About Tacis and GEPLAC

The Georgian Law Review (GLR) is a publication which is funded by the Tacis Programme through the Georgian European Policy and Legal Advice Centre (GEPLAC).

The Tacis Programme is a European Union Initiative for the New Independent States and Mongolia which fosters the development of harmonious and prosperous economic and political links between the European Union and these partner countries.

Tacis does this by providing grant finance for know-how to support the process of transformation to market economies and democratic societies. In its first six years of operation 1991-1997 Tacis has committed ECU 3,300 million.

Tacis works closely with its partner countries and provides know-how from a wide range of public and private organisations including advice and training, developing and reforming legal and regulatory frameworks, institutions and organisations, and setting up partnerships, networks, twinnings and pilot projects.

Tacis also cultivates links and lasting relationships between organisations in the partner countries and the European Union to promote understanding of democracy and a market-oriented social and economic system.

GEPLAC was established in 1998 by Tacis in order to support economic and legal reform in Georgia. Activities under GEPLAC's programme include besides GLR the edition of Georgian Economic Trends (GET), establishment of a library and the provision of economic policy and legal advice to the Parliament and Government of Georgia.

About Georgian Law Review

This is the third edition of Georgian Law Review which is prepared in Georgian and English languages. It enables legal specialists and other interested persons to become informed on the development of Georgia's legal system and the legal systems of EU and its Member States. Georgian Law Review is free of charge and also available through the Internet:

http://www.geplac.org

Georgian Law Review aims to encourage the legal reform currently conducted in Georgia and to promote current Georgian law. Readers may quote any information used provided it is properly acknowledged.

For any additional information please contact Georgian European Policy and Legal Advice Centre at:

26, Gabriel Episkoposi Street
380003 Tbilisi, Georgia
Tel: 995 32 77 65 13
Fax: 995 32 77 65 14

E-mail: masbaum@geplac.org

The following persons participated in the elaboration of this edition of Georgian Law Review:

Rati Amilakhvari, Alexander Barnewitz, Leila Gibradze, David Kereselidze, Maka Machkhaneli, Maik S. Masbaum, Ketevan Mskhiladze, Besik Stvilia, George Tskrialashvili, Alexander Tushuri, Tato Urjumelashvili, Ketevan Vakhtangadze, Kate Whyte, Vakhtang Zaalishvili, Irakli Zhgenti.

TABLE OF CONTENTS

INTRODUCTION

Dear Readers,

With this final edition of the first year of publication, the Georgian Law Review will give priority to legal topics related to jurisdiction and the implementation of law. In addition, various legal issues that we consider highly important at present are touched on, such as Georgian legislation on investment, data-protection, harmonisation of law, and combating of organised crime.

With his introductory essay ***Konstantin Korkelia***, Deputy Director of the Department of International Law of the MfA of Georgia, analyses the competence of the Constitutional Court of Georgia in reviewing international agreements with respect to their adherence to the Constitution. He shows the existing situation in Georgia and provides references to the practice of other countries.

Tengis Liluashvili, Member of the Training Centre Board at the Ministry of Justice of Georgia, illustrates the structure and importance of the new Civil Procedural Code of Georgia that will enter into force on May 15, 1999. The enactment of this Code apart from the enactment of the Civil Code is the second basic step of legal reforms in the field of civil law that sets forth the rules for the application of civil law by the courts and might be called a "revolution" in court-practice.

The need for new rules and a new court structure underlines ***Avtandil Kakhniashvili***, lecturer at Tbilisi State University. He discusses the importance of judicial reforms and of the establishment of an independent court system in terms of respecting human rights and of accelerating the development of the Georgian economy. He analyses the first results of the reform process in the context of examples from other Eastern European transitional countries, and he severely criticises the previous court system in Georgia.

Irakli Shapakidze, Dean of the Faculty of International Legal Relations of Tbilisi State University, continues the tradition of GLR and GEPLAC to deal with private arbitration which is currently of great interest in view of forthcoming legal reforms in that field. This author discusses the rules on private arbitration used by the Court of Arbitration at the International Chamber of Commerce of Stockholm in the light of its specific traditions, and he also provides an overview on other international arbitrary institutions and its legal rules.

GEPLAC's European Legal Expert ***Alexander Barnewitz*** gives a brief outline on the basics of investment legislation in Georgia with a focus on corporate law. He also discusses the implications of this legislation, particularly in terms of the benefits and obstacles for foreign investors.

Mariam Tsatsanashvili, Referent at the Parliamentary Office of the President of Georgia, discusses the ongoing legal reforms in the field of data-protection and these being related to one of the most ambitious legal projects currently under way in Georgia, the elaboration of a Code on Information-management in which she is significantly involved.

A successful harmonisation of Eastern European law with that of the European Union is discussed by ***Andrea Gyulai*** and ***Olaf Zwetkow***, Research Assistants from Budapest and Hamburg University, using the example of the Hungarian law on advertisement. In the context of approximation of Georgian Law with European Law under the recently concluded Partnership and Co-operation Agreement and in

view of further integration with the EU, this might be of interest for the legal community in Georgia as well.

Ia Mariamidse, Deputy Head of the Department of International Law of the Ministry of Justice of Georgia, discusses the direct application of international agreements according to Art. 6 of the Constitution of Georgia and analyses specific problems related to it. This provision will carry special importance after the forthcoming accession of Georgia to the WTO, when the question of direct application of WTO-Agreements and the possible evocation of their provisions by private persons will arise.

Siegfried Lammich and ***Elena Tsiklauri-Lammich*** provide an overview of the campaign against organised crime in Germany. This is a topic that is also of the utmost importance for countries with developing legal structures under the conditions of a transitional economy.

Additionally, the GLR for the first time will provide a list of the most important legal acts that have been issued by legislative and executive bodies in Georgia. This edition shows developments from 1998. Future editions will mirror the state of legal developments in Georgia on a quarterly basis. In this context we would like to draw your attention to the fact that the Legal Inventory, created and updated by GEPLAC, is now available on our Website on the Internet. It comprises data on Georgian legislation that we consider to be most important for business law, including information concerning the sources of publication and the dates of adoption. The Legal Team is looking forward to providing you with further interesting and reliable information on legal affairs in forthcoming editions of the Georgian Law Review.

Best wishes for a happy and successful 1999!

January 1999, Tbilisi

Maik S. Masbaum
Legal Team Leader

Alexander Barnewitz
European Legal Expert

KONSTANTIN KORKELIA*

CONSTITUTIONAL COURT AND INTERNATIONAL TREATIES**

In the judicial branch of Georgia, paramount importance is given to the Constitutional Court, which is responsible for securing the supremacy of the State's Constitution.

One of the means for securing the supremacy of the Constitution is to determine the constitutionality of international treaties by a body authorised by a State. From the beginning, it must be noted that not in all countries is the function of determining the constitutionality of international treaties given to the bodies of constitutional control. For instance, the Supreme Court of the United States, which holds the function of constitutional control, does not determine the constitutionality of international treaties. A similar circumstance exists with the Constitutional Court of Turkey. The Constitution of Turkey directly points out that the Constitutional Court shall not be appealed to on matters regarding the constitutionality of international treaties.[1]

Although in some states, determination of the constitutionality of international treaties is outside the jurisdiction of the bodies of constitutional control, cases of their award to the constitutional courts is rapidly increasing which is illustrated by the power of the newly established constitutional courts of the Central and East European countries.[2]

As known, the establishment of the constitutional court is provided for by the Constitution of Georgia, which states that the Constitutional Court of Georgia is the judicial body of constitutional control (Article 83). According to Article 89 of the Constitution, jurisdiction of the Constitutional Court of Georgia is, *inter alia*, extended to the review of the constitutionality of international treaties.[3]

The Georgian Constitution does not precisely specify the stage during which the Constitutional Court of Georgia may judge and make decisions on the constitutionality of international treaties. As international practice shows the constitutionality of international treaties can be determined by constitutional courts before, as well as after the conclusion of a treaty.

Practice of constitutional courts of different states with regard to the stage of determination of constitutionality of international treaties varies. In some states, the constitutional court determines the constitutionality of an international treaty before the State has expressed its consent to be bound by

---

* *Konstantin Korkelia* is Lecturer at the Faculty of International Law and International Relations of the Tbilisi State Universtity.

** Translation from Georgian language by *GEPLAC*.

1 *J. Polakewicz*, The Implementation of the ECHR in Western Europe, The Domestic Implementation of the European Convention on Human Rights in Eastern and Western Europe, Proceedings of the Seminar held in Leiden 24-26 October, 1996, *E. A. Alkema, T. L. Bellekom, A. Z. Drzemczewski, J. G. C. Schokkenbroek* (eds.), 1992, p. 42.

2 *M. Mitukov*, Constitutional Courts in Post Soviet Space: Comparative Review of Legislation, Constitutional Law: Eastern European Survey, 1997, No. 3 (20), No. 4 (21), p. 36 (in Russian language); *I. I. Lukashuk*, Norms of International Law in the Russian Law System, Spark, 1997, p. 19-22 (in Russian language).

3 *O. Melkadze*, State Law of Foreign Countries, Upleba, Tbilisi, 1996, p. 45-49.

the treaty. For example, the Constitutional Court of Bulgaria is authorised to review the constitutionality of international treaties before the ratification of the treaty.[4]

There is a different practice of the constitutional courts in countries where such advance control of international treaties is applied. One part of constitutional courts carries out the control of all international treaties to be ratified by the state.[5] The other part of the courts carries out the advance control of any international treaty that a body authorised by the State has requested the examination of. In this case, the constitutionality of the international treaty will be examined before the court. In addition it must be noted that, from a practical viewpoint, the latter approach can be accepted more easily, because the probability of conclusion a non-constitutional international treaty is relatively high.[6]

Also of interest is the practice of countries that may determine the constitutionality of acting international treaties. For instance, the Constitutional Court of Ukraine is authorised to review the constitutionality of all international treaties concluded by Ukraine. Also, the Constitutional Court of Ukraine may examine the constitutionality of all international treaties to be submitted to the Parliament of Ukraine.[7]

Although the Constitution of Georgia uses a very general phrase (Article 89), on which it is impossible to interpret the period over which the constitutionality of international treaties may be determined, Article 38 of the Law of Georgia "On the Constitutional Court of Georgia" clarifies many issues.

First of all, attention should be drawn to Article 38, paragraph 2 of the Law, which reads as follows: "[T]he introduction of a constitutional claim relating to such international treaties, agreements or their specific provisions, that are subject to ratification within the Constitution, may take place only before their ratification." This provision of the Law explains that it is possible to determine the constitutionality of an international treaty before Georgia actually ratifies the treaty. This confirms that the Constitutional Court of Georgia carries out advance control of the constitutionality of international treaties.

According to Article 65, paragraph 4 of the Constitution of Georgia, "in case of introduction of a complaint or submission, ratification of the corresponding international treaty or agreement is prohibited before a decision is made by the Constitutional Court". The aim of this provision is to temporarily suspend (until the Constitutional Court makes its decision) Parliamentary debate on the international treaty. This applies if the constitutionality of the international treaty is doubted by the authorised body.

It is interesting to examine the results of the Constitutional Court's decisions regarding the constitutionality of an international treaty. If the Constitutional Court has made a positive decision on the constitutionality of international treaty, clearly nothing shall impede the expression of consent by the state to be bound by the international treaty. On the other hand, if the Constitutional Court decides that the treaty is non-constitutional, the state may take three alternative steps. It may reject the international treaty completely, it may make changes in the treaty to make it consistent with the

[4] Article 149 (1), (4) of the Constitution of Bulgaria; see also *N. Nenovski, M. Zhabinska*, Constitutional Court of Bulgaria, Gosudarstvo i Pravo, 1993, No. 3, p. 76 (in Russian language).

[5] Article 72 of the Constitution of Madagascar.

[6] *I. I. Lukashuk*, International Law in the Courts of States, Moscow – Neva, St. Petersburg, 1993, pp. 254-255 (in Russian language).

[7] Law of Ukraine "On the Constitutional Court", Article 13 (2); *B. A. Futti*, Commentaries to the law "On the Constitutional Court of Ukraine", "Constitutional Law: Eastern European Review", 1997, No. 3 (20), No. 4 (21), pp. 19-21. See also: *J. - P. Kembi*, Constitutional Courts in Europe and International Law, "Rossiskij Ezhegodnik Mezhdunarodnogo Prava", 1995, St. Petersburg, 1996, pp. 149-150.

Constitution of Georgia or it may make changes in the Constitution of Georgia in order to make it compatible with the treaty.

1. If the Constitutional Court determines that an international treaty is non-constitutional, the state has the right to refuse its expression of consent to be bound by the international treaty. In this case, the state informs other parties to the treaty that it does not intend to express its consent to be bound by the treaty. As a result, the state is not obliged to refrain from acts, which defeat the object and purposes of the international treaty. This is provided for by Article 18 of the 1969 Vienna Convention on the Law of Treaties.

2. In the case where the Constitutional Court of Georgia decides that an international treaty is non-constitutional, Georgia may recommence diplomatic negotiations, with the purpose of modifying the treaty's text to make it consistent with the Constitution of Georgia. If the negotiations are restarted and relevant changes are made to the text of the international treaty (which is less probable in the case of multilateral treaties), Georgia can express its consent to be bound by the treaty. With multilateral treaties, Georgia may make a reservation with respect to the article that is inconsistent with the Constitution of Georgia if the reservation is allowed by the international treaty, and does not contradict the object and purposes of the international treaty.

3. If the Constitutional Court determines the international treaty to be non-constitutional, modification of the Constitution of Georgia is a third possibility. Precisely this is provided for by Article 21, paragraph 3 of the Law of Georgia "On International Treaties of Georgia". According to it, "if the Constitutional Court decides that an international treaty is inconsistent with the Constitution of Georgia, it may only be declared legal after the making of relevant changes to the Constitution, under the stated rules." This provision makes clear the possibility of making changes to the Constitution of Georgia in order to express the consent of the State to be bound by the treaty.

Article 38, paragraph 5 of the Law of Georgia "On the Constitutional Court" contains a stipulation that extends the jurisdiction of the Constitutional Court of Georgia with regard to international treaties. In accordance with this paragraph, the Law states that "the introduction of a constitutional complaint, with respect to the conformity of an acting international treaty, agreement or a separate provision with the Constitution, is possible after Parliament refuses to denounce or abrogate them. This is also the case if, after 30 days have passed since the question was raised before the Parliament of Georgia, Parliament has failed to make a decision on the issue."

Analysis of this provision makes clear that the Constitutional Court of Georgia may have constitutional control over all international treaties already acting in Georgia. It also states the two independent conditions whereby the Constitutional Court may accept the complaint submitted to it with reference to the compatibility of an international treaty (or its separate provision) with the Constitution of Georgia:

1. The Constitutional Court may accept a complaint about the determination of the constitutionality of an international treaty (or its separate provision) after Parliament has rejected the denunciation or annulment of the treaty (or its separate provision).

This means that if a subject complains that the treaty contradicts the Constitution of Georgia, the complaint should be submitted to Parliament. In this provision of the law, no reference is made to the subject to whom this parliamentary submittal right is given. However, one might suppose that the subjects submitting the proposals to Parliament are the same as those submitting the constitutional complaint to the Constitutional Court (with reference to the international treaty). It is stated in Article

38, paragraph 1 of the Law, that only the President of Georgia, or at least one fifth of the members of the Parliament of Georgia, may submit a complaint, referring to the constitutionality of an international treaty, to the Constitutional Court.

Therefore, we may conclude that only the Constitutional Court of Georgia may accept a complaint on reviewing the constitutionality of an international treaty acting for Georgia if the Parliament of Georgia rejects the proposal to denounce or annul the international treaty (or its separate provision), as submitted by the President of Georgia, or at least one fifth of the members of Parliament, to the Parliament of Georgia.

2. The Constitutional Court of Georgia may accept a complaint relating to the consistency of the international treaty with the Constitution of Georgia. They may do this if, within 30 days of the issue of denunciation or annulment of the international treaty being submitted to Parliament by the President or one fifth of its members, Parliament has not made a positive decision on the proposal. To some, the period of 30 days may appear to be insufficient for Parliament to reach a decision on the authorised subject's proposal. However, it is understandable that the action of a (likely) non-constitutional legal act should be limited on its time scale. Since parliamentary sessions are not held throughout the entire year, the period of 30 days might appear even briefer - unless we take into account the right of Parliament to call an extraordinary (special) session.

Thus, the Constitutional Court of Georgia may only review the issue of the constitutionality of an acting international treaty in Georgia, after the Parliament of Georgia has rejected the termination of the treaty's ratification. Alternatively, it may do so after 30 days, if the Parliament of Georgia has made no decision on the consistency of the international treaty with the Constitution of Georgia.

Two periods of time could be defined in the process of determination of constitutionality by the Constitutional Court: before the international treaty becomes binding and after it is put into force for Georgia. However, it is unclear whether the Parliament of Georgia may review the constitutionality of the international treaty during the period when Georgia has expressed its consent to be bound by the treaty. This said though, the international treaty is not put into force in Georgia if, for example, the necessary period has not passed for putting the treaty into force, or if other state(s) have not yet - expressed its consent to be bound by the international treaty.

It is useful to outline the measures to be taken by the Parliament of Georgia, should the authorised bodies submit to Parliament a proposal to make an international treaty consistent with the Constitution of Georgia. This is regulated by Article 38, paragraph 5 of the Law of Georgia "On the Constitutional Court".

In accordance with Article 38, paragraph 5 of the Law, the Parliament of Georgia may denounce or annul any international treaty. It must first demonstrate that the international treaty, as submitted to Parliament by an authorised body, contradicts the Constitution of Georgia.

From a legal point of view, difficulties do not emerge around an international treaty with respect of which the Georgian Parliament can make a decision on its denunciation. This, according to Article 3 (k) of the Law of Georgia "On the International Treaties of Georgia", means that the application of the treaty will be terminated, in accordance with provisions contained within. Problems may though be caused by the annulment of the international treaty.

According to Article 3 (l) of the Law of Georgia "On International Treaties of Georgia", the international treaty may be annulled if it is materially violated by another party to the treaty. It may also be terminated under other circumstances, in accordance with the norms of international law (e.g. fundamental change of circumstances). The Law "On International Treaties of Georgia" does not permit the annulment of the international treaty if the reason for the termination is the non-constitutionality of the treaty.

Therefore, the Parliament of Georgia may only terminate an international treaty only through denunciation when such a provision is provided for by the treaty itself. If the treaty does not provide for denunciation, Georgia may hold negotiations with the other party of the treaty (in the case of a bilateral treaty) to terminate the treaty as a whole, if both parties agree. The probability is very low that an agreement can be reached to terminate a multilateral international treaty on the basis of its non-constitutionality.

As mentioned earlier, if the Parliament of Georgia does not sufficiently quickly decide on the consistency of the international treaty with the Constitution of Georgia, a constitutional complaint can be lodged. In this circumstance, the President of Georgia, or one fifth of the members of Parliament, have the right to submit a constitutional claim to the Constitutional Court about the constitutionality of an acting international treaty.

On the basis of this constitutional claim by the President of Georgia or the members of Parliament, the Constitutional Court of Georgia may examine the constitutionality of an acting international treaty, and make a decision thereof.

If the international treaty is in force for Georgia, its annulment by the Constitutional Court of Georgia will cause a legal contradiction. The annulment of the international treaty shall not automatically influence the validity of the treaty at an international level. At the international level the treaty will remain binding for the state, despite the decision of the Constitutional Court.[8]

The decision of the Constitutional Court on non-constitutionality of the treaty may be effective only at the domestic level. International treaty may be terminated only within the states as a result it will no longer bear upon rights and duties for the legal and natural persons. Regarding the termination of the international treaty on a domestic level, one should refer to Article 23, paragraph 5 of the Law of Georgia "On the Constitutional Court of Georgia". According to this, approval of the constitutional submission on the international treaty will result in the cessation of recognition of the international treaty, agreement or their separate provisions for Georgia. Misunderstanding is frequently caused by the term "for Georgia", as used in this clause. If this provision aims at unilateral annulling international treaty validity, it expressly sanctions violation of the international treaty obligations by Georgia.[9]

In the situation where Georgia terminates the domestic validity of an international treaty that is binding for the state on an international level, problems can arise. This is quite dangerous for the state, as the non-implementation of the treaty at the domestic level may result violating its international obligations by Georgia.

Taking the above into account, if the Constitutional Court decides that an international treaty is non-constitutional, it is desirable to establish the practice and procedures of denunciation. The

[8] *I. I. Lukashuk*, International Law, General Part, Beck, Moscow, 1996, p. 231.

[9] *A. N. Talalaev*, Constitutional Court and International Treaties of Russia (With regard to the constitutionality of international treaties of the Russian Federation), Gosudarstvo i Pravo, 1996, No. 3, pp. 120-122.

Constitutional Court of Georgia shall assign the Georgian State Body (which expressed its consent to be bound by the treaty) to carry out the relevant procedures to terminate the international treaty.

Thus, the Constitutional Court of Georgia may determine the constitutionality of an international treaty before Georgia has expressed its consent to be bound by the treaty or after the treaty has entered into force for Georgia.

In view of the period of determination of the constitutionality of the treaty, a different rule is stipulated in Article 21, paragraph 1 of the Law of Georgia "On International Treaties of Georgia". The Constitutional Court of Georgia must make a decision on the treaty "before expression of consent by Georgia to be bound by an international treaty".

According to this provision, if Georgia has not expressed its consent to be bound by an international treaty, only then may the Constitutional Court of Georgia make a decision on the constitutionality of the treaty. Thus, if Georgia has expressed its consent to be bound by an international treaty, the Constitutional Court of Georgia may not review the treaty or make a decision thereof.

Article 38 of the Law "On the Constitutional Court" states the possibility of examining the constitutionality of an international treaty before it has expressed its consent to be bound by the treaty as well as after it has entered into force for Georgia. Article 21 of the Law of Georgia "On International Treaties of Georgia" states that the Constitutional Court of Georgia shall make a decision on constitutionality of the international treaty before Georgia expressed its consent to be bound by the treaty.

We should also clarify whether the Constitutional Court of Georgia is authorised to review the constitutionality of not only those international treaties subject to ratification but also those with respect of which the Executive branch of Georgia has expressed its consent to be bound by the treaty.

Whilst Article 38 of the Law of Georgia "On the Constitutional Court" focuses only on the possibility of determining the constitutionality of treaties subject to ratification, Article 21 (1) of the Law of Georgia "On International Treaties of Georgia" gives grounds for concluding the opposite. The latter emphasises not the actual ratification, but the "expression of consent by Georgia to be bound by an international treaty" which means that not only the Georgian Parliament, but also the Executive branch can express its consent to be bound by the treaty. Hence, in determining this issue, the practice of the Constitutional Court of Georgia is the ultimate one.

International treaties, which enter into force upon signature, shall not be reviewed in advance by the Constitutional Court (i.e. before the expression of consent to be bound by the treaty). This should always be taken into account. It is only possible to determine the constitutionality of such international treaties when they have already entered into force for Georgia

It is also important to outline the issue of who is entitled to lodge a constitutional claim with the Constitutional Court regarding an international treaty.

This topic is covered in Article 38, paragraph 1 of the Law of Georgia "On the Constitutional Court". It states that "the President of Georgia, or not less than one fifth of the members of the Georgian Parliament, have the right to introduce a constitutional claim on the constitutionality of international treaties, and on the agreements or their specific provisions." The Law clearly stipulates that two

subjects may introduce a constitutional complaint: the President of Georgia, and not less than one fifth of the members of the Georgian Parliament.

Therefore, when we analyse the Law "On the Constitutional Court", we have grounds to state that other subjects also have the right to introduce a constitutional claim on the international treaty.

Article 39, paragraph 1 of this Law states that "the Ombudsman of Georgia and residents of Georgia have the right to submit a constitutional complaint to the Constitutional Court, regarding the constitutionality of normative acts or their specific parts. They may only do this if they consider that rights and freedoms, recognised in the second Chapter of the Georgian Constitution, have been violated."

Article 4 of the Law of Georgia "On Normative Acts" states that the international treaty is considered to be a normative act of Georgia. If we take this into account, we can conclude that, together with the President of Georgia and one fifth of the members of the Georgian Parliament, the Ombudsman of Georgia and residents of Georgia may also introduce a constitutional claim on the international treaty. It should also be noted that these subjects may also introduce a constitutional complaint on the treaty, based not only on provisions contained in the Constitution of Georgia generally, but on the issues referring to human rights and freedoms (as recognised by the Chapter 2 of the Constitution of Georgia).

Therefore, together with other subjects (the President of Georgia and members of Parliament), the Ombudsman of Georgia and residents of Georgia and other states can guarantee that the State shall not enter an international treaty that might restrict human rights and freedoms as provided for by Chapter 2 of the Constitution of Georgia.

Just as important as the right to introduce a constitutional claim on an international treaty is Article 20 (1) of the Law of Georgia "On the Constitutional Court". It states that "if while considering a particular case at the general court, the Court concludes the law (or other normative acts used by the court) to be fully or partially incompatible with the Constitution, it ceases consideration of the case, and passes it to the Constitutional Court. The case will be re-opened after a decision has been made on the issue by the Constitutional Court."

The phrase "other normative acts" also covers international treaties. Therefore, one should assume that the Georgian court is also entitled to introduce a complaint on a treaty to the Constitutional Court of Georgia. This is confirmed by the corresponding provision, Article 7, paragraph 2 of the Law of Georgia "On the Courts of general Jurisdiction".[10]

In connection with an international treaty, of paramount importance is Article 19, paragraph b) of the Law of Georgia "On the Constitutional Court". It authorises the Constitutional Court to discuss and adjudicate on disputes between state bodies. It is possible that dispute may rise between the legislative and executive branches of Georgia, about which authority had to express consent of the State to be bound by the treaty. This argument may arise over whether (due to the contents of the treaty) the treaty should be ratified by the Parliament of Georgia in accordance with Article 65 of the Constitution, or whether the executive authority is authorised to express its consent to be bound by the treaty.[11]

[10] Law of Georgia "On the Courts of General Jurisdiction", June 13, 1997, Parlamentis Utzhebani, 1997, No. 33, July 31.
[11] *W. E. Butler*, The Russian Law of Treaties, Simmonds & Hill Publishing Ltd., 1997, p.67.

Conclusion:

The questions raised in this article show that the impact of international treaties on the Georgian legislation is markedly increasing.

Primarily this is due to new legal procedures introduced into the Georgian legal system. Considering the system of constitutional control of Georgia, the Constitutional Court of Georgia is, of course, vital in determining the constitutionality of an international treaty.

The analysis of Georgian legislation clarifies that the Constitutional Court of Georgia may carry out constitutional control of the international treaty in advance (before it has been ratified), as well as in retrospect (after it has entered into force for Georgia).

In considering the constitutionality of an international treaty, focus is drawn to the legal results of the Constitutional Court's decision. If the Constitutional Court decides that an international treaty is constitutional, nothing shall impede the expression of consent of the State to be bound by the treaty. If the Constitutional Court decides that an international treaty is non-constitutional, the state may take one of three steps. It may refuse to express its consent to be bound by the treaty; it may make changes in the treaty to make it consistent with the Constitution of Georgia; or it may make changes in the Constitution of Georgia to make it consistent with the treaty itself.

TENGIZ LILUASHVILI*

THE NEW CIVIL PROCEDURE CODE OF GEORGIA**

On November 14, 1997, the Parliament of Georgia passed the Civil Procedure Code of Georgia, envisaging it to enter into force from May 15, 1999. It is not the first Civil Procedure Code of Georgia. The first Civil Procedure Code was adopted in 1924, acting until November 1931 and the second was in force until 1964. A third Code adopted and enforced in 1964 is still valid even today, and will be recognised until May 1999, when it is replaced by the new Civil Procedure Code of Georgia. Thus, over 74 years, four Civil Procedure Codes have been adopted in Georgia.

It should be noted that the need to adopt the new fourth Civil Procedure Code of Georgia is mainly caused by changes of the economic, political and social situation of Georgia. It is also in response to important recently adopted legal acts, such as the Constitution of Georgia, the Civil Code, Law on Entrepreneurs, Law on Bankruptcy Proceedings, the Tax Code, Law of Georgia on Common Courts etc. It is clear that the draft of a new Civil Procedure Code sought to ensure better protection against the violation or dispute of individuals' natural and legal rights.

It should be emphasised here that all the norms and institutions of the 1964 Civil Procedure Code that have been proven to meet today's requirements, have been preserved in the new Code. Additionally, a number of other issues are treated differently in the new Code, and completely new and unknown institutions have been introduced.

First of all, we should see that the principles of disposition and competition were foremost in the creation of the Civil Procedure Code. It is known that the 1964 Civil Procedure Code of the Georgian SSR was based around the investigative principle. According to Article 11 of this Code, "the court is bound only to consider presented materials and explanations, and to take all necessary legal measures to identify thoroughly and objectively all the circumstances of the case, as well as the rights and duties of the parties". According to Article 52 of this code, the court has the right to suggest that parties present additional evidence, or to appear before the court. Furthermore, the court may exceed the normal boundaries of such a claim. It was not just the party that was entitled to bring a suit whose interests were to be upheld in the court, but also the prosecutor, State governmental bodies, companies and organisations could appeal against the court's verdict at the appeal court.

The Drafting Commission of the new Civil Procedure Code rejected this investigative principle, instead establishing the Code fully on disposition and adversary fundamentals. Where deviation from these principles occurs (e.g. when reviewing cases or making legal judgements in administrative-legal disputes), the Civil Code makes special dispensation.

---

* *Tengiz Liluashvili* is Member of the Training Centre Board at the Georgia Ministry of Justice and Leading Scientist at the Institute of State and Law at the Georgia Academy of Sciences, Doctor of Juridical Sciences, Professor.

** Translation from Georgian language by *GEPLAC*.

In the new Civil Procedure Code, the burden of proof of evidence lies with the relevant parties. Interference of a court by its own initiative is provided for only in exception by the Code. In particular, a court may suggest that parties present additional evidence. If the parties themselves are unable to provide evidence to the court, then the court, by petition of the parties, has the right to demand evidence from whomever they wish.

Almost all of the procedures and institutions centre on the spirit and principles of competition and disposition. These include the initiation and conclusion of trial, the burden of proof, the appeal of court decisions, the limitation of courts by the content of formal procedures, the execution of decisions, and so on. These are wholly the responsibility of the relevant parties. The introduction of the principles of competition and disposition not only extended the procedural rights of the parties, but also immeasurably strengthened the guarantees of protection of their rights against violation or litigation.

The determination of jurisdiction was perhaps the most momentous innovation of the new Code. According to the 1964 Civil Procedure Code, the scope of jurisdiction was covered mainly by two principle characteristics: 'subjectivity' and 'objectivity' - or by the nature and contents of legal disputes. A 'subjective' case meant that a dispute in which one party was a citizen, or otherwise natural person, fell within the common court's jurisdiction. If both parties were legal persons, the case had to be reviewed not by the common court but by the arbitration court.

The 1995 Constitution of Georgia prohibited the establishment of special or ad hoc courts. Consequently, arbitration courts were abolished in Georgia. Currently, general courts review disputes between legal entities as well.

The 'objective' characteristic meant that courts could only review those cases that arose from certain legal disputes. Cases arising from other disputes were reviewed, under the principle of subordination, either by supreme bodies or through administrative procedure. This was directly noted in Article 6 of the 1964 Civil Procedure Code. It allowed the protection of a right to be carried out by a common court, an arbitration or mediation court, a so called "comrades' court", by trade unions and other public organisations, and in certain cases stipulated by law, through administrative procedure.

This time, the scope of jurisdiction has been infinitely expanded. According to the new Civil Procedure Code, the protection of all rights falls within the jurisdiction of the common courts. This excludes the rights that are subject to the jurisdiction of the Constitutional Court and the review of which, according to law, falls within the competence of another body.

It should be emphasised that under rules set out by the Civil Procedure Code, common courts shall review all cases arising from State and administrative disputes. They shall also cover the suits of citizens brought in response to the illegal actions of State bodies, local government bodies or officials, and against the decisions made by them that violate human rights and freedoms. This is if the protection of their rights, according to law, should not be carried out through any other procedure. General courts also review those cases where citizens refuse to accept the legality of normative acts, except for those acts inside the scope of constitutional law.

The courts also review cases that result from international treaties, as well as cases presented by foreign citizens and stateless persons, companies and organisations. The law of Georgia on International Private Law provides for Georgian common courts to cover international cases.

Besides, the Civil Procedure Code allows for property disputes to be transferred and determined by private arbitration (mediation court), if agreed by all parties.

The establishment of a market economy resulted in the introduction of hitherto unknown institutions, such as a body to review cases relating to checks and bills of exchange to simplify the review of debt repayment cases. Lawsuits on such payment issues shall be brought before the court on whoever's territory the payment shall take place and according to the place of residence of the defendant (an alternative jurisdiction). Only documents (written evidence) may be accepted by the court. The verification of documents is only complete if appropriate evidence has been submitted. If a defendant objects to a suit against him, he may demand additional legal proceedings. If this then reveals that the plaintiff's complaint was groundless, the decision made on payment shall be annulled, and the court shall turn away the plaintiff.

As noted above, cases that deal with the payment of debts are now reviewed under simplified rules and conditions. The Civil Procedure Code defines the admissibility of proceedings, the required contents of the application for enforced debt payment, the grounds for refusing to accept such an application, the contents of the order for payment, and so on. It should be noted that the defendant may reject the payment order, and submit an appeal against it. In the event of this, the case shall be reviewed on the basis of general appeal procedures.

The preparation of cases for review, either orally or at a main session of the court, forms the most important part of civil proceedings. A case is prepared for oral review through the drawing up of several written documents. In order to prepare the case, a judge shall execute a number of procedures, varying in subject and nature. He shall send copies of the claim and annexed documents to the defendant, and shall set the defendant a deadline for replying to the application, and to questions contained within. This reply shall indicate whether or not the defendant admits to the accusations of the suit. If he denies the charges, the reply shall indicate which particular circumstance his counter-claim is based on, through what evidence these claims might be proved etc.

Perhaps the biggest peculiarity of the preparation stage is its preparatory session, which, although not a necessary element of the stage, in certain conditions may play a positive role. A preparatory session might be summoned if the presented documents give the judge grounds to believe that the parties may settle the dispute outside of court, or if the defendant has pleaded guilty, or the plaintiff has revoked the claims. If the plaintiff repeals the suit, or the parties have reached a settlement, the judge shall make an injunction to terminate proceedings. However, if the defendant pleads guilty, the judge shall then make a decision in response to the complaint. Naturally, since the preparatory session is held for the purpose of preliminarily tasks, judgement is not carried out here.

Judgement by default is one of the new features of the Civil Procedure Code. Because the legislation in force was incomprehensible, the administration of justice and the timely review and settlement of civil disputes often depended upon the good will of the accused party. If this party wanted to delay the case, he would simply not appear at the court session. Often the court had to delay its decision, and if it finally went ahead and made a judgement by default, a superior court would repeal its decision and return the case to be re-examined.

The new Civil Procedure Code has taken this all into account and introduced a system of 'judgement by default'. If a party, having received a summons as stipulated by law, does not attend court at the appointed time, the court may judge by default. The admissibility of judgement by default should

positively influence the accused party and remove the incentive for him to delay the review of the case.

Proceedings in the appeal court are an important and essential part of legal activity. In actual fact, our previous codes did not contain the right of appeal. There were preliminary and reversal stages, the latter partially bearing the right of appeal (it could examine the factual and legal parts of the disputed decision). The new Civil Procedure Code has established an appeal court.

The decisions of the first court may be appealed against at the appeal court, according to the terms stipulated by law. The appeal court shall check the factual and legal elements of the disputed judgements. The rules of reviewing cases in the appeal court do not substantially differ from the rules of the original court. It might be said that the review of a case in the appeal court is essentially nothing but the re-examination of the case. The new Code with respect to the institute of appeal contains another innovation: the appeal court is restricted to cover just appeal cases and is not permitted to exceed these bounds.

Alongside appeal cases, the new Code provides for appeal under reversal rules. Principal interest lies in the following:

a) Only the decisions of the appeal court shall be reviewed under reversal rules;
b) An appeal on reversal can only be filed with regard to a supposed violation of law;
c) The reversal court is restricted to cover the appeal and may not exceed its limits.

Thus, unlike the appeal court, the reversal court only examines the lawfulness of a decision: its legal part and not its factual one. Of key importance is that the verification is restricted to the extent and limits of the case as required by the parties. In this case, a party is a person who has appealed before the reversal court.

The duty of the original court is to review the case within the limits of its jurisdiction and not to exceed them. The duty of the appeal and reversal courts is to examine judgements within the limits of the appeal on reversal. This is the result of consecutively realised principles of organisation and structure, which have become more important in the market economy, and which are instrumental in protecting human rights.

Thus, the reversal of civil cases is the final stage. The Code no longer provides for protest against decisions at a supervisory court. The revision of decisions on the basis of the protest of an official with judicial power not only violates fundamental legal principles, but also completely undermines the legal force of a decision. This is not admitted under the new civil procedures.

The New Civil Procedure Code provides for the possibility of re-opening proceedings. This is accomplished through an injunction or judgement, so long as the relevant stipulated legal conditions are met.

The re-opening of proceedings accomplished by such a decision or injunction is admissible only if there are grounds to declare the previous decision void, or if there is recent, fresh evidence.

The Civil Procedure Code defines detailed rules for re-opening a case on the basis of overturning a previous decision or presenting fresh evidence. These cover the relevant jurisdictions in force, terms for submitting the application, contents of the application, rules of review of the case etc. They are particularly important if the court annuls the original decision.

In this article we have focused only on a number of points whose significance makes them worthy of particular attention. The new Civil Procedure Code of Georgia contains several other important innovations. Together they give us good reason to think that they will ensure the timely and proper review and settlement of civil disputes.

AVTANDIL KAKHNIASHVILI*

A TRULY INDEPENDENT AND IMPARTIAL COURT – A WARRANTY OF HUMAN RIGHTS**

The quality of the reforms carried out in Georgia until now and in particular of the adopted legal base is one thing, but the non-effectiveness of the mechanism of realisation of enacted laws is another question.

A State, based on the rule of law, is the reference-point for the future, and is strengthened by the Constitution, although a well-regulated State mechanism is still being elaborated in Georgia. The representatives of State power should act as the principal defenders of human rights and the principle of the rule of law, whereby executive bodies should operate as stipulated by normative acts and the population should have the possibility to apply to the court in case of violation of their legal rights.

Although I consider, that the pace of establishment of market relations and of truly democratic institutions is unsatisfactory, and that the legislative process is conducted with serious shortcomings, I believe that in specific cases this process has been accepted as a desirable reality. Priorities have been shifted and have even surpassed the logical succession of events through the adoption of certain laws.

An example of the above might be the Law on Entrepreneurs, enacted three years ago, which delegates judges with the authority to find out how managers are "leading" or "conducting" their activities and whether they are acting as "faithful and honest businessmen" (Articles 9.7 and 14.1.3).

Thus, we have given judges the right to examine rather specific relations and charge the infringing party with material liability, but we have forgotten that legal reform has not yet been accomplished in Georgia, that the court has not become a really independent power, and that the competence of judges in characterising entrepreneurial relations is not credible, let alone their "faithful and honest" approach to this task. Most judges estimate the "soundness" of a businessman through their clothing and on the basis of telephone calls from the "upper echelons". As a result, entrepreneurs consider the court with apparent incredulity and seldom apply to them for the settlement of disputes. As an example for the above-described problem might serve the situation that occurred when the right to issue sanctions for arrest was taken away from the prosecutors and transferred to the judges. No significant improvement has been achieved by this yet and a lot of illegal measures still have been taken so far.

There was a similar situation in autumn 1997, when prosecutors were deprived of the right to issue sanctions for arrest. Allotting judges with this function in the present climate had no positive effect and injustices in criminal proceedings still occur.

---

* *Avtandil Kakhniashvili* is Senior Lecturer at the Law Faculty of Ivane Javakhishvili Tbilisi State University, Candidate of Judicial Sciences.

** Translation from Georgian language by *GEPLAC.*

Due to the blocking of court reform, the amount of crimes committed last year, increased by hundreds, whilst the number of arrests decreased by nearly one fifth. Investigators and prosecutors "abstain" from visits to judges, because apart from private interests, they do not have a guarantee that judges, representing the "old system", will choose the right measure of punishment or might not even help the alleged offender "to abscond".

As a matter of fact, if we had implemented the court reform in the right time frame less infringements would have occurred in the privatisation process and a securities market might even have been established.

About ten years ago, states freed from totalitarianism started their transformation process through court reform, so as not to fall into such a situation. For example, in the former German Democratic Republic the corps of judges was widely replaced with West German jurists of a different mentality, and in the Czech Republic the judges, who had been working for the Soviet system, were not only relieved of their posts, but were even banned from working in governmental institutions.

It should be appreciated that the outlines of legal reform are, at least, identified in Georgia. Though there are number of essential inefficiencies in the present mechanism for choosing judges and securing their independence, I believe that there should be no further delay, and the process of court reform, with some amendments, should be continued, as we are already behind schedule. Otherwise, the democratic transformation and court reform, which have just begun implementation, may be fully discredited and the legal nihilism, deeply rooted in the mind of society, may become stronger.

Even if we had a relatively faultless legislative base, elaborated in compliance with world standards, it was inadmissible not to take into consideration the present situation in Georgia. How can we speak about the mechanism of protection of violated rights in the process of implementation of reforms, when no court reform has been accomplished in Georgia as yet and judges are still obedient subordinates to executive power, deprived of any rights, instead of being an independent, impartial and competent juryman? This should not seem surprising. Though we had a very rich legal culture in the past, Georgian legislation and justice has been developing under the "patronage" (or "guardianship") of Russia (and 70 years of being a part of the Soviet Union) for the last centuries. The "guardian" itself, according to the French lawyer *Rene David*, was marked by the weakness of legal traditions and lack of developed judicial consciousness. The lawyers were mainly the servants of the Tsar and the State, rather than of the people. They lacked the general professional approach.[1]

If we consider the French scientist prejudiced, then we could, at least listen to the English lawyer *J. Fletcher*, who was the British ambassador in Russia several centuries ago. He provides us with the following information about the "Moscow System of regional (district) Government": "Regional governors were appointed to their post by royal decree for one or several years, they were unknown to the people and never enjoyed the love and trust of society. Being greedy, the newly appointed governors began torturing and fleecing the local population to save up as much as possible for themselves and the auditors as well, who considered their wilful action impassively, whilst awaiting benefaction. The court was not separate from the administration; both were governed by one and the same person. Thus, the court was, first of all, considered as the main source of income, and this was the reason for which people hated viceroys so much, who were, in fact, appointed mostly for their ability to cheat and not for the administration of justice. All the above is the manifestation of the

[1] *R. David*, Modern Basic Legislative Systems, Tbilisi, 1993, p. 146.

lamentable state of the people, who are obliged to accept as the founders and defenders of the law those very people, whose unjustness calls for many good and severe laws".

Corruption of the courts of feudal Russia is also dealt with by other foreigners. For instance, *Hermann Herberstein* confirmed that despite the "severe attitude of the Tsar towards unjustness," the judges openly accepted bribes. He quotes an example which was "quite characteristic for the Russian society" of those times. One of the judges-governors accepted bribes from both parties and rendered the judgement in favour of the party who paid more. Moreover, he acknowledged that he accepted bribes, since to his mind, "the rich man should have more trust and respect from the court, than the poor one".

I would also like to call your attention to the fact, that military men, who served the Tsar faithfully, used to write openly in their applications for the post: "You are kindly requested to appoint me, so that I can maintain myself". The government of that period considered such applications as duly acceptable and never found anything inadmissible, due to the nature of the government itself.

I have found all the above quoted information in the book of the famous Russian historian of the pre-revolution period, *V. Kljuchevskij*, who wrote this book on the government and judiciary in Moscow State on the basis of the narratives of foreigners. The reader can detect parallels between the government and judicial systems of ancient, past and modern Russia, and is provided with an analysis of the relations of Georgia with its northern neighbour, the evaluation of the achievements of both countries in the process of building a really democratic civil society, and the description of the level of liberation from old defects.

In order to demonstrate the "efficiency" of general courts, administering justice in Georgia, and their routine of delaying for years the examination of cases, I consider it appropriate to recall one of the most "inoffensive" examples from my personal practice without referring to other sources. My claim, lodged to Mtatsminda district court, pertaining to the wrongful act of local government, which was to be examined within a ten day period, as provided for by the law, has not been taken to court for more than three years now... And in this case, quite apart from the relevant law, there exists a special decision of the plenary session of the Supreme Court, which "reminds" the court, that "... the restoration of a violated right, in some cases, is only deemed possible, if it happens without delay, thus the court should secure the trial of the case during the maximum possible short period and the enforcement of the adopted decision".

It should also be noted, that there are numerous examples, when the courts are enviably operational. The case of the Agar Sugar Plant may serve as an example, where the parties of the case were a member of the Parliament – "the holder of a considerable amount of shares" and a foreign investor (who obtained the controlling shares from the State without giving any notice to the personnel of the plants). Within the period of ten days, the Supreme Court adopted three decisions inconsistent with each other.

As it is apparent, the situation has not changed much over the past years and the statement of *Mr. Angi Arsenishvili*, the former executive secretary of the magazine "Samartali", is, unfortunately, fully applicable to the present state of affairs: "If we simply look through the criminal and civil cases, study the enforced judgements and decisions, pay attention to the culture of court proceedings and recording, we shall find the existing situation is in a sorry plight. For the time being it is difficult even to forecast what future historians will say about the present state of jurisprudence, when studying the cases conducted by us. This should be said, first of all, about civil cases, which are being examined

for such a long time, that sometimes they outlive the plaintiff and defendant. It should be mentioned that not only the formal delay of the case is deplorable, but also that the existence of a large amount of decisions of the courts inconsistent with each other on one and the same instance in the case, and using one or other piece of documentation is far more lamentable".[2]

I would like to quote one, rather well known case, as an example. After intrusion from the "upper echelons" Chugureti District Court examined a case for the second time and rendered a new judgement, opposite to the first one. Moreover, the judge examined the dispute, pertaining to the allotment of shares between the partners of a limited liability company, without either looking into the legally registered charter of the enterprise, nor invoking the "Law on Entrepreneurs" (none of the Articles of the said Law were referred to in the decision).

Instead, the judge referred to the charter of the temporary partnership, liquidated several years beforehand, as the basic evidence. Nor has he taken into account the fact, that in accordance with the Law, the appeal on the decision on the partners is inadmissible after the expiration of the period of two months further to the drawing up of the minutes of the meeting. In the given case more than two years had elapsed.[3]

Many other deplorable cases can be found in the newspapers, demonstrating the "independence" and "competence" of the present corps of judges, thus stressing once again the need for fundamental change of the existing situation.

Hence, I consider the adoption of the decision on the substitution of the corps of the judges to be absolutely necessary and fully justified, though it is also natural, that there is a different opinion in this respect. Some people believe, that the termination of the term of office of the judges as of April 30, 1999 is a premature decision (at the very beginning the termination was planned to take place on May 1, 1998, then on August 1, 1998, the next date appointed was January 20, 1999 and now it is postponed until spring).

Those judges, who considered, that their rights were protected until recently, or acted independently for their protection, have now decided to unite and demand the right to hold their offices until 2001. I think, that in this case the personal interests of the judges are not only explicitly contradicting the interests of the majority of the society but also of the entire State.

The establishment of the Union (Association) of the Judges of Georgia, is considered by its founders as an "integral part of legal reform" and as proof of the fact, that "Georgia has chosen a strongly determined direction towards building up the rule of law".

Establishment of one more non-governmental organisations and invocation of the universally acknowledged rules and principles of international law for the protection of human, and in this case, of judges' rights, should be regarded with much appreciation. It has given hope that this method will be widely implemented in the judiciary in connection with other citizens. Moreover, apart from the predetermined term of judges, some other, no less important guarantees should be created in compliance with the decision of VII congress of the UNO on the basic principles of independence of court bodies in order to secure the real independence of the courts.

[2] *A. Arsenishvili*, "What can I in fact say to such a law ?!", Samartali, 1992, No. 8-9.
[3] *N. Nebieridze*, An Open Letter to the Minister of Justice, Dilis Gazeti, 05.07.98.

It should also be noted, that when international organisations consider the termination of the authorisation of the judges before the term inadmissible, they take it for granted, that the judges are "elected or appointed" to their crucial posts in compliance with democratic procedures and commence their activities by securing the minimum necessary guarantees for their independence.

If we get well acquainted with the order of appointment of judges to their posts in developed countries and compare it with the order of appointment of judges in Georgia at the beginning of 1991, any interested person may draw the relevant conclusions. In any case, the declaration of the Association, that "the corps of judges has been appointed lawfully", may not be in contradiction with the rules in force, but I consider it absolutely unlawful as regards universally acknowledged opinion. In order to evaluate the level of independence of judges of that period, I would like to quote the opinion of *Mr. Tengiz Liluashvili,* Doctor of Judicial Sciences: "The court is an entirely independent body, which is only subordinate to law. The present courts do not meet this requirement. The legally established principle, that judges are independent and are subordinate only to the law, is of declarative nature, and is not secured by anything. The courts were established from the very beginning as an integral part of State bodies. This can be easily understood, as the authority of the court, as an independent authority, was absolutely incompatible and inadmissible for the administrative-command system of State government. We do not have one of the basic characteristics of real justice – the independence of court from legislative and executive power. This is the reason, why we have no real justice".[4] It is up to the founders of the Association, if they have a better impression of their activities to demand for the extension of their authorisation even in this situation, but to my mind, it is inadmissible to proceed in this manner.

It would be useful to quote the International Convention on Civil and Political Rights of Judges as well, where the right of an individual "to be tried or released in due course" is stressed, moreover, "every individual shall be equal before the court" and an individual shall have the right "to have his case tried by a competent, independent and impartial court, established in compliance with the law". It might be interesting to find out how these rights are protected in our country, or what has changed in this direction after the appointment of the present corps of judges. In this case it would be reasonable for each member of the Association and other judges to have a look at the destroyed buildings, where justice is being "administered" for the time being; to remember the permanent influence, manifest in telephone calls from the "upper echelons" or the visits of friends and relatives; the arrangements with the "active representatives" of the region (district) and how many people they are indebted to. And finally, relevant attention should be paid to the conventional rates of the wages and the rather popular mechanism of "mutual appreciation". And only then should they declare whether they have a moral right to call themselves "independent" in this situation and to proceed with their activities with the same composition after the prolongation of their authorisation or even in case of a raise of their salary. In this event, no parallels can be drawn with the representatives of the executive power, as through the substitution of the corps of judges and the achievement of the independence of the court, there will be a chance of dismissal of unworthy persons from other branches of high authority and of the overall improvement of the situation. Otherwise, not only the protection of human rights, but economic reforms, the revival of the budget and the fight against corruption seems to me to be hopeless.

It is evident, that due to a number of subjective and objective reasons, legal reform was carried out in Georgia with many pitfalls. The decision of the Constitutional Court of Georgia, rendered on the basis of the application of one of the judges, to declare the termination of the authorisation of the present corps of the judges before the term as unconstitutional, caused a great controversy in society. Although, I consider the said decision as wrong, and the motivation of the second board of the

[4] *T. Liluashvili*, The Court should be independent, Samartali, 1992, No. 3.

Constitutional Court groundless and erroneous, the decision is rendered on behalf of Georgia, it is final and its non-fulfilment is subject to legal liability.

Thus, the court reform has been set back, but there still is a way out - we must derive certain conclusions from the mistakes made by the State authority or by some of the reformers and proceed towards a State, based on the rule of law more carefully. Some amendments should be made to the "Law on General Courts" and the rules and programme of the qualification examinations of the judges should also be significantly amended. We should also take into account public opinion, as it may seriously affect the effectiveness of the replacement of the corps of judges. We should proceed in replacing judges and the selection of candidates should be carried out on a step-by-step basis and considered of primary importance. We should definitely not hurry in this process and then it will not be turned into an off-hand campaign instead of a civilised procedure. Nothing will improve if the present judge is substituted by a maybe more skilful and better informed - "deeply educated intellectual", but, at the same, by an immoral person and a swindler.

Independence of judges should encourage those entrepreneurs who intend to accumulate their assets through fair business. Unregulated tax and customs policies and corruption of the bureaucracy give them no way out and they are induced to adjust themselves to the lawlessness, as they are deprived of the hope, that damages will be reimbursed in a lawful manner. Moreover, it is possible that mainly honest citizens will become the victims of the campaign for fighting corruption in cases where there are no tangible guarantees for the defence of their rights in the country through the court. Carrying out court reform will give us the chance to, at least, partially amend the mistakes made during the process of privatisation and to solve disputes, arising between the new proprietors impartially.

Thus, for the time being, the efforts of everybody, and especially of the mass media, should be directed towards the choice of thoroughly honourable citizens on the basis of the examination of the judges, the candidates should be considered openly and only then be appointed to their posts (though in territorial section the electoral mechanism could, as well, be used). I am fully in agreement with the idea of *Mr. Angi Arsenishvili*, quoted in the above-mentioned publication: "Longstanding professional and working experience has made me believe, that not only special knowledge and a diploma is enough to tell the difference between right and wrong. In order to become a high priest of justice, first of all special skills and honesty are needed, as trite judgements and decisions may be rendered by those, whose professional skills often become the source for anecdotes".

Already the outstanding Greek philosopher *Demokrit* noted that "the essence of the case means a reasonable knowledge and not the knowledge of much".

When evaluating judges the observation of great *Ilia*, the famous lawyer, should also be taken into consideration: "In order to gain trust, knowledge of the mentality, habits and traditions of the public are more essential than the knowledge of laws, moreover, it is necessary to have a clear mind, an honourable nature and lead a faultless life", "It is more necessary to have professional wisdom, than the knowledge of laws and the experience of a judge", "The administration of justice should be trusted to a person, who is well known to the public, who is trusted by them and who should want to eliminate disorder and irregularity, to punish crime, fault and to reimburse damages".[5]

In the process of implementation of reform, principle attention should be paid to the moral characteristics and the past life of the candidates. Passing the qualification examinations or qualification test should be important and society should also express its opinion in regard with the

[5] *I. Chavchavadze*, Life and Law, Tbilisi, 1987, Vol. IV.

future judge. His/her past should be thoroughly studied, in order to exclude the possibility of a potential bribe-taker or otherwise dishonourable person to become a member of the court power. Hence, it is one thing to adopt a decision on the necessity of judicial reform and its commencement, and quite another, no less important problem is how to carry out the process of substitution of the corps of judges.

In developed countries the office of a judge looks like a library, and during examinations on individual cases, additional literature is often brought in on trolleys. Hence, I consider it ungrounded to prohibit the use of normative acts at the first stage of the qualification examinations of judges. Moreover, I can not see the necessity of basing the questions of the examination tests on the new laws, some of which have not been enacted as yet. Unfortunately, there are not enough commentaries and additional literature and the scientists do not finally agree upon even some of the issues. If we consider that even after the rendering of the verdict by the jury in a case, the American judges often consult for several days before the adoption of the final decision, I think 6 hours is insufficient to come to know the particulars of 100 "factual life situations" (without new Codes, 3-4 minutes for each issue is, definitely, not enough). Moreover, the existing shortcomings of legislative technique may cause additional problems to the candidate and most of the time may be spent on recalling them. For example, has the initially established one week for the court registration of an enterprise increased up to two weeks or fifteen days ? (He/she would have easily dealt with this problem later, in case of need.) There are other remarks as regards the qualification examinations for judges, but this problem will be the subject of a separate study and we shall not deal with it just now.

Apart from freeing the administration from bureaucracy and corruption, many other problems are to be resolved in the State, but the most important of them, to my mind, is judicial reform, inasmuch as without it, every other reform is destined to die and no guarantees for their supremacy and protection of rights will exist in the process of realisation of law. We need a really independent and impartial court, if we intend to build in Georgia a state, based on the rule of law.

IRAKLI SHAPAKIDZE*

INTERNATIONAL ARBITRATION: THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE**

Worldwide-recognised centres of arbitration are Geneva, London, New York, Paris and Stockholm. With regard to the Arbitration Institute of the Stockholm Chamber of Commerce[1] its immense popularity is guaranteed by accomplished national legislation, great experience, highly qualified judges and also important, by its geographical location between the East and the West. Due to this last reason, Sweden has traditionally been the centre of arbitration for the settlement of disputes on economic issues, which arose between representatives of the former Soviet Union and Western countries and it is, at the same time, party to the UN Convention of 1958 on "Recognition and Enforcement of foreign arbitral Awards".

In Sweden, the Arbitral Tribunal is conducted in compliance with Swedish law regardless the participation of foreigners. The basic legal acts, regulating this area are in particular the Law on Arbitration of 1929 and the Law on Foreign Arbitration Agreements and Awards of 1929.

According to Swedish law, the parties have the right to apply their own arbitration rules, as well as the regulations of the Arbitration Institute of the Stockholm Chamber of Commerce or of any other arbitration institution, for the settlement of a particular dispute.

However, Swedish law, to a certain extent, restricts the rights of the parties to set the legal norms regulating their contractual relations themselves. On the one hand, the parties to the contract may agree upon the exclusion of many provisions of Swedish law, that are generally applicable to the legal relations in the commercial field (such excludable legal norms are called *ius dispositivus*). But on the other hand, the parties are not allowed to exclude certain legal norms (such legal norms, which can not be excluded through the agreement of the parties are called *ius cogens*).[2] Thus, the arbitration rules, chosen by parties for the settlement of a dispute, will not be acknowledged in Sweden, if they violate the imperative provisions of Swedish law. For instance, despite the different wishes of the parties, the *ius cogens* norm provides that "if there are several arbitrators, one of them should become the chairman of the arbitral tribunal".[3] A subdivision of legal norms into *ius dispositivus* and *ius cogens* is familiar in other European States as well.

---

* *Irakli Shapakidze* is Dean of the Faculty of International Law and International Relations at Tbilisi Ivane Javakhishvili State University.

** Translation from Georgian language by *GEPLAC*.

1 Arbitration Institute of Stockholm Chamber of Commerce (SCC) was founded in 1917. Initially, the activities of the Institute were limited to the settlement of intrastate arbitration disputes. Lately, the number of international disputes with the participation of government and private sectors has significantly increased.

2 *P. H. Folsom*, *M. U. Gordon*, *J. A. Spanol*, International Transactions (Russian), Moscow, pp. 86-88.

3 Mitsubishi Motors Corp. vs. Soler Chrysler-Plymouth, Hearings of the Case, p. 7.

Swedish law provides for holding the arbitral tribunal in Sweden even when the parties do not apply the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce or the norms of Swedish material law to their dispute, but still choose Stockholm as the place of arbitration. In case of conflict of legal norms, Swedish law generally gives preference to the reservation of the parties on the choice of the law. In the event of the absence of such a reservation, the applicable substantive law is determined on the basis of Swedish conflict of laws provisions.

The basis for the commencement of arbitration proceedings is the written "Request for Arbitration", which shall contain the unconditional declaration of one of the parties, wishing to recourse to arbitration, as well as explicit information regarding the issue under dispute, to be examined by the arbitration tribunal. The other party shall be notified about this request in compliance with the established order. The next stage of the procedure is the choice of an arbitrator or arbitrators.

If the issue of the validity of an arbitration agreement that leads to an arbitration tribunal arises, it is reasonable to transmit the issue for examination to the arbitration court. Though it is possible that the interested party will simultaneously apply to the relevant Swedish courts.

Before the commencement of tribunal proceedings, it is possible to carry out other procedural acts, such as the seizure of property until the award is made so as to enhance the execution of the award or challenging the competence of the arbitrators etc.

THE ELEMENTS OF THE ARBITRATION AGREEMENT

Apart from the choice of arbitration rules and the place of arbitration, it is necessary for the arbitration agreement to include such elements as the issue of *ius cogens* and to choose the applicable norms of substantive law.

When drawing up the arbitration agreement, the parties should pay attention to other issues as well with which we shall deal later.

CHOICE OF THE ARBITRATORS

On the basis of the agreement, the minimum amount of arbitrators – not less than three, is determined. As a rule, an odd number of arbitrators is required. In compliance with the regulations of the Stockholm Arbitration Institute, where the parties agree, the dispute may be examined and settled by a sole arbitrator and in this event the Institute shall appoint the latter itself. Where the dispute is to be referred to three arbitrators, each party is authorised to nominate an equal number of arbitrators and the Institute shall appoint one arbitrator, who will act as chairman. If the parties fail to finish the procedure of choice and appointment of arbitrators within the term scheduled by the Institute, this process will be carried out by the Institute itself.

The national origin of the arbitrators is another important issue. For instance, in China if one of the parties is the representative of that country, the request could be made, that all the arbitrators should be chosen from an approved list, which consists of only Chinese citizens. Other countries may prohibit the appointment of more than one arbitrator from the citizens of the country, which both parties are from. The Arbitration Regulations of the Stockholm Arbitration Institute do not provide for norms to regulate this issue.

When choosing arbitrators, all arbitration institutions pay attention to the professional skills and impartiality of the candidates, as well as to any possible connections with the parties. For instance, in Sweden, a financial relation with one of the parties of the dispute shall serve as the basis for the disqualification of an arbitrator.[4]

As the parties often fail to agree upon the order to appoint the arbitrators, Swedish legislation provides, where necessary, the procedural provisions for the body that is to carry out the appointment. Parties may predetermine the circumstances, when the application of the above procedure of appointment becomes necessary.

ARBITRATORS' FEES AND ISSUES CONNECTED WITH THE EXPENSES OF ARBITRATION

In modern practice, there are two approaches towards the issue of arbitrators' fees. Either a certain amount of money or a daily payment is fixed or the arbitrator's fee is calculated as a percentage of the total sum of the dispute. In compliance with Paragraph 30 of the Arbitration Regulations of the Stockholm Arbitration Institute, the following issues should be taken into consideration while calculating the arbitrator's fee: time spent working on the proceedings, complexity of the case and the amount under dispute.

Arbitration proceedings are connected with other kinds of expenses as well. Permanent arbitration courts including the Stockholm Arbitration Institute have established a so-called administrative fee for institutional services. In different countries and different arbitration institutions the issue as to whether the losing party shall cover all expenses (including expenses for the stenographer's service, for "technical means" and for the service of experts summoned as witnesses) is regulated in different ways.

LANGUAGE OF THE ARBITRATION

Arbitration proceedings in the leading arbitration courts are mainly carried out in English or French. The Stockholm Arbitration Institute regulates this issue as follows: "Unless the parties have agreed on the language or languages to be used in the proceedings, the arbitration tribunal shall take this decision".

If interpreters are engaged the issue of their payment shall be determined in advance. It is recommended to make references in an arbitration agreement preferably in the official language of the evidence and arbitration awards, as well as in all other documents.

THE ORDER OF ARBITRATION PROCEEDINGS

In some countries, the arbitration proceedings are traditionally conducted without hearing the parties, through the presentation of documents. In other countries the hearing of the parties, witnesses' oral testimonies (under oath), cross-examination of witnesses, use of documents, written notifications of barristers, personal inquest of the arbitrator, as well as a recording of the meeting are allowed.

In compliance with Paragraph 16 of the Arbitration Regulations of the Stockholm Arbitration Institute, arbitration proceedings shall be carried out in compliance with the stipulations of the parties in the agreement and will take account of the wishes of the parties. As a rule, oral hearings should be held. The duration of arbitration proceedings, the place of arbitration, the organisational structure, the order

[4] Mitsubishi Motors Corp. vs. Soler Chrysler-Plymouth, Hearings of the Case, pp. 9-10.

of presentation of evidence and other procedural actions shall be determined in compliance with the wishes of the parties.

ARBITRATION AWARDS

The arbitration agreement should provide for the adoption of an award in the case that the parties fail to settle the dispute. Thereby it has to be taken into account that there are different approaches in different countries towards the issues whether the award should state the reasons on which it is based and whether the arbitrators should adopt the award unanimously; arbitration awards should be final and obligatory for the parties only to the extent provided for by the applicable law. One should take into consideration, that in some countries, the issues of substantive law, which arise during the arbitration proceedings, may later be reviewed by the court. In other countries the courts may partially or wholly review the order of arbitration proceedings and the case itself. Hence, an arbitration agreement may prove useful for the parties as regards the exclusion of the court review on the legitimacy of the arbitration award.

With regard to the important problem of enforcement of the arbitration award the most important and efficient international legal instrument for the enforcement of arbitral awards is the New York Convention of 1958 on "Recognition and Enforcement of foreign arbitral Awards".[5]

VALIDITY OF AN ARBITRATION AGREEMENT

It is expedient to determine in an agreement, whether the revocation of the provisions concerning the arbitration or a part of them, should affect the validity of other provisions concerning the arbitration or of the provisions of the entire agreement.

RULES OF INTERNATIONAL ARBITRATION: UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) AND INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID) AND OTHER INSTITUTIONS

The above quoted elements are entered into the Model Arbitration Rules issued by the United Nations Commission on International Trade Law (UNCITRAL) in 1976 after ten years of discussion. These rules are recommendations by nature and should be applicable if any of the parties wish. These rules were thoroughly elaborated by specialists for quite a long period and moreover, UNCITRAL was the place of elaboration of arbitration rules, so that the interests of various countries could be better secured. This demonstrated the universal popularity of the Rules.

The Arbitration Institute of the Stockholm Chamber of Commerce and London Court of International Arbitration often evoke UNCITRAL Rules. For instance, the Court, examining the Iran-USA dispute, related to the confrontation of 1980, evoked the UNCITRAL Rules during the examination of the claims.

Arbitration Rules, provided for by the Washington Convention of 1966 on the "Settlement of Investment Disputes between States and the Nationals of other States" are also based on the above-mentioned principles. By 1983 there were more than 80 signatory States to the Convention.[6] For instance, in compliance with this Convention, in the United States of America, an arbitral award on the

[5] For the time present more that 90 States are parties of the Convention. For Sweden it came into force on January 28, 1972.
[6] For Sweden the Convention came into force on January 28, 1967.

payment of money has the same effect as a final decision of a court of general jurisdiction of any State of the United States of America. This stresses the great importance of the Convention.

The Convention of 1966 provides for the establishment of the International Centre for the Settlement of Investment Disputes (ICSID) as a non-financial body of the World Bank (World Bank for Reconstruction and Development). ICSID represents a forum for the arbitration settlement of disputes and the conciliation between private investors and a host State. The location for the examination of such cases is Washington, unless otherwise stated.

According to Article 25 of the Convention of 1966, the competence of ICSID is applicable only to the "legal dispute, which directly refers to investment disputes, arising between the contractor State, or a subdivision of it, and the national of another State, provided the parties agree to transmit the dispute to the Centre. If such consent exists, none of the parties are authorised to revoke the case unilaterally. If one of the parties disputes the competence of the ICSID, the case may be settled by an arbitration court, and later be appealed by an Ad Hoc Committee, which consists of the arbitrators, chosen by the Administrative Board of the ICSID".

The restricted competence of the Convention of 1966 induced the Administrative Board of the ICSID to establish the body for the conciliation and arbitration settlement of disputes (such disputes that do not arise generally from investments and investment disputes), if one of the parties was a State, which was not a signatory of the Convention or a national of such a State. An additional body is established for the parties, which are participants of longstanding relations, which have special economic importance for the State and are parties to a dispute, which is connected with the utilisation of a resource, significant for both parties. This body is not designated to settle the disputes falling within the competence of the Convention of 1966 or arising from ordinary commercial transactions. The Secretary General of the ICSID shall approve the agreement, providing for the application to an additional body. This additional body operates beyond the scope of application of the Convention of 1966 and possesses its own rules of arbitration.

Parties may consider the issue of the expediency of using other organisational frameworks (for instance the European Convention of 1961 on International Commercial Arbitration or the Inter-American Convention of 1975 on International Commercial Arbitrations) provided for by international agreement, for the given arbitration proceedings. Moreover, the parties may consider the issue of application of the Rules of the Arbitration Court of the Paris International Chamber of Commerce[7] or one of its national committees.

Despite the fact, that none of the special wording of the arbitration clause guarantees successful arbitration, UNCITRAL still recommends that the parties apply to the modal arbitration clause: "Any dispute or disagreement, arising from the present agreement or connected with it, or the issue of the breach, termination and revocation of an agreement, shall be settled on the basis of arbitration, in compliance with the UNCITRAL Arbitration Rules, which are in force at the moment of concluding the agreement".

[7] The Paris International Chamber of Commerce (ICC) was founded in 1919. The International Arbitration Court of the Chamber of Commerce is operating since 1923.

The other permanent arbitration courts have such model clauses as well. For instance, the London Court of International Arbitration[8] offers the following clause to the parties: "Any dispute or disagreement, arising from the present agreement or connected with it, including the issue of its existence, validity and revocation, shall be transmitted and examined by the Arbitration Tribunal on the basis of the Arbitration Rules of the London International Arbitration Court, the application of which should be stipulated by the present reservation."

The Arbitration Court of the Paris International Chamber of Commerce recommends to apply in combination with its own rules the following type of standard arbitration reservation: "Any dispute, controversy or claim arising out of or relating to this contract, of the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. The appointing authority shall be the International Chamber of Commerce (ICC) acting in accordance with the Rules adopted by the ICC for this purpose."

Finally, I would like to draw the readers' attention to a number of circumstances, which demonstrate the great popularity and urgency of a court of arbitration, as an instrument for the settlement of disputes:

a) Top professionals, specialising in the settlement of such disputes, examine disputes at the arbitration organisations. As a rule, they are well-trained lawyers (E.g. the Copenhagen Arbitration Commission and the London International Commercial Arbitrage are considered to be the most authoritative arbitration organisations for the settlement of disputes, arising from maritime conveyances) and therefore the quality of the examination is high;
b) The operational examination of the case, the prompt adoption of an award;
c) In some cases, the cheapness of the said procedure, in comparison with the dispute settlement procedure at the courts of general jurisdiction.

Georgia is making its first steps in this direction. We hope that the national arbitration bodies will gain due respect in the settlement of international commercial disputes.

[8] The London Court of International Arbitration (LCIA) is the oldest organisation of this type in the world and is operating since 1892.

ALEXANDER BARNEWITZ*

INVESTMENT IN GEORGIA – THE LEGAL FRAMEWORK

1. Introduction

Investors are showing increasing interest in the Georgian economy, attracted by a reform program, which is producing a stable macroeconomic situation and an improved, appropriate legal framework. Investment is expected to increase during the last phase of privatisation that is focusing on privatisation of medium and large-scale companies. In this phase the potential participation of foreign investors is likely to play an important role.[1]

Georgia's accession to the World Trade Organisation (WTO) that is envisaged for mid-1999 will entail additional incentives for investors. From the time of accession they can rely in some trade-relevant sectors on a harmonised legal system that is based on international agreements and a bound-tariff-system. The Partnership and Co-operation Agreement (PCA) with the European Communities is to be ratified in the very near future and this is expected to further the process of conversion and completion of the legal system. The goal is expressed in the general provision, Article 43, according to which Georgia "shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community". The same provision expressively refers to various legislative fields, for example customs, company and banking law or financial services and rules on competition.

Besides the realisation of the reform of the legislative system the renewal of the judicial system will play an important part in the effort to achieve a favourable investment climate. With this purpose in view the bench of judges will be re-examined. The process of replacement of judges failing the test will last until the middle or end of 1999, by virtue of a decision of the Constitutional Court, that declared void the pre-term dismissal of judges who had recently been appointed. Once the renewal process has been accomplished, the renewed bench should guarantee the business community qualified and independent court decisions.

2. The Constitution of Georgia

The introduction of a coherent system of business law originated with the adoption of the Constitution of Georgia in August of 1995. In Article 30, Par. 2 the Constitution formulates the framework conditions for a market-oriented economy.[2] Besides this provision the Constitution contains a specific instrument suitable for the protection of investments. According to its Article 6, Par. 2, in conjunction with Article 65, international treaties and agreements prevail over national statutory law in so far as these international legal acts do not contradict the Constitution. According to this provision an investor

---

* *Alexander Barnewitz* is European Legal Expert of *GEPLAC*.

1 For detailed figures on the privatisation program in 1998 see, Georgian Economic Trends, 1998, No 3, pp. 67. According to information of the Ministry of Trade and Foreign Economic Relations of Georgia, as of January 1, 1997, were counted 190 foreign investments from 36 countries with about USD 113 million investments.

2 See more detailed on the Constitution of Georgia and the process of the development of law in Georgia, *Lammich/Sulakvelidze*, Fundamentals in the Development of the Georgian Legal System since 1994, Georgian Law Review, 1st Quarter 1998, pp. 53.

can directly refer to all international treaties concluded by Georgia in respect to those provisions relevant to his particular case regardless of the specific Georgian legislation. Although court practice is so far lacking for this interesting feature, practical results are likely to appear.

3. The Law "On the Promotion and Guarantees of Investment Activities"

Specific laws and their related legal acts for the protection of (foreign) investment are considered to be essential in most of the legal systems of the transitional countries. These laws underpin the reliability of the respective political and legal systems. The first Georgian Law for this purpose, the Law "On Foreign Investments", was repealed in November of 1996. The law was conceding too many benefits for foreign investors and under the conditions of a growing economy and increasing budget necessities the Georgian State has to collect additional revenues. Therefore the Parliament passed on November 14, 1996, the Law "On the Promotion and Guarantees of Investment Activities", the main feature of which is a general application of the law on both foreign and domestic investments and the abolition of the requirement of a license for investments.

The law grants investors no particular benefits but reaffirms economic and property rights that might be taken or restricted only in the cases stipulated by the Constitution and establishes, in addition to the constitution, principles of predictability and non-discrimination. Investors, regardless of whether they are domestic or foreign, have the right to invest in all kinds of tangible and intangible property, with restrictions in respect to land and specific activities that require a special license from the relevant authorities. Moreover the law excludes any restriction of repatriation in income and capital. The Georgian State guarantees the enforcement of awards of the International Centre for Investment Disputes and the enforcement of decisions of any arbitration board established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law.

4. The Multilateral Investment Guarantee Agency (MIGA) and bilateral Agreements

Georgia participates as a member since December of 1992 in the MIGA that was established on April 12, 1988, as a member organisation of the World Bank Group. Membership is open to all World Bank members. The MIGA guarantee system amounted in 1998 to around 830 million USD in 26 different developing countries, however Georgia did not at that time participate in it in practice. MIGA was created to supplement national and private agencies supporting foreign direct investment through their own investment insurance programs. The Agency provides for coverage of non-commercial risks, such as currency transfer risk resulting from host government restrictions and delays in converting and transferring local currency earned by an investor, expropriation, and risk of war and civil disturbance. The Convention adds to these risks traditionally covered by other international agreements the coverage of risk of breach or repudiation of contractual commitments by the host government towards an investor, however under limited conditions.[3]

Georgia signed several bilateral agreements that aim at the protection of foreign investments. Such agreements have been concluded for example with the USA, Germany, France, Italy, Greece, Bulgaria and Iran. The practical impact of these agreements might be questioned and in most cases it is not possible to count an exact increase of foreign investment on the basis of these treaties. However the existence of such guarantees as laid down in the "protection agreements" is partly the pre-condition for the granting of State guarantees. For example German exporters and investors are entitled to guarantees by the German Hermes Credit-Insurance JSC for their contracts under the

[3] See Article 11 of the Convention establishing the Multilateral Investment Guarantee Agency.

relevant agreement. This circumstance obviously constitutes in many cases an incentive for foreign business activities.[4]

Agreements on avoidance of double taxation have been concluded or are currently under preparation with several countries of the former Soviet Union, Iran and Romania. For Germany the double-taxation agreement concluded with the former Soviet Union is still in force, on the basis of exchanges of diplomatic notes until the conclusion of a new agreement.

5. Privatisation

Privatisation began in Georgia in 1992. The privatisation of small-scale enterprises was completed in about 95% of businesses in 1998 by carrying out auctions, tenders and "buy-outs" to the management and the staff. The privatisation of large and medium scale enterprises is intensified since 1997. The Law "On Privatisation of State Property" from May 30, 1997, that replaces two older laws in this sector, is now the legal basis of privatisation. This law eliminates any discrimination against foreign legal entities or foreign nationals investing within Georgia, with respect to the acquisition of the enterprises. The share of the State should be limited to 25%. The Privatisation of the large-scale companies is carried out on the basis of auctions beginning with a zero-price, however certain conditions apply with respect to investments and guarantees for employment. The figures for 1998 for revenues from privatisation confirm a positive development; the privatisation of state property brought (instead of the envisaged 20 million Georgian Lari (GEL)) about 72 million GEL.[5] For 1999 the privatisation by auction is planned for 108 large-scale companies worth about 90 million GEL.

6. Private Ownership and Hypothecation of Land

The ownership of real or immovable property such as buildings, structures or other fixtures is governed by a separate and less restrictive legal regime than that for land. Therefore it is possible for foreign persons to purchase property on apartments. The ownership of land is regulated by the laws "On the Acquisition of non-agricultural Land by natural persons and legal entities of private Law, having Land under Use", the Law "On the Managing and the Disposal of non-agricultural Land being in State Ownership" both from October 28, 1998, and the Law "On the Acquisition of Agricultural Land" from March 22, 1996. According to these acts only Georgian natural persons and legal entities registered in Georgia are entitled to acquire property on land.

Article 6, Par. 1 of the Law "On the Acquisition of non-agricultural Land" emanates not directly from the principle of the unity of land and the connected buildings, however states that "the purchase of premises being in the property of the State has to be carried out in connection with the land plot". Also the Civil Code of Georgia (CC) refers to this principle; providing as it does in Article 208, Par. 3, that a land plot connected to a building that does not constitute the individual property of an owner of an apartment is the common property of the owners of all apartments in the building. All rights related to real property have to be registered in the "public-register". The establishment of a new land-register is about to be prepared.[6] Besides the purchase of land, the lease of land in State ownership is admissible up to a period of 99 years. Agricultural land might also be leased, Article 592 et. seq. CC, which do not set out any restrictions for the terms of the lease agreement.

[4] Comp. with respect to laws for investment protection with the successor States of the former Soviet Union, *T. Heidemann*, Investitionsschutzabkommen mit den Nachfolgestaaten der UdSSR, Wirtschaft und Recht in Osteuropa (WIRO), 1996, pp. 281.
[5] See Prime News Agency Daily Economic Bulletin, Tbilisi, January 13, 1999. The GEL exchange rate from January 13, 1999, for 1 USD amounted to 2,065 GEL.
[6] Georgian Economic Trends (GET), 1998, No. 3, p. 74.

One consequence of the impossibility of land possession of foreigners is that mortgaged real property has to be realised in the case that the mortgage becomes due. Hyphotecation as such is regulated in the CC, Articles 286 et seq. and represents an important means to secure the business circulation. The mortgage has to be registered in the public register in order to become valid.

7. Basic Commercial Laws

7.1. Civil Code

The Georgian Civil Code entered into force in November 1997. The Code follows the Continental European legal tradition and has incorporated examples from (for example) German and Dutch civil legislation; at the same time the Georgian codification reflects its own traditions and culture.[7]

The commercial law of Georgia is mostly incorporated into the Civil Code, but provisions are also to be found in the Law "On Entrepreneurs", for example on the trade representative and the commission agent; with respect to Corporate Law the Civil Code provides for basic rules for the establishment of legal entities pursuing commercial and non-commercial activities. In Articles 24 et seq. are introduced general rules applicable to legal entities, concerning types, name, seat and establishment of branches of a business. These Articles regulate in detail the activities of non-commercial legal persons, i.e. the association and the fund. With respect to commercial organisations Article 29 makes a general reference to the Law of Georgia "On Entrepreneurs".

7.2. Law "On Entrepreneurs"

The Law "On Entrepreneurs" (LE), governs the legal requirements for the establishment, operation and termination for commercial legal entities. The Law in contrast to other legal systems unifies regulation governing the activities of all kinds of commercial legal entities under the umbrella of a general part in one sole law. In the general provisions it sets out the specific characteristics for six forms under which legal entities are allowed to be established in order to perform commercial activities. These are Joint Liability Company, Commandite Company (a kind of limited partnership), Co-operative, Limited Liability Company (LLC) and Joint Stock Company (JSC) (Article 2.6. of the LE) and an Enterprise by State Administration or Local Management Bodies not taking the forms described above; it constitutes a separate property of the State (Article 2.3. of the LE). The legal form of a closed company that does not represent a legal entity, as known in other legal systems, was not introduced. However an individual entrepreneur, owner of an Individual Enterprise, is allowed to carry out business activity with out establishing a legal entity under his own name (Article 2.2. of the LE).

The registration procedure being obligatory for all forms is regulated in detail in Article 5 LE. For the registration in the entrepreneurial register for all company types has to be provided the following information: firm, organisational-legal form, seat (legal address), object of activities, data concerning the commencement and the termination of the economic year, personal data of the founders of the company and information about the power-of-attorney in the company. For LLCs and JSCs additional information has to be provided such as the amount of the authorised capital and the share of each founder in the authorised capital (Article 5.4. of the LE). The documents have to be filed to the Court in the district where the company's legal address is situated. The Court must carry out registration within 15 days after having received full documentation.

[7] An overview of the Georgian Civil Code gives *B. Zoidze* in Georgian Law Review 1998, 1st Quarter, pp. 3.

The authorised capital of the enterprise might be paid up in foreign currency, although in the bookkeeping records of the company the sum is to be fixed in the national currency unit, (Article 3.3. of the LE). The minimum capital for the LLC, according to Article 45.1. of the LE, amounts to 2.000 Georgian Lari (GEL) and to 15.000 GEL for the JSC.

Management and representation in the LLC and JSC are regulated overall by Article 9 of the LE. In the area of management the law corresponds to the interests of foreign investors that may often want to restrict the power-of-attorney of a local representative by stipulating the requirement of a common responsibility with a second representative chosen from the mother company, at least for important matters. The law provides that the representation of the company might be executed by one partner, commonly by two, or also by all directors (Article 9.3. of the LE). An additional protection for the shareholders in the case of an infringement of the limits of the power-of-attorney by a director is set up by Article 9.5. of the LE. It sets forth that if at the moment of the signing of an agreement the other party knew about the restriction of the authority, the company shall be entitled to declare the transaction void within a period of 18 months from the date of the signature; the practical application of this provision will depend on court and customary practice that has to determine to what extent the acquaintance with charter of the company and the public register where the restrictions might be laid down is obligatory before entering into business. Article 9.6. of the LE provides for the possibility of agreeing upon a prohibition of competition for the management of the company at least for the time being employed by the company.

If not otherwise provided for in the charter of the company the company is established without time limitation. The cancelling of the charter by one founder of the LLC and JSC is inadmissible; only in the case that more than 50% of the authorised capital holders vote for the dissolution will such a decision be accepted by the law (Article 14 of the LE). In this and also other cases might therefore arise the question of whether the charter can stipulate majorities differing from that provided in the Law. Georgian law in this respect pursues the approach that in cases where it is not forbidden by law will the law allow for a deviation from the rules stipulated in the law if these provision do not infringe upon legal and economic relations (comp. Article 2.7 of the LE). However the term “legal and economic relation” has to be determined more precisely in the course of the court application.

The regulations on the duties and liabilities of business concerns and for their affiliates in Article 17 of the LE are in some aspects very stringent. For example Article 17.3. of the LE appears to eliminate limited liability for affiliates, as it introduces for companies the duty to reimburse annual losses incurred by a majority owned affiliate. Additionally Article 17.4. stipulates the liability of a company owning more than a 75% share in a Georgian company for damages to the latter brought about by transactions made by the parent company. Moreover the provision in Par. 2 and 3, extends the liability even to the Directors of the LLC and JSC under certain pre-conditions. These Articles not corresponding in all extends to the interests of investors are currently under revision in order to reduce the strong legal liabilities currently held by parent companies.

7.2.1. The Limited Liability Company

Chapter 3 of the LE’s special section treats the LLC with only seven Articles. Accordingly details within the company’s charter have to cover the gaps in the law, wherever the non-mandatory rules of the law allow this. The main framework of rules appears as follows. The LLC can be established by one sole person, without any restriction upon the number and quality of the shareholders of the founding

company as this is partly provided for in the law of other transitional countries (Article 44 of the LE).[8] Each shareholder has the right to sell his share in the charter capital of the company (Article 46.1. of the LE); in this respect the Law admits expressively a deviating regulation (to be included) in the charter of the company.

For the protection of the shareholders it is mandatory to take all decisions that concern amendments to the charter of the company by authority of shareholders' meetings, in which a simple majority of votes can authorise such amendments (Article 47.2. of the LE). All other types of authority vested in shareholders' meetings are at the disposition of the charter of the company (Article 47.3. of the LE). The most important kinds of authority which can be vested in a shareholders' meeting relate to the purchase and the transfer of shares as well as the purchasing, transfer and liquidation of enterprises, the commencement or termination of manufacturing of various types, the commencement or termination of various other economic activities, the determination of how profits are to be used and to what extent managers share in the profit, and the appointment and dismissal of directors.

Additional protection of the shareholders' interests against abuse of them by directors might be interpreted from Article 47.2. of the LE which stipulates that all decisions with significance for the company that exceed the boundaries of a usual entrepreneurial activity have to be made by the shareholders assembly (unless otherwise provided for by the charter). This provision will not lead to practical inconveniences, as it is (according to Article 47.5. of the LE) possible to proclaim decisions by issuing circular letters. The annual profit of the company is distributed according to shares in the company (Article 50 of the LE).

7.2.2. The Joint Stock Company

Chapter 4 of the LE on JSCs comprises nine Articles introducing specific rules for all essential areas; of course, this rough framework of regulation has to be augmented by additional provisions in the company charter and in connected legal documents of the company, in so far that there are no stringent provisions against these in the Law.

Article 51.1. of the LE corresponds to the commonly used definition of a JSC and states that "the JSC is a company with an authorised capital dived into stocks", whereby common stocks might be either bearers' shares or inscribed shares (Article 52.1. of the LE). A company, except a Co-operative, where the number of shareholders exceeds 50 persons must be established in the form of a JSC (Article 2.4. of the LE).

The law establishes a three-tier system of organisation for the JSC. This comprises the Assembly of the Company (Article 54 of the LE), the Supervisory Council (Article 55 of the LE), and the Directors of the company (Article 56 of the LE). The Assembly of the Company is in charge of the most important decisions in the company such as amendments to the articles of association, changes in the amount of stock capital, decisions concerning the distribution of the net profit, the election of the shareholders' representatives to the supervisory council. In order to protect the interests of minority shareholders these decisions require a two-third majority; moreover Article 54.6. of the LE introduces a three-quarter majority requirement for decisions on mergers and decisions that abolish the right of a preferential purchase of stocks by a shareholder during (periods of) increases

[8] For Croatia see, Article 210 of the Commercial Code providing for that a natural or legal person might only be in one sole LLC the sole shareholder or the Russian Civil Code Article 88 Par. 2 that provides that a LLC may not have as a sole participant another business company consisting of one person.

in the size of the company's authorised capital. The Supervisory Council's purpose is to control the Directors and has for this purpose extensive rights to information. It shall consist of at least three members, of which two thirds shall be elected by the shareholder representatives and one third might be elected by the employees. Its function is underpinned by the fact that its members can not take at the same time the function of a Director in the company (Article 55.3. of the LE). Besides this the Supervisory Council plays a role in the management of the company as it has to give its consent to certain important decisions, such as the acquisition and disposal of property rights, the establishment of affiliates, or the granting and cancelling of powers-of-attorney. The management and the representation of the company are carried out by the Directors: the exact scope of competence of the Directors is set out by the Supervisory Council (Article 56 of the LE). In addition to Article 17.4. of the LE, a personal liability of the Directors is introduced by Article 56.4. of the LE which stipulates that each Director is jointly and severally liable for damages caused for the company by activities that are not carried out decently and diligently (Article 56.4. of the LE).

Capital increase is treated in detail by Article 59 of the LE. Protection of minority shareholders is provided through the provision that on the one hand the permitted capital might be issued only up to the amount of 50% of the ordinary or preference shares and on the other hand that the shareholders have preferential rights to purchase shares at nominal sums with respect to each other. The "Law on Entrepreneurs" establishes in its Article 13 and its Appendix I the structure and the rules for accounting, based on the German model.

7.3. Security Law

The Law "On Securities and Stock Exchange" was recently passed. It is to secure the interests of investors in Georgia, and the furtherance of a security market in Georgia, as well as the rules of fair trade and competition in the public trading of securities. The law comprises detailed provisions on the public offering of securities, the preconditions for the carrying out of stock exchange activities and the connected brokerage business. Rules concerning independent bodies for the registration of shares and the supervision of the securities market are also provided.

The introduction of the legal framework and the practical pre-conditions of a security market in Georgia are still in their initial stages. Future developments must show to what extent the stock exchange can mature to a vehicle for sound investment.

8. Protection of Intellectual Property

Georgia is a member of the Paris Industrial Property Convention and joined the World Intellectual Property Organisation (WIPO) as well as the Madrid System "On the International Registration of Trade Marks" the Patent Co-operation Treaty (PCT) and several other treaties administered by the WIPO.

Book Four of the Civil Code regulates the protection of "intellectual property rights". However the Book refers in detail only to "copyrights" and industrial property is regulated in a way that makes reference to other laws still to be enacted. Still in force are a Statute on Trademarks and a Statute on Inventions of March 16, 1992, and a Statute on Industrial Design of March 15, 1992. These acts will be replaced in the near future by Laws on Patents, on Trademarks and on the Protection of Appellations of Origin and on Geographical Indications. They aim at introducing in Georgia an internationally acceptable level of protection for intellectual property.

The approach to regulate copyright in the CC is currently under discussion and it was proposed to shift the provisions into a separate law. An argument in favour of this is that copyright regulations are often amended according to technical progress and international agreements; further, the existing Civil Code constitutes a permanent elaboration that should be left as untouched as possible. Separate regulation might realise this demand and at the same time provide more transparency of the kind that is particularly needed where international intellectual property issues arise in cross-border business.

9. Labour Legislation

As in other CIS countries, the Labour Code of the former Soviet Union of June 28, 1973 is still in force, however with amendments. The old Labour Code was designed mainly to regulate the relationship between the State and the employees. Therefore according to the newly introduced principle of freedom of contract, several aspects of working contracts might be negotiated freely by the parties. A revision of the Labour Code is under preparation; it will introduce more freedom for entrepreneurs in the elaboration of working contracts.

10. Taxation of Enterprises and Payroll Taxes

The tax legislation of Georgia was thoroughly revised and with the adoption of the new Tax Code on June 13, 1997, was set a benchmark on the path to a comprehensive tax regulatory system. The main rates in Georgia are as follows. The tax rate for the profits of companies that are due to pay enterprise profit tax in Georgia is 20% of the profit. The VAT amounts to 20%. The withholding tax from income from shares in Georgian enterprises amounts to 10%. The gross income from foreign companies that do not have a permanent representation in Georgia is taxed at a rate between 4% and 10% of the net-profit according to the particular kind of activity. The property tax accounts to 1% of the property. Income tax amounts to 20% of the taxable income that exceeds 600 Lari income in one year.[9] With these comparable low rates, Georgia has created a favourable climate for investments. Also, however, practical questions arising from permanent contact with the tax authorities play an important role in this climate; therefore assessments of the overall situation differ. Difficulties occur because provisions are new for both State authorities and taxpayers, leading to different explanations of some provisions. This symptom will hopefully disappear with further experience in the application of the provisions.

The social security and pension fund taxes amount to about 33% of an employee's salary. All of this has to be transferred by the employer in the following proportions: 27% to the United State Fund for Social Security (with an additional 1% directly from the employee), 1% to the State Fund for Employment, 3% to the Medical Insurance Fund (with an additional 1% directly from the employee). Additionally 1% of the turnover of a company has to be transferred to the road fund that is to maintain the state road system.

11. Competition Legislation

For the implementation of relevant legal acts and related policies, a State Anti-Monopoly Service was established. It carries out its activities on the basis of the Law "On Monopolistic Activities and Competition", adopted on June 25, 1996. This law defines the terms important in this field, such as "competition", "monopolistic position", and "unfair competition". It also sets up the responsibilities of the State Anti-Monopoly Service for the regulation of the market. It has the overall right to demand the cessation of all activities that are forbidden under the law and enforce this right before courts.

[9] Kooperationsführer Georgien, Deutsche Investitions-und Entwicklungsgesellschaft mbh, Köln, 1998, 2. ed., pp. 53.

Forbidden under the Law are in particular, the conclusion of agreements that restrict competition, the abuse of a monopolistic position with the intention of discriminating against other market participants (here, actions that damage the rights of other market participants are deemed to be an abuse). Unfair competition as such is forbidden and the law gives examples of activities that are regarded as unfair competition, such as "the attainment of a competitive advantage through the use of dumping prices misleading consumers". This and other terms of the law are quite uncertain, which means that they will have to be clarified by application and court practice.

The Law also introduces the term "Natural Monopolies", an approach that is applied in many transitional countries. The Registration of "Natural Monopolies" is executed according to the Ordinance of the President of Georgia "On State Register of Natural Monopolies", from May 20, 1996, according to which the monopolies comprise of the state post service, the frequency management, the railway lines, the main tube of "SakGaz", the high-tension electro-transmission system" of "SakEnergo", the air-space itinerary and controller's office of "SakAeroNavigation", the Poti and Batumi and Sukhumi sea ports.

12. Currency Transfer

Currency legislation in Georgia does not stipulate any impediment to the free transfer of payment from or to other countries, there does not even exist any specific legislation on currency operations from Georgia to abroad. However for international payments certain restrictions in practise have to be considered; these are mainly due to the principle that the Georgian Lari is considered the only legal tender in Georgia. As a consequence all payments in Georgia should be effected in Georgian Lari.[10]

13. Standardisation, Certification

International standards and the harmonisation of certification procedures facilitate world trade by removing import and export impediments. The relevant Georgian legislation is still not consistent with international norms and is undergoing a thorough restructuring that is to a large extent connected with Georgia's accession to the WTO. Part of this process will be the decentralisation of responsibilities and competence and the introduction of a system with voluntary standards. However the achievement of this aim has been delayed by the argument that quality control of products would not be guaranteed under the new system.

For the time being the "Standardisation Law of Georgia" from September 6, 1996, is in force. It does not differentiate between standards and technical regulations, i.e. all standards are mandatory. Product certification that is based on the Law "On Product and Service Certification" is also mandatory. Agreements of mutual recognition of certificates have been concluded with all CIS States, however the practical application of these agreements raises difficulties. Mutual recognition agreements for certification with Israel, Bulgaria, Romania and Turkey are under preparation.

14. Arbitration and Enforcement

Private dispute settlement mechanisms are able to decrease assumed risks for investments and business operation abroad.[11] Although Georgia has enacted a Law on "Private Arbitration" on April 17,

[10] Par. 11 of the Ordinance of the Head of the State of Georgia No. 363, from September 16, 1995, "On putting into circulation the national currency Lari" and Article 3, Par. 10 and Article 4, Par. 11 of the ordinance of the National Bank of Georgia No. 75 from August 19, 1998.

[11] Comp. for the recent development in Germany, *R. H. Kreindler/Th. C. Mahlich,* Das neue deutsche Schiedsverfahrensrecht aus ausländischer Sicht, Neue Juristische Wochenschrift, 1998, pp. 563.

1997, its regulations do not meet in all aspects the requirements of international arbitration outlined in the UNCITRAL Model Law from December 11, 1985. Therefore amendments or a separate law on international arbitration are expected in the near future.

However the existing legislation does not prevent companies from appealing to foreign arbitration courts. The awards of these can then be enforced in Georgia; the Georgian Parliament ratified the following decrees on February 3, 1994: on accession to the New York Convention of 1958, and on the Recognition and Enforcement of Foreign Arbitral Awards. Although the relevant provisions are still missing in Georgian legislation the Convention is directly applied by the Courts of Georgia on the basis of Article 6 of the Constitution.

15. State Procurement

Georgia enacted a Law "On State Procurement" on December 9, 1998, based (with some amendments) on the ideas and the structure of the UNCITRAL model code. It sets out the framework for all tenders to fulfil State procurement. Procurements that exceed 70.000 GEL in general and in case of procurements for construction work 230.000 GEL have to be openly tendered. An international tender invitation has to be carried out, if the respective amounts exceed 600.000 and 8.000.000 GEL. For these the domestic applicants enjoy a 15 % price-preference. In the case of procurement of construction works, a minimum of 70 % of the engineering-technical personnel and of workers involved in construction should be citizens of Georgia.

A special State procurement department under the Ministry of Economy of Georgia is to be established; this department is also to elaborate the by-laws that are still required before the Law might be properly applied. Once the law (including its by-laws) is applied in the day-to-day procurement activities of Georgian State bodies it will contribute to transparency in administration guaranteeing a necessary standard of reliability, this being one of the reasons why the World Bank and other international institutions demanded the introduction of such a law.

16. Natural Resources, Oil and Gas Sector

The Oil and Gas sector is generally expected to become a very important target for foreign investment, because Georgia has modest but promising resources. The Georgian Parliament passed recently in the first reading a Petroleum Law. This law includes regulations affecting production sharing contracts. However before the final enactment of this law (including regulations on the establishment of an interministerial committee that is responsible for the conduct of the operations related to Oil and Gas production and utilisation on behalf of the State) there has to be found a consensus between the competing State organs. After this and other amendments concerning the structures of production sharing agreements (e.g. the definition of the parties of the contract, i.e. the state oil company or a separate ministry and the investor), the regulation is likely to correspond to the international standards.

17. Conclusion

Since its declaration of independence in 1991 Georgia has completed an enormous legislative programme. New investment laws included in this have reached an adequate standard, although many issues are still on the current agenda, for example protection of intellectual property, administrative law and insurance legislation, and licensing of entrepreneurial activity, besides the laws that the Georgian Parliament will have to deal with in its next session, numbering over one hundred. This legislative progress was and will be furthered by the integration of Georgia into the world economic system: i.e. accession to WTO, the ratification of the PCA Agreement and further co-operation/integration with the EU and on a regional level. All these require (appropriate) legislation. The results of this process, together with Georgia's favourable geopolitical location and her traditional cultural relationships with Western Europe, will have the effect of establishing advantageous investment conditions.

MARIAM TSATSANASHVILI*

LEGAL PROBLEMS OF THE INVIOLABILITY OF PRIVACY**

The inviolable nature of human privacy is recognised by a number of international conventions, and reinforced by Article 20 of the Georgian Constitution and other legislative acts. However, the subject is so important that in order to guarantee these rights, an expansion of the legislative base is on the political agenda.

The concept of privacy is a constituent part of the area of the individual's rights and freedoms. On a different level in the development of mankind, its borders were defined by the relationship between the individual and the state. This is why the inviolability of privacy is historically closely related to the development of human rights and the establishment of rule-of-law and of civil society.

Scientists often argue about the concept of “primitive equality”. However, we should also note the so-called “mono norms” that acted during tribal systems. Here the interest of the tribe was seen as being equal to the interest of the individual, and no room was left for the freedom of the individual. Under the casuistic principle, regulated relationships between the members of the tribe had nothing to do with the recognition of human rights. “Mono norms are merely the indicators of socioism in the tribal society.”

In the first states, democracy policies prepared grounds for people to be recognised as individuals, and consequently for personal human rights. During the feudal era, some of the relationships associated with private ownership were starting to develop, without regulation by the state, society or church. In these relationships, “freedom space” was created where elements of “privacy” were upheld. We should therefore note that the idea of equality, originated during this very period, became a base for the conception of natural human rights. Corporations (orders of knights, monks and other similar organisations) of Medieval times were the public institutions that declared the idea of equality. This is why medieval law strictly defends the status of all corporation members. The turning points in the development of human rights are considered to be the 1215 “Great Charter of Freedom”, the 1628 “Petition on Rights” and the 1679 “Bill of Rights”. With the oppression of Royal authority, these Acts sought to expand the rights of Medieval English title-holders and corporations. Society’s conscience was greatly influenced by the Christian ideal of human equality before God. The development of corporate and confessional concepts of equality have encouraged *J. Locke, H. Grotius, Ch. Montesquieu, J. Rousseau, B. Spinoza* and others to justify the theoretical ideas of the importance of human rights. Their practical results can be seen in the 1791 “Bill of Rights” (USA) and the 1789 French “Declaration of Human and Citizen Rights”.

---

* *Mariam Tsatsanashvili* is Referent of the Office of Legislative Activities and Parliamentary Relations to the President of Georgia.

** Translation from Georgian language by *GEPLAC*.

Both of these Acts are a consequence of the bourgeois revolution, and reflect the “negative” freedom of the individual, meaning the freedom everywhere and in everything, known in literature as “the rights of first generation”. However, it is worth noting that any “negative” private right defines, more or less, the frames and boundaries of private life. Before these rights became part of legislation, the principle idea behind them was lacking in structure. Together, the collection of these negative rights comprised the right of the inviolability of privacy. At least a century later, this was acknowledged and fortified under the legislative order. The "Bill of Rights" prohibits the US Federal Government from adopting laws that may limit natural human rights. In this case, human rights are formed not as a right of the individual, but as a limitation of state intervention into the “free space” of the individual. Subsequently, with regard to the state, the Bill of Rights construes the individual as a subordinate. The French Declaration distinguishes the rights and freedoms of the individual and the citizen.

Human activity contains an air of independence, where the individuals' own interests are their driving forces. The existence of such an interest is possible only in a civil society, based on property, family and the scope of privacy. From birth, a human is given this liberty as a natural right. In such cases, society's vocation must be to limit its intervention into the privacy of the individual, and to restrict the interference of other individuals. Whilst such a scenario underlines the need to protect the privacy of the individual, it does not give rise to an absolutism. The limits of intervention are always defined by balancing the interests of the modern society with those of the specific individual and of the state.

Communist ideology established another sense of “the space of human rights and freedoms”. Denying private ownership minimised the material influence on personal human relationships. *Marx's* concept was that the State “gives” rights to humans as a gift, so it may (and is obliged to) define the size and nature of human rights. The socialist experience has shown that social rights (or “rights of second generation”) have been moved to the first stage, due to the paternal role of the socialist state.

Under modern classification, personal human rights are the “rights of first generation”, and there are two ways of protecting them – constitutionally and through international law (one of the latest acts is the 1950 European Declaration on Human Rights). Both means aim to further various aspects of the protection of human rights. Concentration on this issue has led to a complex new field of study being formed – the “inviolability of privacy”, which will be considered separately. It is clear that human rights need huge legislative regulation, otherwise their protection from the state, and their provision of guarantees, would be impossible. The legal regulation of privacy aims not only to defend its inviolability, but also to guarantee that the right is implemented. It is important to take into account the optimal midpoint of interests between the individual and the state or society.

In recent years, legal status has been granted to the protection of private life, giving added prominence to the concept of privacy. This concept was at first mainly characterised by the idea of territorial space, with its roots based in western traditions. The British saying, “my home is my castle”, means that a human’s residence is an inviolable shelter, where he has the right to be left in peace. This concept can be extended to cover, for example, real estate (a plot of land) or physical space (a room in a house or hotel).

However, the individual is surrounded not just by physical space but also by intellectual space. This intellectual space emerged with the birth of mankind and is a necessary condition for the development of society.

Intellectual space is defined as a physical space where the circulation of information takes place. This stream of information covers its movement through time and space. Movement in space requires the

transmission of information, whereas movement in time is merely the maintenance of such information. The individual human is the main source, as well as the main user of this information. He is interested in the circulation of information as, being a creature of intellect, it is essential for his existence. However, for a number of reasons, the individual may like to restrict and control the circulation of sensitive information, such as that about their private life.

A human being has the right to control the circulation of personal information between his own personal space and the outside world. This is his natural right, and the concept of privacy is characterised with territorial and informational space-marks. The root of this idea came many years ago after the publication in a Boston newspaper of minor details about a wedding. The furious father of the newlywed couple, Boston lawyer *Samuel Warren*, and his colleague *Louis Brandaise*, began to consider the acceptable confines of press interest in private lives. In 1890, they wrote an essay entitled "The Right of the Inviolability of Privacy", which soon became the most significant article about the legal matters of privacy. The authors of the concept of privacy have also declared that privacy decreases in line with scientific technical achievements. This clearly suggests that the legal protection needs to be updated regularly.

Analysis of legal precedents makes clear that, from the very beginning, the threat to privacy mainly came from the publication of private information in the press. It is therefore worth noting that the reason the data entered the public domain was the significant advancement of technology in the press (polygraph achievements, instant photos). This progress has turned the press into a genuine "mass media".

Warren and *Brandaise* sought the theoretical basis for the legal protection of privacy in common law. Respectively, this concept should chiefly be viewed in connection with civil society, alongside the principles of common justice.

In the 1950's, *U. Prosesre* published a work dedicated to tort law, where he tackled the topic of the inviolability of privacy. As long as the main users of personal data were from the mass media, tort law was enough to guarantee the protection of privacy. In recent years though, the collection and use of personal data via new optic and radio-electric instruments, has radically changed the situation. Reacting to these new methods, and in response to the new threat they presented, lawyers resorted to the traditional tort "violation of the right of possession". Unfortunately, this method was doomed to failure from the start, as the new remote instruments of secret surveillance made no physical impact on "the right of possession" of others. In practice, the individual may never have known about the violation of law, or about the person conducting it. Ever since secret surveillance has been operated by bodies in the public sector (security, law enforcement authorities etc.), the legal protection of personal data has been increased, as secret surveillance has effectively become regulated. According to *L. Shoiom*, the right of privacy has become politicised, resulting in the personal right acquiring public legal significance.

As personal data began to be processed by computer systems, the necessity further increased for a mechanism that would protect the inviolability of privacy. Software programs have been developed that are capable of matching personal data from various bases, banks or files. It is possible to have a practically complete picture of an individual. The state (for government purposes or for political or criminal search), as well as private corporations (consumer, credit, trade, insurance etc.), is interested in forming personal data banks. Under these conditions, it has become necessary to install a complicated and multilateral legal mechanism to protect personal data. In the present situation,

information about a person might be considered an economic commodity and a means of authorisation.

This critical situation has encouraged society to properly consider the concept of privacy, and has increased pressure on the government to focus on the protection of privacy and "personal data". If we also note that personal data passes through international telecommunication networks, with cross-border data flows, the reality and complexity of the problem becomes obvious. We should not object to the freedom of international exchange of information. Neither though should we avoid establishing guarantees for the extra-territorial protection of personal data, through harmonisation of national legislation with international contractual obligations.

The practice in other countries of protecting personal data has been developed in two directions: firstly by adopting acts concerning Data Protection, and secondly through acts concerning the Freedom of Information. In this respect, the following acts are of particular interest: the Austrian Law "On Data Protection" of 1978, the French Law "On Data Processing" of 1978, the Danish Law "On Public and Private Registration" of 1979, the British Law "On Data Protection" of 1984, the Finnish Law "On Personal Data Files" of 1988, the Belgian Law "On Data Protection" of 1992, the Japanese Law "On keeping of Computer Processed Personal Data by Administrative Bodies" of 1989, the Federal Act of Germany "On Data Protection" of 1990. Further significant advances in national legislation are the Directives of the European Parliament "On Protection of Data Bases" of 11 March 1991, and "On Protection of Computer Programs" of 14 May 1991. See also the Convention "On the Protection of Individuals with regard to Automatic Processing of Personal Data" (Convention No. 108) of the Council of Europe of 1981.

Analysis of this legislation shows that personal data is divided into two categories: "neutral" (non-delicate) and "sensitive" (delicate). The spread of neutral information is not seen as harmful to the subject of the data. However, we all consider delicate personal information to be sensitive, in that the subject of the data considers it to be intimate and confidential and would like to restrict its circulation. Examples of sensitive information would include an individual's political views, religious or philosophic beliefs, health status and sexual life, social or economic status, criminal record, etc.

When processing this information, the written consent of the data's subject should be received before any work is done. Therefore, the individual must be informed about the publisher's purposes, and in the case of refusal of consent, about any resulting action.

The law must take into account the confidential nature of delicate personal data, and seek guarantees of secrecy from all persons in the civil service who are authorised to process the information. It must also carefully monitor private law, through the issuing of licenses authorising the use of data. It should also be taken into account that the obligation of confidentiality remains even after the authorised person has finished its term of employment. Hence, this authorised person should be responsible for any physical or moral damage caused to the subject of the data processing. However, the individual's consent on the processing of sensitive data is not always a conditional requirement. Where the purpose of the process is to protect the individual's freedom, health or privacy, the performance might be admissible under law without the consent of the data subject. However, it must strictly be carried out under the control of the body responsible for data protection.

Practically speaking, any state that has adopted an act similar to the Data Protection Act considers that the existence of a national data protection body (or bodies) is an essential component in the legal regulation of the processing of personal data. These bodies serve registration, licensing, control,

supervision, advisory and executive purposes. It is very rare for the body to be given administrative, authoritative or investigative powers. For instance, Austrian legislation recognises the existence of the Data Protection Board and Commission, Finnish legislation is familiar with the Ombudsman and Data Protection Panel and specialised tribunal courts exist in Great Britain.

It is particularly interesting that in Georgia, data protection has become a subject for the specific protection of natural human rights. These rights have been put at risk by new mechanisms and methods of data processing. Similarly threatening is the unconditional freedom of information that exists, without an information protection mechanism. The 1997 Law of Georgia "On Measures against Corruption and Conflicts of Interest in the Civil Service" sought the declaration of officials of their interests in property, and of their financial standing. According to Article 18 of this Law, the contents of the declaration shall be accessible for the public. In this case, publicity might follow, with severe results. However, justice should not only be found in reaction to a past act, but also in preventative measures that guarantee acts of fairness.

Western countries experienced a gradual intrusion on personal data, first through the mass media, then through computerised processing, and finally through cross-border transmission. This is why their legislation also developed gradually, through individual law cases. In Georgia, in view of the freedom of the mass media and the increasing computerisation, the threat to personal data is two-pronged. With this in mind, in our opinion the law on personal data protection should be drafted using the following system:

1. Principles of personal data protection;
2. Contents of data protection;
3. Subjects of data processing and their rights and duties in the process of data processing;
4. Mechanism of access to the personal data of others;
5. Blocking of data for state or public security, for the investigation of crime and other similar cases;
6. Stipulation of administrative regulating measures of personal data processing;
7.

a) Establishment of national body (or bodies) for personal data protection;
b) Registration of personal data (or licensing). Establishment of Public Register for possessing and using personal data;
c) Licensing the transmission of personal data outside the state;

8. Identifying technical and organisational measures in order to provide security in data processing;
9. Identifying the responsibility for the violation of the rules of data protection, and the peculiarities of examining cases in this category.

ANDREA GYULAI / OLAF ZWETKOW *

THE HUNGARIAN ACT ON ECONOMIC ADVERTISEMENT IN VIEW OF HARMONISATION WITH EU-LEGISLATION**

A. INTRODUCTION

Along with the expansion of mass media, advertisement, as a carrier of information, has become a factor of economic power. It is used not only for the unselfish aim of communicating information to consumers but rather creates their attitudes, tastes and demands and finally influences the demand on the market.[1] In order to protect consumers and competitors from possible infringements of their rights an appropriate regulation of advertisement is needed.

Within the European Union a number of directives exist that aim at granting uniform guarantees and basic principles in the Member States. Among them are especially to mention the Directives on Misleading Advertisement[2] (84/450/EEC[3]) and TV Commercials (89/552/EEC[4]), as well as the recently adopted one on Comparative Advertisement (97/55/EC)[5].

These directives are not designed to provide an overall regulation for the whole sphere of advertisement, but extend only to some of those problems that have a strategic importance for the Union. According to this Member States have to establish their legislation on advertisement with paying special attention to the freedom of competition, freedom of opinion, freedom of trade and freedom to choose a profession and to avoid possible negative results of advertising activities. Thus, an optimal balance of rights and restraints in the sphere of advertisement should be achieved.

In order to attain a rapid accession to the European Union the Hungarian lawmaker follows mentioned objectives as well.[6] As a consequence, the Act on Advertisement that has been adopted last year is

---

* *Andrea Gyulai* is Research Assistant at the Faculty of State and Law, Budapest Catholic University, and *Olaf Zwetkow* is Research Assistant at the Department for Research of Eastern European Law of Hamburg University.

** Translation from German language by *GEPLAC*.

1 Comp. for the history of advertisement: *H. Buchli*, 6 000 Jahre Werbung, Vol. I, Berlin, 1962; on advertising law: *I. Scherer*, Privatrechtliche Grenzen der Verbraucherwerbung, Berlin, 1996, p. 22; a thorough overview on advertising activities and legislation on advertisement in Hungary is provided by *T. Nochta*, Reklám es reklámjog (Advertisement and legislation on advertisement), Dolgozatok az állam és jogtudományok XVIII (treatises on the sciences of state and law), Pécs, 1987, p. 200.

2 In general called Directive on Misleading Advertisement. See, e.g., *P. Schotthöfer* (ed.): Handbuch des Werberechts in den EU-Staaten einschließlich Norwegen, Schweiz, Liechtenstein und USA, 2nd ed., Cologne, 1997, p. 7.

3 O.J. L 250, 19 Oct. 1984, p. 17.

4 O.J. L 298, 17 Oct. 1989, p. 23.

5 Directive on amendments to the Directive on Misleading Advertisement (84/450/EEC) with the Objective of Including Comparative Advertisement of October 6, 1997, O.J. L 290/18, 23 Oct. 1997. This Directive extended the Directive on Misleading Advertisement by the provisions on comparative advertisement. Consequently, its title was renamed by Art. 1 No. 1 of the new Directive in "Directive on Misleading and Comparative Advertisement".

6 It is noteworthy that Hungary considers EU law not only after having filed an application for accession to the EU; the development of European law has been a subject of observance for Hungary for many years (see, e.g.: *F. Madl*, Az EGK joga [EU law], Budapest, 1974). At the very beginning of the emerging common European market, the government of Hungary issued the decrees No. 2023/1988 (Határozatok Tára, 24 Sep. 1988, No. 8, p. 23) and No. 2006/1990 (Határozatok Táara, 24 Mar. 1990, No. 4, p. 7), according to which juridical acts of Hungary were to be worked out considering European law. A step by step approximation of Hungarian legislation with that of the European Union was acknowledged as a desired goal.

not only the first unified law on advertisement in the history of Hungary but a result of the harmonisation of Hungarian law with that of the European Union.[7]

On the one hand the present contribution will introduce the Hungarian Act on Advertisement and on the other hand we would like to show whether it complies with the requirements of European law and whether or not further steps for harmonisation have to be implemented by the Hungarian lawmaker. For this purpose, we will briefly review respective European directives and afterwards the new Hungarian Act on Advertisement will be analysed in view of its compliance with the criteria mentioned in the directives. Provisions of German law on advertisement will be considered and compared, where it is appropriate.

B. JURIDICAL NORMS OF THE EUROPEAN UNION REGULATING THE SPHERE OF ADVERTISEMENT

On the European level only few juridical norms directly regulating advertising activity exist. For this reason, the European advertising law is sometimes called a "torso".[8] The legal source of primary legislation essentially is Art. 100 a of the Treaty establishing the European Community (hereinafter ECT). From secondary legislation are to mention especially the Directive on Misleading Advertisement, the Directive on Television and the new Directive on Comparative Advertisement. Moreover, the Directive on Advertisement on Pharmaceuticals for Human Application comprises a number of provisions concerning advertisement. Besides, several particular provisions are incorporated in some other directives and regulations that aim at the technical unification of various types of products.[9] The latter will not be made subject to a deeper analysis in this essay.[10]

The reason of somehow slack activity of European bodies is the distribution of competencies for the regulation of the law on competition between the Member States and the Union itself. The competence for the regulation of the law on advertisement is in general given to the Member States. The Union has a competence for regulation of the law on advertisement only concerning those issues where from the national rules on advertisement derive restraints for competition within the internal market. Here, the principle of subsidiarity according to Art. 3 b, Par. 2 ECT and the principle of proportionality according to Art. 3 b, Par. 3 ECT are applied thus leaving the Union the authority of regulating only remaining aspects.[11]

1. DIRECTIVE ON MISLEADING ADVERTISEMENT

Basic legal provisions of EU law on advertisement can be found in the Directive relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States concerning Misleading Advertisement.[12] Its Art. 2, Par. 1 defines the notion "advertisement" as "any communication that promotes the performance of trade, business, handicraft or a free profession with

---

[7] Law on Commercial Activity No. LVIII/1997, Magyar Közlöny (M. K.) 1997, No. 59, p. 4458; German and English translations: Hatályos magyar jogszabályok (norms of effective Hungarian law) 1997, No. VIII/16; Articles without additional explanation refer to this law.

[8] *R. Wägenbaur*, Werberecht und Werbeverbote, Europäische Zeitschrift für Wirtschaftsrecht (EuZW), 1995, p. 431 (432).

[9] For example, Directive 79/112/EEC of December 18, 1978, which is aimed at converging juridical norms for labelling and design of food-products that are determined for the final consumers and the advertisement thereof in Member States, O.J. L 33, 8 Feb. 1979, p. 1. This is one of the first directives having a restricting impact on competition.

[10] Comprehensively about norms of European law prohibiting advertisement: *G. Perau*, Werbeverbote im Gemeinschaftsrecht, Gemeinschaftsrechtliche Grenzen nationaler und gemeinschaftsrechtlicher Werbebeschränkungen, Baden-Baden, 1997.

[11] *T. Stein*, Freier Wettbewerb und Werbeverbote in der Europäischen Union, EuZW, 1995, p. 435.

[12] Directive 84/450/EEC of September 10, 1984, O.J. L 250, 19 Sep. 1984, p. 17.

the purpose to increase the sale of goods or the performance of services, including those related to movable property, rights and obligations".

According to Art. 2, Par. 2 of the Directive "misleading advertisement" is "any advertisement that in any way – including by its design – deceives or is appropriate to deceive persons to whom it addresses and by means of immanent wrong information displayed in it, is able to influence their economic behaviour or as a consequence harms or may harm the competitor". In order to define the extent of the deception according to Art. 3 of the Directive it is necessary to consider all particular factors of an attacked advertisement, e.g. the characteristics of the good or service, the price and way of pricing, its determination, and also the character of the person who is advertising. The Directive waives to list typical examples, like it is done by some Member States for the aim of implementation of the Directive. The Directive provides the prohibition of misleading advertisement just by giving a blanket clause.

Art. 4, Par. 1 of the mentioned directive requires from the Member States to provide judicial and/or administrative mechanisms to combat misleading advertisement. For this purpose, pursuant to Art. 4, Par. 2, they have to establish the opportunity to use accelerated procedures. Meanwhile, this directive has already been implemented by all Member States.[13]

2. DIRECTIVE ON TELEVISION (TV DIRECTIVE)

The second directive of significant importance in the context of advertisement is the so-called TV Directive.[14] It is applicable for all types of television broadcasting within the Union. A special chapter of the Directive covers advertisement on television and the financing of television-commercials.

In addition to formal requirements on the placing and shape of commercials, the mentioned directive provides for a great number of material restraints for advertising. According to Art. 10, Par. 3, the use of subliminal techniques in television-commercials (not consciously perceptible advertisement) is without exemptions prohibited as well as surreptitious advertisement, Art. 19, Par. 4. According to Art. 12 of the Directive, the advertisement must not violate human dignity as well as discriminate on the basis of race, gender or nationality. Furthermore, it is prohibited to violate religious or political beliefs and television-commercials must not encourage actions damaging health, safety or the protection of environment.

According to Art. 13, it is completely prohibited to advertise cigarettes and other tobacco products as well as medicaments that need doctor's prescription (Art. 14). Pursuant to Art. 15, it is allowed to advertise alcoholic beverages only provided that strict criteria are observed, according to which minors must not be addressed and it is forbidden to create a suggestion that evokes the impression that alcohol consumption increases personal success.

In order to protect minors from physical and spiritual traumas Art. 16 of the mentioned directive provides for additional criteria. TV commercials must not contain direct call-ups to purchase that abuse their inexperience and naivete. Besides, advertisement must not make them urge their parents or others to obtain advertised goods or services. Besides, the advertisement must not abuse that special confidence, which juveniles have in their parents, teachers or any other trusted person.

[13] Some countries, including Germany, for justified reasons regarded that their rules on advertisement were sufficient for the implementation of the mentioned directive.

[14] Directive 89/552/EEC of October 3, 1989 on Co-ordination of certain Juridical and Administrative Provisions of Member States in the Sphere of Performing TV Activity, O.J. L 298, 17 Oct. 1989, p. 23.

Finally, it is inadmissible to show juveniles in dangerous situations without proper reason. According to Art. 22 - which is the only provision of Chapter V that explicitly serves the protection of juveniles – are all programs prohibited, that may severely violate the physical, mental and moral development of minors, especially pornography or gratuitous violence.

Art. 17 of above said directive defines requirements that should be met by TV programs that are funded by sponsors. They are formal requirements like, for example, where and when should the sponsor be named and how many times may the program be interrupted for advertising purposes. Par. 2 and 3 of Art. 17 provide for material restrictions of advertisement. Art. 17, Par. 2 prohibits to fund programs by those sponsors, whose major activity implies production of such commodities and services that are forbidden to be advertised in compliance with Art. 13 and 14. Art. 17, Par. 3 prohibits funding of news programs for political purposes.

3. DIRECTIVE ON COMPARATIVE ADVERTISEMENT

After long discussions in October 1997 the European Parliament and the European Council adopted the Directive on Comparative Advertisement that had been expected for some time.[15] Already in the 6th consideration of the motivation to the Directive on Misleading Advertisement has been announced its extension by the Directive on Comparative Advertisement, but the decision making had been delayed by several years due to permanently new arising concerns of the Member States.

With the new directive a new Art. 3 a was introduced to the Directive on Misleading Advertisement, which declared comparative advertisement as acceptable but introduced a number of restrictions.[16] Comparative advertisement must not be misleading in the sense of Art. 2, Par. 2, 3 and 7 of the Directive on Misleading Advertisement. Goods and services may be compared only in case when they meet similar demands or serve an identical aim. A comparison must be impartial and may only extend to essential, relevant, verifiable and typical characters of the goods and services compared. The price is explicitly included in these so that the comparison of prices will be admissible after implementation of the directive.

Another precondition for the use of comparative advertisement is that it should not lead to confusion with regard to the identity of the advertising person and his competitors, neither with respect to the enterprises themselves nor with respect to the trade marks and commercial names used by them or the offered products or services. As a matter of fact it is prohibited to depreciate another name as well as the unfair exploitation of the reputation of a competitor or his products and the imitation of protected products. With regard to comparing discount-offers precise information on the period of validity of the offer is required.

Further, the new directive complements the provisions of the directive on misleading advertisement with provisions that take into account the special characteristics of comparative advertisement.

Moreover, special attention should be drawn to the fact that the rules provided by Art. 3 a of the Directive on Misleading Advertisement refer only to the permission of the actual comparison of goods and services. Form and expression of such kind of advertisement are further subject to the up to now existing rules, especially the rules on fairness.

---

[15] Directive 97/55/EC of October 6, 1997, O.J. L 290, 23 Oct. 1997, p. 18.

[16] The amount of mentioned restrictions was the main reason for the start of a long lasting dispute among Member States, comp.: *R. Wägenbaur*, Vergleichende Werbung in der EU, EuZW, 1998, p. 34.

4. RULES ON FIELD ADVERTISEMENT

Several provisions of secondary law contain rules on field advertisement, such as rules on tobacco products and pharmaceuticals.

a) Advertisement of Tobacco Products

Here, in the first place are to mention the discussions on the rules on tobacco-advertisement that in the recent months took place in the European Parliament, the Commission and the Council. The European Commission in 1989 promulgated first suggestions on a Directive on Tobacco Advertisement. But this initiative was opposed by the European Parliament, for the latter demanded entire prohibition of advertising of this product. The much stricter proposal submitted by the Commission in 1991 did not find a majority as well. At the end of 1997, discussions were resumed when the European Parliament again advocated the idea of an entire prohibition. Despite the opposition of the German government and almost all German members of the European Parliament[17], a strict prohibition was adopted which is more far reaching than the prohibition of advertising tobacco on TV existing before then.[18] As a result, starting from 2002, it will be prohibited any public tobacco advertisement, including the until now admissible movie-advertisement and the financing of sports by tobacco producers.[19]

b) Advertisement of Pharmaceuticals (Medicaments)

On the other hand, the Directive on Advertisement for Pharmaceuticals for Human Application assumed a great importance[20], which demands from Member States to establish mechanisms for controlling advertisement of pharmaceuticals that are similar to those of the directive on misleading advertisement. Pursuant to Art. 2, Par. 3, advertisement on pharmaceuticals should facilitate their use according to the rules, which requires displaying of their peculiarities impartially and without exaggeration. Besides, such advertisement must not lead a consumer astray.

Advertising of those pharmaceuticals, which need doctor's prescription or contain psychotropic elements and narcotic substances, is completely prohibited. It is allowed to advertise pharmaceuticals that do not need a prescription (Art. 3, Par. 2 of the Directive), though the advertisement has to contain the indications according to Art. 4. Art. 5 of the Directive prohibits advertisement of medicine in a way that evokes the impression as if use of it improves ordinary good health of a patient, does not have any side-effects, makes a medical examination superfluous etc.

In addition, the third chapter of the Directive provides detailed rules, in how far doctors, apothecaries or other persons engaged in the health care sector are allowed to advertise pharmaceuticals.

---

[17] The mentioned advertising prohibition was adopted on May 13, 1998, comp. Handelsblatt No. 92, 14 May 1998, p. 1; comp. *H.-P. Schneider*, Tollhaus Europa. Unzeitgemäßes zum Werbeverbot für Tabakerzeugnisse, Neue Juristische Wochenschrift (NJW), 1998, p. 576, opposite opinion: *N. Reich*: Tollhaus Europa oder Narrenschiff Staatsrecht? Einige Bemerkungen zum Kommentar von *Schneider* in NJW 1998, S. 576, NJW 1998, p. 1537.

[18] Compare also the results of the 1998 conference of ministers of health care and recent discussions about advertising tobacco products in Germany, which appeared along with the balloting for the "Law on Restrictions for Advertising of Tobacco Products" in the German Parliament on February 17, 1998.

[19] About the history of restrictions on advertisement for tobacco products and proposals suggested by the Commission, see *Wägenbaur*, Werbeverbote, p. 433.

[20] Directive 92/28/EEC of March 31, 1992, No. L 113, 30 Apr. 1992, p. 13.

C. THE HUNGARIAN LAW ON ADVERTISEMENT

I. THE ORIGIN AND THE AIM OF THE LAW

Since the political changes that have taken place in 1989/1990, fundamental reforms were implemented in all economic, political and legal spheres of Hungary[21]. The aim of these reforms was to develop Hungary into a modern state and to accede to the EU as soon as possible. A prerequisite for this is to reform the Hungarian legal system with a "maximum"[22] approximation with EU law[23]. With regard to this Art. 68 of the Europe Agreement defines the most important fields of harmonisation of legislation.[24] In this context the advertising law, being a constituent part of competition law as well as consumer protection law, plays a special role since its approximation means an essential precondition for economic integration.

In order to attain the objectives of integration, the Hungarian lawmaker has already established the most important democratic and market driven basic structures[25]. As a part of the mentioned legislative procedures after intensive preparations has been adopted the long expected Law on Economic Advertisement (No. LVIII/1997).

At the codification of the rules on advertisement the lawmaker followed two objectives. Firstly, a unified law had to be adopted that replaces the scattered and often contradictory rules, which have its origins in the socialist legal system[26], and that at the same time meets the requirements of the modern Hungarian market. Secondly, with the development of this law, Hungary continued its strategy to approximate its legislation with that of the European Union.

---

[21] We should not ignore the fact that Hungary was trying to strengthen elements appropriate for the market economy and attract foreign investments even before implementation of the reforms. Despite this, significant changes in advertising law were implemented only after 1989. For details see footnote 25 below.

[22] For example, formulation of Art. 67, Par. 2 of the Europe Agreement of December 16, 1991 (Agreement on the Establishment of an Association between the European Communities and their Member States on the one hand and Hungary on the other hand), O.J. 1993, No. L 347, 31 Dec. 1993, p. 1 = M. K., 1994, No. 1, p. 1 = BGBI. II/1993, p. 1473; complete text: "Hungary shall act to ensure that future legislation is compatible with Community legislation as far as possible".

[23] Concerning first attempts of harmonisation, see *A. Vida*, Ungarns freiwillige Anpassung an das Europarecht, Wirtschaft und Recht in Osteuropa (WiRO), 1994, p. 4.

[24] These are: customs law, corporate law, banking law, accounting and taxation system, intellectual property, labour safety at workplace, financial services, rules on competition, protection of health and life of human beings, animals and plants, legislation on foodstuffs, consumer protection including product liability, indirect taxation, technical regulations and norms, transport and environment.

[25] The strategic laws for the establishment of a framework for transition to a social market economy are: Law on Corporations of October 10, 1998, No. VI/1998 (M. K. No. 47, p. 1093); Law on Foreign Investments in Hungary of December 31, 1998 No. XXIV/1998 (M. K. No. 69, p. 1708); Law on Economic Associations and Reformation of Societies of June 13, 1998, No. XIII/ 1989, (M. K. No. 38, p. 665); Law on Securities and Sales on Stock Exchange of February 13, 1990 No. VI/1990, (M. K. No. 13, p. 228), substituted by the Law on Securities Flow, Investment Activity and Stock Exchange of December 12, 1996 No. CXI/1996 (M. K. No. 109, p. 6105 with further amendments); Law on Prohibition of Unfair Competition No. LXXXVI/1990 (M. K. No. 121, p. 2361), substituted by the Law on Prohibiting Unfair Competition and Restricting Competition of July 3, 1996 No. LVII/1996 (M. K. No. 56, p. 3498); Law on Prices of December 5, 1990 No. LXXXVII/1990 (M. K. No. 121, p. 2383); Law on Accounting of June 11, 1991 No. XVIII/1991 (M. K. No. 63, p. 1155); Law on Financial Institutions and Financial Activity of November 30, 1991 No. LXIX/1991 (M. K. No. 123, p. 2672, etc.

[26] Norms effective in the sphere of commercial advertising activity before this were based on various laws and instructions of different bodies, which, in most cases, considered prohibitions and restrictions. For example: No. 12/1972 Decree of the Minister of Trade on Implementation of Advertising Activity within the Country of June 5, 1972 (M. K. No. 44, p. 498), substituted by No. 10/1986 Decree of the Minister of Trade on Implementation of Advertising Activity within the Country of October 11, 1998 (M. K. No. 43, p. 1130); No. 19/1977 Decree of the Minister of Trade on Restriction of Trade with Alcoholic Beverages of December 20, 1997 (M. K. No. 95, p. 1288); No. 1/1978 Law on Trade within the Country of April 6, 1978 (M. K. No. 22, p. 233) substituted by the Law of September 17, 1986 (M. K. No. 40, p. 1045).

II. SPHERE OF APPLICATION OF THE LAW ON ADVERTISEMENT

Pursuant to its Art. 1 the law refers to advertisement activities of physical persons and legal entities as well as economic entities without having the status of a legal person, which carry out their advertising activity on the territory of Hungary as a customer, producer or publisher of advertisement.

It is noticeable that the Law on Advertisement is not in favour of a broader application based on the strict territorial principle – which in fact is commonly practised in general competition law - and refers only to those persons who carry out their advertising activity on the Hungarian market. It would have been possible as well to apply the so-called principle of action, according to which the Law should have referred to any person influencing Hungarian market by its activity. According to this principle, the direct conduct of advertising activity on the Hungarian market is not a necessary condition and it is sufficient that a Hungarian consumer only has a possibility to perceive the advertisement.[27] This approach has been introduced to the considerations of motivation of the Directive on Comparative Advertisement, too. In the light of the continuous globalisation of advertising activity – for example, the concept of "Internet-ads" might serve as an example – the Hungarian legislator might have served as a progressive example for other countries.

The new Law on Advertising Activity - similar to previous regulations - covers only those elements of commercial advertisement that are related to the content. The so-called formal elements[28] of economic advertisement are partially regulated by the Law on Mass-media.[29] Other formal provisions will be included in the Law on Outdoor Advertisement in Public Places, which will be adopted in the near future.[30] As an exemption can be regarded the provisions on the form of the registration of advertisers, which is regulated in detail by the Law on Advertisement itself.[31]

Similar to Art. 2, Par. 1 of the European Directive on Misleading Advertisement, the political[32] and social[33] advertising activities do not fall under the scope of regulation of the Law on Advertisement and are subject to regulation by a separate law. Besides the discussed law, additional provisions exist, for example, in the Law on Prohibition of Unfair Market Behaviour and Restriction of Competition[34] or in the Law on Mass-media[35], which include additional specific provisions in the sphere of economic advertising activity.[36]

---

[27] For example, within the sphere of international cartel law, the principle of influence has been further extended. From the standpoint of the international competition law, the part of which is advertising law, extension of the sphere of application is regarded a positive phenomenon in some cases, in particular: *G. Schricker* (ed.), Recht der Werbung in Europa, Vol. 1, Bonn, 1990, marg. 81; the same: Die Durchsetzung deutscher Werberegelungen bei grenzüberschreitender Rundfunkwerbung, Gewerblicher Rechtsschutz und Urherberrecht (GRUR), 1982, p. 720 (723) with further indications; the same: Etikettierung beim Weinexport und internationales Wettbewerbsrecht (Anmerkung zu BGH GRUR, 1982, S. 495. – Domgarten-Brand), IPRax, 1983, p. 103 (105).

[28] "Formal elements" are defined in the provisions about for how long may TV commercials be limited and the like. To draw a line between "formal" and "material" elements is quite a difficult task and probably even not necessary.

[29] Law on TV and Radio Broadcast (Law on Mass-media) No. 1/1996 of January 15, 1996, (M. K. No. 3, p. 97).

[30] See below.

[31] See below, p. 67.

[32] See Law on Industry and Economic Activity No. XXXIII/1989 of October 30, 1989, Law on Election of the Members of the Parliament No. XXXIV/1989 of October 30, 1989 (M. K. No. 77, p. 1305), as well as the Law on Electing Delegates and Mayors No.LXIV/1990 of August 9, 1990 (M. K. No. 78, p. 1592); then the Law on Mass-media.

[33] For example, non-economic unions, public benefit organisations etc.

[34] See above footnote No. 25.

[35] See above footnote No. 21.

[36] For example, Art. 6 of the Law on Unfair Competition prohibits any advertisement of a commodity and service the form, packaging, indication or name of which is pointing to a competitor without consent of the latter. Paragraphs 10-17 of the Law on TV and Radio Broadcast contain similar provisions regulating electronic means of information.

Simultaneously with the adoption of the Law on Advertisement, there should have been adopted two other laws, namely, the Law on Protection of Non-smokers and the mentioned Law on Outdoor Advertisement at Public Places[37]. Due to political disagreements, they have not been adopted yet. As soon as these laws will be adopted rules on advertising outside the Law on Advertisement will be available. Thus, the above[38] mentioned objective of a uniform regulation on advertisement will be more difficult to realise, even before all provisions entered into force.

On September 1, 1997 the Law on Advertisement was enacted on the basis of its Art. 21, Par. 1. The specific provisions on the indications related to the amount of contained nicotine and other substances will enter into force only on December 31, 1998 according to Art. 21, Par. 2.

III. GENERAL PROVISIONS

1. DEFINITION OF CONCEPTS

The definition list of concepts provided in Art. 2 of the Law serves the aim of uniform application of juridical norms existing in the sphere of advertisement; the list includes various types of allowed and prohibited commercial advertisement[39], concepts of the customer and the consumer of advertisement[40] and other specific ones like, for example, the concept of notions related to the system of curative means[41]. However, such type of list, from the standpoint of legislative technique, may appear not usual for, e.g., German juridical society. For example, the Hungarian lawmaker preferred to list them by alphabetic order instead of classifying by groups of juridical concepts.[42] In result, the concepts “adult” and “minor” are defined right after one another while “child” in other place. The same holds for the concepts of “customer”, “producer” and “publisher” of the advertisement, which due to the simple reason of starting with different letters, were separated from each other, though they are always used side by side in the main text of the Law.

2. FORMAL PROCEDURES

A person, in order to conduct advertising activity in Hungary, has to meet a number of formal requirements. For example, according to Art. 3, Par. 1 of the Law, a customer, ordering an advertisement from a publisher[43] is to inform the publisher or the one who places the advertisement in an understandable way about the name of his enterprise[44] and provide evidence on the place of business and the tax-number.[45] If the advertised commodity is subject to quality examination and verification of the ownership right, the customer of the advertisement, pursuant to the first sentence of Art. 3, Par. 2 of the Law, is to prove that the corresponding investigation has been already performed.

---

[37] See below, p. 72.

[38] P. 65.

[39] Art. 2, lit. b (hidden advertisement), lit. g (commercial advertisement), lit. m (comparative advertisement), lit. s (subliminal advertisement).

[40] Art. 2, lit. a (disseminator of the advertisement), lit. f (consumer), lit. n (customer), lit. o (producer).

[41] Art. 2, lit. i (curative means), lit. j (a person responsible for ordering and implementation of advertisement), lit. k (plants recognised as non-curative means, but possessing healing properties), lit. t (laboratory medicine).

[42] This method is often to be found in Hungarian legislation.

[43] Usually, it may be an advertising agency or, for example, a publishing house.

[44] A more precise term – “in an identifiable form” – is used in English translation. For comparison see footnote No. 7 above.

[45] In case when a disseminator (publisher) of the advertisement, for example, a newspaper or radio broadcasting agency, directly receives an advertisement, i.e. not through an advertising agency, to place, the disseminator is to be submitted relevant explanations. After this, the disseminator is responsible for registration and maintenance of the information. The same holds for other provisions, considering relationship between the customer and the disseminator of the advertisement – comp., for example, the first sentence of Art. 3, Par. 2.

If the advertised commodity is not subject to any examination, a special notice should be made (second sentence of Art. 3, Par. 2).

The producer of advertisement should register relevant documentation in accordance with the fourth sentence of Art. 3, Par. 2, and keep it for one year. It is prohibited to publish advertisement without those relevant declarations (third sentence of Art. 3, Par. 2).

Above listed strict formal requirements are astonishing from a German as well as an entire European standpoint. Neither the German Law on Unfair Competition nor relevant European directives consider such requirements for registration of advertising activities. On the other hand, according to Art. 7 of the Directive on Misleading Advertisement, EU member states are allowed to impose broader restrictions than those required by the Directive. Despite the fact that the registration requirement may seem unusual against the background of anticipated accession of Hungary to EU, it still fully complies with the requirements to be considered at the implementation of directives in the case of accession. In the long-term, Hungarian approach may prove to be too bureaucratic, detached from the reality and too difficult to implement.

IV. ADVERTISING PROHIBITIONS

Artt. 4 – 13 of the Law on Advertisement provide for advertising prohibitions and restrictions.

1. GENERAL PROHIBITIONS IN THE SPHERE OF ADVERTISEMENT

Unlike German Law (Art. 1 of the Law on Unfair Competition), Hungarian law does not consider a general rule in its direct sense. However, there are advertising restrictions that refer to all types of goods and services. They are listed in Artt. 4 – 7 of the Law.

a) Protection of Personality, Safety, Environment and related Legal Benefit

Art. 4, lit. a of the Hungarian Law prohibits any advertising activity that violates personality, piety or personal data-protection rights. Lit. b of this article prohibits advertisements that stimulate violence, endanger personal or public safety or instigate actions damaging environment and nature. Art. 4, lit. c provides for banning advertisements that cause fear.

The common characteristic feature of the mentioned provisions is that there are no analogous provisions in EU directives regulating advertising activity. It shows that the directives regulate only a limited sphere of advertising law while other important issues are regulated by the national legislation of the Member States.[46]

b) Protection of Children and Minors

Protection of children and minors, as a new element, assumes special importance. Art. 5 of the Hungarian Law prohibits placing of such advertisement, which addresses children and minor[47], may

[46] *Stein*, p. 435.; *Schotthöfer*, marg. 12. With that nothing is said on the ways of regulating these spheres by national legislation. For example, Hungarian Law on Advertising regulates specifically advertising restrictions. Contrary to this, German advertising law, pursuant to Art. 1 of the law on Unfair Competition, defines all restrictions in relation with the morals. Though, in this respect, analogous groups existing in Hungarian law have, but from a technical point of view their comparison is almost impossible.

[47] Comp.: Art. 16 a of the Directive on TV Commercials.

harm their physical, spiritual and moral development or abuse their inexperience and naivete. The advertisement must not encourage a child to persuade parents to purchase advertised commodity.[48] An advertisement, depicting minor in a situation of violence and sex, is also prohibited.[49]

The above-mentioned prohibitions refer to the way of advertisement and not the content of the advertised commodity. Thus, it is prohibited not the advertisement of toys itself but such advertisement, which directly addresses children. In fact, the Law allows only such kind of advertisement, appearance and form of which is not attractive for juvenile. In other words, the advertisement of the commodity intended only for children should stimulate parents and not children to buy it. With this Hungarian law goes far beyond the requirements of EU directive, for the latter prohibits direct addressing to minors only by means of TV commercials but not in general.[50]

We doubt that such far regulation is in compliance with the principle of economic freedom ensured by the Constitution. Another question is whether those prohibitions can be implemented. In any case, such strict restrictions exceed the basic aim of a balanced regulation of advertisement by far.

It should be mentioned that the problem of protection of minors cannot be solved by means of such general prohibitions. We think, that preference should be given to preventive measures. The Hungarian lawmaker admits this fact himself when adopted the Law on Protection of Non-smokers for the purpose of establishing a legislative basis for public campaign against tobacco consumption.[51]

c) Hidden, Law-infringing and comparative Advertisement

According to Art. 6, Par. 1 of the Law on Advertisement, norms of general prohibition cover legal norms regulating latent and deliberately ambiguous advertisements too; for example, TV commercials, where a trademark is shown for such a little time, that it is reflected only in subconscious (subliminal advertisement). In this respect the Hungarian law is in full compliance with EU legislation. Besides, Art. 6, Par. 2 prohibits advertisement of those goods, production and dissemination of which is banned in Hungary as well as unfair advertisement chasing after gaining tax allowances (Art. 6, Par. 3).

Since the adoption of the EU-Directive on Comparative Advertisement the even more far-reaching prohibition of such kind of advertisement deserves special attention. According to Art. 7 of this law comparative advertisement is admitted only when the competitor concerned gives his consent on the comparison. In so far the Hungarian Law is inconsistent with the European legislation. It is noteworthy that until April 2000 this European directive has to be incorporated into the law of the EU Member States. Hungary, as one of the candidates for accession, will have to revise its advertising law since according to Art. 7, Par. 2 of the (amended) Directive on Misleading Advertisement, it is inadmissible to impose stricter advertising restrictions by the national legislation of the EU Member States.

2. SPECIAL ADVERTISING PROHIBITIONS AND RESTRICTIONS

The part of Hungarian Law on Advertisement, referring to special advertising prohibitions and restrictions, covers four groups of advertising production. Among them:

[48] Also see: Art. 16 b of the Directive on TV Commercials.

[49] Issues of protecting children and minors, concerning advertisement of alcoholic and tobacco products, will be discussed in the next chapter related to particular prohibitions and restrictions.

[50] For comparison see p. 61 above.

[51] See above p. 66.

- weapons, bullets and gunpowder, explosives and means especially dangerous for public safety[52];
- pharmaceuticals;
- alcoholic beverages;
- tobacco products.

While working out particular prohibitions concerning advertisement of these production groups, special attention was paid to the aspects of consumer, minor and health protection.

Unlike alcoholic beverages and tobacco products, Hungarian Parliament and society was unanimous in respect to restrictions imposed upon advertisement of weapons and pharmaceuticals. As a result, advertisement of weapons and pharmaceuticals is strictly restricted.

a) Advertisement of Weapons, Ammunition, Explosives etc.

According to Art. 8 of the Hungarian Law the advertisement of weapons, ammunition and explosives is generally prohibited. The exceptional cases are those when advertising activity serves professional aims and is carried out in the places of sale of this commodity. In this respect, Hungarian law is in conformity with European (and German) legislation.

b) Advertisement of pharmaceuticals

The differentiated and detailed provisions of Art. 9 – 11 of the Law refer to the advertisement of pharmaceuticals. The law regulates the issues related to advertisement of those medicaments, which are used for treating people. Advertisement of veterinary means is allowed and no restrictions are imposed on it.

With respect to the level of restriction the Law on Advertisement distinguishes three categories of curative means.

According to this, the advertisement of medicines which contain narcotics, specified by certain legal rules, or psychotropic substances, or the advertisement for therapeutical areas, specified by certain legal rules or laboratory-made preparations, are prohibited without exemptions.[53] A less strict regulation is imposed on advertisement of curative means available on doctors' prescriptions. Pursuant to Art 9 of the Law, medicines that are given out only on prescription may be advertised only in the form of a so-called "pharmaceutical information".[54] The medicines, not needing prescription belong to a third group, for which the general provisions given in paragraphs 1 and 2 of Art. 10 are applicable.

Art. 10 of the Law refers to any type of medicine intended to cure human beings. With regard to the protection of health, the advertisement of medicines or natural non-pharmaceutical products that serve to cure particular conditions is allowed. Correspondingly, pursuant to Art. 10, Par. 1, the advertisement should indicate the character of a pharmaceutical and the name of the product. It should encourage use of it as prescribed and should contain necessary information about its use and possible side effects. According to Art. 10, Par. 2, advertising information should not give the impression that the advertised product is "a miracle cure" nor that it ensures healing without side effects, without

[52] Hungarian lawmakers do not explain what they mean under this term.

[53] Art. 10, Par. 3.

[54] In this sense, information about curative means is the advertisement of these means and their recommendations. Art. 9, Par. 2 of the advertising law addresses those people, who are engaged in the ordering and distribution of curative means (e.g., doctors, hospitals, drug-stores).

consulting a doctor or without further control. Advertisement must not cause confusion nor give the impression that the health of a person will deteriorate if this medicine is not taken.

The Hungarian Law on advertisement of pharmaceuticals has an orientation on the provisions of the European Directive on Curative Means for Treating People. It mostly reflects the detailed provisions of this directive. Thus, Hungarian Law needs only limited amendments for harmonisation, whereas the control of advertisement on pharmaceuticals for which the directive provides detailed duties on reporting and controlling (e.g. Art. 13) of the Hungarian Law does not regulate this issue to the full.

c) Advertisement of Tobacco and Alcoholic Products

In the process of developing the Law, issues related to the advertisement of tobacco and alcoholic products were subject of intense debates.

The advertisement of the above-mentioned commodities represents the most sensitive sphere of legal regulation. Juridical provisions existing before were based on general prohibitions[55]. It should be mentioned that the old provisions have been applied in practice only in part since the beginning of the 90s. These issues were regulated mostly by the advertisement market itself on the basis of the Hungarian Advertising Association "Advertisement Code"[56] so that in fact prohibitions by the law were hardly necessary.

(1) Advertisement of Tobacco and Alcoholic Products in general

In the process of developing a new Law on Advertisement, two opposite approaches were emphasised with relation to tobacco and alcoholic products.

Supporters of the stricter approach demanded to maintain the general prohibition of the 1978 Code for the purposes of protection of health and of minors. Their arguments were based on the right to physical and spiritual inviolability ensured by Art. 70/D and on the right to a desirable environment ensured by Art. 18 of the Constitution[57] on the one hand and the unfavourable state of Hungarian people's health and the huge consumption of tobacco and alcoholic products on the other.[58]

Supporters of a more liberal regulation, on the contrary, thought that Hungary, as a country following European practice, should set a flexible system[59] that stresses the multitude of opinions and free choice of consumers. Based on the right to free choice of desired products, it follows that consumers of freely available tobacco and alcohol products should have the right to be informed about new products and the characteristics of certain goods. They expected that a consumer, proceeding from the right to freedom of choice, would give preference to that product, which was less harmful for his/her health. A well functioning self-restriction and self–regulation of the advertising industry would have served as a supplement to legal regulations. Issues of health and protection of minors would not have been left without attention, although they were to be regulated mainly by non-legislative levers.

---

[55] Art. 34, Par. 3 of the Law on Domestic Trade No. 1/1978 (see footnote No. 26 above); Art. 2 of Decree No. 10/1986 of the Minister of Trade on National Advertising Activity (see footnote No. 26 above).

[56] Advertisement Codes of Hungary were created first in 1981 and then in 1991, based on the European provisions of "Advertisement Market Self-regulating Code" of 1973.

[57] Law on the Creation of the Republic of Hungary No. XX/1949; German translation: *A. Masing*, *G. Brunner* (eds.), VSO – Verfassungs- und Verwaltungsrecht der Staaten Osteuropas, Berlin, 1995, Länderteil Ungarn, 1. 1.

[58] Comp.: Parliamentary debates held from March 3 to April 8, 1997, Az Országgyülés hiteles jegyzökönyve (Official Minutes of the Parliament), No. 250, 252, 254, 258.

[59] Comp.: above mentioned parliamentary debates.

After discussions, a compromise was made and a version, reflecting liberal elements besides the protection of health and minors was elaborated. Artt. 12 and 13 contain strict prohibitions in the sphere of advertising of tobacco and alcohol.

Art. 12 of the Law refers to both tobacco and alcoholic products. Special attention is paid to the issues of protecting children and minors. According to Art. 12, Par. 1, lit. a, it is generally prohibited to place advertisement of these products in programs addressed to children or juveniles. Art. 12, Par. 1, lit. d prohibits the placement of any type of advertisement of these products on toys and their packages. These advertisements are also prohibited within a radius of 200 meters of educational and medical institutions (Art. 12, Par. 1, lit. e). In addition, such advertisement must not directly address children and juveniles (Art. 12, Par. 1, lit. a and b respectively).

In the interest of the general protection of consumers, it is prohibited to place advertisements of tobacco and alcoholic products on the covers of editions (Art. 12, Par. 1, lit. a). Such advertisement should not call for excessive consumption of tobacco and alcohol (Art. 12, Par. 2, lit. c). The Law does not provide for the definition of "excessive". It is understood that there will be difficulties in reading the law.

(2) Special provisions regulating advertisement of tobacco products

Art. 12 and Art. 13, Par. 3 contain specific provisions referring to tobacco products. Pursuant to them, the tobacco advertisement must not represent consumption as a "healthy" action. It is prohibited to show the consumption of tobacco or its popularisation by means of famous people. According to Art. 13,wf the advertisement of tobacco placed in the press or public places should be accompanied by the following warning: "Smoking may seriously damage your health and your environment". In addition, the volume of nicotine and "other substances" in tobacco products should be indicated. The indications should be made on outdoor advertisements in Hungarian language, in other cases – in the language of the advertisement itself. Besides, the text should be legible and cover not less than 10 per cent of the total size of the surface of the advertisement, but if it is multilingual – 20 per cent (Art. 13, Par. 3).

In addition, the new law on advertising activity proposes comprehensive regulation of advertisements of tobacco and alcoholic products. Advertisements, disseminated through electronic media, are regulated not only by this Law but also by other provisions that are sometimes even stricter. For example, Art. 13, Par. 1 of the Law on Mass-media completely prohibits the advertisement of tobacco products and allows advertisement of alcoholic beverages only with special restrictions. With respect to tobacco advertisement this goes in line with Art. 22, Par. 1 of the German Law on "Food Products and Products of Primary Consumption"[60].

V. ADVERTISEMENT CONTROLLING PROCEDURES

Compared to the previous regulations the new procedure of controlling advertisement[61] has a clearer structure and is more transparent.

According to Art. 15, Par. 1 the control over the compliance with the law on commercial advertising activity is carried out by a supervisory or higher supervisory body of consumer protection. When

[60] Law on turnover of food, tobacco products, cosmetic means and other consumption products of September 9, 1997 (BGBI. I, p. 1169).
[61] Art. 4, 8 and 9 of the Decree No. 12/1972 (see footnote No. 26 above).

prohibitions set by the law on unfair market behaviour and restriction of competition are violated, the supervisory council of economic competition takes appropriate measures. The decisions of the above mentioned supervisory bodies may be considered in court. In case of violation of personal rights, the case may be directly filed in court without any preliminary measures by supervisory bodies. In this case, based on provisions of the Civil Code[62], it is possible to demand compensation for damages and set fines.

If the law on advertising activity is violated, the action may be taken on the basis of an application or mandate. Art. 16, Par. 2 of the Law provides for an "actio popularis", i.e. "when it is impossible to identify the person, who experienced losses or to perform the process due to the number of consumers". If a controlling body detects facts of violation of the provisions of the law on advertising activity, pursuant to Art. 18, it may demand the liquidation of the infringement, prohibit further continuation of the action or impose a fine on the lawbreaker. The fine may be combined with other punishing measures. The transparency of the proceeding is an additional punishing effect of sanctions, which, if the consumer loses confidence, may result in intangible damage to the customer of the advertisement.

The deficiency of the system of sanctions seems to be the fact that the Law does not provide for the highest and lowest levels of fine. This may cause misunderstandings when defining the magnitude of the fine and disparate application of provisions. Undefined formulation requires broad explanation in practice.

VI. CONCLUSION

In conclusion, it may be said that Hungary, in the form of Law on advertising activity, possesses a codified normative act complying with the modern European standard in this sphere. Compared to the German Law on advertisement, which, in essence, elaborates two basic provisions (Art. 1 and 3 of the Law on Unfair Competition) and therefore is clearly only for specialists, Hungarian Law represents a step forward.

From the standpoint of compliance with EU law, Hungary has made a really significant step. Except in the sphere of comparative advertisement, which due to adoption of a new European directive needs improvement, and except of very few specific provisions, Hungary's legislation is in full compliance with EU law. Even the strictest provisions in the sphere of tobacco advertisement, which alarmed us, after the decision of European Parliament, introducing similarly strict prohibitions is "on the contemporary level". This sphere gives us a good example of how EU member states can introduce much stricter norms than are set by European law. This situation assumes much greater significance when you consider the fact that Hungary is not a member of EU yet.

Despite the fact that particular provisions of Hungarian Law (especially the order of definitions of concepts) come under criticism, the mentioned Law is still a good example for the countries of central and eastern Europe, intending to accede to the EU and advertising law of which is still unregulated. Only time will show how the Law manages to serve the market when one considers its strict restrictions.

[62] Art. 84 of the Civil Code of Hungary, Law No. IV/1959 of August 11, 1959 (M. K. No. 82, p. 657), as of Law No. IV/1977 of October 25, 1977 (M. K. 1977, p. 957).

IA MARIAMIDZE*

ARTICLE 6 OF THE GEORGIAN CONSTITUTION AND ITS SIGNIFICANCE FOR THE INTEGRATION OF GEORGIA INTO THE INTERNATIONAL COMMUNITY**

The interrelation of international and domestic law is currently an important and rather troublesome problem. When we talk about this interrelation, it is assumed that both systems are independent. Their connection is based not on the principles of supremacy and subordination, but on the way the two systems work together. In other words, each system considerably influences the other but it does not change, abolish, absorb or prevail over the other. However, each does affect the others functionality and development, and often suffers the same fortune as the other.

Within the picture of the integration of the modern international community, the interrelation of states requires that their socio-economic, political and legal systems are harmonised, and that they all recognise international law. Despite this, a state has the right to remain sovereign and be free to choose its own political, social, cultural and legal systems. This also gives them the right to establish their own independent methods and means of enforcing international law on a national level.

Historically, laws were formed with the aim of regulating domestic relations of the society. Later on though, in parallel with stronger and intensified international relations, international factors also appeared as a subject of legal regulation. The increasing role of international relations, and their influence on the national community, has caused the formation of new national legal systems that govern over regional and international law. Being able to choose its own independent legal body, each state can define the attitude of its system towards international law.

The influence of international law on national law means that the former acts indirectly, effectively being exercised through the state's own free will. Only through the state's sovereign power shall international law be enacted in the territory. In principal, this sovereignty prohibits any other state from imposing its will on another state even if the exercise of this will is justified by agreed international law.

International law is not applied within the state; it does not have its own legal force inside the state's territory. In order for passages of international law to be applied within the framework of national law, they must acquire the power and status of national law. This can only be achieved through the adoption of the relevant act by the territory's sovereign powers.

When concluding an international treaty, the state must examine its domestic ability to adopt and enforce the treaty and meet its international obligations. If it cannot, necessary changes must be made. This is why there is a provision in international law that if it is necessary for a state to take

---

* *Ia Mariamidze* is Deputy Chairman of the Department of International Law of the Ministry of Justice of Georgia.

** Translation from Georgian language by *GEPLAC*.

legislative measures to fulfil international obligations, it must take them, even if the treaty does not directly make these demands.

As described above, a state has its own sovereignty and is free to choose its own legal system, the sovereignty of which will be expressed in the Constitution. The Constitution itself is the state's fundamental legal act, and should define its attitude towards the application of international law. This provision is introduced in Article 6 of the Constitution of Georgia, which states: "an international treaty or agreement concluded by or with Georgia takes precedence over domestic normative acts unless it is in contradiction with the Georgian Constitution."

This constitutional standard is per se fairly progressive, but acting alone, it will prove unproductive if it is not exercised in legislation and in practice. One should conclude that at present, Georgia has significant legislative gaps in this direction. Before they are filled, the realisation of the above constitutional provision seems impossible.

The largest example of this gap lies in the Law of Georgia "On international Treaties of Georgia". According to Article 6, clause 1, "the international treaties of Georgia are an integral part of Georgian legislation". At the same time Article 5 of the Law of Georgia "On normative Acts", which gives a list of all legislative acts and bylaws (which form the legislation of Georgia), international treaties are not even mentioned. Therefore according to Article 4 of the same law, in the hierarchy of normative acts of Georgia, international treaties and agreements come after the Constitution of Georgia and constitutional law. Normative acts, legally more effective than a law, cannot be logically excluded from the list of legislative acts.

Article 6, clause 2 of the Law "On international Treaties of Georgia" repeats the constitutional provision that "unless a Georgian international treaty is in contradiction with the Georgian Constitution, it has legal priority over normative domestic acts." This confirms that in the process of concluding an international treaty, its compliance with the Constitution must be clarified. If it is in contradiction, the treaty - and not the Constitution - is changed or repealed, as envisaged by Article 21, clause 3 of the above law.

Before declaring an international treaty legal, the Constitutional Court of Georgia must determine whether or not it is constitutional. Before their final decision, nobody else can decide on the issue or enact the treaty. According to the second part of Article 89 of the Georgian Constitution, and Article 25, clause 2 of the 1996 Law of Georgia "On the Constitutional Court of Georgia", the following is true: "The act (or part of it recognised as unconstitutional) loses its legal power from the day the appropriate decision of the Constitutional Court is published." Here we are not dealing with the situation where it is possible to change the Constitution if the international treaty is in contradiction with it. This argument is confirmed by Article 6 of the Constitution, which states the exception, "unless contrary to the Constitution". This can be understood as that the priority of the constitution over international treaties is conditional, unless changes to the Constitution are permitted on the said grounds.

It is known that the national legal mechanism is powerless in the regulation of international relations, and that international law is unable to regulate domestic legal relations, therefore the expression "direct application of the provisions of international law" is subject to conditions. These international laws will only be applied after the national law has given them legal force. International law is put into practice and enabled by the state through a relevant domestic act. The consequence of this procedure is that the international law will become part of the national legal system. The point here is that

'national' status will be granted to international law, and that the international law shall be implemented through the national law.

Domestic status is granted to the international treaty by a Decision of the Parliament (in case of ratification) or a Presidential Decree (when ratification is not occurring, but fulfilment of domestic procedures for enforcement purposes is necessary). It is fair to ask, what will happen with those treaties whose enactment is connected with a simple signature, and does not require any additional procedures ? Should one consider that their implementation through domestic law is set on condition? Is it possible to consider that these treaties apply directly, without need for additional acts, and that the treaties do not require ratification or confirmation? In our opinion, further studies should be continued in this direction, and a mechanism must be created for defining their place in the composition of normative acts.

To treaties that require ratification must be drawn special attention in Georgian legislation. Treaties are subject to ratification if they "require the modification of domestic legislation and the adoption of laws and other legal acts that are necessary in order to fulfil international obligations." (Article 65, clause 2 (e) of the Georgian Constitution).

One should be especially careful when using legal terminology. When we mention "legislation" in the above paragraphs, it should be noted that Article 5 of the Law on "normative Acts" defines this as the collection of legislative acts and bylaws. But according to this article an international treaty is defined as a legislative act or a bylaw and as we have already pointed out this is illogical taking into account the place international treaties have in the hierarchy of normative acts. The "modification of the legislation" should not automatically mean that a treaty needs ratification. For instance, if the provisions of a treaty require the modification of the Ordinance of the President of Georgia, it is therefore not subject to ratification. It will automatically be put into force after the President's approval. The President will determine the changes and amendments needed to update the act. (This is seen by some as a legislative defect. In practice at least, the issue is regulated this way).

This is why measures to prevent collision are so important. They make it possible to identify the correspondence between domestic and international law, at the preparatory stage of an international treaty and it is also easier to be definitive about a particular act that has modification pending. However there is no guarantee that all opposition to the act will be eradicated at the preliminary stage – points may be raised while the treaty is being executed and while it is in force. Article 6 of the Georgian Constitution covers this situation. International law states that, even when various mechanisms of regulation exist for one or more stages of negotiations, international law should be applied.

The above arguments have become increasingly popular, especially in the present situation where Georgia acts independently on an international level. The process of integration into the international community has been intensive, requiring that Georgia rapidly harmonises its legal system to agree with international law. For this reason, it is essential that Georgia first of all fills any gaps in its legislation. The Constitution is of utmost importance for the regulation of legal relations on a national and international level. The Georgian Constitution has made significant steps in this direction. In order to put the State's will (as expressed in Article 6 of the Constitution) into reality, it is necessary to modify domestic legal acts adopted on the old basis, and to harmonise them with the standards of international law. Otherwise, the Constitution's declaration will appear to be mere lip service. This said, the existing problem cannot be fully solved, even by drastic improvements in the legislation. However

perfect it may be, a legal act that aims to establish and work within the rule-of-law (and be in harmony internationally), cannot be fulfilled without actual mechanisms of legal implementation.

Some international treaties exist within Georgian territory that regulate specific legal procedures differently to domestic laws. These are given immediate attention by the authorities. Such treaties are mainly those that impose tax and customs preferences, provide for exemption from various fees and cause favouritism. As has become apparent, the payment of these taxes still took place even when it was not called for by the relevant international treaty. This probably happens because the relevant institutions are not informed about the existence of such treaties, or are informed but are unaware of their practical methods. The treaty is completely ineffective if one does not know the ways and means of its execution. Principally, the level of legal awareness has not been high among those persons who carry out the legal drafting, and whose expertise is mainly centred around the application of law on an international level.

This gives us grounds to conclude that in the process of merging international law into domestic law, the adoption of standard procedures is necessary. These should particularly note how the treaty is to be fulfilled, and should identify concrete methods of implementation. Reference might be made to these measures in the Decision of the Parliament on the ratification of international treaties, a Presidential Decree about its approval, etc.

Georgia's gradual integration into the international community puts increasing demands on the country; primarily these relate to improvements to the legal system and harmonisation with international standards.

International organisations form a clear example of the development of the trend of modern integration. An international organisation is formed to gain greater agreement among its members, or at least to group together their interests. Such unity of interests is necessary for the organisation to progress and function efficiently. International organisations have played a significant role in the development of inter-state relations. The integration of a state into an international organisation will cause the delegation of certain functions to the organisation, dependent on the will of that and all other states.

The integration of states and the granting of supranational powers to international organisations are neither radically new for the modern international community, nor particularly outstanding events. We shall discuss separately the circumstance where one group of states recognises the supranational character of these organisations completely, but other states only recognise them in part. This is a sovereign will of the state itself, being a derivative of its different political and legal systems.

Georgia's present position in the international arena enables us to declare that development and integration will not pass it by. Its integration into the international community is an irreversible process, and the legal system (as well as the political, economical and social systems) will gradually be harmonised with international law. This will take time. It is already well evident in Georgia's participation in the CIS, its integration with the European Council, its membership of a number of European organisations and treaties, and its preparation for accession to the WTO. Many problems may occur during the integration of processes and procedures. With Georgia participating in various organisations, this may threaten the fulfilment of uniform obligations, completion of uniform treaties etc. With this in mind, the state should begin to take action, through the aforementioned “measures for preventing collision”.

SIEGFRIED LAMMICH / ELENA TSIKLAURI-LAMMICH*

ORGANISED CRIME AND CRIME-CONTROL MEASURES UNDER RECENT GERMAN LEGISLATION**

Organised crime is regarded as one of the most pressing and dangerous problems of the present day world. This issue frequently becomes a subject of consideration at the UN and international summits. As a social phenomenon it has a complex criminal nature and is closely related to corruption and economic felonies committed in the different sectors of the economy. A maximum profit-motivated crime does not only exploit the common citizen and abuses his legal interests but also presents serious competition to the government authority itself, in a global sense and to the legal bodies, in particular cases.

Nowadays, the main perpetrators of organised crime are perfectly well acquainted with the structure and principles of the industrial organisations and both socially mobile and able to analyse, which enables them to manipulate successfully the demands of the market in order to gain a high profit.

In the contemporary world, along with the national characteristics peculiar to each individual country, organised crime creates a complex transnational criminal phenomenon and it is hard to imagine that any effective crime-control measure could successfully be achieved through the national efforts of just one separate country and its legislature.[1]

The statistical analysis of 1996 published by the German Federal Criminal Police Office indicates the following: 77 per cent of organised felony was partially committed in Germany and partially abroad (in 1993 this figure was 67.9 per cent). This tendency has become characteristic of the criminal world in Germany and is daily expanding. Thus, for instance, the number of foreigners who participated in those cases, which had been initiated as investigations into organised crime, made up 51 % in 1992, while in 1996 this number increased to 62.5 %.[2] This category involves those foreigners, who either have no permanent residence permits in Germany but only have a temporary or a transit visa, or who stay in German territory illegally.

Both mass media and juridical literature often provide information on the increase of organised crime in Germany. Notably, the report made by German Federal Criminal Police Office dated 1997 suggests the following: Organised crime in Germany presents a serious criminal problem and this category of crime looks unlikely to shrink in future.[3]

---

* *Dr. S. Lammich* is Head of the Research Section at the Max-Planck-Institute for Foreign and International Criminal Law in Freiburg/Breisgau, Germany; *E. Tsiklauri-Lammich* is Post-graduate Student at the Tbilisi State University, Georgia.

** Translation from German language by *GEPLAC*.

1 Among common citizens in a country like Italy combat against organised crime took the lives of hundreds of officials in the authorities concerned with legal affairs. That is why in September 1992, in Brussels, the Minister of the Department of Interior of Italy asked the European and other Law Enforcement Authorities to render assistance for the combat against organised crime (Press Release, Meeting of the Ministers of Interior and Justice, Brussels, September 18, 1992).

2 The share of those "foreigners", who are of German origin and come mainly from Eastern Europe and the former USSR, is not reflected in the statistics, as their vast majority already holds German passports.

3 Das Bundeskriminalamt im Lagebild, Organisierte Kriminalität in Deutschland, 1996, Wiesbaden, 1997.

The success of crime control measures is mostly determined by the extent to which it is possible to recover the funds gained from criminal activity and to reduce prospective criminal revenues.

It is of special importance to identify the organisers of such offences, to intrude into the criminal structure they have created and to upset them. One of the main means used by the police in order to attain this goal is to procure information either in a secret or an open manner. Frequently not only the witnesses to the above category of offences but often even the victims abstain from making a declaration or a testimony in order to avoid possible revenge. This can be understood, if we bear in mind the sternness with which criminal groupings pursue all participants in law and order processes.

67 per cent of the cases of organised crime opened in Germany since 1996, were the result of active investigative measures taken by the police. Only 33 per cent of this category of cases were brought up on the basis of notified information or declarations. This problem is especially pressing in those countries, where witness protection or victim security programs are unavailable or inoperative. The above-mentioned prognosis is not unexpected for German practice. Since the 90s the German Federal Criminal Police Office has regularly warned of this threat in its annual reports. Since 1992 the legislature has also become active in this respect and on 15 July the Act "On the Combat against illegal Drug Trade and other Forms of organised Crime"[4] was introduced.

The innovations prescribed by this Act involved not only substantial criminal legislation but also new anti-criminal procedures. In this respect, changes were also performed in 1994 and 1998. The main purpose of these intense legislative measures was to assault organised crime, but only using such means and methods, which would be acceptable to the State in terms of the rule of law. This last requirement creates a lot of complications in putting these ideas of a rule of law into practice. A damaging risk to other gains protected by legislature in the process of crime combat is growing to the same extent as the growth in crime. As to organised crime, the main problem in organised crime control is to obtain evidence and to present it in an appropriate and legitimate way. Investigation of organised crime largely depends on the activity and professionalism of intelligence and investigation bodies. Numerous debates and discussions around this problem help the law enforcement bodies attain a certain proportion of forces i.e. "instruments" necessary to encounter the opponent in this arduous campaign. Let us discuss separate organised crime control measures provided by the active legislation of Germany.

1. INTRODUCTION OF A SECRET OPERATIVE DETECTIVE INTO A CRIMINAL GROUP

In Germany, a so-called "Introduction of a secret operative detective into a criminal group" is regarded as the most far-reaching and reliable source of information on criminal organisations. The above-mentioned and some other investigation measures are related to certain restrictions of human rights protected by Law. Legislative definition of legal regulation of any such possible conflicts in practice and of all the necessary provisions for their admission is and has always been one of the most important issues of legislative discussions in the Federal Republic of Germany. The "property punishment" prescribed in § 43 (a) of the Criminal Code introduced in Germany since 1992 and a extended property confiscation as provided by § 73 (d) was the attempt to regulate legally the above problem, as well as confiscating a defendant's property as prescribed by the Criminal Procedure Code in § 111 (p). The above-indicated criminal and legal procedure measures are admitted

[4] Bundesgesetzblatt (BGBI), I, 1992, p.1302.

only when the *actus reus* of a certain action includes signs characteristic of organised crime.[5]

The German legislator has already provided a list of such actions in the above-mentioned Act of 1992. The same Act introduced a definition of so-called "money laundry" for the first time and its context was further expanded by the Act "On the Combat against Crime". We shall discuss this problem in more detail later.

The following adjustments (§§ 100 et. seq. and §§ 110 et. seq.) to the Criminal Procedure Code provided a legislative base and named prerequisites for such investigative measure, such as the introduction of a secret operative detective into a criminal group and bugging telephone and communication appliances.

Besides the above-mentioned legislative measures on organised crime combat, special attention should be paid to the Act "On the Combat against Crime" [6] of 28 October 1994, the "Act on the Recovery of Profit Gained through Grave Crimes"[7] dated October 25, 1993 and the "Act on the Improvement of the Combat against organised Crime"[8] of May 4, 1998. Among the above legislative acts, it is also necessary to point to the "Act on the Combat against Corruption" enacted in 1997.[9]

On the basis of these and other legislative Acts, some other *acti reus* were included in the Criminal Code, as well as a number of adjustments to the already existing ones relevant to organised crime, with their definition and reinforcement of sanctions.

The above-mentioned legislative modifications created a legal basis for the police to implement, in case of necessity provided by Law, some of the measures already applicable in practice, which had sometimes previously infringed human rights protected by Law. Meanwhile, legitimisation of these measures was a certain response to the "census verdict" made by the Constitutional Court of Germany, which based on the first paragraph of Article 2 of the German Constitution. This verdict stated that any citizen may decide on its discretion about the use and distribution of his personal data and that any suppression of this interest is inadmissible unless it is required for the protection of significant interests of society and only on the basis of legal provisions.

The Act of October 28, 1994 permitted the German Federal Investigation Agency, whose responsibilities according to the Constitution were limited to the collection of information, to advise law enforcement authorities of any information obtained in the course of activities, which directly or indirectly points to the preparation or commitment of such dangerous international crimes as trading in weapons and drugs, or forgery and distribution of money. Before that, the Federal Investigation Agency was allowed to notify such information only to the police. This circumstance is more evidence of previous restrictions to the means and instruments through which the detective and investigation services of Germany had supposed to challenge the world of organised crime, which is unscrupulous about the methods it uses to achieve its goals and wants to maximise its profits at any expense, no matter how bloody the means used are.

---

[5] The sign characteristic of the action, according to the German doctrine, shall be attributed to the category of organised crime. Any criminal signs characteristic of such cases have not yet been particularly outlined either in Russian nor in Georgian juridical literature, that's why its definition is vague, which accounts for the absence of any clear references to distinguish this dangerous crime from plain group crimes. See more detailed, *E. Tsiklauri*, On behalf of the independent Parliamentary Advisors' Counsel, Definition of the organised Crime and its main Characteristics", Parlamentis Utzhebani No 3, 1997, p. 29-35.

[6] BGBI, I, 1994, p. 1770.

[7] BGBI, I, 1994, p. 3180.

[8] BGBI, I, 1998, p. 845.

[9] BGBI., I, 1997, p. 2038.

Organised crime is attributed to so-called “control-crimes” or such actions that are brought upon the initiative or information provided not directly by the parties (usually by a plaintiff) but instead are based on information obtained by the police themselves. One of the ways to obtain such information is represented by secret investigation measures: in particular, introduction of a detective into the criminal group, obtaining information for police through a so-called “entrusted person”. An authorised implementation of the above-described measures in practice applies exclusively for preventive purposes and necessary provisions are defined in the Acts adopted in each of the German lands for the Police Force. Legitimisation of these measures in regard to previously initiated cases was established only after the “Act on the organised-crime Combat Measures” was issued in 1992, on the basis of which into the Federal Code of Criminal Procedure appropriate amendments were introduced. In Germany until 1992, in some cases in investigative practice, evidence obtained through bugging telephone conversations or some other above-mentioned means, was not regarded as legal by the Court on the basis, that the criminal action had in fact already been in progress and the use of these measures for repressive purposes did not comply with the Law.

a) Prerequisites of Introduction of a Secret Agent into a Criminal Group

The first section of § 110 (a) of the Criminal Procedure Code of Germany provides a list of such offences that have a common specification of “special importance”. Normally, such cases form accomplished *acti reus* as early as at the preparatory stage and thereby it ensures a legal basis for the application of the measure in question (i.e. the introduction of a secret agent into the criminal group). In sentence 4 of the first section of the above § of the Criminal Procedure Code the circumstances are outlined, where an introduction of a secret agent into the criminal group is subject to the *ultima-ratio* principle, which means that this measure is to be applied only if the importance of the case requires the introduction and other means would be without prospect.

Permission for the introduction of a secret agent into the criminal group is to be issued by the Prosecutor, unless the circumstances suggest the need for a secret agent to break into someone’s apartment secretly and in this case it is necessary to obtain permission from the Judge. Similar rules are valid in cases, where a secret agent has to secretly intrude into a criminal environment, where particular individuals are suspected of committing some felony. The Judge and the Prosecutor enjoy their final right to oppose a proposal to introduce secretly a particular person into the criminal society i.e. a right to prevent the introduction of a certain operative agent. On the other side, in case of necessity it is theoretically possible to obtain retrospective permission for a previously initiated measure, when the observance of a time-consuming procedure of obtaining permission may be harmful to the case. When a Judge or Prosecutor has already repudiated the introduction, the information acquired in such a way shall no longer be regarded as valid evidence in a criminal court case. The acceptance of the information in a criminal court case provided by a secret agent as evidence shall also be questioned if such information was obtained in an illegal way.

Usually, the problem of application of these measures and introduction of a secret agent into a criminal group is solved by the Police. Some laws relating to the German Police in situations of intense organised crime allow the introduction of a secret agent even with a preventative purpose, which is admissible for a so-called “initiative investigation”. This is a case when there exists a general but a justified suspicion that an offence has already been or might be committed. In this case, the question of a preventive introduction of a secret agent into the criminal environment is to be decided by the police agent himself or by the Head of the responsible Police Department, without a Prosecutor’s permission.

b) Confidentiality of an Operative Agent and Utilisation of his Materials in the Criminal Court Case.

As a rule, the identity of an operative agent introduced into the criminal environment under this status continues is to be kept confidential, even after the accomplishment of such operations. This is a criteria which mainly helps to distinguish this operative and investigation measure from other measures undertaken by different secret operative detectives (for instance, agent–provocateurs), when the requirement of confidentiality will be observed only during execution of the measure.

The issue of disclosing the identity of a secret operative agent is determined by the administration of that body of the Interior Ministry, which stated that his identity needed to be kept confidential. In such case, the opinion of Judge or Prosecutor who originally issued permission on this measure does not count.

The secret operative agent has a right to participate in proceedings under a changed name unless it is strictly required by Court to reveal his identity. Appropriate permission must be issued only by the decree of the body (i.e. the relevant Minister) of the Interior Ministry of the land, which originally authorised that the identity of a particular operative agent should be kept confidential. A refusal by the Interior Minister (compare §§ 96 and 110 (b), section 3, of the Criminal Procedure Code) should be well-grounded with an appropriate reference to the fact that otherwise the security of a secret operative agent or some other agent, or a possibility to use the same operative agent in similar future operations might be threatened. The indicated issue concerns such delicate aspects of human rights protection as the refusal to disclose the identity of the agent might restrict the right on defence of the accused. In respect of this issue, as it was indicated in the Constitutional Court Decision, for a decision of this issue the specifics of each particular case should be taken into account and the cases of refusal to disclose the real identity of an operative agent should be restricted to the minimum by the court.[10] The grounds for such a denial must be formulated so as not to lift the agent's confidentiality. The decision of the appellate court is mandatory both for the Court who has raised this question, and for the Prosecutor.

When a complaint on the confidentiality of an operative agent is raised against one of the Interior Ministries of a German land, which opposes the disclosure of the secret operative agent's real identity, the dispute over this question is solved by way of administrative procedure, at the Administrative Court.[11]

The Interior Ministry frequently declines open participation of an operative agent in legal proceedings, even with a change to his identity, on the grounds that the safety of this person could be threatened.

In this situation, a so-called "witness from hearsay" measure can be applied, which literally means certification of information heard by third parties. In this case, a secret operative agent is subject to interrogation by another staff member of the relevant investigation service and the latter shall be presented with the information heard, as some intermediate evidence, before the Court.

But as it was several times underlined in the decisions of the German Supreme Court (BGH), such intermediate evidence has no weight, unless supported by other corroborating evidence.[12]

[10] See *G. Pfeiffer, T. Fischer*, STPO-Kommentar, Munich, 1995, p. 206.
[11] *J. Lemke*, Heidelberger Kommentar zur Strafprozessordnung (STPO), Heidelberg, 1997, p. 309.
[12] See G. *Pfeiffer, T. Fischer*, STPO-Kommentar, Munich, 1995, p. 622.

According to the majority position in the German Court Doctrine, as the background of the above-mentioned and other Constitutional Court decisions, a suspect, defendant or accused enjoys the right of appeal against the actions performed by a secret operative agent, if the latter has offended his human dignity and constitutional right by misleading methods. However as under the

legislature of any other civilised country, so under § 136 of the Criminal Procedure Code of Germany, a suspect is allowed to refuse his testimony both at the stage of investigation of a criminal case and also at the stage of court proceedings. But according to the most accepted position among various doctrines concerning this problem, and pursuant to the rule established in the Criminal Procedure Code of Germany, obtaining information necessary for investigation by way of introduction of a secret operative agent into the criminal world is not considered contrary to Law and therefore does not contradict the right of a person, as provided by Constitution, to refuse a testimony. This position was reflected in the Constitutional Court decisions. The idea expressed by opponents to this is based on the circumstance, that the acceptance of information obtained by these means shall result in the deterioration of a presumed guilty or suspect's procedural rights, according to which he has a right to be warned in advance that certain kinds of information shall be used against him for accusation and that he has a right to refuse to provide a testimony, if such is his will. Whereas, a person misled by a secret operative agent provides information involuntarily, thus aggravating his accusations.

c) Qualification of legal Offences committed by a Secret Operative Agent in the course of his Duties under the Criminal Code.

The introduction to the 1992 "Act on the Combat against Organised Crime" that was published by the German government states, that the aim of introducing a secret agent into the criminal world is to shadow this group from inside and to collect evidence. Therefore, to avoid suspicions against this person (which might cost him his life) he has to adopt norms of behaviour accepted in the criminal world, which does not exclude a possibility of committing offences of various gravity. The criminal legislature of Germany itself (the legislature of some countries like Czech Republic, Russia and others defines this problem in details) does not provide a straight answer to this problem, which allows us to draw the following conclusion. A criminal definition of the legal offences committed by a secret operative agent introduced into the criminal group in the course of his duties is based on general and universal principles of responsibility, while responsibility exemption is permitted only in case of the "defence of a person" as prescribed in § 32 or in case of a "justifying state of defence" by § 34 of the Criminal Procedure Code of Germany. According to the doctrine accepted in the judicial practice of Germany, it is possible to define such a situation as a case of "justifying state of defence", only if the life of the investigator himself became exposed to danger in the course of secret investigation, and not just the implementation of his instructions is endangered.

Such settlement of the given problem is a clear example of the hierarchy of values typical of the German rule of law. On the one hand the life and health of a particular person, even that of a defendant in a criminal case, are given a higher priority than the aims of Justice. But on the other hand it is unacceptable for the rule of law to apply illegal methods which could affect the citizens' trust in law.[13] Besides, in cases where the legal disorder committed by an agent was related not to an already accomplished offence, but was directed at the prevention of a generally dangerous offence, is also regarded an emergency situation, as the preventative aims ensure grounds for justification. There is also an accepted position in the legal practice that states that only a legal violation aimed at the prevention of an extremely dangerous offence is considered an Justifying State of Necessity provided by § 34.

[13] *Schönke/Schröder*, Strafgesetzbuch, Commentary, Munich, 1997, p. 579.

2. INTRODUCTION OF AN ENTRUSTED PERSON.

So far we have discussed the introduction of a secret detective into the criminal group in order to raise data for investigation.

The legal status of an entrusted person differs from that of an operative agent introduced into the criminal group firstly because he is not a police-officer, and his sole or regular assistance to the police may be either based on remuneration or might be otherwise motivated. Secondly, his status is not clearly regulated by the Criminal Procedure Code, and so far has been frequently criticised in the German Doctrine. However in practice it is considered one of the main means to obtain information on criminal offences (for instance, on organised crime).

According to the procedure his introduction into the criminal group is much easier than that of an operative agent. This decision is solely taken by a responsible police official and requires no permission of a Judge or a Prosecutor.

The value of the data obtained by the entrusted person as evidence raises arguments as to the legitimacy of information obtained in such an investigation. The utilisation in the criminal procedure is not admissible if an entrusted person fulfils the assignment of an investigation, but admissible if he obtains information from him on his own account, however only in case of the "most grave crimes".

For example a decision of May 13, 1996 of the German Supreme Court regarding the acceptance of the information obtained by a private entity (for example an entrusted person) as evidence in the criminal proceedings pointed out that Information which serves to disclose an offence of "special importance" is considered to be admissible if the investigation of the facts by the utilisation of other means of investigation would show less success or the investigation would be substantially hindered. As to the notion of offences "of special importance", this is not defined by law and therefore when making an assessment of such evidence much depends on the subjective opinion of the Judges. Due to this circumstance the above-referred decision of the German Supreme Court in the legal doctrine of Germany was regarded as quite controversial.[14] Most Acts of the German lands relating to the Police prohibit the awarding of the status of an entrusted person or an agent, with preventive purposes, against those persons who have a legal right to refuse to give testimony (doctors, lawyers, ecclesiastics, etc.).

Presentation of the data obtained by an entrusted person usually follows the same procedure as in the above stated cases concerning secret operative agents. Notably, in the case where an appearance of the entrusted person before the trial as a witness would create a threat to his own safety or the safety of some other person or it shall complicate control of organised crime control, it is also allowed to present so called "witness from hearsay" before the court.[15] This problem is also closely related to such violations, when the police try to trace the criminals. Legal problems arising at such moments present a separate subject for consideration, but meanwhile we shall look at problems which have recently raised a number of political and legislative debates in Germany, insofar as they concern human and civil rights and freedoms protected by the Constitution.

[14] *C. Roxin*, zum Hörfallen-Beschluß des Großen Senats für Strafsachen, Neue Zeitschriff für Strafrecht, 1997, p. 18.
K. Bersmann, Anmerkung zum BGH-Beschluß vom 15.5.1997, p. 116.
[15] See *T. Kleinknecht, K. Mayer, L. Mayer-Größner*, Strafprozeßordnung, 43. ed., Munich, 1997, p. 815.

3. SHADOWING OF AN APARTMENT OR SOME EQUIVALENT BUILDING

The problem of an acoustic and visual shadowing of an apartment or some other equivalent building in the course of performing investigation duties has been one of the main subjects of discussion in Germany since the 1990s (this involves shadowing aimed at the repression of crimes and at the disclosure and investigation of offences already committed). Since the principle of the immunity of a dwelling was violated in the course of these activities, such measures were admitted only with a preventive purpose by the legislature; i.e. to serve the purpose of avoiding an anticipated grave offence. The presentation of evidence received in such a way was not admitted at the trial if it concerned an already accomplished offence. This resulted in an absurd situation, which might be illustrated by the following example: while shadowing the building in order to prevent an anticipated murder, it appeared that the suspect had also committed other offences; but regulations governing the performance of these investigative measures did not allow the use of this additional evidence for the purpose of prosecution.

In order to change this situation it was necessary to make adjustments to a corresponding Article of the Constitution, although this raised a number of difficulties, since the Parliamentary opposition was of a contrary opinion. The situation was further complicated when the Free Democrat Party within the coalition in power expressed its disagreement with these adjustments to the Constitution. But when the majority of this party changed its opinion in favour of these adjustments to the Constitution, it caused *Ms Leutheusser-Schnarrenberger*, the coalition Minister of Justice to resign on the basis that she regarded this amendment as a source of threat for human rights. It is apparent that this fact is indeed a backward step in the German history of rule of law and democracy. A number of international legislative acts permit the possibility of certain restrictions to human rights, in particular the Human Rights Declaration of December 10, 1948 as well as the “European Convention on Human Rights and Main Freedoms”, which while concerning the essential rights of mankind as referred to in Article 8, at the same time empathises that “the Public Authorities are permitted to interfere in these rights only in the cases provided by the law of this State”.

If such an approach is pursued with the purpose of protecting general interests and public order in a democratic society, the risk of the application of law with evil purposes in a changed political situation cannot be excluded. It is difficult to provide a simple resolution of this problem. In this particular case priority was given to universal public security and the following trends were presented as the major arguments: an increasing threat from the growing rates of organised crimes in Europe and on the territory of Germany as well as the difficulties in administering control, which is basically related to difficulties in obtaining and producing evidence.

At the second hearing of the above mentioned draft law on January 16, 1998 the German Parliament changed Article 13 of the Constitution, which was approved by the Federal Council on February 6, 1998. It permitted an acoustic shadowing of a dwelling with purpose of identifying criminals and in order to disclose previously accomplished offences. At the same time, important requirements were stipulated: “a suspicion based on a certain fact”, that the committed offence is subject to the investigation for which the Criminal Procedure Code of Germany prescribes the admittance of an acoustic shadowing of a dwelling, and that the investigation of this offence without the application of this measure would be more complicated and prolonged than usual.

The amendments to the Constitution of Germany adopted in January 1998 allowed only the acoustic shadowing of the dwelling, though there is a belief (by such organisations as Trade Unions and others), that optical shadowing should be also regulated, as solely acoustic information frequently

provides an insufficiently complete picture. In the present political situation the chance of pursuing this idea within the legislative bodies of Germany is a rather small. Today according to the Constitution optical shadowing to prevent an offence is admitted only if there is an inevitable threat to public security as well to human life. Optic and acoustic shadowing as a rule is performed on the basis of permission issued by a Court, consisting of a group of three Judges. In exceptional cases, when the delay in pursuing a case might lead to complications, an individual decision of a Judge is regarded as sufficient to authorise a previously initiated shadowing. The question of bugging telephone conversations can also be determined by the sole decision of a Judge.

The constitutional amendments of 1998 also left intact the position of the legislature concerning secret searches of a dwelling: evidence obtained from this would be inadmissible in the case of an already accomplished offence. A suspect's or a defendant's own dwelling, as well as any other such premises, where this person is hiding, can become an object of technical shadowing.

To prevent the application of measures (otherwise necessary for crime prevention operations) in a way which would humiliate human rights with evil purposes, the Government and an appropriate body are liable to report on the case of the technical shadowing of a dwelling to the German Parliament, which shall further become subject to the inspection by a commission appointed by the German Parliament itself.

In view of the problem under consideration one of the last accords of the discussions around these amendments to the Constitution was an exemption from the rules connected to the admissibility of evidence obtained from technical shadowing. In particular, it is prohibited to shadow the dwelling of doctors, journalists, lawyers, ecclesiastics, deputies, etc. (in total-16 professions) as well as to bug their telephones. These are representatives of certain professions who also possess a right to refuse to provide any information. However the above-referred exemptions are not valid in cases where these individuals themselves are considered defendants or suspects in the commitment of a grave offence.

Most of them who supported the above mentioned adjustments to the legislation have subsequently expressed their dissatisfaction with these exemptions to the law relating to acoustic shadowing, and made a joke that due to these exemptions the "Act on Organised Crime" and other grave offences looked like a "toothless lion". This led to the fact that some of the Interior Ministers of the German lands, for instance Baden-Württemberg, which are governed by the majority of the Christian Democratic Party declared that no exemptions shall be made in respect of the combat against grave offences on the territory subject to their jurisdiction. As stated above, for the purpose of preventing grave offences, the issue of application of this law is to be determined by each land. The situation concerning repressive measures is different: here the prerogative is given to the federal law.

The exemption of acoustic shadowing from the "rule of repressive purposes" has caused a certain dissonance in the actual performance of such operative and investigation measures (investigation and other technical shadowing carried out by a secret operative agent), as such an exemption has not been universally proscribed and the information provided by such measures, except repressive acoustic shadowing, is used at the trial as evidence in the same way as the information provided by all other citizens.

4. THE RECOVERY OF PROFITS GAINED FROM CRIMINAL ACTIVITIES

As mentioned previously, one of the most complicated areas in organised crime control is to find and recover the money obtained criminally. An immense amount of capital concentrated in this sphere is

being used not only with the purpose of criminal commerce, but also a large share of it used to bribe statesmen, representatives of Justice, politicians and other powerful figures. Through these means the criminal world makes an impact on social and political processes. Legal measures used previously failed to produce an effect, while this tendency is regarded as one of the threats to the democracy.

a) Substantial Criminal Activities (Definition for the purpose of confiscation of property)

Some acts, which serve to prevent the above effects, have already been indicated above. Among them, a "property punishment" provided in the Criminal Code of Germany of 1992. According to its § 43 (a) there are several stipulations to this measure:

- This measure must be provided in the sanction of a concrete Paragraph (which is the case by crimes committed by an organised criminal group);
- The sentence has to prescribe imprisonment over 2 years;
- "Property punishment" is limited by the total value of the property of the defendant (that might be equal to property confiscation) and

at the same time it should comply with the guilt of the defendant.

It is difficult to determine "the exact parameters" of these conditions, as well as how to comply with them. This and other circumstances bring about harsh hard criticism of this kind of sanction in the German Scientific Doctrine. Notably, *Prof. Jeschek* (the patriarch of criminal theory) and *Prof. Schröder*, both consider property confiscation a regulation contrary to the Constitution and a subject inconsistent with criminal law.[16]

The Supreme Court of Germany was opposed to these views and supported the introduction of this sanction in practice in its decisions. It should be noted that this punishment has in fact, failed to achieve success in practice. § 73 (d) of the Criminal Code of Germany established a measure of so-called "expanded confiscation" relating to the above indicated conditions; this measure is also used when a suspect has been found in possession of a large quantity of cash on a bank account which exceeds the limits of his official income.

An expanded confiscation referred to in § 73 of the Criminal Code of Germany as compared to the simple confiscation may be permitted even in such cases, where a hundred per cent evidence is unavailable: a well-founded suspicion that the property had really been gained in a criminal way, is sufficient for confiscation. This measure is also a subject of criticism in some judicial literature where its nature is considered to contradict the Constitution. In the beginning of 1998 a new reform introduced by the German Parliament concerning organised crime control indicates necessity of making these measures more effective.

The measures relating to money laundry should also be mentioned among the above-referred measures on organised crime control. In 1992 the complexity of measures directed towards organised crime control was represented by one of the most important measures referred to in § 261 (e) of the Criminal Code of Germany, which contained a new *actus reus*, that of money laundry, which means putting profits gained from criminal activities into legitimate financial and industrial investments.

[16] *H. H. Jeschek, Th. Weigand*, Lehrbuch des Strafrechts, General Part, 5. ed., Berlin, 1996, p. 688; Schönke/Schröder, Strafgesetzbuch, Commentary, Munich, 1997, p. 446.

According to the adjustments to the Criminal Code of 1994 this *actus reus* had been further extended, but the big hopes held by the legislature of this measure did not in the end appear sustainable. In a number of countries such as Italy, Germany and others, the recovery of profits from those criminals who had been engaged in organised crime, is considered a real source of refilling the state treasury, though unfortunately, not much progress has been achieved by these means so far.

In the beginning of 1998 the package of reforms introduced by the German Parliament has again raised the question of the extension of this *actus reus*. As previously in 1994, now the adjustment also mainly concerned the lengthening of the list of such *acti reus* in the Criminal Code, from which the money must stem in order to be authorised to confiscate it. In addition, the latest novelty relating to this *actus reus*, presumes that at in case legalisation of illegal funds presents a real fact, not only the person who was arrested, or suspected, (provided this *actus reus* was accomplished by two interconnected individuals) at the moment of legalisation of such money, but also the one, who gained this sum in a criminal way. The question of responsibility for legalisation of illegal money will arise also in case where the limitation of responsibility for the primary *actus reus* of gaining money has already occurred. In all cases, the most important thing is to obtain the relevant evidence.[17]

The referred *actus reus* of legalisation of illegal money, according to the criminal legislature of Germany, shall be considered de-facto, and fulfilled only if the primary action, i.e. the *actus reus* of obtaining money in a criminal way is indicated in the Criminal Code. These *acti reus* do not include for instance, legalisation of funds gained by means of fraud or ordinary theft.

b) Procedures provided in the Criminal Procedure Code and the tax legislation for recovery of sums gained through organised crime

The 1992 Law presented yet another novelty through introducing § 111 (p) of the Criminal Procedure Code of Germany, which allowed the authorities to seal the criminal's property, with the purpose of ensuring the anticipated property confiscation. According to this provision only that part of the property is subject to seal which shall be presumed to be sufficient to meet the anticipated property penalty. As a result of this measure, the owner shall be devoid of his rights of property management. Application of this measure is admissible only in direct relation to the *acti reus,* which have been specifically indicated in the Criminal Code. At present it is difficult to discuss the progress achieved through the introduction of this measure in practice.[18] By the initiative of the Social Democrat Party, the Government and the opposition have agreed that the measure referred to in § 111 (p) of the Criminal Procedure Code should also apply in cases when there is no urgent suspicion but only an ordinary suspicion that an offence was committed.[19] In fact every new act sharpens an existing act through the aggravating of sanctions or by means of introducing new acti reus into the criminal laws.

The preceding sections were devoted to the problems of recovery of money and other property gained through organised crime. It described the criminal measures, through which the German legislature

[17] Under Criminal Code of the Russian Federation (Article 174), for legalisation (laundry) of money gained in a criminal way, it is admissible to apply the referred *actus reus* in case of any kinds of legal offences. The approach relating this problem (see the newspaper "Sakartvelos Respublika" from August 2, 1997, No. 203-204, p. 8 as referred to in Article 193 of the draft Criminal Code of Georgia ("Legalisation of money gained in an illegal way") is similar, though work on this draft law has not yet been completed, and the above mentioned norm might still undergo certain changes. There at this place is to be underlined only that Article 193 of the referred draft law, defines the repeated misbehaviour, taking advantage of one's position, by an organised group or a large number, as aggravating circumstances.

[18] *J. Mayer, W. Hetzer*, Schulterschluß gegen organisierte Kriminalität, 1997, p. 694; *W. Hetzer*, Steuer und Strafe, Neue kriminalpolitische Orientierungen, Kriminalistik, 1998, p. 34.

[19] *J. Mayer, W. Hetzer*, Schulterschluß gegen organisierte Kriminalität, 1997, p. 699.

tried to settle this problem, though the measures that have so far been applied have not produced any significant effects.

c) Certain attempts were undertaken to charge that the burden of evidence relating to the origination of property should be laid on the accused. This idea provoked various discussions; finally the Social Democrat Party which introduced this idea, acknowledged its unconstitutional nature with respect to its "inconsistency with the principle of presumption of innocence". The search for a way out of the existing situation since the beginning of 1998 has been incomplete and came to the end when in May 1998 the Law was finally adopted, which offered the following novelties:

According to section 2 of Article 10 of the Law on Money Laundry, legislative bodies are entitled to bring up suits in those criminal cases which inspire suspicion as to the legalisation of illegal money and to notify the tax inspection authorities immediately. According to the previous version of the Act application of this measure was admissible only after the decision by court had become valid. The previous version raised a lot of problems. It took years to complete investigations and to authorise the decision of the court especially in relation to industrial and economic offences, until finally the case was presented before the tax authorities by which time it would have become very complicated to determine the facts relevant to taxation and time limitation of actions with respect to tax offences occurring. By this time the owner would already have managed to hide his capital in a more reliable location somewhere abroad.

Unlike in criminal procedure, taxation law lays the burden of evidence on the property owner, who is held liable to present notification on all his income sources. Although the payer has the right to retain such information, this may still cause him trouble as in such case an official shall procure this information himself and shall himself evaluate levels of tax indebtedness.

To prevent large capital outflows from Germany with the purpose of avoiding tax payments, the new Act rendered it compulsory to indicate the amount of the sum transferred abroad at the customs service. If information registered with customs turns out to be false, sanctions allow a fine up to the total amount of the detected sum. In case of any suspicions concerning the "legalisation" of illegal money, the customs officer is liable to inform the prosecution authorities. Such information can be used from both the criminal investigation authorities and the tax authorities.

According to the new adjustment to the Act on Money Laundry, information on the "legalisation" of illegal money received from banks or other credit organisations shall be regarded as sufficient grounds to bring up a criminal case. Heretofore, this was admissible only in cases when the sanction for the presumed offence extended beyond a two-year prison sentence.

In the preceding pages we have attempted to acquaint the reader with those legal and legislative measures through which the latest German legal doctrine tries to control organised crime.

Unfortunately, along this complicated path, the legislature was bound to restrict some of the positions characteristic of a democratic society (for instance relating to residence shadowing and telephone bugging) though these compromises between democratic rights and law enforcement came about only after lengthy discussions and against a background of an attack upon the most grave of offences, that is organised crime. The establishment of these measures became admissible only after it attained a legitimate, legally sanctioned nature and it is inadmissible by common legal practice of Germany to apply the evidence provided through unorthodox methods and the special measures mentioned above only directly against organised crime and its perpetrators.

IMPORTANT LEGAL ACTS ADOPTED IN 1998

I. LAWS ADOPTED BY THE PARLIAMENT OF GEORGIA

04.02.1998	Law of Georgia on the Introduction of the Day of Human Rights Protection (PU[1] No. 8-9, p. 6)
05.02.1998	Law of Georgia on Changes to the Tax Code of Georgia (PU No. 8-9, p. 7)
06.02.1998	Law of Georgia on the Basics of the System of Fees (PU No. 8-9, p. 8)
06.02.1998	Law of Georgia on State Procurement in the field of Construction (PU No. 8-9, p. 10)
18.02.1998	Law of Georgia on Tax Fees (PU No. 11-12, p. 37)
18.02.1998	Law of Georgia on State Security (PU No. 11-12, p.5)
18.02.1998	Law of Georgia on Advertisement (PU No. 11-12, p.15)
18.02.1998	Law of Georgia on Amendments to the Administrative Procedure Code (PU No. 11-12, p. 24)
18.02.1998	Law of Georgia on Amendments to Criminal and Criminal Procedure Codes (PU No. 11-12, p. 25)
18.02.1998	Law of Georgia on Changes to the Customs Code (PU No. 11-12, p. 26)
18.02.1998	Law of Georgia on Refugees (PU No. 11-12, p. 39)
18.02.1998	Law of Georgia on Amendments to the Administrative Procedure Code (PU No. 11-12, p. 27)
18.02.1998	Law of Georgia on Changes to the Law on the Notary (PU No. 11-12, p. 28)
20.02.1998	Law of Georgia on Changes and Amendments to the Law on Public Service (PU No. 11-12, p. 29)
20.02.1998	Law on the Criminal Procedure Code (PU No. 13-14, p. 31)
20.02.1998	Law of Georgia on the Capital of Georgia – Tbilisi (PU No. 11-12, p. 42)
20.02.1998	Law of Georgian on Changes and Amendments to the Law on Courts of the General Jurisdiction (PU No. 11-12, p. 31)
20.02.1998	Law of Georgia on Changes to the Civil Procedure Code (PU No. 11-12, p. 32)
20.02.1998	Law of Georgia on Amendments to the Civil Procedure Code (PU No. 11-12, p. 33)
20.02.1998	Law of Georgia on the Strengthening of Measures against Terrorism (PU No. 11-12, p. 34)

[1] Parlamentis Utzhebani (PU) is the official journal of the Parliament of Georgia.

20.02.1998	Law of Georgia on Changes and Amendments to the Criminal Procedure Code (PU No. 11-12, p. 36)
04.03.1998	Law of Georgia on Amendments to the Law on State Secrets (PU No. 13-14, p. 30)
04.03.1998	Law of Georgia on Amendments to the Law on the Provisional Investigative Commission of the Georgian Parliament (PU No. 13-14, p. 27)
04.03.1998	Law of Georgia on Amendments to the Law on Parliamentary Committees (PU No. 13-14, p. 28)
04.03.1998	Law of Georgia on the Group of Confidence (PU No. 13-14, p. 25)
05.03.1998	Law of Georgia approving the Amount of Georgian Military Forces (PU No. 13-14, p. 29)
05.03.1998	Law of Georgia on Changes to the Law on Wages of the Members of the Parliament of Georgia (PU No. 13-14, p. 24)
05.03.1998	Law of Georgia on the Reorganisation of Tax Debts (PU No. 13-14, p. 21)
05.03.1998	Law of Georgia on State Debt (PU No. 13-14, p. 9)
05.03.1998	Law of Georgia on the Status of the Members of the Parliament (PU No. 13-14, p. 201)
20.03.1998	Law of Georgia on Changes and Amendments to the Criminal Procedure Code (PU No. 13-14, p. 209)
20.03.1998	Law of Georgian on Customs Fees (PU No. 13-14, p. 227)
20.03.1998	Law of Georgia on Amendments to the Law on Tourism and Resorts (PU No. 15-16, p. 9)
20.03.1998	Law of Georgia on Sanitary Zones of Resorts and Vacation Spots (PU No. 15-16, p. 5)
20.03.1998	Law of Georgia on Amendments to the law of Georgia on the Enforcement of the Law on the Ownership of Agricultural Land (PU No. 15-16, p. 10)
31.03.1998	Law of Georgia on Amendments to the law on the Insurance of Pensions of those Persons transferred to the Reserve (and their Family Members) (PU No. 15-16, p. 11)
31.03 1998	Law of Georgia on export-licensing Fees for raw Material Wood-Timber (PU No. 15-16, p. 12)
03.04.1998	Law of Georgia on Changes and Amendments to the Law of Georgia on Consulate Fees (PU No. 15-16, p. 15)
14.04.1998	Law of Georgia on architectural Activities (PU No. 17-18, p. 15)
28.04.1998	Law of Georgia on geodesic and cartographic Activities (PU No. 19-20, p. 9)
28.04.1998	Law of Georgia on Changes and Amendments to the Administrative Procedure Code (PU No. 19-20, p. 17)

28.04.1998	Law of Georgia on Changes and Amendments to the Administrative Procedure Code (PU No. 19-20, p. 18)
28.04.1998	Law of Georgia on Armament, military Equipment and Export Control of Production with dual Purposes (PU No. 19-20, p. 19)
29.04.1998	Law of Georgia on Private International Law (PU No. 19-20, p. 25)
29.04.1998	Law of Georgia on State Fees (PU No. 19-20, p. 37)
29.04.1998	Law of Georgia on Changes and Amendments in some legislative Acts of Georgia (PU No. 19-20, p. 41)
30.04.1998	Law of Georgia on Internal Military Forces (PU No. 19-20, p. 42)
01.05.1998	Law of Georgia on Changes and Amendments to the Tax Code of Georgia (PU No. 19-20, p. 50)
01.05.1998	Law of Georgia on Changes to the Law on Budget System and Budget Competence (PU No. 19-20, p. 59)
01.05.1998	Law of Georgia on Changes and Amendments to the Law on Customs Fees and Duties (PU No. 19-20, p. 60)
12.05.1998	Law of Georgia on Fire Security (PU No. 19-20, p. 61)
13.05.1998	Law of Georgia on Amendments to the Tax Code (PU No. 19-20, p. 75)
15.05.1998	Law of Georgia on Amendments and Changes to the Law on Gatherings and public Meetings (PU No. 19-20, p. 76)
15.05.1998	Law of Georgia on Changes and Amendments to the Law on Public Service (PU No. 19-20, p. 74)
29.05.1998	Law of Georgia on Local Fees (PU No. 21-22, p. 6)
29.05.1998	Law of Georgia on Amendments and Changes to the Law on recognising Georgian Citizens as the Victims of political Repression and about the social Protection of the Repressed (PU No. 21-22, p. 10)
29.05.1998	Law of Georgia on Changes and Amendments to some Normative Acts of Georgia (PU No. 21-22, p. 11)
29.05.1998	Law of Georgia on Changes and Amendments to the Law on the Status of Members of Parliament (PU No. 21-22, p. 12)
29.05.1998	Law of Georgia on Amendments and Changes to the Law on Committees of the Georgian Parliament (PU No. 21-22, p. 5)
11.06.1998	Law of Georgia on Fees for notarial Services (PU No. 25-26, p. 5)
11.06.1998	Law of Georgia on Changes to the Law on the Notary (PU No. 23-24, p. 5)
12.06.1998	Law of Georgia on dangerous Chemicals (PU No. 23-24, p. 6)
12.06.1998	Law of Georgia on Changes to the Law on State Debts (PU No. 23-24, p. 26)

12.06.1998 Law of Georgia on Amendments and Changes to the Law on long-term economical Normatives on Allocations in the Budgets of Abkhaz and Adjar Autonomous Republics and other administrative Units of Georgia from State Taxes (PU No. 23-24, p. 35)

12.06.1998 Law of Georgia on Changes to the Law on Budget Systems and Budget Competence (PU No. 23-24, p. 36)

12.06.1998 Law of Georgia on Vineyards and Wine (PU No. 23-24, p. 37)

12.06.1998 Law of Georgia on Amendments and Changes to the Law on the Prosecution Office (General Prosecutor's Office) (PU No. 23-24, p. 50)

12.06.1998 Law of Georgia on Changes and Amendments to the Administrative Procedure Code (PU No. 23-24, p. 51)

12.06.1998 Law of Georgia on Amendments to the Criminal Procedure Code (PU No. 23-24, p. 52)

12.06.1998 Law of Georgia on the Prolongation of the Term of Authority of the Supreme Court Judges of Georgia (PU No. 23-24, p. 52)

12.06.1998 Law of Georgia on Changes and Amendments to the Law on Education (PU No. 23-24, p. 54)

12.06.1998 Law of Georgia on Amendments to the Law on Privatisation of State Property (PU No. 23-24, p. 55)

II. ORDINANCES OF THE PRESIDENT OF GEORGIA

22.02.1998 Ordinance of the President of Georgia No. 95: On Mechanisms to achieve State Regulation of Natural Monopolies

04.03.1998 Ordinance of the President of Georgia No. 124: On measures relating to further Development of legislative Activity

30.04.1998 Ordinance of the President of Georgia No. 282: On the Program for reducing the Scope of the shadow Economy in Georgia

17.05.1998 Ordinance of the President of Georgia No. 326: On the Preparation, Issuing, Promulgating and Application of Measures issued by the Executive Power

15.06.1998 Ordinance of the President of Georgia No. 374: On urgent Measures concerning antimonopoly Policy Promotion in the Country

25.06.1998 Ordinance of the President of Georgia No. 387: On Regulations affecting the Awarding of Asylum to foreign Nationals

28.06.1998 Ordinance of the President of Georgia No. 392: On the Establishment of the intellectual Property Centre " Sakpatenti" (under the Ministry of Economy)

05.07.1998 Ordinance of the President of Georgia No. 403: On the Privatisation Strategy of the Energy System Companies

02.08.1998 Ordinance of the President of Georgia No. 446: On Rules affecting of agricultural Land leasing within State Ownership

31.10.1998 Ordinance of the President of Georgia No. 615: On Acceleration of Privatisation of Georgian health care Facilities

05.12.1998 Ordinance of the President of Georgia No. 678: On Measures for Fulfilling the Requirements of the Agreement on the Technical Barriers to Trade, with respect to Georgia's Accession to the World Trade Organization

III. DECREES OF THE PRESIDENT OF GEORGIA

15.04.1998 Decree of the President of Georgia No. 142: On Establishment of the permanent Competition Committee for Privatisation of important State Facilities

16.04.1998 Decree of the President of Georgia No. 143: On Establishment of the Governmental Committee for the Implementation of the Physical and Legal Persons' Identification and Personalisation Unified Informational Computer System

28.05.1998 Decree of the President of Georgia No. 226: On Ensuring the Translation of foreign Language of international Treaties or their draft Texts into the Georgian Language

31.05.1998 Decree of the President of Georgia No. 244: On Participation of the Georgian Delegation in the diplomatic Conference on international Criminal Court and Signing of the Charter

22.06.1998 Decree of the President of Georgia No. 327: On Establishment of the Interinstitutional Committee of International Humanitarian Law

28.06.1998 Decree of the President of Georgia No. 336: On Establishment of the Antimonopoly Council under the State Antimonopoly Service of Georgia

30.06.1998 Decree of the President of Georgia No. 340: On Amendments to the Decree of the President of Georgia No. 173 from 16 July 1996 on starting Negotiations for Accession to the World Trade Organisation

12.07.1998 Decree of the President of Georgia No. 394: On Amendments to the Decree of the President of Georgia No. 173 from 16 July 1996 on Starting Negotiations for Accession to the World Trade Organization

17.07.1998 Decree of the President of Georgia No. 402: On Amendments to the Decrees of the President of Georgia No. 340 from 30 June 1998 and No. 173 from 16 July 1996 on Starting Negotiations for Accession to the World Trade Organization

19.09.1998 Decree of the President of Georgia No. 620: On Elections of the local Representative Bodies – Sakrebulo

25.09.1998	Decree of the President of Georgia No. 647: On emergency Measures for Strengthening of the financial System and monetary Policy and Defence of the State Economy from the negative Influence of external Factors
25.09.1998	Decree of the President of Georgia No. 648: On urgent Measures promoting Protection of Georgian food Products from Falsification on internal and external Markets
28.09.1998	Decree of the President of Georgia No. 659: On additional Measures to strengthen the Lari as the only Means of Payment within the territory of Georgia
04.10.1998	Decree of the President of Georgia No. 683: On the national Co-ordinator of the EU TACIS Program
21.10.1998	Decree of the President of Georgia No. 751: On the Establishment of the Georgian International Auction and Tendering House
23.10.1998	Decree of the President of Georgia No. 763: On the Establishment of the Governmental- organisational Committee connected to the Georgia's Chairmanship of Black Sea Economic Co-operation (BSEC)
18.11.1998	Decree of the President of Georgia No. 852: On Amendments to the Decree of the President of Georgia No. 173 from 16 July 1996 on the Starting of Negotiations for Accession to the World Trade Organization
14.12.1998	Decree of the President of Georgia No. 942: On amendments to the Decree of the President of Georgia from 16 April 1998 on Establishment of the Governmental Committee for the Implementation of the Physical and Legal Persons' Identification and Personalisation Unified Informational Computer System.