditions common to the Member States.

All of these changes introduced by the Lisbon Treaty, had an impact on judicial cooperation in criminal matters. Changes are elaborated in more detail in the following chapters.

2. Abolish of the third pillar and legal acts

Fundamental change that the Lisbon Treaty introduced was the abolition of pillar structure. Pillar structure originally differed supranational first pillar and the intergovernmental second and third pillars. Following the adoption of the Lisbon Treaty communization of the former third pillar happened. It means that the legal character and nature of the area of the third pillar occurred as the first pillar. Former third pillar (police and judicial cooperation in criminal matters) became part of the Treaty on the Functioning of the European Union under Part Three, Title V, Chapter 4, "Judicial cooperation in criminal matters" (Article 82 TFEU up to 86) and Chapter 5 "Police cooperation "(Art. 87 up 89 TFEU). This means in both areas will be further adopted only traditional secondary acts (the former of Community) law, i.e. regulations, directives and decisions as binding acts, respectively. non-binding instruments such as recommendations and opinions. Those instruments on judicial cooperation in criminal matters will be accorded any legal effect to them by the treaties and the case law of the Court of Justice of the European Union. The Lisbon Treaty has removed ambiguity about the legal status of the legal effects of the third pillar instruments.

The abolition of the third pillar by the Treaty of Lisbon also changed the way the adoption of acts on judicial cooperation in criminal matters. Almost exclusive position of the Council in the adoption of legal instruments of the third pillar replaced the participation of the Council and the European Parliament. In the context of judicial cooperation in criminal matters applies the ordinary legislative procedure, which ensures equal position of the Council and the European Parliament. The ordinary procedure means the procedure provided for in the article 294 TFEU. The scope of this article does not allow to completely present the ordinary legislative procedure, hence we will limit our considerations to point out the main differences between the new and the old regulations

- the European Commission has a monopoly of the right of initiative;

- the European Council decides by a qualified majority voting instead of an unanimously voted framework decision;

- the European Parliament is involved in the procedure and even has the power to bring a proposal to an end.;

- the Court of Justice ensures the uniformity in the interpretation of the Community law;

- national parliaments may be involved in the procedure. [3]

Changing the way in the adoption of legislative acts by introducing ordinary legislative process undermined the original right to veto of member states. The Lisbon Treaty, however, retained a modified variant of the right of veto for Member States in the form so-called brake system. Brake system is governed by Art. 82 Paragraph 3 TFEU. If a member of the Council representing the Member State considers that a draft of directive under Art. 82 Paragraph 2 TFEU would affect fundamental aspects of its criminal justice system, may request that the draft of directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. If the disagreement, and if at least nine Member States of the body on the basis of the draft of directive establish enhanced cooperation in the same period, it shall notify the European Parliament, the Council and the Commission. In such a case, the authorization to proceed with enhanced cooperation referred to Art. 20 Paragraph 2 TFEU and Art. 329 Paragraph 1 TFEU of this contract deemed granted and the provisions on enhanced cooperation. [4]

Legislative acts may be subject to all kinds of legal proceedings before the Court of Justice of the European Union. There was, however, a situation in which remained in effect acts adopted under the third pillar and the relevant provisions of the founding treaties of the jurisdiction of the Court of Justice of the European Union have been changed. It was necessary to deal with the question of further treatment of existing third pillar acts, including the possibility amend or repeal these acts and powers of the Court to them. Those adaptations Protocol on transitional provisions annexed to the Treaty of Lisbon. As a transitional measure, and with respect to acts of the Union in the field of police and judicial cooperation in criminal matters adopted before the entry into force of the Lisbon Treaty, have the date of entry into force (12.01 2009) institutions following powers:

i) the powers of the Commission under Article 258 TFEU shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, as in force before the entry into force of the Lisbon Treaty, remain the same, including where they have been accepted under Art. 35 Paragraph 2 TFEU,

ii) amendment of acts adopted under the EU Treaty (in particular, framework decisions) results applicability of the powers of the institutions as defined in the Treaties with respect to the amended act for those Member States to which that amended act applies.

The efficacy of the above transitional provisions shall cease to five years after the entry into force of the Lisbon Treaty, i.e. 1 December 2014. From that point, the Commission and the Court shall have full powers under the infringement procedure under Art. 258 up to Art. 260 TFEU. [5] However, just as the CT and the current Art 35 (5) EU, the Court will still not have the power to review the validity or proportionality of operations carried out by the police or other law enforcement agencies of a Member State or the exercise of responsibilities

incumbent upon Member states with regard to the maintenance of law and order and the safeguarding of internal security. [6]

Communication of the third pillar remedy these two shortcomings. One of the most important reasons that cause a lack of effectiveness and the associated inefficiencies, was the unanimous way of adoption of acts in the third pillar. Unanimity is not caused only delayed the adoption of acts. Due to the fact disapproval of one country have resulted in failure to take action, but also minimize the content, because if you wanted to reach a unanimous vote to an act, you had to make various concessions that based on lengthy discussions at Council levels. It have ultimately led to the act, the shortcomings especially in the field of legal instruments have resulted in a lack of efficiency.

Under the new provisions of art. 82 TFEU judicial cooperation in criminal matters in the Union, formed on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the following fields[7]:

(a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;

(b) prevent and settle conflicts of jurisdiction between Member States;

(c) support the training of the judiciary and judicial staff;

(d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

(e) mutual admissibility of evidence between Member States;

(f) the rights of individuals in criminal procedure;

(g) the rights of victims of crime;

(h) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

(i) promote and support the action of Member States in the field of crime prevention, excluding any harmonization of the laws and regulations

The fight against cross-border crime has become imperative and it is important to emphasize that states have understood that their obligation is to cooperate with each other to solve any problems that may arise or to prevent conflict situations. [8] Article 69 Paragraph 1 TFEU in turn concerns the regulation of substantive criminal law and stipulates that the European Parliament and the Council may establish minimum rules concerning the definition of criminal law offences and sanctions in the area of particularly serious crime with a cross border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Thereafter, this provision sets out a list of crimes in which the EU shall have legislative competence such as terrorism, organized crime and money laundering. Thus, it also states that the Council may identify other possible areas of crime, which meet the criteria of cross border nature and seriousness. Moreover, interestingly § 2 of the same article stipulates that there is a possibility to approximate if that proves essential to ensure the effective implementation of a Union policy in an area which has already been subject to harmonization measures. In such a case, the same ordinary or special procedure shall apply as was followed for the adoption of the harmonization measure in question. [9]

3. European Public Prosecutor's Office

The Lisbon Treaty somewhat broadens the possibilities of enhanced cooperation by also extending it to police cooperation as well as to the establishment of European Public Prosecutor (Art. 69 TFEU). The setting-up of a European Public Prosecutor's Office is not an obligation, but a possibility. The treaty writes that the Council "may establish" the office acting unanimously and after obtaining the consent of the EP. [10] This means that members of parliament as representatives of the Member States can block a decision establishing a European Public Prosecutor's Office, which would take the representatives of the Member States in the Council. The text of the Lisbon Treaty may reflect the interest of treaty creators to establish a European Public Prosecutor´s Office through possibility of breaking through the failure to achieve the necessary consensus in the Council. If neither this option is not successful, some Member States, but at least nine, may establish a European Public Prosecutor's Office in the framework of enhanced cooperation. Such a prosecutor shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in the paragraph. [11]

Offenses against the financial interests of the European Union are not limit to the scope of a European Public Prosecutor´s Office. The European Council may, at the same time or Subsequently, the Adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the Perpetrators of , and accomplices in, serious crimes affecting more than one Member State. In other words, change the relevant article there is a change of founding treaty and those of its review and further transfer of powers from the Member States to the European Union.

European Public Prosecutor's Office is responsible for bringing to judgment and shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.. This setting raises the question of cooperation between national prosecutors and European Public Prosecutor's Office, and the same questions define the scope of the national prosecutor's office.

If it was created by the European Public Prosecutor's Office, it would mean a step forward for criminal justice policy at the European level. The European Union should this step gained a more prominent role in the criminal policy which the Member States have tried to keep in-house. Possibility to extend the powers under Art. 69 E last paragraph TFEU acquires The European Council decisive opportunity to move from the jurisdiction of the Member States towards the European Union.

4. Conclusion

The Lisbon Treaty was a major advancement in the field of criminal policy in the European Union. Criminal policy is an area that Member States keeps for a long time for themselves. The changes brought by the Lisbon Treaty allows for the further unification of the system of substantive law That deals with the crimes considered to be the most challenging for the EU.

Change in the process of adopting legislative acts of judicial cooperation in criminal matters I consider positively, because the process of co-decision by the Council and the European Parliament brings more democracy and control by the Member States and their

representatives. In the new legal framework, the ECJs jurisdictions on criminal matters is the same as that on any other issue regulated earlier in the first pillar.

I evaluate repeal pillar structure positively again. Firstly it brings clarity to the kinds of acts and their legal effects and, secondly communization seems to be quicker, simpler and more democratic.

Finally, one of the most visible changes to the public may be the establishment of a European Public Prosecutor´s Office. It will be interesting to watch the development of cooperation between it and the Member States as well as practical issues related to the translation and to knowledge of criminal procedural law of the Member States by the European prosecutors.

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THE PRINCIPLE OF SUPERFICIES (NON) SOLO CEDIT DECISIONS OF THE COURTS

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Key words: superficies solo cedit, civil code, civil law, property law, court decisions.

Abstract:

The paper deals with the old Roman law principle – superficies solo cedit, which is now no longer the case with us, but its "reign" will presumably re-introduced into our legal system. Thanks to its withdrawal was to many practical problems in real life. Every recodification commission, which meets and prepares new civil codes intends to reintroduce this principle still so avoid this. It becomes so forthcoming of recodification of our civil law. It deals with this principle in general as well as its brief history. Through individual judgments is trying to bring its (non) application in practice. Takes into account the decisions of the courts of the Czech Republic. It addresses the issue of unauthorized constructions.

JEL classification: K11

1. Introduction

Although theory teaches us that today in the Slovak Republic we have already enshrined the old Roman principle of superficies solo cedit, the practice often has to deal with. In many cases, courts must consider the case of acquisition of ownership even on the basis of this principle. The issue of land and buildings thereon built creates a matter of great debate, not only in professional circles to the public, but particularly among the general public, as this major part of the population can often come with it. For some it is simply difficult to understand that when buying a house, cottage or garage buyers don't own the land on which these structures are built. In the Slovak Republic is de lege lata legal regime of land separated from the legal regime building on it. Although de lege ferenda counts with another arrangement it is necessary at the moment to base on the current status.

2. Superficies solo cedit principle

The principle of superficies solo cedit can be slightly translated as "the surface of the land" or according to Kincl[1] "subsides giving way to land." From above mentioned construction is then obvious, that everything is located on the surface of the land, and it is inextricably linked to the owner of land. This construction is based on the notion of ownership, i.e. Roman rule as exclusive, unrestricted and direct dominion over things. It should be added that in ancient Rome whole land was exclusively regarded as immovable things and everything else were movable things. So everything grown up (whether natural-plants, trees or human activity – building) on a plot of land was also the fate of the legal monitoring of the property of the owner, regardless of who planted the plants or built the buildings. "According to this explanation, the right of ownership belonged to things so tightly connected with the land owner of the land itself".[2] Peter refers to superficial principle as one of the most natural.[3]

Over the centuries the Roman law principle solo credit has found its place in the modern states of Europe and even "became the basis for the modern concept of continental adjustments and land ownership which is known also in our legal system".[4]

Mentioning our legal system Lazar[5] distinguishes between three ownership schemes that address the mode of land and buildings. In the first case, the application of the superficies solo cedit principle had been accepted until 1950. Second term is bounded between 1951 and 1964 and is represented in particular by amending the Act 141/1950 Coll Civil Code and ends up by passing a new (currently still in force) Civil Code, where the principle in question is inoperable, but has been modified at least the right building. Last mode is represented by the period from adoption of Act no. 40/1964 Coll. Civil Code and lasts until today, and does not apply to the principle of superficies solo cedit nor is there a law institute building.

Following that in our conditions the principle in question had applied until the end of the 1950s and adopting Act No.141/1950 Coll., of the civil code (among other things) this principle had to break down. A former legislator in the explanatory memorandum stated that the old principle of Roman law is falling down, according to which durable construction is considered to be a part of the building. He insisted on the fact, that the development of JRD (unified peasant cooperatives) as well as the common agricultural policy as a whole, could hamper this principle.Its maintaining and consistent respect would lead to the fact that the construction of the cooperatives would belong to the private land owner, the building on the State soil to the State, even in the case that they had been set up with funds from the cooperatives. According to the explanatory memorandum new permanent structures as a separate items of property contribution help in the further development of personal property to families, who should be working on cooperative or state plots. Therefore coined the educational curriculum of the civil code the new principle complaining, that the constructions

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are not part of the plot. The implication was that the ownership of the buildings could be assessed separately, regardless of the ownership of the land.

Legislature in a new pillar of private law (specifically was the section 25) stated that part of the land is all that it will come. Buildings are not part of the plot. This helped in distribution of the building and the land. The mentioned provision is now available to the explanatory memorandum and the proposed total warp. In response to this is important to point out section 155 of the Code, according to which the owner of the building may be a different person from the landowner.

From the first of January 1951 the principle superficies solo cedit isn´t part of Slovak law system, which means that the buildings are not part of the plot, and therefore (and in fact) many problems of unauthorized structures could be found.

3. Superficies solo cedit in the Slovak Supreme Court decisions

The Slovak Supreme Court in many of its decisions discusses the principle in question, for example in the judgment sp. spots. 8Sžo/86/2009 correctly explains that the Slovak legal system doesn´t apply Roman law principle of superficies solo cedit (mountain retreats bottom), whose fundamentals is the principle that all buildings or other objects located on the property and fixed to the ground, are inherent in this land and the land owner is therefore always also the owner of all buildings on the property. Slovak law, however, does not recognize this institution, land and properties thereon located may have different owners, as expressed in the provisions section 120 paragraph 2 of Act no. 40/1964 Coll. Civil Code (also section 25 of the Act before the effective No.141/1950 Coll. Civil Code). Even though the base hasn´t been paid for more than 60 years in Slovakia, it still remains in judicial decisions. Even before 1950 the application of this principle has been boundless. It is necessary to point out the decision of the Supreme Court of the Slovak Republic Cpj 59/71, which was published in the collection of court decisions and opinions under number R 65/72. It follows misconception according to which the Act no. 141/1950 Coll. Civil Code in our area isn´t true that the ownership structures according to the principle of Roman law superficies solo cedit is transferred to the landowner. In that times it was expected that the one who was determined as owner of the building on his land, he became the owner of the land on which the building stands, naturally with the responsibility to provide compensation for the land. Before further interpretation by reference to the mentioned explanation is important to emphasize, that before 1950 our civil law was based largely on the legal traditions and customs. Although today we have written civil law (substantive) captured mainly in Law.40/1964 Coll. Civil code, before 1950 that right was only an unwritten law. The whole complex of civil relations both in Slovakia as well as in the Hungarian part of the Czechoslovak Republic had essentially functioned as a kind of proposal on Code of 1514. It was the Opus Tripartitum (governing other relationships except those civil), which never happened to become a law although Hungarian parliament had approved it. It was important that Hungarian parliament recognized the judicial practice and later issued laws referred to it and its provisions. It is appropriate to emphasize the fact that these customs in many ways resemble (and were the same) with the legislation in the rest of the Czechoslovak Republic - General Civil Code - ABGB (Allgemeines Bürgerliches Gesetzbuch), which means they were written as a codified law . According to the present opinion of the Supreme Court during this period in Slovakia paid adjustment similar to the provisions of section 418 of the General Civil Code of 1811, saying: "If someone has built using their own materials without informing the owner of the land, building belongs to the land owner. Good-natured builder may claim compensation for

necessary and reasonable expenses; in bad builder could be [1] treated as an Executives without warrant. However, if the landowner knew of innocent construction and the builder did not prohibit it immediately the land owner may apply for land only general price." Between January the firs 1951 to the thirty-first of March1964 weren´t building relationships based on foreign land specially tailored and therefore were considered only using the analogy of the provisions of section 125 et seq Act no. 141/1950 Coll. Civil Code. If the completion of construction on foreign land took place under Act no. 141/1950 Coll. Civil Code, should be the relationship between the landowner and the client, to its origin as well as to claims arising from construction status, assessed regarding the provisions of section 498 of Act no.40/1964 Coll. Civil Code under then applicable regulations.

In that opinion when considering the courts under the provisions of section 126 paragraph 1 of the Act 141/1950 Coll. the valuation of the participants in the product, did not always take into consideration the fact that construction on a foreign land is not just the area where the building stands, but in any case even surface, which is needed to use the building plus the access road and adjacent work or storage space, etc., sometimes even the whole area, which may have considerable size and its value may well exceed the value of the building. So for example the garage in the garden in front of the family house is not interference, which affects only the area where the garage is, and the area between the public road and garage; has the area where the house stands has been allocated out of the plot, and became a separate parcel, the complex represented by the house and garden in front of him would be considerably depreciated ; the rest of that parcel would acquire improper shape , and would it be impossible to build a garage serving homeowners there and the like . In this case, therefore, special attention should be paid to what should be regarded as final "product resulting from the processing ". This request was urgent, because it was not feasible to order the destruction of economically important already constructed values; the court is forced to look for another solution than return to the previous state, while not harming those whose rights have been violated.

Furthermore, the opinion states that although the Civil Code permits the building coming under different ownership regimes as the land on which it stands, this duality property regimes is characteristic only for cases of personal use of the land on which the user was building. In all other cases will be a different ownership of house, land on which the house is, only exceptional. In those exceptional cases where the owner of the building constructed on an alien parcels was provided the builder, the ownership of the land remains unchanged.

Slovak courts dealt with the use of the principle of superficies solo cedit particularly in relation to possible enduring structures built on land acquired by participants. It could even occur the situation when the building itself prevented the enduring land - as stated in the resolution of the Supreme Court, sp. Spots. 5Cdo 144/2010, according to which the meaning of the provision of section 120 paragraph 2 Act no.40/1964 Coll .Civil Code structure is not part of the plot , thus negating traditional Roman judical principle of superficies solo cedit . When considering prescription of the area an important issue of this principle is also a part of the land (crops, as well as the space above and below the land surface). From that point of view it is conceivable that the existence of buildings on the property can prevent the existence of good faith (bona fides) the holder of the construction of buildings and land. The holder´s arguments that specific land belongs to him and it is threatened as his own must be supported by factual circumstances from which it can be concluded that this reasonable belief was withstand all the time (R 8/91). The holder is the one disposing with the land as his own, or who executes the right for himself. This is expressed as the corpus possessionos (waste matter - law enforcement) and animus possidendi (like having your own - for yourself).

Although in our territory principle superficies solo cedit is being now not applied the Supreme Court concluded in its decision sp. spots. 2 Cdo 295/2006 on an entirely different principle. In terms of the method of acquiring ownership of the land owner of the building thereon built, the most important agreement was decisive consent of the owner of land with building for the builder. Basing on this judgment the land (built-up area and the necessary handling space needed to use the building) "cleaved" to build in terms of classical civilian principle superficies solo cedit, which in private law eliminated the right socialist legal system after 1950; before and after that period the law has created a rule saying, that he who builds on foreign land with the consent of the owner, takes over ownership of not only the building (buildings), but also used areas in the scope of its built up.

4. The principle of superficies solo cedit in judicial decisions in Czech Republic

In principle, there was a paradoxical situation where the law courts in Czech Republic are usable for the purposes of the courts of the Slovak Republic since the first of January 2014 Czech courts accepted a new civil code, the principle of superficies solo cedit.

Even in Czech Republic the courts dealt with in good faith and prescription of construction after obtaining the land. The Supreme Court of the Czech Republic in its decision sp. spots. III.ÚS 1483/13 of 23 May 2013 stated that if the applicant derives the existence of its ownership to the disputed building essentially from the fact that, the date when the acquired land under the building in question was according to good faith hers and that good faith has come from the fact that the company Max Ltd., from which the land was acquired has received above mentioned land from the Land Fund as" replacement land", which could not be burdened with rights of third parties. As the ordinary courts pointed out that the building of the railways could not be transferred under the contract ultimately concluded and the complainant could not "automatically" acquire it along with the land, because the applicable law isn´t worth on the principle of superficies solo cedit. General courts altogether refused that they were enduring for the lack of good faith on the side of the complainant.

Czech courts in many cases also addressed the question of what can be considered as part of land (part of the case). In this respect, it was an important decision of the Supreme Court of the Czech Republic on January 31st 1990, sp.spots.3 En 3/90, according to which the legal character of things is part of the indivisibility without concomitant deterioration of the case; it is quite immaterial whether the department destroys part. Impairment of things can´t be understood only in the strict sense, it means as the destruction, or at least substantial damage to the main issue in separating components; separating the components of the plot of land the land itself as a principal rule isn´t physically damaged, but its price is reduced; impairment may therefore also be understood in terms of price reduction of the item. Impairment may also mean that the case will be at a lower level perform its function, and finally can be considered in terms of impairment appearance of things (the aesthetic depreciation). Different vegetation from the property ownership of land was in some cases governed by specific regulations (eg Act 61/1977 Coll. or government regulation no. 47/1955 Coll.). In all other cases, the growths remain part of the land under the provisions of section 120 of the Civil Code and can´t be the subject of separate rights and responsibilities; moment of physical connection with the earth shall become the property of the landowner. Part of the land under the provisions of section 120 of the Civil Code are also external modifications (retaining walls, paving, curbs, water and sewer connections, floral ponds, outdoor submitted stairs , fences with a height less than 100 cm and more). Many other decisions are based on this decision (published under the name R 4/1992). For instance, in sp. spots.22 Cdo 2125/2000 Czech Supreme Court

addressed the question of who owns the property right to the wall, which was part of the building, but this building disappeared. Controversial part of this trial was the wall in the property of the applicant, which had a separate economic importance, was itself functional and should not therefore be the subject of a separate legal relations . Although a part of the house served defendants, it could also serve as a wall of the house, which was established on the land of the plaintiff. The mere fact that folded house, part of which was formerly a wall, can´t lead to the conclusion that the disputed wall "cleave" to the adjacent building, of which would become part. In case that after the dissolution of the house as a separate immovable property only the wall of the house survives, which has independent economic significance (used for enclosure), the wall remains as the property of the homeowner . If the wall does not have independent economic significance, it becomes part of the land on which it is built, and owner of the land has it increased. Just in case that the wall would still have to serve only the house on the neighboring property, it would be conceivable to increase this house. Furthermore, it is possible to mention the decision of the Supreme Court of the Czech Republic sp. spots. 22 Cdo 2918/2000 of 17th September 2002, which dealt with terrace created just by finishing and hardening the surface,is a separate part of the building or land. The Supreme Court of the Czech Republic in the spirit of the above decision tendencies noted that the disputed terrace (created just finish and paved land) is part of the land, not a separate building.

Supreme Court of the Czech Republic in its case - according to the judgment sp. spots. 22 Cdo 1118/2005 dated February 28th 2006 - concluded that in the case of civil regulations using the term "construction", the content of that term can´t be interpreted only according to building regulations, which construed the term "construction" dynamically, that is as an activity geared towards the realization of the work, but in the purpose of civil law the concept of building has to be interpreted in the static way as a case. It took the view that the construction from a civil sense of view means the result of construction activity, as this activity is understood by the Construction Act and its implementing regulations, if the result of this activity is the thing in the legal sense liable to subject civil relations, not part of another case. Thus a certain building construction was under civil law a real construction and not only a part of the land on which it was built, it has to be a subject of a separate civil relations. In the present case, the courts seek to ascertain whether the contested tennis courts can´t be the subject of civil relations and why can´t they be considered as a separate case from a civil point of view. The facts pointed out that the tennis courts were created by stacking various natural building materials, or by processing and depiction of the land.[6] Appellate court in that case expressed the opinion that there is no reason to look at tennis courts differently than just as a thing that is not a building. Tennis court therefore can´t be both land and building at the same time under civil as two different things with different legal regimes. Generally we can conclude that in terms of civil law a building construction can´t be identified as a created building or structure with no clear line of the end of the land and beginning of the building itself .

The courts have addressed the issue of building built below the surface, whether the principle of superficies solo cedit (regardless of whether they apply or not) has a big impact on that kind of building or not. As reported Bílková historically a part of the plot was formed also by the space above and below the undeveloped land area, the ground to a depth below the ground.[7] During the first Czechoslovakia the Supreme Court of Czechoslovakia sp. spots. I

[6] Supreme court ČR dated October 26th 1999 , sp. spots. 2 Cdon 1414/97

[7] BÍLKOVÁ, J. K podzemní stavbě jako samostatné věci v právním smyslu, *In:* Právní rozhledy, 12/2011, s. 444

RV 813/22 of 6th February 1923 addressed the issue of basements. It states that the cellar may in some circumstances be the subject of a separate property right, when it is under foreign land. Following the above mentioned judgement, the Supreme Court of the Czech Republic in the judgment of 24th May 2006, sp. spots. 22 Cdo 911/2005 clearly stated that the subject of a separate legal relations can also be ground down. As reported Bílková assessing something as a part of the main building or as a separate subject of civil relations is not a simple matter. We should always base on the specific circumstances of the case, because only on the basic facts it is possible to reach the relevant legal conclusion. She pointed out particularly on the decision of the Supreme Court of the Czech Republic sp. spots. 28 Cdo 537/2010 dated December 14th 2010, by which one of the important criteria for assessing whether it is a single case or part of the case, it maintained its functionality (utility value). Then the system of underground tunnels (former military fortress), which is in disrepair, is not a separate matter in the legal sense (only 1 km out of 45 km of tunnels was operational).

5. The principle of superficies solo cedit and unauthorized construction

Constituional Court of the Slovak Republic, sp. spots. PL. CC 19/2009 states that the Slovak Republic until 1950 used the principle of superficies solo cedit – pays attention to the bottom of the hill, the building is part of the plot. Law no. 141/1950 Coll. Civil Code, this principle was repealed and replaced by the concept that the building is not part of the plot. It is not without relevance that the motive for this change was to enable the cooperative construction of buildings on lands of different owners. Due to the mentioned suggestions the huge impact and inertia of the approach hasn´t yet intentionally been reduced. The above mentioned principle made it easy to facilitate the extension of the negative phenomenon of irregular structures, which can be found today in whole Slovakia.

The purpose of this article isn´t to treat the issue of unauthorized structures, but to point out with the principle of superficies solo cedit, that the legislature in the case of unauthorized construction is based on a priority of the protection of the landowner. If someone in a foreign land built building (and didn´t do it legally) the court has several options to decide properly. Since this is a design procedure, the court is acting on a proposal from the landowner. The first possibility for the court is to decide to demolish the building at the expense of the person who set up the building. Act no. 40/1964 Coll. Civil Code in this case alleviates their rigor in case of demolishing the building to pay the property to the owner of the land . This is only possible provided that with the landowner´s agreement. If you can´t even rely on this alternative, the court itself may organize relations between the parties in different ways. For example, an easement is set up as a replacement, necessary for the exercise of ownership rights to build.

6. Conclusion

Even when the principle of superficies solo cedit is not directly expressed in the currently effective law system of Slovakia, it remains engaged in its fields of activity. Its withdrawal caused many practical problems in real life and recodification commission, which meets and prepares new civil codes intends to reintroduce this principle, it hasn´t been avoided yet. It is true that while there hasn´t been adoption of new codes of private law, but in the same time it should be added that its implementation may not wait until its recasting. In this context, we also point out Dvorak according to whom the correction of the previous legal regime is not a

one-off event and civil law must get a new form and content, but in particular, there must be a proper understanding of the meaning of the basic professional private law.[8]

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BIOEETHICS AND LAW IN THE POSTMODERN SOCIETY

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Abstract:

The paper examines the regulation of health care and considers the principal human rights issues which arise during the practice of health care law. It explores the relationship between law and bioethics in the postmodern society – it argues that the law focuses on what is legal, while it is not necessarily morally right. The aim of this article is to deal with the bioethical disputes and the value of the law of bioethics. It begins with an introduction to the roots of ethical thinking about medical decision-making. Following a brief theotertical part, the author focuses on particular topics such as: confidentiality, consent, research and experimentation, organ donation, new medical technologies, nanomedicine, new reproductive technologies, stem cell research, biotechnology regulation and more. Emphasis is placed on the concepts of medical ethics, patients' rights and efficiency and safety in health care. Finally, the work suggests that there is an urgent need for a global concept of bioethics law.

1. Introduction

During a research stay at the Waseda University of Japan, the author had the opportunity to study Applied Philosophy - dealing with some of the most important questions facing humanity today, and those include questions in relation to what is happening as a consequence of the huge advances in medical research. Now, that we sequenced the human genome and understand better how the physiology of the body works, we need to deal with ethical questions that have real application to the world.

Science is telling us that we can do phenomenal things, if we put our minds and resources to it. But we have to make sure, that there is an effective system of checks and balances, because its application can also have detrimental effects. But science at its purest is constantly looking for discovery and using those discoveries for the benefit of mankind – and as such, science stands out amongst the most important endeavors that humankind can pursue.

Mankind evolves. There is no doubt that we have evolved, evolving through various lower species to our own, but there is also the continuing evolution that is associated with mankind. And a lot of that is using what specifically and particularly makes us into human beings, and that is our intellect and our will. We have a choice. We can analyze things and act in an intellectual manner. And that is the very foundation of what science is. As we get more and more in the arena of understanding science and getting better opportunities, the fact that we can do things with biological sciences that have a direct impact on our lives means we must have certain ethical standards. And paramount among these are when we do something that involves a human subject. There are a lot of bioethical issues, therefore there have to be some

fundamental, immutable principles of ethics that guide what we can and cannot do when we are dealing with another human being.

Is it or is it not ethical to create an embryo for the sole purpose of getting an organ to give to someone else? Our knee-jerk reaction is absolutely not - but we need the ethical analysis of that to show why and how that is something that we need to stay away from. As science gets more and more sophisticated, and as the opportunities for transforming biological sciences occur, we are going to be faced with more and more important ethical questions.

2. Bioethics – Definition and Etymology

Ethics seeks to determine what a person should do, or the best course of action, and provides reasons why. It also helps people decide how to behave and treat one another, and what kinds of communities would be good to live in.[9] Bioethics is a subfield of ethics that explores ethical questions related to the life sciences. There are many definitions of bioethics, including "the systematic study of the moral dimensions – including moral vision, decisions, conduct, and policies – of the life sciences and health care, employing a variety of ethical methodologies in an interdisciplinary setting."[10] Another popular way of defining what the word bioethics entails is „a discipline dealing with the ethical implications of biological research and applications especially in medicine and philosophical implications of certain biological and medical procedures, technologies, treatments – as organ transplants, genetic engineering and care of the terminally ill."[11] Generally speaking, bioethics is the study of typically controversial ethics brought about by advances in biology and modern medicine.

The term itself comes from the conjunction of two Greek words – bios, meaning life and ethos, meaning behavior. While there is no doubt about the etymology of the word itself, there are many differing opinions of when bioethics was born as an independent field.[12] When Hippocrates wrote his now famous dictum *Primum non nocere* (First, do no harm), he was grappling with one of the core issues still facing human medicine, namely, the role and duty of the doctor. With the dawn of 19-20th century science, an academic field emerged to reflect not only on the important age-old issues raised by the practice of medicine, but also on the ethical problems generated by the remarkably rapid progress in technology and science. While some might argue, that the Hippocratic Oath already contains a plethora of professional ethical standards and has served as a source of ethical direction that new physicians swear upon since ancient Greece, the earliest date of the beginning of modern bioethics usually mentioned is 1847, the year the American Medical Association published the first edition of its Code of Medical Ethics, based on the work of English physician and author Thomas Percival. The Code was the very first step on the long journey of transforming an unregulated craft into a profession based on scientific and moral principles and devoted to the service of society.[13]

Another possible starting date for bioethics is 1926 when the term itself was coined by Fritz Jahr, a German philosopher, who "anticipated many of the arguments and discussions now

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current in biological research involving animals" in an article titled "Bio-Ethics: A Review of the Ethical Relationships of Humans to Animals and Plants"[14] where he proposed a so-called "bioethical imperative,"[15] as he named it, extending Immanuel Kant's moral imperative to all forms of life. The article redefined moral obligations towards human and nonhuman forms of life, outlining the concept of bioethics as an academic discipline, the most important argument of the article being that new research and technology requires new ethical standards and their philosophical reflection.

Another important date marking the beginnings of bioethics is 1947. In that year, following the trial and conviction of twenty Nazi doctors and three medical administrators for their role in various medical experiments on concentration camp prisoners,[16] the Nuremberg Code was published,[17] containing a set of research ethics principles for human experimentation. It was the first international declaration of the limits of scientific research and medical experimentation. The Code established the ethical requirements for biomedical research on human subjects. By today's standards, the Code is extremely vague and not demanding enough. The Nuremberg code includes such principles as informed consent and absence of coercion, properly formulated scientific experimentation and beneficence towards experiment participants.[18] The Nuremberg Code provided the ethical justification and intellectual impetus for the regulation of research and experimentation throughout the world.

In 1970, an American oncologist of the University of Wisconsin, Van Rensselaer Potter in his article titled "Bioethics, the Science of Survival"[19] used the term with a broader meaning including solidarity towards the biosphere, thus generating a so-called "global ethics," a discipline representing a link between biology, ecology, medicine, law and human values in order to attain the survival of both human beings and other animal species.[20] Van Rensselaer Potter also published the first bioethics textbook the following year, 1971, titled Bioethics: Bridge to the Future.[21]

From these modest beginnings, the field of bioethics has exploded, with dozens of universities following suit, creating institutions whose sole function was the study of various bioethical issues. Its growth was and is continuously fueled by the invention of new technologies (such as the artificial heart and in vitro fertilization) and by the appearance of new challenges humanity must face (such as the fight against HIV or Ebola). Bioethics is now permanently on the academic map and central to public discussion.

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[19] Van Rensselaer Potter. Bioethics: The Science of Survival, 14 Perspectives in Biol, & Med. Vol. 127. 1970.

[20] Goldim, J. R. (2009). Revisiting the beginning of bioethics: The contributions of Fritz Jahr (1927). Perspect Biol Med, Sum, 377-380.

[21] Van Rensselaer Potter. In: Bioethics: Bridge to die Future. Swanson Carl P., editor. Englewood Cliffs. NJ: Prentice-Hall; 1971.

It is rather difficult and not particularly illuminating to seek the precise starting date for the field of bioethics. It is much more important to address the purpose and scope of the field itself.

3. Bioethics – Purpose and Scope

Bioethics evolved from the need to bring the perceived chaos of the life sciences and medicine into the order of moral principle.

Bioethics is a term that is becoming widely used today. It entails the objective appraisal of how our values, desires and actions affect others. There is a disagreement about the precise limits of bioethics as a discipline, debating whether the field should concern itself with the ethical evaluation of all questions involving biology and medicine, or only a subset of these issues. Some bioethicists would narrow ethical evaluation only to the morality of medical treatments of humans and technological innovations related to these treatments. Others, by contrast, would broaden the scope of ethical evaluation to include the morality of all actions that might help or harm organisms capable of feeling fear. In my opinion, a healthy mankind is concerned about its humanity - how compassionately it acts toward its own kind and toward other sentient beings and the Earth.

Bioethics has addressed a broad swath of human inquiry so far, mainly discussing the boundaries of life (e.g. abortion, euthanasia, surrogacy) and the allocation of scarce health care resources (e.g. organ donation, health care rationing). We must however stress, that the scope of bioethics can and will definitely expand with new biotechnology - including cloning, gene therapy, life extension, human genetic engineering, astroethics and life in space, and manipulation of basic biology through altered DNA, RNA, XNA and proteins.[22] Bioethics is an exceptionally dynamic field, reflecting the current scientific developments. These developments will undoubtedly affect its future evolution, and may require new principles that address life at its core.

The field of bioethics has three main purposes:

1. To raise important questions about the general practice of medicine – including institutions of health care, medical professionalism, informed consent, confidentiality, euthanasia, substituted judgment, rationing of and access to health care, withdrawal and withholding of care and many more. Bioethics at its most basic form deals with the issues of clinical and research medicine – these issues are only slightly affected by advances in science and research, constituting the most stable purpose of bioethics.

2. To tackle the new bioethical dilemmas constantly being generated by the novel biomedical technologies, i.e. the need for ethical principles to keep pace with scientific developments. With every new scientific discovery, humanity finds itself in a yet untouched ethical terrain that can be difficult to navigate. As a response to the monumental breakthroughs is science and technology, the scope of bioethics has expanded and keeps expanding to include the ethical questions raised by these new advances.

[22] Freemont, P. F.; Kitney, R. I. (2012). Synthetic Biology. New Jersey: World Scientific. ISBN 978-1-84816-862-6.

3. To equalize international moral principles in the field of bioethics and set a certain set of minimal standards of health care all over the world – including the economically undeveloped parts of the globe. What ethical principles should govern the conduct of research and therapy against malaria, Ebola or HIV - local or Western standards? Do we have the right to press our principles upon societies with different moral values?

Even though bioethics addresses many issues as old as healing itself, it is still considered to be a relatively new field, a very dynamic one at its core, always reflecting the profound changes in medicine and the life sciences.

4. The Principles of Bioethics

Ethical choices confront us every day in the provision of health care for persons with diverse values living in a multicultural society. In the face of such diversity, where can we find moral guidelines without confusion about what ought to be done? Due to the pluralistic society we live in the principles of bioethics are often not considered absolutes, but rather serve as powerful action guides in clinical medicine. Some key principles of medical ethics have been in use for centuries. (See more in chapter 1 of this article.)

The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research was initially established in 1974, as the first public body to shape bioethics policy and to identify the basic ethical principles that should underline the conduct of biomedical and behavioral research involving human subjects. The commission produced their Reports and Recommendations on various areas of research, the most significant being the Belmot report. Its full title is the *Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research, Report of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research*.[23] The *Belmont Report* summarized moral principles and standards for responsible research involving human subjects. Three core principles were identified, namely, autonomy, beneficence, and justice. These basic principles have influenced the thinking of many bioethicists regarding a wide range of issues. However, some debate, that the list of basic principles ought to be expanded with principles such as human dignity, non-maleficence or transgenerational equity (concern for future generations). In that same year, in 1979, Tom Beauchamp and James Childress published the first edition of *Principles of Biomedical Ethics*, now in its seventh edition, specifically in regard to ethical decisions in medicine, popularizing the use of moral principles in efforts to resolve issues in clinical medicine. From these two major publications we can derive the following basic principles of bioethics.

1. Respect for autonomy - It basically means the protection of all people and treating them with courtesy and respect and allowing for informed consent. Any notion of moral decision-making assumes that rational agents are involved in making informed and voluntary decisions. In health care, our respect for the autonomy of the patient

[23] See the Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research, Report of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. http://videocast.nih.gov/pdf/ohrp_appendix_belmont_report_vol_2.pdf

implies that the patient has the capacity to act intentionally, with understanding and without duress. This principle is the basis for the practice of informed consent.

2. Beneficience - It entails the idea of "do no harm" while maximizing the benefits for the research project and minimizing risks to the research subjects. The basis of this principle is that health care providers have a duty to be of a benefit to the patient, as well as to take positive steps to prevent and to remove harm from the patient. The goal of providing benefit can be applied both to individual patients, and to the good of society as a whole.

3. Justice - The principle of ensuring the fair distribution of costs and benefits to potential research participants. Justice is a form of fairness, or as Aristotle once said „giving to each which is his due. " The issue of distributive justice hinges on the fact that some treatments are in short supply, so a just way of allocating scarce resources must be created.

5. Bioethics and Law

Even though the roots of bioethics' central questions extend far back into philosophical history, bioethics developed as a separate field of discourse in the twentieth century. During the first half of the twentieth century, medicine was largely a cottage industry. Physicians took the Hippocratic Oath upon graduation, but that did not necessary mean that all doctors were ethical. In the 1970s medicine and the life sciences underwent swift and remarkable changes and in tandem with these biomedical research practices came under increased scrutiny from the society. The post World War II revelations about the horrors of Nazi experimentation resulted in a number of ethical codes. These ethical codes did not immediately transform the old research practices. A 1966 edition of the very reputable New England Journal of Medicine included several studies that we would consider absolutely immoral and unacceptable these days. (Including an experiment on children residing in a state institution, that were purposely given hepatitis in order to determine the disease's infectivity. Another experiment from the same journal subjected newborn babies to catheterization to study infant bladders.)[24] The US Congress passed the National Research Act of 1974. It established a National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. Among other things, the law directed the commission to provide guidance in the construction of regulations aiming to protect humans involved in research. That guidance was provided in what has become known as the Belmont Report. (Further discussed in chapter 2 of this article.) The National Commission operated from 1974–1978, and it was succeeded by a series of other public ethics bodies including the National Bioethics Advisory Commission (1996–2001) and the President's Council on Bioethics (2001–2009). The precedent was established that difficult public policy issues, such as research ethics, human cloning, and stem cell research should be considered by experts in bioethics in a deliberative, open and public process.[25]

The beginnings of bioethics law in Europe started years after the US legislation, but countries in Europe have moved more rapidly from bioethics to biolaw than the United States. Since the

[24] Henry K. Beecher: Ethics andClinical Research, 274 New England Journal of Medicine. 1966.

[25] See Office of Technology Assessment. United States Congress, Biomedical Ethics in US Public Policy.Washington, DC: U.S. Government Printing Office; 1993.

1980s, the Council of Europe has been very involved in the promotion of human rights related to medical law and biotechnology. In 1985 a special group unit was created, the Ad hoc Committee of experts on Bioethics (CAHBI), set up under the direct authority of the Committee of Ministers of the Council of Europe, was responsible for the intergovernmental activities of the Council of Europe in the field of bioethics. In 1992, it became the Steering Committee on Bioethics (CDBI). The work of these institutions has led to the adoption of Recommendations of the Committee of Ministers and to the preparation of the Convention on Human Rights and Biomedicine.[26] This was the first international treaty in this field, that entered into force in 1999. It is a transnational binding instrument aimed to protect human rights in the specific field of biomedical research, genetics and health care. It is a unique legal instrument, with power to hold responsible the ratifying states that do not comply with the minimum level of protection conferred to human rights regarding bioethics. Even though European countries developed in the same cultural background, many nations are still apart from each other in their view on some key moral issues, therefore some domains were particularly difficult to regulate. In these problematic issues – such as abortion or embryo experimentation - the convention refers to the national regulation. To avoid too many unresolved matters, the text of the convention was drafted to reflect general principles, instead of specific norms. Because of this vagueness, many topics required additional detailed specification in the form of additional protocols. The Convention was subject to severe criticism from many countries, especially regarding the problematic matters of embryos – Germany found the text too liberal, while the United Kingdom argued it was too restrictive.[27]

While the Convention is most definitely not the pinnacle of legislation, we must take into consideration that any ratification in the field of bioethics is not easy to achieve. Bioethics and biolaw remain matters which are truly connected to the most deeply held beliefs of each society. Law, however, must seek effective and universal ways of regulating the issues of medicine and the life sciences. While lawyers of our era seem to suffer some unpopularity, the law itself still reflects the idealism of the society. *„The law is the witness and external deposit of our moral life. Its history is the history of the moral development of our race. The practice of it, in spite of popular jests, tends to make good citizens and good men. When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law. Thus, the law reflects what each society at any given point views as acceptable, ethically appropriate behavior"*[28] Looking at a legal norm is like viewing a snapshot in time of humanity's moral views of which behaviors are right or wrong. With the time passing, these views might change, and this is generally reflected by changing our laws. While law and ethics both deal with questions of right and wrong in human interactions, they differ starkly in their ability to enforce the ideals set by them. Ethics is aspirational; on the other hand, law is obligatory. The connection between bioethics and law raises several challenges. In my opinion, the future of bioethics law is based on the following three issues:

1. Keeping pace with science – Law does not usually change as rapidly as science or even societal values. Because of these frequent lags, legislators need to be careful not to keep addressing the scientific problems of the past, but the present. Legal norms need to be reassessed continually to reflect the current conditions of medicine and

[26] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, http://conventions.coe.int/Treaty/en/Treaties/html/164.htm.

[27] See Legal and Forensic Medicine 2013, pp 1405-1423 European Convention of Human Rights and Biomedicine Dr. Vera Lúcia Raposo, Eduardo Osuna

[28] Holmes, Oliver Wendell, Jr. The Path of the Law. Harward Law Review. 1897. p.457-478.

science. As bioethics is one of the most dynamic fields of the 21st century, biolaw needs to mirror this quality – and not by drafting overly vague legal texts based on general principles, but by creating effective control mechanisms and supporting a multidisciplinary implementation of bioethics in cooperation with scientists, physicians, ethicists, philosophers and lawyers, thus resulting in dynamic, future-oriented legal norms.

2. Eliminating the negative effects of legal procedure - The law's emphasis on procedural regularity is essential to many areas of the law. Nevertheless, similar procedures applied to science, research and technology result in burdensome and slow processes that can hold back technological advances and scientific research.

3. Connection of bioethics and biolaw – We must be aware, that ethics and law have similar, but not identical aims. Law sets ethical minimums, not maximums. Through law, our society does not attempt to agree upon all behavior that is ethical or unethical. Law serves a much more narrow function. By addressing what we generally agreed is wrong conduct, the law sets the legal minimums for behavior, it does not address the ethical maximums. The law sets minimum standards of what must be done. On the other hands, ethics sets aims that ought to be done. The law provides sanctions for wrongdoing, but does not provide rewards for what is right. That is the province of ethics – it goes way beyond the law. The very force of law can therefore create moral pitfalls – as when we focus on purely the law, we tend to lose sight of its ethical spirit. Bioethics developed at a time when the legal profession and the role of law was expanding. At that time, advances in science, research, medicine, technology, and health care raised a new swath of contentious moral and social issues. Medical advances were no longer regarded as always entirely beneficial, but there was no consensus on the criteria to use in weighing the potential harms and benefits. This was the original aim of biolaw. Humankind, however, needs to bear in mind, that legal minimums are not all, that ethics required us to do. As the scope of biolaw broadens, and legal requirements enter more territories of the life sciences, it is crucial, that minimum legal standards of conduct not replace more demanding ethical principles. Ethics helps to conceptualize problems, elucidate essential values, and influence the development of legal doctrines and processes. In turn, laws are often devised to produce consistent, institutional responses to the issues that ethics – and more specifically, bioethics - alone could never achieve.[29]

Even legal professionals must keep in mind the multidisciplinary character of biolaw. Bioethics and law exist in a symbiosis, where bioethics leads to the continuous development of the legal rules that can become an integral part of the research enterprise. The law institutionalizes and makes mandatory the analytical framework for the ethical conduct of research developed by experts in the field of bioethics.

6. Conclusion

We live in an age of extreme moral and medical transformation. Advances in science and technology are occurring at such a rapid pace that scientific professionals and the general

[29] See Spielman Bethany J. Bioethics in Law. Totawa, NJ: Humana Press; 2007.

public as well have a difficult time keeping up with the ethical implications of these developments.

Since World War II many feel the necessity of reflecting upon the values that are at stake when conducting medical and scientific research. In doing experiments with animals, plants or humans the welfare of these living beings can be hampered, issues of human rights can become prominent, matters of individual and collective forms of responsibility can become urgent, funding organizations can confront scientists with new ethical issues, society – or even future societies - can challenge existing ways of doing research, and new legal norms can confront scientists with new ethical issues. In all these dimensions a wide array of problems has emerged, that need to be addressed urgently. Life sciences concentrate on life and death - this simple statement stands for most of the urgent ethical problems science is confronted with. There is an undeniably strong connection between studying living organisms and social and ethical considerations triggered by them. Science cannot escape ethical issues and controversies, that require debate, guidelines and a dynamic legal framework.

PROSTITUTION – MÖGLICHKEITEN DEREN ÖFFENTLICH-RECHTLICHER REGULIERUNG

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Abstract:

Die Rechtstheorie und Rechtspraxis gehen in vielen Bereichen des menschlichen Lebens auseinander. Insbesondere in denjenigen Bereichen, wo kein Gesetz dem Mensch in konkreter Situation zur Verfügung gestellt wird und dieser seine momentane Situation gesetzmäßig nicht klären kann. Das Rechtsinstitut Prostitution ist ein typisches Beispiel dafür in der Slowakei, selbst wenn die Rechtstheorie die Abweichungen toleriert.

1. Einleitung

Im Thema meines Beitrages „Prostitution – Möglichkeiten deren öffentlich-rechtlichen Regulierung“ ist es erforderlich, ungenügende Legislative zu lösen. Das Gesetz bietet keine ausreichenden Möglichkeiten und Lösungen des Regimes der Regulierung vom Institut „Prostitution“.

Selbst wenn die Prostitution mit ihren Folgen im normalen slowakischen Leben existiert, wurde sie in rechtlicher Hinsicht nicht geklärt. Ich halte es für richtig, sich diesem Thema zu widmen und seine Lösung den Erfahrungen der Nachbarländer (EU-Länder) anzupassen. In meinem Beitrag versuche ich mich auf theoretische Grundlagen Österreichs zu stützten. Die Republik Österreich führte das Institut „PROSTITUTION“ in ihre Rechtsordnung ein. Die Prostitution wird in Österreich gesetzlich geregelt, wobei die Auswirkungen des Gesetzes in Praxis klar bestimmt sind und seine Empfehlungen streng befolgt werden. Ich möchte auf die ungenügende Legislative in diesem Bereich in der Slowakischen Republik sowie auf ähnliche Lösungen nach dem Prostitutionsgesetz in der Republik Österreich hinweisen.

Die Möglichkeiten der öffentlich-rechtlichen Regulierung vom Lebensphänomen „Prostitution“ in der Slowakischen Republik liegen weit hinter rechtlicher Regelung der Ausübung von anderen Lebenstätigkeiten zurück. In der Slowakischen Republik ist die Prostitution weder verboten noch gesetzlich geregelt. Eine Ausnahme bildet das Strafgesetz, in dem die Prostitution nur beiläufig im Rahmen des Instituts “Zuhälterei“ angeführt wird. Dort wird ihr strafrechtliches Element verankert, das mit Kriminalität also mit unfreiwilliger Ausübung dieser Tätigkeit auf Grund des Zwangs verbunden ist.

Im Zivilrecht gibt es keine ausdrücklich die Prostitution betreffende Regelung. Die Aussagen der Rechtsprechung ergeben sich vielmehr aus allgemein gehaltenen Regelungen. In seiner zu Entgeltforderungen von Prostituierten und des Betreibers eines „Etablissements“ ergangenen Entscheidung sind in Österreich 3 Ob 516/89 hat der Oberste Gerichtshof Verträge, die

sexuelle Dienstleistungen gegen Entgelt zum Inhalt haben, als sittenwidrig qualifiziert. In den Entscheidungsgründen dieses Erkenntnisses heisst es, dass im Zusammenhang mit der Prostitution häufig der Leichtsinn, die Unerfahrenheit, die Triebhaftigkeit und die Trunkenheit von Personen ausgenützt würden. Weitere Indizien für die Sittenwidrigkeit von Prostitutionsverträgen seien verbundene Kommerzializierung sexueller Handlungen, die Beeinträchtigung des Persönlichkeitsschutzes und die „Gefahr für familienrechtliche Institutionen".

All diese Gesichtspunkte begründeten in ihrer Gesamtheit einen Verstoss gegen die guten Sitten und damit die zivilrechtliche Nichtigkeiten solcher Verträge. Das habe allerdings nicht zur Folge, dass auch ein schon bezahltes Entgelt zurückverlangt werden könne. Zur Vermeidung von Missverständnissen sei doch auch klargestellt, dass es bei der Bewertung eines bestimmten Verhältnisses als sittenwidrig weniger um dessen moralische Bewertung als vielmehr um dessen Vereinbarkeit mit grundlegenden Wertentscheidungen und Prinzipien der Rechtsordnung geht.

Die Verwendung der Begriffe Prostitution/Prostituierte erschwert in der Praxis eine klare sprachliche Abgrenzung zwischen freiwilliger Erbringung von sexuellen Dienstleistungen und kriminellen Formen der sexuellen Ausbeutung und Gewalt.

2. Erforschung

Zu konkreten Erkenntnissen gelangte ich in benachbartem Österreich, wo ein Arbeitsteam erstellt wurde, das sich mit Forschung und Möglichkeiten der Ausübung der Prostitution beschäftigte. Das Arbeitsteam durchforschte gesetzliche Grundlagen und voraussichtliche Entwicklung damit, dass es ein Modell zur Arbeitstätigkeit der Prostitution zusammen mit der Arbeits- und Sozialsicherung vorlegte. Selbstverständlich, dass sich das Arbeitsteam ausschließlich mit dem Teil der Beschäftigten oder mit den selbständig Erwerbstätigen befasste, die die Prostitution freiwillig ausübten. Die Forschung beinhaltet weder Menschenhandel noch Verletzung der Menschenrechte bei gewaltsamer Verschleppung und Zwangsprostitution.

Das Arbeitsteam übte seine Tätigkeit in Zusammensetzung aus 4 Teams aus, die die einzelnen Teams bildeten für:

- Zivil- und Strafrecht
- Gesundheitswesen
- Ausländerrecht
- Bundesländer

Erste Aufgabe des ExpertInnenkreises war, notwendige Präzisierungen über den Arbeitsauftrag vorzunehmen. Wiewohl klar war, dass der Arbeitsauftrag den Bereich umfasste, ist der Begriff „Prostituierte" doch kein gesetzlich oder sprachlich klar definierter Ausdruck. Der ExpertInnenkreis hat die vom Bericht zu erfassende Zielgruppe daher wie folgt eingeschränkt: *Personen, die gegen Entgelt und gewerbsmäßig sexuelle Dienstleistungen direkt am Kunden erbringen.*

Diese Definition umfasst nicht notwendiger Weise Geschlechtsverkehr, ausschlaggebend sind der direkte körperliche Kontakt zum Kunden und die Absicht, sexuell zu erregen. Diese eingeschränkte Definition umschreibt keineswegs eine homogene Personengruppe, sondern von einer großen Vielfältigkeit bestimmt ist.

Auch zu den Zielen, die mit den erarbeiteten Maßnahmen verfolgt werden sollen, waren Klarstellungen notwendig. Neben dem übergeordneten Ziel einer klaren Unterscheidung zwischen freiwilligen Prostitution und Formen der sexuellen Ausbeutung und Gewalt wurden vor allem folgende – an der Zielgruppe orientierte – Unterziele festgelegt:

- Die Verbesserung der Arbeitsbedienungen;
- Der sozialen Absicherung;
- Des Gesundheitsschutzes;
- Verstärkter Schutz von Ausbeutung;
- Förderung der Selbstbestimmtheit;
- Gewährleistung Nachhaltigkeit der vorgeschlagene Massnahmen.

Das Verdikt der Sittenwidrigkeit des Vertrages über eine entgeltliche geschlechtliche Leistung hat allerdings nicht zur völligen „Entrechtung“ von Personen, die sexuelle Dienstleistungen erbringen, geführt. Die Judikatur zeichnet ein differenzierendes Bild. Wenn die Frau durch ein von Schädiger zu vertretendes Ereignis ausser Stande gesetzt werde, ein Einkommen zu erziehen, dann bestehe kein Grund dafür, den Verantwortlichen ganz oder teilweise von der Ersatzpflicht zu befreien. Gründe der geschlechtlichen Moral seien nicht hinreichend, um den Anspruch der Klägerin zu verneinen, zumal der vom Gesetz verwendete Ausdruck gute Sitten mit Moral nicht gleichzusetzen sein.

Die Judikatur lässt den Abschluss von rechtswirksamen Verträgen über sexuelle Dienstleistungen mit Körperkontakt nicht zu. Auf die Einklagbarkeit von Honorarforderungen liegen keine spezifischen Daten vor. Gerichtliche Verfahren, in denen es um die Wirksamkeit oder Nichtigkeit solcher Vereinbarungen und die Durchsetzung von Ansprüchen aus der entgeltlichen Erbringung von sexuellen Dienstleistungen geht, sind nicht bekannt. Dafür dürfte es verschiedene Ursachen geben. Das Kostenrisiko ist angesichts der höchstgerichtlichen Judikatur hoch. Die geprellten Betroffenen werden zudem kaum einmal bereit und in der Lage sein, ihren Fall an die Gerichte heranzutragen. Auch mag die Praxis der „Vorauskasse“ das Problem entschärfen.

3. Empfehlungen

Eine Änderung der bisherigen Rechtssprechung bedarf einer gesetzlichen Regelung. Diese wirft aber ihrerseits wieder eine Reihe von Folgefragen auf, die beantwortet werden müssen. Auch sollte sich eine gesetzliche Regelung auf den Kern des Problems, nämlich die Verbesserung der zivilrechtlichen Position der betroffenen Frauen und Männer, beschränken. Das Gesetz sollte klar stellen, dass deren persönliche Würde weiter geschützt bleibt, aber nicht die Ausbeutung und Ausnützung von Sexdienstleisterinnen begünstigen.

Im Rahmen einer gesetzlichen Änderung wird weiter zu prüfen sein, ob der Anspruch aus einer sexuellen Dienstleistung so wie jeder andere zivilrechtliche Anspruch behandelt werden soll. Es fragt sich hier etwa, welche – zivilrechtlichen – Einwendungen gegen den Entgeltanspruch zustehen sollen, ob dieser Anspruch frei abgetreten, verpfändet oder gepfändet werden kann, welche Verpflichtungen mit einem einklagbaren Entgeltanspruch verbunden sein können und welche zivilrechtlichen Schranken bestehen bleiben sollen. Gelöst werden muss auch das Verhältnis zwischen verwaltungsrechtlichen Vorgaben und zivilrechtlichen Ansprüchen.

Grauzonen und Rechtsunsicherheit sollen so weit wie möglich beseitigt werden, die Ausbeutung der betroffenen Frauen und Männer besser erkennbar werden. Dabei ist es besonders wichtig. Missverständnissen in der öffentlichen Rezeption des Vorhabens vorzubeugen. Es geht nicht etwa um die „ Förderung der Prostitution“ oder eine „Liberalisierung der Sexindustrie“. Auch kann dem Vorhaben nicht vorgeworfen werden, dass es die Sexualität weiter kommerzialisiere, wenn es auch das Zivilrecht an die realen Verhältnisse anpasst. Es geht allein um die Verbesserung der Rechtsstellung der betroffenen Frauen und Männer. Zum Teil geht es jedenfalls um den Schutz der betroffenen Frauen. Der Wegfall solcher Auswirkungen der Judikatur durch eine Gesetzeänderung muss auf andere Art und Weise kompensiert werden. Begleitende Massnahmen zur Verbesserung der Arbeitsbediengungen und des soziales Schutzes sind daher unabdingbar, wenn das Anliegen einer realen Verbesserung ernst gemeint sein soll.

Analog zum österreichischen Prostitutionsgesetz wäre die Schaffung einer gesetzlichen Regelung zu diskutieren, die die Vereinbarung über Entgelt als rechtswirksame Forderung anerkennt, auch wenn sexuelle Handlungen vorgenommen werden. Eine solche gesetzliche Regelung würde zur Folge haben, dass auch Verträge, die die Erbringung sexueller Dienstleistungen einem anderen gegenüber zum Gegenstand haben, nicht mehr als nichtig auszusehen wären und Entgelt- bzw. Honoraransprüche gerichtlich geltend gemacht werden könnten.

Die rechtliche Qualifikation von Verträgen über sexuelle Dienstleistungen wäre dann – wie bei jedem anderen Vertragsverhältnis – in jedem Einzelfall nach den von der Judikatur entwickelten. Die einzelnen Rechtsfolgen sind vom Vorliegen des jeweiligen Vertrags-verhältnisses abhängig.

Bei der Ermöglichung des Abschlusses von Verträgen über sexuelle Dienstleistungen wäre auf die spezifische Art der Tätigkeit Bedacht zu nehmen. Niemand sollte aufgrund eines Vertragsverhältnisses verpflichtet werden, gegen seinen Willen einen bestimmten Kunden zu bedienen oder bestimmte Praktiken auszuüben. Ebenso sollte der jederzeitige Ausstieg möglich sein. Das sexuelle Selbstbestimmungsrecht wäre zu wahren.

Im Zuge der geplanten Steuerreform sollte geprüft werden, ob für Sexdienstleisterinnen eine Abzugsteuer von jenem Betrieb (Bordell, Barbetrieb, etc….) eingehoben werden soll, in dessen Organisation die Sexdienstleisterin eingebunden bzw. in deren Auftrag sie tätig ist. Diese Abzugssteuer sollte den Charakter einer Einkommenssteuer – Vorauszahlung haben.

4. Abschliessende Bemerkung

Durch die Möglichkeit, Verträge über sexuelle Dienstleistungen legal abschliessen zu können, würde eine Verbesserung der sonstigen Rahmenbedingungen für die sozialrechtliche Absicherung dieser Personen bewirkt werden. Ebenso würde diese zu mehr Rechtssicherheit führen. Die Bekämpfung von Menschenhandel und Minderjährigenprostitution sowie der Schutz vor Gewalt und Ausbeutung würden erleichtert werden.

Ausgehend von den Erfahrungen erscheint es jedoch nicht praxistauglich, die vertragsrechtliche Ausgestaltung dieser Tätigkeit auf ein Arbeitsverhältnis einzuengen. Vielmehr sollte entsprechend der tatsächlichen Situation, in der die Leistungen erbracht werden, die Wahl des Vertrages (im Rahmen einer selbständigen oder unselbständigen Erwerbstätigkeit) offen gelassen werden. Es ist also nicht daran gedacht (freie) Dienst-verhältnisse zu fördern oder gar zu forcieren.

Die Erfahrungen zeigen weiters, dass gesetzliche Massnahmen alleine keine Verbesserung der arbeits- und sozialversicherungsrechtlichen Absicherung von Prostituierten bewirken können. Unbedingt erforderlich sind darüber hinausgehende Begleitmassnahmem. Ein grosses Manko der Rechtslage zur Prostitution ist etwa, dass über die Ermöglichung von Beschäftigungsverhältnissen hinaus keinerlei Massnahmen getroffen wurden, die die Verbesserung der sonstigen Bedingungen zum Ziel hatten. Tatsächlich wurden seit Einführung des Prostitutionsgesetzes die Mittel für Beratungseinrichtungen und Unterstützungsprojekte gekürzt. Positive Auswirkungen des Prostitutionsgesetzes auf die realen Lebens- und Arbeitsbedingungen sind unter anderem auch aus diesem Grund bis heute kaum festzustellen.

Das Problem des Sittenwidrigkeitsverdikts über Verträge, die Prostitution zum Inhalt haben, hat aus Sicht der Sozialversicherung im Allgemeinen keine Bedeutung. Hier sind bereits nach heutiger Rechtslage adäquate Möglichkeiten vorhanden, damit Prostituierte in den Genuss des Versicherungsschutzes kommen. Sie werden von den Betroffenen jedoch aus tatsächlichen Gründen oft nicht in Anspruch genommen, obgleich viele Sexdienstleisterinnen unter einer anderen Berufszeichnung sozialversichert sind, so beispielsweise als „Gogo-Tänzerin“ oder als Kellnerin. Aus legislativer Sicht erscheint die Rechtslage als adäquat, weswegen hier kein Änderungsbedarf besteht. Empfohlen werden aber Massnahmen organisatorisch-technischer Natur, um realen Zugang zu erleichten.

Dazu ist insbesondere bessere Information über bestehende Versicherungsmöglichkeiten von Seiten der Versicherungsträger notwendig. Der niederschwellige Zugang zu diesen Informationen sowie Unterstützung bei der Anmeldung sollten in weiterer Folge vor allem über zielgruppenspezifische Beratungsstellen erfolgen.

Wünschenswert wären ferner institutionalisierte Vertretungen, die im Sozial-versicherungsrecht die kollektiven Interessen betroffener Frauen und Männer wahrnehmen können, etwa bei Ausarbeitung einer Liste der anerkannten Berufskrankheiten von Sexdienstleisterinnen und Sexdienstleistern.

Weiters wird der Prüfung der Möglichkeiten empfohlen, eine besondere Aus-kunftsverpflichtung der Bordellbetreiber über die sozialversicherungsrechtliche Absicherung – insbesondere über die zu leistenden Sozialversicherungsbeiträge – von Sexdienstleisterinnen zu schaffen.

Im Hinblick auf die unterschiedlichen Einkommensgrenzen für die Entstehung der Einkommenssteuerpflicht und der Sozialversicherungspflicht wurde von Seiten der Beratungsstellen eine Harmonisierung in Richtung Angleichung an die Einkommens-steuerpflicht angeregt.

Referenzen:

Prostitution in Österreich: Rechtslage, Auswirkungen, Empfehlungen

Die Task Force Menschenhandel

Prostitutionsgesetz (ProstG vom 20.Dezember 2001; BGBI. IS. 3983)

Strafgesetzbuch (StGB)

IMPACT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION CASE C-599/10 ON ABNORMALLY LOW TENDERS IN PUBLIC PROCUREMENT LAW

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Abstract:

The term "abnormally low tender" has not been defined yet in the European Union procurement rules, but the Directive 2004/18/EC contains explicit provisions on this term and the Court of Justice of the European Union when the opportunities arose, given a definitive ruling on how to calculate such a tender.

National legislation that statutorily defines an abnormally low tender by reference to a mathematical formula is not prohibited. Indeed, according to the European Commission, such laws exist in Belgium, Italy, Portugal, Spain and Greece. In these states, a certain percentage less than the average of all tenders submitted or discounts granted is applied to identify an abnormally low tender. However, the Court of Justice of the European Union ruled that tenders may not automatically be excluded on the grounds of excessive deviation from the average of all other tenders submitted.

However, it may be seen as offering a simplified though due to its extremely favorable conditions, it is clear or reasonable to believe that the applicant will not be able to implement the terms offered subject of performance. The Directive 2004/18/EC does not generally prevent rejection of low bids which appear abnormally low, but a purchaser or requires like a public authority must seek a written explanation before rejecting it for that reason. In this respect Article 55(1) of the Directive 2004/18/EC and this provision was introduce to prevent, in particular rejection of bids which appear low but which reflect the cost advantages of provider´s home State. Request explanations in abnormally low tenders, respectively significant items of this offer has prevent the exclusion of low bids that just objectively reflect lower costs. For example, the national conditions in the individual Member States. In the Court of Justice of the European Union procedures which interpreting and using the term abnormally low tender were frequently discussing about provisions of national law as concerning which determination of criteria for abnormally low offer and the related exclusion of such any offer.

In the case of C-599/10 the Court of Justice of the European Union confirmed that if a tenderer offers an abnormally low price, the contracting authority must ask it in writing to clarify its price proposal. However, this case is important that the Court of Justice of the European Union does not precluded a provision of national law, in essence, the contracting authority may ask tenderers in writing to clarify their tenders and contracting authority must

treat the carious tenderers equally and fairly, in such a way that a request for clarification cannot appear unduly to have favoured or disadvantaged. In terms of the case is important that the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome.

JEL classification: K33 International Law

1. Introduction

In legal terms, abnormally low tenders should be related with objective concepts as the economic sustainability of bids and not the seriousness or genuineness of bids that has the potential to be subjective. From a client's perspective that is of interest for the research, the economic sustainability of tenders concerns whether there is a reasonable risk of non-performance of the contract or of financial instability or disequilibrium. Thus, abnormally low might be regarded any tender priced at a level which leads the client to conclude that the project cannot be delivered in accordance with the contract, in the manner promised by the bid and for the whole duration of the contract.

In the case of the Court of Justice of the European Union of case SAG ELV Slovensko, a.s. (C-599/10)[30] the reference for a preliminary ruling concerned the interpretation of Articles 2, 51 and 55 of Directive 2004/18/EC[31] on the coordination of procedures for award of public works contracts, public supply contracts and public service contracts.

The reference has been made in proceedings between the Public Procurement Office of Slovak republic (*Úrad pre verejné obstarávanie SR*) and undertakings which were unsuccessful in a call for tenders launched during 2007 by a commercial undertaking wholly controlled by the Slovak State (*Národná diaľničná spoločnosť a.s.*), with a view to the supply of services relating to toll collection on motorways and certain roads.

2. Abnormally low tenders with view of European case law

Many abnormally low tenders' cases have been brought to the courts of European countries numerous times by reason of the absence of strict definition of abnormally low tenders and of an established to manage them in the legislation act of EU. From these cases makes four distinct points or view at abnormally low tenders. The first is whether there is a duty for the client to investigate abnormally low tenders. The second question is concerned with the procedure that should be followed before rejecting abnormally low tenders. The third is whether it is permissible to use an automatic formula to identify abnormally low tenders. In the end and the most essential question concerns what an abnormally low tenders is.

[30] Judgment of the European Court of Justice 29 March 2012 in Case C-599/10 SAG ELV Slovensko a.s., FELA Management AG, ASCOM (Schweiz) AG, Asseco Central Europe a.s., TESLA Stropkov a.s., Autostrade per l'Italia SpA, EFKON AG, EFKON AG, Stalexport Autostrady SA versus Úrad pre verejné obstarávanie, intervening party: Národná diaľničná spoločnost' a.s.

[31] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

The most important are whether the rulings of courts in different cases converge or diverge or opposite. The cases that went to court can be categorized in two groups, namely the rejection and the non-rejection cases. The rejection cases involve the exclusion of a very low tender and are brought to court by the tenderer that was excluded. The non-rejection are cases where contractors that were not awarded the bid claim that the winning bid should have been considered to be abnormally low and thus should have been excluded. The reason why this differentiation is essential is to examine if it has an influence on the argumentation of the court.

3. A duty for contracting authority to investigate abnormally low tenders

The argumentation of the courts in a duty for the client to investigate abnormally low tenders partly builds on the ruling of previous same or similar cases. However, this is justified only if a new case has the exact characteristics of a previous one. Some controversies have been encountered in the approach of the Court of Justice of the European Union about whether there is a duty for the client to investigate abnormally low tenders. This can be attributed partly on the differentiation between rejection and non-rejection cases. Mostly, it is caused by an evolution on the perception about how to treat abnormally low tenders efficiently.

There were two non-rejection cases where the claimant was an unsuccessful bidder, namely the Morrison[32] and Varney[33] cases. In both cases, a bidder claimed that the client had a duty to investigate if the winning bid was abnormally low, but failed to carry out the necessary investigations. The claimants' arguments were rejected, as it can be seen in article 17 of the Morrison case and article 157 of the Varney case. According to Giffin, in the Morrison case the judge relied upon the word "shall" used in article 55 of the EU Directive and claimed that "it seems seriously arguable that a contracting authority does come under a duty to investigate".

A rejection case of special interest is the Renco case[34], where the claimant was a bidder that was excluded because of submitting an abnormally low tender. The bidder objected to the rejection and went to court, where his arguments were turned down. In the decision it seems that there is some sort of duty to investigate for the contracting authority. In particular, the court stated in article 76 that the contracting authority does not need to check each price quoted in each tender, but it must examine those tenders which are considered to be suspect. Interestingly, the decision of the court was identical to the decision in a non-rejection case, namely the PC Ware case[35].

1. The procedure to be followed before rejecting a tender as abnormally low

[32] Case EWHC 487, Morrison Facilities Services Ltd versus Norwich CC 22 February 2010 (CH), available at: http://www.casetrack.com/ct4plc.nsf/items/4-502-7238.

[33] Case EWHC 1404, J Varney & Sons Waste Management Ltd versus Hertfordshire CC 24 March 2010 (QB), available at: http://www.bailii.org/ew/cases/EWHC/QB/2010/1404.html.

[34] Judgment of the Court of First Instance of 25 February 2003 in case T-4/01, Renco SpA versus Council of the European Union, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001TJ0004: EN:HTML.

[35] Judgment of the General Court in case T-121/08, PC Ware Information Technologies BV versus European Commission 11 May 2010, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=80486&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3762905.

The case of Impresa Lombardini SpA[36] is a milestone for the procedure to be followed before rejecting abnormally low tenders and the ruling of the Court of Justice of the European Union was that the potential exclusion of bids as abnormally low should not be automatic. The bidder, as stated by the court, should have the opportunity to give an effective explanation of his bid. Moreover, in article 53 it is clarified that the tenderer should be made aware of the precise points about his bid which gave rise to questions in the mind of the contracting authority. The process was described in article 55 as "*inter partes*" examination, suggesting that some sort of continuing dialogue may be necessary in some cases. The approach followed in the Lombardini case was imprinted later on in the article 55 of the existing EU Directive.[37]

2. The permission of automatic formulae

An issue that has not attracted much attention but is significant for this research is whether applying an automatic formula to identify abnormally low tenders is permissible from a legal perspective. In article 67 of Lombardini case the Court of Justice of the European Union ruled that this was a matter for the member states to decide on. However, according to the ruling in Lombardini it was considered to be acceptable to operate a system under which there is an "anomaly threshold" of a certain percentage of the mean discount offered by tenderers from a pre-set base price.[38] Again, the exclusion of bids should not be automatic, but the bidder should have an opportunity to give an explanation on his bid in written.

The line of reasoning in permitting the use of automatic formulas was that all the bidders were in the same position as they could not know in advance what the average price tendered would be and thus what level of pricing would come under scrutiny as abnormally low. Thus, it is imperative that bidders know beforehand what system is applied to avoid a breach of the transparency principle. In conclusion, an automatic formula can be used only to identify tenders that are suspicious of being abnormally low and for which investigation is needed. One point that remains unclear is whether it is sufficient to prescribe the formula on the tender documents or it is necessary to set in national law. In order to clarify this, a question was formulated in the interviews conducted with legal experts.

3. Identifying of abnormally low tenders

A critical point in the pursuit of addressing the problem of identifying abnormally low tenders is to determine which concepts among those trying to describe the term "abnormally low" best stand in court. An important detail to bear in mind is that although the term "abnormally low" seems to refer only to the price of the tender this is not true. For instance, in articles 29 and 30 of the Belfass case[39] the number of hours' work necessary to provide the service were considered abnormally low, even though the bottom line price was not.

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[36] Judgment of the European Court of Justice in case C-285/99, Impresa Lombardini SpA 27 November 2001 ECR I-9233, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=46878&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3764600.

[37] GRAELLS, A.S. Public Procurement and the EU Competition Rules, Hart, 2011, page 2.

[38] GIFFIN, N. Abnormally Low Tenders in Procurement Law, Procurement Lawyer's Association, KDW, London, 2010, page 3.

[39] Judgment of the Court of First Instance In Case T-495/04, Belfass SPRL versus Council of the European Union, from 21 May 2008, Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004TJ0495:EN:HTML.

In the decisions of the Court of Justice of the European Union and the Court of First Instance various concepts can be encountered that intend to describe an abnormally low tender:

1) Whether the bid is "genuine" in cases Amey LG[40] and Lombardini,
2) Whether it is "genuine and viable" or "sound and viable" in case SECAP[41],
3) Whether it is "serious" in case PC-Ware,
4) Whether it is "reliable and serious" in case Renco SpA.

In article 20 of the Amey LG case, the judge argued that not all of the aforementioned concepts are of the same validity in legal terms. In particular, he claimed that reliability, viability and soundness are objective concepts, whereas seriousness and genuineness have the potential to be subjective. In articles 6 of the decision it is stated that the rejected bid involved unacceptable financial and operational risks and could not be considered economically sustainable. Moreover, in article 42 it was stated that even though the term genuine was incorrectly used to describe the tender, this could not undermine the conclusion that the tender involved unacceptable risks and was not economically sustainable. In other words, even if a tender is genuine the client still has to decide if the performance tendered is economically sustainable.[42]

As Giffin, aptly observes a question that rises is whether economic sustainability is to be looked at from the perspective of the contractor or that of the contracting authority.[43] From the contractor's point of view the economic sustainability of a bid is related to the margin for profit. Conversely, from the client's point of view it concerns whether the tender will result in a situation where complying with the contract conditions and project requirements is extremely difficult. As it noticed by Graells[44] the justification for the empowerment of clients to reject abnormally low tenders seems to be that they should not award the contract under circumstances where there is a reasonable risk of non-performance of the contract. Thus, in the view of this research, the economic sustainability of tenders should be examined from what is described as the client's perspective.

4. Case SAG ELV Slovensko, a.s. and Others - depends this case on abnormally low tenders

The most important case on abnormally low tenders was case SAG ELV Slovensko, a.s. and others C-599/10 in which, after a bid was rejected as abnormally low by the administrative appeal body, the bidder appealed to the Supreme Court of the Slovak Republic. The Supreme Court due to concerns as to whether this decision may had breached the principles of non-

[40] Opinion of Lord Hodge in Case CA114/12, Amey LG Ltd versus Scottish Ministers, Available at: http://www.scotcourts.gov.uk/opinions/2012CSOH181.html.

[41] Judgment of the Court of Justice of the European Union in joined cases C-147/06 and C-148/06, SECAP SpA versus Comune di Torino, Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=67371&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3785185.

[42] GOLDEN, J., Abnormally Low Tenders in Public Sector Procurement, Society of the Construction Law, Belfast, Northern Ireland, 2013, page 17.

[43] GIFFIN, N. Abnormally Low Tenders in Procurement Law, Procurement Lawyer's Association, KDW, London, 2010.

[44] GRAELLS, A.S. Public Procurement and the EU Competition Rules, Hart, 2011, page 3.

discrimination and transparency, decided to refer to the Court of Justice of the European Union. The court's judgment in article 45 expanded on the role of the national law arguing that article 55 actually requires that national law mandates investigation of abnormally low tenders, by asking for explanations of the bid in written.

The ruling of the Court of Justice of the European Union on this case is of decisive importance since it is the most recent one, but also due to the way it has been interpreted. The court's judgment emphasized that the EU's legislature, in enacting article 55 of Directive 2004/18/EC, intended to require contracting authorities to examine abnormally low tenders.[45] Moreover he comments that the court's view that clients are obliged to investigate abnormally low tenders, is the most notable and significant aspect of the judgment, because statements in previous cases had only suggested that such an obligation may exist. The ruling on the case is very recent and thus there is no subsequent case of an abnormally low tender on the Court of Justice of the European Union to act as an interpretation. Nevertheless, in the absence of a definition of what constitutes an abnormally low tender, it seems doubtful that there could be an obligation for the client to investigate.

Lastly, a comparative view of the Court of Justice of the European Union ruling in rejection versus non-rejection cases is of interest. It seems there is a tendency in the rulings of non-rejection cases to indicate that there is no duty to investigate tenders, while in rejection cases some sort of duty for clients to investigate is often described. Specifically, in two out of three non-rejection cases it is explicitly stated that there is no duty for investigation. Conversely, in four out of five rejection cases some sort of duty is referred. Such a tendency could be attributed to the courts being more in favour of the client's side to avoid lengthy legal proceedings delaying the execution of projects, which are aimed to improve social well-being. Because in terms of this section a limited number of cases on court have been examined such a tendency cannot be generalized.

1. Dispute in the Main Proceedings and questions for a preliminary ruling

The commercial undertaking wholly controlled by the Slovak State (*Národná diaľničná spoločnosť a.s.*) launched a restricted call for tenders by notice published in the Official Journal of the European Union on 27 September 2007, with a view to concluding a public contract having an estimated value in excess of EUR 600 million for the supply of toll collection services on motorways and certain roads.

Národná diaľničná spoločnosť a.s. sent requests for tender clarification to two groups of undertakings, including candidates. At the first group were 5 undertakings: SAG ELV Slovensko a.s., FELA Management AG, ASCOM (*Schweiz*) AG, Asseco Central Europe a.s. and SAG ELV and Others (*TESLA Stropkov a.s.*), and second were 3 undertakings: Autostrade per l'Italia SpA, EFKON AG and Stalexport Autostrady SA (*Slovakpass*). In addition to questions specific to each of the tenders relating to their technical aspects, those two groups were asked to provide clarification of the abnormally low prices which they had proposed and answers were given to those questions.

Two of the undertakings (*SAG ELV and Others* and *Slovakpass*) were excluded from the procedure by decisions of 29 April 2008. Those decisions were challenged before *Národná diaľničná spoločnosť a.s.,* which upheld them and subsequently before the competent

[45] Mc GOWAN, D. An obligation to investigate abnormally low bids? SAG ELV Slovensko a.s. (C-599/10), Public Procurement Law Review, Volume 21, Thomson Reuters, 2012, pages 165-168.

administrative appeal body. The Úrad pre verejné obstarávanie SR, which on 2 July 2008 in turn dismissed the appeals brought before it.

The Public Procurement Office of Slovak republic (*Úrad pre verejné obstarávanie SR*) took the view that, although one of the grounds put forward by *Národná diaľničná spoločnosť a.s.* to justify the exclusion of the two groups concerned from the call for tender procedure, namely the failure to produce certificates for installations not yet approved, was unfounded, the other two grounds advanced did, however, justify that exclusion. Firstly, those two groups had failed to provide an adequate response to the request for clarification of the abnormally low price in their tenders. Secondly, those tenders failed to comply with certain conditions set out in the tender specifications in Article 11, as regards *SAG ELV and Others*, requiring, in essence, determination of the parameters enabling calculation of tolls as a function of the toll sections by season, days of the week, hours of the day, and those set out in Article 12 as regards *Slovakpass*, requiring provision of a diesel-powered emergency electricity generator.

SAG ELV and Others and *Slovakpass* challenged those decisions before the Bratislava Regional Court of Slovak Republic (Krajský súd Bratislava). By judgment of 6 May 2009, that court dismissed the action brought by SAG ELV and Others. In this judgment was dismissed the actions brought by Slovakpass, which it had joined and which sought, first, annulment of the decision of the Public Procurement Office of Slovak republic (Úrad pre verejné obstarávanie SR) and second, annulment of the decision by which *Národná diaľničná spoločnosť a.s.* had confirmed the soundness of its measure creating a tender assessment committee, also contested by *Slovakpass*.

Appeals against those two judgments were lodged before the Supreme Court of the Slovak Republic (*Najvyšší súd Slovenskej republiky*). Having regard to the arguments raised by *SAG ELV and Others* and by *Slovakpass*, and in the light of the grounds relied on by the European Commission in the action for failure to fulfil obligations brought against the Slovak Republic because of irregularities in the public procurement procedure at issue in the main proceedings, the national court has doubts as to whether the *Národná diaľničná spoločnosť a.s.* decisions concerned comply with the principles of European Union law on non-discrimination and transparency in the award of public contracts. In those circumstances, the Supreme Court of the Slovak Republic decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

> *1. "Is the interpretation that, under Article 51, in conjunction with Article 2, of Directive 2004/18, taking account of the principle/s of non-discrimination and transparency in the award of public contracts, the contracting authority is obliged to seek clarification of a tender, respecting the subjective procedural right of the individual to be requested to supplement or clarify certificates and documents submitted pursuant to Articles 45 to 50 of the Directive, if a disputable or unclear understanding of the tenderer's bid could result in the exclusion of that tenderer, in conformity with the above Directive in the wording in effect in the relevant period?"*
>
> *2. "Is the interpretation that, under Article 51, in conjunction with Article 2, of Directive 2004/18, taking account of the principle/s of non-discrimination and transparency in the award of public contracts, the contracting authority is not obliged to seek clarification of a tender if the contracting authority considers it established that the requirements regarding the subject matter of the contract have not been met, in conformity with the Directive in the wording in effect in the relevant period?"*
>
> *3. "Is a provision of national law under which a committee established to evaluate tenders only may request tenderers in writing to clarify their bid in*

conformity with Article 51 and Article 2 of Directive 2004/18 in the wording in effect in the relevant period?"

"Is a contracting authority's procedure, according to which it is not obliged to request a tenderer to clarify an abnormally low price, in conformity with Article 55 of Directive 2004/18, and, on the formulation of the question put by the contracting authority to the applicants in connection with the abnormally low price, did the applicants have the opportunity to explain sufficiently the constituent features of the tender submitted?"[46]

2. Final opinions of the Court of Justice of the European Union

The argumentation of the Court of Justice of the European Union for the first and second question for a preliminary ruling is based on, that the provisions of the article 51 of Directive 2004/18 are therefore irrelevant to the assessment which the Court of Justice of the European Union must make in order to answer the questions which have been referred and which relate, having regard to the facts of the cases in the main proceedings, solely to that stage of the restricted call for tenders procedure in which, following selection of the tenderers entitled to submit a tender, it is for the contracting authority to assess those tenders. There is therefore no need for the Court of Justice of the European Union to rule on the interpretation of Article 51 of Directive 2004/18. Secondly, the fact that the contracting authority has, in the present proceedings, set up a committee responsible for assessing, on its behalf, the tenders submitted by the tenderers does not relieve that authority of its responsibility to comply with the requirements of European Union law in the field of public procurement. The Court of Justice of the European Union must understand the questions referred to it, taken as a whole, as seeking to ascertain to what extent contracting authorities, when they take the view, in a restricted public procurement procedure, that the tender submitted by a tenderer is abnormally low or imprecise or does not meet the technical requirements of the tender specifications, may or must seek clarification from the tenderer concerned, having regard to Articles 2 and 55 of Directive 2004/18. In order to pursue the free movement of services and the opening-up to undistorted competition in all the Member States, European Union law applies *inter alia* the principle of equal treatment of tenderers and the obligation of transparency resulting.[47]

As regards first part of the third question, the Court of Justice of the European Union argued that the Article 2 of Directive 2004/18 does not preclude the absence, in national legislation, of a provision which would oblige the contracting authority to request tenderers, in a restricted public procurement procedure, to clarify their tenders in the light of the technical requirements of the tender specifications before rejecting them because they are imprecise or do not meet those requirements. The Article 2 of Directive 2004/18 on the Court of Justice of the European Union view does not preclude, in particular, the correction or amplification of details of a tender where appropriate, on an exceptional basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender. Nor does that article

[46] Reference for a preliminary ruling from the Najvyšší súd Slovenskej republiky (Slovak Republic) lodged on 17 December 2010 - SAG ELV Slovensko, a.s., FELA Management AG, ASCOM (Schweiz) AG, Asseco Central Europe, a.s., TESLA Stropokov, a.s., Autostrade per l'Italia S.p.A., EFKON AG, Stalexport Autostrady S.A. v Úrad pre verejné obstarávanie (Case C-599/10).

[47] Judgment *SAG ELV Slovensko, a.s. and Others*, paras 22, 23, 24 and 25.

preclude a provision of national legislation such as Article 42(2) of Law No 25/2006, according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tender without, however, requesting or accepting any amendment to the tender. A request for clarification of a tender may be made only after the contracting authority has looked at all the tenders.[48]

Furthermore, that request must be sent in an equivalent manner to all undertakings which are in the same situation, unless there is an objectively verifiable ground capable of justifying different treatment of the tenderers in that regard, in particular where the tender must, in any event, in the light of other factors, be rejected. In addition, that request must relate to all sections of the tender which are imprecise or which do not meet the technical requirements of the tender specifications, without the contracting authority being entitled to reject a tender because of the lack of clarity of a part thereof which was not covered in that request.[49]

As regards second part of the third question, the Court of Justice of the European Union argued that the list in the second subparagraph of Article 55(1) of Directive 2004/18 is not exhaustive, it is also not purely indicative, and therefore does not leave contracting authorities free to determine which are the relevant factors to be taken into consideration before rejecting a tender which appears to be abnormally low. Secondly, in order for Article 55(1) of Directive 2004/18 to be effective, the contracting authority must set out clearly the request sent to the tenderers concerned so that they are in a position fully and effectively to show that their tenders are genuine. Furthermore, Article 55 of Directive 2004/18, far from precluding a provision of national legislation such as Article 42(3) of Law No 25/2006. Accordingly, Article 55 of Directive 2004/18 does preclude, in particular, a contracting authority from claiming, that it is not obliged to request a tenderer to clarify an abnormally low price.[50]

5. Conclusion

The Court of Justice of the European Union of the case C-599/10 was ruled followed conclusion:

"Article 55 of Directive 2004/18 must be interpreted as requiring the inclusion in national legislation of a provision such as Article 42(3) of Law No 25/2006 on public procurement, which, in essence, provides that if a tenderer offers an abnormally low price, the contracting authority must ask it in writing to clarify its price proposal. It is for the national court to ascertain, having regard to all the documents in the file placed before it, whether the request for clarification enabled the tenderer concerned to provide a sufficient explanation of the composition of its tender,

Article 55 of Directive 2004/18 precludes a contracting authority from taking the view that it is not required to ask a tenderer to clarify an abnormally low price;

Article 2 of Directive 2004/18 does not preclude a provision of national law, such as Article 42(2) of Law No 25/2006, according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tenders without, however, requesting or accepting any amendment to the tenders. In the exercise of the discretion thus enjoyed by the contracting authority, that authority must treat the various tenderers equally and fairly, in such a way

[48] Judgment *SAG ELV Slovensko, a.s. and Others*, paras 39 and 40.

[49] Judgment *SAG ELV Slovensko, a.s. and Others*, paras 43 and 44.

[50] Judgment *SAG ELV Slovensko, a.s. and Others*, paras 30, 31 and 34.

that a request for clarification cannot appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome."[51]

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LEGALITY VERSUS LEGITIMACY. GLOBAL CHALLENGE IN HUMANITARIAN WAR DEPLOYMENT

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Abstract:

The area of public international law is nowadays facing serious problems in the field of humanitarian intervention. Following past events in Kosovo, Rwanda or Georgia and present crisis in Ukraine or Sudan, the discussion on whether and how to intervene when gross violations of human rights are happening, is referring to breach of international law while at the same time to the necessity of protecting individual as well as collective human rights.

The article will deal with struggle between legality and legitimacy in the area of use of force following especially the UN Charter as a core document providing humanitarian war deployment instruments. In the centre of the paper the definitions of both terms will be provided and the question of humanitarian intervention will be analysed from international law perspective, however deriving also from cases studies from the far or close history. Subsequently, the concept of responsibility to protect will be explained and used as a possible solution of the issue. Despite is present non-binding form, it strength lies in its normative basis and strong support from the side of Secretary General. However, right because of its non-binding basis, it applicability cannot be enforced and therefore the international community is not pushed to intervene either because of economic or political reasons. However, the paper will still promote the peaceful solution of dispute as a first possibility and war deployment as a last resort.

1. Introduction

The area of humanitarian intervention has been in struggle merely for two decades. The modern period after the fall of iron curtain and dissolution of Soviet Union caused that the UN Security Council (hereinafter SC) started to intervene in conflict areas more often. However, this was not always the case. The intervention, whether civilian or military, has depended on political will and interest of states having capabilities to undertake the operation. Nevertheless, there were stated no rules for humanitarian intervention for a long time and it was evaluated ad hoc depending on the success of the deployment. The paper will deal with two sides of the intervention – its legality and legitimacy. The basic premise was stated by the Independent Commission on Kosovo Intervention stating that the NATO airstrikes were illegal, but legitimate. Therefore the paper's task was to define these two terms and try to find the current trend in this area. Aside, the paper will used the division of Matlary focusing on

European and American approach to humanitarian intervention providing the introduction to decision-making process of these two actors. The paper will hence try to answer the question, whether and how does the doctrine of responsibility to protect solve the gap between legality and legitimacy of humanitarian intervention.

The paper is part of the wider research on the impact of the doctrine of Responsibility to protect on the behaviour of states and international organizations such as the UN and the EU focusing mainly on the decision-making process. The legality-legitimacy gap is one of the arising questions in such a research.

2. Humanitarian intervention

Humanitarian intervention can be defined in the framework of an ethical obligation of intervention when suffering of the people is happening or simply said when the human rights are violated. According to NATO it is an "armed intervention in another state, without the agreement of that state, to address (the threat of) a humanitarian disaster, in particular caused by grave and large-scale violations of fundamental human rights."[1] There are several criteria, which has to be followed in order to undertake the humanitarian intervention. There must be a threat or occurrence of grave and large-scale violations of human rights, clear and objective evidence of such a threat or occurrence. The government of a state is not going to take remedial action. The action has to be urgent and the use of force should be used as the last possibility - the last resort. The purpose of humanitarian intervention has to be clearly explained to public and international community to be fully understood, and it should be limited to stopping human rights abuses. The action should be supported by those for whom it is intended and the support of regional states must be present too. Of course, there should be high probability of success and mapped-out transition to post-conflict peace building. The core issue is that the use of force should be proportionate to achieving these goals and that the international law has to be followed [1].

The significance of humanitarian intervention has been growing since 90s due to the civil struggles in African countries, like Democratic republic Congo, Somalia, Liberia and mostly due the genocide in Rwanda. Looking on the European territory we must mention the Bosnia and Herzegovina and latest, but not the least, East Timor from the area of Asia. These are just some of the cases, where the UN managed to intervene (more or less successful), but there are also places where the UN was incapable of an action like Sudan or Kosovo. Sudan was long time - strictly to say – ignored, because of no will and no leading country that would take the operation under its wings.

Nowadays we are witnessing shift from the typical humanitarian intervention to democratic intervention or regime change intervention. The justification for such an action was referring to Art. 51, as well as to unilateral security doctrine [2]. This shift was started by the 9/11 terrorist attacks on the World Trade Centre. Does it seem like we are going back from multilateral value based interventions to unilateral traditional state security policy diminishing the role of the UN? It can be said that we are not witnessing a reversal, there are nowadays two streams of perceiving the use of force in the "western world", and balancing the relation between legality and legitimacy – one is that of the USA and the other is the community of states giving the UN the primacy role on use-of-force-decision-making. This is not change from past ten years; this was, is and probably will be the reality of the USA. It seems like they have the isolationism rooted in their minds and just go their way and driven by their self-interest and benefit from their position in the international environment. Nevertheless, their

action – although several times pushed by wrong reasons – is helpful for the whole international community. The United States is the only state from the UN members that can undertake such risky operations, illegal or illegitimate and still the UN does not contradicts them, quite the contrary, the UN even support them. Terrorism gave birth, inter alia, to the concept of preventive use of force, so popular in the US foreign policy.

Hence, now is clear, that humanitarian intervention is complicated concept regarding its legality and legitimacy. What do these terms represent? On the next pages, I will deal with the issue of legitimacy and legality from the theoretical perspective. What is more important? Follow the law or help people for purely humanitarian intension? Can be Kosovo taken as a precedent? If the reasons are not purely humanitarian, but it fulfils also this purpose, how should be the intervention treated? The paper seeks to find answers also to these questions.

3. Legality v. Legitimacy

The UN SC has the monopoly of use of force beyond the self-defence cases. It is clearly stated what type of threats should be dealt within the concept of humanitarian intervention as well as it is stated how the resolution authorizing this type of action should be carried out [3].

The ideal of a humanitarian intervention should join the legality as well as legitimacy. But they are not necessary connected. An operation can be legal, but illegitimate in the same way as it can be illegal but legitimate. The worst combination is when it is illegal and illegitimate. Due to the fact that legality and legitimacy are often interchanged and therefore the paper uses the division on legal and military legitimacy that refers to clearer classification and subsequent simpler use of the terms, since legitimacy is use in legal as well as normative sense.

Legal legitimacy is referring to the legality of use of force that is grounded in the UN Chapter, where exceptions are stated, however with more-or-less open to UN SC consideration. This consideration is thus dependent on the SC resolution that will authorize the use of force and make the intervention legal. The UN SC resolution may invoke also the legitimization, however the resolution does not have to be always sign of military legitimacy. When the International Commission on Kosovo reported on the NATO attacks, it concluded, that the attacks were illegal, but legitimate [4]. But if there was no resolution, no UN mandate, than the UN mandate does not represent legitimacy, rather the legality. Looking into history, from the legal point of view there were three streams of legitimacy. The first one is the positivist view, very similar to the European approach, where the multilateralism and the UN SC stand in the centre. The second is the substantive discussion of justice, which is characterized by the Kosovo precedent – meaning calibrated situation of human rights violations and multilateral decision making of state, not necessarily with the involvement of UN SC. The last, but not the least is the realist model referring to national interest as the core for deciding upon intervention. However, this model lacks the reasoning for democratic intervention in failed states.

Under military legitimacy, on the other hand, the moral and ethical reasons regarded the driving force for intervention, are understood. Nevertheless, it must be supported by majority of international community of states and public support. The issue of self-interest is very complicated. Despite the presence of clear self-interest of intervening country, the intervention may be helpful for the current crisis. Regarding the future development of the particular state, one might be not sure about the benefits of the intervention. However, the

paper focuses on the time of crisis and not state-building after intervention, and therefore the self-interest is permissible to certain limits. If the benefits of preventing or ending human suffering are higher than the consequences in terms of future influence and involvement of intervening country in the problematic one, then self-interest does not play such an important role. From military point of view, there are three phases that define the legitimacy, each of them is important, although one more, one less. The first one is the so called ad bellum phase or decision phase, where the decision is being made and so this phase is gathering maximum political attention. The second stage – in bello phase is characterized by judging the intervention through political as well as military performance of the forces. Many times, the final phase– the post-bellum phase (also post-conflict) - is the most crucial, because it provides us the result of the intervention – success or failure. This phase is used for condemning the legitimization or delegitimization of the mission. Of course this could take also several years when counting state-building and restoration. This phase is closely connected with ad hoc legitimacy. If there was an intervention without mandate and was successful, it can be legitimated ad hoc –such as interventions by ECOWAS's Monitoring Group (ECOMOG) in Liberia in 1992 and Sierra Leone in 1997 [5]. So the final stage of military legitimacy is quite important.

One should realize that over the world, the opinions on legitimacy are not united. There are several sources used in particular part of world. The USA and Europe are the most active actors in the area of humanitarian intervention, despite they have different view on what creates legitimacy.

1. European and American approach

Legitimacy is related both to ethics and to international law – in ideal case it would be, but in reality, one or another overrules. In these terms, we can look on legitimacy from two points of view. The paper uses Matlary's division on a European and American approaches. In her book "Values and Weapons", she deeply analysed these two perceptions and provided a good starting point for analysis of US or EU behaviour in crisis management. Both approaches are connected to their perception of security and defence policy. The EU stresses the international legal norms, multilateralism centred on the UN, democracy and human rights, whereas the US is supporter of Wesphalian view on security policy – the state interest and security of the citizens is the driven force for an action [6]. US think that multilateralism is "good, but not vital". US legitimacy for use of force is grounded in their American tradition of democracy and freedom (upon which is build the concept of 'democratic intervention') and their 'special mission' in history (superpower, saviour in the WW II, new world) and not in the UN documents and international law [7].

Regarding the European attitude, the UN SC authorization became the key element in legitimizing the use of force. European states rely more on the UN than on their own discretion. Also the European Security Strategy from 2003 stresses the important role of international law regarding intervention. Although the UN mandate is not a requirement, it is very desirable, since the whole political process should be undertaken in the UN SC. However, after the Kosovo intervention, this approach changed a little, especially when there is intra-institutional problem (as the veto power of SC permanent members).

On the one side, the original European attitude is understandable when remembering events of First and Second World War. The UN Pact is considered very high power and for them is identical with the international law. On the other side, they let too much responsibility on the UN. Considering that the happening during the Cold war can easily repeat (meaning the

inaction of SC and join sphere of influence of UN SC members), the behaviour of the European states seems like excuse. What if the UN SC failed again? What if it did not give a damn to events like Rwanda, Srebrenica or Sudan again if they happened in future? Should the UN SC be so overrated? If the UN SC made a bad decision, what would they behave then? Would the European states just throw the guilt and responsibility on the SC? The pure reliance on UN SC in the area of legitimacy is too excusive.

However, the Kosovo crisis brought change towards to the European thinking thanks the public pressure. Public pressure and mobilization can wake up the governments to do something. Public, as well as in the election, also in foreign policy actions are the source of legitimacy. To conclude what constituted the legitimacy for the European countries, we must combine the pillar of UN mandate (as equal to international law) and the pillar of public support. Sometimes there are supported also by the concept of human security [8].

The United States, contrary to European states, see the use of force and intervention as the issue of their own national policy. They respect the UN, since they asked for the resolution, if they decided to intervene. The point is that even if the resolution was not accepted, the intervention took place either. When regarding multilateralism, they understand it as the coalition of states [8]. USA underline the importance of military success in 'in bello' phase of military legitimacy, because this phase decides whether the intervention was successful or not. Considering the legal legitimacy, it is judged more in terms of moral and ethical requirements. USA respects the UN, however, the mandate is not necessary for the decision to intervene and the US it is still able and willing to act unilaterally in this area. The USA are still referring to their values, national values, national interesting, although they can refer to global or universal as well (since they should be the same involving democracy, rule of law and human rights). Their war on terror complicated the situation even more, because it provides them with new series of reasoning and fighting. It caused a shift in intervention perception of the USA from humanitarian concerns towards the democracy building and intervention in failed states, meaning the regime change.

The great US advantage is that countries and IOs will always look on the United States for a military support. From the realist point of view we can say, that human rights (as stressed by the EU) rarely constitutes the one and only reason and motivation for intervention. So what is legitimacy? "Legitimacy is tied to both ethics and international law." [6]. For the USA, the role of authorizing the use of force is important, but not necessary for the decision to intervene, when it is in favour of national interest. For the USA the use of force still remains a national decision [9]. Although it is said, that the US cannot undertake unilateral action without support, or that they should not afford it, they do it, and they can do it. I do not think the international community would punish them. Yet also the enforcement of responsibility is complicated anyway. Even though the will of state will to enforce the responsibility was to be present, it would be very hard to prove. The US is unique through its history and specific values as liberty. Multilateralism is not perceived as in the case of the EU in the form of the UN, but in the form of coalitions. They underline the moral legitimacy above the procedural and stressed the democracy as the driven force and key element to legitimacy. The US was never afraid of unilateral use of force, and such a behavior – whether that of the US or that of the international community – can make a unilateral regime change, a precedent that would damage all the stuff, efforts and beliefs built since 1945 [9].

There is not always a disagreement on the intervention between Europe and the USA. Regarding Kosovo, they agreed, in the case of Iraq their opinions went quite the opposite way (not counting UK as a country with 'special relationship' with the USA). However, Europe was full of wars beginning with Ancient Greece, Roman Empire, Habsburg Empire followed by WW I and WW II. After 1945, the huge conflicts ceased and regional ones started to

appeal. Nowadays Europe is united in the European Union, strong promoter of human values, generally considered as a soft or normative power. In the framework of military power I would call it a 'military worm'. In the last few years, the EU also tries to build its military capabilities with Battle groups, cooperation between British and French and today there are talks about common European security. Nevertheless, still the US is given the military primacy when talking about western allies.

So the EU does not see the military power and its use as a key instrument for survival, instead it promotes values as democracy, rules of law and human rights. It takes into account also rising role of international organizations, NGOs, public and media. But this does not mean that the EU does not want to or is not capable of using its military force. The force can be used, however, with legitimacy. In this issue, the UN got the main role. The UN became a source of legitimacy, representing the system of multilateralism. Interesting role is played by public. One might think that public does not play role, but most of the intervention happened thanks to them. The pressure that public is capable of pushes authorities to act and not just sit and look on what is happening. So the legitimacy for the EU lies on two pillars – one represented by international law, especially the UN mandate and second comprising of public support.

The point is that thorough the history, this gap between legal and military legitimacy has not attracted attention, either because there was not interesting or because it was not so important. Nevertheless, after the Kosovo intervention, it is started to be noticed and observed. Even bigger question mark above this gap was brought by the Iraq invasion mainly due to the use of Kosovo intervention as a precedent of unilateral use of force.

The question that arises is *'is military legitimacy becoming more important than legal one?'* The reasons of justification used in the case of humanitarian intervention are mostly referring to peoples suffering, mass killing, violation of human rights, enormous number of displaced persons, refugees heading to the neighbouring countries. It is clear that the meaning and significance of legitimacy is growing, but after the NATO intervention in Kosovo, it was clearly stated, that such an action should not become a common operation, and that unilateral use of force is still prohibited. Many recognize the operation as illegal but legitimate. On the other side, invasion in Iraq is considered illegal and illegitimate (the UN resolution was adopted four days after the attack). When categorizing the Australia intervention in East Timor, the Tony Blair's idea of 'ethical imperialism' is the most suitable. This insisted on the right of the major powers to disregard international law and national sovereignty, on the basis of so-called 'humanitarian' concerns but on the other side ethical imperialism provides space for the major powers to hide their strategic interest behind moral imperatives.

When looking at the conflict of legal and military legitimacy, one might find the analogy with the struggle of state sovereignty and human rights. Sovereign state is defined by territory, population, governing authority and recognition of others. When dealing with humanitarian intervention, state sovereignty is the core problem. Even the UN Charter refers to norm of non-intervention in Article 2, which was several times the reason for no or not sufficient intervention in crisis area. It has been used especially by Russia or Asian countries. State sovereignty causes problems also in intrastate conflicts. Such conflicts are governed only by Common article 3 of Geneva conventions and Additional protocol 2 to the Geneva conventions unlike interstate conflicts that can rely on huge amount of international law sources (i.e. Hague and Geneva conventions).

Human rights, on the other side, gained on their importance mainly during 90s throughout conflicts in Yugoslavia and Africa (Rwanda, Congo, Somalia). They triggered whole new thinking in the international law. The Westphalian concept of sovereignty began to change in

more human one, with global ethical values prevailing over national interest and state sovereignty in its initial meaning. Hence, the human rights doctrine is incompatible with the notion of state sovereignty [10] and human rights violations are the source of legitimacy nowadays and they many time wake up the civil society to act. Media coverage contributes with pictures of death children, damaged houses and raise dissatisfaction.

The humanitarian intervention as a rising concept, inability of SC to react and struggle between two already basic concepts – sovereignty and human rights – was spreading. It was all included in Kofi Annan's Millennium report in 2000, where the then Secretary-General commented the primary role of protecting people and that sovereignty cannot prevail over human rights and humanity. He stressed the moral duty of the SC and whole international community to protect these values [11]. The main result of the debate of humanitarian intervention and the report of Kofi Annan was the creation of International Commission on Intervention and State Sovereignty, established by Canadian government. It task was to conceptualize humanitarian intervention in comprehensive manner and to find a global consensus. In 2001, the Commission released a report called The Responsibility to protect [12].

2. Responsibility to Protect

Several times a question 'what should international community do, how it should react, when human rights are intentionally violated and the responsible state is not able or willing to stop it' was posed. The above mentioned Report of ICISS and its concept of 'responsibility to protect' were prepared to provide an answer. It was understood as a "guiding principle of international politics" when establishing a criteria and principles of intervention [13]. According to Greppi, RtP represents the relationship between humanitarian and human rights law including humanitarian intervention discussion [14]. However, it has gone a long way, conceptual discussion and debate about duty, whether legal or moral. When we look at the reports and evolution of the concept, we must mention firstly The Report of the International Commission on Intervention and State Sovereignty (2001), then The Report of the High-Level Panel on Threats, Challenges and Change (2004), The Report of the Secretary-General In Larger Freedom (2005), The 2005 World Summit as well as The Report of the Secretary-General on Implementing the Responsibility To Protect (2009) and finally The Responsibility To Protect and the 63rd Session of the General Assembly[15].

In current form, the responsibility to protect stand on three pillars [16]:

1. "The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;
2. The international community has a responsibility to encourage and assist States in fulfilling this responsibility;
3. The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nation".

Simply said, states are obliged to protect its citizens from serious human rights violation and international community (meaning UN, regional organizations, etc.) should help them. And if the state is not able or willing to do so, then the community must be prepared to take collective action against it.

RtP represents shift from 'right to intervene' to the 'responsibility to protect' [12] as well as it "comprises a conceptual change with regard to the principle of sovereignty" [13]. The sovereignty is not absolute anymore. Rather it is considered a "sovereignty as responsibility" which in other words means conditional sovereignty when state enjoys its sovereignty only if it protects its citizens. If it is not able or willing, the non-intervention norm can be omitted and state sovereignty too when undertaking the intervention. This shift is targeted on the debate shift back to those who need help. Its idea was that the shared responsibility of state as well as community of state is to prevent genocide and other serious human rights violation [17]. RtP was firstly meant as an obligation for international community to intervene when serious human rights violations are being committed, to avoid situations like Rwanda or Kosovo as wished by Annan. From one point of view it diminishes the veto power of permanent members since they should take an action in mentioned cases, even if one member did not want to. If the concept was implemented in this meaning, that would make the intervention legal, as well as legitimate. On the other side, it would be in contrary to the UN Charter because of the veto power grounded in there. RtP cannot cease the veto power of permanent members when it is rooted in the Charter. Especially, the USA was against any legal obligation of permanent members and loss of veto power. Also Annan proposed to replace to word 'responsibility' with the word 'obligation'. USA was strictly against it. It is hard to established guiding unambiguous rules and principles, when states like to leave the back door open. In this case, the Charter should have been modified, but the change has to be accepted by all five permanent members. Hence it is very improbable that permanent members would sign their power limitations. This sign of legal obligation to intervene was therefore left out from the text and replaced by "prepared to take collective action". We cannot forget about the fact, that to legalize the military intervention (use of force), the consent of the UN SC is necessary.

4. Conclusion

As we can see, the international law and world system of state has been changing. The human rights doctrine brought another perception of interest – a global interest. Because of the horrible events of 90s, human rights gained on its importance and caused a shift from Westphalian concept of sovereignty through right to intervene towards sovereignty as responsibility. However, this change brought lot of ambiguities too. One of the arising problems was the gap between legal and legitimate intervention. Despite the provisions rooted in UN Charter, international or regional organizations are still able and willing to intervene without the SC resolution and thus making the intervention illegal. Depending on its success or failure, the UN decides ad hoc on the legitimacy of the intervention. The attitudes are not united, nevertheless there arises the question of efficiency of the Security Council in the area of crisis management and humanitarian war deployment. It is clear that there is the will to solve the veto problem in SC, but somehow, there is the legal limitation going out of the Charter. There were attempts to reform the SC, even from the Secretary-General himself, but the most crucial changes were not accepted. Several years we have been listening to the necessary to widen the SC, especially its permanent members with Brazil, Japan, Germany or

India. But still the point is that veto power, as it exists today, will be not overweighed by more permanent members.

After decade of bloody conflicts, the ICISS published the Report on Responsibility to Protect that should have solved the complicated and not unified concept of the humanitarian intervention. One might state that RtP did not bring anything new in the framework and this paper agrees with this notion, nevertheless, it brought requirements and conditions for intervention and peace building plan under one roof. RtP has all prerequisites to become a strong norm guiding crisis management. However, its existence is dated only back to 2001 and still that is too little time for impact to be as huge as expected. The political will especially of UN members is decisive factor in further development of the norm and changes in international system.

When looking an answer to our question whether and how has the RtP solved the question of legal and military legitimacy, one might say that the ICISS report was more concrete and provided more specific conditions under which the intervention can happen. On the other side, the wording of the implemented text by the UN does not solve the question of what to do when SC failed to take an action on the grounds of RtP representing the core problem.

The paper concludes that even the responsibility to protect does not contributed to the solution of the gap between legality and legitimacy to such an extent as one might think. The theory is very ambiguous about the contrine, the legal documents always underlined with Security Council's primary role for authorizing use if force in humanitarian intervention. Nevertheless, the history provides us with numerous cases, when the UN did not play any or very limited role in the intervention. On the other side, its strong normative character has a huge potential. However, based on latest cases of Syria and Ukraine, the consent of Permanent Five is necessary. The RtP lacks the solution for the situation of the SC being incapable or unwilling to undertake an action, it takes for granted that if the situation demanded the intervention, the SC would adopt a resolution under Chapter VII. However, such thinking is naïve and the RtP should be rooted in international treaty in order to get legal power and enforce the action, making the action an obligation for UN members, especially the SC.

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CURRENT ISSUES OF SUCCESSION LAW IN EUROPE IN TERMS OF REGULATION EU NO. 650/2012 OF 4TH JULY 2012

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Key words: European cases of succession, EU Regulation No. 650/2012, unified rules of jurisdiction, applicable law, recognition and enforcement of decision, European Certificate for Succession

Abstract

In the past, international cross-border cases of succession have been exceptional rather than a common practice. The times have changed. With an increase in movement of persons within the European Union (EU) territory, the cross-border investment of people's income has increased considerably. In the recent years, number of persons who acquire property abroad and set up a bank account in a foreign country is on a rise. Due to this fact, an importance of international succession has grown and over the coming decades the same tendency of transmission of property throughout the European countries can be foreseen. An annual number of successions in Europe is estimated at around four to five million, out of which ten percent is of cross-border nature. It is due to the fact that property of a deceased person is commonly situated in a different member state than a member state of nationality of deceased originated or his potential heirs. The rules that should be applied in these international succession cases are very complex. Difficulties arise as a consequence of the diversity in national legislation and laws applicable in cases of international succession within different EU jurisdictions. The absence of the unified rules in these matters is the main cause of problems that arise in international succession cases. The solution to legal uncertainty for a person seeking to plan his succession and of his heirs to prove their heirship in a foreign country has long been overdue. The solution to the matter provides the EU Regulation No. 650/2012 accepted on the 4th July 2012, which deals with European cases of succession. The above mentioned Regulation is a package of unified rules guiding issues of jurisdiction, applicable law, recognition and enforcement of decision and authentic instrument in the matters of succession and creation of European Certificate for Succession. The work on its implementation is currently in progress in respective member states. States will however have to address issues that arise due to the Regulation and decide on matters connected to the transnational communication between registers of property, acceptance of European Certificate of Succession and Registers of Wills.

1. Introduction

Wills and succession of cross - border cases were excluded from Brussels Convention on Jurisdiction and Enforcement of Judgment in Civil and Commercial Matters from 1968 and with no change they remained excluded from Council Regulation No. 44/2001[1], which replaced the Convention. On the same basis the wills and successions were excluded from Lugano Convention [2], which is applicable to Switzerland, Iceland, Norway and Poland. The exclusion of wills and succession from the principle of mutual recognition and enforcement of judgments in civil and commercial matters has called for the separate regulation of recognition and enforcement of judgments in Succession law. The Council and Commission have correctly presumed that without any set of harmonized conflict rules in the field of cross - border successions, there cannot be any progress foreseen in this area. [3]

One of the significant attempts in this field was made by Hague Conference. The new perspective of setting the common rules governing the international successions was unfortunately not successful. New legal act, The Hague Convention of 1st August 1989 on the law applicable to succession to the estates of deceased persons, has never come into force. In spite of this fact, the progress was made by enacting the Hague Convention of 5th October 1961 on the conflicts of laws relating to the form of testamentary disposition. This legal act has been ratified by 16 Member States and ratification of the Convention by other states would be more than desirable. [4]

The further attempt of an adoption of legal instrument as an act of harmonization of rules of cross - border succession cases has been preceded by European Union. It was the part of its progressively trying attempt to establish a common area of freedom, security and justice, especially through an adoption of judicial cooperation in civil matters. The adoption of a legal instrument on European level in the field of succession was already one of the priorities of The Vienna Action Plan from 1998 (OJ C 19, 23rd January 1999). Similarly The Hague Programme (4th and 5th November, 2004, European Council, Brussels) was in favor of harmonization of succession law and was presented as a new legal instrument covering the applicable law, jurisdiction and recognition, and administrative measures and also certificate of inheritance and register of wills.

Before the proposal was drawn-up, wide range of consultation had passed through various Committees composed of national experts from all respective fields. However the work on the new legal instrument was under the control and in charge of honored experts, there is no act which makes it possible to resolve all the difficulties appearing in the respective field. Because of this notion, there is a need to discuss the questions upon issues affected and settled by the Regulation which could be considered positive on one hand and negative on the other hand. There also raises the question whether the main aim stipulated as the role of the Regulation has been fulfilled. The anticipation of the analysis of the positive and negative issues affecting the new European legislature is the approach to main concept of the Regulation n. 650/2012 (Regulation) [5], since the mentioned issues depend thereon.

The main concept of the Regulation:

The diversity of substantive succession law and international private rules of law within the Member states presents obstacle in free movement of persons in European Union. The Explanatory Memorandum of Proposal for a Regulation [4] states that the divergence of mentioned rules even more prevents the full exercise of private property law, which is determined as the fundamental right ensured by the Court of Justice. [6]

Legal uncertainty for a person seeking to plan his succession and his heirs to prove their heirship in a foreign country are the matters to be solved. The solution should be above mentioned Regulation, which has already entered into force on the16th of August, 2012 but will directly affect the cross-border successions on or after the 17th August 2015. Up to the character of the Regulation, this legal act is a package of unified rules guiding issues of jurisdiction, an applicable law, a recognition and an enforcement of a decision and an authentic instrument in the matters of succession and creation of European Certificate for Succession. [7]

The Regulation, new legal instrument in the field of succession on European level, is not determined to have any effect on the national substantive succession law concerning the status or rights and duties of the heirs upon the succession. [8] Therefore, the purpose of The Regulation is not to harmonize or unify the substantive succession law or private property law. Legal scholars and expert lawyers are skeptic about the idea of harmonization or unification of the law of succession in Europe. They support the idea that it is not possible in the current stage, neither in the near future, to think of unified European Union law of succession, which would be common throughout the community. [9]

Urve Liin stipulates in his article that the goal of European Union was to promote a vibrant common marker and "economic activities" throughout the Community, not to promote uniform succession law. There is no doubt up to this statement. The main aim of the Regulation is to settle the successions with cross - border implications within The Union speedily, smoothly and efficiently and to guarantee the right of heirs to demonstrate their heirship in another Member states. There is not seen the perspective for harmonization or unification of substantive law in the current stage of development. The inadmissibility of harmonization in this field is supported also by the argument of the loss of cultural identity up to the fact that succession law is deeply rooted in culture of the certain state. The issue of this statement may be considered arbitrary. However on one hand there could be find certain relevance of the statement, on the other hand there must be stipulated that succession law is not as static as it used to be. European legal systems in succession law have undergone many reform changes, and are not any more resistant of an influence of the law of their neighboring country or the Community. Therefore European countries have already lost part of their culture and national individuality. [7] Proposed tendency supports the fact that several legislative changes of private substantive has been observed in certain Member states as the result of adaption of new national legal acts of private law. This phenomenon can be defined as spontaneous harmonization of substantive law. There can be presumed that those changes have a close connection to the Regulation. The great example of the phenomenon of spontaneous harmonization is the recent codification of legal acts of private law in Czech Republic. The convergence that has direct connection to a new European legislature in the field of succession can be seen firstly, in the settlement of renewed type of disposition of property upon death, concretely agreement as to succession, secondly, the switch of connecting factor of Private International Law from "nationality" to "habitual residence".

A spontaneous harmonization can be considered as the sideway success in the fulfillment of the main aim of the Regulation – creation of "area of freedom, security and justice". In order to obtain this result, it was inevitable to settle the rules that are equitable and provide great level of predictability and make easy and efficiently its application. The question is whether these rules are sufficient to reach the purpose of the Regulation. The right answer to this question may secure only legal practice. In the current stage there can be stipulated only the discussion based on predictability, which comes from legal theory and doctrine. In order to come to the conclusion of fulfillment of the main aim of the Regulation, next chapter provides

the analysis of issues that have affected negatively the creation of set of common rules, consequently analysis of issues settled by Regulation that should be considered.

2. Issues that have affected negatively the Regulation

The process of the creation of the Regulation has been confronted from the beginning with difficulties connected to the different approach to succession adopted by civil and common law the jurisdiction. According to common law jurisdiction the property which is left by deceased person is vested in personal representatives who have a duty to collect in the deceased assets, pay their debts and distribute the balance between the persons beneficially entitled. On the other hand according to civil law jurisdiction the heir of the deceased person who accepts the inheritance unconditionally is not only entitled to the deceased assets but also liable to their debts even in case the debts exceed the assets in value. Different approach to a succession law of these two different type of jurisdiction is only the basis from which the different approach precede to other several main issues, that the Regulation was up to settle. There can be mentioned for instance the provisions of forced share, claw-back rule, or a connecting factor for determining the applicable law, jurisdiction or formal validity of legal acts. [10]

The different approach of civil and common law jurisdiction to all matters mentioned, is the reason of absence of compromise solution of the issues that should be settled by the Regulation and finally not opting in United Kingdom to the Regulation.

Therefore the common law jurisdiction and civil law jurisdiction does not only differ in the approach to succession but also in several more issues mentioned in the following text upon which it is impossible to come up with a compromise as a result of a discussion.

The Issues of the Regulation that appear to be up to consideration

The Regulation presents a package of unified rules guiding issues of jurisdiction, applicable law, recognition and enforcement of decision and authentic instrument in the matters of succession and creation of European Certificate for Succession. According to a Prof. Dr. M. H. ten Wolde [11], this set of rules may be considered as "rules of private interregional law" which refer to "intra-European conflicts of laws rules". Therefore, different principles are applied for these rules than for rules of private international law. He consequently defines various differences between these two categories of rules. At the first place he stipulates the comparison of their concept. Private international conflict of law rules are determined by every certain state, therefore the set of private international conflict of law rules differs from one Member state to another. Correctly, in accordance with legal theory, Prof. Dr. M. H. ten Wolde considers these set of rules to be rules forming the part of certain national legal systems as the reflection of the national values and standards. On the other hand the "interregional conflict of law rules" has a common basis shared generally within the region of European Union. This region presents the great variety of national values and standards. I can stipulate that common basis of the "interregional conflict of law rules" is the compromise made between the Member states, taking into account that every state tries to preserve its own national values to the greatest extent possible. Common basis is therefore formed by special principles, which suppose to be autonomous for the region of European Union. These principles according to the author should be applied in "interregional conflict of law rules". First of all the main principle of "interregional conflict of law rules" is to guarantee the

confidence in each other's jurisdiction, secondly the principle of decisional harmony and finally the principle of respect for each other's culture and legal order. The question is whether we can be in favor that the Regulation and its settled issues would be in accordance with the stipulated main principles. The position upon the accuracy of the stipulated main principles of "interregional conflict of law rules" may to be taken after the analysis of various issues settled by the Regulation, which proceed in following text.

1. Determining the jurisdiction and applicable law through the general conflict of law rule based of connecting factor habitual residence

Is the habitual residence the right choice as the uniform criteria for determining the jurisdiction and the applicable law in the cross-boarder successions?

After several discussions Member states have come to a conclusion of opting for "the habitual residence at the time of death of deceased person" as the uniform rule while there is an absence of "professio iuris" (choice of law of deceased). This conclusion sets an end of duality of legal systems having a uniform rule and those making a difference between movable and immovable assets. The applicable law determined would govern the succession as a whole, covering all the assets of the estate, irrespective of their nature and their location in another Member state or in a third state.This general uniform conflict of law rule, which prevails over the Regulation was opt in instead of "nationality" or "domicile". The compromise and choice was made on the ground that the habitual residence is the most appropriate connecting factor of both movable and immovable property and raises less purpose for litigation. This notion may be stipulated on the ground of legal theory however the practice can show this phenomenon from a different point of view. [4]

The first question that should be stipulated in the connection to the general uniform conflict of law rule of "habitual residence" is its definition and the concept. Unfortunately, the legal definition of "habitual residence" does not exist on national neither on European level. Even the states would work together to create one, the result is not feasibly. Similar attempt was made as a part of work of Hague Conference on the Hague Convention of 1st August 1989 on the law applicable to succession to the estates of deceased persons. Despite of the long term discussions that went on, the result was not successful and all of the discussions ended up with frustration and solution to abandon any definition.

Here can be presented the argument of David Hayton: *"As a compromise it is easy to say that no definition is needed as we know habitual residence when we see it and that if the problem of determining the habitual residence appears European Court of Justice would resolve it and reach the satisfactory compromise"*. [12]

This statement is on the right place here. However, the definition is not to be foreseen, there must be stipulated some provisional situations that could be followed in certain cases. This kind of provision may be found in the recital of the Regulation Art. 23, which states that in order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements. In particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned, taking the specific aims of this Regulation into account. The question is whether the stipulated matters would be satisfactory and helpful in absolute way to determine the "habitual residence" of deceased person. What if "habitual residence" could not be determined by imposing the

criteria stated in the recital or two states are found to be the states of "habitual residence" of deceased person. These questions are more than desirable to be answered. It really seems that hard work would be vested in practitioners. Baiju S. Vasani and Sylvia Tonova [13] in their article righteously named the notaries, who would take care of execution of succession, the "detectives" searching for all the evidence and finding out the matters necessary to determine the habitual residence of deceased person.

In case the habitual residence could not be determined according to criteria stated in the recital or two states are found to be the habitual residence of deceased person, only European Court of Justice (ECJ) could resolve this uncertainty and reach the satisfactory compromise.

Up to the date we can find various definition of habitual residence in the explanatory part of judicial decision of The ECJ concerning habitual residence of workers, or habitual residence of a child. In general, the person is habitually resident in the jurisdiction which is the main center of his personal life and the place of his interest. [14] [15]

Consequently, the absence of clear definition of habitual residence creates uncertainty in determining the "lex successionis" (applicable law) in an absence of "professio iuris". The fact of nonexistence of the definition strengthened also the position of The United Kingdom in the question of opting in the Regulation. In adopting this European legal instrument, The United Kingdom was in the stage of moving forward in switching the connecting factor of applicable law from "domicile" to "habitual residence". Their requirement up to this issue was to have a clear definition of "habitual residence". As this requirement was not fulfilled, it was one of the reasons why The United Kingdom has not opt in the Regulation. They tried to prevent the risk of uncertainty and predictability of deceased person to plan his succession. For instance, prevent that English domiciled person who resides outside England for a certain period intending to return back in due course, would be found to have died habitually resident outside England. [10]

It is hard to determine whether the issue of uniform conflict of law rule the "habitual residence" fulfill the main principle of "interregional conflict of law rules" either the main aim of the Regulation which is predictability and easy application of the set of common rules. For sure, we can conclude that settled connecting factor presents on one hand the closer and more stable connection between succession and applicable law [16], but on the other hand it is inevitably arbitrary and less stable up to possible change of a residence of deceased. The connecting factor of "nationality" is a very stable factor upon the consideration that person can be identified with more precise by nationality than by residence. Fortunately, the law of nationality has not been completely refused.

2. Testamentary freedom of choice of applicable law of succession

According to the Regulation the testator has the right to make a choice of applicable law and determine the applicable law to his succession. The right of deceased person to plan his succession represents the guarantee of his testamentary freedom which prevails over the right of his heirs. The choice of the "lex successionis" is restricted to law of nationality of deceased person at the time of his death or at the time of making the choice and has to be made in a form of disposition of property upon death. The limitation determined can be considered as a correct choice. If the deceased would be able to choose as the "lex successionis" the law of his habitual residence at the time of making his choice, it could be undergone by misuse and frauds as the result of easy disposition with the document of "disposition of property upon death". The requirement of The United Kingdom up to this issue was to empower the right of testator to make a choice of law for special circumstances allowing him far too much

flexibility as for instance the law of closest connection. As this requirement was not fulfill it was another reasons why The United Kingdom has not opt in the Regulation.

Up to the fact that the Regulation was not able to rely on the unified substantive rules of law, because of the different approach of certain Member states to succession law, Member states had to come to a compromise of a balance between the freedom of testator and the protection of family heirs who will be in the position of beneficiaries. This issue may be considered to be the choice of policy of Member states, which empowers the party autonomy of testator and at the same time weakens the forced share right of family members and decrease its effectiveness. [7]

The issue of guarantee of testamentary freedom of deceased which prevails over forced share of beneficiaries shows that the Regulation is not able to stipulate neutral rules. On one hand the right of deceased to choose the applicable law may be considered in accordance with the main principle of guarantee of the confidence in each other's jurisdiction, and the principle of decisional harmony up to the fact that choice of law of nationality of deceased is the stable factor and therefore the identification is less problematic than in the case of "habitual residence". On the other hand concerned issue is in the breach of the principle of respect for each other's culture and legal order, in the sense that the "right of forced share" of family members cannot be literally preserved. This provision must be interpreted in the way that choice of law may refer to application of foreign law which does not sufficiently grand the right of family member beneficiaries. This could be understood in the way that family member are entitled under the foreign law to a smaller portion than under law of the forum. Can be therefore any help of application of public policy restriction to guarantee the stipulated rights of family members?

3. Public policy

Public policy is well recognized principle of rules of private international law. In general, according to private international law theory, public policy may be defined as a set of rules determined to rule out a legislation of foreign country, which is considered to be a violation of fundamental principles of the forum. [17] Slight differences in interpretation of the public policy may be seen under the set of "interregional conflict of law rules", which should have an autonomous meaning, and refers to "European public policy". European public policy may be considered as a set of rules trying to protect fundamental rights vested in European Convention of Human Rights, treaties and Charter of Fundamental Rights of the European Union. European public policy is used by European Union regulation, also in the field of succession law, as a tool for to the fight against any form of discrimination. [13]

According to the consideration of Member states, European public policy would no longer have any significance as the fact of European harmonization. This statement may be supported by many scholars, who stipulate that domestic and European public policy does not differ from each other, because all Member states are party to The European Court of Human Rights (ECHR). On the other hand, according to the idea of Baiju S. Vasani and Sylvia Tonova there is still one issue which is not protected by ECHR in field of succession law. It is the already mentioned "right of forced share". The question is therefore whether the fact that competent court must apply law, which protects family members less than the law of forum, could be determined as a violation of public policy.

Forced share may be defined as a portion of deceased's estate reserved for beneficiaries, who are generally relatives of deceased. Force share is generally unknown by common law jurisdiction and in civil law jurisdiction could be recognized the variety of legal concept of

forced share through the state. There are several levels of forced share with respect to beneficiaries and the portion of their share. In some Member states forced share guarantee the protection of succession law of descendents, in other Member states there is indeed a protection of succession law of surviving spouse and ascendants. The main issue is that the institute of forced share is not harmonized throughout European countries neither with respect to beneficiaries nor the portion of share. This may be argued as a main reason why the force share should not be covered as the violation of public policy.

Moreover, the force share is in a close connection to "Special rule imposing restrictions concerning or affecting the succession in respect of certain assets", settled by the recital of Regulation, Art. 54, states that "reserved share of the estate greater than that provided for in the law applicable to the succession under this Regulation may not be regarded as constituting special rules imposing restrictions concerning or affecting the succession in respect of certain assets". [5] This suggests that the forced share is not even determined as a special rule which imposes restriction and which is similar to a mandatory rule. There can be concluded that the forced share remains as the autonomous rule of every respective Member state and is applied to a succession case when forming part of "lex successionis".

4. European Certificate of Inheritance

The great step forward is the issue and consequently the settlement of new authentic legal document, European Certificate of Inheritance (ECI). The first main role of this authentic document is to settle succession with cross-border implications within the Union speedily, smoothly and efficiently. Secondly the role of ECI is to enable the heirs, legatees, executors of the will or administrators of the estate to demonstrate easily their status, rights and powers in another Member State, on the base of existing certificate for instance in a Member State in which succession property is located. In order to respect the principle of subsidiarity, the Certificate should not take the place of internal documents which may exist for similar purposes in the Member States. This provision must be understood in the way that ECI does not replace existing certificate in certain Member states.

Up to the fact that there exist large differences in the content of the national certificates of inheritance, the great advantage of ECI is the fact that it enables direct regulation of several of substantive requirements as for instance legitimacy of beneficiaries, protection of third party or evidentiary functions.

In the current stage, the process of the work on settlement of Register of ECS is still in progress. The confidence in each other's jurisdiction depends on its result. The subject of the discussion is over the choice between centralized of decentralized register. Both solutions: The central European register and national interconnected registers have their advantages. Either one should be helpful to preserve the main principles of "interregional conflict of law rules": the confidence in each other's jurisdiction, the decisional harmony and respect for each other's culture and legal order. Even more issue of ECS in the light of harmonization is on the interface between private international rules of law and substantive national rules of law of succession.

3. Conclusion

The solution upon the fulfillment of the main aim of the Regulation and principles of "interregional conflict of law rules" can be stipulated in the current stage, when the Regulation, which has already entered into force, but will have a direct effect on cross-border successions on or after the 17th August 2015, only on predictability of legal theory and doctrine. Many issues are still the subject worth to a broad discussion and consideration. For instance prevailing criteria of conflict rule of law of Regulation- habitual residence may cause significant difficulties even more breach of speed, smooth and efficient proceeding, which is one of the main aim of the Regulation. Following issue, testamentary freedom of deceased to choose applicable law, empowers the party autonomy of deceased on one hand and weakens the position of family member beneficiaries on the other hand. The public policy restriction cannot be of any help up to this fact. The different amount and nature of forced heirship right cannot be considered as incompatible with the law of forum. Therefore, the testamentary freedom of deceased and neither the fact that family member beneficiaries are entitled under the foreign law to a smaller portion than under law of the forum, cannot be determined as a violation of public policy. Finally the role of confidence in each other's jurisdiction, and decisional harmony should be fulfilled in absolute way by The European Certificate of Succession which is in the light of harmonization on the interface between private international rules of law and substantive national rules of law of succession.

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STRENGTHENING THE RULE OF LAW IN THE EUROPEAN UNION

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Key words: rule of law, European Union, principle

Abstract:

The presented paper deals with the question of the rule of law which is identified as a common principle - a principle that forms the very basis of cooperation in the European Union and belongs to the EU's founding values which have to be respected by all Member States but on the other hand is hardly verifiable. This paper therefore focuses on a role of the rule of law and its assurance throughout the European Union. Moreover, it reflects a recent stage of the political dialogue on the rule of law which has become more structured process aimed at elaborating a comprehensive definition of the rule of law and defining indicators which provide verifiable, credible, and comparable data among EU Member States.

1. Development and current status of the rule of law in the European Union

The rule of law is clearly a principle of a fundamental nature which aims to regulate the exercise of public power, it refers to the system where laws are applied and enforced, and is common not only to member states of the European Union ("EU" or "Union"), but also to the European Union itself. "*The rule of law is the backbone of modern democratic, pluralist societies and constitutional democracies,* […] *it means* ***equality before the law*** **[and also]** ***fairness and due process***, […] *it means ultimately* ***a system where justice is not only done, but it is seen to be done,*** *so that the system can be trusted by all citizens*." [1]

On the EU level, it was the Court of Justice which made an explicit reference to the concept of the rule of law for the first time in its judgment Les Verts [2] in 1986 when it referred to the European Economic Community as "*a Community based on the rule of law*" inasmuch as neither the member states nor its institutions can avoid a review of the conformity of their acts with its "*basic constitutional charter*," the founding treaty. [3]

Consequently, the judicial reference was followed by multiple references made to the principle of the rule of law in the EU's founding treaties. However, the formal enshrinement of the rule of law in the EU's treaties was based on the political context of the time. After the end of the cold war which appeared as the universal and permanent triumph of the Western democratic and liberal model, European countries agreed to commit themselves to promoting human rights, democracy and the rule of law as the three fundamental principles on which the "new Europe" must be founded.[4]

Presently, the most important provision referring to the rule of law, Article 2 of the Treaty on European Union [5] ("TEU"), recognizes the rule of law both as a value common to the EU member states and one on which the EU is founded. On the other hand, the rule of law is

identified as a principle in the preamble of the Charter of Fundamental Rights of the EU [6] ("Charter"). Although the TEU is referring to the rule of law as a value and the Charter as a principle, it is doubtful that those responsible for this terminological variation intended to introduce this distinction into the EU primary law.

Compliance with the rule of law is a prerequisite for the protection of all fundamental values listed in Article 2 TEU as well as for upholding all rights and obligations deriving from the treaties in general. Even though, the Court of Justice regularly stresses the importance of the rule of law as a defining element of the EU's constitutional character, there is no consensus in the EU as to its meaning. As suggested by Craig, not only is the modern literature extensive and diverse, "*there is considerable diversity of opinion as to the meaning of the rule of law and the consequences that do and should follow from breach of the concept.*" [7] In other words, if there is one thing on which everybody seems to agree, it is that the rule of law is an extensive notion giving rise to a divergence of understandings and analogous to the notion of the good in the sense that everyone is for it, but have contrasting convictions about what it is. [8] It is however not the aim of this article to analyze the meaning of the rule of law or define it, nor to compare its content in different member states.

Among references to the rule of law, two additional significant references should be mentioned. The first one contained in Article 7 TEU concerns the current member states while the second in Article 49 TEU is applicable to the countries wishing to accede to the EU.

With regard to candidate countries, Article 49 TEU provides that any European state wishing to become a member of the Union must respect and promote the values on which it is founded, including the rule of law.

Concerning the current EU member states, Article 7 TEU enables the Council to take measures against any Member State which was determined by the European Council to be guilty of "*a serious and persistent breach*" of the values referred to in Article 2 TEU. Where such determination has been made, the Council may decide to suspend certain rights of the member state in question deriving from the treaties, including its voting rights in the Council. However, obligations under the founding treaties continue to be binding on that member state. Preventive recommendations are also possible in situations where there is "*a clear risk of a serious breach*".

Action under Article 7 TEU is probably the EU's most powerful but at the same time never used enforcement tool. Firstly, the fact that there must be a clear risk or that the actual breach must be simultaneously serious and persistent, indicates that conditions for applying Article 7 TEU will be hard to satisfy. Further, an implementation of this provision is conditioned by demanding voting and discretionary power of the Council to sanction the relevant member state. [9] This aspect and also the lack of any explicit definition of the rule of law clearly show the predominant political nature of Article 7 TEU and presuppose a political judgment to establish a breach, rather than a legal one.

Moreover, the Court of Justice lacks the jurisdiction to review the legality of any decision determining that there is a clear risk of a breach of the EU's foundational principles or a serious and persistent breach of these principles. Its jurisdiction is limited to the review of the purely procedural stipulations in Article 7 TEU [10], the Court is not equipped to review the material merits of a Council decision. "*In other words, Article 7 TEU mechanisms whose main purpose is to guarantee permanent compliance with the rule of law, among other principles, may paradoxically be criticized for not fully satisfying rule of law's requirements*."[11]

The same was also confirmed by the General Court in the case Luis Bertelli Gálvez [12] when the applicant asked at that time the Court of First Instance to declare that the Commission has failed to act in not investigating the serious breach by Spain of the principles mentioned in actual Article 2 TEU. Before concluding that it has no jurisdiction to adjudicate on this action, it stated that the TEU "*gives no jurisdiction to the Community judicature to determine whether the Community institutions have acted lawfully to ensure the respect by the Member States of the principles laid down under Article 6(1) EU or to adjudicate on the lawfulness of acts adopted on the basis of Article 7 EU, save in relation to questions concerning the procedural stipulations contained in that article, which the Court may address only at the request of the Member State concerned*" [13].

On the other hand, Article 49 TEU does not limit the Court from reviewing its application what is however of a little practical significance since a fulfillment of the condition according to which all countries wishing to accede to the EU must respect its foundational values, simply grants the relevant country an option to apply, not a right to become a member state of the Union.

2. The new EU framework to strengthen the rule of law

The European Commission has been recently confronted on several occasions with crisis events in some Member States which revealed specific rule of law problems. Viviane Reding, the Vice-President of the European Commission and the EU Justice Commissioner in her speech at the Centre for European Policy Studies in September 2013 [14] specifically mentioned three cases [15] in which the EU has *been confronted with* a crisis of the rule of law in a member state and the Commission's intervention was necessary and outlined her vision for a possible new rule of law framework for the EU. The experience of these situations has been very instructive and it has shown a number of shortcomings in the tools available to remedy a true rule of law crisis.

Very recently, on March 11, 2014 the European Commission announced a new EU framework to strengthen the rule of law [16] addressing systemic threats to the rule of law in any of the EU's 28 Member States**,** a tool which is its response to calls by EU member states, the European Parliament, and civil society groups for an enhanced EU capacity to address threats to its founding values.

The Commission plays a key role in this new mechanism which establishes an early warning tool allowing the Commission to enter into a dialogue with the specific member state and it can be activated in situations which systemically adversely affect the integrity, stability and proper functioning of institutions and mechanisms securing the rule of law at the national level. On the other hand, it is not designed to deal with individual situations or isolated cases of breaches of fundamental rights or miscarriages of justice. If no solution is found, application of Article 7 TEU will always remain a possibility for ensuring compliance with EU values. Therefore, this new tool is not an alternative to action under Article 7 TEU, but it precedes and complements it, as well as it is complementary to infringement proceedings. Moreover, the new framework does not provide any new competences for the Commission but it contributes to the fulfillment of the role of the Commission as the guardian of the treaties and the Union's values.

Since this mechanism enables to prevent emerging of a serious and persistent breach of the rule of law and initiating the use of Article 7 TEU, it can be called as a pre-Article 7 procedure. The process includes three stages.

Firstly, the Commission collects and examines all the relevant information and makes an assessment. If it supposes the existence of a systemic threat to the rule of law, it will initiate a dialogue with the relevant member state by sending its opinion which can be considered to be a warning to which the member state has a possibility to respond. Consequently, unless the matter has been already satisfactorily resolved, the Commission will issue a public recommendation instructing the resolving of problems identified within a fixed time limit and informing the Commission of the steps taken to that effect. In a third stage, the Commission will monitor the follow-up given by the member state to the recommendation. In case of no satisfactory follow-up within the specified time limit, mechanisms under Article 7 TEU may apply.

For purposes of the new mechanism, it was necessary to attempt to define the concept of the rule of law. A broad definition was accepted, based on the case law of the Court of Justice and the European Court of Human Rights. The Court of Justice has highlighted several general principles of law which are linked to the rule of law. [17] Among those which need to be mentioned are the principle of legality which includes a transparent, accountable, democratic and pluralistic process for enacting laws, and legal certainty which requires that adopted rules are clear and predictable and cannot be changed retrospectively. The principle of the rule of law also includes an independent and effective judicial review, respect for fundamental rights, separation of powers and the prohibition of arbitrariness of the public power and makes sure that every intervention of a state has a legal basis and is constrained by law. Further, equality before the law which is emphasized as a general principle of the EU in the case law of the Court as well as in the Charter can be definitely implied in the rule of law.

3. More ambitious proposals for the future of the rule of law

Although, we need to appreciate efforts and ongoing discussion with regard to such an important question which the rule of law in the EU definitely is, at the same time it is not sure whether the Commission's awaited rule of law mechanism is designed to make big improvements and bring real results.

The Commissioner Reding made very interesting and constructive proposals for the strengthening the rule of law in the European Union which are however too significant, much more ambitious and therefore less realistic to achieve.

Among the future proposals could be the extension of the jurisdiction of the Court of Justice to Article 2 TEU, allowing the Court to hear cases on alleged breaches of any of the common values enshrined in this Article, including the rule of law. Also, a treaty amendment could be adopted simplifying conditions for activating the Article 7 procedure. This could include for example specific powers of the Commission to gather information and issue sanctions regarding the rule of law violations before the political Article 7 decisions.

Another possibility for strengthening the rule of law in the EU would be to extend the mandate of the EU Fundamental Rights Agency which can currently only analyze fundamental rights issues at the Union level and is not allowed to analyze or criticize national situations. The Council has even refused to amend the mandate of the Fundamental Rights Agency to include the justice and home affairs policies, as would be logical now after the Lisbon Treaty has entered into force. [18]

Probably the most ambitious treaty amendment would be abolishing the Article 51 of the Charter which currently limits the scope of application of the Charter "*to the institutions,*

bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law", so as to make all fundamental rights directly applicable in the member states. This would however make possible to bring infringement actions for violations of fundamental rights by member states even if they are not implementing the EU law which is quite federalizing step.

We believe that these proposals are not only interesting but they would bring solutions to certain EU problems. On the other hand, they are not easy to achieve because they require further conferral of competence to the EU and to judicial institutions of the Union and at the expense of the sovereignty of member states.

4. Conclusion

Although definitional debates on the meaning of the rule of law have proved to be long and inconclusive, and the compliance with this principle is hard to measure, the discussion on the strengthening of this concept in the European Union in practice does not cease.

The newly adopted EU framework to strengthen the rule of law complements the existing mechanisms and supports informal measures, e.g. a dialogue with the member state in question, followed by an assessment. It is however questionable if the difficulty to resolve a possible rule of law crisis in a member state and effectively uphold values of the EU which were affirmed by all member states and not only by the EU in some Abstract: sense, is not a consequence of a lack of effective available tools but rather a lack of political will.

Finally, it needs to be remembered that giving practical meaning to the principle or value of the rule of law is a shared responsibility which should be upheld not only centrally by the EU institutions and the Court of Justice, but also by national legal system and national courts as **decentralized EU courts**.

Literature

[1] Speech of REDING, V.: "*The EU and the Rule of Law – What next?*" at the Centre for European Policy Studies, Brussels on September 4, 2013, European Commission - SPEECH/13/677, available online: http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm?locale=en [cited May 27, 2014].

[2] This case had been initiated by the question whether it was possible under the treaties to sue the European Parliament for an alleged illegal action even though the Parliament was at the time not mentioned by the text of the treaty as one of the possible defendants in an action for annulment. The Court of Justice therefore had to go beyond the wording of the law to find an answer in the main principles on which the EU is founded.

[3] Case 294/83 Parti écologiste 'Les Verts' v. European Parliament [1986] ECR 1339, para. 23

[4] PECH, L.: *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper 04/09, New York: New York University School of Law, 2009, p. 17. ISSN 1087-2221

[5] "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons*

belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

[6] "*Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law*."

[7] CRAIG, P.: *The Rule of Law*. Appendix 5 in House of Lords Select Committee on the Constitution. Relations between the executive, the judiciary and parliament. HL Paper 151 (2006-2007), available online: http://www.publications.parliament.uk/pa/ld200607/ldselect/ ldconst/151/15115.htm [cited May 29, 2014].

[8] TAMANAHA, B. Z.: *On the Rule of Law. History, Politics, Theory*. Cambridge: Cambridge University Press, 2004, p. 3. ISBN 978-0521604659

[9] The determination of whether there is a clear risk of a serious breach requires firstly a proposal by one third of the member states, by the Parliament or the Commission, and further the consent of the European Parliament and a majority of four fifths in the Council. Regarding the determination of an existing serious and persistent violation, the same conditions apply with two differences - the European Council is supposed to act and it must do so by unanimity. For further rules on the voting the purposes of Article 7 TEU, see Article 354 of the Treaty on the Functioning of the European Union.

[10] Article 269 TFEU stipulates that "*[t]he Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article. Such a request must be made within one month from the date of such determination*."

[11] PECH, L.: *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper 04/09, New York: New York University School of Law, 2009, p. 66. ISSN 1087-2221

[12] Case T-337/03, *Luis Bertelli Gálvez v. Commission* [2004] ECR II-1041

[13] Para. 15 of the order

[14] Speech of REDING, V.: "*The EU and the Rule of Law – What next?*" at the Centre for European Policy Studies, Brussels on September 4, 2013, European Commission - SPEECH/13/677, available online: http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm?locale=en [cited May 27, 2014].

[15] The three cases identified by the Commissioner Reding as the recent rule of law crisis in the EU include t*he **Roma crisis in France** regarding the repatriation of* several thousand Roma originating from Romania and Bulgaria who had neither residence nor work permits, back to their countries of origin *in summer 2010; the **Hungarian crisis*** mostly concerning the **independence of the judiciary** and the new constitution of Hungary in 2011*; and the **Romanian*** constitutional ***crisis** in the summer of 2012* when the newly elected government did not respect constitutional court judgments.

[16] Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law. COM(2014) 158 final

[17] See Annex 1 to the Communication from the Commission to the European Parliament and the Council. A new EU Framework to Strengthen the Rule of Law. COM(2014) 158 fina

[18] Speech of REDING, V.: "*The EU and the Rule of Law – What next?*" at the Centre for European Policy Studies, Brussels on September 4, 2013, European Commission - SPEECH/13/677, available online: http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm?locale=en [cited May 27, 2014].

THE APPEARANCE OF LAW

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Key words: Law, form, custom, culture, esthetics, art, codex, principles, legal certainty

Abstract:

Presented article is focused on law and his theoretical aspect, therefore it depicts the law from the Abstract: point of view. It argues, if the law, as a system of values, is accepted by society only because of its form /as a legal codex/ or it possesses a natural respect, which everyone from us recognizes and obeys and so, would be for the society sufficient /in this place we mention the theory of custom by Benjamin Cardozo and compare it with the principle of legal certainty/. This comparison would bring us to the question, whether is then the meaning of law more important than the form, which it bears or vice versa. The article also presents some artistic examples from literature, trying to give the answer of what is the essence of the form?

1. Introduction

The diversity of the concept of „law" is notoriously known. When speaking about law, we can think of countless amount of law regulations and codexes, as well as we can think of pure justice, which can be formulated to a sentece: „That´s my right." This article is focused on law and its form and it controverts with an idea, if the law could achieve its glory only by possessed autoritative character and respect, without its codified order or is it the written form, which stands here as an alfa and omega.

On the other hand there is a need for objective valuation, as we live in times, when an intended motion is not even yet approved by Parliament, but some of the members of Parliament are already preparing an amendement. Did we straiten the law only to formalism? This article aims not to confirm unambiguously all the mentioned hypotesis or to deny them, but aims to present constructive approach to this topic. Is the form more important than content or is it the other way around? Do we have legitimation to ask this kind of questions?

While working on this topic, we are using esthetical form of expression as an inspiration, as its clear form depicts in a truest way the main orientation on values and stands for the symbiotic character of the content and form. More acknowledged answer is for us confirming the philosophy of Hegel, based on three moments of Absolut Geist: art, religion and philosophy. Hegel says, that art materializes the highest values of human spirit and by its own way is showing human beings what does it mean to be a bearer of these values. [52]

[52] DANTO, A.: *Zneužitie krásy. Alebo estetika a pojem umenia*. Bratislava: Kalligram 2008, s. 182.

„If you have 10 000 regulations you ruin all the respect towards law." Churchill

I was always fascinated by the very simple picture from the Bible, which left me everytime with strong emotions. The Jews are just about to stone to death the faithless woman when Jesus comes to them, croaches and starts to write something on the ground.[53] Some say, He started to write down all the sins of the people who were present, some say He started to write down the Ten Commandments. What is more important here is the fact, that Jesus was writing on the ground in the ash than the form how he did it. In this „story" is it a content, substance, which was kept for the further generations. Therefore, the content foreruns the form.

Legal theorist R. Poláček is saying by the similar words,, „that in law, we should be more aware of the content and form should just carry it, not covers it. A judgement should be based on a careful consideration, the treaty should express the real will of the involved parties and doctrinal publication should content lessons or impulse to think." [54] Connecting the initial quote by Churchil and picture from the Bibel and an opinion of a legal theorist we naturally came to the question, which we will try to answer by this essay. The question sounds: is the nature of the law created only by the legislation, by written form, or does the written form creates its own independent existence alongside the law? Can we even say that the written form „helps" to destroy legal dynamism?

When considering law not as a concept of „political will, not even as a set of moral commandements, but as a system of common rules, which are regulating social behaviour,"[55] by logic conclusion we came to the cognition, that these common rules should have the ground in some historic and philosophical determinations. Coming from the traditions, customs and they come from the /national/ culture. Similarly reacts also B. Cardozo: „Constant assumption is ruled by law, that natural and spontaneous evolution of the conventions is drawing the lines of good and evil. Slight expansion of the custom is identifying it with morality, prevailing standard of the right human behaviour, the morals of the time.. A life modelates the forms of behaviour, which got fixed one day as a law. Law preserve the matrice, which gained the form and shape from the life. "[56]

The human mankind went through a lot of difficulties during his existence and we are not entitled here to objectively judge monstrosities of the war or implacability of political systems, which came to existence throught its propagators, but what is determiningly important for us, they found its support in valid legal order. How could law legitimate something like that? Looking from another point of view: how can we judge now all the people back then who just acted according to law and legal regulations? Novelist M. Kundera asks similar question in his book „Unbearable lightness of being" but with very suggestive undertone: „Is a man innocent because he doesn´t know? .. Let's say, that in the beginning of 50ties czech prosecutor, who requested a dead penalty for an innocent man, was cheated by russian secret police and was also cheated by the governemnt of his own country. Is it possible, that today, when we know about absurdity of all the charges and some of the prosecuted were innocent, is possible that the same prosecutor defends now the clarity of his

[53] Jn 8:5-9

[54] POLÁČEK, R.: *Literární kamufláž práva a množení právnických světlušek* IN: BOBEk, M., ŠIMÍČEK, V.: Jiné právo literární. Praha: Auditorium 2011. S. 94

[55] PŘIBÁŇ, J., HOLLANDER, P. et al.: *Právo a dobro v ústavní demokracii*. Praha: SLON 2011, s. 32

[56] CARDOZO, B.: *Podstata súdneho procesu*. Bratislava: Kalligram 2011, s. 63

soul and screams from the bottom of his heart: my consciousness is clear, I didn´t know about it all, I believed! Doesn´t lie in his sentence: ´I didn´t know about it all, I believed!´ the unreparable guilt?"[57] Though, we would like to pose a question slightly in a different way: how big could be the mistake of believing in the ideals of a period?

In these kind of cases we can probably get inspiration from the main male character in the movie The Reader Michael Berg, when prosecuting the main female character Hanna Schmitz for all the acts she commited as a guard in an extermination camp, he says in a matter of her defence: „We are lawyers we should try to understand." In these terms, maybe we should try to figure out, why during the history there comes to situations, when law as a system of values fails? What does the law stand on then? Is it just plain formal expression of legal order or is it really its substance?

In one of his works polish sociologist Z. Bauman points out the „eternal" antagonism between the nature and racionality, when after all the tragedies caused by the nature, people started to focus again on belief in wisdom and rule of a man. As he himself later on states, „the catastrophe of the first world war undermined the confidence, which had been invested nearly 200 years into the wisdom and effectivity of an order, which had been built by the mankind..and questioned the whole conviction, that through this kind of order of a man, bigger goodness and justice could be achieved, than would be ever achievable by nature..First world war shows, except all the reasonable doubts, that results of the human leadership can be as well incalculable, unpredictable, blind, ruthless and reckless towards the human as the results of the leadership of the nature..and they can be even more rough and destroying. "[58]

So, what can we really imagine under the term „esence of law"? Has the law its own essence? Or is it only formally embraced in the codexes, which briefly, clearly and appropriatelly describe the social relationships? By deduction we find out is not always worthy to rely on the belief in so called „instant" recionality of lawgivers. According to this reason we will aim to recognize the core of the law, or put in other words, to recognize something, which should shape the codified regulations and what is neccessary not to neglect when creating them.

2. Custom and principles as a base of the legal certainity?

Despite the undisconformity of a hypotesis, which assumes that by the form of law we primarly mean its codex objectification, we think that is appropriate to think also about the existence of an unwritten, unsubstential form of law. Cultural habits, traditions and customs were creating the origin of the written image of law from the very beginning. „When history and philosophy don´t serve to appoint any direction to a principle, then the custom can step in this place."[59] Periodical and cultural habits of the society, which remained relatively without any bigger changes after long and significant period of time, these habits could represent the base for the creation of socially approved legal principles. These recognized principles are then applied by the defenders of justice on the procedural level. Primarly we could say, that it is a category of the time, racionality and valuable experience of the history that engrave the

[57] KUNDERA, M.: *Nesnesitelná lehkost bytí*. Brno: Atlantis 2007, s. 190

[58] BAUMAN, Z.: *Umění života*. Praha: Academia 2010, s. 67

[59] CARDOZO, B.: *Podstata súdneho procesu*. Bratislava: Kalligram 2011, s. 59

words of law into the countless codexes. The Preambel of the Slovak constitution was created at the same principles.[60]

We did state previously in a similar way, that /legal/ custom had become the basic element for creating many legal terms. The /legal/ custom plays a key role in the above quoted Cardozo´s theory, from which we derivate legal dynamism. „The obligation of a judge to declare the law in a conformity with the wit and justice looks like as a phase of his duty to proclaim law in a conformity with the custom. "[61] Considering this as a platform, we can courageously generate a hypotesis, that law is oriented on the base of a custom, which means is oriented on alived, logic and stable habitual principles of behaviour by the whole society. F. C. Savigny was following the same direction as Cardozo, he was against incorporating new ways quickly into existing legal order and claimed that only experienced custom can work in the right way. [62] Italian novelist A. Baricco reminding us the same message, but in a more poetical way, when he says, that „the connection between new and old granted a prestige. „The new" releasing from „the old" was ensuring a success. The motion of unique and creative gesture resembled blooming, which revealed the whole beauty of a seed.the gesture of a creator was valuable when led to completing „the old." "[63]

When balancing on this level of thinking, we slowly but unsurprisingly get to the term of legal certainity, which represents in the theory of a state one of the main pillars of a legal state. Can we state, that the /legal/ custom could be similar to to the principle of legal certainity? In accordance with the decision of slovakian Constitutional court /PL. ÚS 15/98/, legal certainity is defined as an essential component of a legal state. „When applying this principle of a legal certainity, we ask not only for the general validity, stability, racionality and fair content of legal norms and their availability for the public, but we also require to predict the acts of the public authorities /legal certainity/. The ground should lie in clear language and understandability of legal norms /which requires presumption, that any man could understand the sense of the legal norms/."

When we compare legal certainity with the custom, as an immanent part of law, we let ourselves to point out again the quotes by B. Cardozo, who speaks about /moral/ duty of a judge to proclaim law in accordance with the custom. The mentioned decision by constitutional court of Slovakia appeals on „the requirement of foreseeable acts of public authorities." Then is only left to our subjective consideration how deeply we can identify the principle of a legal certainity with the „predictability" of a legal custom.

3. The importance of a form

Does the form represent in a matter of law really only secondary concern is it considered only as a mediator of the values? Can we rely on the ius-natural awareness of human beings? Or should law be translated into the paragraps and therefore fortify its stability and seriousness in the society? Refering to the one of the greatest italian playwriter L. Pirandello, we adopt his

[60] „We, the nation of slovakians, remembering our political and cultural heritage of our ancestors and hundreds of experiences from the fights for the national existence and own statehood.."

[61] CARDOZO, B.: *Podstata súdneho procesu*. Bratislava: Kalligram 2011, s. 89

[62] GÁBRIŠ, T.: *Definícia veci a výzvy modernej vedy* IN: Justičná revue 4/2008. Roč. 60, s. 53

[63] BARICCO.A.: *Barbari.* Bratislava: Kalligram 2011, s.175

statement, that „we only can recognize something, when we can give a form to it.“[64] It is the same postulate with the law in the society. To recognize a legal order and to obey it in a sense „ignorantia juris non excusat“, codiefied regulations are neccessary to grant the function of a society. The importance of a form lies in giving to the legal principles and categories /as for instance to justice, equity, truth./a substance to shape them to categorical imperatives. We would like to state in this particular situation opinions of theorists in an art field, C. Freeland and Goodman, who think that every form broaden our perception of the world and /art/ can fullfil the same criterion than which ensure the success of scientific hypotesis. Explicitness, simplicity and especially the accuracy of a realization.[65]

We devote ourselves to interdisciplinarity with art and law in this article intentionally, because according to our opinion, both fields stand for the same values and try to formulate them and express into concrete and transparent form. The art presents visually, that some artistic medium can by the bearer of a deep thoughtful fundament in a very simple performance, obeying strictly all the formal features. „..similarly as seen on other pictures, the formal features neutralize inner emotional impression. The size of Triptique refers to religious icons and altar painitngs. The pain is balanced by static composition using dark, unconventional colours.. Bacon´s painitngs are the manifst of a form.“[66] On this /artistic/ example we could clearly see, how the sense and emotions have to subordinate under the prescribed standards of the form. The legislative proceedure has to fulfill the requirement of racionality to become binding and respected and also the requirement of a formality. Decisions of a court follow the same patterns, especially when considering the second-level proceedures. Respected lawyer J. Drgonec says, that the application to initiate a legal action has to contain prescribed requirements. The application, which therefore doesnt contain binding requirements ordered by law is not able to evoke the legal proceeding. Every single application has to contain general requirements, without any further exemptions. General requirements are about the form and content of an application.[67]

When we continue in a level of interdisciplinarity, we would like to refer to an opinion of legal theorist M. Škop, according to whom „the form is a construction, which carries the meaning and therefore is no less of an importance than the meaning..Literature can offer to judge not only the form. Literature can help him to state through the form what he exactly intends. To express the real state of the case by exact pictures and simultanously describe the legal opinion, which the judge created, than this exactness is unambiguously given by the form. “[68]The defence of a form and literature as a potential bearing construction of a judge´s decision made by Škop is for us definitely very inspiring. But above quoted italian playwriter Pirandello asks in a matter of the context of a form, that „what kind of knowledge do we speak about? Does the form represent a thing itself?“[69]

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[64] PIRANDELLO, L.: *Jeden, žiaden, stotisíc*. Bratislava: Európa 2009, s. 40

[65] FREELANDOVÁ, C.: *Teorie umění*. Praha: Dokořán 2011, s.137

[66] FREELANDOVÁ, C.: *Teorie umění*. Praha: Dokořán 2011, s. 125

[67] DRGONEC, J.: *Konanie pred Ústavným súdom Slovenskej republiky*. Šamorín: Heuréka 2008., s. 65

[68] ŠKOP, M.: *Právo a vášeň. Jazyk, příběh, interpretace*. Brno: Muni Press 2011, s. 117-118

[69] PIRANDELLO, L.: *Jeden, žiaden, stotisíc*. Bratislava: Európa 2009, s. 40

4. Short conclusion

We could discuss this dispute about the importance of a form or materia even more closely, but the results would not be clearer in a sense of resolving the issue completly. Therefore we came to conclusion, that despite of importance and relevance of a form, we still think that form should only „carry" the meaning, and therefore to confirm and validate its existence. In these terms legal order serves as a great example. When complementary supplying the form with an essence, it definitely has its own foundation and the situation, when the form consumes the whole meta-content should never happend.

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TOWARDS JURISTOCRACY IN THE JUDICIAL COUNCIL OR "AGAINST" THE JUDICIAL COUNCIL

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Key words: Judicial Council, Juristocracy, judicial power, administration of justice, justify-cation

Abstract

The institution of the Judicial Council has been mentioned in the media quite often recently. This is mostly due to the fact that the government intends to make constitutional changes within the judiciary, whereby these changes might well affect the Judicial Council as well. More specifically, the government (among others) wants to separate constitutionally the office of the chairman of the Judicial Council and the office of the Chief Justice of the Supreme Court. What significance would this amendment have? Why should this separation of offices be so important within the judicial power? When searching for the right answers to these questions we have to return to the very foundations of the Judicial Council, to the circumstances of its creation, its constitutional footing, its position within the judicial power and its competences.

The Council itself is a relatively young institution within the Slovak constitutional system. Originally, Slovakia applied the Austrian system of administration of justice with the Minister of Justice as the main authority. Influenced by the EU´s recommendation as a reaction to "demokratura" in the mid-1990s, the Euro-amendment of the Slovakian Constitution in 2002 introduced the Judicial Council with strong personal powers over judicial personnel. Its design combines "ratio and voluntas" components.

The main goal of this article is to present the position of the Judicial Council within the judicial power, its main competences, circumstances of its creation and significance through the prism of legal literature, legislation as well as some decisions of the constitutional courts. The thesis of the article is whether and how decisions of the Judicial Council should be justified, and so whether in Slovakia the sentimental attachment to the Austrian system is justified. The article also deals with the historical need for creation of the Council.

JEL classification: K30

1. Introduction

"There is as yet no liberty if the power of judging be not separated from legislative power and the executrix." [1] (Ch. Montesquieu)

There is a paradigm scrolling through the idealistic and cultural heritage of the European civilization according to which the independence of the courts and judges is one of the most important guarantees of human freedom. Only truly independent and impartial judges can ensure the protection of rights of citizens and the society itself.

The principle of independence of the judicial power and the separation of its execution from other public authorities is established in Article No. 141 of the Constitution of the Slovak Republic. [2] However, in the near past, there was a huge influence of the executive power on the judicial power because the Constitution - until its so called „Great Amendment" [3] came into force on July 1st 2001 – anticipated that the nomination of the candidates for judicial offices and the decision on their course of service (except for the actions of the Chief Justice of the Supreme Court) was subject to the government´s competence. These competences were in the exclusive power of the Minister of Justice as the representative of the executive power. The point of this establishment was the principle of the political responsibility of the Minister of Justice for the operation of the judicial system. Despite the relatively high expectations from the side of judges, the councils of judges and the Judicial Council of the Slovak Republic founded by Act No. 307/1995 Coll. did not, and possibly could not become the true representatives of the judicial power and its interests, most probably due to the fact that these institutions had only advisory powers towards the government. Therefore, their proposals, opinions and recommendations were often rejected or not respected without any obligation to justify this kind of ignorance from the side of the executive power. This problem was pointed out e.g. by the Expert mission of the European Commission in 1997 according to which one of the main problems of the jurisdiction was „the absence of self-administration of the judiciary, and on the contrary, its complete dependence on the executive power". [4] The unrestricted authority of the Minister of Justice to nominate and to recall the chairmen of district- and regional courts and their deputies along with his authority in the field of case assignments, evaluation of judges, deciding on composition of the disciplinary senates, etc.- gave to the executive power a chance to pursue its own interests right through the chairmen of any general court. Until the Great Amendment of the Constitution came into force, there had been also absent the constitutional establishment of a representative body representing the judiciary in a way as it was already established in the case of the legislative and executive powers.

2. Founding the Council and its first issues: the issue of „judicial proportionality"

It was the Great Amendment which was meant to resolve the mentioned shortcomings by founding the Judicial Council in Article No. 141a of the Constitution. The incorporation of the Judicial Council into the Chapter 7 of the Constitution emphasizes its independent status from the legislative and executive powers and it also denotes the real constitutional implementation of the constitutional principle of independence of the judicial power and the separation of its administration from other governmental bodies. This approach also meets the demand of Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges (adopted on 13 October 1994) [5] on the independence of the authority responsible for selection and career of judges from the executive government and the state administration.

Achieving the above mentioned goals and principles should have been reached also by the constitution of the 18 member Judicial Council in which half of the members (9) is generated from the delegates of the judges elected by their colleagues in a way ensuring the broadest possible representation of the judges from every level of the jurisdiction as it has been

predicted by the general principles of the European Charter on the Statute of Judges. [6] On the grounds of the mentioned constitutional adaptation of the Judicial Council, the Chief Justice of the Supreme Court becomes the Chairman of the Judicial Council whereby the rest of the council consists of 8 judges from other courts, 3 members elected and recalled by the National Council of the Slovak Republic, 3 members nominated by the President of the Slovak Republic and 3 members nominated and recalled by the Government of the Slovak Republic. [7]

However, the Constitution does not govern who shall represent the President, the Parliament or the Government. It has already resulted though from the explanatory report of the Great Amendment of the Constitution that: „The National Council and the Government will be entitled to delegate to the Judicial Council their own members or some other responsible persons. Theoretically, the President could decide to become a member in the Council himself. However, it is more likely from practical reasons that he will nominate his delegates to this body, - persons who will not only understand the issue of the judicial power (significant experts in the field of legal theory or the representatives of other professional associations of lawyers), and also persons who enjoy the President's trust". [8]

After twelve years of functioning of the Judicial Council we can state that the main goals of the legislator with its establishment have not been fully achieved. First of all, if the legislator anticipated the election and/or nomination of only 9 judges into the eighteen members Judicial Council to avoid corporativism and not to lose completely the indirect influence of the other society on the administration of jurisdiction, - this aim has not been surely completely achieved. As a matter of fact, already in the first electoral term of the Judicial Council (from 2002 to 2007) the Parliament, the Government and the President elected or nominated to the Council judges of general courts too and through this they infringed the balance within the council in behalf of the judges in a proportion of 12:6. In other words, the aim of nominating only nine judges to the Council did not secure the many-sidedness of views and opinions on the issues of the Council, and it did not prevent the possible subjective views and asserting of particular interests in the decision making of the Judicial Council. Similarly, in the second and third term of office of the Judicial Council the Parliament, the Government and the President kept nominating judges in addition to the nine judges already nominated by the judicial power, and this way the Judicial Council got "under the control" of judges. This leads us to the conclusion that if the Parliament, the President and the Government do not fulfil the real aim and idea of creating the Judicial Council nominating there also other members than purely judges, they might push the administration of the judiciary towards a closer and more corporativist level, and if this nomination attitude does not change, the judiciary might be labelled by the critical concept of „juristocracy".

3. The position of the Judicial Council - purely administrative or partly decisive institution?

The Judicial Council is a relatively young institution within the scope of the Slovak legal order; it was only implemented by the Great Amendment of the Constitution in 2001 and subsequently on a legislative level by Act no. 185/2002 Coll. on the Judicial Council of the Slovak Republic and on amendments of certain Acts. [9] It is, however, an interesting fact that neither the Constitution nor the Act on the Judicial Council do not contain any fundamental definition of the Judicial Council itself. The Judicial Council, as it is established in the Constitution and specified in the legislation, was never theoretically

precisely defined or dogmatically entrenched from the point of view of its role or character, and for that reason it is difficult to find its constitutional characteristics. After all, it was the Constitutional Court that has specified the Council as an institution *„sui generis"* [10]. One of the most important powers of the Judicial Council is - among others - to submit to the President of the Slovak Republic proposals of candidates for appointment to the judicial office or proposals aimed at recalling of judges from their offices. [11] The power of the Judicial Council to propose recalling of a judge under certain conditions eliminates any chance to evolve pressure on the judges that contributes to their required independence. However, it has not been clear until now in the case-law of the courts - especially in the Constitutional Court case-law, – whether we may speak in the case of the Judicial Council about a constitutional authority of judicial character which has the obligation to justify its decisions and/or resolutions, or it is more a type of institution of governmental character that is not obliged principally to justify its decisions. In the case of the Constitutional Court No. II. ÚS 29/2011 [12] the subject of the applicant's constitutional complaint was a circumstance when the Judicial Council decided about the issue of proposal to nominate the applicant for judicial office by a single voting without interpreting any identifiable reasons of the decision-making, or more precisely, without justifying its decision in a non-discriminatory approach and by reasons within the legal framework. In the Constitutional Court's opinion presented in the aforesaid decision: „the configuration of the Judicial Council evidently manifests a constant search for the right figure of (non-)justifying its decisions. The Constitutional Court in its decision No. III. ÚS 79/04 presented an opinion according to which the decisions of the Council as the results of a voting of a public authority is a *factum juridicum* of public law in the form of a decision addressed to the President. It is, however, not an individual legal act (as a result of action of a competent authority as to which entitlements and obligations of several persons are established, altered or abolished, or occasionally authoritatively determined), but a special class of legal procedure. The results of votings related to creations of the public or constitutional actors (not only decisions of the Council on the proposals of candidates for appointment to the judicial office to the President) do not need any reasoning, whereby it is not possible to make the voters responsible for their voting. (...) The Constitutional Court applied these outputs also in several other analogical cases (such as III. ÚS 128/09)." [13] However, the legislator immediately reacted to the aforementioned interpretation of the Constitutional Court with an amendment of the Act on the Judicial Council. In terms of the governmental amendment draft of the Act on the Judicial Council § 6, Section 6 of the Act should have had the wording as follows: *„All resolutions of the Judicial Council shall be reasoned. The Judicial Council is obliged to ground its resolutions convincingly. Written forms of the Judicial Council resolutions related to rights and interests of judges protected by law shall contain a reasoning in which the Judicial Council shall reason its considerations leading it to the legal evaluation of the issue".* [14] In the second reading of this amendment, a Member of Parliament supporting the coalition government proposed to change this version of the amendment as follows: *„Audio recordings and minutes shall be made of each meeting of the Judicial Council; The records, - beside the attendance, the agenda of the Judicial Council meetings and the content of the adopted resolutions, - shall also contain the following: the content, the course of the deliberations, the opinion of the members of the judicial council on particular points of the agenda and the result of voting on particular points of the agenda of the Judicial Council meeting in a way that the minutes obviously indicate what kind of considerations the judicial council members followed during their decision-making".* [15] The submitter of the modification proposal has reasoned the proposed changes in a way that while respecting the discussions on the issue of reasoning the Judicial Council´s resolutions and the reservations on the technical opportunities of elaboration of the reasoning to all its resolutions, - he would propose instead of these approach to record the

course of the deliberations of the Judicial Council in more details, including the opinions of the Judicial Council on the discussed issues. All this should happen in a way that the minutes clearly show what were the specific considerations the Judicial Council applied during its decision-making on the issues subject to its jurisdiction. [16] This was the version of the bill finally adopted after the President's veto. [17] Adopting this amendment, the legislator has found (this time) the balance between the independence or autonomy of the Judicial Council (as it is found in Article 141a of the Constitution) on one hand, and its own responsibility and transparency on the other one. So the Constitutional Court did not have any reason to doubt about the balance adjusted by the legislator (cp. also II. ÚS 269/09) and decided to take the legislative changes into account while deciding on the merits of the case. It has also stated that generally from the point of view of the constitutional law resulting from the responsibility, or rather accountability of the Judicial Council, it is the right of the candidate to apply for the appointment to the judicial office under equal terms. The Constitutional Court already stated in relation to the Judicial Council in the past that the absence of a proper method or form of execution of its powers does not mean that there is no implicit demand for objectivity (from which arises the demand for adequate transparency) in the actions taken by the public authorities (II. ÚS. 5/03). The Constitutional Court has also constantly adjudicated that the prohibition of arbitrariness linked with the demand of objectiveness as its negation - is one of the self-evident attributes of the material state governed by the rule of law (cp. PL. ÚS 52/99, PL. ÚS 49/03, PL. ÚS 1/04, PL. ÚS 12/05). The fact that the Judicial Council always performs secret voting does not mean yet, it is not possible to satisfy some implicit demands for objectivity, as for example by hearing the candidates for the judicial offices, publishing the minutes of the Judicial Council deliberations, arranging public meetings, publishing the audio recordings of the meetings, or by some other analogical reasoning of its decisions. [18]

4. Conclusion – recent changes and their possible effect

The relevant legal literature most commonly describes the Judicial Council as the „constitutional body of judicial legitimacy and the guarantee of the independence of the judicial power". [19] Recently, the institution of the Judicial Council has become subject to many discussions among the Slovak scholars. It is especially due to the fact that the current government has very recently made several changes within the judiciary whereby the changes have concerned also the Judicial Council. Among others, with the recently adopted amendment of the Slovak Constitution there was created a constitutional separation of the office of the Chief Justice of the Supreme Court from the office of the Chairman of the Judicial Council. [20] What is the significance of this amendment? Why is it important at all? The main reasoning of the reporters of this constitutional amendment is that the separation of these two offices within the scope of the judicial power could avoid the concentration of powers in the hands of one single person; - however, it might not bring really significant changes into the functioning of the Judicial Council, or, if it does, it is not clear in what way it could change significantly the functioning of the Judicial Council: that is why, only time (and perhaps the possible future case-law of the Constitutional Court in this issue) could show if this separation is effective at all, or if it is just a symbolic change within the administration of the judiciary.

In the light of the historical circumstances of its creation and its current main issues including the above mentioned recent legislative changes we can conclude that it is out of question that the Judicial Council - as a truly important constitutional institution - still has to go through an extensive development to be able to fill its commitment and aim which is the creation of the

most proper conditions and circumstances for the execution of judicial self-administration within the framework of the judicial powers besides preserving the independence of the judicial power and the system of general courts in the Slovak Republic.

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[3] Constitutional Act No. 90/2001 Coll. of March 17th 2001

[4] The Report of the European Commission Expert Mission and the Slovak Ministry of Home Affairs of November 1997

[5]https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=534553&SecMode=1&DocId=514386&Usage=2

[6] The Council of Europe European Charter on the Statute of Judges and Explanatory Memorandum from July 8th – 10th 1998: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf

[7] Article No. 141a (1) of the Constitution of the Slovak Republic

[8] Explanatory report of May 25th 2000 on adopting of Constitutional Act amending the Constitution of the Slovak republic, Parliamentary print nr. 643, Second electoral term, p. no. 156.

[9] Act no. 185/2002 Coll. on the Judicial Council of the Slovak Republic and on amendments of certain Acts of April 16th 2002

[10] Decision of the Slovak Contitutional Court no. I. ÚS 62/06 of March 1st 2006

[11] Article No. 141a (4)(a) of the Constitution of the Slovak Republic

[12] Decision of the Slovak Contitutional Court no. II. ÚS 29/2011 of December 13th 2012

[13] ibid. Section No. 10.1

[14] Parliamentary print No. 59, Fifth electoral term

[15] ibid.

[16] Decision of the Slovak Contitutional Court no. II. ÚS 29/2011 of December 13th 2012, Section no. 10.2

[17] Parliamentary print No. 174, Fifth electoral term

[18] Decision of the Slovak Contitutional Court no. II. ÚS 29/2011 of December 13th 2012, Section No. 11

[19] e.g.: Posluch, M.; Cibulka, Ľ.: Štátne právo Slovenskej republiky. Šamorín : Heuréka, 2003. ISBN 80-89122-07-8

[20] At the time of publishing this article the described amendment has not been yet published in the Slovak Collection of Laws, therefore we refer to Parliamentary print No. 921, Sixth electoral term.

DIE ENTWICKLUNG DES PRINZIPS DER SCHADENSHAFTUNG VON EU-MITGLIEDSTAATEN FÜR UNIONSRECHTSWIDRIGE GERICHTLICHE ENTSCHEIDUNG: KÖBLER V. REPUBLIK ÖSTERREICH

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Schlüsselwörter: Köbler-Entscheidung, Staatshaftung für Schäden, judikatives Unrecht

Abstrakt:

Der Artikel widmet sich der Grundsatzentscheidung des Gerichtshofs der Europäischen Union (vormals „Gerichtshof der Europäischen Gemeinschaften“) in der Rechtssache C-224/01 – Gerhard Köbler gegen Republik Österreich, in der die Kriterien für die Haftung des EU-Mitgliedstaats für Schäden, die durch eine unionrechtswidrige Entscheidung eines innerstaatlichen Gerichts entstanden sind, formuliert wurden. Die Autorin des Artikels weist auf die Wichtigkeit und den Beitrag dieser Entscheidung hin, wie auch auf die Kritik die an dieser Entscheidung im Hinblick auf die Einhaltung bestimmter Rechtsgrundsätze geübt wurde.

1. Einführung zur Haftung des EU-Mitgliedstaats für Schäden im EU-Recht

Die Europäischen Gemeinschaften (im Folgenden als "EG" bezeichnet), sowie später die Europäische Union (im Folgenden als "EU" bezeichnet), wurden von den Gründungsstaaten zur Erreichung gemeinsamer Ziele und Interessen gegründet. In diesem Sinne betont der Art. 3 Abs. 1 des Vertrags über die EU (im folgenden als "EUV" bezeichnet) als grundlegendes Ziel der EU *„den Frieden, ihre Werte und das Wohlergehen ihrer Völkern zu fördern“* und zählt in weiterer Folge verschiedene politische, kulturelle, soziale und wirtschaftliche Ziele auf, wobei es sich hierbei um eine der wesentlichsten Bestimmungen der Gründungsverträge handelt.[70] Zur Verwirklichung der Vision der Erreichung gemeinsamer Ziele und Fortschritte war es jedoch notwendig sicherzustellen, dass die EG/EU-Mitgliedstaaten (im folgenden als "Mitgliedstaaten" bezeichnet) ihre sich aus dem EG- bzw. später EU-Recht ergebenden Verpflichtungen ordnungsgemäß erfüllen. Zum Zwecke der Durchsetzung der gemeinsam angenommenen Regeln wurden bestimmte Verantwortlichkeitsmechanismen entwickelt, die die EG- bzw. heute EU-Institutionen, die Mitgliedstaaten und nicht zuletzt den Einzelnen schützen sollten. Eine wichtige Rolle in diesem Prozess spielte das Vertragsverletzungs-

[70] Karpat, A.: Vízia Európskej komisie o komplexnej európskej medzinárodnej investičnej politike. In: Verejná správa a regionálny rozvoj, Jahrgang VIII, Nr. 2, S. 118, 2012

verfahren, im Anschluss an dem sich das Institut der Haftung der Mitgliedstaaten für Schäden, die den Einzelnen durch Verstöße des EU-Rechts verursacht wurden, zu entwickeln begann.

Der Grundsatz der Haftung des Mitgliedstaats für Schäden entwickelte sich Jahrzehnte bis zu seiner heutigen Form. Entscheidend hierbei war die Rechtsprechung des Gerichtshofes der Europäischen Gemeinschaften (heute „Gerichtshof der EU", im folgenden als „Gerichtshof" bezeichnet), der gemäß Art. 19 Abs. 1 EUV *„die Wahrung des Rechts bei der Auslegung und Anwendung"* der EU-Gründungsverträge sichert, sodass ihm die alleinige Kompetenz zur verbindlichen Auslegung des gesamten EU-Rechts zusteht.[71] Von den ersten Andeutungen des Gerichtshofes, dass die Mitgliedstaaten die negativen Folgen der Verletzung von EU-Recht auch mit Hilfe des Schadensersatzes beseitigen sollten, bildete sich im Laufe der Zeit ein relativ klar formuliertes Konzept der Staatshaftung für gerichtliche Entscheidungen. Das Institut der Staatshaftung für Schäden entwickelte sich aus der Rechtsprechung des Gerichthofes, wobei es bis heute (im Gegensatz zu der Schadenshaftung der EU) seinen Weg in das geschriebene EU-Recht nicht Eingang fand. Die Tatsache, dass obwohl das Prinzip der Schadenshaftung der Mitgliedstaaten nie ausdrücklich in den Verträgen verankert wurde, seine Existenz und die genauen Bedingungen ihrer Entstehung jedoch durch den Gerichtshof wiederholt betont wurden, verursachte im Hinblick auf seine Akzeptanz durch die Mitgliedstaaten wesentliche Probleme.

Das Konzept der Schadenshaftung des Mitgliedstaates wurde auf Grundlage von mehreren Generationen von Entscheidungen des Gerichthofes herausgebildet, in welchen die Formen der Schäden, die Bedingungen der Haftung oder der Umfang der Haftung des Mitgliedstaates für die Handlungen in seinem Namen handelnden Organe, angeführt wurden. Im Bezug auf das letztgenannte Kriterium sah sich der Gerichtshof, nachdem er bereits die Schadenshaftung bei unionsrechtswidrigen Handeln der Legislative und Exekutive zugestimmt hat, mit der heiklen Frage der Anerkennung der Staatshaftung für judikatives Unrecht konfrontiert. Der Grundsatz der Haftung des Staates für Schäden, die dem Einzelnen durch den Verstoß gegen das EU-Recht entstanden sind, wurde vom Gerichtshof erstmals in der Entscheidung im Fall Köbler formuliert (im folgenden auch als „die Entscheidung" oder „die Köbler-Entscheidung" bezeichnet).[72]

Im folgenden Beitrag wird kurz der Sachverhalt des Falls Köbler geschildert und dann die Aufmerksamkeit jenen ausgewählten problematischen Aspekten gewidmet, die mit der Köbler-Entscheidung zusammenhängen. Analysiert werden die Grundsätze der Rechtssicherheit und der Rechtskraft (*res judicata*) im Kontext der Möglichkeit der Erhebung einer Schadensersatzklage, wie auch die Frage der Unabhängigkeit der Justiz und die Position des Gerichtshofes bezüglich der nationalen Gerichte. Im Beitrag werden jedoch die spezifischen Bedingungen für die Entstehung der Staatshaftung, sowie die Fragen der Beschränkung der Freizügigkeit der Arbeitnehmer, die ebenfalls mit der Entscheidung zusammenhängen, nicht behandelt.

[71] Karpat, A.: Die Vorlagepflicht von Vorabentscheidungsfragen durch slowakische Gerichte im Lichte der Verfassungsgerichtsjudikatur der Slowakischen Republik. In: Die Stellung des Arbeitsrechts im Rechtssystem der Slowakischen Republik. Wien : Paul Gerin, S. 107, 2012

[72] EuGH, Rechtsache C-244/01, Gerhard Köbler v. Republik Österreich, Urteil vom 30. September 2003

2. Der Köbler-Fall

Der österreichische Professor Gerhard Köbler forderte im Jahr 1996 einen Gehaltzuschlag für sein Dienstalter, der nach dem österreichischen Recht den Professoren, die an den österreichischen Universitäten mindestens fünfzehn Jahren gewirkt haben, gehört. Professor Köbler arbeitete jedoch zu dieser Zeit an österreichischen Universitäten nur zehn Jahre, wobei er die erforderliche Dienstlänge nur unter Berücksichtigung der geleisteten Dienstzeit auch an den Universitäten in anderen Mitgliedstaaten erfüllt hatte. Er behauptete, dass eine Ablehnung der Berücksichtigung der Dienstzeit, die er an den Universitäten anderer Mitgliedstaaten diente, eine gemeinschaftrechtlich nicht gerechtfertigte mittelbare Diskriminierung darstelle, insbesondere in Bezug auf die Freizügigkeit der Arbeitnehmer. Die österreichischen Verwaltungsbehörden haben den Antrag Professors Köbler abgelehnt und den Fall an den Verwaltungsgerichtshof weitergeleitet.

Der Verwaltungsgerichtshof richtete zwar *ein Vorabentscheidungsersuchen an den Gerichtshof*[73], auf Grund der Antwort der Kanzlei des Gerichtshofs, welche auf die Existenz von ähnlicher früherer Rechtsprechung des Gerichtshofs[74] verwies, *später jedoch wieder zurückgenommen. Obwohl die frühere Rechtsprechung des Gerichtshofs zugunsten von Professor Köbler hätte ausgelegt werden können, wies der Verwaltungsgerichtshof seine Beschwerde ab. Den Gehaltzuschlag für das Dienstalter qualifizierte er als eine Treueprämie, welche eine unterschiedliche Behandlung in Bezug auf die Freizügigkeit der Arbeitnehmer rechtfertigte.*

Professor Köbler akzeptierte diese Entscheidung nicht und erhob vor dem Landesgericht für Zivilrechtssachen Wien eine Klage gegen die Republik Österreich auf den Ersatz des Schadens, der ihm durch das Urteil des Verwaltungsgerichtshofes verursacht wurde. Er behauptete, dieses Urteil widerspräche den u*nmittelbar anwendbaren Bestimmungen des Gemeinschaftsrechts. Das* Landesgericht für Zivilrechtssachen Wien legte dem Gerichthof fünf Fragen zur Vorabentscheidung vor, in denen, vereinfacht gesagt, nach der Möglichkeit der Zurechnung der gegen das *Gemeinschaftsrecht* verstoßenden Entscheidung des letztinstanzlichen nationalen Gerichts eines Mitgliedstaats, sowie nach den Voraussetzungen einer eventuellen Staatshaftung, gefragt wurde.

Die Antwort des Gerichthofes auf die vorgelegten Fragen lautete folgendermaßen: der Mitgliedstaat haftet für Schäden, die dem Einzelnen durch den Verstoß gegen das Gemeinschaftrecht verursacht wurden und die ihm auf Grund der Entscheidung des letztinstanzlichen Gerichts zuzurechnen sind, wenn der Verstoß hinreichend qualifiziert und offenkundig ist. Eine solche Schlussfolgerung löste bei der Fachöffentlichkeit widersprüchliche Reaktion aus. Kritisiert wurde unter anderem die Begründung der Entscheidung, in der mehrere Fragen nicht zufriedenstellend beantwortet wurden… Und was brachte die Entscheidung für Professor Köbler? Da der Gerichtshof keinen „hinreichend qualifizierten" Verstoß gegen das Gemeinschaftrecht festgestellt hat, erhielt Professor Köbler von der Republik Österreich keinen Schadenersatz.

[73] Der Antrag wurde unter Nr. C-382-97, Gerhard Köbler v. Bundesminister für Wissenschaft, Forschung und Kunst, registriert.

[74] EuGH, Rechtsache C-15/96, Kalliope Schöning-Kougebetopoulou v. Freie und Hansestadt Hamburg, Urteil vom 15. Januar 1998

3. Problematische Aspekte der Köbler-Entscheidung

Die Entscheidung im Fall Köbler hat bestätigt, was schon vorher allgemein angenommen wurde und zwar, dass die Entscheidung eines letztinstanzlichen Gerichts, die im Widerspruch mit dem EU-Recht steht, unter bestimmen Voraussetzungen zur Staatshaftung für Schäden führen kann. Somit war die Position des Einzelnen vor nationalen Gerichten im Schadensersatzverfahren gefestigt, und die Voraussetzungen klar festgelegt, die „*erforderlich und ausreichend [sind], um einen Entschädigungsanspruch des Einzelnen zu begründen*“[75].

Die Entscheidung wurde jedoch nicht vorbehaltslos angenommen. Die sogenannte Köbler-Doktrin wurde zum Objekt der Kritik von den Vertretern der Theorie und Praxis aus dem Grund, dass sie nach deren Meinung den Rechtgrundsatz der Rechtssicherheit und damit verbundenem Rechtgrundsatz der Rechtskraft untergräbt, sowie die Unabhängigkeit der Justiz und die autonomen Entscheidungen der Gerichte stört. Diese Argumente befanden sich ebenfalls in den beim Gerichtshof eingereichten Erklärungen der Regierungen der Republik Österreich, der Republik Frankreich und des Vereinigten Königreichs.[76]

Einigen Meinungen nach veränderte sich die Position des Gerichthofes zu den nationalen Gerichten zu einer übergeordneten Stellung, denn dem Gerichtshof wurde *„ermöglicht… die Entwicklung der Auslegung und Anwendung des EU-Rechts auf nationaler Ebene zu kontrollieren“*[77]. Trotz der Kritik an der Köbler-Entscheidung knüpften weitere Entscheidungen des Gerichtshofes an diese an. Zu diesen zählt zum Beispiel die Entscheidung in der Rechtsache *Traghetti del Mediterraneo*[78], die die Staatshaftung für Handlungen oder Unterlassungen von allen seinen Organen betonte, und das ohne Berücksichtigung der nationalen Bestimmungen, die eine solche Haftung beschränkten würden.

1. Der Grundsatz der Rechtssicherheit, der Grundsatz der Rechtskraft

Das vielleicht stärkste Argument gegen das Konzept der Staatshaftung für Schäden, die durch Verletzung von EU-Recht durch das Gericht verursacht wurden, hängt mit dem Zweifel zusammen, ob dieses mit den Grundsätzen der Rechtssicherheit und der Rechtskraft in Einklang zu bringen ist. Um die Problematik besser zu verstehen, ist es jedoch notwendig, zuerst den Inhalt und die Reichweite der beiden Prinzipien näher zu bringen.

Der Grundsatz der Rechtskraft und auch der Grundsatz der Rechtssicherheit gehören zu den Rechtsgrundsätzen, die nicht nur das nationale Recht der Mitgliedstaaten kennt, sondern auch das EU-Recht - insbesondere die Rechtsprechung des Gerichthofes. Beide Prinzipien sind sehr eng miteinander verbunden, man könnte sagen, dass der Grundsatz der Rechtskraft ein Teil oder eine Untermenge des Grundsatzes der Rechtssicherheit ist. Das Wesen des Grundsatzes der Rechtskraft besteht darin, dass sofern einmal ein Gericht in einer Sache rechtskräftig entscheidet, diese prinzipiell zwischen denselben Parteien aus dem gleichen Grund nicht wieder verhandelt werden darf. Dieses Prinzip schützt einerseits den Beklagten,

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[75] EuGH, Rechtsache C-244/01, Gerhard Köbler v. Republik Österreich, Urteil vom 30. September 2003; Rn. 57

[76] Siehe dazu EuGH, Rechtsache C-244/01, Gerhard Köbler v. Republik Österreich, Urteil vom 30. September 2003; Rn. 20-28

[77] Komárek, J.: Inter-Court Constitutional Dialogue After the Enlargement – Implications of the Case of University Professor Köbler. In: Croatian Yearbook of European Law and Policy, Band 1., S. 14, 2005

[78] EuGH, Rechtscache C-173/03, Traghetti del Mediterraneo SpA in Liquidation v. Italienische Republik, Urteil vom 13. Juni 2006

damit er nicht wiederholt vor einem Gericht in der gleichen Sache sich verteidigen muss, auf der anderen Seite kann die gewinnende Partei davon ausgehen, dass ihre auf einer rechtskräftigen Entscheidung gegründete Rechtsposition endgültig ist. Der Zweck des Grundsatzes der Rechtskraft besteht in der Gewährleistung gewisser Stabilität der Rechtsbeziehungen, damit diese nicht mehr infrage gestellt werden können. Der Grundsatz der Rechtssicherheit ist ein elementares Prinzip des Rechtsstaates, welcher die Qualität der Schöpfung sowie auch der Anwendung des Rechts beeinflusst. Er gewährleistet die Voraussehbarkeit der Rechtsbeziehungen und bedeutet, dass auf eine bestimmte rechtlich relevante Frage unter gleichen Voraussetzungen es eine gleiche Antwort gegeben muss. *Der Grundsatz der Rechtssicherheit wird in der Regel in zwei Ebenen aufgefasst, und zwar als der Grundsatz des Verwaltungsrechts und als grundlegendes Menschenrecht.*[79]

Im Prinzip sind die beiden Grundsätze nicht einer absoluten Natur, d.h. unter bestimmten Umständen können sie einem anderen Recht oder einem anderen Grundsatz zurückweichen. Die Rechtstheorie spricht in diesem Zusammenhang über eine sog. Abwägung der Argumente, welche auf folgender Prämisse basiert: *„je größer der Eingriff oder die Beeinträchtigung von einem Recht oder Prinzip ist, desto größer [muss] die Bedeutung der Befriedigung von der anderen sein…“*[80]. Mit anderen Worten, in jedem individuellen Fall ist es notwendig, das Vorziehen von einem Rechtsgrundsatz auf Kosten der anderen, sorgfältig zu prüfen.

In dem Köbler-Fall fehlt jedoch das erwähnte „Abwägung der Argumente“ für den effektiven Schutz der Rechte des Einzelnen auf Kosten der Grundsätze der Rechtssicherheit und der Rechtskraft. Was noch interessanter ist, zuerst erkennt der Gerichtshof keinen Konflikt hinsichtlich beider Prinzipien und stellt dann später fest, dass man bei der Beurteilung der Erfüllung der Bedingung des hinreichend qualifizierten Verstoßes, „*wie auch die Mitgliedstaaten vorgetragen haben, [...] die berechtigten Belange der Rechtssicherheit… berücksichtigen“*[81] *muss.*

Gerade die streng formale Argumentation des Gerichthofes im Bezug auf das Prinzip der Rechtskraft wird als die größte Schwäche der Entscheidung bezeichnet.[82] Mit dem Grundsatz der Rechtskraft setzte sich der Gerichtshof in der Randnr. 39 der Entscheidung auseinander und stellte fest, dass die Anerkennung des *Grundsatzes der Staatshaftung für Entscheidungen letztinstanzlicher Gerichte die Rechtskraft einer solchen Entscheidung nicht in Frage stellt, weil „ein Verfahren zur Feststellung der Haftung des Staates… nicht denselben Gegenstand und nicht zwangsläufig dieselben Parteien [hat] wie das Verfahren, das zur rechtskräftigen Entscheidung geführt hat“*[83]*. Obwohl man mit so einer Argumentation übereinstimmen kann, wird jedoch gleichzeitig eines klar - wenn ein Gericht über die Staatshaftung für Schäden entscheidet, die durch gegen das EU-Recht verstoßenden gerichtlichen Entscheidung verursacht wurden, muss er auch den Einklang der Entscheidung mit dem EU-Recht überprüfen und somit auch seine inhaltliche Korrektheit.* Wir glauben, dass eine solche Überprüfung in gewissem Masse die Legitimität von Entscheidungen betrifft und somit in die

[79] Groussot, X. – Minssen, T.: Res Judicata in the Court of Justice Case Law: Balancing Legal Certainity with Legality? In: European Constitutional Law Review, 3. Ausgabe, S. 388, 2007

[80] Alexy, R. On Balancing and Subsumption. A Structural Comarison. In: Ratio Juris, Band 16, 4. Ausgabe, S. 436, 2003

[81] EuGH, Rechtsache C-244/01, Gerhard Köbler v. Republik Österreich, Urteil vom 30. September 2003; Rn. 53

[82] Classen, C. D.: Case C-224/01, Gerhard Köbler v. Republik Österreich, Judgement of 30 September 2003, Full Court. In: Common Market Law Review, Band 41, 3. Ausgabe, S. 818, 2004

[83] EuGH, Rechtsache C-244/01, Gerhard Köbler v. Republik Österreich, Urteil vom 30. September 2003; Rn. 39

Rechtssicherheit der gewinnenden Partei eingreift, was im Ganzen nicht mit dem Ziel des Grundsatzes der Rechtskraft im Einklang zu bringen ist (und zwar die Stabilität und Unbezweifelbarkeit der Rechtsbeziehungen zu gewährleisten). Eine allgemeine Ablehnung des Konflikts der erwähnten Grundsätze, wie in der Köbler-Entscheidung angedeutet wurde, ist demzufolge wahrscheinlich nicht ganz richtig.

Die Köbler-Entscheidung bestätigte, dass man unter bestimmten Voraussetzungen den Schadensersatz verlangen kann, nicht aber die Revision der Entscheidung, die zur Entstehung vom Schadensersatzanspruch führte. Andere Entscheidungen des Gerichthofes haben aber die Möglichkeit der Revision von rechtskräftigen gegen das EU-Recht verstoßenden Gerichtsentscheidungen und Verwaltungsentscheidungen zugelassen.[84] *Gemäß manchen Stellungsnahmen, erst in den Situationen, in denen es nicht möglich ist, die Revision von Gerichtsentscheidung oder Verwaltungsentscheidung zu erreichen, kann man subsidiär die Köbler-Doktrin anwenden.*[85]

2. Die Unabhängigkeit der Justiz

Nach Komarek kann *"die Schadensersatzklage wegen der Existenz der gerichtlichen Entscheidung in einem Geist vom Urteil in Köbler… manchmal als eine indirekte Berufung funktionieren"*[86]. Der Autor stützt diese Argumentation auf die Tatsache, dass die Schadensersatzklage wahrscheinlich von den Gerichten unteren Instanzen behandelt wird, welche laut Statistiken viel zuvorkommender dem Gerichtshof Fragen zur Vorabentscheidung vorlegen. Weiter arbeitet er mit der These, dass man angesichts der Empfindlichkeit von den Fällen der Staatshaftung für judikatives Unrecht vermuten kann, dass die nationalen Gerichte sich an den Gerichtshof lieber wenden, und sich somit der Verantwortung für ihre Entscheidungen teilweise zu entledigen.

In zweiter Vorlagefrage in Köbler-Fall wurde die Zuständigkeit von nationalen Gerichten für die Entscheidung der Rechtsstreitigkeiten hinsichtlich des Schadensersatzes für die gegen das EU-Recht verstoßenden gerichtlichen Entscheidungen behandelt. Das nationale Gericht fragte, ob die Lösung dieser Frage eine Sache der Rechtsordnung jedes Mitgliedstaats ist, auch wenn es sich um das Urteil eines Höchstgerichts handelt. Das Vereinigte Königreich stellte in seinen Erklärungen fest, dass die Bestimmung der Zuständigkeit eines Gerichts in diesen Staatshaftungsfällen in Bezug auf den Charakter ihres Gerichtssystems, schwierig ist. Die Antwort des Gerichtshofes war im Grunde nur eine kurze Bemerkung, dass es die Sache der Mitgliedstaaten ist, zu bestimmen, welches Gericht für die Entscheidung von solchen Klagen zuständig ist.

Wir glauben, dass die Problematik der Zuständigkeit eines Gerichts auch mit der Unabhängigkeit der Justiz zusammenhängt. Die Richter der untergeordneten Gerichte, die über den Schadensersatzanspruch aufgrund einer Gerichtsentscheidung eines Höchstgerichts entscheiden, müssen nämlich über die Richtigkeit der Entscheidung der Richter des Höchstgerichts urteilen, und zwar hinsichtlich der Frage, ob diese im Einklang mit dem EU-Recht war. Paradoxerweise ist es sogar möglich, dass der Richter, der über den Schadensersatzanspruch entscheidet, derselbe Richter ist, welcher selbst durch sein Urteil das

[84] Siehe z.B.: EuGH, Rechtsache C-453/00, Kühne und Heitz, Urteil vom 13. Januar 2004, Rn. 26 - 28

[85] Groussot, X. – Minssen, T.: Res Judicata in the Court of Justice Case Law: Balancing Legal Certainity with Legality? In: European Constitutional Law Review, 3. Ausgabe, S. 417, 2007

[86] Komárek, J.: „Velký hybatel" – Soudní dvůr a hledání vnitřního souladu právního řádu Společenství. In: Právník, Nr. 5, S. 6, 2006

EU-Recht verletzte. Sehr interessant war die Debatte über die Zuständigkeit der Gerichte in den Schadensersatzfällen in Österreich. Es wurde vorgeschlagen, dass für diese Art von Streitigkeiten das Verfassungsgericht zuständig sein könnte, wobei das Verfassungsgericht selbst in mehreren Fällen seine Zuständigkeit akzeptierte, ohne das es vorher zu einer Änderung der nationalen Legislative gekommen wäre.[87]

4. Die Schlussfolgerung

Das Ziel dieses Artikels war es, einerseits die Bedeutung, andererseits auch die Probleme der Entscheidung des Gerichtshofes in der Rechtssache Köbler aufzuzeigen. In der Köbler-Entscheidung sprach sich der Gerichtshof zum ersten Mal für die Staatshaftung für Schäden aus, die durch die Verletzung des EU-Rechts durch die Entscheidung des letztinstanzlichen Gerichts verursacht wurden. Es bleibt zu bemerken, dass für das komplexe Verständnis des Instituts der Staatshaftung für Schäden es notwendig ist, diese im Licht der späteren Rechtsprechung des Gerichtshofes und der nationalen Gerichte zu untersuchen.

Es ist zwar offensichtlich, dass der Gerichthof ein gewisses Maß an Kontrolle über die nationalen Gerichte erworben hat, dennoch sind wir jedoch der Meinung, dass diese Entwicklung nicht all zu dramatisiert werden sollte. Die Köbler-Entscheidung wurde zu einer Zeit gefällt, in der es immer häufiger zur Missachtung des EU-Rechts durch die innerstaatlichen Gerichten gekommen war, sodass sich dem Gerichtshof hierbei die einzigartige Gelegenheit geboten hat, nicht nur seine Position zu festigen, sondern auch der Einhaltung des EU-Rechts zu helfen. Man kann somit feststellen, dass mit Hilfe des Konzepts der Staatshaftung für Schäden der Gerichtshof über die nationalen Gerichte eine Art der Kontrolle ausübt, die als logische Konsequenz seiner Bemühungen um die Einhaltung vom EU-Recht, das den Vorrang vor dem nationalen Recht geniest, erscheint.

Es ist außerdem notwendig zu betonen, dass die Staatshaftung für Schäden bei der Ausübung der richterlichen Gewalt durch das Erfordernis eines hinreichend qualifizierten Verstoßes gegen das EU-Recht beschränkt ist, und diese zusätzlich nur die Entscheidungen der letztinstanzlichen Gerichte betrifft. In diesem Zusammenhang wird somit die Staathaftung nicht so häufig vorkommen. Einige verstehen das Institut der Haftung des Staates für Schäden nur als subsidiär anwendbar in Fällen, wo die Revision gegen eine gerichtliche Entscheidung gescheitert ist.

Abschließend erlauben wir uns unsere Meinung zu äußern, dass der Köbler-Fall einen weiteren Impuls für die effektive Durchsetzung vom EU-Recht darstellt. Vielleicht ist er am besten mit der folgenden Überlegung des Gerichtshofes zu beschreiben: „*In Anbetracht der entscheidenden Rolle, die die Judikative beim Schutz der dem Einzelnen aufgrund gemeinschaftsrechtlicher Bestimmungen zustehenden Rechte spielt, wäre die volle Wirksamkeit dieser Bestimmungen beeinträchtigt und der Schutz der durch sie begründeten Rechte gemindert, wenn der Einzelne unter bestimmten Voraussetzungen dann keine Entschädigung erlangen könnte, wenn seine Rechte durch einen Verstoß gegen das Gemeinschaftsrecht verletzt werden, der einer Entscheidung eines letztinstanzlichen Gerichts eines Mitgliedstaats zuzurechnen ist.“*[88]

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[87] Komárek, J.: „Velký hybatel“ – Soudní dvůr a hledání vnitřního souladu právního řádu Společenství. In: Právník, Nr. 5, S. 6, 2006

[88] EuGH, Rechtsache C-244/01, Gerhard Köbler v. Republik Österreich, Urteil vom 30. September 2003; Rn. 33

WHITE-COLLAR CRIMES FROM TWO DIFFERENT PERSPECTIVES: HONG KONG IMPLICATIONS, SLOVAK WARNINGS

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Abstract:

Conference papers deal with the two different perspectives in white-collar crime approach in Slovakia and Hong Kong. First of all it refers on legal framework related to white-collar crimes which is a core stone of different assumptions. Slovak legal framework is unite as civil law jurisdiction which enact criminal offences in Criminal Code. On the other hand Hong Kong is common law jurisdiction with mixed parts from mainland China law jurisdiction that makes some white-collar crime also part of commercial crimes. Second objective of paper is in criminal litigation differences where we explain fundamental aspects in understanding of whole criminal proceedings as proper way to secure purity of public space and economy from money-laundering. Hong Kong as only one financial center avoid of HIBOR manipulation as their siblings in London, Tokio and Frankfurt, which seems that proceedings of criminal litigation are due to these circumstances much effective than Slovak and rest of Europe approach. Last part is narrative due to case law, which goes from legal practice that shows how to be aware from white-collar crimes threat. Slovak legal practice in this field shows that rule of law, democracy and constitution are only formal words in opposite of political connection, economic background.

1. Introduction

After a Velvet revolution as the bigger crossroads between rule of law and totalitarianism Slovak republic was constituted as successor of Czech-Slovak socialist republic. Previous communist legal system was brought to new legal order as legal awareness in theory, practice and last but not least most of pivotal legislation survive political and legal change e.g. Penal Code and Code of Criminal Procedure until 2005, Commercial Code with amendments until now with Civil Code. These structure in legal framework adversarial with newcomer in Slovak Constitution as Act No. 460/1992 Coll. established great opportunity to newly formed criminals in economic sphere.

The core problem, which survives until these days, we can found in transition of economics and privatization in early 90´s and second wave of privatization around 2000. First years of early stage of economic transition brought in the center the idea of "*5 minutes of turning lights off*" which in post-communists context means everything which can be stolen will

belong to new owner. Under this rule, lack of political accountability, relic in communists legal acts in key areas create a new economic system named by ex-president Vaclav Havel as "*mafioso´s capitalism.*" These attributes survive until these days. First wave of privatization was not only about economic transition but also about institutional transition. Sense of institutional transition was misleading because it was not about the changing centralized government structure into democratic institutional and political framework with respect to rule of law, justice and human rights. Privatization of institutional framework overshot in personal content which means transition of communist leaders with socialist connections into industry, banking and economic leaders, prior law enforcement members with secret services personal content into organized crime.

In early 90´s first wave of privatization leads into adverse moments than authorities expected. In national "sale" threatened jeopardy about infiltration of "dirty money" inside new economic and financial system. Attorney General said that "*it begin to flow dubious Arabic and Italian capital ..., the time has come when the prosecutor's office and the police have to intervene*" (Měchýř, 1999 p. 246).

On the other hand in reply to Attorney General, former Minister of Finance V. Klaus quoted that "*the term "dirty money" is indefinable, their origin is undetectable and their existence is not proven.*" (Hodnotové zakotvenie slovenského občianskeho práva, 2007 p. 73)

So that the idea behind the wave of privatization wasn´t to established market economy and balance natural inequalities of various sphere of society. Main structure of economic, social a legal skeleton of successor states was money on the first place without consent of public will due to that whole society work on creation of economic values in whole communist era. All parts of state banking, industry, trade belongs to people and "we the people" could decide what we have to do with our property. Injustice established by first and second wave of privatization show off problem with justice consciousness on the judge's side. As former soviet colony Czech and Slovak republic became states with huge inequalities, without any respect to rule of law from state authorities and last but not least entrepreneurship acquired rumor as waste of society with fraudsters, liars and wash-outs.

Hong Kong as former British colony inherits great values, which one of them is independent and impartial justice. But impartial and independent justice is not only one thing, which improves Hong Kong to successful rate of white-collar convictions (rate is considered between 85-90% convictions). Legislation takes important role also. Rather than establishing new legal order or law Hong Kong adopted English legal system known as common law. "*The reception of English law was put on a legislative basis by the Supreme Court Ordinance of 1844 and its successors. The final early legislative version that was to regulate this issue can be found in section 5 of the Supreme Court Ordinance of 1873.*" (MCWALTERS, 2003 p. 2)

Adopting common law and British law practice Hong Kong obtained great heritage of world legal minds. Despite them unique circumstances of crossroads between west and east Hong Kong met his own weakness on the path to the state of art rule of law observance. Until 70 ´s it was common and expected in Hong Kong to give a bribe to government officials, law enforcement agencies. Under British dominance there was raised a subculture of corruption and frauds. However the British values and rule of law was the great contribution to the Hong Kong nature, legislation propositions also bring a better future in struggling with corruption. From 50´s to 70´s there was established a legislation against corruption with the first committee regarded to struggling against corruption. We can illustrate the feeling of that era quoting Ng Sik Ho, convicted drug trafficker in 1984 by "*law did exist. Police enforcing it did not: … my money did it."* (1984 p. 2)

By these weakness Hong Kong authorities could fight and win this race overall. That´s the main reason why we compare a lovely coincidence – Hong Kong contrived that it is possible to change fraudulent culture and corrupted relations. That brings us a hope for next days of struggling with the biggest problem in Slovakia. It is a Slovak transition, which last more than 21 years from Velvet revolution without any proved positive result – Slovakia hasn´t got any convicted white-collar criminal with strong political, economic and social background. We will try to draw key areas of problem, which eventuate to worst result as criminal justice in this particular field can brings.

2. Legal Framework of White-Collar crimes

Slovak legal framework as civil law jurisdiction is based on Constitutional provisions. Due to Act No. 460/1992 Coll. – The Constitution of the Slovak republic Art. 17 para. 2 "*No one shall be prosecuted or deprived of his liberty except on such grounds and in the manner provided by law.*" In collaboration with Art. 1 para. 1 "*Slovak republic is democratic and legally consistent state"* constitutional propositions are put on unite Penal Code as Act No. 300/2005 Coll. with subsidiary legislation amending several crimes related to white-collar crimes issues. Despite unification of Criminal offences into one single Criminal Code. White-Collar crime related offences are scattered on whole code. Main problem of this approach is that white-collar crime as part of doctrine of substantive criminal law is not widely extend in theory and practice for above reasons – many of white-collar offences are part of common business practices or techniques.

Thanks to all of these circumstances neither in doctrine nor in practice Slovak criminal law is missing general definition of white-collar crimes. Father of white-collar crimes studies defines white-collar crime as all offences *"committed by a person of respectability and high social status in the course of his occupation*" (SUTHERLAND, 1949 p. 12).

White-Collar crime during sixty years of permanent research and policy making gets a variety of synonyms related to activities linked in White-Collar crime e.g. "*elite deviance is one example, other terms include economic crime, commercial crime, business crime, marketplace crime, consumer crime, respectable crime, crime at the top, suite crime, official crime and deviance, political crime, governmental crime, state (state-organized) crime, occupational crime and deviance, workplace crime, folk crime and invisible crime*" (FRIEDRICHS, 2010 p. 5).

This kind of definition is broader for strict usage in substantive criminal law where is necessary loud and clear definition of criminal offences related to this kind of offenders. In according to requirements requested by nature of substantive criminal law, "*substantive white collar crimes refer to legal areas of crime that national and international laws seek to prevent and punish. They can include fraud, computer crimes, securities, commodities futures, antitrust, intellectual property, customs, export control, environmental, money laundering, organized crime, transnational corruption, and taxation.*" (Zagaris, 2010 p. 7)

Even though Slovak republic haven´t got integrated structure of white-collar crimes in Criminal Code we would reffer about crimes, which are in nature purely white-collar crimes but are included in few parts of Penal Code.

1. Slovak republic

Slovak Penal Code in Section 1 states that "*this Act regulates the fundamentals of criminal liability, types of punishment, types of protective measures, their imposition and merits of the criminal offences*" so that Penal Code served as *legi generali* of criminal law in Slovakia. First difference between Hong Kong and Slovakia approach to white-collar crimes which are committed in majority by corporations respectively by natural persons through corporations we can see in legal definition of offender where Section 19 para. 2 states that "*an offender of a criminal offence may be a natural person.*" Slovak criminal law haven´t got established for more than 22 years of transformation respectively 10 years from recodification of criminal law corporate criminal liability which open space for any corporate crime without criminal consequences. There were only established criminal sanctions where legal person is involved in criminal offense can be punished by Confiscation of a Monetary Sum under section 83a and by Confiscation of Assets under section 83b. In Slovak criminal practice these kind of sanction from time of their establishing never was used.

Most of the white-collar crimes are included in Chapter Four – Criminal Offences against Assets and Chapter Five – Economic Criminal Offences. Chapter Four imply offences such as Section 212 Theft, Section 213 Embezzlement, Section 214 Non-payment of Wages and Severance, Section 219 Illegal Production and Use of Payment Instruments, Electronic Money or another Payment Card, Section 221 Fraud, Section 222 Credit Fraud, Section 223 Insurance Fraud, Section 224 Capital Fraud, Section 225 Subsidy Fraud, Section 226 Illegal Enrichment, Section 227 Fraudulent Bankruptcy, Section 228 Caused Bankruptcy, Money Laundering Section 233, Violations of Obligations of Trust Section 237, Section 239 Damage to a Creditor, Section 240 Favouring of a Creditor, Section 241 Machinations in Connection with the Bankruptcy and Settlement Proceedings Obstruction of Bankruptcy or Settlement Proceedings Section 242.

Chapter five – Economic Crimes includes Section 250 Abuse of Participation in Tenders, Section 251 Illegal Enterprise, Section 252 Illegal Trading in Foreign Exchange Assets and the Provision of Foreign Exchange Services, Section 254 Violation of Regulations on the Circulation of Goods in Foreign Relations, Violation of Regulations on the Handling of Controlled Goods and Technology Section 255, Section 258 Endangering of Foreign Exchange Economy, Misrepresentation of Data of Economic and Commercial Records Section 259, Damage to the Financial Interests of the European Communities Section 261, Section 264 Endangering of Trade, Banking, Postal, Telecommunications and Tax Secrets, Section 265 Insider Trading, Machinations in Public Procurement and Public Auction Section 266, Section 269 Damage to a Consumer, Counterfeiting, Alteration and Unlawful Production of Money and Securities and many more.

Substantive form of Penal Code is amended by several subsidiary legislation on the assumption that bodies of criminal proceedings and court apply interpretation rules as *lex specialis derogat legi generali* and *lex superior derogat legi inferiori.* These Acts are Act No. 297/2008 Coll. as amended about protection before legalization of Illegal enrichment from Criminal Activity and about Protection before Funding of Terrorism which are consequence of Slovak enter into European Union and harmonization and approximation the Slovak criminal law legislature in according to third pillar and article 29 TEU and 31 para. 1TEU.

Second is Act No. 101/2010 Coll. about Proving Asset Origin which is consequence of major white-collar crime offences by members of National Council without any further convictions. Existence of the Act is formal argument for OECD and European Union do declare struggling against corruption, bribery and white-collar crime but as we said in introduction above many usual businesses in country are made by white-collar crimes. So that any enforcing by the Act

is impossible due to two major obstacles: (i) Act haven´t got any criminal sanctions, (ii) bodies of criminal proceedings are afraid to investigate into successful end any bigger case involving group of fraudsters made by members of government and political parties, related industry and businessman with financial institutions, judges, prosecutors and investigators, (iii) if there is any brave investigator or prosecutor still are there affined judges to take care about the case from District Court to Supreme Court .

2. Hong Kong

Hong Kong approach is quite different than Slovakia´s last twenty years in according to white-collar crimes. As we discussed above during years 1948 – 1971. Hong Kong legislative environment isn´t leading in innovation providing justice. Policy for creating functional legislative environment and rule of law is based on simple principle – Hong Kong import legislative acts and practice from leading common law countries and then create their own modification for local environment. So that drafters of legislative Acts follow English pattern and blend group of three acts dwelled on bribery and corruption, literally Public bodies Corrupt Practices 1889 and two Acts related to prevention of corruption - the Prevention of Corruption Act 1906 and the Prevention Corruption Act 1916 into one Prevention of Corruption Ordinance. Content of Prevention of Corruption Ordinance consisted from 12 sections where contrary to Slovak Penal Code offences were in two sections – 3 and 4. These sections contained just two types of offences: a) corruption in public sector and b) corruption in private sector. Due to base in English legislation keyword in offences was corrupt which define *actus reus* in different variation of criminal activities. As usual in every interpretation of legislative acts by court some terms brings uncertainty so that it is necessary to explain affect and meaning. That was the case of corrupt therefore the Full Court in *R v RE Low (1961) HKLR 13.* Recce J as president of the court at pages 37 - 38 said: "*What then is the principle? I take the view that the principle to be applied here is to be found in the passage at page 169 of the judgment of Regina v Smith where Lord Parker said: — (a) The Mischief aimed at by the Act, as the judge told the jury was to prevent public officers or public servants being put in a position where they are subject to temptation," And at page 38: It is the fact of being placed in a position of temptation resulting in a conflict of interest with his duty which is the key to the meaning of the words "corruptly accepted" in the present case.*"

During a years from 1948 – 1968 corruption took place in public concern so that government established the Standing Committee on Corruption which had three members. Chairman was Principal Crown Counsel with other members who are Establishment officer and Director of Anti-Corruption branch. Major of her responsibilities and activities were examination of corruption in public service, reporting, advising, control and maintaining standards related to corruption. On the other establishing Commission sought as not efficient option in struggling against corruption and defeat her from public sector. In 1968 to 1970 started period of revision current anti-corruption legislation. Leading place took Anti-corruption branch. It was established Working Party on revision of legislation in struggling against corruption in pattern of Ceylon, Malaysia and Singapore jurisdiction with regard to corruption matters. After examinations of legislation and practice in bribery matters Working Party provided a report and draft a provision bill which became pattern of the new ordinance.

Draft Bill which comes from Working Party became in 1970 pattern to The Prevention of Corruption Bill which became separate law regulation of corruption as The Prevention of Bribery Ordinance. The new Law is compose by five parts included 36 sections. The various offence sections were enacted to deal with corruption in the government, public and private sectors. The offence sections were sufficient and potent enough to catch all situations of quid

pro quo corruption until lately the corrupt was able to beat the system. That said the modus operandi of the corrupt in accepting the so called delayed advantages or their demeanour that enables benefiting their cronies can be dealt with under the common law offence of "misconduct in public office". "*Rather the offences require no more than that a person: (1) being a public servant for public sector corruption, or an agent, for private sector corruption. (for soliciting or accepting offences); or any person (for offering offences) intends to: (2) offer, solicit or accept; (3) an advantage, (which is very- broadly defined); (4) for a purpose relating to either the public servants capacity as public servant (for public sector corruption offences), or the agents principals affairs or business (for private sector corruption offences); and (5) to do so without lawful authority or reasonable excuse."* (MCWALTERS, 2003 p. 17)

On the basis of the written above Slovak formalism in legislature seems merely less efficient in struggling against white-collar crimes. On the other band the crucial contrast is not in written law but in practice how is enforce, respectively how the government agencies with power to investigate exercise they own abilities and their successful rate of convictions with public confidence into their work which provide in case of pursuing offenders. It should be noted that there are the biggest differences.

3. Institutional Framework Regarding to Investigation Power of White-Collar crimes

1. Slovak republic

Insight into Slovak law enforcement structure shoe us that it goes about unite system representing by Police. Police force is only one law enforcement agency with investigation power in regard to criminal offences. The nature of the investigation unity is based on Act No. 171/1993 Coll. about Police Force in according to section 1 para. 1 as "*The Police Force is an armed security force, which perform tasks in the field of public order, security, combating with organized crime, including its coordinated species and international forms and accomplish tasks of the Police Force under the international commitments of the Slovak Republic*."

It is clear that in case of white-collar crimes the Police Force is competent to investigate these types of offences. For species in investigation of white collar crimes Police Force established under section 4 para. 1 several departments whereby competent to investigate white-collar crimes are Department of Financial Police and Department and Department of Criminal Police. On the other hand the most relevant are units under Presidium of the Police Force effects National Criminal Agency.

National Criminal Agency is major unit for small special units. One of the Units related to investigation power to white-collar crimes is National Unit of Financial Police. National Unit of Financial Police is empowered to investigation and disclosure the most severe forms of criminal offences against property and economic crimes where was harm done or spoil amounting to at least twenty five thousand fold of Minor Damage under Penal Code (6.638.783 EUR) on which is concurrently relevant to competence of Specialized Criminal Court. Simultaneously objectives of unit activities are suspicions of criminal offences, account elements of organized crime with detection of concern organized and criminal groups or agency of person from organized crime environment.

In second place par of institutional framework related to white-collar crimes is National Anti-Corruption Unit as part of National Criminal Agency. National Anti-Corruption Unit served in important tasks on the field of investigation and disclosure of criminal offences qualified in

Chapter Eight special part of Penal Code, which represent threat for sturdiness of rule of law and regular functionality of democratic institutions, located their negative and dishonor glance in market economy such as in social and economic progression.

Thirdly, the legislature framework of Financial Intelligence Unit activities is shaped by Act No. 297/2008 Coll. about protection before legalization of Illegal enrichment from Criminal Activity and about Protection before Funding of Terrorism and other several Acts referred above. Financial Intelligence Unit use status as control Authority to obligee under section 5 Act No. 297/2008 Coll. about protection before legalization of Illegal enrichment from Criminal Activity and about Protection before Funding of Terrorism and under this law she can Act as Administrative Authority.

Financial Intelligence Unit is simultaneously determined as instate for Asser Recovery Office, which task is to simply tracing and identification of profit from criminal activity and any other asset connected with criminal activity, which can be in case of criminal proceedings on behalf of competent judicial authority freezed, secure or confiscated.

Under section 14 of the Act No. 301/2005 Coll. Code of Criminal Procedure special provision refers to the competence of The Specialised Criminal Court in Judicial branch for selected white-collar crimes as "*b) a criminal offence of machinations in public procurement and public auction under Section 266 Subsection 3 of the Penal Code, c) a criminal offence of counterfeiting, alteration and illegal production of money and securities under Section 270 Subsection 4 of the Penal Code, d) a criminal offence of the abuse of authority of a public official under Section 326 Subsection 3 and 4 of the Penal Code in conjunction with the criminal offences under Paragraphs b), c), e), f), g), h), k) or l), e) a criminal offence of accepting a bribe under Section 328 through 331 of the Penal Code, f) a criminal offence of bribery under Section 332 through 335 of the Penal Code, g) a criminal offence of indirect bribery under Section 336 of the Penal Code, h) a criminal offence of electoral fraud under Section 336a of the Penal Code, k) a criminal offence against assets under Chapter Four of the separate part of the Penal Code or a criminal offence under Chapter Five of a separate part of the Penal Code, if the commission of such a criminal offence caused damage or a benefit was obtained reaching at least twenty-five thousand times the minor damage under the Penal Code or if such an act was committed to the extent that reaches the value of at least twenty-five thousand times the minor damage under the Penal Code, l) a criminal offence of damaging the financial interests of the European Communities, m) a criminal offence relating to the criminal offences referred to in Paragraphs a) through k) or l), if the terms for the joint action are satisfied.*"

2. Hong Kong

In accordance with Hong Kong legal framework in case of white-collar crimes enforcement is major in bribery cases. The Independent Commission Against Corruption (ICAC) was set up on 15 February 1974 under the ICAC Ordinance, Chapter 204, Laws of Hong Kong. The Section 3 of the said ordinance gave rise the birth of the ICAC and created he post of the Commissioner and the Deputy Commissioner. Section 5 requires the Commissioner to be answerable only to the Chief Executive of the Hong Kong Special Administrative Region (HKSAR) who is the head of the HKSAR Government, and he who appoints the Commissioner and the Deputy Commissioner.

The Commissioner is vested with the power to appoint officers to help him perform his functions under the ICAC Ordinance. At the same time, he also has the power to terminate the employment of an officer.

The anti-corruption strategy is a three-pronged attack on corruption, namely through law enforcement, prevention and education. The strategy is actually embedded in Section 12 of the Ordinance. Sub-sections 12(a)–(c) define the duties of the Operations Department which is responsible for enforcing the anti-bribery law and the related laws. Sub-section (12)(d)-(f) spell out the duties of the Corruption Prevention Department; while Sub-section 12(f)-(g) those of the Community Relations Department. In fact, the three departments fulfil the near term, medium term and long term goal of the Commission in containing, minimizing and eradicating corruption in social fabrics of Hong Kong. It not only aims at cleaning up the government and public sector but also the business sector or the private sector.

The investigation of corruption allegations against a person, be it a civil servant or not, is the duty of the Operations Department. Investigators are only responsible for collecting evidence in order to substantiate the allegations or otherwise. They do not possess the power to prosecute the alleged offender(s) as Section 31 of the Prevention of Bribery Ordinance requires the consent of the Secretary for Justice to prosecute before a suspect can be charged with offences under that ordinance. This is regarded as a kind of check and balance on the powers of the ICAC which some critics said was draconian.

Hong Kong adopts the British legal system, and a separation of the executive, legislative and judicial powers. Presumption of innocence until the contrary is proved is the norm and a suspect has the right of silence and the right to appoint a legal adviser to look after his/her interest. This means once a person is charged with an offence, the court will take over the process by hearing the evidence presented by both the prosecution and the defence in an adversarial manner. The ICAC's role in the judicial process is to assist the prosecution in presenting the evidence, the prosecutor or council on behalf of the HKSAR Government will try to make the evidence admissible.

Every allegation received by the ICAC, whether or not the allegation is substantiated, or the suspect prosecuted, or acquitted, the result of the investigation or the trial result, as the case may be, has to be reported to an oversight body called the Operations Review Committee comprising professional, social dignitaries appointed by the Chief Executive of the HKSAR. Committee meetings are held every six weeks to scrutinize all cases in the aforesaid manner. If they are not satisfied with the result of an investigation, it has to be further investigated to the satisfaction of its members. The committee has to report to the Chief Executive annually about the work of the Operations Department. The members are providing their service to the public on a voluntary basis and a two-year term.

The ICAC gained its credence by investigating each and every complaint fairly without fear or favor. The results speak for themselves thereby maintaining its independence status, without any political inference. The media also plays a vital role in ensuring the ICAC is doing the right thing by monitoring the work of the oversight body, the Operations Department and its investigators through the open court hearing and expose any of their wrong doings.

4. Conclusion

Let´s acknowledge that for our society, which had experience with socialistic version of criminal proceedings, it is still new white-collar crime as criminal offence without literally harm. In according to that it must be clearly defined in criminal proceedings parties mind. Private advocacy was caught by these trends, already in progress. Truth still is, that neither bodies of criminal proceedings haven´t got effective and clear vision what white-collar crimes

or corporate crime investigations needs and allows, which pursuance is permit more precisely, which form of performance of their mission is undisqualified for incompatibility with fundamentals of their nature. Must is to remind that democracy and rule of law isn´t only about what they doctrinal definitions allows, but also about what these concepts for content feature disallow respectively prohibit and thereby appear to self-restraint request.

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THE COMPARISON OF INTERNATIONAL AND NATIONAL COURTS IN RESPECT OF EFFECTIVENESS OF PUNISHMENT FOR CRIMES AGAINST INTERNATIONAL LAW (CASE SAIF AL-ISLAM GADDAFI)

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Key words: International Criminal Law, tribunal, crimes, prosecution, effectiveness, Islamic Law.

Abstract:

This paper deals with the comparison of international and national courts in respect of effectiveness of punishment for crimes against International Law. In the paper, both general and specific comparisons of international and national courts have been presented on the example of the case Saif al-Islam Gaddafi that is currently very topical. While examining the effective means to punish Saif al-Islam Gaddafi´s crimes on international or national level, the Islamic legal system has also been described, especially the system of penalties and institutional system in Libya for more thorough comparing and analysing the problems.

JEL classification: K33

1. Introduction

The aim of the article is to compile problems of effective punishing criminals at the national and international level in accordance with the International Law. The article is divided into two parts. The first part focuses on comparing national and international courts as an effective means for punishing criminals in accordance with International Law. It concentrates on different aspects and characteristics of national and international courts in order to reach a more efficient means applied on these criminals. This topic is closely related to the situation in Libya. Intensive communication between governmental authorities of Libya and ICC (International Criminal Court) are underway as to where Saif al-Islam Gaddafi will be prosecuted. The ambition of the second part of this article is to sketch functioning of the Islamic legal system with emphasis on the system of penalties and institutional system of Libya within more detailed comparison.

2. Comparison of criminal sanctions under International Law at the national or international level

The efforts to punish criminals in accordance with international law and the establishing International Criminal Court have had a long history. Even prior the First World War the opinion had been stabilized, according to that some acts breaking International Law, especially those ones having happened during a war, deserve punishment.[1] Important milestones for the creating international criminal bodies were both World Wars. Having had the experience from the First World War, the international community was persuaded that the culprits could be punished justly only at the international level.

The aim of international criminal law is to punish not only direct executors of crimes operating at the lowest hierarchical levels but especially the leaders and organizers of crimes as well as supervisors who are responsible for the acts of their subordinates, therefore the obligation to prevent committing crimes results from their position. However, criminal liability for crimes of subordinates arises if they have known about such deeds or with regard to circumstances they had to have known about them but they did not take any measures resulting from their jurisdiction to prevent or punish such an act.[2] It results from the logic of the matter that those persons who were in positions of public authorities should not be prosecuted at the national level. The next two situations may come about - firstly, there is the threat of possible political manipulation of the process, and secondly, it may threaten that such people would not have guaranteed the right to a fair legal process. They may be sentenced in their absence; therefore from this point of view it is more effective to try persons in the position of state bodies at the international level.

The establishment of international ad hoc tribunals and International Criminal Court has posed the problem how to coordinate their action with that of national courts: whenever both classes of courts are empowered to pronounce on the same crimes, which should take precedence and under what conditions. The relationship of international criminal tribunals with national jurisdictions contains three major elements: allocation of cases, cooperation and the recognition of judgements. There is a strong link between the allocation of cases and the recognition of judgements. The central and the most sensitive point in this link is the degree of supervision to be exercised by international criminal tribunals over national efforts to bring to justice persons suspected of international crimes. The difference between the ad hoc tribunals and the ICC regarding this supervision is that the former enjoy in the interests of international peace and security primacy over domestic investigations and prosecutions. It is a sort of protective and preventive function of the ICC.[3] National courts are organized hierarchically, but there is no structural connection among particular international courts. The necessary assumption for effective trial before international criminal bodies is mutual cooperation with states, because international tribunals' activity has a direct impact on individuals living in the territory of sovereign states. Unlike national courts, international criminal tribunals have no effective coercive means for fulfilling the decision. No international court or tribunal could function effectively without cooperation of states. Therefore it is essential that international criminal authorities should cooperate with states, especially in the taking evidence, examinations, service of documents, ascertaining the place of residence of persons, carrying out searching, witness statements or arrest warrant executions. From this point of view, national courts seem to be much more effective means. Just national authorities, on territory of which the crime was committed, can access to primary actions in the proceedings in more efficient and faster way. Moreover, it is also less expensive. It is frequently necessary to examine many witnesses during proceedings, where

majority of them have no travel documents as they have never been abroad, so the examination of witnesses and victims is usually more complicated at the international level.[4]

For the ICTY and the ICTR, the first legal basis of the duty to cooperate consists of the statues, the Security Council resolutions establishing the tribunals and the UN Charter. In operative paragraph 4 of the Resolution 827 (1993), the Security Council, acting under Chapter VII, deems that all states shall cooperate fully with the ICTY and its organs in accordance with the resolution and the tribunal's statute. Security Council Resolutions 827 and 955, regarding the duty to cooperate, refer to all states and not only to UN members.[5] In addition to the UN Charter, an important basis for the duty to cooperate is the Dayton Peace Agreement, concluded between the states and one entity constituting the former Yugoslavia. Although the essential purpose of this agreement is to restore and to maintain peace in the former Yugoslavia, assistance to the work of the ICTY is considered an important aspect of this purpose. The parties recognized the ICTY and obligated to cooperate mutually. The ICTY and ICTR are based on so called vertical cooperation model. This model is based on the fact that international tribunals are at supranational position, so they are authorized to enforce cooperation more effectively.[6] In the Blaškić case the Appeals Chamber held that the states and entities of the former Yugoslavia are obliged to cooperate with Tribunal. It also noted that this obligation was restated in the Dayton Agreement. In the Krstić case, the Karadžić case and the Mladić case, reference was made to the Dayton Agreement, especially Republic Serbian's obligation under that treaty to cooperate with the Tribunal. This obligation of states is enforceable only just by the UN Security Council. This tribunal is provided with extensive powers which are the basis for issuing binding instructions for states, as well as for individuals in the private sector. In the mentioned Blaškić case, the ICTY also commented denials to provide evidence since the Prosecutor is authorized to take charge of investigation on the territory of the former Yugoslavia and glean the evidence directly. This extensive power of the ICTY is an efficient and rapid means for prosecuting crimes having committed on the territory of the former Yugoslavia. In case that an individual refuses to cooperate, even the Tribunal may judge them for contempt of the Tribunal *in absentia*.

The first and obvious legal basis for the duty to cooperate is the Treaty of Rome, containing the ICC Statute. However, many states have not ratified the Rome Statute, thus they are not obliged to cooperate with the Court. Despite the fact, assistance of these states is sometimes necessary for effective prosecution of crimes under International Law. Accordingly to article 12 par. 3 of the Statute, a non-contracting party may accept jurisdiction of the Court on the *ad hoc* basis. It implies a duty of the state to cooperate with regard to a particular case in accordance with Part 9 of the Statute.[7] The International Criminal Court as the authority having been created contractually, has neither executive power nor they execute the territorial sovereignty in any country. As the body created by sovereign states on the base of contract, they have no coercive means at disposal. Therefore the possibility of the Court to conduct successful investigations and prosecutions of crimes depends completely on cooperation of the states.[8] In case of the International Criminal Court, this is about so called mixed model of cooperation which comprises two elements, both vertical and horizontal model. In Article 86 the Rome Statute embodies general obligation to cooperate with the Court. Somebody can see the alternative that such cooperation should be enforced by the Security Council of the UN, even if the case was initiated by the Prosecutor *proprio motu* or by the state. Although the statute does not exclude these possibilities, they are not expressly laid down.[9] The court may have issued a request to arrest the suspected person at any time after beginning investigation on condition that the inquisitional senate has reached the conclusion that necessary reasons were included in the Prosecutor´s proposal. On this basis the Court may ask the State, in whose territory a suspected person resides, for cooperation at apprehension and subsequent

handover. The rules of national law relating to immunity of public officials, extradition, rendition or limitation are not justifiable reasons for a denial of cooperation.[10] Article 98 of the Statute takes the previous obligations of states into account and determines the necessity of their consent to extradition persons to the court. However, it is inconsistent with Article 86 according to which the parties have an obligation to hand over persons accused of crimes under international law. But it is only related to those obligations which states had had before acceding to the Rome Statute. According to several opinions, it is a very controversial article that has been added at the initiative of the United States and denies the main sense of this international treaty. This clause considerably reduces the effectiveness of prosecuting crimes by the International Criminal Court.[11] Immunities under national law or international law cannot prevent from implementing jurisdiction of the Court. Exclusion of immunity has important consequences for the parties' obligation to cooperate with the Court, as well as for investigating or prosecuting the most serious crimes by national courts. It is different with the third countries´ government representatives who can benefit from immunities within the extent permitted by international law. Under Article 98 in such a case the Court cannot continue arguing a request for extradition or help, for which the requested state would have to act contrary to its international legal obligations in relation to the State or diplomatic immunity of persons or property of third countries, with the exception of cases where the Court for the purposes of this abandonment immunity can first secure cooperation of that third State.[12] Just opening the question of immunity of third states represents a weakness of the Rome Statute. From logic of contract law it is understandable that the Statute as an international treaty cannot impose obligations for the states that are not its contracting party, though, there is the question of reasonable limitation of this approach in crimes, the punishing of which has not been established by the Statute, but it follows from the customary rules of municipal international law, having mostly the character of *jus cogens*.[13]

Judge Cancado Trindade noted that history shows that war crimes and crimes against humanity are generally committed by individuals with the support of the so-called State "intelligence" (with all its cruelty), misuse of language, material resources and the apparatus of the State, in pursuance of State policies. The individual and the State responsibilities for such crimes are thus complementary, one does not exclude the other. There is no room for the invocation of State immunities in face of those crimes. In the ICJ Judgement, the Court's majority starts in his opinion from the wrong assumption that no conflict exists, or can exist, between the substantive "rules of *jus cogens*" and the procedural "rules of State immunity". There is thus a material conflict, even though a formalist one may not be discernible. The fact remains that a conflict does exist, and the Court's reasoning leads to what he perceived as a groundless deconstruction of *jus cogens*, depriving this latter of its effects and legal consequences. In sum, in his understanding, there can be no prerogative or privilege of State immunity in cases of international crimes.[14]

In the inter-state context it is still quite common for certain states to refuse to extradite their nationals. They often refer especially to the principle of non-interference into the internal affairs of states that are equal. Other typical grounds for refusing assistance in the inter-state context are the political offence exception, the double criminality requirement, and the *ne bis in idem* condition. The political offence exception is based on a number of grounds, including non-intervention in the internal matters of other states. The double criminality requirement means that the act for which extradition or transfer has been requested constitutes an offence according to the laws of both the requesting and the requested party. The requirement is based on the position that a state should not assist in the prosecution of conduct which it deems itself not to constitute criminal behaviour. According to the *ne bis in idem* condition, a state may refuse to comply with a request for assistance if this request concerns prosecution for an

offence for which the accused has already been tried. In both statutes of *ad hoc* tribunals, the principle of *ne bis in idem* is laid down. Other reasons for unwillingness of states to cooperate are the interference in the sovereignty of states, public order, security or other essential interests of the state. It is important to realize that simultaneously with the establishment of *ad hoc* tribunals, their primacy over national courts has been laid down in the statutes and this represents an interference with national sovereignty. These reasons for refusing extradition of perpetrators are eligible in certain cases, but do not apply to crimes under international law.[15] Therefore from this point of view, just law proceedings in international criminal tribunals seem to be more effective.

Most principles having applied in criminal proceedings are originally based on the national law of the country. One of the most important principles is that everyone has the right to a fair trial which is a customary norm of international law. It means that the case should be proceeded by an independent and impartial tribunal established by law – righteously, publicly, within due time. This law has several elements. According to international law, the accused of crimes have the same procedural rights before international criminal courts as before the national courts. One of the basic requirements is that the judges should act impartially, without bias. Independence and impartiality of judges should be guaranteed by taking measures, under which judges would be independent from other organs of state power and they would excel at a high degree of competence, impartiality and high moral integrity. In international proceedings, independence is guaranteed by the legal institution of exclusion judge of the nation state. Judges are obliged forbear from doing any action, in which there is a threat of suspecting from taking one's side. At the same time they enjoy immunities and privileges. Many provisions have been laid down in the Rome Statute which is the guarantee of independence of ICC judges. Procedural rights having lain down in the Statute are comparable to national legislation of states.[16] In our opinion, there is no risk of handling legal acting as for judges at international tribunals. They are better at international law and ICC norms, so they are more or less the representatives of the community. The role of national judges is to enforce law and order; therefore they are not competent and capable to prosecute effectively enough the most serious conflicts that endanger peace and security. Better knowledge of the environment and background of the conflict unambiguously says in favour of national judges. Although the guarantees of independence of national and international judges are rather broad, it is very naive to believe that judges are living in an air bubble without any access to the media. The media often have the tendency to consider the suspected of committing crimes to be guilty beforehand. Thus another important principle, presumption of innocence, which is applied in criminal proceedings, has been broken. So the absolute independence of judges at national or international level is more or less a mere vision. Thus it has no influence on the efficiency of both examined systems.

Generally, proving guilt of having committed crimes under international law is a lengthy process. Frequently it is necessary to interrogate witnesses from different countries, so international criminal authorities must rely on the cooperation of states. Language barrier is another obstacle of speed of proceedings at the international level. Language of the court is usually different from the language of the accused and witnesses. Procedural rights of the accused include the right to file objections. All the factors contribute to the lengthy and complicated criminal proceedings at the international level. Legal proceedings are more effective if they are held in such a place where is possible to get the most evidence, or where they witnesses and the accused live, or where most of the involved understand legal system and language.

The seat of the International Criminal Court is located far from the region of crimes, which contributes to difficulties during investigation of the case. That is why the proceedings are

prolonging unnecessarily. Although many states have a problem with delays in legal proceedings, it is true that the International Criminal Court gave its first judgment 10 years after the entry into force of the Rome Statute. It results consequently into weaker trust of people in justice. Time delays at national or international level have a negative impact on the country's efforts to cope with conflict and possible violence as quickly as possible. Therefore prosecuting crimes at the international level does not guarantee the promptness of proceedings either. Even in terms of post-conflict national settlement, sentencing a perpetrator would contribute to the restoration of legal power, to enhancing confidence at judicial system and to moral compensation for victims. The antithesis is, however, if a state has a non-functioning justice system, or perhaps there is no legislation to sanction crimes. Lack of finance of a state government may impact on covering effective investigation or subsequent criminal proceedings. In addition to time delays in proceedings, the negative feature of international criminal bodies is their financing. Enormous money is being spent to finance international judicial bodies. From the financial point of view, proceedings at national level are much more efficient. Especially, if the proceedings protract disproportionately, it is necessary to gain further financing for their running.

At the national level, there is also the possibility of politicizing the process and bias of judges. National authorities might not have sufficient political willingness to open an investigation. Despite it, various surveys among local population have shown the lack of confidence in international tribunals. This fact is closely related to distinctive understanding of punishing and justice, which are often different in African or Islamic system in comparison to the Continental or Anglo-Saxon legal system. National courts might not have sufficient means for effective prosecution of crimes under international law and there is no guarantee or safety of victims or witnesses either. That is the fact, the majority of cases, which the International Criminal Court dealt with, are from African continent. In view of different aspects, most resonating when comparing judicial bodies, it is quite difficult to conclude what judicial authority will provide more effective penalty for crimes in accordance with the international law. So-called hybrid courts would be the kind of ideal theoretical solution. They would represent an alternative way how to implement the international law.

Domestic courts are very familiar with the environment, the background of the conflict, cultural and social conditions. Their possible lack of professionalism and lack of knowledge of international law would be solved by the international board of judges. This would also solve the problem of excessive finances that are necessary to give to the international judicial bodies or possible lack of finances in a national system. Although to mix up both elements might seem to be the perfect theoretical solution, it is very difficult to predict how the International Community would face to the establishment of mixed tribunals.

3. The role of Islamic Criminal Law in case of criminal sanction of Saif al-Islam Gaddafi

At present intensive communication is running between Libyan authorities and the International Criminal Court about which body should investigate and then prosecute Saif al-Islam Gaddafi for crimes against humanity that he committed as de facto the prime minister of Libya on its territory. So that we could make a comparison of this particular case at the international and national levels, it is necessary to become familiar with Islamic legal system. For the purposes of thorough analysis and comparison, it is necessary to be acquainted with the institutional system, sentencing structure and the background of the situation in Libya. Just this knowledge influences the theory, on what system basis criminals should be

prosecuted in this particular case. This is a typical example of a conflict between a national court and an international judicial authority. Criminal proceedings in Islamic system are based on the same or similar principles with more or less different understanding the prosecution and justice as other systems of the world.

Protecting and improving the dignity of the individuals is the basic principle of Islamic political and legal theory. It is evident that some conceptual differences between Islamic law and human rights law may occur, but this does not mean that they are incompatible. It is true that individuals in Islamic law are subordinate to God's commands, but it does not mean they do not enjoy natural human rights. The principle of legality is a fundamental principle of Islamic law, according to which everything is permitted what is not expressly prohibited by Sharia. Contemporary Islamic law is formally applied as it was interpreted by the classical school of Sunni and Shiite classical school. Static and excessive sticking to the traditional interpretation of Sharia law may limit the scope of Islamic law at present.[17]

Islamic law differentiates the judgement of a competent court (qada‘) from a legal opinion (fatwa) given by a jurisconsult (mutfí) on a particular issue. This legal opinion is not legally binding. A final and executable judgement can only be given by a competent judge after the full consideration of a case in accordance with due process of the law. The accused persons have the right to defend themselves before the court and it shall not be denied them. In Islamic criminal law the presumption of innocence is applied as well.[18] Sharia contains mainly substantive legal provisions of Islamic law, while procedural aspects fall within the sphere of Fiqh. In Islamic law, the parties have equal status both in civil and in criminal proceedings and trials are public. When applying the rules of evidence, testimonies of two women are equal to a testimony of one man. Islamic scholars defend these discriminatory rules by applying only to certain criminal offences.[18]

Prohibition of torture is one of the imperative norms of international law. Islamic law prohibits torture and cruel, inhuman or degrading treatment. The question is, to what extent these provisions are consistent with penalties being allowed by Islamic criminal law. Islamic law prescribes fixed punishments called hudúd for certain offences, retributive punishments called qisas and for other offences and discretionary punishments called ta’zír. A Muslim State‘s conformity to an international standard of punishment in crimes that attract qisas or ta’zír punishments under Islamic law therefore depends on the political will and other international considerations of a particular State. The tension with international human rights law is essentially in respect of the hudúd punishments which are fixed and invariable as long as the crime is fully established as provided by Islamic law. The hudúd punishments are amputation of a hand, death, crucifixion, stoning to death, and cross-amputation of the hand and foot. These punishments are classified as the rights of God. For the perspective of international human rights law, Mayer has argued that these hudúd punishments are inconsistent with modern penological principles and modern human rights norms.[19] Penalties should not be of degrading and inhuman character. Even though most Muslim states avoid inflicting such penalties, they are not explicitly prohibited in national orders.

Libya has a special place, even in the Arab world. Its full name was The Great Socialist People's Libyan Arab Jamahiriya. Jamahiriya was derived from the plural word Dzumhur, which means nation in arabic. The UN formally recognized the country as "Libya" in September 2011 based on a request from the Permanent Mission of Libya. The current name, "State of Libya" (Dawlat Libya), was adopted unanimously by the General National Congress in January 2013.[20]

Libya is the contractor in almost all human rights documents from the United Nations workshop.[21] UN Security Council Resolution 1970 (2011) dated on 26 February refused

gross and systematic violation of human rights, including the intervention against protesters and violence against civilians, which were perpetrated by Libyan government. The Security Council unanimously decided to hand over the situation in Libya to the Prosecutor of the International Criminal Court and simultaneously Libya was dared to cooperate with the ICC.[22] Later, on 27 June 2011, the International Criminal Court issued three arrest warrants: for of Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi and Abdullah al-Sennusi for crimes against humanity (murders and persecution) which they committed in Libya from 15 February to 28 February 2011 with the military forces. On 22 November 2011 the prosecution against Muammar Gaddafi was officially terminated because of his death.[23]

Saif al-Islam Gaddafi was considered as de facto Prime Minister of Libya. Officially, he is not in state custody, but he has been held in captivity around the town of Zintan. Pre-trial judges consider that these problems cause Libya is not able to arrange a proper and fair trial of the accused, within which their procedural rights would be met. In their declaration, judges of the International Criminal Court recognized the efforts of Libya to restore institutions and the legal state but Libya is facing serious difficulties in administration of justice throughout the country. The Minister of Justice Salah al-Marghani insists on that Libya has the right to prosecute its own citizens. From his point of view, it is necessary to try Gaddafi in Libya to revive credit of Libyan judicial system. Libya has assured the ICC that the suspect is accused of the same crimes for which he is prosecuted by the Court. According to its law, it is possible for these crimes to set up death penalty for these crimes. Libyan representative stated that during investigation in the territory of Libya gain important evidence. But under the Code of Criminal Procedure of Libya the evidence can only be declassified in a summary report to avoid obstruction of investigation. Through this basis, it is possible to confirm the assumption: at national level, evidence is better assurance, so whole success of investigation depends on perfect cooperation of the International Criminal Court with national authorities. The problem arises when Libya does not want to provide such evidence, because they want to judge Gaddafi by themselves.

On 31 May 2013 the International Criminal Court addressed the challenge to Libya, so that they released the suspect. Libyan authorities have appealed against this decision and filed another appeal for examination admissibility in accordance with Article 19 paragraph 4 of the Statute. After a thorough examination of all the facts, pre-trial judges have concluded that Libya is not able to transport Gaddafi to state prison and provide him legal agency.[24] In accordance with Articles 17, 19, 21, 90 and 95 of the Statute and Articles 58 and 59 of the Rules of Procedure, the judges have examined two questions in relation to admissibility of proceedings at the national level. Firstly, they have investigated whether Libya has made some progress within the investigation since Gaddafi was captured; and secondly, whether the state is able and willing to investigate the case sufficiently and judge the accused afterwards. For that purpose national authorities must have shown concrete evidence that would apply to the merits of the dispute. It has concerned of examination of witnesses and suspects, gathering documentary evidence, decisions authorities they have taken in the matter, as well as various internal reports, updates, filing in the investigation file, which would be unmistakable sign that Libya has acted in the case. Libya has requested for prolongation the deadline for submitting evidence, but the Court found that Libya had had enough time to prove these activities. The Court positively evaluated Libya's cooperation with national governments and regional or international organizations in an effort to restore the institution and the legally consistent state. Despite this progress, the Court has come to a conclusion that problems still persist in the country and they have considerable difficulties in the administration of justice in the territory. The Court can see the main problem in the inability to transport Gaddafi from Zintan city to state prison, because Libya has taken no action; therefore it can be assumed that

the situation will not be different in the near future. The Court considers that Libya is not able to provide the safety to witnesses and so to get the necessary testimonies. With regard to the security situation in Libya, there are serious obstacles to provide legal representation to Gaddafi.[25]

Saif al-Islam appeared before Libya court on May 2014. In Libya he faces a string of charges related to his alleged incitement to or ordering of crimes committed during civil unrest, which started on 15 February 2011, and the ensuing armed conflict. Charges include but are not limited to indiscriminate shelling, opening fire at demonstrators and engaging in acts of vandalism, looting and killing. Amnesty International considers that Libya is not capable of ensuring that Saif al-Islam Gaddafi be brought to justice through a fair trial and therefore believes that he should face a trial at the ICC. A majority of the ICC Appeals Chamber rejected all four grounds of appeal brought by the Libyan government and upheld an earlier decision of the Pre Trial Chamber that Saif al-Islam al-Gaddafi should be tried by the ICC. The reasons for the refusal include the government's failure to demonstrate that he was facing substantially the same case nationally as he would face at the ICC.[26]

Based on many reports of organizations protecting human rights, human rights protection system in Libya is at a very low level. It can be concluded that Libya will not be able to provide the due process for Saif al-Islam Gaddafi, in which all the procedural rights would be guaranteed. Gaddafi himself asks to be issued to the ICC. In the Islamic world, there is different understanding of justice and punishing which results into the effort of Libyan authorities to prosecute Gaddafi. Even if Gaddafi was sentenced by Libyan court, most likely it would lead to his conviction in a fast procedure and he would be sentenced to life imprisonment or death penalty. However, idea of justice would be met according to Libyan people and their rules; thus in their understanding, such sentencing would be the moral satisfaction.

4. Conclusion

The article is intended as an international comparison of judicial authorities and national courts with regard to the effectiveness of prosecuting crimes under international law. We have paid attention especially to certain aspects that are crucial for purposes of comparison. Comparison of international and national courts is presented in the article both generally and specifically, on the case Saif al-Islam Gaddafi that is currently topical. At the time of writing, there is communication between governmental authorities of Libya and the International Criminal Court about where the proceedings against Saif al-Islam Gaddafi should take place. International Criminal Court asked Libya so that they issue him to the Court, because the country, with regards to the given situation, is not able to prosecute and sentence his crimes effectively. The conclusion of Libyan conflict is of great importance for the region and post-conflict reconciliation. Based on thorough analysis and comparison of the two judicial systems, we have concluded that it cannot be clearly determined, which system is more efficient for prosecuting crimes under international law. A kind of ideal theoretical solution would be so-called hybrid courts that would represent an alternative way of implementing international law. It would be a mixture of the best elements taken from both systems.

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THE CJEU CASE LAW ON SUBSIDIARY PROTECTION: REFLECTIONS ON ELGAFAJI AND DIAKITÉ

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Key words: subsidiary protection, serious harm, armed conflict

Abstract:

It has been acknowledged that, however properly the refugee definition contained in 1951 Convention relating to the Status of Refugees may be applied, there are some categories of persons in need of protection who do not fall under the strict scope of this instrument. Protection needs of such individuals have been partly solved by introduction of the institute of subsidiary protection in EU Qualification Directive. According to Article 2 f) of the Directive person eligible for subsidiary protection means a third-country national who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that if returned to his or her country of origin would face a real risk of suffering serious harm which consists of the death penalty or execution, torture or inhuman or degrading treatment or punishment in the country of origin, or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. This paper analyses protection that is currently afforded in EU to victims of indiscriminate violence in the context of article 15c of the EU Qualification Directive as well as CJEU´s interpretation in Cases Elgafaji and Diakité.

1. Introduction

It has been generally acknowledged that, however properly the refugee definition contained in the 1951 Convention relating to the Status of Refugees (hereinafter Geneva Convention) and 1967 New York Protocol may be applied, there are some categories of persons in need of protection who do not fall under the strict scope of these instruments. Such refugees of concern to UNHCR include, for example, those fleeing the indiscriminate effects of violence arising in situations of armed conflict, with no specific element of persecution. [1]

The European Council on its special meeting in Tampere in 1999 agreed to work towards establishing Common European Asylum system based on the Geneva Convention and the principle of *non-refoulement*. According to the conclusions of this meeting, rules regarding refugee status should be complemented by measures on subsidiary forms of protection, which should be complementary and additional to the refugee protection enshrined in the Geneva Convention and it should offer an appropriate status to any person in need of such protection. [2]

Standards for definition and content of subsidiary protection status were laid down in the Qualification Directive. [3] According to the Article 2(f) of the Qualification Directive,

subsidiary protection shall be granted to person who does not qualify as a refugee, but in respect of whom substantial grounds have been shown for believing that if returned to his/her country of origin, would face a real risk of suffering serious harm, which consists of death penalty or execution, torture or inhuman or degrading treatment or punishment, or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. [4]

This Paper will analyze the latter judgement of the Court of Justice of the European Union (hereinafter "CJEU") on subsidiary protection, *Diakité* Case [5], focusing on the interpretation of the Article 15 (c) of the Qualification Directive. We will have a closer look also on the Opinion of Advocate General Paolo Mengozzi (hereinafter "AG"), which is far more explaining than the judgement itself. References and comparison with the first judgement of CJEU in this field in the *Elgafaji* Case [6] will also be made.

2. Facts and questions referred for preliminary ruling

In 2008 Mr. Diakité unsuccessfully applied for asylum in Belgium, invoking the repression and violence he had endured due to his participation in protest movements against the ruling regime. In 2010 Mr. Diakité lodged his second application for asylum. The responsible authority refused to grant him either refugee status or subsidiary protection finding above all that there was no situation of indiscriminate violence or armed conflict in Guinea. This decision was upheld by the judgement of the respective appeal authority.

Mr. Diakité contested the above mentioned judgment before the Court on the ground that it relied on the definition of armed conflict used by the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY) [7] in order to find whether the condition laid down in paragraph Article 15 (c) of the Qualification Directive was met. The Court was of the opinion that, in view of the *Elgafaji* judgment, it is possible that the concept of armed conflict as referred to in the Qualification Directive may be interpreted autonomously and consequently could have a different meaning from the concept of armed conflict as defined in the case-law of ICTY.

In those circumstances, the Court stayed the proceedings and referred to CJEU the following question for a preliminary ruling:

'Must Article 15(c) of the Qualification Directive be interpreted as meaning that that provision offers protection only in a situation of "internal armed conflict", as interpreted by international humanitarian law, and, in particular, by reference to Common Article 3 of the four Geneva Conventions (hereinafter Common Article 3) [8] *?*

If the concept of "internal armed conflict" referred to in Article 15(c) of the Qualification Directive is to be given an interpretation independent of Common Article 3 …, what, in that case, are the criteria for determining whether such an "internal armed conflict" exists?' [9]

3. Consideration of the question referred

Even though CJEU already tried to clarify meaning of the Article 15 (c) of the Qualification Directive in *Elgafaji* Case, it did not provide explicit definition on the concept of internal armed conflict which can be considered as one of the key terms of this Article. As we have seen in the previous section, similar notion can be found in the provisions of International

Humanitarian Law (hereinafter "IHL"). According to these instruments for armed conflict of not international character is distinctive certain degree of intensity of conflict, level of organisation of combatants and duration of armed violence. Central matter of the question referred for preliminary ruling was whether these conditions are applicable also for interpretation of the Article 15 (c) of the Qualification Directive.

4. Question of application of the rules of IHL

Initially CJEU referred to the paragraph 31 of the *Elgafaji* judgement and reiterated that the three types of serious harm defined in Article 15 of the Qualification Directive constitute the qualification for subsidiary protection, where substantial grounds have been shown for believing that the applicant faces a real risk of such harm if returned to the relevant country. In its judgement CJEU followed AG´s Opinion and applied autonomous interpretation in defining Article 15 (c) of the Qualification Directive. CJEU pointed out three main differences that distinguishes institute of subsidiary protection from IHL – terminology, aim and area of application.

The type of harm specified in Article 15(c) of the Qualification Directive consists in a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. CJEU noted that the legislature of the European Union has used the phrase international or internal armed conflict, as opposed to international armed conflict and armed conflict not of an international character, the concepts on which IHL is based. CJEU observed that the European legislature wished to grant subsidiary protection not only to persons affected by international armed conflicts and by armed conflict not of an international character, as defined in IHL, but also to persons affected by internal armed conflict, provided that such conflict involves indiscriminate violence. Subsequently, it is not necessary for all the criteria referred to in Common Article 3 and Article 1(1) of Protocol II [10], to be satisfied. [11]

To understand this CJEU´s conclusion looking at point 35 of AG´s Opinion might be helpful. AG in order to distinguish internal armed conflict according to the Qualification Directive and in IHL applied subjective teleological method of interpretation. According to preparatory works states participating on the adoption of the Common Article 3 in particular feared, that the Geneva Conventions would consequently apply to all forms of uprisings, riots, state decay and crime itself which would enable persons responsible for these acts invoke the status of combatants in order to seek legal recognition and avoid the consequences of their actions.

CJEU relying again on AG´s Opinion observed that IHL, on the one hand, and the subsidiary protection regime, on the other, pursue different aims and establish quite distinct protection mechanisms. CJEU differentiated aim of the two examined regimes by stating that while IHL is designed, inter alia, to provide protection for civilian populations in a conflict zone by restricting the effects of war on persons and property, it does not provide for international protection to be granted to certain civilians who are outside both the conflict zone and the territory of the conflicting parties. As a consequence, the definitions of armed conflict provided in IHL are not designed to identify situations in which such international protection would be necessary and would thus have to be granted. [12]

According to AG the function of armed conflict of not international character lies primarily in identifying certain categories of conflicts covered by IHL, thus it defines its scope and corresponds to the particular inherent objective of this branch of international law. On the other hand refugee status and subsidiary protection are considered to be two separate, but

closely interlinked components of the European Union´s concept of international protection. Such an integrated approach enables to interpret provisions of Qualification Directive and Temporary Protection Directive [13] as a prospective comprehensive normative system that can cover every situation when the third-country national who can´t obtain protection in home country seek international protection in the European Union. [14]

Following once more AG opinion, CJEU noted that there is a close link between IHL and international criminal law, since certain breaches of the former branch of law give rise to individual criminal liability. On the other hand, no such relationship exists in the case of the subsidiary protection mechanism. Accordingly, in CJEU´s opinion it is not possible, without disregarding those two distinct areas, to make eligibility for subsidiary protection conditional upon a finding that the conditions for applying IHL have been met. [15]

To sum up before focusing on the second part of the question referred for a preliminary ruling, we can conclude that in the light of all the foregoing considerations, especially different terminology used by IHL and the Qualification Directive, their different aims and area of application CJEU applied autonomous interpretation in order to define the concept of internal armed conflict under Article 15 (c) of the Qualification Directive. CJEU has already held in the Elgafaji judgment that Article 15 (c) is independent from the Article 3 of the ECHR. This conclusion was reached on the basis of the different wording of the two provisions, as well as allegations of systemic nature. [16]

1. Defining internal armed conflict

Since the Qualification Directive does not define internal armed conflict, its meaning and scope, according to the well established case-law of CJEU, must be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part. [17]

According to CJEU the usual meaning in everyday language of internal armed conflict is a situation in which a State's armed forces confront one or more armed groups or in which two or more armed groups confront each other. [18] CJEU pointed out that although the original Commission proposal of Article15(c) would recognise that threats to the life, safety or freedom of the applicant could arise either through armed conflict or through systematic or generalised violation of human rights, the legislature of the European Union ultimately decided to retain only the idea of a threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. [19]

Moreover as CJEU has already stated in the *Elgafaji* judgement, the existence of an internal armed conflict can be a cause for granting subsidiary protection only where confrontations between a State's armed forces and one or more armed groups or between two or more armed groups exceptionally create a serious and individual threat to the life or person, because the degree of indiscriminate violence reaches such a high level, that substantial grounds are shown for believing that a civilian, if returned to the relevant country, would solely on account of his presence on that territory, face a real risk of being subject to that threat. [20] The more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection. [21] In that context, it is not necessary, when considering an application for subsidiary protection, to carry out a specific assessment of the intensity of such confrontations in order to determine, whether the condition relating to armed conflict has been met. [22]

Sticking to the point 92 of AG´s Opinion CJEU stated that finding that there is an armed conflict must not be made conditional upon the armed forces involved having a certain level of organisation or upon the conflict lasting for a specific length of time. It is sufficient if the confrontations, in which those armed forces are involved, give rise to the level of violence when every civilian, if returned to the relevant country, would solely on account of his presence on that territory face a real risk of being subject to serious and individual threat to his life or person. [23]

In the light of the all above mentioned arguments CJEU acknowledged that internal armed conflict exists, for the purposes of applying Article 15(c) of the Qualification Directive, if a State's armed forces confront one or more armed groups or if two or more armed groups confront each other. It is not necessary for that conflict to be categorised as armed conflict not of an international character under IHL, nor is it necessary to carry out, in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict. [24]

2. Two steps forward or one step back?

CJEU, at least from what we could read in its judgement, has applied autonomous interpretation principle in combination with textual, contextual and teleological interpretation method. In fact CJEU didn't pay much attention to any of these methods of interpretation. Actually it didn't use latter two methods at all and when applying textual interpretation it only rephrased part of the IHL definition, although it expressly rejected it, what may seem puzzling.

In our opinion, arguments of CJEU are considerably weak and it should have gone further in defining the concept of internal armed conflict. Using different terminology does not always have to imply that the terms have automatically different meaning, on the contrary they can be synonyms. We can´t neither agree, that the two examined fields of law have different purposes. The overriding aim of both IHL and Article 15 (c) of the Qualification Directive is protection of civilians in case of armed conflict. The only difference is the territorial aspect. In other words, where is the affected person placed, whether in the conflict zone or not (IHL operates territorially, however subsidiary protection extraterritorially) can´t be determining given that both institutes seek to provide protection to the victims of the same conflict. After all the risk the concerned person is facing is the same regardless where he or she is physically present.

Finally, more intensive relationship between IHL and international criminal law or non-existence of this kind of relationship between the latter and subsidiary protection is not very persuasive argument to be a ground for application of the autonomous interpretation.

5. Conclusions

Interpretation of the concept of internal armed conflict adopted by CJEU in the *Diakité* judgment is in our opinion very vague, what has many negative side effects. First of all every Member State will apply this concept differently, what is in contrary to the harmonisation and effort to create common standards in the field of international protection in the European

Union. It raises possibility of subsequent third reference for preliminary ruling as well. Furthermore, this judgement has no added value for practise of Member States.

Another interesting negative is a higher overlap of Article 15 (c) with Article 15 (b). Although European Commission already in its Explanatory Memorandum to the Qualification Directive [25] mentioned that the three grounds set in Article 15 are separate but potentially overlapping, we doubt that such overlap that makes one of the grounds redundant was their intention. On the contrary we believe that this would be very unwanted consequence. Moreover, as CJEU already stated in paragraph 28 of the *Elgafaji* judgement Article 15(b) of the Qualification Directive corresponds, in essence, to Article 3 of the European Convention on Human Rights, by contrast, Article 15(c) is a provision, the content of which is different from that of Article 3 of the European Convention on Human Rights, and the interpretation of which must, therefore, be carried out independently. [26]

We believe that CJEU should have used definitions provided in IHL as a starting point for interpreting internal armed conflict. Extensive interpretation based on criteria of intensity of a conflict [27], level of organisation of combatants and duration of armed violence would be more appropriate and what is important it would avoid negatives mentioned in previous lines, especially overlap with Article 15 (b) what we consider to be the most significant problem. Having the mentioned criteria helps us to clarify relationship between these two provisions and interpreting them in extensive way, makes them adapt for the needs of subsidiary protection (and cover situations not falling under the IHL definitions at the same time). Even if we consider internal armed conflict to be autonomous concept characteristic for the European Union Law, this argument finds its support in teleological interpretation method since in our view IHL and subsidiary protection pursue the same purpose, as mentioned above.

The intention of CJEU is obvious to extend subsidiary protection to additional groups beyond the reach of IHL by means of lowering burden of proof imposed on applicants for subsidiary protection. And it is definitely an honourable intention. However, with all the negatives this interpretation entails, was it really the best decision?

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of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.

[4] See Article 15 of the Qualification Directive.

[5] Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides*.

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[7] Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) para 70. "*On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there*."

[8] According to the Common article 3 "*In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.
An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

[9] For further details see *Diakité* Case paras 9 – 16.

[10] Article 1 (1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non‑International Armed Conflicts (Protocol II), of 8 June 1977 provides that: *this Protocol, which develops and supplements Common Article 3 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the [four Geneva Conventions], and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol*.

[11] See *Diakité* Case paras 19 – 21.

[12] Ibid paras 23, 24.

[13] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

[14] Opinion of Advocate General Mengozzi in *Diakité* Case (hereinafter "AG Opinion") points 51, 55, 60, 61. This conclusion is also supported by the Article 78 (1) of the Treaty on the functioning of the European Union.

[15] See *Diakité* Case paras 25, 26. See also AG Opinion points 50, 53, 70.

[16] See AG Opinion points 78-79.

[17] See for example Case C-549/07 Wallentin-Hermann para 17 or Case C-119/12 Probst, para 20.

[18] See *Diakité* Case para 28.

[19] Ibid para 29, See also COM (2001) 510 final.

[20] See *Elgafaji* Case, para 43.

[21] Ibid para 39.

[22] See *Diakité* Case para 32.

[23] Ibid para 34.

[24] Ibid para 35.

[25] See Document COM (2001) 510 final.

[26] See also *Elgafaji* Case para 44 and European Court for Human Rights´ judgement in Case NA v The United Kingdom, Application no. 25904/07 paras 115 – 117.

[27] Intensity of armed conflict for the purposes of Article 15 (c) of the Qualification Directive should be assessed naturally in light of paras 39 a 40 of the *Elgafaji* judgement.

MORAL PRINCIPLES AS THE LAW DOGMA VS. SOCIAL EVOLUTION EFFECTIVITY IN LEGAL SYSTEM

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Key words: social evolution, law dogma, moral principles, transition

Abstract:

This article is based on comparation of the general moral principles incorporated in current legal system, which is heavily influenced by modern euro-american law approach, and natural social evolution as a part of the theory of social evolution. Author presents separatly these two auxiliary „subconscious" ways of legal system creation, because its sole existence speed-line is different and direct impact of this convergence represents notoric tension between de lege lata and de lege ferenda.

Main article also follows closely related issues such as important problems of current political, economical and social situation in euro-american space, which is based on its incompetence to incorporate the necessary changes and revoke the old dogma which influenced especially the traditional view of law. (reasoned by practical examples) Traditional principles of law are attained to conservative point of view, for example vision of the state as the institution of 18th or 19th century.

The social evolution is mainly the mechanism of searching the adequate solutions, naming the real problems, finding the objectives and creating the functions. This theory works with crucial element – semantic term „the transition" , that other attitudes don´t even define by similar related terminus technicus.

Transition had always its source in society, so state, as the primal derivate of society, could only react on this change, which is the main problem. This reaction should be appriopriate and also we should question why state has to answer these needs. State itself is also influenced by social evolution and it has very different atributes include not only a political model of the state, which is in general by academic officials elevated on the top of legal analysis, but also several others components, that counts on this matter. Author´s article is confronting these complex problem and he´s trying to find only a fresh point of view, which is always a start for a new beginning of reformation.

1. Introduction

Current legal principles, which our european legal system is build upon and obviously the slovak law system derivated from it, are heavily influenced by internal and external pressure reflected in the social and economical tension (12) in euroamerican space in the beginning of 21 st. century and followed by social criticism as vast majority people´s recoil reaction against ruling bodies of the states. Social criticism is derived mainly from rational core of the interpreting subject. Social anger and higher level – the social panic, is caused by serious state and legal system failure, and the interpreting subject is no longer able for reasonable approach.

Primal general animosity of european broad mass of people is originated in dissatisfaction (in many cases it is pure desperation) from ineffectivity of basic state and law function – regularity (1,2). Following article explains our positive options and perspective to the future, mechanism of its searching and creating, added with practical situation, which are based mainly on philosophical offspring of utilitarism, pragmatism, and as a synthesis peak - social evolution.

As a basic note of grave importance mentioned by author reflects, that he is actually refusing philosophical approach functionally or ideologically connected with any form of legal or philosophical dogmatism, its legacy materialized in „absolute", absolute values, which are eternal and unchangeable. Author represents the opposite attitude, which is confirmed by rational and empirical research of human society during its whole history. The best notion of the following article is perhaps paraphrased by Gautama Buddha´s quote:

- There´s only one unchangeable, objective and still constant on this world – the change.

2. The term „change" and criticism of basic premises

The „change", as the objective phenomenon, which cannot be stopped by any natural law or human behavior, crosses whole spectrum of natural, but even social branch of science. Facing these „change", the biggest discontinuum and animosity against mentioned variables, creates jurisprudence, which has organically implemented in its basic purpose - the function of regularity, that means to set out certain human behavior with aid of state institutes, which are made by it, so the highest power is expressed by common will of the certain community. Regularity, if we follow the concept of civil society, always confirms with legal regulation used *mores* of certain state, or negative effects are denied by explicit or implicit interdict. Creation of the new rules unfamiliar to specific civil society and derived from the thesis – denying of denied, caused animosity to legal regulation and its future existence would be objectively questionable. (10)

Author mention fact that the law, which is generally accepted, nowadays is bound to the state, or international institutions and alliances. Even this premise is evolved from two variables, which are *apriori* concerned as an eternal and still cathegory (which author considers as dead end) and they are state and the law in their basic principles. According to basic nexus is logical, that certain variables should be considered as relatively stable, if we wish to continue with mathematic operation, however not obligatory constant.

In this moment comes the first crisis of basic premise, because throughout history of human society we could noticed several atributes of the state, which have dynamically evolved and changed. This evolution hasn´t stop even in 21st century, and states are liable to drastic functional changes as a result of new postmodern capitalism development mainly in euroamerican space. Economical power is concentrated due to ultimative comprehension of business freedom and own the property ideas, in the hands of „state-paralell" organisations established with one purpose – to concentrate and to invest capital and which truthfully create economic power nowadays no longer bordered on specific region.(4) Basic functions of the state remain in its original form, but concrete means for its realisation state doesn´t possess anymore and it is reliant on its partners (private corporation subject), and that means essential twist in responsibility transfer from state sphere of power to capital corporation sphere of power.

Understanding of the state, as the sovereign subject, which is ultimative expression of the society´s will, nowadays cannot stand on real arguments. The main interests of the broad population in Slovak republic about public affairs is minimal, what we can proved by statistics in certain kinds of elections. Will and interest of the citizen is not concentrated in public affairs, but in capital economical affairs. Ultimative will´s expression of the slovak society is most of all focused in gathering the capital, which represents purpose property associations, corporations. These subjects transfered the real delegation of society power in euroamerican space, because the basic needs were also modified.

So if the state as the main creator of law system, which people of the country delegated its power through classical constitutional symbolism of 18th and 19th century on, it lost its source of real legitimity, because it became fully depended on purpose-made companies capital, the law also start to lose attribute of general application. Formal appearance remains the same, but real (factual) merit leads us to old-new model of quasi-particular law system, where each social level is not differentiated by origin of birth, but quantity of capital, which adjust specific status and form of law treatment.

3. Solution – seeking possible basis with assistance of social evolution

When we agree and accept two mentioned premises related to the state and law, we can approach to creation and modification of basic mechanism, so we should achieve relatively positive change of marked problems. Current evolution peak, according to the author´s opinion, in understanding of evolution of human society is theory of social evolution, which is derivated from philosophical movement of utilitarism, pragmatism, biological Darwin´s theory of evolution and Einstein´s theory of relativity. Size of the philosophical matter should be restricted accordingly by author, and focused only on the latest level and introduced it as a part of goals mentioned above.

Semantical understanding and law interpretation is opened to more acceptable term – social evolution, which is more actual than social darwinism, which is irrationally identified with ideology, even it became science theory of H. Spencer, T. Malthus, T.N. Carver and they are considered as establishers of both movements.(8)

Ideology admits very hard its own modification, and basic thesis without question, because the main goal is not conformed to objetive criticism, but to create dogmas, which are linked to the main difference between ideology and scientific theory. It is also unlogical to identify mentioned social evolution theory with national socialism idealism and with its symbolism of survival of the fittest – in this case aryan race, which was by empirical and historical experience denied.

William D. Hamilton used teleological point of view to apply natural science law and theories, specifically theory of evolution, on society evolution directives. His basic premise goes out from presumptiom, that if human society is composites from human beings, in certain way it subjects to natural laws too, especially to the theory of evolution. (7)

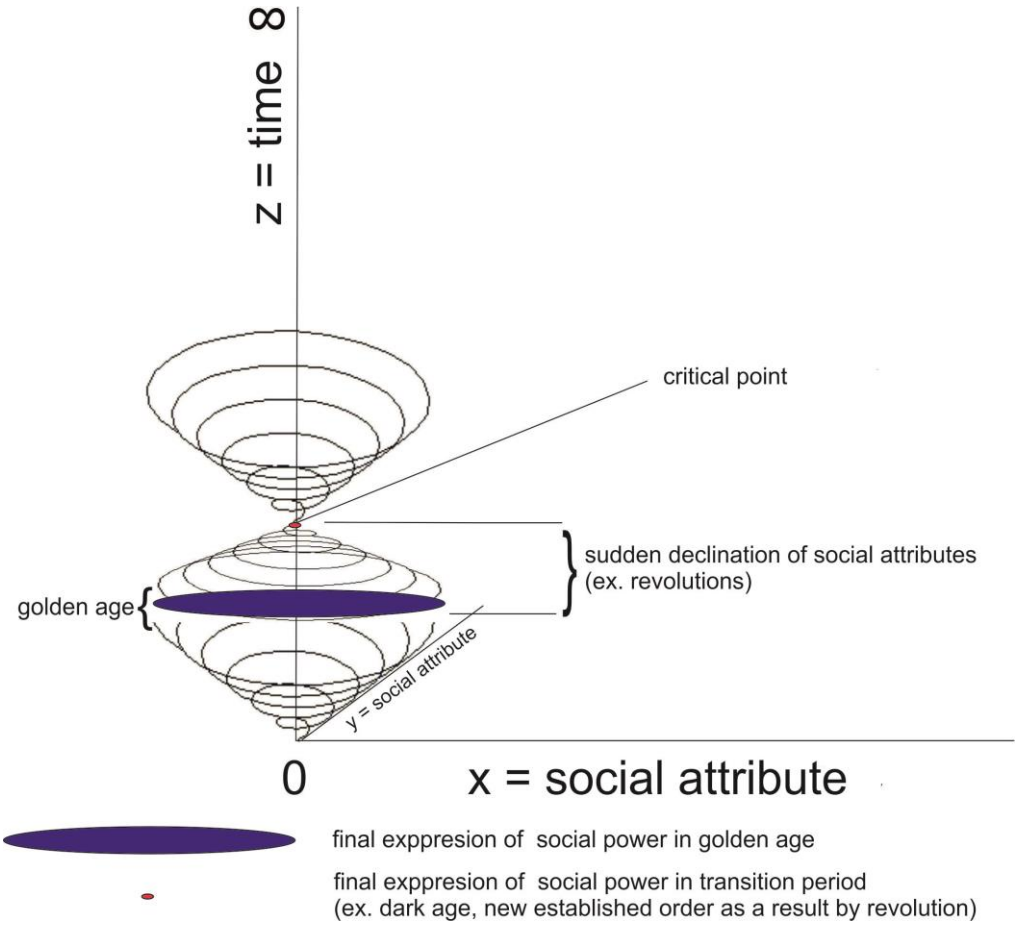
So if the human society is subject to certain natural mechanism, we should functionally select basic variables and values, which they evolve according to specific time horizont. Following scheme was created by author and he made parallel of five main principles of Darwin evolution theory, corelated with social evolution theory.

Principles	Darwin biological evolution theory	Social evolution theory
1. Objective existence of the evolution	General recognition of biological transformation as one unique constant.	General denial of social static and acceptance of social dynamic transformation.
2. Common predecessor	We presume general common element presented by all living beings, which were confronted in common interaction and from that stage were evolved.	Every human society evolves from the first common proto-society attributes and it transformed to current variables images.
3. Creation of new kinds	Every new generation of living creatures influenced by time is differentiated from the preceding one and thus it creates new models, which makes a new kinds.	Every new generation of social system „creators" modulate preceding version, thus creates a new version of social system *de facto*.
4. Gradual escalation of the change	Evolution doesn´t recognize sudden leap influenced by exogenous or endogenous factors. What appears as sudden leap – progress or degression, is actually outcome of longterm process.	The general acceptance of the leading idea, that evolution is one real principle of society evolution and the excess of revolution form is only misunderstood derivate of large changes in short period of time.
5. Natural selection	It is explained by two variables – presumptions – effectivity and purposiveness. Purposiveness is basic presumption of objective existence. General loss of purposiveness lead to gradual extinction. „Effectivity" is ratio, percentual expression of purposiveness. If effectivity came to minimal value – 0%, purposiveness changed to inexpediency. These principles lead the natural selection, wrongfully understood as a survival of the fittest.	According to biological theory, social evolution also recognizes two basic presumptions – effectivity and purposiveness. Basic presumption about human society leads us to general foundation - main purpose. If the existence of the society is bound to purpose, proved empirical principle of effectivity follows also purposivenes as its ratio, percentual expression. *Argumentum a contrario*, what is not maximal effective and lost its purpose, in time it is going to extinct.

Scheme n.1:

(first two columns) On the Tendency of Species to form Varieties; and on the Perpetuation of Varieties and Species by Natural Means of Selection. Linnean Society London 1858.

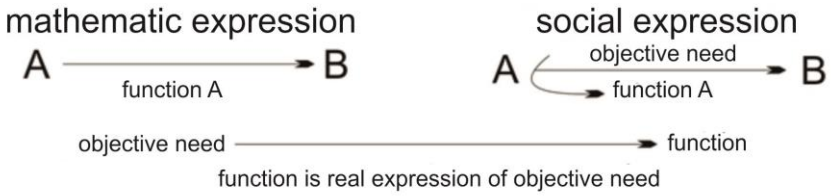
According to the 5 principles in the scheme n.1, the author created diagram, which decribes evolution value of human society:



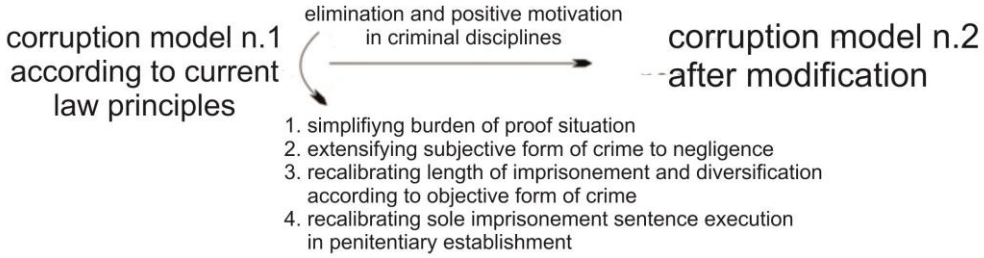
Scheme n.2:

Scheme n.2 is exemplified chart with no closer quantification, that means values on axis x,y,z, are exemplary, appropriate to demosntrate theory of social evolution. Axis x,y represent two dimensional attributes of society, where ax x involves values such as culture, economy, military strenght etc. Ax y involves current scientific, spiritual or moral level of the society. Ax z represents time line. Chart finally shows monolytic model one specific society, where coordinates 0,0,0, introduce the beginning also for other societies. Scheme n.2 explains that evolution is not linear, but non-linear spiral, which creates effect of repeating the history (scheme n.4). Critical point represents notable breaktrough and degradation on axis x,y (for instance declination of western roman empire), the social attributes.

Mathematical and social expression is materialised into following scheme:



Examples:



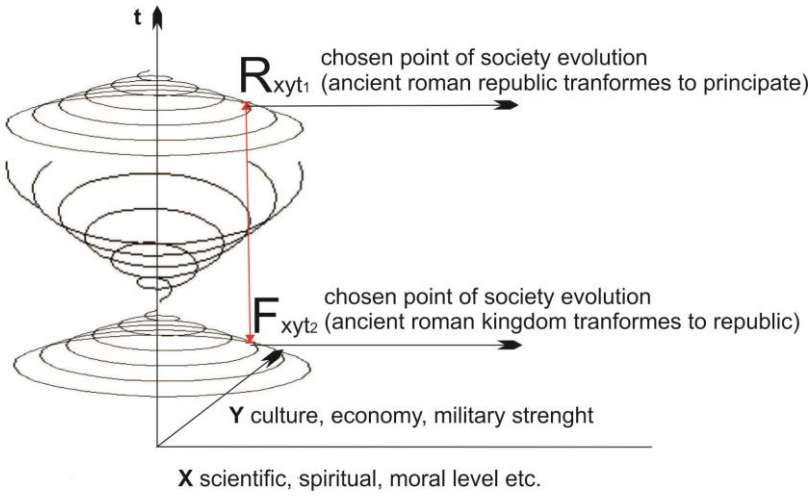
Scheme n.3:

The main expression with the help of social evolution theory describes clear picture, how should basic mechanism and choosing optimal solution look like. Survival aspect of law, state and society result from two variables, which determine its future. Most of all it is purposiveness and its ratio called effectivity. If effectivity matches to 0%, it suggests that mentioned mechanism or solution is purposeless. Everything what we can describe as puposeless or relatively purposeless aspect, it can´t objectively exist in the environment, where exist comparable aspect with higher ratio of effectivity. How we can quantified sole effectivity? We follow mentioned scheme n.3. First of all, defined relation has to have obligatory attributes. That means 1. time flowing, where can be find out status „before“ and „after“, and 2. objective need for application process. In our case, we mentioned corruption model n.1 from the past. Objective need appeared, when corruption model n.1 as social phenomenon, seized to be tolerated by certain society and status of society demands internal change. When there is objective need, it must be processed by function, which is our concrete mechanism, that achieves transformation of corruption model n.1 to corruption model n.2. Absolute absency of corrupt behaviour is not objectively achievable. We can achieve maximal suppression, or modification, but entire denial at the current status of understanding cannot be execute. The function is what we seek, what can fullfill our objective needs.

Mathematic explanation is very simple. On the left side of the equation is certain value, for instance 3. After that, objective need appeared for change of the value on the left side of the equation, because on the right side value 3 is changed to 9. To keep the equation balance, the formal value on the left side must be changed. The simpliest way is applied in the function 3 multiplied by 3, or 3 plus 6. There are also complicated mathematic operation, at last we can reason, that the most effective way is to apply simplier or the simpliest mathematic form

Social expression is similar to the mathematic form. Solution of the function, which should be the simpliest and leads to correct result, is the most effective and so it has chance for survival. If we dispose with several solutions, aspect of effectivity and purposiveness selects out „weaker“ alternatives:

Scheme n.4:



4. Conclusion

1. Examples of the solutions – state

Author is going to return to the core of the problem linked with basic revision of legal principles and dogmas. If we respect the fact, that modern euroamerican state subjetcs come to the temporal declination of economical, political and, in general, social life, isolated revision of legal principles with certian function would not bring anticipated positive effect. Most of all, according to mentioned scheme n. 3, we must define objective need and then functions, that carry out its content.

On the national and supranational level appears, as a objective need, legitimizing the power of capital corporation, which they *de facto* hold real source of state power, and introduce them to broad public, not only as mark for consumers, but as concrete people and thus demask amorphed corporate machinery. We have to get clear about the economical flow of the capital, which direct from these subject to the state treasury and thus they could legitimize their real power. Broad mass of the people should be offered an economical participation on gainings (10) (not only in form employer – employee, or depositor and manager of deposits, but as real active partners sharing gains and losses), which the power of corporate ruling body would be restricted and responsibility relation would increase. Against this form of economical policy stand up euroamerican subjects, which try to hold the status on level „depositor - manager of deposits“. On the opposite, chinese economical subjects and islamic banks follow the principles of making available capital to the broad mass of people. They share real losses and gains and interest is generally forbidden.

Elimination trend of the middle-class should stop to continue, due to gaining access of capital participation. Poor class would be eventually able to share the creation of social values, which in reverse would be given back in useable form.

In the cases of social crisis, which are represented by social-economical tension on one hand, and religious intolerance on the other, exist the tide connection with the loss of authority of the state. State formally restricts its activity by legal and moral principles, but in fact it is objective disability to solve specific problem, because internal struggle was, is and always be a source of large income. If state creates its own indiferention to the hot spots, it is due to understanding, that real power holders, represents by economical subjects with corporate characteristics, see in social problems opportunity to exploit than to problem to solve.

2. Examples of the solutions – law and legal principles

When we describe the objective needs, we can approach for seeking appropriate, the most effective functions. According to the chosen method, it would be adequate to present negative exemplified list, to show what is certainly not effective and purposeful. We cannot no longer stick to the old dogmatic ideas, which current legal principles are derivated, because they are disfunctional, ineffective. For example, state definition as the highest form of society organisation cannot hold out, because it doesn´t hold real power and reversible course in this situation cannot be realized. Law system and its creation should follow real situation in society and reflects its needs. Utilitarian point of view should be set on the first place. For example, if we are aware that serious economic crimes according to the 5. article slovak criminal codex cause the biggest damages to society and objective side – form of culpability – *mens rea* demands intentional *animus,* which is very hard (perhaps impossible in slovak legal reality) to prove during the pre-trial process by investigation police force, we should partially relieve burden of proof, or add intentional negligence to *mens rea.* Principle of restitution should be also reflected in punishment, to be considered in the most extensional interpretation. If the main goal of legal punishment relies in resocialisation the perpetrator, author sees deep antagonism with the legal text of Constitution of slovak republic escpecially the general interdict of unfree labor. The main definition gap is in the interpretation, slovak legal definition calls for forced labor, the modern legal systems bequest on unfree or slavery labor. According to current avalaible psychological and social research studies, the work process creates new social relationships and work abilities, which convict can use after serves the punishment of imprisonment.

Political intentions no longer follow the society´s interests, because that is expressed in capital corporate organisations, which relatively independently, without control, promote policy of increased consumption. Global interest of mentioned problems is emphasized especially by external formalisation, legitimisation and by general knowledgeability about corporate subjects, because potential dissatisfaction broad population would transfer on competent subjects, what is in our current understanding still a state and its officials. On the other hand author doesn´t see survival of euroamerican society with its state forms as a objective possiblity of evolution. Corporative character of companies established in euramerican space would survive, because it is not concetrated on specific teritory, or by personal base, it is determined only by bid and demand. We can derive the conclusion, that in near future with the absence of mentioned problem´s solution, business corporation based and established in european and american continent are going to survive with complete different personal base, meanwhile the society, states and the whole civilisation are going to be modified. Main character attributes would get closer to the other representative advanced civilisation than preserved modern west culture.

5. Summary

The main problem of current political, economical and social situation in euroamerican space is its incompetence to incorporate the necessary changes and revoke the old dogmas which influenced especially the traditional view of law. Traditional principles of law are attained to conservative point of view, for example view of the state as the institution of 18th or 19th century. The social evolution is mainly the mechanism of searching adequate solutions, naming the real problems, finding the objectives and creating the functions. This theory works with crucial element, that others don´t, the change. Change had always its source in society, so state, as primal derivate of society, could only react on this change which is main problem. This reaction should be appriopriate and also we should question why state has to answer these needs. State is also influenced by social evolution and has very different atributes than form of state century ago. Author´s article is fighting with these complex problem and trying to find only a new point of view, which is always a start for a new beginning of reformation.

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THE DEATH PENALTY IN TERMS OF EQUITY

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Key words: law, equity, death penalty, miscarriage of justice, basic human rights

Abstract:

This paper summarises the most common arguments of the proponents as well as opponents of the death penalty. The author analyses the death penalty in terms of equity with an emphasis on the regulation of the death penalty since the establishment of the Czechoslovak Republic in 1918 until the removal of the death penalty in 1990. At the same time, the author describes the empirical research in which the hypotheses are verified on a sample of 113 respondents. In the conclusion, the author provides the results of her original empirical research.

1. Introduction

"In any case, frequent punishments are a sign of weakness or slackness in the government. There is no man so bad that he cannot be made good for something. No man should be put to death, even as an example, if he can be left to live without danger to society." (Jean-Jacques Rousseau, *The Social Contract*)

The development of international relations after World War II led to several declarations with global or regional effect which directly or indirectly touch on the question of capital punishment. As early as 1948, the General Assembly of the United Nations agreed on The Universal Declaration of Human Rights, which states the following: *"Everyone has the right to life, liberty and security of person. (...) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*[89] This declaration was followed by the European Convention on Human Rights, which explicitly awarded the partaking states the right to enact the death penalty: *"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court..."*[90] Ultimately, however, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms from 1983 states the following:

"Article 1 - Abolition of the death penalty

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

[89] Article 3 and 5: The Universal Declaration of Human Rights, 10. XII. 1948, Paris.

[90] Article 2 (Right to life): European Convention on Human Rights, 4. XI. 1950, Rome.

Article 2 - Death penalty in time of war

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; (...).

Article 3 - Prohibition of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention."[91]

While the first two articles will be clear to the reader, the third may warrant a short explanation. Article 15 of the European Convention on Human Rights enables the member states of the Council of Europe to enact measures circumventing the obligations of the Convention *"in time of war or other public emergency threatening the life of the nation."*[92] There may be no exceptions to Protocol No. 6, however, not even in the case that a state considered the death penalty to be the only effective way to stop a rapid increase in homicides, for example.[93]

After the break-up of Czechoslovakia, Slovakia was in a relatively complicated situation in terms of the death penalty and the joining of the Council of Europe. If the new country had not accepted the European Convention for the Protection of Human Rights, complete with its accompanying Protocols, including the 6th one, which were ratified by the former Czechoslovakia, the international community might have deemed the avoidance of Protocol No. 6 the country's attempt to return to the death penalty immediately. The Council of Europe was therefore compelled to send out a few warnings condemning the disrespect of the European rejection of the death penalty, especially to those member states which joined the Council of Europe after 1993. These states had previously agreed to abolish the death penalty within a certain period, and to cease sentencing people to death within the same period. In June 1996, the Parliamentary Assembly of the Council of Europe had to express its concerns about Russia, Ukraine, and Lithuania, which all resolved to abolish the death penalty upon their joining of the Council of Europe and which still had not fulfilled this resolution and continued to award and carry out the death penalty.

2. The Arguments For and Against the Death Penalty

The predominant argument of the proponents of the death penalty is its deterring effect. The underlying assumption is that the life of the perpetrator of a crime should be taken in order to scare others from committing the same type of crime. This assumption has been contested and discussed for years. The first econometric research indicating a considerable deterring effect of the death penalty was published by I. Ehrlich in the 1970s. Using complicated differential equations, Ehrlich arrived at the conclusion that a single death penalty carried out may have the effect of preventing seven to eight other homicides on average.[94] Ehrlich's research was

[91] Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, 28. IV. 1983, Strasbourg.

[92] Article 15 (Derogation in time of emergency): European Convention on Human Rights, 4. XI. 1950, Rome.

[93] In order to clarify, we need to emphasise that at the time of Slovak Republic's joining of the Council of Europe on June 30th, 1993, the ratification of Protocol No. 6 was not a compulsory requirement for entry into this international institution.

[94] EHRLICH I.: The Deterrent Effect of Capital Punishment: A Question of Life and Death. In: The American Economic Review, Vol. 65, 1975, No. 3, p. 397 et seq.

subsequently intensely scrutinised and a mere few decades later, the public opinion had shifted to the belief that there was no unambiguous evidence of the deterring effect of capital punishment. In 2003 and 2004, new research findings were published in the United States which accounted for the data from the post-1976 period, when the moratorium on execution had been lifted.[95] The data distinctly proves that the number of homicides increased immediately after the enactment of the moratorium and decreased immediately after the moratorium was lifted. At the same time, the research of Emory University professors of economy from 2003 asserted very convincingly that one execution of a perpetrator may prevent up to 18 other homicides.[96] The econometric models also indicate that the deterring effect of capital punishment on potential perpetrators is compounded by a higher probability of capture. Nevertheless, the death penalty only fulfils its deterring role if it is in fact carried out.[97] Its theoretical threat in the Criminal code has no preventative effect. Furthermore, other research has shown that there is no similar deterring effect in any alternative strict punishments, such as life imprisonment.[98]

Another argument for the death penalty is its assurance effect in terms of preventing re-offense, regardless of its capacity to deter other perpetrators. In this case, death penalty is undeniably the best and most reliable form of special prevention: an executed perpetrator is, of course, absolutely harmless. If we are ready to accept the assurance effect as a viable argument for the death penalty, we must also inevitably assume the infallibility of human opinions and judgements, as well as the ineptitude of the state to maintain security and safety. According to H.-P. Alt, an execution is unjust *"when it is carried out without absolute necessity. In such case, it represents a murder committed by the state from its higher power over a defenceless person."*[99]

The proponents of the death penalty are also convinced that one of the purposes of law is to provide a reciprocal punishment – a retribution – for a committed crime, in the spirit of *an eye for an eye, a tooth for a tooth*.[100] A notable critic of this approach was Mahatma Gandhi, with a quote attributed to him: *"An eye for an eye will make the whole world blind."* It is important to mention that the reciprocal argument differs from the deterrence argument and the assurance argument mainly in that it does not aim to prevent other crimes from happening. The killing of an offender is in this case supposed to demonstrate the so-called just justice, because the society in question has condemned the crime. Alt sees the biggest difference between legally justified retribution and revenge in the way the sentence materialises.[101] The theory of criminal law considers the tenet of *talio* as an adequate basis for the level of

[95] In years 1972 through 1976, the Supreme Court suspended executions of criminals due to constitutional reasons. This allowed for comparisons of homicide rates in individual states in the three distinct periods before the suspension, during the suspension, and afterwards.

[96] DEZHBAKHSH, H. - RUBIN, P. H. - SHEPHERD, J. M.: Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data. In: American Law & Economics Review, Vol. 5, 2003, No. 2, p. 344 et seq.

[97] According to the research papers cited above, the deterring effect was found in jurisdictions that performed at least nine executions in the analysed 20-year interval of 1977-1996.

[98] There has been no similar econometric research performed in the countries of the European Union, as of the publishing of this paper.

[99] ALT, H. P.: Das Problem der Todesstrafe. München: Kaiser, 1960, p. 27.

[100] This is based on various old legal codes, such as Hammurabi's Code, the underlying principle of which was an eye for an eye, a tooth for a tooth, or the Law of Retaliation. It consisted of 282 articles describing 282 cases of conduct which attracted punishment.

[101] Revenge has the same emotional motivations. That is why it can grow out of proportion. It is doubtful whether such unjustifiable overpunishment can be ruled out in case of retribution based on criminal law.

punishment: *"The punishment is warranted and just when it reflects the crime in question exactly, when the crime and the punishment move like the arms of a balanced scale."*[102] I. Kant also expressed his inclination to *talio* by stating the following: *"What kind and what level of punishment has the public justice chosen as its principle and its yardstick? It is but the principle of equity (like a balanced scale of Justice), without a bias toward either side… Only the law of equal reciprocity (ius talionis) … may determine the quality and quantity of the punishment; all other approaches oscillate around the balance and cannot withstand the objection of inadequacy from the perspective of pure and strict justice.*[103] In my opinion, Kant's reasoning in favour of *talio* is flawed in that he focuses on reason and utility while completely avoiding any ethical justification.[104]

Those in favour with the death penalty will also point out its lower financial cost as compared to life imprisonment, the latter being a considerable burden to the state budget. Some endorse a limited implementation of the capital punishment law, which would limit its applicability to exceptionally severe crimes by perpetrators with a long and violent criminal record. These would be cases when there is no hope of correction even after a long-term imprisonment.

Among the most poignant arguments against the death penalty is the contingency of miscarriage of justice, i.e. the risk of executing an innocent person. No judicial system is completely flawless, even though there are modern investigation methods applied to violent crimes, especially DNA analysis, which minimise the room for mistakes. According to experts, these modern methods combined with a rigorous legal process (e.g. obligatory assessment of all death sentences by highest-degree courts[105]) push the probability of a mistaken execution of a person in a democratic, legal state to the theoretical realm. The opponents of the death penalty also point out the inhumane nature of this form of punishment, referring to the *right to life* embedded in many international documents.[106]

3. The Death Penalty in the Region of Slovak Republic

At the foundation of the Czechoslovak Republic, statute no. 11/1918 Sb. effectively adopted the Austrian and Hungarian criminal code.[107] This brought about legal dualism, as the Czech lands[108] adhered to the Austrian version of the law and the Slovak lands and Carpathian Ruthenia adhered to the Hungarian version of the law.[109] Homicide was the only crime which could attract the death penalty. In 1948, statute no. 231 on the Protection of the Democratic People's Republic was enacted, allowing the state to issue 99 death sentences for political delicts between 1948 and 1950. Two years later, Criminal code no. 86/1950 Sb. was enacted,

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[102] ALT, H. P.: Das Problem der Todesstrafe. München: Kaiser, 1960, p. 54.

[103] KANT, I: Die Metaphysik der Sitten. Berlin: Cassirer, 1916, p. 139 et seq.

[104] BESTOVÁ, C. C.: Trest smrti v německo-českém porovnání. Brno: Doplňek, 1996, p. 16-28.

[105] Up until 1990, every sentence ordering the death penalty was scrutinised by the Supreme Court in Czechoslovakia as well. See details: § 316 et seq. statute no. 141/1961 Sb. about criminal proceedings in court, valid until June 30th 1990.

[106] CHOVANCOVÁ, J.: Jednotlivé stanoviská k trestu smrti. In: Acta Iuridica Sladkoviciensia 2, Sládkovičovo: Vysoká škola v Sládkovičove, 2011, p. 121.

[107] See details: Statute no. 11/1918 Sb. o zřízení samostatného státu československého, from November 23rd 1918.

[108] Criminal code no. 117/1852 ř. z. about crimes, felonies, and misdemeanours.

[109] Article V from 1878 (Criminal code about crimes and felonies) applied.

extending the possibility of the death penalty to as many as 25 types of crimes. For some of these crimes, the death penalty was the only option of punishment. The objective of the punishment, outlined in § 17 para. 1, sheds some light on the perceived reasons for such a harsh and unforgiving implementation:

"The purpose of the punishment is:

a) to eliminate the enemies of the working people,

b) to prevent the perpetrator from committing other crimes and to train him to abide by the rules of the socialist community,

c) to have an educational effect on other members of the society."[110]

According to § 29 of the abovementioned law, the death penalty was to be carried out by hanging and, during a period of heightened danger to the state, shooting was permitted. Instead of the death penalty, a person could be sentenced to life or to 15-20 years' imprisonment. Based on this law, as many as 158 people were sentenced to death for political delicts between 1951 and 1955. This data reliably suggests that during this five-year period, capital punishment was often used to eliminate politically inconvenient people. A change was brought about only by statute no. 63/1956 Sb.[111] which removed the definitions of some crimes for which the death penalty could be awarded under the statute from 1950. Concurrently, article II of this new law introduced life sentence as an alternative to crimes for which death penalty had been the only option. Furthermore, statute no. 64/1956 Sb. about criminal proceedings was enacted in 1956, requiring the Supreme Court of ČSSR to assess the legality of every death sentence. Between 1962 and 1988, the Supreme Court found that there were legal issues with as many as 42 out of a total of 131 death sentences awarded in this period. On the other hand, the Criminal code no. 140/1961 Sb. increased again the number of crimes for which the death penalty could be awarded to 33.[112] Statute no. 45/1973 Sb. amended the Criminal code from 1961, most notably introducing the option to give an exceptional punishment of 15 to 25 years, which the previous law lacked. The period of carrying out of the death penalty ended only with the amendment of the Criminal code with statute no. 175/1990 Sb., effective July 1st, 1990, which changed the substance of its § 29 substituting the death penalty with the exceptional punishments of 15 to 25 years or life.[113] Charter of Fundamental Rights and Basic Freedoms had the final word in the discussions about the appropriateness and effectiveness of the death penalty when it was adopted by constitutional statute no. 23/1991 Zb. of the Federal Assembly of the Czech and Slovak Federative Republic on January 9th, 1991. It states in Article 6 para. 3 that *"the death penalty is prohibited."* For this reason, the current criminal code does not recognise the death penalty. Instead, it uses the concepts of incarceration for a given period or life imprisonment.[114]

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[110] See detail: Criminal code no. 86/1950 Sb. as valid until January 1st 1962.

[111] See detail: Statute no. 63/1956 Sb., which amends and adds to the Criminal code no. 86/1950 Sb. from December 19th 1956.

[112] These included a number of offences against the Republic (e.g. § 114 military betrayal, § 97 para. 3 sabotage, § 91 treason, §94 para. 3 terorism, etc.), offences against humanity (§ 259 "genocídium", § 263 para. 2 cruelty in war, § 219 murder, § 179 para. 3 general endangerment, etc.) and more.

[113] See detail: Statute no. 175/1990 Sb., which amends and adds to the Criminal code, as valid until January 1st 2006.

[114] CHOVANCOVÁ, J.: Jednotlivé stanoviská k trestu smrti. In: Acta Iuridica Sladkoviciensia 2, Sládkovičovo: Vysoká škola v Sládkovičove, 2011, p. 122-123.

4. Empirical Research

I conducted empirical research on *"Law and Justice: The Death Penalty"* using a questionnaire. Every questionnaire contained the same questions. There were 8 regular questions, one of which had two sub-questions, and 4 personal questions. Answers to the personal questions were used to categorise the respondents based on their gender, age, education, and residence. The questionnaire used in my research was a set of multiple-choice questions with no open questions. The respondents were selected at random and could mark exactly one answer to each question. The questionnaire was anonymous.

The primary purpose of this research was to find out about the opinions of respondents about matters related to the death penalty and about the possibility of re-enactment of the death penalty in the Slovak Republic.

1. Research Hypotheses

We assume that:

1. Most of the respondents think that capital punishment was abolished in the Slovak Republic **in 1990**.
2. Most of the respondents **do not agree** with the re-enactment of the death penalty in the Slovak Republic.
3. Respondents who **agree** with the re-enactment of the death penalty argue for it primarily due to its assurance aspect: **the death penalty prevents re-offences by eliminating the perpetrators forever**.
4. Respondents who **do not agree** with the re-enactment of the death penalty in the Slovak Republic argue against it primarily due to **the contingency of miscarriage of justice**.
5. Most respondents **do not believe** that the cost of an execution affects their decisions.
6. Most respondents **don't think** that the re-enactment of the death penalty would decrease the incidence of criminal acts.
7. Most respondents **agree** that the death penalty should be awarded **for exceptionally severe crimes**.
8. Most respondents **don't believe** that a legal state has the right to decide about the life and death of its citizens.
9. Most respondents **agree** that the death penalty is in conflict with the basic human rights.
10. The respondents think that a life sentence (as the highest possible punishment) **is** an adequate substitute for the death penalty.

Tab.1: Selection and character of the research sample			
1.	Gender	55	male
		58	female
2.	Age	88	18 - 30 years
		15	31 - 50 years
		10	51 and more years
3.	Education	6	elementary
		27	high school
		80	university
4.	Residence	91	town/city (5 000+ inhabitants)
		22	village (< 5 000 inhabitants)

The above table indicates that I assembled a random research sample of 113 respondents, 55 male and 58 female of varied ages and levels of achieved education.

2. Evaluation of Answers

In first question, **"Which year do you think the death penalty was abolished in the Slovak Republic?"** as many as 40% respondents indicated 1990. The other answers shared the remainder almost equally, specifically: year 1989 - 16%, year 1945 – 12%, years 1968 and 1993 equally 11%. The least popular answer was 1918, chosen by 10% of the respondents.

From the answers to the second question, **"Do you agree with the re-enactment of the death penalty in the Slovak Republic?"** we find that a distinct majority of respondents does not agree with the re-enactment of the death penalty in the Slovak Republic - 53%. 36% would agree with the re-enactment, while 11% were not sure or choose not to express their opinion.

Question 2a **"If you answered question 2 as YES, please choose the main reason for the re-enactment of the death penalty"** was to be answered only by those respondents who expressed their agreement with the re-enactment of the death penalty in Question 2. As many as 58% of the respondents believes that some crimes are as severe as to warrant the capital punishment. 23% believe that the death penalty prevents re-offence by eliminating the perpetrators forever. 16% believes that the death penalty scares off potential offenders from committing a crime. Only 3% of respondents agree with the death penalty because they deem it just and a killer must also be killed.

Question 2b **"If you answered question 2 as NO, please choose the main reason against the re-enactment of the death penalty"** was to be answered only by those respondents who expressed their disagreement with the re-enactment of the death penalty in Question 2. As many as 46% of the respondents states the contingency of a miscarriage of justice as their main argument against re-enactment. 27% believe that the current criminal code offers other satisfactory means of punishment for crimes. 21% deems execution inhumane because there is no humane way to kill a person. Only 6% deem the death penalty ineffective because it does has not been proven that it has a deterring effect.

The third question, **"Are your decisions influenced by the cost of an execution?"** was overwhelmingly (80%) answered negatively. 10% answered the question positively and 10% could not decide conclusively.

The answers to the fourth question, **"Would the re-enactment of the death penalty help decrease the incidence of criminal acts?"** were interesting in that nearly half of the respondents (47%) thought re-enactment would decrease the incidence of offences, 39% think the opposite, and mere 14% could not decide conclusively.

The fifth question asked about the **"opinion about the kinds of crimes which should warrant the death penalty"**. 58% of the respondents think that the death penalty should be awarded for exceptionally severe crimes. As many as 30% could not decide conclusively and 12% think that recidivists should also be considered for the death penalty.

The sixth question, **"Do you think that a legal state has the right to decide about the life and death of its citizens?"** was answered negatively by 54% of the respondents, which I personally find very reassuring. 34% think that a legal state does have the right to decide and 12% chose not to decide.

Based on the answers to the seventh question, **"Do you think that the death penalty is in conflict with basic human rights?"** we find that 60% of the respondents believes that it does, which reinforces the above majority opinion that this type of punishment should not be re-enacted in our country. 31% believe that the death penalty does not conflict with basic human rights. 9% of the respondents could not decide whether or not there is a conflict.

The eighth question, **"Do you believe that a life sentence (as the highest punishment) is an adequate substitute for the death penalty?"** was answered as "Yes" by 51% and "No" by 40%. The remaining 9% could not decide.

3. Evaluation of Hypotheses

Hypothesis 1 assumes that most of the respondents think that capital punishment was abolished in the Slovak Republic in 1990. This hypothesis was verified in the questionnaire with question 1. The summary of the answers to this question asserts that the respondents picked predominantly the correct option and hence know the year of the abolition of the death penalty in the Slovak Republic.

Hypothesis 1 was confirmed.

Hypothesis 2 assumes that most of the respondents do not agree with the re-enactment of the death penalty in the Slovak Republic. This hypothesis was verified in the questionnaire with question 2. Based on the answers of the respondents, we can conclude that most respondents (53%) do not agree with the re-enactment of the death penalty in the Slovak Republic.

Hypothesis 2 was confirmed.

Hypothesis 3 assumes that respondents who agree with the re-enactment of the death penalty argue for it primarily due to its assurance aspect: the death penalty prevents re-offences by eliminating the perpetrators forever. This hypothesis was verified in the questionnaire with question 2a. Based on the evaluation of the answers of the respondents, we find that only 23% of the respondents deem the assumed reason for re-enactment as their primary argument. On the other hand, 58% think that some crimes are significant enough that they warrant a death

penalty. In summary, the results indicate the majority of the respondents who agree with the re-enactment of the capital punishment in the country would like to see the re-enactment in the form of an amendment to the criminal code which would introduce the death penalty as the highest punishment for some crimes.

Hypothesis 3 was not confirmed.

Hypothesis 4 assumes that respondents who do not agree with the re-enactment of the death penalty in the Slovak Republic argue against it primarily due to the contingency of miscarriage of justice. This hypothesis was verified in the questionnaire with question 2b. The summary of respondents' answers confirmed that the biggest portion of respondents (46%) does not agree with the re-enactment of the death penalty in the country due to the contingency of miscarriage of justice.

Hypothesis 4 was confirmed.

Hypothesis 5 assumes that most respondents do not believe that the cost of an execution affects their decisions. This hypothesis was verified in the questionnaire with question 3. The summary of respondents' answers indicates that an overwhelming majority (80%) of respondents were not influenced in their decisions about the death penalty in the Slovak Republic by their perceived cost of an execution.

Hypothesis 5 was confirmed.

Hypothesis 6 assumes that most respondents don't think that the re-enactment of the death penalty would decrease the incidence of criminal acts. This hypothesis was verified in the questionnaire with question 4. The summary of the answers shows, however, that only 39% of the respondents agree with this proposition. Surprisingly, as many as 47% believe that re-enactment would contribute to the decrease in the incidence of crime.

Hypothesis 6 was not confirmed.

Hypothesis 7 assumes that most respondents agree that the death penalty should be awarded for exceptionally severe crimes. This hypothesis was verified in the questionnaire with question 5. Based on the respondents' answers, we can conclude that most of (58%) indeed thinks that the death penalty should be awarded for this category of crimes.

Hypothesis 7 was confirmed.

Hypothesis 8 assumes that most respondents don't believe that a legal state has the right to decide about the life and death of its citizens. This hypothesis was verified in the questionnaire with question 6. The summary of the answers to this question asserts the veracity of the hypothesis by showing that 54% of the respondents indeed believe that the state should not have such powers.

Hypothesis 8 was confirmed.

Hypothesis 9 assumes that most respondents agree that the death penalty is in conflict with the basic human rights. This hypothesis was verified in the questionnaire with question 7. Based

on the evaluation of the results, we can say that the majority of the respondents (60%) does see a contradiction between the death penalty and basic human rights.

Hypothesis 9 was confirmed.

Hypothesis 10 assumes that the respondents think that a life sentence (as the highest possible punishment) is an adequate substitute for the death penalty. This hypothesis was verified in the questionnaire with question 10. The summary of the results for this hypothesis confirmed that the majority of the respondents (51%) considers the current criminal code as sufficient in terms of capital punishment.

Hypothesis 10 was confirmed.

5. Conclusion

The death penalty, as has been proven by discussions between its proponents and opponents spanning several decades, is one of the most controversial concepts of the criminal law. The uncertainties around this concept range from its core significance to the best approach to resolving the answer to a difficult question: *"How do we deal with the death penalty?"* Due to this complexity, I decided to focus my empirical research on the aspects of law and justice. When dealing with the concept of death penalty in discussion or in research, one must keep her or his emotional distance and objectivity. For those reasons, I chose a questionnaire as the form of data gathering. The questionnaire consisted of eight research questions plus two sub-questions. Based on the respondents' answers, we can conclude that the majority of our respondents do not agree with the re-enactment of the death penalty in the Slovak Republic, especially because they are apprehensive of the contingency of a miscarriage of justice. More than half of the respondents thinks that a legal state does not even have the right to decide about life and death of its citizens. At the same time, 60% of the respondents believes that the death penalty is in conflict with basic human rights. In summary, we have confirmed that the majority of the respondents (51%) regards the current criminal code as satisfactory and deems the life sentence to be an adequate alternative to the death penalty.

36% of the respondents expressed their sympathy for the re-enactment of the death penalty in the country. Most of them indicated that some crimes simply warrant this type of punishment. 58% indicated that at least the most severe crimes deserve the capital punishment. Simultaneously, nearly one half of the respondents believes that the capital punishment would contribute to discouraging crime. The results therefore definitely suggest that the majority of the proponents of the re-enactment of the death penalty would prefer an amendment to the current criminal code in terms of a re-introduction of the death penalty as the highest possible means of punishment for severe or repeated crimes.

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THE APPLICATION OF COMPETITION LAW IN THE EU AND THE U.S.

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Key words: competition law, application, EU, U.S.

Abstract:

The paper focuses on the comparison of application of competition law in the European union and the United States of America. These two legal frameworks are principal competition law frameworks, which dominate global competition law. The focal point of this article is the application of provisions of competition law of delegated competition authorities and courts in both the EU and the U.S. Attention is dedicated to specific case law, with the emphasis on the similarities as well as discrepancies in the application of particular provisions, which are represented in both legal frameworks.

JEL classification: *K21*

1. Introduction

As the EU and the U.S. are the two leading competition powers, it is vital to analyze the differences of their competition law and policy, in order to establish the key issues dividing these two legal frameworks. This paper focuses on the objectives of EU competition law, which are analyzed in the first section. It is important to declare, that the objectives, aims and goals of both powers do differ, but the EU and the U.S. also share a number of similarities in their approach to competition law.

Both primary and secondary legislation of the EU in the field of competition law is examined in the second section of the paper. This is then contrasted later in the text with the U.S. competition law definitions from various legal texts.

The role of EU institutions and the competences of Member States are depicted in the next section of the paper. The responsibilities and power of competition authorities and other relevant institutions may be set as a significant dissimilarity in the two analyzed legal frameworks.

The last section of the paper is dedicated to the key dissimilarities, which can be distinguished in the approach of the two leading competition powers.

2. The objectives of EU competition law

When comparing two legal frameworks, one must first concentrate on the objectives and aims of both legal systems. To begin, we will focus on the key objectives of the EU competition law. There is one principal aim of this legal framework: the creation, maintenance and supervision of the internal market of the EU. Alongside this key intention, consumer protection, as well as protection of competitors on the market is placed. All the objectives incorporate equality and fairness. The competition policy of the EU aims to „create and maintain a healthy competitive economic base and to support the growth of small and medium-sized enterprises, which are economically valuable both to their own member state, as well as to the EU as a whole. This policy also encourages an enterprise culture within EU.

The supervision of the internal market goes hand in hand with economic efficiency. The efficiency of competition within a specific area, the internal market of the EU, results in a well established and equal market for all competitors as well as satisfied consumers on the other side. But, the competition policies of the EU are not designed to encourage economic efficiency at all costs due to the fact, that if they did so, the most efficient competitors would be protected while the less efficient could be eliminated.

As previously stated, consumer protection is also a significant aim of EU competition law. Although, consumers may be divided into a number of categories, all consumers are influenced by anti-competitive conduct of undertakings. Consumers should only be affected by the conduct of undertakings in a positive fashion, in the form of „ a greater variety of products, improved service and guaranteed facilities to more retail outlets for the provided goods.“ This provision is provided by Article 101 (3) of the TFEU, which states, that if agreements, concerted practices or decision „contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit“, they are not infringing rules of competition under EU law.

The main aim of the EU concerning competition law is enclosed in the Treaty of Functioning of the European Union (TFEU). The competition law in the TFEU is concluded in title VII, chapter 1, section 1 and 2, articles 101 to 109. Also other previous articles of the Treaty are relevant to competition law. Article 3 of the TFEU states that: „ The Union shall have exclusive competence in the following areas (a) customs union;(b) the establishing of the competition rules necessary for the functioning of the internal market;(c) monetary policy for the Member States whose currency is the euro;(d) the conservation of marine biological resources under the common fisheries policy;(e) common commercial policy.“

Also, article 119 of the TFEU illustrates the activities of member states and the EU, among which is also „the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition“. All economical and monetary matters of the EU and its member states should, therefore, be in accordance with the principle of an open market economy with free competition.

Article 101 to 109 of the TFEU handle the competition rules of the EU. Article 101 (1) is concerned with the prohibition of agreements, decisions by associations of undertakings, and concerted practices, which aim to restrict competition. However, according to Article 101 (3), the provision in Article 101 (1) may be declared inapplicable in a number of situations, which will be explained below. Article 102 prohibits abuse by one or more undertakings of

a dominant position. Article 103 depicts the role of the Council, the EC and the European parliament in generating of proper regulations and directives, which are concerned with the issues of Articles 101 and 102. Under Article 104, until the provisions of Article 103 are in force, it is up to national authorities, to regulate the admissibility of agreements, decisions and concerted practices, within the scope of Articles 101 and 102. Article 105 entitles the EC to ensure the application of provisions of Articles 101 and 102.

„The Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.“

Article 106 imposes obligations on Member States in regard to public undertakings, where Article 106 (1) impresses obligations upon member states in relation to the TFEU generally and the competition rules specifically, and Article 106 (2) is concerned with the application of the competition rules to public undertakings and private undertakings to which member states entrust specific responsibilities. Articles 107 to 109 are concerned with the topic of state aid. Article 107 declares, that:

„Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market. “This article also informs us about the state aid which shall be compatible with the internal market, as well as state aid which should be considered as compatible with the internal market. Article 108 is concerned with the role of the EC when it comes to state aid. Article 109 deals with the role of the Council regarding regulations for the application of Articles 107 and 108.

3. Secondary legislation

Together with the provisions of primary law, secondary legislation provides a valuable and significant source of EU competition law. Regulation 1/2003 is especially vital for the purpose of this article. This Regulation is on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU. It lays down the basic principles of EU competition law, which are also stated in the TFEU. We will examine the structure of the Regulation in the following text. Powers of the EC and powers of national competition authorities are the main object of the second chapter of the Regulation. Also, the decision of the EC are regulated, mainly finding and termination of infringement, interim measures, commitments and finding of inapplicability. Cooperation between EC and national competition authorities of Member States, the exchange of information between them, suspension or termination of proceedings, cooperation with national courts, and the uniform application of EU competition law are also part of the Regulation. Investigation into sectors of economy and into types of agreements, requests for information, the power to take statements, the powers of inspection and the investigation of competition authorities of Member States are also an element of the power of the EC. Fines and penalty payments imposed by the EC are also examined by the Regulation.

The significant role of the EC is captured by the Regulation. The EC’s authority to investigate into sectors of economy and into types of agreements is embodied in a section of the document. Penalties and fines, which can be conferred upon undertakings by the EC, are demonstrated in Chapter VI. The relationship between Articles 101 and 102 and national competition law is also discussed. The cooperation between the EC and national competition

authorities as well as national courts is exemplified in Chapter IV of the Regulation. Based on the Regulation, powers of institutions, EU and national, will be stated in the next section.

The main advantage brought by the 1/2003 Regulation is the decentralized application, which was built on the principles laid down by Regulation 17/62. The 1/2003 Regulation amended the Regulation 17/62. Also, this Regulation changed the role of national competition authorities, especially national courts.

4. Involvement of institutions and MS

Another significant factor, when comparing two legal frameworks, is the involvement of institutions and, in this case, Member States. EU institutions are involved in competition law in a number of ways. Also, member states play a critical role in EU competition law. Member states are able to be involved in the development of competition law through their own legislative and execute power, as well as via undertakings, which hold control over a number of various public services. The EU law is neutral, when it comes to ownership of undertakings mentioned above. According to Article 345 TFEU: „The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership." Although, when it comes to state aid, the ownership of public undertakings may interfere with competition rules, as we discussed above.

The role of the European Commission (EC) is discussed in Article 17 of TEU. Under this Article, the EC „shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union." The EC's control over matters of competition law is strengthened by Article 106 (3) TFEU, where „the Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States."

A number of directives and decisions were created by the EC, such as Directive 88/301/EEC on competition in the markets in telecommunications terminal equipment (later amended by Directive 2008/63/EC) and Directive 90/388/EEC on competition in the markets for telecommunications services (amended by Directive 2007/77/EC). An Action for annulment was filed by a number of Member States and brought before the Court in the case of both Directives. The Court confirmed the right of the EC to issue both Directives, except for one Article. Besides the fact, that the EC issues directives and decisions, it also has the power to act in the case of an existing infringement of EU competition law and impose fines upon undertakings fro anti-competitive behavior. The main tasks of the EC are „fact-finding, taking action against infringements of EU competition law, imposing penalties or fines, adopting block exemption regulations, conducting sectored inquiries, investigating mergers and state aids, as well as developing policy and legislative initiatives under the subject of EU competition law. Also, the EC „shall consult an Advisory Committee on Restrictive Practices and Dominant Positions prior to the taking of any decision under Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1)" of Regulation 1/2003. Also, according to the same Article, „the Commission shall take the utmost account of the opinion delivered by the Advisory Committee. It shall inform the Committee of the manner in which its opinion has been taken into account."

The responsibility of the Council is illustrated in Article 16 TEU: „The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out

policy-making and coordinating functions as laid down in the Treaties.“ Also, upon a request from a Member State, the Council unanimously decides on the issue of state aid in the time frame of three months. The Council is not directly engaged in EU competition policies on daily basis, but via the adoption of a number of regulations concerning EU competition law, such as regulation enforcing competition rules or regulations delegating important powers to the EC regarding competition law.

European Parliament offers consultations, when it comes to competition law issues.

The role of the European Competition Network is to provide information in order to avoid multiple investigations in an anti-competitive behavior case. Also, the European Competition Network is responsible for coordination of said investigation, as well as it provides help in the investigation. Evidence exchange is also a part of the European Competition Network's obligation, or responsibility.

National institutions require that an infringement be brought to an end, order interim measures, accept commitments, impose fines, periodic penalty payments or any other penalty provided for in the national law of the particular Member State. National institutions also decide, if there is no reason to intervene, and are concerned with withdrawal of sectored exemptions.

National courts of each Member State have the power to determine, whether an agreement does or does not comply with EU law. Individuals are able to claim damages in the case of competition law infringement.

5. The legislative provisions of U.S. antitrust law

When examining the U.S. antitrust law, one must consider the legal provisions of the relevant legislative acts. Our primary focus is directed towards the Sherman Act, due to the basic legal definitions it provides.

First of all, “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”

Second of all, “every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”

Third of all, “the word “person”, or “persons”, wherever used in this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.“

"Section 1 of the Sherman Act condemns contracts, combinations, and conspiracies "in restraint of trade." Section 2 of the Sherman Act prohibits "monopolizing" and "attempts to monopolize"." Also, "the Sherman Act makes violations of its provisions a criminal offense.

6. The objectives of U.S. antitrust law in comparison with the EU

The other side of the pond has an extensive historical and legal background concerning competition policy. US antitrust law has a number of similarities with EU competition law, but this article focuses on the specific dissimilarities. It is unfeasible to study competition law without reference to US antitrust law.

The contrast in the competences of US and EU competition authorities and the development of the legal framework itself are the key differences of these two legal systems. In the EU, "most antitrust claims are analyzed under rule of reason doctrine, according to which the finder of fact must decide whether the questioned practice imposed an unreasonable restraint on competition, taking into account a variety of factors like restraint history, nature and effect." European rule of reason analysis involves the identification of the relevant product and geographical market.

"Rule of reason analysis, as understood by US authorities, involves identification of the relevant market, establishing the defendant's market power as well as multitude of other factors used to analyze whether the restraint adversely affects competition in the inter-brand market."

The USA was one of the first jurisdictions adopting a modern system of competition law. The US antitrust policy was built based on the principle of rule of law and legal precedent. In the US law, primary antitrust statutes are the Sherman Act (1890), Clayton Act (1914) and Robinson- Patman Act (1936). The Sherman and Clayton Acts' objective is the protection of the competitive process and the Robinson- Patman Act serves for the protection of competitors.

The Sherman Act establishes prohibition on restraints of trade and monopolization. The Act was not a simple legislative text, "it also embodied the values on which America was built: individualism, fairness and free enterprise." In comparison, on of the EU's vital aims ids consumer protection, whereas the US focuses on how actions of undertakings affect other undertakings. According to Funta, the US antitrust rules are more favourable to innovation than EU competition rules.

A very significant difference is that while in the USA the antitrust procedure is criminal, in the EU is administrative. This factor is also very visible in the remedies and sanctions stemming from a breach of competition law. According to Jones and Sufrin, the distinction between the competences of US and EU competition authorities, the development of law are the key contrast points of EU and US competition law.

The US competition authorities enforce the antitrust laws by bringing actions before ordinary federal courts and they are rather prosecutors than judges. „The Federal State Commission (FTC) has administrative adjudication authority and both agencies shape the application of the law by issuing of guidelines, making speeches or negotiating settlements. The Department of Justice (DOJ) may start criminal as well as civil proceedings for violations of the Sherman Act."

On the other hand, the European Commission enforces the competition rules by taking decisions binding on the undertakings concerned, acting as both prosecutor and judge. US law has been developed on a case by case basis by the courts, while in the EU it has been developed by an administrative authority with the Court acting only to review the authority's actions and decisions.

"Despite differences in procedure or analytical technique between the EU and United States, there is a progress toward greater cooperation in the implementation of competition policy. Future improvements will mainly depend on the willingness and good relationship between the EU and US Competition agencies."

7. Conclusion

Although the focus of this paper was intended to be the comparison of the application of competition law in the EU and the U.S., the aim shifted towards the actual comparison of the legislation on competition on the market in both territories. The reasoning behind such shift is that the differences in substantive law need to be established in order to be able to focus on the comparison of the actual application of the law, which is the main focus of my dissertation thesis.

As the two leading competition law powers are also key players on the global market, the significance of the variety in their approach to competition law application is impossible to overlook.

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DOCTORAL STUDENTS' SECTION

B. FAKULTÄT FÜR ÖKONOMIE UND UNTERNEHMENSFÜHRUNG / FACULTY OF ECONOMICS AND BUSINESS *)

*) Order according to conference

ROLE OF SOVEREIGN WEALTH FUNDS DURING CRISIS: STATISTICAL ANALYSIS OF THEIR RETURNS AND EQUITY PROPORTIONS

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Keywords: Sovereign Wealth Funds, Investments, Return

Abstract:

The main focus of this paper is on examining the role of Sovereign Wealth Funds (SWFs) during crisis, moreover we analyze sovereign investing in times of crisis. In other words, SWFs played interesting and stabilizing role as significant source of liquidity in global financial markets during period of financial crisis. The paper examines if increase of SWFs return in 2010 is due the fact that, they did not implement different asset allocation after 2008, in other words with no changes in their portfolio, observed returns of 12 observed SWFs. In this context, we determine the reliability of 95 percent and we want to determine confidence interval of proportion equity in each asset allocation in observed SWFs.

JEL classification: F21, G01

1. Introduction

During period November 2007 and February 2008 Sovereign Wealth Funds (SWFs) have been through major market financial institutions required to put additional capital, more to the point funds absorbed the impacts of the crisis.

In other words, the first months of 2008, the financial community dealt with the instability in the global banking system, because of problems in real estate argued Bean (2008). The trigger for bank losses during financial crisis was subprime mortgages, which had been packaged and repackaged as securitized investments (Collateralized debt obligation), and which the banks had purchased in the search for higher yields and larger personal paydays.

Since stakes in global banks were purchased, on the one hand when their credit default swap (CDS) spreads were negatively affected and on the other hands their stock prices have been at their lowest levels. Some examples of prominent investments made by SWFs during the subprime crisis include stakes purchased in UBS, Citigroup, Merrill Lynch, Credit Suisse and Morgan Stanley, Barclays PLC. More to the point, Government of Singapore Inv. Co. purchased stakes in UBS for 9,8bn USD in December 2007 and in Citi for 6,9bn USD in January 2008.

In this regard, SWFs mainly have assisted in stabilizing share prices and the elevated CDS spreads, at least over the short run. In most cases, after the announcement of new capital injections, the initial share price reactions to the SWF investments were positive. Also, share price volatility declined somewhat following the capital injections, which supports the view that SWFs could have a volatility-reducing impact on markets.

There are a number of studies on the this subject of SWFs since 2007. In particular, Cappelen, A. and Urheim, R. (2012) explore the arguments for a more active corporate governance policy among pension funds and sovereign-wealth funds and discusses the obstacles to such policies. Johan, S.; Knill, A.M. and Mauck, N. (2012) examine the investments of 19 sovereign wealth funds are similar to other institutional investors, and are less likely to invest in private equity versus public equity internationally. In, F. H.; Park, R. J.; Ji, P. and Lee, B. S. (2013) describe that foreign investments of SWFs played a pivotal role in the stabilization of international stock markets during the recent financial crisis. Considering the heterogeneity of SWF groups and measuring the tail risk of SWF investments, they found that SWF investments generally lead to destabilizing effects on the stock markets.

1. Data and Method**o**logy

This study examines hypotheses by using data of quarterly, annualy reports from 12 observed funds due the fact that most of funds do not provide data to the public. The first estimation takes into account the returns of investments from 2008 and 2010 and we used The ‘Student’ t-test distribution with (N−1) degrees of freedom and The two-sample t-test for mean value. The second estimation determines at the reliability of 95 percent confidence interval of proportion equity in asset allocation in SWFs by using TINV function.

2. Structure of the Study

The paper proceeds as follows: Section 2 presents briefly definitions of SWFs, loses of their investments, ten largest SWF´s transactions during crisis 2007-2008 by deal volume and value and their role during crisis. Section 3 provides examined hypotheses, section 4 concludes the paper.

2. Literature Re**v**i**ew**

This section contains the various definitions of the SWFs. On the one hand, the EU Commission describes SWFs as state owned investment vehicles, which manage a diversified portfolio of domestic and international financial assets. On the other hand, U.S. Treasury Department presents SWF as “a government investment vehicle which is funded by foreign exchange assets, and which manages those assets separately from the official reserves of the monetary authorities.” Balin, B. J. (2008) clearly describes why countries establish SWF´s. Shortly summary is that, when the country’s natural resources are exhausted, therefore, future generations can continue to live prosperously using the earnings of their forefathers. It means when a country is faced with a competitiveness crisis, it can call on its SWF assets to reinvest in new sectors of the economy that can revive the country’s competitive advantages.

1. Sovereign investing in times of crisis

SWF´s in context of subprime crisis, their potential impact on global financial markets are disccussed in this section. Moreover, Brazil established its own SWF, with the stated objective of buffering the country from the global financial crisis and helping Brazilian companies to boost trade and expand overseas. It is likely that such international expansion is spurred by the Brazilian government's appeal with multinationals and other regulators. In other words, SWFs provide valuable political connections by Fernandez and Bris (2011).

The question is: How much they lost during times of crisis? In sum, Jen of Morgan Stanley estimated that all SWFs lost between 500 billion USD and 700 billion USD in 2008, between 18-25 percent of their value. According to the data from Monitor, during the crisis investment value of SWF deals declined later in the year, dropping from 67,8 billion USD in Q1 of 2008 to 35,1 billion USD in Q4 of 2008. Potential credit losses (on banks, markets) were lower aggregate capital adequacy ratios at U.S. banks by about 250 basis points, and at European banks by about 150 basis points. Although aggregate ratios remained above regulatory norms, in view in historical perspective, the subprime crisis (losses 20 percent of GDP) was of similar dollar magnitude to the Japanese banking crisis of the 1990s.

However, SWFs have been criticized for their losses. First, because of for entering the equity market at the wrong time. Second, some blamed for a lack of insight for investing in financial institutions at the early stage of the crisis then suffering heavy losses. Third, others reproached for investing abroad when their support for domestic markets was highly needed according to IMF.

Mezzacapo (2009) noted that since the spread of the sub-prime crisis in 2007 SWFs have invested between 60 billion USD and 92 billion USD in return of large minority stakes in financial institutions (generally lower that 10 percent), over two-thirds of the capital invested in foreign financial institutions in 2007 and early 2008 came from Asian SWFs (13 percent from China), with Middle Eastern SWFs generating the remainder.

More to the point, SWFs consequently acquired a significantly influential position in such companies, but they typically avoided taking controlling stakes and mainly behaved as passive institutional shareholder. As a result of that, we can say that SWFs played interesting and stabilizing role as significant source of liquidity in global financial markets during period of financial crisis, what is listed in Table 1 below.

Portfolio commpany	**$ bn**	**% stake**
Citigroup	22.0	12.7
Merrill Lynch	12.2	23.0
UBS	11.5	12.0
Morgan Stanley	5.0	9.9
Barclays	5.0	5.2
Canadian Imperial Bank	2.7	11.1
Bear Stearns	1.0	6.0
∑ **Total**	**59.4**	

Tab.1: SWF´s Shareholders in major financial institutions (end-October

Source: Author´s, according to data from Mezzacapo, S., *The so-called "Sovereign Wealth Funds": regulatory issues, financial stability and prudential supervision, 2009, p.* 99

In nuce, it is important to note ten largest SWF´s transactions during crisis 2007-2008 by sector distribution - deal volume and deal value. They are illustrated in details in Figure 1 and 2 below. By deal volume 37 percent has been invested in financial institututions, 10 percent in real estate and by deal volume 63 percent also in financial institutions.

In other words, common features of these transactions were, first significant in size, while remaining minority stakes in companies, second privately negotiated rather than executed in public markets, and third often in convertible bonds, high-yielding bonds that are to be converted to equity stakes in the future.

Figure 1: Ten largest SWF´s transactions during crisis 2007-2008

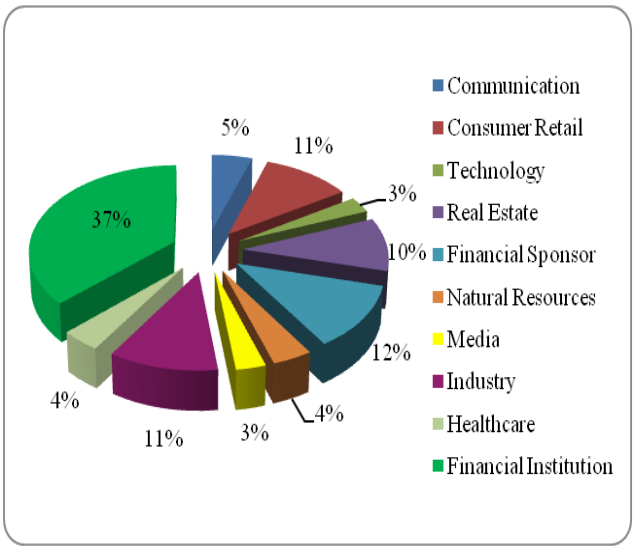
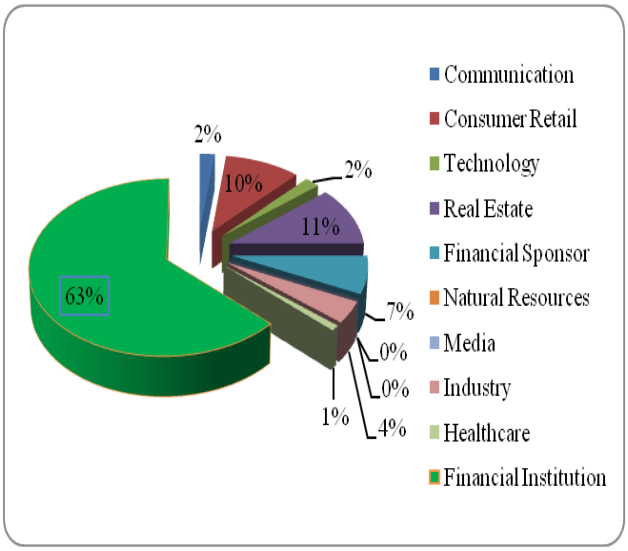


Figure 2: Ten largest SWF´s transactions during crisis 2007-2008



Source: Author´s according to Mezzacapo, S., *The so-called "Sovereign Wealth Funds": regulatory issues, financial stability and prudential supervision*, 2009, p. 100-1

However, their typically long time horizon and limited liquidity needs, SWFs can have a shock-absorbing role, at least in terms of abating short-term market volatility. Next a few several factors that facilitate the ability of the SWFs to act as a countervailing force in times of market stress. First, most SWFs have a long-term investment horizon and limited liquidity needs, second many SWFs aim to meet long-term real return objectives, and accept short-term volatility in return for expected higher long-term returns, third compared with other institutional investors, SWFs also have a stable funding base and no prudential regulatory requirements, fourth SWFs to accumulate significant exposure in the global financial sector.

It is interesting to review how the SWFs reacted to the worst decline in the equity markets since the Great Depression. SWFs reacted Vice versa, they did not make a panic and sold their worst performing holdings, they behaved as long-term, wealth-maximizing private investors. Moreover, one impact of the crisis has been increased focus at home on the foreign investment activities of various SWFs. For example, the transparent, super-large Norwegian Government Pension Fund Global, has encountered domestic political pressures. In the September 2009 Norwegian election, each political party campaigned in part on the proper allocation of resources in the national SWF presented by Bean (2008).

2. SWFs potential impact on global financial markets and international imbalances

Monk and Clark (2010) describe that after of the global financial crisis, SWFs may benefit first from exploiting gaps in and between markets, second the risk-aversion of established market players, third the obvious reliance of nation states on SWFs as market-makers for government bonds and fourth the increasing reliance of certain companies on SWFs to act as investors of last resort.

They argued that in the depth of the global financial crisis, largest SWFs effectively underwrote the liquidity of global equity and bond markets. In other words, SWFs remained a element in the markets of advanced economies, mainly the US dollar and the Euro. SWFs depend to major market returns on assets invested, so they become universal owners. Their long - term investment programmes are a form of insurance for the short-term prospects of whole nations. Like Chinese government has been resistant to calls to discount the value of the Renminbi. The government through the CIC and SAFE has underwritten the assumption of debt by the US government. By the way China´s CIC has about 60 percent of assets invested in U.S. However, recovery from the crisis is a structural problem not simply a short-term macroeconomic fix.

In other point of view, the fact is that in the 1960's and 1970's, it would have been unimaginable for SWF from China, the Middle East or Russia to invest in the US financial sector or other sector that has been considered critical to national strategic, interests. In sum, funds are now not only seating on the boards of heavyweight Wall Street companies, but also regarded as "saviors" of the recent subprime crisis. So with globalization, SWFs can invest in economies with long-term growth potential and truly capitalize on global economic growth presented by Chen (2009).

In addition what is mentioned above, SWFs can play a stabilizing role in global financial markets, because they are long-term investors and with mainly unleveraged positions. Second, SWFs' investments may enhance the depth and breadth of markets. Third, SWFs could, as long-term investors and by diversifying the global investor base, contribute to greater market efficiency and lower volatility.

If we look at the shift from reserve assets to SWFs, first could have implications for the absolute and relative price of assets, second the flow of funds between countries, and third the evolution of global imbalances.

In this light, the next effects may be felt on mature sovereign debt markets. First, SWFs may increasingly diversify their existing portfolio away from low-risk, short-term instruments, such as U.S. Treasury bills, and into longer-term equity stakes. So this may affect interest rates and equity prices. Second, if SWFs diversify away from dollar holdings, and invest more in line with global equity indices, a decline in capital inflows into the United States may cause an increase in real interest rate differentials and a dollar depreciation.

Consequently of crisis, stabilization funds played prominent roles in financing government operations, through rising fiscal deficits, and some of them have supported stimulus packages to prop up economic activity. The funds have provided liquidity to the banking system by depositing their assets in domestic banks, others have helped with bank recapitalization. On the other hand, funds have purchased domestic stocks to boost markets and investor confidence.

3. Hypotheses

This section contains examined hypotheses. On the other hand, data calculations are the best estimations of author.

1. Testing hypothesis 1

Due the fact that many SWF´s do not provide data of asset allocation, we focus on funds and their returns that are shown in following Table 2. We formulate hypothesis as follows:

H_0 : Increase of SWFs return in 2010 due the fact that, they did not implement different asset allocation after 2008. (NO changes in portfolio)

H_1 : Increase of SWFs return in 2010 due the fact, that they implemented different asset allocation after 2008. (changes in portfolio)

Tab. 2: Return of SWFs

(%)		1	2	3	4	5	6	7	8	9	10	11	12
Return after crisis 2010	**X_1**	9.60%	11.77 %	4.60%	5.51%	6.07%	1.00%	12.80 %	15.45 %	-3.00%	3.90%	8.46%	11.70 %
Return during crisis 2008	**X_2**	- 23.30 %	- 24.61 %	- 30.00 %	7.63%	3.61%	3.79%	-4.20%	-4.92%	- 30.40 %	2.60%	- 13.71 %	-2.10%
$d=x_1 - x_2$		32.90 %	36.38 %	34.60 %	-2.12%	2.46%	-2.79%	17.00 %	20.37 %	27.40 %	1.30%	22.17 %	13.80 %

Source: Author´s estimation, according to data of reports from websites of observed funds

Table 2 shows return of 12 observed SWFs, includes: Alaska Permanent Fund Corporation–USA, Government Pension Fund Global-Norway, Temasek-Singapore, Economic and Social Stabilization Fund-Chile, The Heritage and Stabilization Fund- Trinidad and Tobago, State Oil Fund–Azerbaijan, The Future Fund-Australia, Superannuation Fund-New Zealand, National Pensions Reserve Fund–Ireland, Goverment of Singapore Investment Corporation-Singapore, Korea Investment Corporation–Korea, China Investment Corporation-China.

We examine whether is increase of return of funds a statistically significant and whether that could be as a result to the effects of changes in asset portfolio. We create new variable d-observed difference, the difference returns before and after the crisis.

Tab. 3: Numerical characteristics for the value of d (continued on the next page)

Explanatory variable d	
Mean	0.155063636
Error	0.042984245
Median	0.17
The standard deviation	0.142562613
Variance	0.020324099
Kurt	-1.398936317
Skew	0.061528377
Vr	0.3917
Minimum	-0.0279
Maximum	0.3638
Sum	1.7057
Number	12
The largest (1)	0.3638
The smallest (1)	-0.0279
Confidence level (95.0%)	0.095774866

Source: Author´s estimation.

We use method The 'Student' t-test distribution with (N−1) degrees of freedom, mean test of correlation with a known constant.

$$t = \frac{\bar{d} - \mu_d}{s_d} . \sqrt{n} \qquad (1)$$

Indicates significance at the 5 percent level, α=0.05. We formulate our hypothesis as follows:

H₀ : $m_1 = m_2 \quad / \mu_d = 0 /$

H₁ : $m_1 > m_2 \quad / \mu_d > 0 /$

If we assume that the mean of values of X_1 and X_2 sets are equal, then the value will be $\mu_d = 0$.

$$t = \frac{0.155063636}{0.142562613} * \sqrt{12} = 3.6074$$

Tab. 4: The two-sample t-test for mean value

Explanatory variable	x_1	x_2
Mean	0.071145455	-0.08391818
Variance	0.003063277	0.01981757
Observations	11	11
Correlation	0.164073932	
Difference	10	
t stat	3.607452828	
P(T<=t) (1)	0.002394151	
t crit (1)	1.812461102	← Critical value for one-sided alternative hypothesis
P(T<=t) (2)	0.004788302	
t crit (2)	2.228138842	

Source: Author´s estimation.

Results coming out from t-test depicted in Table 4:

$$3.607452828 > 1.812461102 \rightarrow t > t_{c.}$$

We accept an alternative hypothesis, that means this method showed an increase, what is a statistically significant. In short, we may say that increase of SWFs return in 2010 could be caused through changes in portfolio, in financial markets due the fact of implementing different asset allocation after 2008. Because the differences are not random.

2. Testing hypothesis 2

However, savings funds have varying proportions of equities in their portfolios including debt (fixed income), cash figures are typically for stabilization SWFs. Funds with stabilization objectives usually do not invest in alternative assets. In this hypothesis we also use data of asset allocations observed 12 SWFs (see previous hypothesis for details). Moreover, we determine the reliability of 95 percent and we want to determine confidence interval of proportion equity in asset allocation in SWFs.

Tab. 5: Variables

Z	Equity %
Government Pension Fund Global - Norway	55.6
Qatar Investment Authority - Qatar	60
Alaska Permanent Fund Corporation - USA	42
Alberta Heritage Savings Trust Fund - Canada	50
The Heritage and Stabilization Fund - Trinidad and Tobago	36.27
State Oil Fund - Azerbaijan	0.8
The Future Fund - Australia	42.1
Superannuation Fund - New Zealand	65.4
National Pensions Reserve Fund - Ireland	34.5
Goverment of Singapore Investment Corporation - Singapore	51
Korea Investment Corporation - Korea	43.4
China Investment Corporation - China	48
AVERAGE	44.08917
STDEV	16.44174
TINV for □/2	2.200985
TINV for □	1.795885

Source: Author´s according to available data from observed funds.

* Australia 3Q 2011
* New Zealand 3Q 2011
* Ireland 3Q 2011
* Trinidad and Tobago Jun 2011
* Azerbaijan 2010
* Norway classified as savings fund, Q3 2011
* Qatar 2010
* USA 2011
* Canada, annual report from April 2010 March 2011
* Singapore - 1Q 2010
* China 2010
* Korea Dec 2010

We use TINV function that returns the value of t Student's t-distribution as a function of the probability and the degrees of freedom, in our case the number of degrees of freedom

$$\left(\bar{x} - t_{1-\frac{\alpha}{2}} \frac{s_1}{\sqrt{n-1}} \le \mu \le \bar{x} + t_{1-\frac{\alpha}{2}} \frac{s_1}{\sqrt{n-1}}\right) = 1-\alpha$$

$= n\text{-}1$ where n is the number of values of a probability $\alpha = 0.05$. Two-sided confidence interval can be determined from the relation:

(2)

$$\left(44.08 - 2.20\frac{16.44}{\sqrt{11}} \le \mu \le 44.08 + 2.20\frac{16.44}{\sqrt{11}}\right) = 1-\alpha$$
$$(33.17 \le \mu \le 54.99) = 95\%$$

It means acceptable range for levels of significance.

Results coming out from this formula explain that with 95 percent probability suppose to proportion of equity in asset allocations in SWFs between 33.17 and 54.99 percent of total portfolio.

To determine the left-hand interval, confidence interval of equity, we use the relationship:

$$P\left(\mu \ge \bar{x} - t_{1-\alpha} \frac{s_1}{\sqrt{n-1}}\right) = 1-\alpha$$
$$P\left(\mu \ge 44.08 - 1.79\frac{16.44}{\sqrt{11}}\right) = 0.95 \qquad (3)$$
$$P(\mu \ge 35.21) = 95\%$$

Proportion of equity in asset allocation of SWFs will be more than 35.21 percent. Then we formulate hypothesis as follows:

H_0: This is random deviations due to the selection of elements in the file, m= μ.

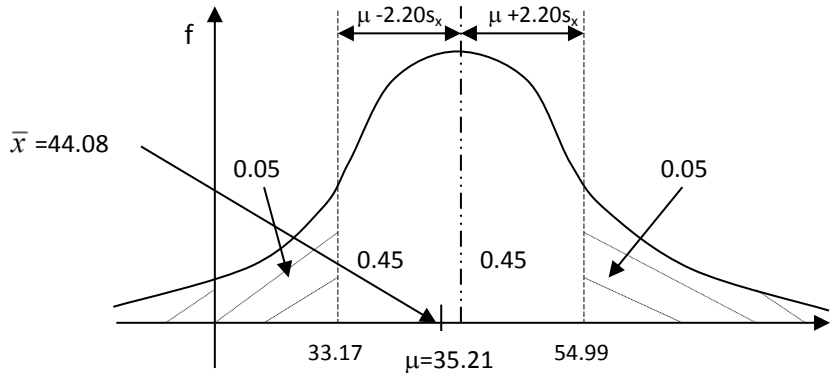
H_1: This is NOT random deviations due to the selection of elements in the file m$\neq \mu$.

$$t = \frac{|\bar{x} - \mu|}{s}\sqrt{n} = \frac{44.08 - 35.21}{16.44}\sqrt{12} = 1.86$$

$$t_{crit} = 2.20$$

The significance level of 0.05 and (N-1); 11 degrees of freedom, the inverse two-sided t-distribution is calculated by TINV (0.05; 11) is 2.20. Results coming out showed that $t < t_{crit}$ therefore we accept null hypothesis; 44.08=35.21 and deviation is caused by random selection of funds in file Z, what is not statistically significant.

Figure 3: Proportion of equity in asset allocation



Source: Author´s.

Figure 3 illustrates that the measured value 44.08 is located inside the acceptable range, and therefore we accept the null hypothesis.

4. Concluding Remarks

First, we created new variable d-observed difference, the difference returns before and after the crisis. Then we found that increase of SWFs return in 2010 could be caused through changes in portfolio, in financial markets due the fact of implementing different asset allocation after 2008. Because the differences are not random. Second hypothesis presents that with 95 percent probability suppose to proportion of equity in asset allocations in SWFs is between 33.17 and 54.99 percent of total portfolio. Then we determined the left-hand interval that showed proportion of equity in asset allocation 35.21 percent and formulated another hypothesis that results showed that deviation is caused by random selection of funds in file Z, what is not statistically significant. In short, investment objective, investment purpose (long term, short term), investment risk (exchange rate, interest rate), return may contribute to the changes of AUM of SWFs.

However, since 2008 assets under managemet of SWFs rose by 76.39 percent to 5.38tn USD in October 2013. That is as a result of investment activities of these funds. On the other hand, it is due to fact that new SWFs have been formed over past years and growth of pre-existing SWFs. For example, the 4,8bn USD Heritage and Stablisation Fund (Trinidad and Tobago) is targeting growth of up to 40bn USD by 2020 if the budget of Trinidad and Tobago moves towards a non-energy fiscal deficit of 10 percent of GDP. In short, we can expect further growth of these funds as a investors.

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MANGELNDES FINANZCONTROLLING UND DIE DAMIT VERBUNDENE LIQUIDITÄTSPROBLEMATIK MITTELSTÄNDISCHER UNTERNEHMEN – URSACHENANALYSE UND STRATEGISCHE GEGENSTEUERUNGSPROZESSE

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Abstract:

If you read the press releases, reports of corporate bankruptcies are known again and most of corporate insolvencies are attribute to liquidity problems and insolvency. The mass of insolvencies predominantly affects medium-sized companies. Dynamics and high complexity additionally burden the companies. The worldwide opening of the markets increases the competitive pressure. Due to these factors it requires a meaningful financial controlling from the companies. The financial and liquidity management is therefore a central, strategic instrument.

The aim of this study is to characterize the financial and liquidity controlling with its traditional areas. Medium-sized companies are the target audience of this work.

In the past large companies have successfully implemented significant progresses in the financial- and in the strategic area. Here already applies the principle of "liquidity before profitability".

Unfortunately, many medium-sized companies still have considerable need for action. Meaningfull financial planning are missing very often. The strategic financial planning is rarely applied in medium-sized companies. In the future these companies must rely more on liquidity prevention.

A new set of financial strategic concept should be shown. Not only the traditional methods of financial controlling are to investigate, but also targeted the planned strategie activities and measures. For a successful strategic liquidity prevention all the following and the unscheduled business projects must be integrated into the financial planning process in the future.

With surveys in mid-sized companies should be confirmed primarily the new strategtic financial concept. Subsequently the chance is used to discuss new ideas and practice-oriented approaches for a successful and furture-oriented financial controlling.

1. Ausgangslage, Problemstellung und Thematische Einführung

Liest man aufmerksam die aktuellen Medienmitteilungen der vergangenen Wochen und Monaten, so werden immer wieder Meldungen über Unternehmenspleiten in Deutschland bekannt. Prognostiziert werden nach der Wirtschaftauskunftei Creditreform für 2014 rund 25.000 Unternehmensinsolvenzen. Eine Verschlechterung der Zahlungsbereitschaft bzw. des

Zahlungsverhalten ist in einigen Branchen spürbar. Die zu verzeichnenden Unternehmensinsolvenzen sind zum Großteil auf Liquiditätsprobleme und Zahlungsunfähigkeit zurückzuführen.

Die Masse der Insolvenzen betrifft überwiegend mittelständische Unternehmen. Dabei geraten immer mehr Personengesellschaften in die Zahlungsunfähigkeit bzw. Kapitalgesellschaften überschulden sich. Dieser Trend zeigt deutlich auf, dass einerseits die Sicherstellung der Liquidität und andererseits die Erfolgsabsicherung durch leistungsfähige Instrumente zum Finanzcontrolling, insbesondere bei mittelständischen Unternehmen, in den Vordergrund rückt. In kleineren und mittleren Unternehmen ist sehr oft das Finanzmanagement unzureichend organisiert und gleichzeitig nicht in genügendem Umfang verbreitet, um das Finanzrisiko rechtzeitig zu erkennen und entsprechend gegenzusteuern.

Außerdem ist gegenwärtig das Unternehmensumfeld durch eine verstärkte Zunahme an Dynamik und hoher Komplexität gekennzeichnet. Die Unternehmen werden zudem durch ständige Veränderungsprozesse im ökonomischen, politischen, sozialen und ökologischen Umfeld beeinflusst. Durch die Öffnung der weltweiten Binnenmärkte steigt der Wettbewerbsdruck und verlangt gleichzeitig von den Unternehmen ein zunehmendes Kosten- und Finanzcontrolling.

Es besteht von daher die absolute Notwendigkeit, das Finanz- und Liquiditätscontrolling auch in mittelständischen Unternehmen zu einem zentralen strategischen Instrument der Unternehmensführung zu bilden. Ein leistungsfähiges Planungs- und Strategieinstrumentarium, unterlegt mit finanziellen Ansätzen, soll weitgehendst den Prozess zur Erkennung und Beseitigung der Unsicherheiten unterstützen. Als generelle Zielsetzung des Finanzcontrollings ist neben der Informations-, Koordinations- und Steuerungsfunktion die nachhaltige Existenz- und Substanzerhaltung der Unternehmen zu verfolgen.

Die Ausgangslage zeigt deutlich auf, dass insbesondere in mittelständischen Unternehmen die Planungs- und Kontrollprozesse mit finanziellen Größenordnungen in Theorie und Praxis sehr stark abweichen. Dieser Umstand ist leider auf die relativ knappen finanziellen und personellen Ressourcen in diesem Organisationsbereich zurückzuführen.

2. Zielsetzung der Dissertation

Ziel der vorliegenden Untersuchung ist es, das Finanz- und Liquiditätscontrolling mit seinen verantwortlichen Aufgaben zu charakterisieren und entsprechend darzulegen. Mittlere und kleinere Unternehmen sind die Zielgruppe dieser Arbeit.

Erkennbar ist, dass größere Unternehmen in den letzten Jahren wesentliche Fortschritte im betriebswirtschaftlichen- sowie im strategischen Bereich erfolgreich umgesetzt haben. In größeren Unternehmen ist die Konzeption „Liquidität vor Rentabilität“ kein Fremdwort mehr. Hingegen haben die kleineren und mittleren Unternehmen noch erheblichen Informations- und Realisierungsbedarf. Das Finanzmanagement bei mittelständischen Unternehmen wird leider immer noch stark vernachlässigt. Aussagekräftige Finanzplanungen im kurz-, mittel- und langfristigen Betrachtungsphasen fehlen sehr häufig, obwohl bereits diese Instrumente mehrfach von den Bankinstituten angefordert werden und diese Dokumente zudem einen wesentlichen Einfluss auf das Finanzrating bzw. auf vorhandene Finanzierungskosten haben. Strategische Finanzplanungen sind für viele KMU-Betriebe ein absolutes Fremdwort und finden in der Praxis kaum Anwendung.

Die mittelständischen Unternehmen sind nach wie vor die absoluten Leistungsträger einer Volkswirtschaft. Durch die Öffnung der weltweiten Produktions- und Absatzmärkte sind

deshalb die mittelständischen Betriebe aufgefordert, neben der Verbessung der Rentabilität gezielter und kontinuierlicher auf die Absicherung der Liquidität zu achten.

Der Anspruch und das Ziel der Dissertation soll eine neue Konzeption aufzeigen, dass nicht nur die klassischen Methoden des Finanzcontrollings, sondern vielmehr im Vorfeld auch alle strategischen Aktivitäten und Maßnahmen hinsichtlich Finanzplanung, Finanzanalyse und Finanzkontrolle mit Wertansätzen bewertet und integriert werden, um letztendlich zur optimalen Liquiditätssicherung bzw. der finanziellen Risikominimierung der Unternehmen beizutragen. Die bedeutende Untersuchung hat des weiteren die Zielsetzung, dass die betriebswirtschaftliche Forschung einen Nutzen für die Unternehmenspraxis bringen soll. In diesem Sinne ist das angewandte Dissertationsergebnis praxisorientiert einzusetzen. Vor diesem Hintergrund verfolgt die Dissertation primär ein sachbezogenes Wissenschaftsziel.

3. Vorgehensweise der Untersuchung

Die Dissertation wird in nachstehende Kapitel gegliedert:

Im 1. Kapitel wird auf die Problemstellung sowie auf die Zielsetzung und Vorgehensweise der Untersuchung eingegangen. Im 2. Kapitel werden die theoretischen Grundlagen zum Finanzcontrolling beschrieben. Die Bedeutung des Finanzcontrolling als Element der Unternehmenssteuerung wird definiert und es wird eine Abgrenzung des Finanz- vom Kosten- und Ergebniscontrolling vorgenommen. Zudem werden die zentralen Ziele und Aufgabenbereiche des Finanzcontrolling erläutert und diskutiert. Im Mittelpunkt des 3. Kapitels steht dann das Finanzcontrolling in mittelständischen Unternehmen. Neben den besonderen internen und externen Risikofeldern in diesem Unternehmenssegment werden unter anderem Adressaten genannt und die positiven Auswirkungen des Finanzcontrolling auf mittelständische Unternehmen formuliert. Das 4. Kapitel ist ein zentrales Element dieser Dissertation und hat die Ursachen für die Liquiditätsproblematik in mittelständischen Unternehmen zum Thema. Die Position des Liquiditätscontrollings im Rahmen des Finanzcontrollings steht am Anfang des Kapitels. Anschließend wird auf die Aufgaben und Ziele des Finanzcontrollings eingegangen und gleichzeitig werden interne und externe Ursachen für die Liquiditätsengpässe in mittelständischen Betrieben genannt. Zum Schluss hin wird begründet, weshalb sich mittelständische Unternehmen besonderen Anforderungen an das Liquiditätscontrolling gegenüberstehen.

Das Kernelement dieser Dissertation stellt das 5. Kapitel dar. Hier finden die grundlegenden sowie die langfristigen strategischen Maßnahmen bzw. strategische Gegensteuerungsprozesse, die zur wesentlichen Risikominimierung ergriffen werden können, ihren Niederschlag. Zunächst werden die betriebswirtschaftlich-organisatorischen Maßnahmen im Rahmen der strategischen Finanzplanung, Finanzanalyse und Finanzkontrolle durch konkrete strategische Aktivitäten zur Liquiditätssicherung beschrieben. An einem Phasenschema werden die möglichen Liquiditätskrisenfaktoren dargestellt. Durch die Initiierung eines Liquiditätscontrollingprozesses sollen die möglichen Gefahren identifiziert, klassifiziert und dokumentiert werden. Danach wird die Rangfolge zur Prävention aufgestellt. Als weiteren und existenziellen Kernpunkt für eine nachhaltige strategische Liquiditätsprävention sind alle noch zu erwartende und außerplanmäßige Geschäftsprojekte in den Finanzplanungsprozess aufzunehmen. Diese müssen mit den zu erwartenden Ein- und Auszahlungsansätzen bewertet werden und finden danach in der Finanzplanung zusätzliche Berücksichtigung.

Im 6. Kapitel werden schließlich Befragungen zur Durchführung von Finanz- und Liquiditätscontrolling in mittelständischen Unternehmen vorgenommen. Diese Befragungen sollen belegen, ob die bisher in der Literatur genannten Ursachen für das unterstellte mangelnde Finanzcontrolling und die damit verbundene Liquiditätsproblematik mittelständischer Unternehmen bestätigt werden kann. Als weitere Bestätigung soll in der Befragung eruiert werden, ob vor allem die außerplanmäßigen strategischen Zusatzaktivitäten in der Praxis für das Finanzcontrolling von Bedeutung und gleichzeitig umsetzbar sind. Zugleich soll in den Interviews die Chance genutzt werden, um neuzeitliche und praxisorientierte Denkansätze für ein erfolgreiches, zukunftsorientiertes Finanzcontrolling für klein- und mittelständische Unternehmen zu diskutieren.

WAHL DER ABSATZMÄRKTE BEI DER INTERNATIONALISIERUNG IM BAUSTOFF-FACHHANDEL MIT HILFE EINES PLANUNGSPROFILS

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Key words: Internationalization, expansion planning, management requirements, market segmentation

Abstract:

For a successful internationalization an accurate knowledge of the market is also required like a decision-support for the management to country selection. Experience has shown that the precise specifications and sales expectations are often far below forecasts. These problems can be solved with the help of a planning profile which was derived by methods from quality management. The expansion is carried out in five phases. Starting from the definition of the strategic direction and their criteria of the target the performance level shall be laid down. After the evaluation and ranking out of markets, the search of a suit-able location is following. By doing so, bad investments should be avoided, because market outlets are connected with considerable costs.

JEL Classification M15; M31; L 22; L21

1. Einführung

Im Rahmen einer Internationalisierung stellt sich oft die Frage, welcher Zeitpunkt ideal für eine Auslandsexpansion in das betreffende Land ist. Oft gibt es keine genauen Managementvorgaben und die strategische Richtung wird im Nachgang festgelegt. Eine einmal falsch getroffene Entscheidung kann bei einem späteren Marktaustritt nur schwer revidiert werden. Neben Imageverlust ist dieser auch mit erheblichen Kosten verbunden, denn die Investoren haben oft langfristige Mietverträge vereinbart. Oft werden gerade in Schwellenländern und potenziellen EU-Beitrittsländern die Umsatzerwartungen zu positiv eingeschätzt. Mit Hilfe eines möglichen Planungsprofils können diese Probleme im Vorfeld ausgeschlossen werden. Das Management legt vorab Kriterien für die Länderselektion und dessen Erfüllungsgrad anhand eines Planungsprofils fest. Im Anschluss werden die Ergebnisse mit Hilfe eines Scores bewertet und in einem Portfolio dargestellt.

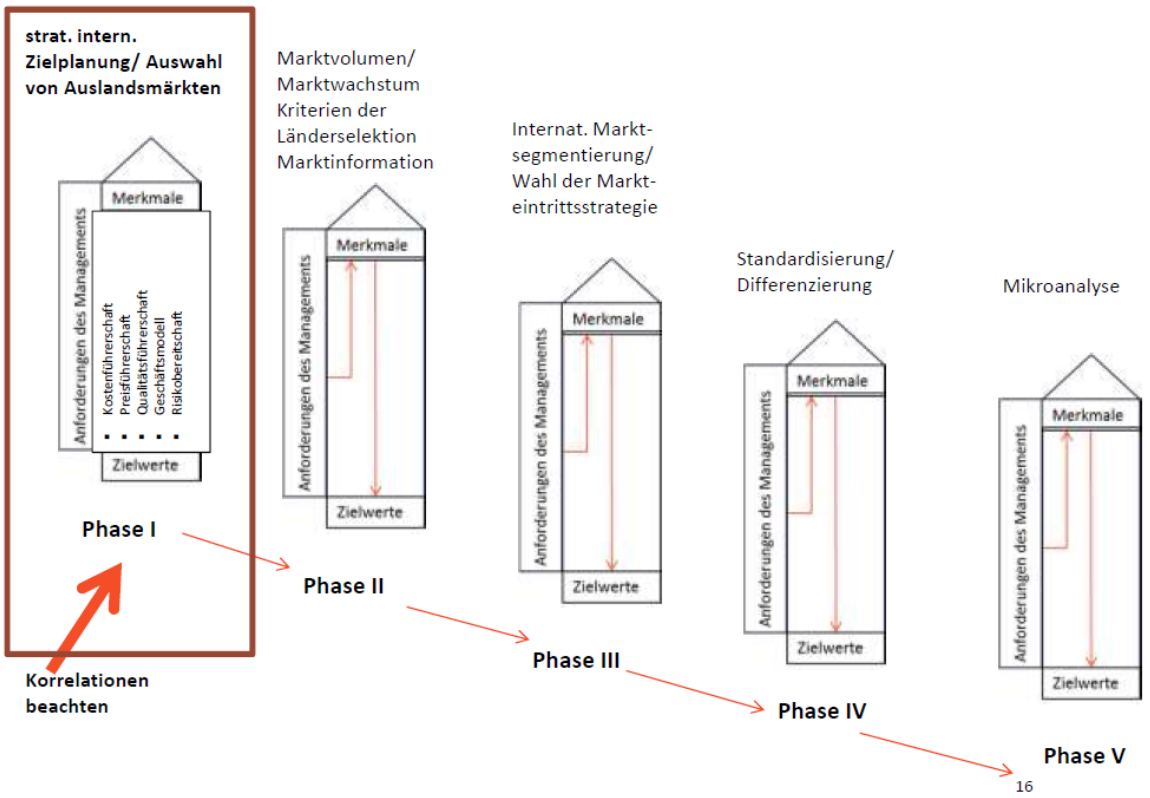


Abbildung 1: mögliches Planungsprofil in Anlehnung an QFD

Quelle: eigene Darstellung in Anlehnung an Linß, 2007; S. 52

Die Methode QFD stammt aus dem Qualitätsmanagement und verfolgt das Ziel, Kundenanforderungen und ihre Zusammenhänge sowie geforderte Merkmale von Produkten zu erkennen und in qualitätsbeeinflussende Eigenschaften umzuwandeln. . Das Vorgehen hierbei fordert stets die Beantwortung der vier Leitfragen (vgl. Linß, 2007, S. 53 ff.):

Was? Wie? Wieviel? Warum? welche die Werkzeug ddes „House of Quality“ sind. Die Arbeitsschritte hierbei:

I. Ermittlung von Managementanforderungen
II. Ermittlungen von Kennzahlen/Qualitätsmerkmalen
III. Festlegung von Zielwerten
IV. Prüfung von Wechselwirkungen
V. Vergleich der Kennzahlen, Qualitätsmerkmalen und Länderselektion anhand der KO-Kriterien

Das Planungsprofil besteht aus fünf Phasen, welche nacheinander durchlaufen werden.

Phase I: *Strategische, internationale Zielplanung* mit der Festlegung von Kosten-Preis- oder Qualitätsführerschaft, Wahl des Geschäftsmodells, *Wahl der Auslandsaktivitäten* durch Festlegung der Risikobereitschaft, Pionier-, oder Nachahmer, Festlegung von Zielerfüllungsgrad und deren Kriterien, Wahl der Bausparte sowie der Ermittlung der Korrelationen von Standortfaktoren.

Phase II: *Ermittlung des Marktvolumens-und Marktwachstums* inkl. Bewertung, Bautrend in den Bausparten, Fördermöglichkeiten, Beschaffung von Marktinformationen und Makroanalyse, *Kriterien der Länderselektion in Form von:* Sicherungsmöglichkeiten von Forderungen, Infrastrukturen, soziokulturelle Faktoren und Pro-Kopf-Einkommen, Verfügbarkeit von Lieferanten, und Wettbewerbsintensität.

Phase III: *Internationale Marktsegmentierung* anhand von Zielgruppen, Bautrends und Demografie, *Wahl der Markteintrittsstrategie* in Form von Direktinvestition, Franchising, Joint Venture.

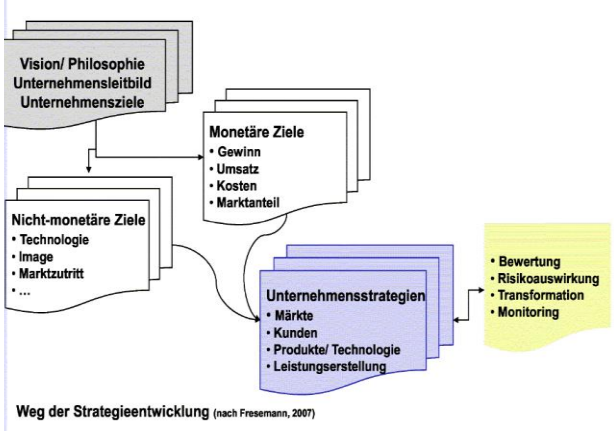
Phase IV: *Standardisierung oder Differenzierung* bei der Auswahl von Betriebstypen, Sortiments,- Preis- und Servicepolitik, Einsatz von Category-Management, Festlegung der Standortpolitik.

Phase V: *Mikroanalyse* mit der Bestimmung des Einzugsgebietes, Bewertung der Standortfaktoren, Ermittlung des Potenzials, Bewertung der Immobilie.

2. Strategische internationale Zielplanung und Marketing-Konzeption

Strategische Entscheidungen im Marketing werden weitgehend auf Dauer getroffen. Diese lassen sich nur langfristig verändern und korrigieren. Deshalb ist es umso wichtiger, dass sich die Unternehmen über ihre langfristigen Ziele klar werden und sie diese Entscheidungen auch betriebswirtschaftlich absichern [1]. Strategische Entscheidungen können im Bottom-Up oder Top-Down-Prinzip erfolgen. Viele Unternehmen realisieren erst viel zu spät, dass mit ihren operativen Entscheidungen zugleich auch weitreichende strategische Entscheidungen getroffen werden. Diese gilt es dann nachträglich zu bewahren und auszufüllen. Anders beim Top-Down-Prozess. In diesem Fall werden diese Entscheidungen innerhalb eines vorgegebenen Rahmens getroffen und es sind unterschiedliche Entscheidungs-Wirkungs-Zusammenhänge zu erkennen: Es gibt strategische Grundsatzentscheidungen mit einer unmittelbaren Wirkung auf die Aktionen des Unternehmens:

- Es werden operative und taktische Entscheidungen mit unmittelbarer Wirkung auf die Aktionen von Unternehmen getroffen
- Es gibt einen mittelbaren Einfluss operativer und taktischer Entscheidungen auf strategische Entscheidungen über die normative Kraft des Es bestehen Rückwirkungen der Veränderung der internationalen Wettbewerbssituation auf die strategischen, die operativen und taktischen Entscheidungen



Weg der Strategieentwicklung (nach Fresemann, 2007)

Abbildung 2: Wege der Strategieentwicklung

Quelle: Alexander Köninger, Vorlesung MBA-Studiengang, S. 9

Ein zentraler Punkt ist dabei die Einbindung in das betriebliche Planungssystem. Oft sind die strategischen Pläne wenig formal ausgearbeitet und beschränken sich auf die Festlegung von unternehmenspolitischen Zielvorstellungen bezüglich der quantitativen Konsequenzen. Die operativen Pläne sind in finanzieller und rentabilitätsmäßiger Sicht aufeinander abgestimmt und werden meist für einen Zeitraum von 3-5 Jahren geplant (Mittelfristplanung). Taktische Pläne werden zum Teil ad-hoc aufgestellt. Als Voraussetzung für eine langfristige strategische Planung müssen die Strukturen eines Unternehmens festgelegt werden, dessen Grundlage die übergreifende Unternehmensphilosophie ist. Mit dieser bekundet das Unternehmen ein grundsätzliches Interesse an Auslandsaktivitäten und legt fest, ob ein Going-International beabsichtigt wird. Es definiert die klassischen Zieldimensionen Zielinhalt, Zielausmaß und zeitlicher Bezug, welche um die geografische Komponente des Ländermarktes zu erweitern ist. Grundlage für die Formulierung strategischer Marketingziele sind die Gesamtunternehmensziele. Dazu gehören:

- Wachstums, - und Gewinnziele
- Sicherheitsziele und
- Macht, -und Prestigeziele

Aus diesen Gesamtunternehmenszielen werden die allg. Internationalisierungsziele abgeleitet. Sie beziehen sich zunächst auf mehrere Ländermärkte, welche es im Zuge der Segmentierung und Auswahl von Auslandsaktivitäten zu spezifizieren gilt [2] In diesem Zusammenhang spricht man auch von Marktzielen, welche oft in einem Zielportfolio dargestellt werden.

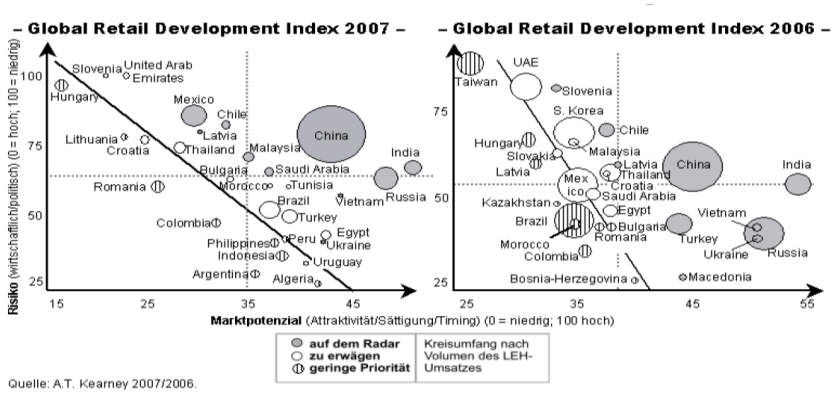


Abbildung 3:Marktselektion sekundärer (Einzel-) Indikatoren-Portfolioansatz zur Grobbewertung

Quelle: Handelsmonitor 2009, S. 57

Darin sind die einzelnen Ziele für die jeweiligen Länder und deren bearbeiteten Geschäftsfelder enthalten. Im Ergebnis werden die spezifischen Marktziele für die einzelnen Funktionsbereiche (Beschaffung, Marketing, Vertrieb) konkretisiert.

3. Internationalisierungsziele für den Baustoff-Fachhandel

Marktstellungsziele: Dabei werden Zielinhalte wie Umsatz, -und Marktanteile durch die Erschließung neuer Absatzmärkte verfolgt. Gleichzeitig wird die Marketingstrategie in dem jeweiligen Land festgelegt (Marktdurchdringung, Marktentwicklung, Leistungsentwicklung, Diversifikation und Rückzug).

Macht- und Prestigeziele: Diese Ziele sind auf das Erreichen und Festigen einer Einflussposition gegenüber Lieferanten, Konkurrenten, Abnehmern und der Öffentlichkeit ausgerichtet. Gleichzeitig werden Imageziele verfolgt wie z. B. eine Filialeröffung in Tschechien oder Polen. Damit will man potenziellen Konkurrenten zuvorkommen

Sicherheitsziele: Mit den Auslandsaktivitäten wird zugleich eine Risikostreuung vorgenommen um das Gesamtrisiko für das Unternehmen zu senken. Bedingt durch unterschiedliche Entwicklungen der Länder bestehen auch unterschiedliche Konjunkturzyklen. Man beabsichtigt damit, die Abhängigkeit von einem einzigen oder wenigen Märkten zu verringern. Als Beispiel sei hier die aktuelle Entwicklung in Deutschland genannt. Derzeit existiert ein Trend vom Land in die Stadt. Der dafür benötigte Wohnraum und die Bautätigkeit konzentrieren sich auf nur wenige Ballungsgebiete. Bedingt durch diese Entwicklung sind die Unternehmen im Baustoff-Fachhandel gezwungen, ihre Standorte in ländlichen Regionen aufzugeben und neue in den Ballungszentren zu eröffnen. In diesen Gebieten besteht aber oft schon eine hohe Wettbewerbsintensität und Flächen sind nur begrenzt verfügbar. Um am Markt weiter zu bestehen, ist es deshalb notwendig, Auslandsaktivitäten auszulösen.

Finanzziele: Diese beinhalten die Kreditwürdigkeit, Liquidität, Verschuldungsgrad und stellen wichtige Einflussfaktoren für die Beschaffung von Eigen -und Fremdkapital dar. Gerade bei börsennotierten Unternehmen ist eine gewisse Renditeerwartung der Stakeholder vorhanden, dessen Erfüllung durch Auslandsaktivitäten nicht gefährdet werden darf.

4. Länderselektion und Erfüllungsgrad

Aufgrund von begrenzten Ressourcen müssen Unternehmen im Baustoff-Fachhandel eine interne Priorisierung vornehmen. Sie treffen eine Marktauswahl anhand von Selektionskriterien. Diese wurden in der bisherigen Literatur häufig als Verfahren der Ländersegmentierung angesehen [3]. In Anlehnung an Berndt/Fantapie Altobelli/Sander [4] werden diese in die Kategorien: Generelle Kriterien, Branche und Wettbewerb betreffende Kriterien sowie Unternehmensspezifische Kriterien eingeteilt.

Die ***generellen Kriterien*** sind branchenunabhängig und beschreiben die allgemeine Situation eines Landes. Sehr oft wird diesen Kriterien ein vorgelagerter Charakter im Sinne von „KO-Kriterien“ zugesprochen. Werden die sog. KO-Kriterien nicht erfüllt, erfolgt oftmals auch keine weitere Länderanalyse. Diese untergliedern sich in ökonomische, politisch-rechtliche und soziokulturelle und geografische Kriterien. In Anlehnung an Zentes/Scheer/Lehnert sind diese für den Baustoff-Fachhandel in der nachfolgenden Tabelle 1 aufgeführt:

	Ge-wichtungs-faktoren	Generelle Kriterien	Land A		Land B	
			Bewertung	Gewichtete Bewertung	Bewertung	Gewichtete Bewertung
Öko-nomisch **30 %**		Höhe BIP Pro-Kopf-Einkommen Ausgabebetrag Lebenshaltungskosten Inflationsrate Marktvolumen Marktwachstum Angebot an qualifizierten Arbeitskräften Baukonjunktur Vorhandensein der potenziellen Zielgruppen Flexibilität des Arbeitsmarktes Wettbewerbsintensität Verfügbarkeit von Lieferanten Ländertypische Bauweise				
Summe	**1,0**					
Politisch -recht-lich **25 %**		Politische Stabilität Stabilität der Gesellschaftsstruktur Durchsetzbarkeit von Verträgen /Rechtsordnung/Korr. Höhe von Subventionen Sicherungsmöglichkeiten für Forderungen Tarife, Zölle, Einfuhrbestimmungen Vorschriften für Baumaterialien Möglichkeiten einer Zentralregulierung etc.				
Summe	**1,0**					
Sozio-Kultu-rell **15 %**		Kulturell psychische Distanz Kenntnisse der jeweiligen Landessprache Kenntnisse der englischen Sprache				
Summe	**1.0**					
Geogra-fisch-logi-stisch **30 %**		Infrastruktur Logistikkosten Beschaffungskosten Kommunikationswege und -struktur				
Summe	**1,0**					
Gesamt	**0,5**					

Tabelle 1: ökonomische, politisch-rechtliche, soziokulturelle und geografische Kriterien
Quelle: Zentes, Scheer/Lehnert; 2007, S. 91 ff.

	Gewich-tungs-faktoren	Branche/Wettbewerb betreffende Kriterien	Land A		Land B	
			Bewertung	gewichtete Bewertung	Bewertung	Gewichtete Bewertung
Bran-chen-struktur 40 %		Kapitalbedarf Grundstückspreise Vorhandensein guter Standorte Vorhandensein mittelständischer Handwerksbetriebe Bekanntheitsgrad und Geschäftsmodell Servicepolitik				
Summe	**1,0**					
Wett-Bewer-ber 60 %		Anzahl etablierter Verbundgruppen und Filialisten Wettbewerbsintensität Zugang Vertriebskanäle				
Summe	1,0					
Gesamt	**0,35**					

Tabelle 2: Kriterien Branchenstruktur und Wettbewerber
Quelle: Zentes, Scheer/Lehnert; 2007, S. 91 ff.

Gewichtungs-faktoren	Zusammenfassung/ Marktbarrieren	Land A		Land B	
		Bewertung	gewichtete Bewertung	Bewertung	Gewichtete Bewertung
0,50	**Generelle Kriterien**				
0,35	**Branche/Wettbewerb betreffende Kriterien**				
0,15	**Unternehmensspezifische Kriterien**				
1,0					

Tabelle 3: Kategorisierung von Länderselektionskriterien für den BST-Fachhandel

Quelle: Zentes, Scheer/Lehnert; 2007, S. 91 ff.

Gewichtungs-faktoren	Zusammenfassung/ Marktattraktivität	Land A		Land B	
		Bewertung	gewichtete Bewertung	Bewertung	Gewichtete Bewertung
0,50	**Bauvolumen**				
0,20	**Fördergelder**				
0,,50	**Marktwachstum**				
1,0					

Tabelle 4: Zusammenfassung Marktattraktivität

Quelle: eigene Darstellung

Abschließend erfolgt eine Darstellung des Scoring-Modells zur besseren Übersichtlichkeit in einem Länderportfolio. Diese zweidimensionale grafische Darstellung erleichtert die Selektion. Darauf folgt eine Systematisierung, welche generelle (Kernmärkte), zukünftige

(Hoffnungsmärkte), gelegentlich (Gelegenheitsmärkte) oder aber nicht (Abstinenzmärkte) bearbeitet werden soll [5]. Zusammenfassend bezeichnet die Attraktivität eines Marktes die zu realisierenden ökonomischen Ertragschancen und die Marktbarrieren stellen die Gesamtbedingungen dar, welche zum Eintritt in einem Ländermarkt erforderlich sind.

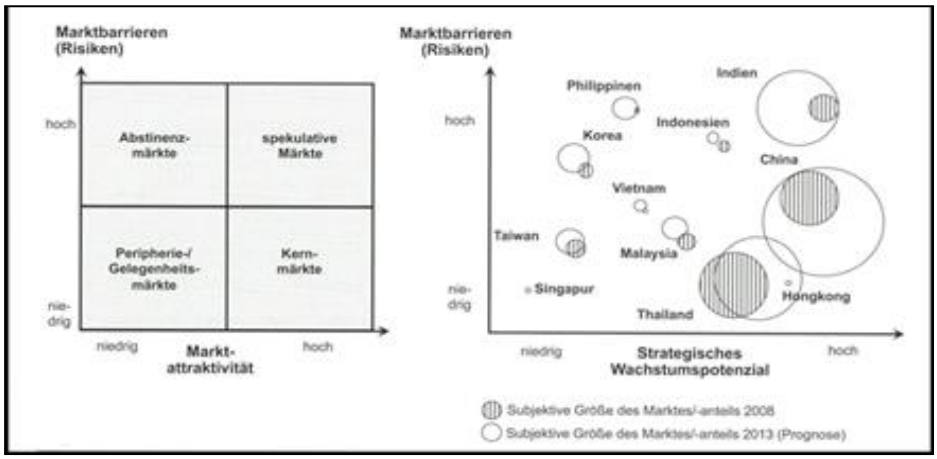


Abbildung 4 :Portfolio-Betrachtungen aus der Sicht eines Supermarktbetreibers
Quelle: Handelsmonitor 2009; S. 130

5. Fazit

Mit Hilfe dieses Planungsprofils, anhand dessen Management die strategischen Ziele inklusiver Zielerfüllungsgrade im Vorfeld festlegt, werden Investitionen in risikoreiche Länder vorab schon ausgeschlossen. Beachtet man diese Faktoren nicht, läuft man Gefahr, das zu erwartende Umsatzvolumen zu überschätzen und stellt damit damit die Wirtschaftlichkeitsrechnung einer Expansion zu positiv dar. Letztendlich werden die eigentlichen Unternehmensziele nicht erreicht und man ist zu kostenintensiven Marktaustritten gezwungen. Neben dem Imageverlust können schon einzelne Fehl-investitionen dazu betragen, dass ein Unternehmen finanziell derart geschwächt wird und vom Marktgeschehen ausscheidet.

Jüngstes Beispiel ist der Konzern Praktiker, der in 2005 einen Auslandsumsatz von 25 % erzielte und in 2009 trotz Wirtschaftskrise noch in Albanien expandierte. Bedingt durch mehrere Fehlinvestitionen im Ausland, schlechtem Image, zu schnellem Wachstum und falscher Unternehmensstrategie musste der Konzern in 2013 Konkurs anmelden.

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MONETARY ARRAGEMENTS AS THE REACTION TO DEBT CRISIS

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Key words: debt crisis, monetary arrangements, fiscal arrangements, European central bank, interest rates

Abstract:

Ongoing debt crisis is affecting the Eurozone since 2009. The crisis has its basis in combination of the sovereign debt crisis, banking crisis, growth and competitiveness and crisis of ethics. Member states have been dealing with difficulties to repay the government debts and to keep the sustainable economic growth since then. As a reaction both, the European central bank and the European union institutions took relevant actions to alleviate or solve the consequences caused by crisis. The main aim of this paper is to compare the actions taken and declare, which of them was more effective.

JEL classification: E63, G28

1. Introduction

In consequences of subprime crisis in USA stock markets were hit as investors invested in safer projects because of an increasing risk aversion. Functioning of European money market deteriorated (several European banks had huge losses due to the amount of investments in mortgage-backed securities), resulting in the lack of trust between banks. This in turn has resulted in a noticeable worsening situation in the euro money market. The ECB has provided overnight liquidity within its powers to an interbank market. By this step ECB provided temporary almost smooth functioning of interbank markets, reduced the volatility of short-term interest rates and eliminate the risk. [1] The fall of Lehman Brothers in October 2008 was the second impulse for greater uncertainty in international financial markets, resulting in a lack of confidence in the financial health of banks around the world. It was difficult to determine which banks have what amounts of default assets in its portfolio. Increase of the bank's liquidity tightened lending to households, businesses and removed risks from their balance sheets. Thus, the global financial crisis began to spread into the real economy of the euro area, which led to a rapid decline of the GDP, the deterioration of economic conditions and subsequent overflow of international trade. The financial crisis has passed an economic crisis into the world. The EU economies, which had been dealing with high government spending, low saving, less competitiveness and decrease in demand for years, weren't

excluded from the economies dealing with serious problems with fiscal sustainability of government finance, increasing unemployment. On the other hand, some of them, such as Greece, Italy, Spain and Portugal recorded the highest level of debt. There has been a broad list of policies, which have been discussed over past four years at the EU level to stabilize the debt, help the economic growth and lower the most crucial imbalances among Member States.

2. Legislative action by the EU organs

While the world economies (including EU member states) were hit by the global economic crisis, Europe's current situation is multiplied with the (i) unfinished structure of economic and monetary union and (ii) macroeconomic imbalances among 18 countries. The main aim of economic and monetary union is to converge the various national economic policies of EU Member States, the creation of a common currency and a common monetary policy performance with the main maintenance of price stability. The decision of creation EMU became a part of Maastricht Treaty, but only regulations about monetary union were included. Governing the fiscal policies stayed without uniformly defined conditions at the level of EU Member States apart from reference level of the government debt and budget deficit. Under the Protocol on excessive deficit procedure the limits are set at 3% GDP of the planned or actual government deficit and 60% government debt to GDP. The imbalances are defined as the differences in the current accounts, competitiveness, in state of economy. Level of competitiveness can be measured by unit labor cost. German ULC are though to be 25% more competitive than those of Greece and some 33% more than Italy's. [2]

Misgoverning of fiscal policies by governments, coordination of economic policies carried out without sanctions, unfair income distribution, moral hazard, uncontrolled unemployment rate increase cause, that EU bodies were forced to take an immediate action to deal with a debt crisis, which was transferred into sovereign debt crisis in words of economies in euro area. The result was The Stability and Growth Pact multiplies reformation in years 2011 and 2013. Since its introduction, SGP has faced a criticism for inadequate definition of tools for enforcement of the rules and criteria. Thus, it was more than needed to tighten up the surveillance over the completion of fiscal policies by governments, the implementation of excessive deficit procedure and to set up new instruments for awarding the sanctions in case of breaking the rules. [5]

The current crisis has revealed serious shortcomings and therefore a legislative act named "Six-Pack" was adopted in 2011. Package of five regulations and one directive was created to fill the gaps and deficiencies identified during the debt crisis of euro area. Strengthening fiscal surveillance and enforcing the provisions of the Pact by adding the expenditure criteria necessary to review the fiscal status of the country and to monitor the implementation of 60% debt criteria is the key element. Moreover, six-pack defines stricter financial rules by quantitative "significant deviation". It also increased the supervision of budgetary and economic policies within the European Semester in order to ensure consistency of those instructions. It also sets a system of sanctions in the event of excessive macroeconomic imbalances, improves the enforcement of the preventive and corrective arms of SGP, focuses on trends that could lead to adverse development of macroeconomic indicators in the Member States of the existing legislation. Directive 2011/85/EU on 8th November 2011 on requirements for budgetary frameworks of the Member States provides for a system of budgetary accounting and statistical reporting rules and procedures in the development of forecasts for budgetary planning and numerical rules for individual euro area countries. Six-

pack introduced qualified revision for majority voting for most penalties, increasing the likelihood of recovery.

Fiscal Compact (formally, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) was introduced as a new sticker version of the previous Stability and Growth Pack, It was signed on 2 March 2012 with EU Member States. Czech Republic and the United Kingdom abstained. The main goal is to foster fiscal discipline, notably in the euro area, building on and enhancing the reinforced SGP. It consists of two main modules: a balances budget rule including an automatic correction mechanism, and a strengthening of the excessive deficit procedure. [14] The contracting parties commit to implementing in their national legislation a fiscal rule, which requires government budgets are in balance or in surplus as it is established in the legislation (this rule is fulfilled as the annual structural balance is in the line with the MTO). Contracting parties must evaluate an analysis of expenditure net of discretionary revenue measures. Under the exceptional circumstances the Member States' economies can break the balanced budget rule for certain period of time. [1] The second modul of intergovernmental treaty strengthens the excessive deficit procedure, which is defined in SGP.

Strengthening the Stability and Growth Pact demonstrates the "two-pack" from March 12, 2013, which focuses on economic and financial management of the EU. Through the legislative acts supervision, coordination and implementation of budgetary discipline will be strength. The new legislation defines additional powers to the European Commission in assessing the budgets of the Member States of the euro area, but it also under greater control by the European Parliament and the Member States. Strengthen the supervision of the Commission, ECB and IMF over economic reforms, increasing transparency. For Member States implementing rules that must be met if requesting financial assistance from the EU. Independent bodies should monitor common fiscal rules at the national level.

The global crisis significantly increased the demands on those aspects, in which the Lisbon strategy failed- unrealistic goals, Member States' passivity, an inadequate monitoring of the implementation of the national reform programs and mechanisms for recovering weak. Political priorities and objectives are part of the Europe 2020 strategy. The agenda of the EU represents ten-year strategy to sustainable economic growth and job creation. Is more than just overcome the crisis that continues to threaten the economies of Member States. Includes options to address the shortcomings of the European model of growth and the creation of smarter, more sustainable and more open growth by 2020. To achieve the strategy entitled "A strategy for smart, sustainable and inclusive growth", the EU objectives in five areas: employment (75% - to employment of the population from 20 to 64 years), education (reduction of early primary education under the 10% with at least 40% of 30-34 annual completion of higher education), science and research (3% of EU GDP should be invested in R & D), environmental policy ("20/20/20" - to increase energy efficiency by 20% or by the end of 2020 compared to 1990 to reduce emissions by 20% and increase the share of renewables to 20%) and poverty reduction (less than 20 million people at risk of poverty or social exclusion).[5]

EU institutions have agreed on creating a "rescue fund" knows as EFSF/ESM . It is main role is to borrow to government of those countries, which public finance are no longer sustainable, to invest in banks (recapitalization). Thus, by funding it restructures debt by passing on discounted prices to principal cuts. The EFSF may also intervene in the primary and secondary bond markets.

3. Monetary steps taken by ECB as reaction to debt crisis

The main reasons for the serious problems of the euro area include the uniqueness of the single monetary policy, which covers 18 states. They retain full sovereignty in the fiscal and structural areas of regulation, supervision and the restructuring. The ECB is limited in its actions by decisions of national parliaments, without which explicit consent must not imposed operations involving risk or transfers of income between countries, which are excluded from functions of the ECB. Otherwise there would be a conflict between integrity and effectiveness of monetary policy and domestic legitimacy. The ECB may act only within the limits of the policies for which it was responsible.

ECB under its legitimate powers reacted to the negative developments in the European financial market with a number of measures, namely: (i) a reduction in interest rates, (ii) the provision of emergency liquidity with an extended list of eligible collateral, and (iii) extend the maturity of loans to banks.

To release unlimited funds and fixed rates was crucial. Thus banks operating in the European market, provided and an adequate collateral, were given liquidity by ECB. The result was that a large part of the transactions concluded between the financial intermediaries, has been transferred to the ECB balance sheet. Financial institutions, which showed surplus, rather preferred warranty by the ECB than taking a risk, which was high under such conditions. The ECB has been virtually the sole supplier of liquidity. The implementation of this function led to a significant increase in the balance sheet, which was supposed to expand to the point where the crisis has blocked other ways to finance member countries, which were hardest hit by the crisis.

Purchase of securities issued in the private and public sector have played an important role in the expansion of the ECB balance sheet. Two consecutive programs for the purchase of covered bonds began and continued by direct purchases of government bonds from countries that have been under stress in order to restore the conversion of monetary policy. From May 2010 to early 2012 bonds of Greece, Portugal, Ireland, Italy and Spain were purchased for more than 220 billion euros, as the daily Frankfurter Allgemeine Zeitung says. (2013) Purchase of government bonds of highly indebted countries, under same name "Securities Market Programme" (SMP) was strongly criticized in particular by German economists (Dönges B., M. Neumann and Milbradt), who consider that this procedure exceeded ECB's mandate since legislation forbids the ECB to finance the Member States. According to M. Draghi buying government bonds helped to make the cut in interest rates reflected in the EMU countries, which need it the most. ECB measures provided time to breathe countries, which were pushed into a position where excessively high interest rates have increased the insolvency. [4]

In the chart above there is a composition of extending the ECB balance sheet compared to the balance sheets of the Fed and the Bank of England. The most remarkable difference is the lower scale of purchased securities, mainly government securities, compared with a much more important role to credit institutions. [3]

Central Bank under its jurisdiction provides funds to the banking sector, which has the ability to change interest rates. Non-standard measures of increasing the liquidity and facilitating the transmission of monetary policy to the final agents' decision to invest were carried out in parallel with the management of monetary policy. In response to events, which took place between years 2007 and 2008, an effort to protect European banks have increased interest

rates to 4% in July 2007, which remained until July 2008. Following this step the ECB engage in commercial banks tightening conditions for lending to commercial banks to households and businesses. Extremely expansive monetary policy was intended to create favorable conditions for maintaining the dynamics of private investment and consumption expenditure. Gradual decrease in interest rates since October 2011 has reached a historical lows (the most recent data indicate a value of 0.15%). Development of prediction shows a raise of interest rates until 2016. According to the words of E. Nowotny economy needs to grow by strong tempo, but interest rates will rise, when it comes to strong growth, ranging from 0.5 to 3.1%. Recovery based on ECB Governor's words is still very fragile and an offer of cheap money is not always translated into loans to businesses.

Lower base rate of the ECB was reflected in lower interest rates on the interbank market. Not only banks but also the governments of the member countries of the euro area borrowed for the smallest interest. In the case of Slovakia in the June's auction, investors borrowed 112 million euros for ten years for less than 2.5%.

Low interest on government debt is positive especially for the borrowing country, but indirectly borrowers and depositors are positively affected, as interest rates affect the decisions of households and businesses on savings and investments. Higher interest rates, for example, have a tendency to reduce the demand for loans, mortgage or consumer.

Chart 3: Interest rates (in %)

A B C

A- non- financial institution loans (up to 250 000 €

B- household consumer loans

C- mortgage

Source: Own proceeding based on data from ECB, 2014

Interest rate premium (spreads) to Spanish, Irish, Portuguese and Italian bonds have increased significantly after the problems in Greece and Cyprus (they have lost the opportunity to refinance their debts by due new emissions-bearing securities). Although the introduction of the euro has brought down the interest rate premiums, the real results in the cost of servicing government debt will increase due to the increase in spreads and nominal growth of public debt. As a result, in September 2012 in order to maintain consistency of its monetary policy, the ECB has authorized the feasibility of direct currency transactions (DCT). By this step ECB wished to ensure an adequate transmission of the monetary policy to the real economy, which has been crippled by a tightening of the rules of borrowing and the level of interest rates. Unlike SMP is a necessary condition for DCT strict and effective conditions, which are part of the EFSF / ESM. At the first place price stability should be maintained and the governments should realize the necessary fiscal adjustment and structural reforms. As it is apparent from a number of financial indicators and reports actual implementation of DCT is very effective in achieving the goals of restoring confidence in financial markets and reducing imbalances in current accounts balance of payments of the euro area peripheral countries.

The main objective of the ECB is to maintain price stability, as the Treaty on the Functioning of the European Union defines it. The Council has defined the price stability as "annual growth in HICP of the euro area below 2%. Price stability is maintained in the medium term.

In relation to inflation, this means that price stability is when inflation is below or close to 2%. Currently, the ECB is criticized by economists against defaults a core mission of maintaining price stability, whereas the euro area is increasingly associated with the term "deflation". The ECB wouldn't delay long its inaction, because sharper the decrease means (in March fell to 0.5% from 0.7% in February), higher risk of deflationary spiral due to the fact that households and businesses will not be willing to spend their savings, if deflation will take too long and the resumption of economic growth will be remote and impracticable objective. Some Eurozone countries are among the most indebted economies in the world economy. For these economies, it is necessary to pay off debts at low loan installments, for which inflation is needed.

4. Conclusion

The complex analysis shows that the steps taken by the ECB for short time stabilize the situation in euro area. It was the policy of ECB, whose taken steps lead to and recovery of economic growth of the countries of Eurozone. Economic recovery in most EU Member States and in the EU as a whole will continue. After emerging from recession in the spring of 2013, three quarters of subdued recovery an economic growth slightly accelerated. The forecast anticipates a growth in real gross domestic product of the EU this year and by 1.5%, in euro area GDP by 1.2%. Compared to the autumn forecast, the European Commission regards the improvement of prediction by 0.1 percentage point in the growth of the EU economy and the euro area, as well. The European Commission also notes that the labor market is characterized by a slow stabilization of employment. Predicts that this year will decline in the unemployment rate, which in 2015 across the European Union will be reduced to 10.4% in the euro area, to 11.7%. The EC expects the EU and the euro area this year will moderate inflation, a rise of 1.2% and 1%. This might be good news because low inflation makes it difficult to service the debt. Annual growth rate of consumer prices in the euro area is at 0.5%. Too low inflation may have a negative impact on the economy, thus the ECB is trying to promote the growth of consumer prices in the euro area, for example, extremely low interest rates. ECB ensures price stability in the annual inflation rate just below 2%. The Commission predicts a continued reduction of public deficits. In the euro area predicts fall of the government deficit to 2.6% of GDP. The EU should strengthen domestic demand, which can bring more balanced and sustainable growth.

If we look at the legislation and financial help to counties, which had serious problems with repaying the government debts, we call simply say that those are only words on a paper. For the first time maximum government spending and budget deficit limits were set in the convergence criteria, which must be followed by every state, which is willing to join the euro area (in the text used also as "EA") as well as during its membership. However we witness rule breaking from some of the Member States before entering and during the membership, as well. Thus, the new rule- base framework was an understandable step made by the EU, but didn't succeed. Triple reform of SGP shows that intergovernmental agreement didn't set sufficient rules to keep sound government debts. It should be a first thing the EU institutions will do as soon as possible. To include missing "E" in EMU, so the union can work under the same rules in fiscal policies.

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OPPORTUNITY MANAGEMENT IN THE SALES PROCESS

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Key words: sales process, opportunity management

Abstract:

The sales distribution requirements are constant increasing as a result of market saturation. Therefore, it is particularly important to edit existing customer requests specifically and consistently.

An opportunity is a sales possibility to sell goods and services to a customer. Opportunity management is described as a methodology and approach for transferring of sales opportunities to specific customer orders. The trick is to identify the appropriate sales opportunities, then to edit them structured, as well as to identify potential disruptive actions occurring in time and develop and implement appropriate courses of action.

Opportunity management objective is to develop as many prospects as part of an optimized sales process, as well as to gain a rapid insight and overview of the current sales projects.

The success of the process depends mainly on two aspects. On the one hand is a proper selection and prioritization of the opportunities the base to focus on the essential cases. In addition, the active control and handling of the cases is also very important.

In this article, models will be described to evaluate and manage sales cases. The scoring model for the proper selections of cases, as well as the NUTBASER model and the BLUBZEWE model for the controlling and management of sales cases will be described in more detail.

JEL classification: M29, L80

1. Opportunity Management

Eine Opportunity ist eine konkrete Verkaufschance Güter und/oder Dienstleistungen bei einem Kunden zu platzieren. Das Opportunity Management beschreibt, mit welchem Prozess eine Verkaufschance erfolgreich in einen konkreten Kundenauftrag überführt werden kann. Hierbei wird die Ausgangskundensituation analysiert und eine kundenindividuelle Vorgehensweise definiert und festgelegt.

Zur Minimierung der Vertriebskosten ist es kaufmännisch sinnvoll die erfolgsversprechensten Vertriebsleads auszuwählen. Die Konsequenz kann somit auch eine Entscheidung gegen eine Verkaufschance zur Folge haben [1].

Ziel des Opportunity-Managements ist es, möglichst viele Aufträge im Rahmen des Vertriebsprozesses zu platzieren und stets einen Überblick über die gesamten Verkaufsprojekte zu haben. Der Prozess endet mit einem Kundenauftrag, oder im negativen Fall, wenn sich der Interessent gegen das Angebot entscheidet.

Der Erfolg des Opportunity-Managements hängt im Wesentlichen von zwei Kriterien ab.

- Auswahl und Priorisierung der Verkaufschancen (**Fokusierung der Fälle**)
- aktive Steuerung des Vertriebsprozesses auf Grundlage einer koordinierten Vorgehensweise **(Erfolgreiche Umsetzung der Fälle)**

2. Modelle zur Bewertung von Opportunities

In den folgenden Unterkapiteln werden gängige Bewertungsmodelle vorgestellt. Im abschließenden Kapitel werden diese Modelle kritisch hinterfragt und ein Ausblick auf die Dissertation gegeben.

1. Scoring Modell

Bei diesem Modell wird der Vertriebslead nach Kriterien einzeln bewertet und mit einem Gewichtungsfaktor berücksichtigt. Die jeweiligen Kriterien sind zuvor firmenspezifisch festzulegen. Diese Bewertung wird vom Vertriebsmitarbeiter für jeden Fall individuell vorgenommen.

Für die Ergebnisdarstellung wird in der Praxis häufig die Portfoliotechnik angewendet. Abbildung 1 stellt ein exemplarisches Beispiel einer Projektbewertung nach diesem Ansatz dar. Als Ergebnis ist der jeweilige Erfüllungsgrad sichtbar. Diese beiden Werte werden dann mit Hilfe der Portfoliotechnik grafisch dargestellt [2].

Attraktivität des Projekts	Gewichtungs-faktor	max. Punkte	1	2	3	4	5	6	Bewertungs-punkte	Erfüllungsgrad
Standort: gute Betreuung möglich?	6	36				**x**			24	67%
Kauf wichtig für Kunden?	6	36					**x**		30	83%
Übereinstimmung Kundenwunsch/APplus?	6	36				**x**			24	67%
Passt die Branche zur Asseco?	6	36				**x**			24	67%
finanzielle Situation des Kunden?	6	36			**x**				18	50%
ausreichend Budget für das Projekt?	6	36			**x**				18	50%
Entscheider ist in das Projekt eingebunden?	6	36				**x**			24	67%
Aufwand für die Akquisition?	3	18			**x**				9	50%
Potential für Folgegeschäfte?	3	18			**x**				9	50%
Zeithorizont für Entscheidung?	3	18			**x**				9	50%
		306							**189**	**62%**

Eigene Position/Stärke										
Grad der internen Unterstützung?	4	24			**x**				12	50%
Unterstützung durch Beeinflusser?	6	36				**x**			24	67%
Vorteile durch befreundete Unternehmen/Berater?	6	36				**x**			24	67%
Stärke gegenüber Wettbewerber?	6	36				**x**			24	67%
Preisvorteile gegenüber Wettbewerb?	6	36			**x**				18	50%
		168							**102**	**61%**

Ergebnisse

Attraktivität des Projekts	189	**62%**
Eigene Position/Stärke	102	**61%**

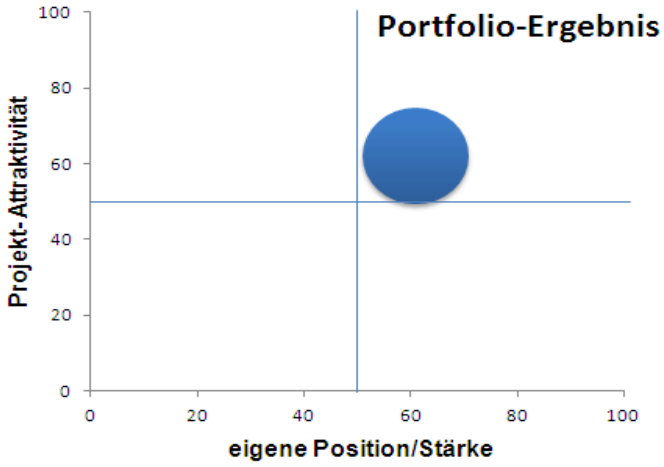

Abbildung 1: Bewertung von Opportunities / Scoring-Methode (eigene Darstellung)

2. Das NUTBASER-Modell

Mit Hilfe des NUTBASER-Modells können die Verkaufschancen nach einer Bewertung und Priorisierung, systematisch und transparent bearbeitet werden.

Dieses Modell beruht dabei auf acht Kriterien die als Parameter für eine Kaufentscheidung wichtig sind:

N eeds	=	Kundenbedürfnisse
U niques	=	Alleinstellungsmerkmale
T imeframe	=	Zeitrahmen für die Kaufentscheidung
B udget	=	Verfügbares Budget
A uthority	=	Offizielle Entscheider
S olution	=	Können und Wollen auf Anbieterseite
E nemy	=	Mitbewerb
R elationship	=	Inoffizielle Entscheider

Diese acht Kriterien werden entsprechend gewichtet und danach gemäß Wissens- und Bearbeitungsstand möglichst objektiv von den Vertriebsmitarbeitern bewertet. Daraus abgeleitet, wird nach der Scoring-Methode eine Abschlusswahrscheinlichkeit errechnet.

Diese Opportunity-Bewertungen lassen sich dabei in einem Polaritätenprofil veranschaulichen - siehe Abbildung 2.

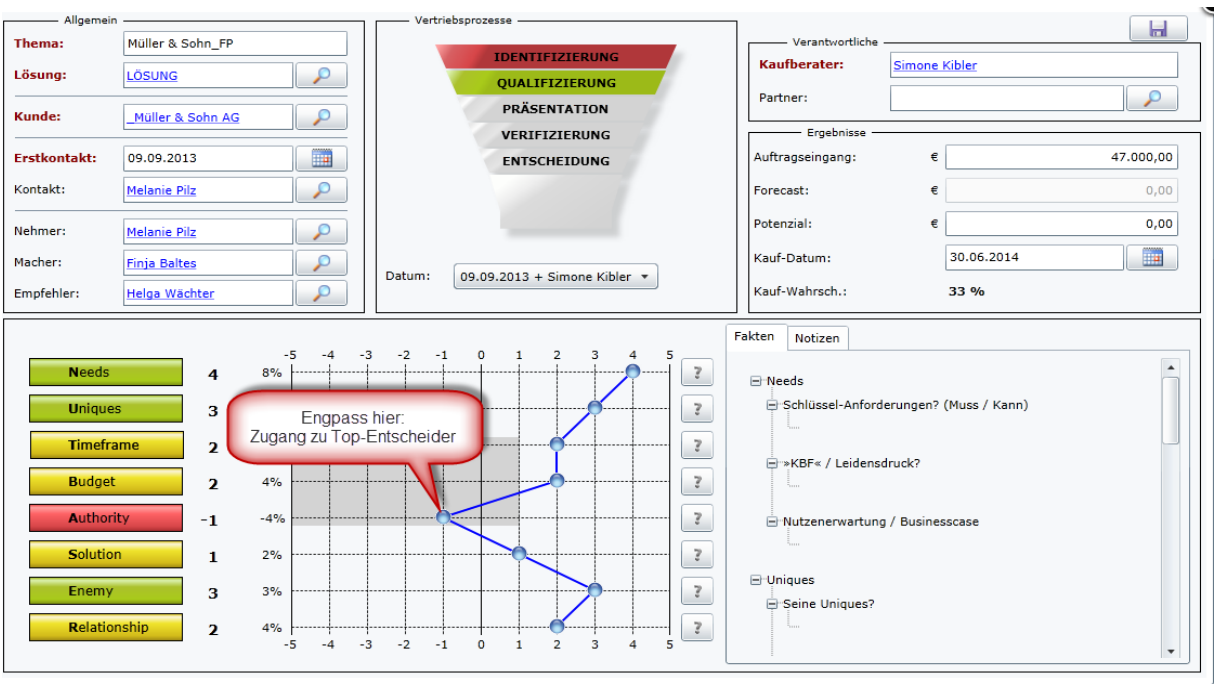

Abbildung 2: Opportunity-Management mit der NUTBASER-Methode [3]

3. Das BLUBZEWE Modell

Dieses Modell ist nach derselben Logik wie das NUTBASER Modell aufgebaut. Es werden bei diesem Ansatz ebenfalls die einzelnen Verkaufschancen nach Kriterien bewertet und ein Gesamtfaktor errechnet. Das Ergebnis wird in einem Netzdiagramm angezeigt. In der nachfolgenden Abbildung ist eine exemplarische Darstellung angeführt.

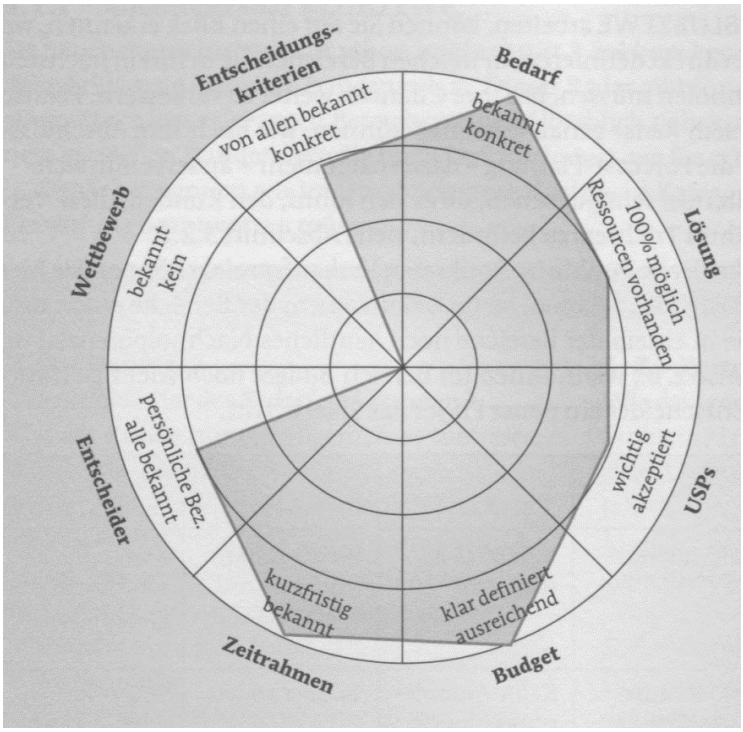

Abbildung 3: Opportunity-Management mit der NUTBASER-Methode [4]

In der nachstehenden Übersicht werden die einzelnen Kriterien der beiden Modelle gegenübergestellt.

Bedarf	=	**N**eeds
USP	=	**U**nique
Zeitrahmen	=	**T**imeframe
Budget	=	**B**udget
Entscheider	=	**A**uthority
Lösung	=	**S**olution
Wettbewerb	=	**E**nemy
	=	**R**elationship
Kriterien	=	

Anhand dieses Gegenüberstelllung ist die starke Überschneidung der beiden Ansätze sehr deutlich. Lediglich in den Kriteren Relationship bzw. Entscheidungskriterien ist ein Unterschied festzustellen.

3. Kritische Betrachtung und Ausblick

In den angeführten Modellen basiert die Bewertung und Einschätzung der Vertriebsfälle auf einer subjektiven Einschätzung des Leads durch den Vertriebsmitarbeiter. Durch diesen subjektiven Faktor ist es in Summe schwierig einen möglichst objektiven Überblick in der Gesamtheit aller Fälle aller Vertriebsmitarbeiter zu erhalten. Weiters werden keine objektiven Rückmeldungen und Informationen direkt vom Kunden eingearbeitet (Feedbackbögen durch den Kunden, Referenzbesuche, ...).

Diese Punkte werden in der Dissertation aufgegriffen und dabei zwei Hauptrichtungen verfolgt. Zum einen ein Modell zum Opportunity Management weiterzuentwickeln. Dabei werden objektive Aussagen und Stellungnahmen des Kunden eingearbeitet. Zum zweiten wird auf Basis der gefunden Kriterien empirisch untersucht, ob ein Zusammenhang zwischen Bewertungsergebnisse und der Erfolgswahrscheinlichkeit besteht.

Wenn ein Zusammenhang festgestellt werden kann, könnte dies wesentliche Verbesserungen im Prozess mit sich bringen. Rasche und zeitnahe Aussagen zu den Vertriebsfällen führen zu einer frühen Priorisierung und gezielten Abarbeitung der Fälle.

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FUTURE TRENDS OF PROCESS INNOVATIONS

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Key words: process innovation; future trends; change management; process management

Abstracts:

Due to the fact that the current business situation is less stable as in the past, organizations are facing more intricate issues and the innovation process needs to be utilized in the complex business environment. As a consequence, the need for process innovation increases in order to accommodate new business requirements, to correct faults in the infrastructure or the services or for other reasons such as market or legal requirements. All process changes tend to have disruptive potential on the organization, hence managing the release of processes is critical.

This paper provides an overview of some key trends of process innovation in organizations. Adverts to the need of flexible management of company strategy, points out to the need of the alignment with new technologies and advice on person's involvement in process innovation implementation from any department of the organization. Process innovation techniques need to be practiced and interpreted by any employee. Future trends of process management are about doing things easier, faster and with higher quality.

JEL: O30, O31, O32

1. Introduction

In multiple organizations, mainly in manufacturing industries, the term process innovation is frequently considered as synonymous with the product development process. However the growing importance of process innovation in many sectors of process industries, points out on the need to distinguish between these two terms.

“Process innovation” term according to OECD glossary of statistical terms is the implementation of a new or significantly improved production or delivery method. This includes significant changes in techniques, equipment and/or software (OECD, 2005). Process innovations can be targeted to decrease production costs per unit, or to cut delivery lead-time, to increase quality, or to produce or deliver new or significantly improved products.

According to Farmer (Farmer, 1993) customer satisfaction, increased productivity, higher flexibility, increased employees and improved coordination, and improved competitive advantage are the main benefits of successful process innovation implementation. Process innovation helps organizations reach new heights of success by dramatically changing existing business processes.

Innovating business processes across an enterprise can contribute to dramatic improvements in performance, enabling organizations to deliver outstanding value to customers in ways that also generate higher profits for shareholders (Hammer, 2007). Companies of all sizes, in every industry have achieved exceptional improvements in cost, quality, speed, profitability and other key areas by concentrating on measuring and redesigning their internal as well as customer facing processes.

However actual recognition of the need for process innovation and adoption of new ideas does not necessarily ensure its proper implementation and further usage.

Nowadays, more and more companies are built on the principles of process innovation. However this term is many times misinterpreted with product innovation or incorrectly interpreted by stakeholders. For term clarification, consider the examples below:

- Dell, for example, did not invent the PC, but created new business processes to bring PCs to market, eliminating unnecessary steps in the supply chain while offering more flexibility and control to the client. These procedures have become Dell's main differentiator in the competitive market place.
- Amazon.com did not invent the book but introduced the revolutionary process of buying books online from home.
- eBay did not invent the auction, but its online, easy-to-use processes transformed e-commerce and the buying and selling products within online auctions.

Process innovation or re-engineering makes company more competitive and adaptable to change. Achieving this has as well the effect on lowering operating expenses and produces financial rewards.

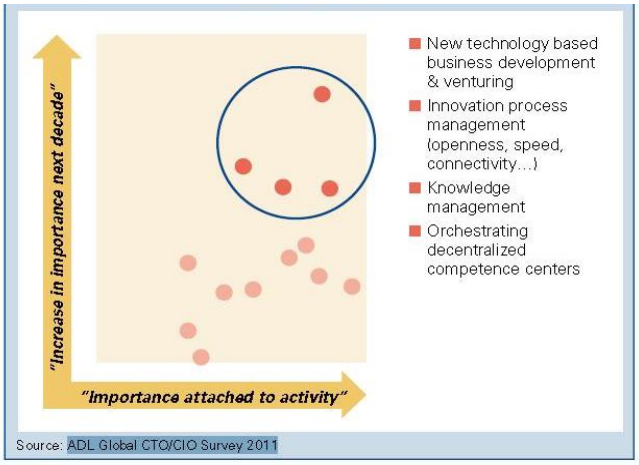
To assure long term growth, company should place the process innovation on the top of daily operations. In this article however I would like to point out to future direction of process innovation as well as to define some actual trends. Only companies that are one step ahead have a chance in current quickly changing environment.

2. Future of process innovation

One of the key messages from survey conducted by ADL Global is that the next years are expected to be even more demanding than the previous ones in terms of the innovation demand. To stay competitive companies are going to have to up their game, especially in terms of innovation in adjacent/new business areas and in managing the complexity of truly global, decentralized innovation resources [4].

As seen in the picture below, innovation process management is going to be a central activity for the future development of the company. Companies ought to discover new possibilities how to manage their innovation process. It is essential for new processes to unite closely with customers, to empower implementation of innovation completely across the organization, to expand the speed to market, to empower growth of new business models and to stimulate new ambits such as frugal innovation across enterprises.

Figure 1: Innovation challenges impacting the role of a CTO / CIO



Since the environment in the current business situation is more unstable as in the past, businesses are facing more complex issues and the innovation process must be employed in the complex business environment. This triggers the need to change the processes in order to be easily adaptable to changes and as well technology used for managing processes needs to possess the capacity to rapidly accommodate to what is required.

1. Innovation aligned with company strategy

The hierarchical structures and organizational processes we have used for decades to run and improve our enterprises are no longer up to the task of winning in this faster-moving world [8]. In a marketplace such attempts can actually thwart the endeavor to compete in a marketplace, where innovators need to be ready to confront new problems since failures are more frequent. Companies rarely took into consideration company strategy directions when thinking about process innovations. However in the current dynamic environment any company not considering the complex picture when planning the processes is putting itself at risk and can easily victim future process quality decrease or in the worst case its failure.

As part of core business strategy, process innovation can be a powerful competitive differentiator. One of Dell's central business ideas is the product personalization. Their business processes revolve around the mass customization of laptop and personal computers. To accomplish this efficiently and conveniently, it is a significant portion of Dell's strategy to invest heavily in process innovation, leaving product innovation to their suppliers. Between 1999 and 2004, through process innovation, one of Dell's U.S – based assembly plants reduced assembly time per computer from 28 to 5 minutes [16].

Increasing number of companies already claim process innovations is being integrated into business strategy, but is facing difficulties to clarify how this happens – more post-event justification than reality. As innovative tools, including business process management tools and project management tools, become more embedded throughout the system, we expect that leading organizations will become experts in their implementation more purposefully and effectively in a conjunctive strategic context. Even though such suggestion sounds very natural, managers frequently elided process alignment with company strategy during the process planning phase.

2. Go LEAN

In this age of mass customization, management's attention is being directed towards active, flexible and lean service operations and manufacturing. They are getting strategically positioned to meet the dynamic global competition [16]. A vital role of senior management is not only to create quality-consciousness as a business strategy, but also to ensure that quality results are not only short term improvements.

Lean production was developed as the core theme of the hugely successful Toyota Production System, focusing on the removal of all forms of waste from a system. Many project management methodologies focus on lean processes. The idea is not to identify the best project management methodology for process innovations, but to apply any that suits the best for the current company. Simple management techniques are now widely used among large enterprises, but future trends indicate the mass usage among small or medium enterprises. Aforementioned skills do not need to be mastered only by certified practitioners, but are moving towards any manager that wants to improve processes.

Eagar and Oene states: "We understand the need for increasing proficiency and effectiveness in utilizing techniques to focus especially on radical innovation and new growth opportunities in adjacent or completely new business areas"[4]. It is crucial to recognize that complexity, integration, speed and globalization all mean that excellence in knowledge management, including sources external to the company, are going to be more crucial than ever in the next decade.

Inexplicably, enterprises continually enforces that project managers lack skills with negotiation, customer relations and communication, generally speaking "soft skills", their focus remains on the "hard skills" related to project management. It is essential for organizations to develop leadership skills, which are frequently more important as perfectly drilled project management techniques.

Finally it's well known that lean principles and practice starts and continues to successful implementation with a dedicated commitment from process owners and business managers. Each manager needs to be a showcase of good combination of great management techniques with perfect personal and communication skills.

3. Embedded process innovation ownership

Ownership of process innovation project is increasingly being removed from technology and R&D positions, basically becoming entirely entrenched in other business roles such as department management. We expect to see innovation performance being assessed more explicitly across these functions and implementation quality measurement is becoming a key task.

It is important to obtain an appropriate person to guide implementation. According to the character of the process innovation such person needs to have certain skill set for successful project completion. In extreme cases, process innovation may demand not only just new skills, but new employees [2]. Employees from an unrelated department or from another organization can provide important insight and credibility.

Current trends show that a better option is to hire capable, flexible employees from the beginning and invest to keep their skills current and adaptable to the needs of new processes. As we all know, attracting the best employees possible to the organization is crucial for long

term success. This is applicable not only for process innovation but for any changes made in the corporation.

4. Decentralized competence centers

As mentioned in the point above, innovation is shifting towards employees rather than R&D management. In the world which is relationship dominated, the company is now more focused on employee engaged innovation since they are in closer contact with customers, have better insight on their needs and can confirm the future trends with very limited costs involved.

Participation of the employees includes many types of involvement, particularly focus groups and other activities that enable employee input to the design of the innovation. A research conducted by Procsi international demonstrates the need for proactive interactions that fostered feedback and resulted in enthusiastic and motivated employees who knew why the change was needed. Study participants reported a growing resilience among employees with a noticeable willingness to support needed business innovations. Customer input was also cited as an important element for successful change management programs [11].

Companies that will be able to link the strategy, customer experience, product, innovation and employee engagement all in the well-defined organization structure will be those who wins in the growing competition. Specialists dedicated for process innovations should be selected by management and identified as well as developed within the organization.

3. Methodology knowledge at all management levels

As a result of decentralized competence centers in an organization, a process management skills at all stakeholder levels becomes key ability in any department. Participants of survey conducted in 2012 by Prosci International indicated more demand for training and knowledge of process management skills, as well as more competency building programs. Such competencies are currently evident in senior management or task management; however process management techniques are becoming necessary in all management levels. The appetite for a methodology is increasing. Process management and its application is becoming more formalized and consistent in successful enterprises. We realize the evident need for more structured and formal processes in our survey outcome on Process Innovation in 2013. The majority of respondents indicated a strong demand for formalized process management techniques and project management tools should be included in all process innovation activities.

4. Unified communication

Unified communication has several definitions, however what is important is the effect of it. A basic definition would be “communications integrated to optimize business processes” [15].

It’s a commonly employed term for the integration of different communications systems, devices, applications and media. This possibly contains the combination of fixed and mobile voice, email, instant messaging desktop and advanced business applications, internet protocol, etc.

Gartner states the largest single value of UC is the ability to reduce human latency in business processes [6]. Unified communications allows for an individual to check and retrieve an e-mail or voicemail from any communication device at any time. It expands beyond voicemail services to data communications and video services [13]. There have been attempts at producing a single product solution; however, the most popular answer is dependent on multiple products [10].

Figure 2: Unified communication, Source: VMatrix

Managers are constantly experiencing the pressure of lack of time. Use of unified devices saves you time and more importantly decrease the chance of losing the data. The principal goal of process management is to deliver the correct information to the right people at the right time. We need to make sure we use all tools and techniques available to be best in the market and primarily to simplify our work.

5. Social process management

To tie up on the previous point, social technologies are now a central part of everyday life and work. The social generations are reshaping enterprises from the inside, helping them to build wider, more agile networks to create and deliver value to customers. Mobility and connectedness will be the core of the future business environment: communications and marketing are moving from a focus on one-to-one relationships, to many-to-many [14].

Social Business Process Management deals with integrating the processes your customers and employees perform in the social networks into your company process ground. The use of social media by customers increases and they will expect to see our company using it as well.

However this will put us under more pressure since our processes are becoming more transparent to them. Process owners and consultants need to consider what customer thinks about our processes when interacting with us. Companies need to become more sophisticated in their process innovation approaches and we see closer alliances between customer and supplier since the interface between them will blur.

6. Conclusion

Frequently innovation is not working out the way many organizations have expected. Despite increasing commitment, funding and organizational accountability, companies are disappointed by the returns they are deriving from their investments [1]. Sustainable process improvement and innovation requires hard, diligent work. It requires capital and human resources. It requires a desire for change – not for the same of being different, but the sake of being better – of being a better company.

Companies often focus on ensuring process managers have the right project management skills. Not only "hard skills" are necessary for successful completion of the project but equally important are the "soft skills".

Modern and successful company need to adapt the changes quickly and implement needed innovations effectively. This must be done in all departments involved, with department managers affected. We will see fewer consultants that will examine our business processes and more internal employees with respective process management training and education. Process management techniques become widely applied throughout the organization with less emphasis on the certification and more focus on practical usage. Project management will become a tool of common employer not a skill mastered by "fortunate few".

Ultimately, the future of process management is linked to new technologies and social media that will interact with business. The company becomes more competitive with high ability to change adoption. Usage of unified communication is here to help us react to any demands faster and to have all information available when needed.

It is essential to keep in mind that process innovation is primarily about people, if the right people don't have the proper skill set and are not equipped with the necessary tools, any process change, even the thoroughly planned one, will be unsuccessful.

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DOCTORAL STUDENTS' SECTION

C. FAKULTÄT FÜR MASSENMEDIEN / FACULTY OF MASS MEDIA *)

*) Order according to conference

THE LANGUAGE ANALYSIS IN THE MEN'S LIFESTYLE MAGAZINES

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Key words: Magazine. Men's magazine, Language, Stylistics, Lifestyle, Masculinity

Abstract:

Culture of language in the men's lifestyle magazines. Magazines for men are unique periodicals that are categorized as lifestyle magazine and targeted primarily but not only on men's readers. Generally, the culture of language differs in every type of periodical. This is true even in the category of lifestyle. The women's lifestyle magazines are using more friendly and bonding-like language. From the point of language these magazines acts like good caring friend. In the men's lifestyle magazines, the language used is completely different and even has its own variations. The use of language varies from language of sophisticated man or hard-to-please man to typical masculine archetypal picture man as rough hunter. The theorists even talk about the literary and rich language. The main goal of this article is to compare three different Slovak men's lifestyle magazines (Brejk, GoldMan, ForMen) in terms of type of language used (style and culture of language).

1. Introduction – The lifestyle

Lifestyle can be easily characterized as the way of life that describes man's attitudes, values and integration in certain social groups. The open encyclopedia of philosophy FILIT describes lifestyle as functional and aesthetic integration of our social life that expresses itself as integrated forms of relationships, consciousness and environment [1]. Lifestyle is influenced by culture, family or/and social groups [2]. It is very important in media not only in creative process of making new product (magazine) but also in marketing way.

McQuail said it helps us categorize our customers and therefore enhance our impact of marketing activities [3]. This is why we have to study all fragments of media individually. Not only holistically – all magazines – but each one as unit of style. Thus we are aiming to analyze particular fragment – men's magazines or, exactly said, men's lifestyle magazines. In this paper, we are focused particularly on the language and the culture of language of men's magazine because of one of the main virtues that differs them from other magazines – the style of language. Paper can be useful for better comprehension of language used by this kind of customers and can used by editors, journalists, teachers and students.

2. Lifestyle and culture

The culture influences not only the reader but also the media. Nowadays we can use the term of postmodern culture and its dominance in our lives. Postmodern culture serves us the provocative content. Sharing and distributing this kind of provocative content presumes existence of social group that provokes aesthetically, verbally, by its style, by creating a style, by its hygienic or fashion habits etc [4]. Thus we can assume existence of people with certain lifestyle and this existence is confirmed by Giddens. Lifestyle not only exists but people have to choose it. As Giddens said there is no option not to choose, we are obliged, even forced to make a choice [5]. Therefore lifestyle gives us an identity.

In case of lifestyle magazines for men we can say these magazines provide opportunity to identify with patriarchal masculine culture. A man wants to identify with this leading mainstream of dominating masculinity to fulfill the role of leader, hunter, alpha male etc. The men's magazines helps him with this, leads him to success in work, relationships with women, sports and hobby.

3. Man and lifestyle

As we said, a lifestyle magazine is important instrument to create or to find an identity. In this case the identity mentioned as alpha male. Men's magazine often describes man as successful person, a man that relies on his own.

The main paradox is, all men's magazines also impliedly describe man as helpless person. He needs to buy a magazine to know how to be successful with women, in work or in his hobby. He needs to know how to dress properly and how to handle certain situations in life. Basically he needs to know how to be a man. We can see it in the content of men's magazines. For example: advices related to sex, career guidance, etc.

This is the part of finding and choosing our identity by reading a magazine. But we need to mention the gender role which is the most important here. The gender role forms not only the content but also the language of magazine [6]. Gauntlett properly described all the content of men's magazine including not only the pictures of women but also including advices and answers to questions how to dress properly, how to be better lover or husband etc [7].

But the reader is also supposed to learn the language of men. By reading he is influenced to used the same or the similar verbal, morphological, lexical and syntactical structures. So the customer, or if we use the postmodern term the consumer, of men's magazine is oblige to choose not only lifestyle but also the language of mentioned masculine stereotype. Therefore we need to focus on the language.

4. Language and history

If we want to study or publish men's magazine, we need to consider four segmentations: demographic, social demographic, psychological and lifestyle segmentation [8]. All these segments has its own characteristics. The language is clearly one of them. Considering

mentioned segmentations we can pick the proper style of language to create proper content. But man and his language changed during the history.

The first men's magazine was The Gentleman's magazine published since 1731 to 1904, followed by Man about Town, Gentleman's pictorial, Country Gentleman and The Gentleman's Journal [9]. As we can see, these magazines were suited for gentlemen. The best example is the most successful The Gentleman's Journal which contained news, history, philosophy, poetry, music etc. and not only the content but also the language was suited for gentlemen, upper class with distinguished manners and lifestyle [10]. The radical change came with Men Only in 1935 – this magazine excluded women from its readers, adjust contend and language to men only but soon downgraded into erotic magazine [11]. The new era of men's magazine as we know started with magazines like Esquire and Playboy.

5. Style and culture of language in men's magazine

Mistrik defined stylistics as way of expression with systematic selection, order and usage of language registers and features in consideration of function, situation, author's intention, theme and content features [12]. To analyze the style of language we need to consider other fields of study: the lexicology, morphology and also syntax [13]. In case of men's magazine it means there are special features and aspects that are creating the language style of this kind of magazine.

Kasarda compared language of women's magazine and men's magazine. Women's magazine often uses friendly tone, talks to reader as helpful and caring friend but men's magazine is more masculine, with emotional and extravagant language [14]. This vague characteristic can be specified by Lakoff. As a linguist he characterized the language of men as way to assert supremacy over women and instrument to display men's authority, virtue and power [15].

To conclude and explain language style of men we have to mention so-called male gossips. Benwell divided gossips to two categories by gender. Female gossips are the well-known tabloid-like gossips but the male gossips are used to mock certain men who do not succeed in fulfilling all aspects of normative masculinity [16].

Again we can see why language and lifestyle are connected and important. To fulfill and live by the normative masculinity means to succeed as an alpha male therefore to accept the lifestyle that is offered and presented in men's magazine. Quoting the Samuel Johnson, poet, essayist, lexicographer and editor: "Language is the dress of thought."

6. The research

To make this study more practical we compared three Slovak men's magazines: GoldMan, ForMen, Brejk. We focused on language, language culture and other relevant linguistic aspects. The main criteria was to study the use of standard language, or better said literary and non-literary language. We assumed the differences between magazines, between their styles and we also assumed to make relevant final conclusion. We used six – seven of each magazine issues, from June to December 2013. Two of magazines have only the summer edition that contains July and August, only Brejk is published literally monthly twelve times a year.

1. GoldMan

GoldMan has very highbred, literate, cultured, sophisticated and cultivated language. Usage of literary and standard language is more than a norm. There are no vulgarisms, no slang, no expressive words, no substandard vocabulary. Each text, even the poetic editorial of chief editor, is very artistic, creative a literate. Headlines contain creative metaphors or artistic equivoque.

Use of English language or derivations is very interesting. Albeit all sections are in English (articles, car, motorcycles, high tech, fragrance, science & sport, history, travel,…), there are almost none English word or derivations in articles.

Language slightly oscillates between artistic and journalistic style, frequently tend to be more artistic with the very essence of originality. Adjectives dominate other word classes, therefore reading is slower and text is weakened but very interesting to read.

Articles about technology, science, cars and motorcycles are written in non-fiction popular science style, easily understandable to every average magazine reader. In syntax GoldMan prefers longer sentences. Section called Novel contains short story in really artistic style of such literary work.

The typical men's language is present in proper language that symbolizes the gentleman, the dominant, intelligent and elegant male. There are no urges to be the alpha male, no chauvinism, no unnecessary mocking. The language of GoldMan creates a suites a lifestyle of educated, stable, elegant and successful man. Proving dominancy is not achieved by power or might but in style itself.

2. ForMen

Formerly Czech magazine ForMen has now its own Slovak version. Interesting thing about ForMen is the discrepancy in style between content and language. The content does not include pictorials with half-naked or naked women neither the sex-related advices. It creates illusion of sophisticated and highbred magazine that does not need cheap erotic content. Therefore reader assumes same style of language. But the language is much more different that GoldMan or Brejk. ForMen tries to be very fresh and trendy so the language culture is not so sophisticated and artistic as GoldMan.

ForMen uses lots of slang words. English words and derivations are used very frequently. Sentences are shorter –articles are more dynamic.

Authors are not so creative as in GoldMan. They often use cliché, stereotypes, current fads, cultural references, superlatives and even imperatives. Exclamation marks are more than frequent here. Front page contains at least two or three exclamation marks in each issue of magazine. From the stylistic point of view, the front page looks overhyped in vain.

Used language often negatively exceeds norm of standard and literal language. We even found non-literal words. There is considerable difference and there should be a line between use of slang to make a certain style and editor's mistake. Expressive words are very frequent, especially the negative ones.

The language of ForMen creates style of ordinary man. There are urges, mocking, slightly masked or masked chauvinism. Language represents younger adult male, active, nonconformist.

3. Brejk

Brejk fulfills all expectations about men's magazine – both content and language. There are naïve sex-related advices with very dynamic and distinctive style of language. There are also articles about science, technology, cars and motorcycles. These are written in non-fiction popular-science style.

Articles about travelling and extreme sports are written very artistic with a sense of adventure, authors tend to use artistic style.

Culture of language in interviews is changing by the theme. Interview with cover girl is very open, contains slang words but interview with scientist, businessman or athlete has its own style.

Brejk has also a erotic short story. From the first sentence the skilled reader can assume the author is woman – which it was. The style of writing is very tense, abrupt, dynamic, sometimes telegraphic and reminds the paperback literature for women.

Brejk also contains expressive words but not as much as ForMen.

Headlines often use creativity rather than cliché or exclamation marks. There are some but only a few.

This men's magazine oscillates somewhere in the middle between artistic GoldMan and slang ForMen. Brejk satisfies both dynamic alpha male and elegant or intelligent man.

7. Conclusion

Language is the one of main aspects of creating a lifestyle. The culture of language in Slovak men's magazines varies from ordinary slang to elegant artistic language. There are three conclusion in this paper. First of all, the style and culture of language is important. Language creates lifestyle because how we communicate is habit and habits are parts of lifestyle mosaic. Secondly – the language is also a communication tool that can be used in marketing. The way how magazine communicates is important because of finding the right reader. Demographical, social demographical, psychological and lifestyle segmentation requires proper use of style and culture of language. Lastly, the language is one the main aspects that make the real difference between similar products (magazines). We compared three Slovak men's magazines and saw the three different lifestyles they create and represent.

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SCIENTIFIC SHOWS FOR GENERAL PUBLIC IN PUBLIC SERVICE BROADCASTING

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Key words: radio, science, show, listener, talk radio head

Abstract:

Scientific shows in radio broadcasting are common practice in our media. Is it possible to speak about science and scientific findings so that a current recipient will understand? This work is focusing on scientific shows already broadcastig in Slovakia. We will analyse them in order to determine how such shows are suitable for listeners who do not have the necessary expertise. We will present possibilities how to make up such shows in the way that they will be more interesting for target audience.

1. Introduction

The topic of our post-graduate thesis is formation of youth through the radio. It deals with formation focused on young people´s values, education, awareness of chances and duties awaiting them in their future. Such kind of personality formation certainly also requires scientific shows, which can be listened to on the radio.

Radio is a medium lacking possibility of visual display, and thus, it is up to listeners' imagination, how they understand and imagine sounds they hear. "From the recipients' point of view, the essential characteristic of the radio is auditivity (it is perceived through hearing), therefore radio communication is ephemeral (fleeting), it resounds and disappears."[1] That is why it is very difficult for the radio staff to create a scientific show, where different phenomena and inventions could be described as close and informatively as possible by means of sound. At the same time, such a show should be informative, interesting and amusing in a way. As soon as it could not capture young listener´s attention, the listener loses interest and automatically seeks a different radio station, which offers what he wants to hear.

The role of a scientific show is to bring new information and educate its listeners. Therefore, our work will, apart from purely scientific shows, also focus on educative ones, which should provide listeners with more information of scientific disciplines, whether nature sciences or humanities.

This work is dealing with the issue how a scientific radio show that can attract listeners should look like. We will consider individual shows broadcast within the Slovak radio. We will find out what their frequency, duration is and how the talk radio host or editor tries to create his show to be both attractive and informative for listeners.

2. Creating the Show

"Considering the fact that listeners do not judge the radio station by one show only, the programme structure surely is the strategic matter for mixing the components addressing disparate listeners groups."[2] According to this definition, it is natural that each show, both scientific and educational, has to have its suitable place within overall programme structure, in order to affect listeners in the right way. Slovak Radio comprises various circuits and 80% of the shows it is broadcasting are unique and do not exist in any other commercial radios. The programme structure of each individual circuit has been composed based on various listeners' surveys. "Existence and boom of television has meant a challenge for the radio broadcasting management and creative staff to act more inventively and resourcefully. The problem of programme differentiation has come in the forefront."[3]

Such approach can be seen in various shows, offered by the Slovak Radio. However, if we take a closer look at individual programmes focusing on scientific topics, we can see that there is no big differentiation. Creating a show, which should deal with science, is the most difficult part of seeking information and selecting facts. "The procedure of searching and subsequent journalistic processing of primary information, which represents the backbone of radio text or of the whole show, requires systematic efforts of the editor to create groundwork as full as possible to create an acoustically shaped image of a monitored current issue."[4] At the same time, facts and information have to be provided to listeners in an understandable way, with due regard to the fact that some listeners could not have ever heard anything to the subject. This is the fact that has to be on the mind of a scientific show creator from the very beginning of his work. It is important for him to understand the topic as exactly as possible, to be able to process it in his show in a suitable way later on.

3. Scientific Shows in Slovak Radios

There is a dual broadcasting system in Slovakia, which means that a public serving radio and radios with purchased licences can broadcast simultaneously. At present, there are various commercial radios with purchased licences, which broadcast nationwide. Their programme structures are very similar, and regarding scientific shows, we can analyse all private radios as one. After studying various programme structures, we concluded that no radio station deals specifically with science or education programmes. The only chance how a listener of such radio stations can find information on scientific research or people presenting certain knowledge, is in specific comments in current broadcasting. Those are presented blocks, in which talk radio hosts introduce news and current affairs of the day. It means that if scientists have just discovered something new or a Slovak person has become famous for his knowledge, talk radio heads will mention this piece of information in one of their comments. They are random remarks (entries) without any regularity or patterns. That is the reason why this type of providing information cannot be described as a scientific or educational show. The only show that dealt with news in the world of science was Spektrum, broadcast by Radio Twist and later on by Radio Viva. The show has been transferred from commercial radios to public serving broadcasting. Thus commercial radios become irrelevant for the purposes of our work.

Therefore, we are going to focus on public service radio – RTVS - broadcasting. It is given by the law that Radio Slovensko should give part of its airtime to science and educational

programmes. Coll. 552/2010, Article No l1/3/ 3 reads: "Programme service of RTVS (Rozhlas a televízia Slovenska – Radio and Television of Slovakia) consists of current affairs, journalistic, documentary, drama, music, sports, entertainment and educational programmes, shows for children and young people and other shows, which…c) develop cultural identity of the Slovak population, regardless of sex, race, colour of their skin, language, age, belief and religion, political or other opinion, national or social origin, nationality or ethnic group, property, birth or other status, so that these programmes reflect diversity of opinions, political, religious, philosophical movements and art styles and support development of a knowledge society."

Slovak radio placed great emphasis on education of their listeners in the 1990´s, after the separation from the common broadcast with the Czech Radio.

"Great attention in Slovak broadcasting has always been paid to systematic sharing of information with an intention that their listeners can adopt and use it in practice. New situation does not mean that the radio has entirely resigned to educational programmes. Different, indirect and mainly journalistic forms have been found for spreading the knowledge."[5] This phenomenon has still been here nowadays. Analysing individual programmes we will show that science in the radio has been presented mainly in journalistic form. "Attention to humanities predominates in Slovak Radio broadcasts, and more attention is given to the results of their work over the role and work of scientists."[6]

4. Analysis of Individual Shows

Radio Slovensko is broadcasting in nine circuits, three of which are broadcast only via the Internet. Each transmission circuit focuses on something else and has its specific listeners. Scientific shows can be found on three circuits - Radio Slovakia, Radio Devín and Radio Patria.

Spektrum (Spectrum)

As we have mentioned before, Spektrum is a show, which started in a commercial radio. The author of the show is Ján Mečiar, who was producing it in Radio Twist and is carrying on the production in Radio Slovensko. During the broadcast of this show, the way of its implementation has not changed much. More time has been given to Spektrum in the commercial radio.

Spektrum in Radio Slovensko is a short show, approximately 2-3 minutes long. The talk radio head always processes 3 interesting pieces of news from the world of science and technology. They are mostly new research issues discovered by "American scientists." Due to the show´s duration, information is presented dynamically, enhanced by music in the background. The show is divided into three parts, separated by a music jingle. The talk radio head is trying to provide information as understandably as possible, with a kind of easiness, to attract and entertain his listeners. Spektrum has its regular space in the morning broadcasting of Radio Slovensko, at 8:20, from Monday to Friday. It is the only show focused exclusively on science.

Naši svetoví (Our World-Renown Ones)

Naši svetoví is not a separate show; it is a journalistic section within the afternoon band of the Slovak radio. Editors search Slovak people who were able to fight their way within international fora. It may be a different scope; these people are often scientists. In interviews with them, the editor does not bring information about their research as such, but about people themselves, about what they are like and how they succeeded to fight their way in the big competition. This section is not primarily focused on scientific research and inventions; it introduces lives of people who deal with science. It is a short, 5-10 minute section, broadcast once in a week, on Sunday afternoons.

Ľudia, fakty, udalosti (People, Facts, Events)

It is a discussion programme, broadcast once in a month (on Tuesday) in Radio Devín. Two alternating talk radio heads, Jaroslav Rozsíval and Róbert Šedivý, invite guests to the studio. These famous people can come from science, culture, arts or sports. Since the show is broadcast once in a month and has a broader focus, the talk radio heads come to the topic of "science" only several times a year. The programme itself is one hour long, and when a science guest comes, it is always an in-depth interview. The talk radio heads belong to the older generation and the whole programme focuses more on an older or more engaged listener. The show implementation is not focused on wider public.

Fokus (Focus)

It is a programme, broadcast from Radio Devin each working day from 16:30 -17:00. As in the show Ľudia, fakty, udalosti, the show Fokus also deals with various topics. On Monday it discusses acting, on Tuesday invisible professions, on Wednesday arts as such, on Thursday literature and the Friday show has no settled topic. From time to time, on Fridays, this show is dedicated to scientific disciplines as well. Editors prepare interviews with guests and a talk radio head combines all contributions.

Svet kultúry, Svet vedy (World of Culture, World of Science)

Radio Patria is the fifth RTVS broadcasting circuit, designed for minorities living in Slovakia. Svet kultúry, Svet vedy is a regular show designed for the Hungarian minority. It is broadcast once a week, on Sundays. The talk radio head together with editors discuss current topics of science and interview people able to express their opinion to the given issue. Besides the scientific focus, this show focuses also on cultural events. It is a one-hour block, in which a half of the time is dedicated to arts and culture and the other half to science.

Besides these five regular shows, certain attention – as in commercial radios - is naturally given to science and education in individual presented blocks - Dobré ráno, Slovensko (Good Morning, Slovakia), Dobrý deň, Slovensko (Good Day, Slovakia), Popoludnie s rozhlasom (Afternoon with the Radio) and Dobrý večer, Slovensko (Good Evening, Slovakia). In these blocks, as in current broadcasting in private radios, talk radio heads deal with up-to-date topics, i.e. if something happens in the world of science and technology, they use it as a contribution to their shows. However, these are not regular sections, and that is why they cannot be clearly mapped.

After analysis of selected shows, we can conclude that science is not given enough space in radio broadcasting. Most shows focus on various topics, which sometimes also touch science. These shows are made in journalistic style or in the form of a discussion with an invited guest.

The only show broadcast in Slovak air and focused only on science is Spektrum. It is a very short format offered to its listeners in a dynamic way. No challenging scientific knowledge is discussed there; it focuses on simpler topics, rather interesting issues, which the listener can easily remember, but they are not so important for his further education. Due to the regular jingle that separates individual topics, it cannot happen that the listener does not notice the change of the topic and therefore loses continuity of individual pieces of information.

5. Conclusion

No space is given to scientific and educational programmes in commercial broadcasting. In public service broadcasting, only minimum space is also given to identical topics. The only example is the Spektrum show, which is broadcast in the third radio station. This show has a long-time tradition, and therefore a question has to be asked why such show is still broadcast? Why is it still a success? The other commercial stations should consider the attractiveness of finding a certain short show format, which could deal with scientific issues and would be interesting for listeners. If such show was created in an attractive way, it would certainly find its regular listeners.

Slovak Radio is proud to be broadcasting for a more exacting listener, and it is clear from the law that part of the programme has to deal with science and education. The radio has a designed space for this issue and can afford to do it in a more demanding way. After our analysis, we can conclude that in shows dealing with science, culture and arts, science comes last and it is given minimum space.

Short journalistic programme Naši svetoví is a very interesting format, able to introduce a person behind some scientific research and the research itself within few minutes. This is the way which could work for the other shows dealing with identical topics. Short shows can attract attention and keep their listeners interested; however, listening to the radio is only being used as a background for work.

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FROM DIGITAL MARKETING TO CUSTOMER INTELLIGENCE

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Key words: Digital marketing, Marketing campaign, Customer Intelligence, Analytics, Multimedia messages.

Abstract:

Digital marketing provides many multimedia messaging capabilities – including email, mobile and web within marketing campaigns. But for the campaigns to be successful, you need to understand each customer's path to purchase and anticipate their next move. The goal is to choose the best action for each interaction. And this is where customer intelligence comes in. Customer intelligence solutions are enabled to customize multimedia messages at the individual level. They create relevant, personalized digital content for each marketing message and deliver them to the customers most likely to respond.

1. Introduction

Over the last century, the marketing has gone through development changes which have been affecting customer's perception and thus the creation of new marketing strategies. These days, companies are not only focused on the product, sales, production and propagation but also on the buyer - the customer. They try to understand him and use all available information about his life and behavior. Every transaction that you have ever made has been monitored. During a usual day, many people use debit or credit cards, a phone, access cards, loyalty cards, a call center, a digital television and the Internet. On each occasion the data are being collected, recorded and they form a profile of each individual consumer. Companies collect information about customers' behavior, in which events they participate, on which forms of marketing communication they react. Based on this data, they are focusing on targeted marketing.

This study focuses on the new approach in the marketing management - Customer Intelligence or also called the Integrated Marketing Management. It will provide us the way how to plan an effective integrated marketing strategy of the campaign by using digital marketing tools.

2. Digital Marketing

The digital marketing is the promotion of products or brands via one or more forms of electronic media and uses all channels – web, social media, mobile, direct mail, point of sale, etc. Digital marketers monitor what is being viewed, how often and for how long, sales conversions, what content works and what doesn't work.

People want brands they can trust, companies that know them, communications that are personalized and relevant, and offers tailored to their needs and preferences. The deeper the insight into customer's behavior and preferences, the more likely it is to engage them in interactions. Mass mailing is not an effective form anymore. People tend to delete messages that look like a spam or simply ignore those that don't speak to them.

The marketing has changed. Customers are in the heart of everything we do. But their expectations of behavior are constantly changing. For them it is very much about experience than it is about product, price, place and promotion. To create positive and profitable experiences, it is important to have a knowledge and view of each customer in order to recognize which offers interactions will be relevant, timely and profitable.

Dagmar Lesáková [3] states that it is necessary to develop strategies that will be designed to improve access to customers. Their satisfaction should not only be the aim for companies but also a marketing tool. And here comes a new approach in marketing management developed by international IT companies - the Integrated Marketing Management.

3. Customer Intelligence

Customer Intelligence (CI) or Integrated Marketing Management (IMM) represents „the knowledge that an organization has concerning the likely future intentions of its customers or prospective customers. And, since customers no longer respond en masse to any particular marketing stimulus, the concept of customer intelligence must encompass a detailed empirical knowledge of the separate components that comprise a given market. Having an intelligence capability allows the enterprise to respond to, (or better still to anticipate), the increasingly fragmented behavior patterns of customers." [2] The information is now considered as decisive competitive weapon.

"IMM supports closed-loop marketing by integrating operational, executional and analytical marketing processes from concept/idea to planning to resource allocation to creation/project management to piloting to full-scale execution through to evaluation and analysis." [9]

In order to develop an integrated, multichannel digital marketing strategy successfully, you must:

1. Create the right message for the right customer by mapping customers and segments to relevant personalization.
2. Deliver messages at the right time via the right channel.
3. Track and improve results with sophisticated reporting that is fully integrated with broader marketing reporting and analysis functions.
4. Adopt a solution that integrates with other CRM systems. [6]

4. Campaign planning process

The analytics is a part of marketing strategy. Whether it is an analysis of customers or their interactions. Thanks to the analytics we can statistically measure the success of our campaign and then anticipate its possible success or risks.

1. Mission and goals

The mission is to create the best focused marketing campaign in our segment based on the customers' information in the company's CRM system. Either we want to communicate a new product, or invite our customers to a conference, an event presenting our new product or eventually evaluate our campaign.

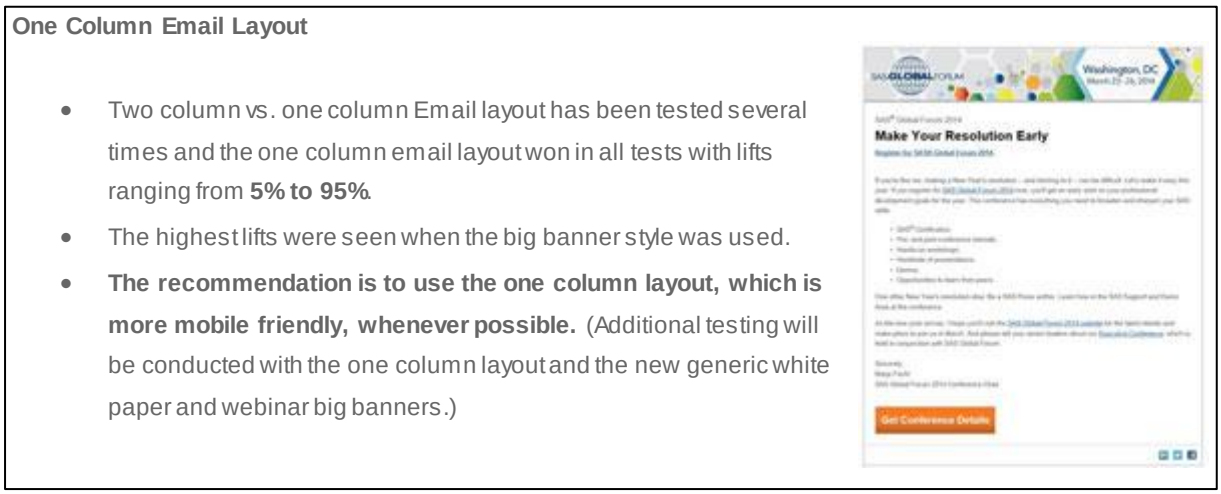
Based on the following four steps we can present the whole planning process of the online campaign within the Integrated Marketing Management.

2. The message

The first step in the planning process of the digital campaign is the idea and the message, which we tend to send to our customers. But not only the content is important, but also the overall visual of the message. To make the look of the message attractive, companies use the method of A/B Testing. They are testing customers' preferences of visual of the campaign. Based on the survey results, they can optimize the appearance of campaign's message.

What can we test?

- Location and color of the call to action button
- Text or text with a picture
- Subject line (personalization, or more defined subject or industry, e.g. New types of accounts for banking, we define our target group – banks, instead of writing only New types of reports). [7]



Pic. 1: Example of A/B Testing

Source: SAS Institute, Inc.

3. Segmentation

At this stage the selection of the target group for the e-mail campaign is made. The most important part is the customer segmentation. The main goal is building strong relationships with customers. Based on the gradual collection of detailed information about customers, their interactions and opportunities associated with a company, it builds a long-term relationship, loyalty and their satisfaction. "Building strong relationships with customers is used under the term as CRM (Customer Relationship Management). The main factor of the profitability of the company is the total value of its customer base." [3]

The Diagram 1 shows the selection of customers from the CRM system using the SAS CI Studio software solution. The Online Marketing Specialist determines choice of customers from the group: department = marketing, also selects customers who have previously viewed a product page and they are from the country Slovakia (Country = Slovakia) and excludes employees of his company, competitors on the market and contacts that are no longer active, but are located in the CRM system. Then he merges the whole group and gets the target group of the campaign which he gets as an export in the form of a table with names and email addresses of customers.

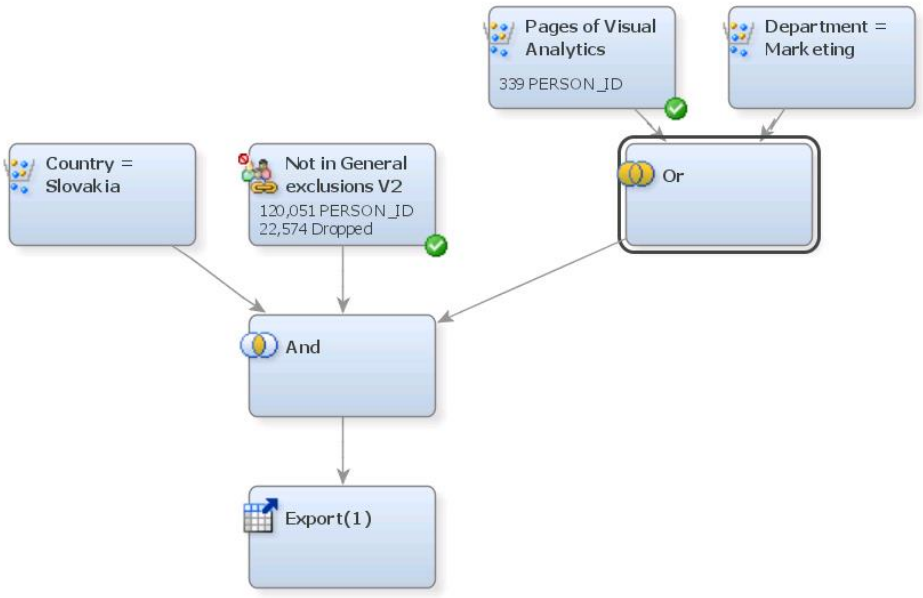


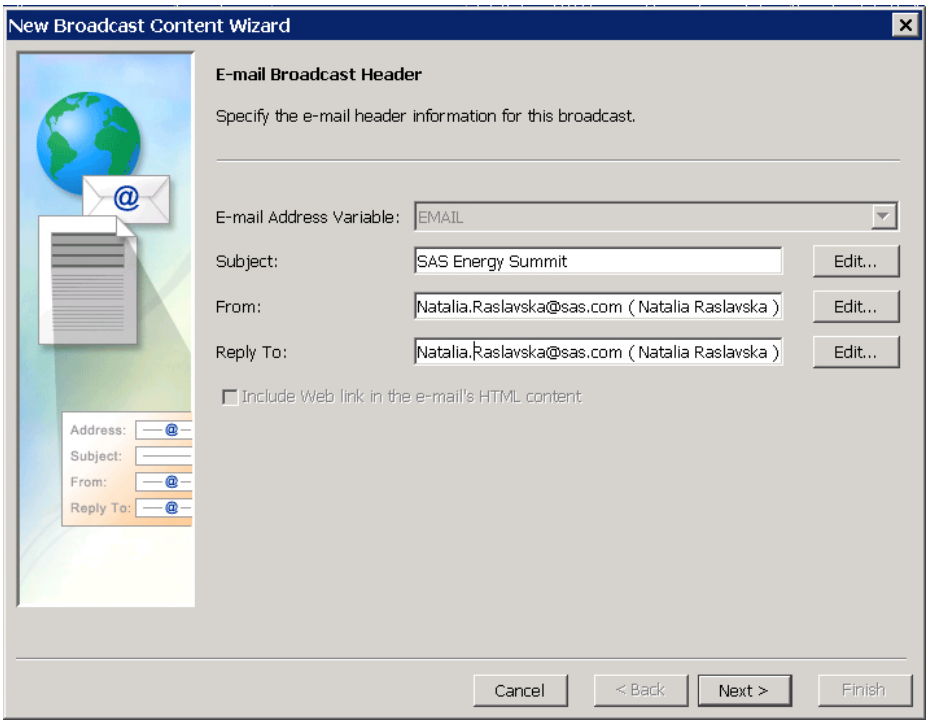
Diagram 1: SAS CI Studio, Segmentation

Source: SAS Slovakia

4. How to send the message?

Companies used to send their mailing campaigns from mail clients such as Outlook, G-Mail, Lotus mail, etc. Mass mailing messages are often evaluated as spam by spam filters, since they are sent once in tens, hundreds or thousands of e-mails. Currently, there are software solutions that enable the transmission of e-mail campaigns (Pic 2 shows an example of e-mail broadcast in the SAS Digital Marketing). E-mails are sent from the software, but messages are personalized and look like they were sent from your email account, for example, from the Marketing Manager. This type of software sends messages in blocks, not as a mass, so they avoid mail filters and are not evaluated as a spam.

The following picture shows settings for broadcasting the campaign message to customers as an e-mail and its header and subject. Also shows the e-mail address from which customers will receive the message and the answer e-mail if they decide to reply to the message.



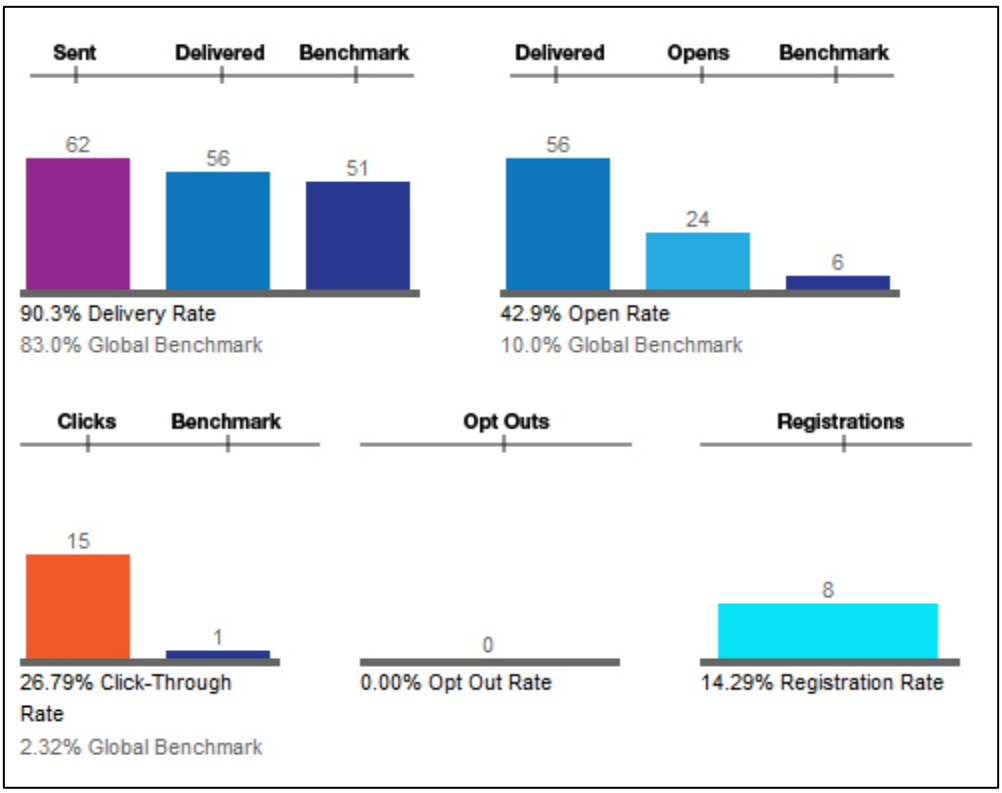
Pic 2: SAS Digital Marketing

Source: SAS Slovakia

5. Reporting

After broadcasting stage, the next step is reporting and data analysis. Analytical software can statistically evaluate based on the the number of sent emails, how many of them were received, how many people opened them, how many of them clicked-through to the message and how many registrations were successful. We also know their exact names and e-mail addresses based on tracking codes that are being attached to the message.

The following chart shows the evaluation of the cam-paign, which was sent to the target group of 62 customers, of which 56 received the message, 24 opened it and 15 read it and clicked on it. Of these, 8 participants had registered.



Graph 1: SAS Digital Marketing

Source: SAS Slovakia

6. Follow up

The last step is the follow up. After the reporting phase and analyzing of the campaign, the marketing department can identify the group of remaining customers who had already viewed the message, but have not yet registered. By the follow-up telephone call or again by the personalized e-mail they can be contacted with the action reminder.

The overall mission of the campaign is to choose the right strategy and reach the right target audience. As a consequence, the focus of the marketing strategy is to create relationship with customers, to meet their expectations in delivering information, products and services.

5. IMM

American economist Michael Porter says that to achieve competitiveness, the enterprise must definitely decide for one of the generic strategies and consistently apply it. Usually there is not only one best strategy for all companies in a particular sector, because every company has different skills, resources and conditions for business. [3]

Software solutions of integrated marketing management are offered by companies that are leaders in the IT industry and are also cost leaders within the IMM segment - IBM, SAS Institute, Teradata and SAP. Also other companies which develop software under the IMM are pictured on the following Magic Quadrant by Gartner, which annually monitors the IMM market. [8]

Pic 3: Magic Quadrant for Integrated Marketing Management

Source: Gartner, Inc.

6. Conclusion

Integrated Marketing Management combines marketing tools with analysis. Together they lead to the realization of an effective marketing campaign. Through the creation of its idea, the visual and text of the message, to the selection of the target group through the segmentation process resulting to the sending of messages through the marketing software solution and the following statistical evaluation of the campaign. It also includes the follow-up in the form of email or telephone contact of potential customers who have not registered during the mailing campaign.

Customers' information is a key to their understanding and to their involvement in the interactions. Companies must know which data about their customers they can use. The possibility of their use and protection of persons and their personal data are protected by the law.

The advantage of Integrated Marketing Management is the use of user friendly digital software solutions that are compatible with existing CRM system of the company. As well as the option of sending personalized messages that are sent from the software and avoiding of being evaluated as a spam by system filters. The disadvantage is the higher cost of buying and maintaining software solutions.

Customers are constantly being contacted with different offers of products and events, and it is now the task of marketers to send the right message to the right customers to keep their interest and attention. Based on these interactions, companies create loyalty and good relationships with their established or potential customers.

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Positive Role of Gatekeeping in the Process of Understanding Reality

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Key words: gatekeeping, dissemination, filtering information, misunderstanding, construction of reality, social interaction

Abstract:

As it is obvious, gatekeeping is the process of filtering information for dissemination. This process with all its nuances attracts scientists and researchers seeking understanding of the gatekeeping in its entire complexity. In this article we want to discuss some of the current issues of gatekeeping through the prism of a positive understanding of this process.

It might cause confusion whenever we ignore the preferred modern critical approach in studying different processes in mass-media while observing these processes through the lenses of positivism bordering on naivety. In this particular case we believe there is a strong need to clarify the importance of a gatekeeper´s role not only to general audience, but especially to students of journalism – future professionals dealing with the filtering of information. In such a situation a more critical approach and discussion on related issues might lead to misunderstanding.

If we – at least partially – concede the premise that we all interact in a reality constructed by mass-media, we can observe how the qualitative parameters of this reality vary and also change in time primarily depending on disseminated information. From the position of professionals participating in this never-ending process we are obliged to understand how to filter information, what to disseminate, what to stress and what to detract to do the job the best we can. All in the hope that our recipients will better understand reality and their place in society.

1. Introduction

Gatekeeping, as we all know, is the process of filtering information for dissemination, whether for publication, broadcasting, the Internet, or some other means of communication. This ubiquitous definition has accompanied us in any study of mass communication for more than half a century. It is already encountered by students coming to university to study mass media science. However, as it can often be seen in other fields of study, theory does not always match the praxis, and even though students understand at least partially the Abstract: term ‘gatekeeping‘, following their own transition to practical journalism they carry out their jobs as if they forget that they, too, represent keepers of the proverbial gate. It is them as well, or even them first and foremost, who make decisions on what passes through the gate and related communication channels all the way to the audience and, contrariwise, what remains

left behind, unstated and ignored. However, with this kind of power it comes great responsibility, too.

We assume that Slovak mass media science in recent years has been expected to study the practical aspects of gatekeeping in the environment of the Slovak mass media and, therefore, we should focus our attention more intensely to the study of the aforementioned decisions – often made on a daily basis. These decisions might seem non-substantial at first glance, yet they lead to a broad range of consequences that often leave a lasting impact on our society.

It wouldn't do justice – in fact, would smack of dilettantism, to claim that research in this field is absent in Slovakia or that no findings applicable to mass media praxis have been made. On the contrary, there is research carried out by academia as well as an extensive number of surveys and public opinion polls conducted by various organizations ranging from public institutes, NGOs up to specialized agencies. Thus, any attempts by this article to interpret figures arrived at by other researchers would be a bit like carrying coal to Newcastle.

2. Concept of Gatekeeping

As mentioned above, Gatekeeping is not a new concept to the theory of mass communication. It was in early twenties already when Robert Park analyzed this phenomenon, however, he did not use the term gatekeeping. The theory of gatekeeping was first instituted by social psychologist Kurt Lewin in 1943. Since then this theory has enjoyed a fair share of popularity, study, verification and scrutiny from numerous perspectives. In words of Denis McQuail, let's recall that the term gatekeeping is used "as a metaphor for the processes by which selections are made in media work, especially decisions whether or not to admit a particular news story to pass through the "gates" of a news medium into the news channels"

The gatekeeper, as Lewin stated, is the person who decides what shall pass through each gate section, of which, in any process, there are several. Although he applied it originally to the food chain, he then added that the gating process can include a news item winding through communication channels in a group. This is the point from which most gatekeeper studies in communication were launched.

David Manning White was the person who turned Lewin's comments toward journalism in 1950. In the seventies, Max McCombs and David Shaw focused on the effects of gatekeepers' decisions. They found that the audience learns to attach importance to a news item from the emphasis the media place on it, which is the premise embraced, further developed and updated by media theory and praxis even today.

So, that´s the look into the history. In a post-modern era we can witness how hard it is to attract attention and how sophisticated are the tools which force recipients to maintain their attention. Gatekeeping occurs at all levels of the media structure — from a reporter choosing which sources are to be included in a story to editors deciding which stories are to be printed or covered.

In her influential book Gatekeeping Theory (co-authored with Timothy Vos), Pamela Shoemaker points that gatekeeping as a process needs to be described in broad social context, with the need to take into consideration various factors influencing the process of filtering of information. But this concept is challenged with self-delusion of many media practitioners believing that only those contents that are transmitted to the audience in the simplest or even intellectually careless form can enjoy the greatest degree of comprehension. Why does the audience get underestimated so much? Why do we degrade them to the position of a dumb-witted mass? Why do we ignore their qualities?

For our purposes, it will suffice to formulate an appeal to a gatekeeper to adhere as much as possible to the principles of objectivity when filtering information with respect to the qualities of recipients. Of these principles, greatest emphasis should be placed on fairness and keeping news in proportion. Aside from the quality in which news are conveyed, it is also the comprehensiveness that matters, as we have to accent for our students of mass media science.

3. One recent fail

If "traditional" media – mostly print media and television – don't want to lose that part of the audience which doesn't care for information shortcuts and oversimplifications or don't want to lose their influence in shaping public opinion then sooner or later they will have to reconsider their approach to journalism and to gatekeeping.

If we – at least partially – concede the premise that we all interact in a reality constructed by mass-media, we can observe how the qualitative parametres of this reality vary and also change in time primarily depending on disseminated information. From the position of professionals participating in this never-ending process we are obliged to understand how to filter information, what to disseminate, what to stress and what to detract to do the job the best we can. Otherwise, we're headed towards inevitable failures, some of which might have serious society-wide consequences. But there's no need to deal with the subject solely in Abstract: terms, as one relatively recent example conveniently begs attention. Although it occurred in Slovakia, parallel cases could be found with minimal effort in any modern democracy, where media from time to time fail to carry the burden of their society-wide responsibilities.

Now, a few weeks removed from the EP election, we – meaning Slovak media practitioners – are still in the state of confusion because sufficient explanation for voter turnout at about 13 per cent hasn't been found. Many experts, sociologists, political scientists, etc. are busy as well trying to determine and explain reasons why we, Slovaks, ignored the past election (and many other elections before).

We can reveal one secret to you: there is a good reason, indeed. And we are not hesitant to declare that its importance cannot be overstated; it might be the main reason or one of the most relevant reasons behind the phenomenon. The turnout figures are so low and ignorance overwhelming because there is no public debate about the EU and its institutions! This, in fact, falls fully under remit of gatekeeping. A rather worthy lesson of how the gatekeeping can fail and how broad are the consequences.

Let's rewind back to the period before we joined the EU: Slovaks were led or misled, if you want, to believe that EU means nothing but bright future. Different opinions were filtered out. No common public debate was allowed. If you tried to mention that there were also cons beside pros, you risked public defamation as euro-skeptic, pessimist or saboteur.

In the past ten years of our EU membership we have witnessed how promises faded out, bright future is not so bright and international relations still remain complicated in many fields. And we, meaning Slovaks, are unable to fully understand why. That is because there is no systematic public debate, no systematic reasoning and no discussion. Believe it or not, just one day before the election one of Slovak televisions broadcasted a silly coverage about overblown income of MEPs.

Was it just stupidity or sabotage?! We don´t know and it isn´t really important in the long run. No debate, with disillusion, frustration and horribly low voter turnout as a result!

4. Easy way out

If we had submitted the aforementioned example to a more thorough analysis or weren't sufficiently well-versed in the field of mass media science, we could have easily bee already n led astray by an erroneous conclusion that the problem at hand is extremely complex and no solutions to it exist due to the current state of affairs on media market, trends prevailing in journalistic praxis and the correlation between society and mass media as institutes with specific public roles. As is often the case, however, giving up the effort to seek feasible solutions might be convenient but in this particular case more than harmful. Not to mention premature!

Although the media social responsibility theory is not new in any aspect, it's quite pleasant to learn that we can draw inspiration from findings of the American Committee for Press Freedom (McQuail 2009, p. 183) as well as from ideas put forth by newer authors such as Prof. Tadeusz Zasepa, who has been active in Slovakia for a long time. Without resorting to positivist dramatic expressions of bygone days seen in the first half of previous century and steering clear of any ideological coating, we need to stress time and time again to both students of journalism and seasoned journalists alike their own share of social responsibility and require them to not only respect the legally binding limits and principles of ethics incorporated into the code of self-regulating character but also common sense.

Or to put it differently: let's give our readers, viewers and listeners – in short, our audience – a chance to understand reality in the broadest context possible. Let's not keep away from them important facts or context, and let's not relinquish the media role of persuasion (or political agitation), which was described almost seven decades ago by Harold Lasswell. Not to pursue specific ideological goals but to stop public life drifting further away from public. Negative consequences of such divergence can be observed already today. And let's not be mistaken: in case such divergence continues to deepen, media – at least the television, radio and press – won't emerge as winners at the end of the day but loosers. First the loss of prestige, then trustworthiness and, finally, audience.

This makes us call all the louder upon the next generation of media practitioners as well as creators of media concepts to realize their responsibility and decide accordingly what exactly and in which form they let pass through the proverbial gate.

5. Conclusion

Instead of attempting to draft a comprehensive evaluation, it'll be more than sufficient to realize that this represents a good example of how the gatekeeping can fail and how it can affect whole society. It is our responsibility to adhere as much as possible to the principles of objectivity when filtering information with respect to the undeniable qualities of recipients. Of these principles, greatest emphasis should be placed on fairness and keeping news in proportion. Aside from the quality in which news are conveyed, it is also the comprehensiveness that matters.

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THE ROLE OF STORY IN THE THEMATIC PLAN OF ADVERTISING

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Key words: narrative, advertisement, story, audiovisual advertising

Abstract:

The narrative structures are irreplaceable for a human mind. In modern narrative we are trying to explore the complex narrative fictions. Story and discourse belong to the basic narrative text. The story directly influences of advertising and it creates the emotions, which have a tendency to be easier to remember. The space of story in the audio – visual media is literal. It means that the objects, dimensions and relationships are analogical to the objects, dimensions and relationships in a real world. The current trend of advertising is a story, which can be invented in the advertisement or it carries the signs from the history of society and its development or actual characteristics of the product. In the contribution, we would like to devote to the advertising narrative.

1. Introduction

Nowadays, consumers are exposed on a daily basis to the impact of advertising, whether it's the traditional kind or the new, alternative one. Consumers are becoming immune to its effects. Every day, we are under the influence of more than six hundred advertising messages. (Clow, 2008, p. 124)

The surfeit of the market and strong competitive environment push the advertising creators to more creative solutions. The reason is simple. To impress the consumer and get into his or her short – term or in better case, long – term memory.

Narrative structures of audiovisual advertising, which I would like to examine here, are important for the advertisement itself. In modern narrative, we are trying to focus on the complex narrative fictions. Story and discourse belong to the basic division of narrative text. Stories have an influence on the creative side of advertisement, which is trying to transfer the message to the consumer and have an impact on his/her long-term memory. The modern term used in advertising is a "story", which can be fictitious or be based on historical events; the overall characteristics of the product can also be included. Set Godin said: *„Successful marketing stands on a good story.''* (Clow, 2008, p. 124)

In the following contribution, I would like to focus on advertising narratives in audiovisual media. he thesis has the ambition to point at some specific applicable rules of television advertising.

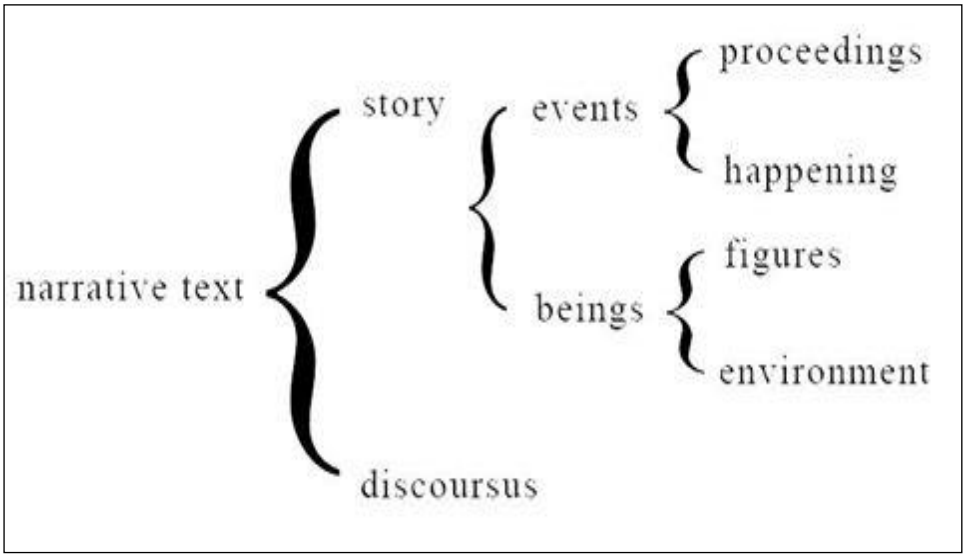
2. Advertising narrative – the role of story in advertising

Narratology, as a science, studies the theory of narrative, regardless of the medium, through which it is communicated. Gerald Prince defines the concept of narrative as: *„The description of (the result or process, object or act, structure or structuring) one or more real or fictive events, which reports one or more (more or less clear), narrators for two or more (more or less clear) recipients."* (Bílek, 2003, p.127)

Modern narratives contain modern structural complexity, which are applied for advertising narratives. (Chatman, 2008, p. 14)

Narrative has two parts, according to the structural theory. Firstly, the story (histoirie) which means content or chain of events, negotiation and happening. The story goes together with something that can be named as beings (figures, factors and environment) and the discursus, which means expression or facility. Simply said, the story is something that is shown in narrative form and the discursus is the way it is shown. (Chatman, 2008, p. 18)

Table no. 1 – Diagram of a narrative text



Source: CHATMAN, S. Příběh a diskurz, str. 18

We divide the story into the events and the existents. Advertising narrative in audiovisual advert is specific and it uses a combination of several factors. For example, image and sound.

Russian formalists also presented similar severances, however they used only two terms. The first one is (fabula) – the primary material for the story and the aggregate amount of all events--which the narrative collects--and the (syzet) stand at the opposite sides. In other words, the story is actually told by narrative, when the events are together. French structuralists worked with this kind of severance as well. According to the Claude Bremond there is an autonomous significant class, with gifted structure, that can be separated from the whole message and that is the story. (Chatman, 2008, p. 19)

The story can be transferred from one media to another, without losing its significant characteristics. For example, the theme of a story can be useful-- like a ballet theme for a novel or advertisement. It can carry itself to the stage or to a movie screen. We can tell the story of a movie to someone who hasn't seen it yet. We read the words, watch the images,

decode a variety of gestures, as well as perceive the music. This way, we can follow the story without changing it. What we say has its own significant elements, the elements of the story. And it's not even words, images or gestures; but rather events, situations, and the behavior which is making the words, images and gestures. (Bremond, 1966, p. 4)

The mentioned elements in audiovisual advertisements are very similar to movie ads. Audiovisual advertisement can be called a short filmmaking, which is promoting a certain brand, product, service, etc.

The possibility to transfer the story between several forms of media is a strong reason for the claim that the narrative are real structures for any kind of media. The division is just bringing the story to the recipient and the action of a story still unchanged. Narrative represents the unit or it is created by some parts, events or being, which differ from the thing they form.

Events and beings are individual and discreet, but the narrative is continuously compounded. Events in the narrative are relatable to each other and they mutually presuppose. Pragit says that events in a real narrative enter the stage in an orderly fashion, as opposed to random events merging together. The events show a clear organization in narrative. (Chatman, 2008, p. 20)

In audiovisual media, the space of the story is literal. This means, that the objects, ranges and relationships are analogical to the objects, ranges and relationships in the real world. (Chatman, 2008, p. 101)

The story in audiovisual media differs from the others by its spatiality, implying:

1. **Size:** every being has a certain size in audiovisual advertisement, which depends on the size in a real world.
2. **Contour, texture, satiety:** audiovisual advertisement as a two-dimensional medium has to design its third dimension. Texture of the surface is expressed by modelling using shadows.
3. **Position:** every being is situated in a vertical or horizontal range from an image in relationship to another being inside the image.
4. **Degree, type and area of a light reflecting**: the light source may be concentrated or dispersed.
5. **Optical resolution:** The object is sharpened sharply or softly. (Chatman, 2008, p. 101)

The power of a story in advertisement has a direct influence to the recipient and his or her shopping behavior. The story in advertisement evokes emotions. The aim is to influence the recipients of the advert during shopping decisions and to get into their memories as well. The assumption of an active advertising is catching the attention and the influence on the shopping behaviour. (Chatman, 2008, p. 101)

We define the entire advertising industry as a form of paid, non-personal presentation and support for selling products, services, and/or thoughts, which are realized by way of the media. (Světlík, 2011, p. 13)

Advertising informs, persuades, and influences the purchase itself. The story thus becomes a weapon in a brand communication.

3. Perception of advertising narrative by students of mass media faculty at Paneuropean University

At the end of this contribution, I would like to add my own perception from my lectures. The subjects, such as aesthetics of advertisement and semiotics, were used to tough third year bachelors' students and second year masters' students. We discussed various audiovisual advertisements by content analysis. I made the distinction between advertising of story and advertising of fact by comparing content in audiovisual ads. I deliberately chose outdated advertisements, which were broadcasted especially on TV a few years ago. We analyzed the difference in advertising, consisting of narrative structures, so that the advertisement, which interprets the story, is left without a narrative structure. It's the advertising of a fact. The description of the advertisements of facts was not attractive enough for the students. On the other hand, they quickly understood the message, which the advertisement brought to the recipients. The content analysis was more difficult in that kind of advertisement, which disposed narrative structures. From the showed advertisements, I came up with a question for my students: "What ad do you remember from the media?'' (primarily from TV, in this case). Most of their responses included advertising that included narrative structures. The story reached their long-term memory, rather than being merely a fact. Stories make advertisements easier to remember and have an impact on consumers' emotions. For example Nike, by its marketing communication, is telling the story that their trainers are the best for running. Apple is telling a story about simplicity and new ideas. Mercedes is talking about social status and BMW is talking about driving pleasure. Brands need stories because people remember stories. During broadcasted advertisements in audiovisual media, the impact on the consumer is greater because he/she perceives not only image, but also sound.

4. Conclusion

Advertising narrative contains modern structural complexities. It has two parts, the story and the discursus, according to structural theories. In my contribution, I was trying to exclusively focus on the first part: the story. The interesting thing about the story is that we can transfer it between the different media outlets. Advertising narrative in audiovisual media carries the story elements of the movie narrative, as well as a real structure. It is necessary to point out the literal space, brought by audiovisual media.

David Ogilvy recommended a story in advertisement five years ago. An interesting story can attract a lot of consumers. It directly affects his/her mind and the subconscious. It is able to attract and hold attention. It can bring the viewer into the action. Narrative stimulates our imagination and when the viewer is immersed into the action of the story, the consumer is engaged on a deep, personal level. Narrative influences the emotions of the consumer. A story can differentiate a product from its competition and thus the story is able to add value to the product.

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GLOSSY WOMEN MAGAZINE AS A PHENOMEN OF MODERN MASS CULTURE IN CONTEXT OF GLOBALIZATION

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Key words: magazine, glossy magazine, mass culture, life style, gender, stereotype, standardization, globalization, cultural characteristics

Abstract:

The world community in the context of globalization is functioning as a common market. This article is about how media react to a general trend of globalization, standardization and implementation of women's modern image. The conceptions of "gender" and "globalization" are definitely linked. Change in basic function of media from informing to formation is the main feature of information flow in today's society. Other media form the public perception of the women, while glossy magazines form women's perception of themselves. Those and others should understand the importance of this issue and be responsible to the society and, above all, to the women. In other words, women's glossy magazines not only satisfy the specific needs of women, but mostly form these needs. But that would be a mistake to say that success of glossy magazines would be possible, if they not relied in their editorial and marketing policy to the emerging needs of women. Task of creation of a lifestyle image of modern women based on gender stereotypes glossy magazines fulfill using both: content and advertising. Also in the article the following themes as marketing strategies, gender bias and gender institutes, are discussed.

Mass media could not but respond to general trend of globalization, as well as to modern society's ideas about a woman and a woman's ideas about herself. The notions of 'gender' and 'globalization' are undoubtedly interconnected. For Russian mentality, the connection between gender and globalization is not only unclear but far-fetched to some extent. There are two reasons for this; firstly, it's rejection of Western concepts comprising open reflection regarding unavoidable change of roles and gender subordination within new (liberalized) systems of production and reproduction of the society; secondly, it's a patriarchal belief that transplantation of gender conceptions to the Russian soil was supported by the reformation of the country's economics that aggravated financial insolvency of a significant part of the male population and caused dramatic polarization of the society by income level. In fact globalization is impossible without modernization of the gender relations system; moreover, it should be drastic. Modern business and mass media predominantly image globalization like a homogenizing process that covers the entire world through new technologies, producing extensive free global markets where all participants are equal. In M.M. Malysheva's opinion, this image is far-fetched. Modern global world has been historically formed under the influence of European countries' expansion in the 15th century and the creation of colonial empires. Those are the processes where the roots of the modern world gender order are discovered. Imperialism was initially a genderized process where researchers distinguish three

phases. The first phase was colonial conquests and settlement; it was implemented by gender-generated forces and resulted in mass destruction of gender orders of indigenous peoples.

The second phase was stabilization of colonial societies, where gender division of labor in colonial cities and economies was created. Gender ideology merged with racial hierarchy and cultural protection of the empire.

The third phase is called economic neocolonialism; it provided modern growth of global markets and financial control structures and detected gender reallocation of labor division on a massive scale. Genderized violation increased together with Western militaristic technology.

All this resulted in a partially integrated and very unequal global society where the connection of gender relations on a global scale exists. Needless to say, this process was accompanied with changes of images spread by mass media that follow North-American and European models in the majority of countries of the world.

Modern global gender order is still patriarchal, i.e. it gives more privileges to men in comparison with women; it is also masculinized, as the control over basic institutions is concentrated in the hands of male economic and political elites, which strengthens manifestations of gender bias connected with global finance. R. Connel calls it transnational business masculinity. According to Connel, on a first approximation this masculinity is characterized by the following: 1) growing egocentrism; 2) corporate loyalty, and 3) reduced sense of responsibility for others (it reveals itself only if it is necessary to maintain one's image).

As a result, worldwide and especially in Russia, the modern woman finds herself in a situation where the process of socialization and social life development is left to herself and largely depends on her perceptions and actions. For the society in general this process of individuation took place gradually, within a few generations; but for each woman it occurs directly, right there and then; at this, she is in a time trouble and does not have appropriate skills, as education is still too traditional and lags behind the dynamics of social relations.

Having lost the opportunity of direct traditional control of a person through religious institutions, tribal clans, families, craft enterprises etc., modern society has developed corresponding methods of influence – it interacts with a person through mass and communication media in all their variety. At a first glance it may seem that monthly glossy magazines cannot be a lever of globalization process, as they do not contain operative news information. However those are the editions which have been popularizing global cultural values for a number of decades. It can be assumed that magazines have become the first heralds of globalization process. They brought their ideas, advertisements and format to Russia before the wide use of Internet or mobile telephony.

In the context of globalization the role of women's glossy magazines is quite significant. Considering their nature of integrity and qualitative determinacy in terms of journalism typology, in communicative regard it is maintenance of mass information interaction among women and a method of forming a lifestyle and gender of a modern woman on a global scale.

This shift of mass media function from informing to forming constitutes the main feature of the information flow in a modern society. Gender stereotyping of a modern Western woman is one of the major tasks of Western glossy magazines. In other words, women's glossy magazines not so much satisfy women's certain needs as form those needs. That is what determines the position of women's periodicals in the overall media structure.

The problem of forming a modern woman's lifestyle is solved by glossy magazines through the formation of 'apriority', or the ideas which a modern woman should take 'for granted',

beyond doubt. A certain image of a woman is formed in women's glossy magazines both by their content (ideological and value) and by advertisement.

For women, the role of content is firstly to form a dream and secondly to provide a universal advisor for all occasions. Herewith, regularly encouraging women to become the most pleasing product in the eyes of men as buyers, glossy magazines actively promote feminism. The stereotypes imposed to women by Russian glossy magazines are generally determined by female readers themselves, and it's their point of view that is attractive.

Women's perception of 'glamour' content is often reduced to the fact that it formulates a dream. Stereotypes that are not formulated in women's mind are implemented by 'glamour' as ready ideas. Here they are:

- it is bad to be a single woman;
- it is bad to have no children, especially if you are older than thirty;
- it is bad not to take care of yourself;
- it is bad not to know how to run a household;
- it is bad to be openly, obviously and provocatively smart;
- a woman should manage everything;
- a woman should fulfill herself as a personality;
- a woman should monitor her own health and the health of her family members;
- a woman should possess money. The source of financing is of no importance.

At that, it does not matter what image each of these magazines has (aggressive like 'Cosmo'; philosophical and dreamy like 'Elle'; intelligent like 'Goodhouse'; languishing and capricious like 'Harper's Bazaar'); they all are alike in their gender stereotypes and ineradicable mentor tone.

Figuratively, any glossy magazine appears as a universal encyclopedia and a found of popular female wisdom. Glossy magazines advise what to read and what cinema to watch, how to dress for a job interview and which perfume to present to beloved men, what to wear under a transparent blouse and what color the new kitchen furniture should be. However, the most important point is that glossy magazines tell and show women what their meaning of life is and what to do. In 'Cosmopolitan' magazine advertising, the three words ('career', 'beauty' and 'admirers') define the concept of all glossy magazines. 'We'll teach you how to succeed,' promise the authors of glossy articles. It means, 'we'll tell you what success is'. The success consists in the following elements: work, wellness and worshipers – the three 'W's of a modern Russian woman.

Here is a list of basic concepts taken for granted (or imposed) in modern Western glossy magazines: beauty, fashion, health, career, sex, freedom, family and society, individual features.

The second important component of gender stereotypes imposed by Russian glossy magazines is reflected in advertisements they publish; one of their aspects is gender identification. What does being a woman mean in a particular sociocultural context? Advertisement attempts to answer this question distributing certain images.

Advertisements published in Russian women's glossy magazines dictate not only standards of beauty. The peculiarity of a modern Russian woman's position is the complexity of female roles interweaving. In such a framework she has to be at the same time a house-proud woman, a careful mother, the country's reigning beauty, and a successful business-lady. Apparently

such an interweaving of global (Western lifestyle and idea of a woman) and local (women's position in Russia) points should determine the content and form of advertisements in women's glossy magazines distributed in Russia.

The greatest interest is the question how the mentioned gender stereotypes correlate with feministic views in the era of globalization.

From the standpoint of feminism, gender stereotypes are a recurrence of patriarchal consciousness which is cultivated in mass media; this phenomenon distorts mass consciousness and thwarts the development of truly democratic media and the society in general. Centuries-old gender stereotypes have gone out of date, but still they are dying hard. That is why it's important that mass media should not strengthen those stereotypes but help to change them.

Thus, a positive point of appearance of Russian women's glossy magazines is that having broken into the Russian information space, they offered a number of topics which had not been discussed in the Soviet press at all and changed the idea of a woman as a builder of a new society. Women understood there are spheres of life that are as important for them as social interests, i.e. their beauty and attractiveness, more open relationships with men, the importance of sex, the opportunity of life choices. However, those magazines have a number of negative points like implementation in women's consciousness of the above mentioned stereotypes and attitude towards themselves and their bodies as products that should be preserved in order to be sold in time to their beneficial owners, i.e. to men.

It would be wrong to claim that Russian women's magazines just form stereotypes and, respectively, their consumer. They would not have appeared and obtained such success on the market if they hadn't been based in their editorial and market policy on Russian women's needs. In this respect, bearers of such needs are first of all young women who have not been imposed musty Soviet ideas of female roles yet. Target audience of all women's glossy magazines is young women under 35. The market of women's glossy magazines in Russia needs application of marketing concepts which would help to build a system of women's press and determine its typological characteristics. However, globalization is manifested in the idea that 'glossy' marketing strategies should be based on women's universal similarities, no matter what country they live in.

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NEW TRENDS IN VISUAL LANGUAGE OF TELEVISION SERIES

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Key words: visual language, television, TV series, cinema, new trends, cinematography, visual concept, dramaturgy, The Game of Thrones

Abstract:

In acquiring higher ratings, productions of TV serials tend to innovate new principles of communication with television viewers. Although production budgets for television serials are being reduced, viewers' expectation are growing. New television serials are trying to find a new way in communication with potential viewers – not only in storyline but also in visual representation. Our paper will try to capture main points of tv serial historic development in terms of filming process, filming in studio or external location filming. Main point of our paper is to analyze the implementation of cinematography language from cinema to television serials. We will also rely on interviews with television serials, cinematographers as well as attaintment of film history and visual studies.

1. Introduction

Television broadcasting faces a new challenge and fights a new media competition – the internet. Digital-age audiences stop focusing on single screening. New age viewer is watching content on the mobile phone while background is consisted of television broadcasting. Viewers most frequently search for content on smart phones or ipad/tablets.

Executive producer of the ABC mystery serial *"Castle"* for Los Angeles Times defines that new age television has been watched with laptop on legs. He claims that *"If you don't capture the audience in the first two episodes, you don't have a chance."* [1]

Joe Flint for Los Angeles Times interprets research from 2009 by Ball State University's Center for Media Design backs up the theory of the distracted viewer. Results showed that about 20% of television watchers are also playing with computers or other media at the same time. Expansion of new digital media such as iPad, tablets or smart phones took their place several years after the research, in 2012. Los Angles Times states Michal Holmes, he center's director of insight and research claims about future of digital media "television will quickly become the second most important screen in the room. Holmes added: "The Internet is a very engaging, interactive medium, so your attention is on that and the television recedes into the background." [1]

Television is in the war situation with other digital media. New age is typical for searching for content. New age viewer tends to seek for suitable and interesting formats, he is not waiting for broadcasting time of desired programme. Maureen Ryan says that media environment is

fractured: “most of us—network suits and civilians alike—have accepted the idea that smaller audiences are the new norm.” [2]

There are several ways to “capture” the viewer: plot line, casting or visuality. However, the right recipe for making a successful television serial is hard to predict. Generally it is considered that without a strong plot a good casting with popular actors are irrelevant. Viewer will not come back to the episode if he is not interested in the story development.

In our paper we will work on cinematography in television serial in forms of visual handling of the plot. In Cinematography, Theory and Practice, Bruce Block claims that „the history of cinema can easily be studied as the introduction and addition of various techniques and methods that we call *cinematic”*[3]. According to him, these cinematic tools are conceptual and thay can be separatedly analyzed – the frame, the lens, light and color, texture, movement, establishing and point-of -view. [3]

In our paper we will discuss the visual style and technology in the serial The Game of Thrones.

2. Impact of shooting technology on the final image

In preproduction part, cinematographer in collaboration with other film professions is creating visual style of audiovisual work. One of most important decision is choosing shooting technology, location scouting or studio setup, creating lighting plan and choosing shooting method.

After reading the plot or screenplay cinematographer in correlation with director is setting the visual style of the image. In this part, it is crucial to set the atmosphere. In a matter of visual style and image, atmosphere is the point from where the work on visual elements is starting. One of the first points is choosing the shooting technology or choosing the camera which can reproduce the willing image.

In the question of shooting technology, television and film industry are at the oposite sides. As the technology was going forth and shooting image turned on digital technology from 16mm or 35mm film material. Television found more benefits in shooting on another than film technology due to less production costs. Cinematography continued in using film material not counting underground ways which had used digital technology as a manner of aesthetic form. However, between television and film we find television serials. These forms of popular dramatic programme often are being shooted on film material.

Searching for a right shooting technology, cinematographer are discussing above many other technologic specification main points which have the effect on visual concept: color reproduction and dynamic range.

New age television phenomenon - Game of Thrones

Television HBO started the production of television serial Game of Thrones in April 2011. The plot of dramatic serial is based in medieval ages. Serial is based on the bestselling fantasy book series *A Song of Ice and Fire*, by George R.R. Martin. The aim was to make a serial with a feature film quality photography. TV serial had great success in subculture, but after broadcasting season two number of viewers rapidly got higher numbers and started to be mainstream. The Game of Thrones is considered to be the third most popular HBO's serials. [4] As the plot documents the political, military and emotional entanglements between rival

ancient kingdoms on a fictional continent Michael Goldmen writes for American Cinematographer that: "As such, it's a period piece, a fantasy piece, an ensemble piece and a production that relies heavily on location, design and camerawork to pull off the illusion." [5]

To maintain the illusion of medieval but to preserve modern and attractive look which is held in the documentary picture, style scenes were shot mainly in exteriors. It was an aim to keep naturalistic look so film studios and green screens were avoided as much as possible. Cinematographer Marco Pontecorvo explained the visual concept of serial as a very strong and committed look, in order to express the atmosphere and scale of the show. [6] With cinematographers Matt Jensen and Alik Sakharov they have decided to shoot this tv serial on digital camera ARRI Alexa. Visual concept was to keep feature film look-alike which meant to keep mainly the depth of field and dynamic range. Marco Pontecorvo for arri.com explained his style of cinematography: "My style for the show was to shoot with a high contrast ratio. That was the case even in Northern Ireland, when we were shooting on the stage; I had a lot of contrast, with strong shafts of light and lots of shadow. The range could easily be from T2.8 to T22, so I did need the ALEXA's dynamic range and it performed very well."[6]

This technology gave an opportunity to work with dailies instantly and also share them on several shooting locations as the serial The Game of Thrones had been shot in different countries (Malta, Croatia and Northern Ireland) paralelly. This feature helped directors of photography to maintain very similar final image look. This new approach to workflow was a benefit for both cinematographers and directors alike but also for production cost which significantly decreased.

3. Visual style in television serial

Cinematogrpahy stands for visual interpretation of location in which the story is based. Philippe Rousselot claims that any location, even a house or a road posses its own logical structure. These logical structures can be windows, vertical telephone poles, trees, etc. which can be the key for cinematograph visual interpretation: "These operate as constraints, defining the paths to follow, the operations to accomplish, and dictate the light sources and positions of the camera as much as the indications of the mise en scéne and the purely narrative elements."[7]

Block defines design principles in cinematography which relate to depth of field, movement and visual force of the elements in the image: unity, balance, visual tension, rhythm, proportion, contrast, texture and directionality. [3] These principles are derivates from the primary, as the Block defines them – conceptual tools of cinematograpy: the frame and composition, light and color, using of the lens, movement, texture, establishing and point of view. [3] In European cinematography school as the main cinamatography means of expression are considered to be mainly composition of the frame, focal length, point of view, color and the main expression is working with light, creating the light atmosphere.

Creating visual concept of The Game of Thrones lasted for six months. After setting the primaries based on natural look and choosing digital camera ARRI Alexa as the shooting scope, directors of photography could work with breaking situations.

In the scenes of The Game of Thrones, scene have naturalistic look. This look is achieved using minimum of light. It is easily to compare with another studio television serials which work with a great light park. Instead, palpable atmosphere suitable for the shot of plot epoch is achieved not using artificial light and keep the primary source in the lot of firelight.

Analyzing scenes, it is obvious that the lighting philosophy was clear – avoiding multiplicity of light sources.

Working with color and color correction cinematographer Pontecorvo had a philosophy to difference the locations in the feeling of color perception and made a pattern: "mainly it was playing with the curve and applying desaturation, with a generally warmer look in Malta and a cooler approach for Northern Ireland. Unfortunately I had to shoot some stuff in Northern Ireland to match the Malta footage, which was extremely difficult because we had rain and grey clouds in Ireland! In Malta the sun was warm and higher in the sky, so to be faced with the flat, grey light of Northern Ireland was a big challenge! I had to use a cherry picker with a couple of ARRIMAX lights so that there was at least a little bit of shape to the backlight; then I pushed the contrast and the curve of the image." [6] As the shooting in studio was minimized, the cinematographers had an opportunity to use natural light in more creative way.

Shooting method and the visual style

Shooting method is not the only question of cinematography but, theoretically, the main concept is on editor. However, setting a plan of shooting is determined by several cinematographic tools – lighting, point of view, the lens and movement and therefore it is crucial for cinematographer to discuss this question with editor and director.

Bruce Block defines several shooting methods: the master scene method, coverage, overlapping, in-one and freeform method. [3] Most frequent shooting methods in television serials is overlapping or triple-take method. Basic of this method is shooting one scene on minimum three cameras. Cameras are being placed on various stages to aim at different points of view. Triple-take method is based on classical television serial scene with dialogue of two characters. Conversation should be filmed in one wider shot as a master. Secondary cameras are dedicated to closer shots – one closer for one character and second camera for close up of second charaker. Depending on number of characters or scene ranges, it is possible to add cameras and camera stages to overlapping shooting method. Shooting methods divide cinematography tradition. Mainly Hollywood tradition use this method in realization film, on the other hand, European tradition uses triple-take method mainly for shooting television serials.

In the question of The Game of Thrones, a classical triple-take method was used but the exteriors were much greater than typical television studies, which gave the opportunity to implement more cameras or even use various movement technologies and keep the rhythm of the cinematography and the story tension in a way of feature film. Nevertheless, shooting one scene from a different point of view affects the budget in a positive way. Moreover, minimal lighting equipment provided opportunity to tell the story in a more creative way.

4. Conclusion

Visual language and visual style of cinematogrpahy in television and feature film are constantly in progress. This evolution is also based on technology progress in shooting technology which gives an opportunity to authors to experiment and try new methods and new conceptual looks or means of expression. One of the most successful television serial tried collaboration of genres from television and feature film. Creators of the television serial combined shooting technology and visual style of feature film and television workflow.

The Game of Thrones in its visual style uses modern tools which feature cinematograhy derive from documentary films – naturalistic look. This look is mainly achieved by minimizing lighting sources to a minimum and uses natural light as the prime. And, finally, television serial The Game of Throne got out of television studios to real exterior unlike the others serials. Real exteriors give to the visual style believable structures and allow seize the story divided into episodes and keep the viewer in not only in belief but also in impatience.

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DOCTORAL STUDENTS' SECTION

D. FAKULTÄT FÜR PSYCHOLOGIE / FACULTY OF PSYCHOLOGY *)

*) Order according to conference

SELF-ESTEEM OF ADOLESCENT TWINS IN RELATION TO SELECTED PSYCHOLOGICAL CONTEXTS

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Key words: self-esteem, twins, mutual evaluation, academic environment

Abstract:

The contribution deals with the characterization of self-esteem with an emphasis on twin self-esteem during the period of adolescence. These subjects were part of a research where the sample included 75 twins. Study interprets the results of the research on the basis of which the dissertation project were prepared. Dissertation project submitted presents a research proposal aimed to more closely study twins as a specific type of population. The primary focus aims at the relationship between self-esteem and the following psychological contexts: attitude toward the twins‘ mutual evaluation, their creativity, school classroom placement and parenting style. Next line of focus is on teachers and their approach to the dynamics of twins in an academic environment.

1. Introduction

In recent years we can see still greater incidence of multiple pregnancies in our country and abroad. As reported by the Demographic Research Centre SOSR representation of multiple births in Slovakia increased from 0.92% in 1997 to 1.43% in 2008. Studies of twins are no longer primarily focused on the impact of heredity or environment on different aspects. Researchers are much more interested in the twins themselves – their personality, twin relationship, family or school environment. There is just a little amount of studies of twins with the theme of the self-esteem of twins and varied factors affecting it. This theme was already the main issue of our thesis research, and we perceive the need for further exploration of it. Positive self-esteem is important for a person's life at any age. Self-esteem is an essential aspect of personal experience and quality of life [17]. Has a significant impact on self-concept, that is thanks to her person feels competent, respected and valuable. The rate of self-esteem affects a person in many areas. It is very important in terms of maintaining mental balance and integrity of the entire human personality. Includes a sense of usefulness, optimistic attitude towards life and expresses success in achieving objectives. It is characterized by acceptance of oneself, positive relationship to oneself, to body image, physical and mental abilities [13, 36]. Self-esteem changes and develops all human life. Some studies indicate increasing self-esteem with age [7, 11, 19, 32]. However there are studies which showed no change in the level of self-esteem associated with the age of respondents [6, 38]. In other studies, the level of self-esteem decreased with age [12, 14, 21]. One of the

factors affecting the level of self-esteem is also gender. Some authors state that during adolescence, boys have a higher level of self-esteem than adolescent girls [3, 6]. In the research of Erol & Orth [7] relationship between sex and evolution of self-esteem of adolescents showed up. Contrast, the results of longitudinal study of Raevuori et al. [20] showed that self-esteem has a different developmental course for men and women. While genetic factors play a major role in the self-esteem of men, and common environmental factors play an important role for self-esteem in women. The rate of self-esteem is moving on a continuum high – low. A high level of self-esteem man gives the realization that his task handles well, is positively accepted by other people, better carries fail and respects himself [1, 13]. According to Winterová [37] a person with higher self-esteem willing to reveal their vulnerabilities and better handle stressful situations. Low self-esteem is manifested by fear of failure, ridicule or conflict. Its manifestation may be on one side receding behavior, on the other hand, may prove emotional blackmail and aggressive tendencies [1, 13]. The importance of self-esteem in the formation of identity mentioned Steinberg & Belski [35]. They write about two components of self-esteem during adolescence. One component is shaped throughout life and is called basic self-esteem. The second component is the current self-esteem, which depends on the current state of adolescent and it is at this time very changeable, fragile and vulnerable.

In adolescence self-esteem has generally decreased and adolescent needs to carry support from family and peers. Twins have the advantage that they have next to each other almost constantly a peer who is also their family. At the age of two years, twin beginning to realize its uniqueness, that she is the individual and at the same time part of a couple [18]. This feeling of uniqueness becomes later stronger. Identical or very similar twins everyone notices immediately. It is therefore easier for them to make contact with other people. Twins, which are not similar, have their power in the presence of someone they know well even in the new company they meet. This allows them to be more courageous in making new contacts. This may have a positive effect on their self-esteem. As reported by Siemon [25] psychological environment of twins is very different from the environment of individuals.

The relationship between twins can mean for them certain strength and support, and they know that whatever happens they have their twin to help them. Paired feel great power, there are not alone in the new society of adults or children, they already have each other. Also in terms of the search for friends and other social contacts is certain advantage, since they are like twins attractions for others. This may be positively correlated with their self-esteem, which, however, is also affected by many other factors (e.g. family atmosphere, peers, physical and psychological changes, the search for identity and so on). However, this also has a negative side of things, namely the fact that the twins were thus do not learn the way how to seek social contacts and how to build the site to a new society, because it often happened by itself, the mere fact that they were two. Then they can feel more vulnerable when they meet new people by themselves, without their twin side by side. May experience shame, guilt, or even confusion when they find themselves alone in the spotlight, because they are simply not used to be the center of attention themselves without their twin. It happens, however, that the twins in adolescence build together against parents [8]. They create a strong coalition from which they can draw energy and share it. This can have a positive impact on their attitude to themselves. We wondered, therefore, whether it is for twins that they are the twins, at this time advantage for their self-esteem, or vice versa disadvantage. Pearlman [16] states that the twins have more difficulty than individuals in the process of separation and individuation and the development of self-esteem due to the fact that in pair of twins each spend less time with her mother alone and there is constantly present another individual of the same age as placeholder. Several case studies of adult twins confirm these assumptions and expectations [16]. Some studies [16] do not indicate that being a twin is a developmental disadvantage.

The process of separation-individuation, object relations and self-esteem were not significantly different between group of individuals and group of twins.

Self-esteem of adolescent twins was a major topic of research that we conducted in 2010 [28]. Participants were 151 individuals (83 girls and 68 boys) in the age of 16 to 20. Second group was made of 75 twin respondents in the age of 13 to 23 (26 boys and 49 girls). There were 21 monozygotic twins, 34 fraternal same sex twins and 20 fraternal twins of different sex. We have set a fairly wide age interface mainly due to the fact that we managed to get the greatest sample size of twins. The twins are a specific group and therefore it was quite difficult to find respondents. In selecting the sample, we used a casual selection that is based on the availability of people and their willingness to participate in research.

Based on our empirical findings [28, 29], we can conclude that the twins, who perceived more positively the mother's education had a higher level of self-esteem. We did not find a significant difference in self-esteem between monozygotic and dizygotic twins as well as between the twins and individuals. Twins, as in Pearlman's research [16], tended to slightly higher self-esteem than individuals, but this relationship did not show statistically significant. We expect that the absence of significance was mainly due to the fact that these two groups were not balanced (individuals n=146, twins n=75). Results showed statistically significant relationship between the occurrence of negative life experiences and levels of self-esteem of twins (r = 0, 471; Sig.= 0,000) and also between life satisfaction and levels of self-esteem of adolescent twins (r = - 0,264; Sig. = 0,022). The more respondents had negative experiences, the lower the rate of self-esteem. With increasing life satisfaction slightly increased level of self-esteem of respondents. It turned out that there is a statistically significant difference in self-esteem of the group of twins that were compared, and a group of twins that were not compared (t = -2, 108; Sig.= 0,038). Twins that have met with comparison had higher self-esteem than those who were not compared. This is an interesting result, because the comparison is one of the reasons why experts [22, 39] do not recommend for the twins to attend the same school together. When twins are compared, mostly it does not affect them positively. They have to listen constantly about more positive or negative characteristics of each other. On the one hand, it seems that twin, which is considered a smarter will not have a problem with the comparison. This may have a positive effect on their relationship with themselves, because they most have positive feedback from social surroundings. We consider this one of the reasons why the results showed a positive relationship between comparison and self-esteem. Another reason may be as follows. Since they are compared, it strengthens them in an effort to differentiate and demonstrate the uniqueness of each other. They may free themselves from bonds with their twins, which according to Siemon [25] is an important role of personality development of twins. They can become aware of their strengths by thmeselves as individuals, which, together with the knowledge of the uniqueness that they come from the twins, can truly be in positive relationship with their self-esteem.

We decided to continue research on the self-esteem of twins whereupon the dissertation project arose. The primary focus is aimed at the relationship between self-esteem and the following psychological contexts:

- Attitude toward the twins' mutual evaluation

  - The fact that twins are compared and evaluated depending on one another is not surprising. The above-mentioned results suggest a positive relationship between self-esteem and comparing twins, which is inconsistent with the finding of Hay & Preedy [10]. We decided to further examine precisely that category. We will focus on the attitude twins have connected with evaluation of them. Perceived positive assessment, although depending on their twin, can enhance self-image and self-esteem of the individual and vice versa.

- Creativity of twins,

  - Twins take its place also in creativity research. However, the most common are "twins in the service of science" [18] as tool that allows you to watch share impact of heredity and environment on the development of creativity. Our intention is to determine the level of creativity of twins and its relation to their self-esteem. Szobiová & Boleková [27] state that building self-esteem and "education" to creativity is based on similar principles involving encouragement to express the thoughts and emotions in different ways, delivering the courage to free expression of their own opinions, acceptance of various expressions of creativity and layout environment providing space for self-expression.

- School classroom placement,

  - Before taking the twins to school the parents cope with the problem if the kids should attend the same or a different class, or even a different schools. It is frequently discussed topic in abroad [10, 23, 31]. There are conflicting views on the subject. Some experts, often teachers, talk about how important it is for each twin to have any alone space for itself so they could achieve its full potential [15, 23]. They recommend separating twins to different classes. On the other hand, there are experts who point to the fact that in the time of school the child meets number of changes he needs to adapt to and therefore it is the advantage for twins being together in one class [24, 30]. For this difference of opinion we will focus to the school environment of twins from the perspective of the twins themselves and from the perspective of teachers.

- Parenting style

  - Education of parents is an important aspect in the lives of adolescents. Despite the usual attempt to free from family, adolescent needs a secure family environment [2, 4].

We have set the following goals:

- Examine the choice of adolescent twins from the view of their level of self-esteem and creativity.
- To compare the self-esteem of monozygotic and dizygotic adolescent twins.
- To compare the self-esteem of twins in relation to the attitude they have toward theirs' mutual evaluation
- Clarify the relationship between the level of self-esteem and level of creativity of twins.
- To compare the self-esteem of twins attending common classes and different classes.
- Examine the relationship between parenting style by the father and mother and the level of self-esteem of twins.
- Determine teacher's approach to the dynamics of twins in an academic environment.

2. Methods

The planned research is combination of quantitative and qualitative research. The primary analysis will focus on the type and degree of correlation between quantitative variables. With a view to statistically verifies hypotheses and research questions we plan to use quantitative methods of data analysis. Data will be collected through self-assessment statements. The qualitative part of the research concerns the open questions and we will use content analysis on its evaluation.

3. Population and sample

Research participants can be divided into two main groups:

- Firstly, participants will be coming from twin respondents. The selection criterion is age-interface: 11-19 years. We chose a fairly wide age interface, given the specificity of the population, which we will examine. Advantage, however, we see the possibility of a comparison of respondents and in terms of age. Another reason is the effort to obtain the largest number of respondents.
- The second group of respondents will consist of primary and secondary school teachers.

1. Data collection methods

Respondents will be submitted to the following questionnaire data collection methods.

Focused on the level of self-esteem of respondents:

- Coopersmith Self-Esteem Questionnaire (SEI) contains 58 items. Respondent expresses its agreement or disagreement with those statements. Items cover self-esteem in four subcategories: General or personal self , family self , peer-self, school self.

- Rosenberg Self-Esteem Scale is one of the most widely used methods for the detection of not only adolescent's self-esteem. Was conceived as a one-dimensional scale, which measures the overall level of global relations to oneself [9]. Classical item analysis confirmed that most of the items contributing to good internal consistency range [9]. The Likert-type scale contains 10 items to which respondent answers on a four-point scale ranging from "strongly agree" to "strongly disagree".

Focus on creativity level of respondents:

- Urban's figural creativity test of creative thinking (TSD-Z) is considered a screening tool that can provide essential information about the creative potential of the individual. Can detect individuals with high creative abilities, but also individuals with under-developed ability to create [33]. TSD-Z is the drawing test. Respondent's task is to illustrate 6 unfinished fragments in 15 minutes [34]. TSD-Z is reliable and objective tool for assessing the level of creative abilities. Concurrent reliability (r= .62 – 70), inter-rater reliability (α= .87) i test- retest reliability evaluated at intervals of 8-12 weeks (r= .81) has been verified [34].

- Creative act – this method affects the creativity of individuals according to results of theirs acts [26]. The task is to write all of what the respondent so far in life has created what he considers original. Using this method it is possible to also affect the everyday creativity. The validity of this method is questionable, as it is not possible to verify the extent to which respondents described creative works actually carried out [26]. Therefore, we use this method as a complementary method. We consider it an interesting tool for our sample of respondents, because there we have the opportunity to further examine the twins creativity in everyday life and theirs verbal creative expression.

Aimed at detecting parental educational styles:

The questionnaire method of parental educational styles - The questionnaire focuses on the parenting style of the mother and father. The questionnaire has 40 items relating to common situations in communication between parents and children. Respondent evaluates separately mother's and father's behavior by choosing one of three possible answers (yes, partially and not). It is possible to work specifically with the results for dad and for the mother or the parental subsystem as a whole.

The results indicate:

- Emotional relationship between a mother / father to child, which can be: extremely positive, positive, negative and positive-negative.
- educational management of parents in four categories: strong, weak, medium and contradictory.

The combination of them speaks of parents' parenting style. Educational styles are arranged in the pattern of nine fields [5].

Reliability was assessed in two ways. The first was dependability (test-retest), the Pearson correlation coefficient ranged from 0.74 to 0.87. The other way was determined by expression of internal consistency, Cronbach's alpha ranged from 0.59 to 0.82. The main criterion validity of empirical scale questionnaire was ADOR. Validity was assessed using the Pearson correlation coefficient.

Focus on the characteristics of respondents

Custom questionnaire - for twins - will serve to identify the different aspects used for further understanding of the special relationship between twins and their school environment. Each twin will fill out a questionnaire for himself.

It consists of the basic anamnestic data (date of birth, age, gender, number and age of siblings, whether the respondent comes from monozygotic or dizygotic twins). Next several items focus on the field of school environment of twins. If the twin was compared is determined on a scale from 1 (never) to 5 (very common). Specifically, we are interested in the person who usually compared them: teachers, classmates, parents, siblings, or other people. We chose the possibility of responding to scale, because it offers greater possibilities than the category of responses - yes/no.

The last three questions in the questionnaire are open and they are useful for understanding the relationship between twins.

Custom questionnaire - for teachers – will be used to further examine the issue of teachers' preparedness for the presence of twins in the classroom. It will give us basic information - gender, elementary / high school teacher, years of practice. Followed by 5 questions relating

to information whether respondent taught a class with twins, whether they varied their approach to students of twins and other students. We wondered whether the respondents during the study met with the theme of twins in the educational process and to what extent. Questions consist of two or three options from which respondents circle the one. The last two questions are open. One relates to respondent's opinion on the placement of the twins in classrooms. The second deals with teacher's approach to the dynamics of twins in an academic environment.

4. Expected results

We expect that proposed research will bring the knowledge for deeper understanding the population group of twins. Based on the study of available literature and previous research we suggests that results will not demonstrate a significant difference in self-esteem among a group of monozygotic twins and dizygotic. We expect to show a significant difference in self-esteem of twins that have more positive attitudes toward theirs mutual evaluation and those whose attitude toward theirs mutual evaluation is more negative. We also think that the results will enrich the research of creativity due to the fact that the available studies of creativity in the context of the twins is primarily concerned with the question of extent of genetic influences or environmental influences on the level of creativity. We expect a positive relation between the level of self-esteem and creativity. We expect that our research findings will bring knowledge that can be used in addressing the placement of the twins in a single or shared class. Results will show the teachers approach to the dynamics of twins in an academic environment. Finally, we assume that the collection of research data and personal contact with respondents will help to create a database of twins in order to simplify data collection in further research in our cultural and demographic conditions.

Given the projected cooperation with the Twins club in Prague we expect the possibility of a comparison of selected aspects relating to twins in Slovakia and Czech Republic.

One of the limits of the research, are self-assessment research methods, which are largely subjective and depend on the ability and willingness of respondents to give a true answer. To control socially desirable answers is to some extent possible using qualitative methods. However, given the relatively weak elaboration of the themes in our cultural and demographic environment, we decided to primarily use quantitative approach, which allows more generalization of conclusions. At the same time research findings may be a good basis for further expansion and qualitative research. The objective of obtaining the greatest number of respondents to our research suggests that this approach will help us to meet the objective of the creation of the twins' database.

Due to the fact that the twin topic is relatively little investigated in our country and if mostly it is qualitative research, we have created our own questionnaires. At the same time we are aware of the limitations of using non-standard methods to explore attitudes toward twins' mutual evaluation that has not been previously studied in terms of internal and external validity.

Certain anticipated limitation may also be uneven representation of dizygotic and monozygotic twins. Given the limited choice of respondents a number of them will be in the first place for us. We will primarily pay less attention to even distribution. We are aware of the time demands on data collection. This part of the research puts quite a heavy demands on the researcher.

5. Conclusion

The main aim of this article was to contribute to the expansion of knowledge about the twins as a specific group of the population that is becoming increasingly widespread. We deal mainly with the self-esteem of twins, which we consider an important aspect of quality of life. Research results [28], which we introduced above, inspired us to create a research proposal in which we focus on the self-esteem of twins in relation to the following context: attitude toward the twins‘ mutual evaluation, their creativity, school classroom placement and parenting style. Last but not least we would like to explore teacher's approach to the dynamics of twins in an academic environment. Given the relatively difficult conditions of obtaining respondents - twins we encountered with similar research relatively rarely. If twins' research in our country exists, it is mostly qualitative research with just one or few sets of twin's respondents. Therefore, one of the purposes of the project is to create a database of twins, which could serve as a "springboard" for other similar studies in our demographic conditions.

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