THE APPROXIMATION OF EC LAW IN THE CZECH REPUBLIC: TRANSPOSITION OR TRANSFORMATION?

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ABSTRACT

This thesis examines the process of approximating EC law that the Czech Republic has undertaken both under the Europe Agreement and in order to fulfill one of the conditions for membership in the European Union. The thesis aims to determine whether the transposition of EC legislation has been undertaken with a view to effective implementation of the *acquis communautaire* and to assess what implications this process will have for the Czech Republic. To this end, three areas of law which are subject to approximation are examined, namely competition law, environmental law and company law. Accordingly, Chapter I provides a general overview of the process of approximation and the challenges it poses for the Czech Republic. The process of approximation in the field of competition law is examined in Chapter II, followed by environmental law in Chapter III. The area of company law is addressed in Chapter IV. Finally, Chapter V concludes with an analysis of the findings of the previous chapters with a discussion of the implications of approximation for the legal order of the Czech Republic.

RÉSUMÉ

Cette thèse de maîtrise examine le processus de rapprochement au droit communautaire entrepris par la République tchèque en vertu des provisions de l'Accord européen ainsi que pour remplir une des conditions de son adhésion à l'Union européenne. Cette thèse cherche à déterminer si la transposition du droit communautaire a été effectuée afin de permettre une mise en oeuvre efficace de l'acquis communautaire. À ces fins, trois domaines de droit qui font l'objet du rapprochement sont examinés, notamment le droit de la concurrence, le droit de l'environnement et le droit des sociétés. À cette mesure, le premier chapitre survole les problèmes posés par le processus de rapprochement ainsi que les défis que ceux-ci posent pour la République tchèque. Le processus de rapprochement dans le domaine de la concurrence est examiné dans le deuxième chapitre, suivit d'un exposé du droit de l'environnement dans chapitre trois. Le domaine du droit des sociétés est adressé dans le quatrième chapitre. Finalement, chapitre cinq termine l'analyse en faisant le bilan des conclusions tirées des chapitres précédents ainsi qu'en présentant une discussion des implications de ce processus sur l'ordre juridique de la République tchèque.

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INTRODUCTION

Following the collapse of the communist regime in 1989 and secession from Czechoslovakia in 1992, the Czech Republic inherited the massive task of transforming from a centrally planned economy and communist dictatorship to a market oriented democracy, based on the rule of law. In order to claim a position among the developed European states and thus confirm its transition to a democratic state with a market-driven economy, the Czech Republic has endeavored to become a member of several international organizations, namely the Council of Europe and the North Atlantic Treaty Organization. Above all, however, the Czech Republic has striven to become a member of the European Union.

In order to qualify for membership in the European Union, the Czech Republic must fulfill numerous criteria one of which is the approximation of its laws with the *acquis communautaire*. This condition may at first glance appear to be a relatively straightforward obligation. However, when one considers the scope of the *acquis* and the ramifications of this undertaking, it becomes clear that the Czech Republic is faced with an arduous task, one that will have far-reaching consequences which will invariably impact the legal system and all aspects of civil society in the Czech Republic.

This thesis examines the process of approximation that the Czech Republic has undertaken both as required under the Europe Agreement and in order to qualify for membership in the European Union. The aim of this thesis is to determine the progress that has been achieved in the process of approximation and what implications this process will have for the legal order and the institutions of the

Czech Republic. In particular, this thesis seeks to determine whether the process of approximation has been undertaken with a view to effective implementation of the *acquis* in the Czech Republic and not merely formal transposition.

Three specific areas that are subject to approximation are analyzed, given that an in-depth examination of all the legal sectors subject to approximation would exceed the scope of this thesis. These are competition law, environmental law and company law. These areas have been selected as they each involve critical issues with respect to the process of approximation and provide useful illustrations of the key points raised in this analysis.

Competition law was chosen for its important role not only in the proper functioning of the internal market but also for its effect on the economies of the individual Member States. Moreover, as competition law in Europe exists both at the national and at the EC level, this area of law provides an interesting illustration of the distinction between the two legal regimes.

Environmental law was chosen because significant developments have occurred in this field over the last two decades, which have resulted in the creation of an extensive body of EC environmental legislation and policies. Given that the Czech Republic inherited an environment that suffered many years of neglect under communist rule, the environment is an area which poses specific challenges in the process of approximation.

Finally, company law was chosen both for its importance for the functioning of the internal market and as it is an area of law where significant efforts to harmonize the company law legislation of the Member States have been undertaken at the

Community level. Moreover, company law was one of the first areas where efforts to transpose EC legislation occurred in the Czech Republic and thus it provides an illustration of the development of the process of approximation in the Czech Republic.

The analysis begins with a brief outline of the historical context of enlargement of the European Union, followed by an overview of the context and the legal basis for approximation in the Czech Republic. Then the institutional framework of approximation is briefly summarized at both the EC and the national levels. This is followed by an outline of the progress that has been achieved in the process of approximation. Finally, the challenges and difficulties of approximation are examined. Chapter II examines the process of approximation with respect to competition law. Chapter III addresses environmental law. The process of approximation in the field of company law is examined in Chapter IV. Finally, Chapter V summarizes the findings of the previous chapters.

I. GENERAL OVERVIEW OF APPROXIMATION IN THE CZECH REPUBLIC

1.1 THE ENLARGEMENT OF THE EUROPEAN UNION

Since its creation, the European Union has undertaken successive waves of enlargement, increasing the number of Member States from the original six founding states[1] to the current fifteen Member States. To date there have been four enlargements,[2] beginning with the accession of the United Kingdom, Ireland and Denmark in 1973. Greece acceded in 1981, followed by Portugal and Spain in 1986. Finally, the most recent expansion occurred in 1995 when Austria, Finland and Sweden became Member States.[3]

Enlargement has been a major catalyst for the development of the European Union by enabling it to expand its markets, increase its population and further integration.[4] Both the Treaty of Rome and the Treaty on European Union state that one of the principal objectives is the founding of an "ever closer union among the peoples of Europe".[5]

The potential candidates for the next wave of enlargement include Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. Although Bulgaria, Romania and Turkey have also submitted applications

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[1] The original signatories of the Treaty of Rome were Belgium, France, Germany, Italy, Luxemburg and the Netherlands.

[2] The unification of the German Democratic Republic (GDR) with the Federal Republic of Germany (FRG) on 3 October 1990 technically was not an enlargement of the EU but rather of the FRG. For further details on the process of German reunification see M. Bothe, "The German Experience to Meet the Challenges of Reunification" in A.E. Kellermann, J.W. de Zwaan & J. Czuczai, eds., *EU Enlargement: The Constitutional Impact at the EU and National Level* (The Hague: T.M. C. Asser Press, 2001) 435 at 437.

[3] P. Kent, *Law of the European Union*, 3 ed. (Essex: Pearson Education Limited, 2001) at 5-6.

[4] See M. J. Baun, *A Wider Europe: The Process and Politics of EU Enlargement* (Lanham: Rowman & Littlefield Publishers, 2000) at 1.

[5] Preamble, *Treaty Establishing the European Community* of 25 March 1957, 298 U.N.T.S. 11, as subsequently amended by the *Single European Act* (1986)O.J.L. 169/1, and the *Treaty of Amsterdam* of 2 October 1997 OJ C 340/1[hereinafter *EC Treaty*]; Preamble, *Treaty on European Union* of 7 February 1992, OJ C 224/1(1992) [hereinafter *Treaty on European Union* or *TEU*].

for membership in the EU, they are generally not being considered as candidates for the upcoming round of enlargement.[6] Nevertheless, the next enlargement will be unprecedented in terms of both size and diversity, as it is estimated that the next enlargement will most likely number ten candidate countries, thus increasing the population of the EU by nearly 100 million and its geographic area by almost 1 million square kilometers.[7]

Given the economic and cultural diversity of the candidate countries, the next phase of enlargement poses specific economic and political challenges. In particular, the sheer size of the envisioned enlargement has necessitated that the institutions and policies of the European Union be modified in order to duly accommodate new Member States. These issues have been the subject of much debate within the EU and form the basis of the Treaty of Nice, which was signed on 26 February 2001.[8]

Moreover, the majority of the candidate countries were, with the exception of Cyprus, Malta and Turkey, formerly communist regimes with centrally planned economies that have in recent years undertaken a transformation to a market driven economy. Thus, the economic position of the candidate countries is, in comparison to that of the Member States, less developed. As an example, the GDPs per capita of

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[6] EC, Commission, "Summit Backs Enlargement For 2004" in Europa - Enlargement Weekly Newsletter (25 June 2002), online: <http://www.europa.eu.int/comm/enlargement/docs/newsletter/weekly_250602.htm> (date accessed: 26 June 2002).

[7] Royal Danish Ministry of Foreign Affairs, *Issues In Focus: The Candidate Countries' Way to the EU* (2002), online: <http://www.eu2002.dk/ewebeditpro2/upload/OWStaticContent/827/Engelsk.pdf> (date accessed: 23 July 2002) at 12.

[8] Ireland was the last Member State to ratify the Treaty, which occurred on 19 October 2002 (see EC, Commission, "Irish Referendum Results Bring Clarity to Enlargement" in Europa - Enlargement Newsletter Weekly (22 October 2002), online: <http://www.europa.eu.int/comm/enlargement/docs/newsletter/weekly_221002.htm>). For further details on the Treaty of Nice and its implications for the process of enlargement, see generally EC, Commission, *What Difference Will the Treaty of Nice Make?* (Luxemburg: EC, 2001); also M. G. Puder, "Salade Nicoise from Amsterdam Left-Overs - Does the Treaty of Nice Contain the Institutional Recipe to Ready the European Union for Enlargement?" (2002) 8 Colum. J. Eur. L. 53.

Poland, Hungary and the Czech Republic – states generally considered among the most developed Central and Eastern European states – correspond to roughly 32, 37 and 54 per cent of the EU average.[9]

Similarly, as the majority of the candidate countries were subject to communist rule, the legal, political and social infrastructure of these states is less developed than that of the Member States. Many of the candidate countries have only in recent years moved towards democracy and undertaken the difficult task of restructuring their internal administrative and institutional infrastructure.

Accordingly, the candidate countries' obligation to transpose and fully implement the *acquis communautaire*[10] represents a formidable challenge, particularly given that the *acquis* is not static, but continuously developing.[11] Recently, the Commission estimated that the secondary legislation comprising the *acquis* numbers over 80,000 Official Journal pages and that approximately 2,500 new legislative

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[9] G. Denton, "Agenda 2000 and EU Budget Strategy: Funding Enlargement and Relations with Eastern and Southern Neighbours" in M. Maresceau & E. Lannon, eds., *The EU's Enlargement and Mediterranean States: A Comparative Analysis* (New York: Palgrave Publishers, 2000)141 at 145-46. In contrast, the GDPs per capita of Greece, Portugal and Spain, which number amongst the least developed Member States of the European Union, were 61, 72, 78 per cent respectively of the European Union average (*ibid.* at 146).

[10] The term refers to the rights, obligations, and principles that arise from EC law (both primary and secondary) and the decisions of the Court of Justice. In addition, it includes all declarations, resolutions and practices that are adopted within the framework of the European Union. (EC, Commission, *The European Union: Still Enlarging* (Luxemburg: Office for the Official Publications of the European Communities, 2001) at 8 [hereinafter *European Union: Still Enlarging*]; C. Clements, "A More Perfect Union? Eastern Enlargement and the Institutional Challenges of the Czech Republic's Accession to the European Union" (2002) 29 Syracuse J. Int'l L. & Com. 401 at n. 18). For a discussion on the *acquis*, see C. C. Gialdino, "Some Reflections on the *Acquis Communautaire*" (1995) 32 C.M.L.R. 1089; C. Delcourt, "The *Acquis Communautiare*: Has the Concept Had its Day?" (2001) 38 C.M.L.R. 829.

[11] The acquis is often described as "a moving target", see *e.g.* J. Pellegrin, *The Political Economy of Competitiveness in an Enlarged Europe* (New York: Palgrave Publishers, 2001) at 8; or, perhaps more fittingly, has been referred to as "a moving target in the fog" given that it is unknown what final form the *acquis* will take (Baun, *supra* note 4 at 7).

norms are generated each year.[12] Thus, not only are the candidate countries faced with taking over a more complex and comprehensive *acquis* than did previous applicants in prior enlargements, but the *acquis* has evolved and expanded from the date that the candidate countries submitted their applications for membership.[13]

Although the next enlargement poses much greater challenges, there are several compelling factors that justify undertaking the next wave of enlargement. As the next enlargement would include several former communist states of Central and Eastern Europe, this would increase political stability and security in the region.[14] In addition, it would bring economic benefits by enlarging the internal market, thus creating new business opportunities for European businesses and providing incentives for job growth in the European Union.[15] Moreover, as the new Member States would be required to fully adopt and implement Community legislation and policies, enlargement would have a positive impact in such areas as the environment and controlling organized crime.[16] Furthermore, the increased size and scope of the European Union would enhance its role in international relations, in particular with respect to trade and foreign policy.[17] Finally, there is the perception that the European Union has a moral obligation with respect to the Central and Eastern

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[12] EC, Commission, *Communication from the Commission to the European Parliament and Council - Codification of the Acquis communautaire* (Brussels: EC, 2001) at 7.
[13] H. Grabbe & K. Hughes, *Enlarging the EU Eastwards* (London: Chastham House Papers, 1998) at 1. For a more detailed discussion of the political development of the acquis, see A. Wiener, "The Embedded *Acquis Communautaire*: Transmission Belt and Prism of New Governance" in K. Neunreither & A. Wiener, eds., *European Integration After Amsterdam: Institutional Dynamics and Prospects for Democracy* (Oxford: Oxford University Press, 2000) at 318.
[14] *European Union: Still Enlarging, supra* note 10 at 4.
[15] EC, Commission, *EU Enlargement: A Historic Opportunity* (Luxemburg: EC, 2001) at 4, online: <http://europa.eu.int/comm/enlargement/docs/index.htm> (date accessed: 23 July 2002) [hereinafter *Historic Opportunity*]
[16] *Ibid.* at 5.
[17] *Ibid.*; see also *European Union: Still Enlarging, supra* note 10 at 4.

European states and that such an enlargement would provide a historic opportunity to reunite Europe.[18]

It is interesting to note the evolution in the European Union's position towards enlargement. Although the fall of communism marked a new opportunity for closer relations with the Central and Eastern European states, the European Community initially suffered internal division on the issue of enlargement.[19] Although some Member States, namely Germany and Great Britain supported the idea of enlargement, other Member States opposed such plans.[20] Thus the Europe Agreements concluded with Eastern and Central European states following the demise of communism do not contain any express provisions relating to the possibility of membership for the associated states. In fact, the Commission had stated that the Agreements did not form a basis for future membership.[21] However, the Copenhagen European Council in 1993 marked a significant shift in the position on enlargement when the Council acknowledged the possibility that the associated states could potentially become members and when it outlined for the first time the criteria for membership.[22]

1.2 THE CONTEXT OF APPROXIMATION IN THE CZECH REPUBLIC

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[18] Grabbe & Hughes, *supra* note 13 at 1.

[19] For a detailed account of the internal dissent within the EC with respect to enlargement during the period 1990-1993, see J. I. Torreblanca, *The Reuniting of Europe: Promises, Negotiations and Compromises* (Burlington: Ashgate Publishing Ltd., 2001).

[20] The southern Mediterranean states were among the opponents to the idea of granting membership to the associated states were as they believed enlargement would lead to a decrease in EC subsidies (see Baun, *supra* note 4 at 55).

[21] A. Inotai, "The CEECs: From Association Agreements to Full Membership?" in J. Redmond & G. G. Rosenthal, eds., *The Expanding European Union: Past, Present and Future* (Boulder: Lynne Riener Publishers, 1998)157 at 158.

[22] U. Sedelmeier, "East of Amsterdam: The Implications of the Amsterdam Treaty for Eastern Enlargement" in Neunreither & Wiener, *supra* note 13, at 222.

Membership in the European Union has been deemed necessary by the Czech government for several reasons. Foremost, there is a general perception that only by acquiring membership in the European Union will there truly be a "return to Europe". Accordingly, membership in the EU has been seen by the Czech government as a means of confirming the position of the Czech Republic among European democratic states.[23] Moreover, joining the internal market would strengthen and expediate the development of the market economy.[24] In addition, there is a political perspective – not joining the EU while other associated states do could potentially result in political isolation and negatively impact the role and position of the Czech Republic in European and international relations.

As a step towards achieving its goal of membership in the European Union, the Czech Republic signed the Europe Agreement[25] on 4 October 1993, which came into effect on 1 February 1995. The Europe Agreement forms the cornerstone and legal basis of relations between the Czech Republic and the EC and its Member States. The primary objective of the Agreement is to enable the Czech Republic to participate in the process of European integration and to assist the Czech Republic in its ultimate goal of becoming a member of the European Union.[26] To this end, the

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[23] Ministry for Regional Development of the Czech Republic, *Cesta do Evropské Unie: Sbližování práva České republky s právem Evropských společenství*, svazek č. 9 (Prague: Ministry for Regional Development of the Czech Republic, 1997) at 6.

[24] M. Dauderstädt, *Kandidátské země tzv. první vlny ze střední a východní evropy na cestě do Evropské unie* (Prague: Ministry for Regional Development of the Czech Republic, 2000) at 13.

[25] *Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part* (1993) OJ L 360/2; promulgated in the Czech Republic as *sdělení Ministerstva zahraničních věcí České republiky č. 7/1995 Sb.* [hereinafter *Europe Agreement* or *EA*].

[26] EA, Preamble, paras. 4 and 17.

Czech Republic submitted its application for membership to the European Union on 17 January 1996.[27]

In order to accede to the European Union, the Czech Republic must fulfill several preconditions,[28] which may be summarized and classified into three broad categories: political criteria,[29] economic criteria[30] and the ability to assume obligations arising from membership in the European Union. The last category includes both the capacity to fully incorporate the *acquis communautaire* as well as the effective implementation of the *acquis*.[31] Accordingly, one of the principal preconditions to membership in the European Union is the approximation of the laws of the Czech Republic with the *acquis communautaire*.[32]

1.3 LEGAL BASIS AND SCOPE OF APPROXIMATION

The term approximation of law is not defined in the Agreement nor is it concisely defined in European law.[33] The process of approximating Czech law with Community legislation has, however, been defined by the Czech government as "the

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[27] Dauderstädt, *supra* note 24 at 12.

[28] Formal conditions for membership are provided for in Art. 49 TEU. These include the submission of an application to the European Council and the requirement that the applicant be a "European" state, which upholds the fundamental principles outlined in Art. 6(1)TEU (democracy, liberty, rule of law and respect for human rights and fundamental freedoms) (D. Štrupová, *Sbližování práva České republiky s právem Evropské unie v rámci předvstupní strategie* (Prague: Charles University, 2000) at 7-9 [hereinafter *sbližování předvstupní strategie*]; N. Šišková, "Evropská dohoda jako nástroj sbližování českého práva s právem ES" (1999) Právník č. 138/99 at 63 [hereinafter "nástroj sbližování"]).

[29] The political criteria include democracy, rule of law, respect for human rights and minority protection. The conditions were summarized by the Commission in the *Agenda 2000 - Commission Opinion on the Czech Republic's Application for Membership of the European Union* (Brussels: EC, 1997) [hereinafter *Commission Opinion]* at 9.

[30] The economic criteria consist of the requirement of a functioning market economy and the ability of the applicant state to effectively compete in the internal market (*ibid.* at 28).

[31] *Ibid.* at 1.

[32] N. Šišková, *Základní otázky sbližování českého práva s právem ES* (Prague: Codex Bohemia, 1998) at 40[hereinafter *Základní Otázky Sbližování*].

[33] *Ibid.* at 17-18. Both the terms 'approximation' and 'harmonization' are commonly used in reference to the process of transposing European law by Member States and by the candidate countries. The distinction between the two terms is further discussed below in section 1.6.

preparation and the process of transposing legislation together with ensuring the conditions for their implementation, which is aimed at gradually achieving compatibility of Czech legislation with EC law".[34]

The legal basis for the obligation of the Czech Republic to approximate its legislation with that of the Community is to be found in the Europe Agreement, which contains both general and special provisions relating to the approximation of law.[35] Articles 69 to 71 of the Europe Agreement form the general provisions that govern the process of approximation, while special provisions relating to approximation are contained in the sections that relate to specific areas of the internal market.[36]

Pursuant to Article 69 EA, the approximation of the legislation of the Czech Republic with that of the Community is one of the fundamental conditions required for the Czech Republic's economic integration into the EC. According to Article 69 EA, the legislation of the Czech Republic is to be 'gradually made compatible with that of the Community'. Moreover, both existing and future legislation of the Czech Republic and the European Communities is subject to approximation.[37]

The second general provision – Article 70 EA – outlines the areas of law that are subject to approximation.[38] The list, however, is non-exhaustive and merely delimits

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[34] *Usnesení vlády České republiky ze dne 15. listopadu 1999 č. 1212 o Metodických pokynech pro zajišťování práci na sbližování právních předpisů České republiky s právem Evropských společenství* (1999) at II.1.(a) [author's translation][hereinafter *Resolution No 1212*].

[35] "Nástroj sbližování", *supra* note 28 at 64-65; L. Tichý & R. Arnold, *Evropské právo* (Prague: C. H. Beck, 1999) at 813.

[36] A. Verny, *Právní aspekty přidružení a členství v EU se zvláštní zřetelem ke sbližování práva*, vol. I (Prague: Vysoká škola ekonomická v Praze, 1999) at 201.

[37] EA, art. 69.

[38] Article 70 EA reads: 'The approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health

the priority areas on which approximation should be focused.[39] It should be noted that the scope of approximation under the Europe Agreement is narrower than that called for under the Copenhagen preconditions for accession, as under the Copenhagen criteria, states seeking membership in the European Union must transpose the entire *acquis communautaire*.[40] This obligation to approximate is broader in scope, as the *acquis* includes the policies and legislatory mechanisms of the European Union and not only the legislation of the European Communities, which compose the first pillar of the European Union.[41]

The third general provision, Article 71 EA, provides for the obligation of the EC to furnish the Czech Republic with technical assistance for the process of approximation such as expert assistance, training and aid for the translation of legislation into the Czech language.

The special provisions governing approximation are found in the various provisions of the Agreement that relate to areas that are of key importance to the functioning of the internal market. These include provisions that govern air and interstate transport;[42] free movement of capital;[43] competition rules;[44] public undertakings;[45] protection of industrial and intellectual property rights;[46] agricultural

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and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, nuclear law and regulation, transport and the environment'.

[39] *Základní Otázky Sbližování*, *supra* note 32 at 43.

[40] *Sbližování předvstupní strategie*, *supra* note 28 at 16.

[41] *Ibid.* at 16; see discussion *infra* note 79.

[42] *Europe Agreement*, art. 57(5).

[43] *Ibid.* art. 62 (1),(2).

[44] *Ibid.* art. 64 (2). Pursuant to this Article, the competition provisions of the EC Treaty (Arts. 81, 82 and 87 respectively) are directly applicable to anticompetitive behavior that affects trade between the Czech Republic and the EC. This is further discussed below in Chapter II.

[45] *Ibid.* art. 66.

[46] *Ibid.* art. 67(1).

and agro-industrial sector;[47] the environment;[48] transport;[49] the banking, insurance and financial services sector;[50] and customs.[51] Although these provisions in some instances cover the same areas outlined in Article 70 EA, these provisions further elaborate the process of approximation which is to be achieved in a given area.[52]

Generally, the provisions call for achieving the gradual alignment of Czech legislation with that of the Community. However, in three areas the Agreement calls for a higher degree of compability of Czech legislation with Community legislation. In the areas of technical norms and standards,[53] money laundering[54] and consumer protection[55] the Europe Agreement provides for achieving full alignment of Czech legislation with that of the EC.[56]Both the general and the specific provisions of the Agreement relating to the approximation of law outline only generally the result which it is to be achieved. The Agreement does not specify which existing EC legislation is subject to approximation,[57] nor does it provide a specific timeframe for approximation.[58] Moreover, with the exception of the obligation of the EC to provide technical assistance pursuant to Article 71 EA and the bilateral institutional

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[47] *Ibid.* art. 78(1).
[48] *Ibid.* art. 81(3); see Chapter III, below, for a more detailed discussion.
[49] *Ibid.* art. 82(3).
[50] *Ibid.* art. 84(1).
[51] *Ibid.* art. 93(1); see Verny, *supra* note 36 at 201-202.
[52] M. A. Dauses, A. Verny & J. Zemanek, *Cesta do Evropské unie: Metodické zásady sbližování práva přidruženého státu s právem Evropské Unie na příkladu České republiky* (Prague: Ministry for Regional Development of the Czech Republic, 1996) at 60.
[53] *Europe Agreement*, art. 75(1).
[54] *Ibid.* art. 86(2).
[55] *Ibid.* art. 92(1).
[56]Tichy & Arnold, *supra* note 35 at 814-15.
[57]According to some estimates, the Europe Agreement only covers approximately thirty per cent of the acquis communautaire (see Štrupová, *supra* note 28 at 16).
[58] Although the Agreement was concluded for an indefinite period of time (Art. 120 EA), it provides for a 'transitional period' that has a duration of ten years and which is divided into two successive stages of five years (Art. 7(1) EA).

framework established by the Agreement,[59] the Agreement does not elaborate the method or procedure that should be undertaken by the Czech Republic in the process of approximation.[60]

Accordingly, the scope of legislation subject to approximation under the Europe Agreement was subsequently elaborated by the Commission in its White Paper[61] on the preparation of associated states for integration into the common market, which was issued by the Commission in May 1995.[62] Although it is targeted generally at all the Central and Eastern European candidate countries and is not legally binding,[63] the White Paper represents an important tool for the process of approximation. Apart from summarizing the development and functioning of the internal market,[64] the White Paper outlines a comprehensive strategy and the concrete steps that the candidate countries need to take in the process of approximation. To this end, the White Paper identifies which Community legislation must be transposed by the candidate countries in order to enable their integration into the common market.[65] Moreover, for the first time, the Commission emphasizes the need for the effective implementation of Community legislation.[66]

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[59] See *EA*, Title IX.

[60] "Nástroj sbližování," *supra* note 28 at 64; K. Inglis, "The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation" (2000) 37 C.M.L.R 1173 at 1197.

[61] EC, Commission, *White Paper on the preparation of the associated countries of Central and Eastern Europe for integration into the Internal Market* (Brussels: EC, 1995) [hereinafter *White Paper*].

[62] Tichý & Arnold, *supra* note 35 at 814.

[63] White papers and similar types of reports issued by the Commission, such as green papers, are merely recommendations and as such are not legally binding on its addressees under EC law (Art. 249 EC Treaty).

[64] See generally *White Paper*, *supra* note 61 at Chapter 2.

[65] It should be noted that the White Paper underlines the distinction between the approximation of legislation in order to achieve integration into the common market and the broader obligation to transpose the entire acquis communautaire (*ibid.* at 1)

[66] *Ibid.* para. 1.12.

The overview of the EC legislation is contained in the Annex of the White Paper and is subdivided into twenty-three sections, each of which is an area integral to the functioning of the internal market. In total, there are over 1,300 EC legal norms outlined in the Annex of the White Paper.[67]

In response to the applications for membership from the associated states, the Commission issued in June 1997 Agenda 2000.[68] The document, largely perceived as the Commission's guide to enlargement,[69] included an assessment of the impact that enlargement would have on the European Union as well as recommendations regarding the enlargement process. In addition, the Agenda 2000 also contained the Commission's Opinions on the applications for membership submitted by the associated states.[70]

The Commission based its assessment of the applications on several criteria, namely the conditions for membership outlined by the Copenhagen European Council in 1993, on the associated states' fulfillment of the Europe Agreement as well as on the progress that they had achieved in adopting and implementing the measures outlined in the Commission's White Paper.[71] The significance of the Agenda 2000 lay not only in its evaluation of the candidate countries' applications for membership, but foremost in the Commission's recommendation that pre-

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[67] Tichý & Arnold, *supra* note 35 at 814.

[68] EC, Commission, *Agenda 2000 – Volume I – Communication: For a stronger and wider Union*, COM DOC/97/6; *Volume II – Communication: Reinforcing the Pre-Accession Strategy*, COM DOC/97/7. *Volume III – Summary and conclusions of the opinions of Commission concerning the application for membership to the European Union presented by the candidate countries*, COM DOC/97/8 (Brussels: EC, 1997).

[69] M. Soveroski, "Enlarging the European Union: Is Agenda 2000 a Guiding Star for the New Millennium" in P. Coffey, ed., *Europe – Toward the Next Enlargement* (Boston: Kluwer Academic Publishers, 2000)35 at 37.

[70] The Commission Opinions on the individual candidate countries' applications for membership were attached in the form of annexes.

[71] *Ibid.* at 2-3.

accession negotiations be started with those associated states that satisfactorily met the requirements for membership.[72] Accordingly, the Luxembourg European Council decided in December 1997 to launch pre-accession negotiations in March 1998 with the Czech Republic, Hungary, Estonia, Poland, Slovenia and Cyprus on the basis of the Commission's recommendations.[73] The launching of these negotiations marked the formal beginning of the accession process.[74]

The accession negotiations between the Commission and the candidate countries were to be undertaken in several phases, namely screening, the negotiation of the various chapters of the *acquis*[75] and finally the negotiation of the accession treaty and the institutional aspects of accession.[76] Screening marked the first phase of the pre-accession negotiations and involved a process of evaluating the compability of existing Czech legislation with that of EC law.[77]For the purposes of screening, the *acquis communautaire* was divided into thirty one chapters[78] and the corresponding legislation in the Czech Republic was subjected to an extensive audit. The object of

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[72] Inglis, *supra* note 60 at 1174.
[73] Clements, *supra* note 10 at 420.
[74] M. Maresceau, "The EU Pre-Accession Strategies: A Political and legal Analysis" in Maresceau & Lannon *supra* note 9 at 7.
[75] It should be noted that the scope and content of the negotiations were in reality limited from the onset to negotiating short-term transitional periods with respect to the various chapters.
[76] I. Witzová, "Konec screeningu" (1999) Mezinarodní politika 9/1999 at 21.
[77] *Ibid.*
[78] The chapters are as follows: 1) Free movement of goods; 2) Free movement of persons; 3) Free movement of services; 4) Free movement of capital; 5) Company law; 6) Competition policy; 7) Agriculture; 8) Fisheries; 9) Transport policy; 10) Taxation; 11) Economic and monetary union; 12) Statistics; 13) Social policy and employment; 14) Energy; 15) Industrial policy; 16) Small and medium-sized undertakings; 17) Science and research; 18) Education and training; 19) Telecommunications and information technologies; 20) Culture and audiovisual policy; 21) Regional policy and coordination of structural instruments; 22) Environment; 23) Consumer and health protection; 24) Cooperation in the field of justice and home affairs; 25) Customs union; 26) External relations; 27) Common Foreign and Security Policy; 28) Financial control; 29) Financial and budgetary provisions; 30) Institutions and 31) Other. The latter two chapters were not included in the screening process as the chapter relating to institutions is predominantly of a political nature and the final chapter encompasses maters that are, for the most part, not directly related to the acquis (Witzová, *supra* note 76 at 23 and n. 3).

the screening process was to determine not only whether the existing legislation in the Czech Republic was compatible with EC law, but also to evaluate the ability of the national institutions to duly implement legislation.[79] Moreover, the scope of the screening process was not limited to the *acquis communautaire* but also included the second and third pillars of the European Union.[80] The process of screening began on 30 March 1998 and was concluded in the beginning of June 1999. Through the screening process it was determined that over half of the relevant Czech legislation was not compatible with EC law and that approximately 4, 340 EC legal norms would have to be transposed.[81]

Following the issuing of its Opinion in 1997, the Commission began publishing annual regular reports assessing the progress that had been achieved by each individual associated state in transposing the *acquis communautaire.*[82] The Commission issued its first set of reports in 1998, which were based in part on the results of the screening process. The assessments were in-depth evaluations of the associated states progress in fulfilling the Copenhagen criteria. Subsequent reports have been issued annually and have followed largely the same structure.[83]

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[79] *Ibid.* at 21.

[80] *Ibid.* The second pillar of the European Union is the Common Foreign and Security Policy (Arts. 11- 29 TEU) and the third pillar is the Police and Judicial Cooperation in Criminal Matters (Arts. 29 – 42 TEU). Prior to the amendment of the TEU by the Treaty of Amsterdam, the third pillar was known as Cooperation in Justice and Home Affairs. Both the second and third pillar are administered under intergovernmental cooperation as only the first pillar of the European Union (encompassing the three Communities) is governed by EC law (P. Craig & G. de Burca, *EU Law: Text, Cases and Materials*, 2d. ed. (Oxford: Oxford University Press, 1998) at 28; Kent, *supra* note 3 at 8). It should be noted, however, that the European Coal and Steel Community Treaty expired on 23 July 2002; see EC, Commission, News Release IP/02/898, "Fifty years at the service of peace and prosperity: The European Coal and Steel Community (ECSC) Treaty expires" (19 June 2002).

[81] Witzová, *supra* note 76 at 21.

[82] Maresceau, *supra* note 74 at 8.

[83] Subsequent Regular Reports on the progress achieved by the Czech Republic have been issued by the Commission on 13 October 1999, 8 November 2000, 13 November 2001 and 9 October 2002. The reports are available on the Commission's website online at: <http://www.europa.eu.int/comm/enlarg

1.4 INSTITUTIONAL FRAMEWORK OF APPROXIMATION

In order to coordinate and undertake approximation, several administrative bodies have been established both at the national level within the legislative and administrative infrastructure of the Czech Republic as well as at the bilateral level between the Czech Republic and the EC. In addition, the European Union has created various programs targeted at providing assistance to the candidate countries in the process of approximation.

A. INSTITUTIONAL FRAMEWORK IN THE CZECH REPUBLIC

The institutional infrastructure for the approximation of law within the Czech Republic is effected at both at the ministerial and at the government level. Pursuant to Government Resolution No.1212,[84] the ministries and central government agencies of the Czech Republic are responsible for ensuring that all existing legislation relevant to the *acquis communautaire* which falls within the scope of their competencies[85] is compatible with EC law.[86] Moreover, any new legislative proposals brought forth by the government, the ministries or members of Parliament must be in principle fully compatible with EC law and all drafts of new legislation must be accompanied by an assessment of the draft bill's compability with EC law.[87] Within each ministry or central government agency there is a Department for

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ement>.

[84] *Resolution No 1212, supra* note 34.

[85] The scope of competencies of the ministries is governed by *zákon č.2/1969 Sb., o zřízení ministerstev a ostatních ústředních orgánů státní správy České republiky*, as subsequently amended.

[86] *Resolution No. 1212, supra* note 34, para.V.1.

[87] *Ibid.*, paras. III.9 and III.10. The assessment of compatibility with EC law is commonly referred to as the 'compatibility clause' (*doložka kompability*).

European Integration that is charged with implementing the relevant aspects of the European agenda for that given ministry or central government agency.[88]

At the government level, several committees and working groups have been established to oversee and coordinate the process of approximation. The Government Council for European Integration (*Rada vlády pro evropskou integraci*) is chaired by the Prime Minister and is comprised of the Deputy Prime Ministers in charge of legislation and economic policies as well as the heads of the key ministries involved in European integration.[89] The Government Council which acts as an advisory council to the government formulates and coordinates policies for achieving membership in the European Union.[90]

The Working Committee for EU Integration (*Pracovní výbor pro integraci České republiky do Evropské unie*) is lead by the Deputy Minister for Foreign Affairs and is comprised of higher-level ministry officials which are appointed to the Committee by the Minister of Foreign Affairs.[91] Each member of the Working Committee also heads a working group of experts that deals with specific provisions of the Europe

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[88] The establishment of these Departments was called for by *Usnesení vlády České republiky ze dne 23. července 1997 č. 451 k organizačnímu a personálnímu zajištění agendy Evropské unie v ústředních orgánech státní správy České republiky* (1997).

[89] Pursuant to *Usnesení vlády České republiky ze dne 7. listopadu 2001 č. 1161 o Statutu Rady vlády pro evropskou integraci* (2001)[hereinafter *Resolution No. 1161*], the heads of the following ministries are members of the Council: foreign affairs, labor and social affairs, finance, the interior, justice, industry and trade, regional development, agriculture and the environment (*ibid.*, Art. III).

[90] *Ibid.* art. II; see also Ministry of Foreign Affairs of the Czech Republic, "Institucionální zajištění integrace ČR do EU" at 1, online: <http://www.euroskop.ca/euroskop/site/cr/pripravacr/instit.html> (date accessed: 14 February 2002) [hereinafter "Institucionální zajištění"].

[91] See *Usnesení vlády České republiky ze dne 9. listopadu 1994 č. 631 o institucionálním zajištění procesu integrace České republiky do Evropské unie, včetně harmonizace právního řádu České republiky s právním řádem Evropské unie*; also P. Desny, "The Harmonization of the Legislation of the Czech Republic with European Union Law" (1997) Perspectives No.8/1997 at 52.

Agreement.[92] The Working Committee coordinates the activities of the ministries and central government agencies in matters relating to integration into the EU.[93]

Within the Office of the Government (*Úřad vlády*), there are two departments that are directly involved in the process of approximation – the Department for European Integration (*odbor evropské integrace*) and the Department for Compatibility (*odbor kompatibility*). The main task of the Department for European Integration is the provision of administrative and technical support to the Government Council for European Integration. As such, the Department works together with the Ministry of Foreign Affairs and other ministries and central government agencies in producing documentation for the Government Council. In addition, the Department for European Integration monitors and evaluates the carrying out of legislative and non-legislative tasks related to European integration.[94]

The Department of Compatibility of the Office of the Government[95] plays a vital role in the process of approximation. The Department is the principal coordinator of activities relating to the process of approximation in the Czech Republic. It assesses the compatibility of legislative proposals with EC law and evaluates the progress that has been achieved in the process of approximation.[96]As such, the Department of Compatibility closely follows the development of EC legislation and informs the

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[92] Working groups of experts have been established for the following matters governed by the Europe Agreement: the approximation of law, free movement of goods, persons, capital and services, competition, state aids, industrial cooperation economic and fiscal policy, science and research, agriculture, environment, transport. For a full summary of the working groups, see Tichy & Arnold, *supra* note 35 at 809.

[93] "Institucionální zajištění," *supra* note 90 at 1.

[94]Office of the Government of the Czech Republic, "Uřád vlády České republiky" online: <http://www.vlada.cz/1250/vrk/eu/oei.htm> (date accessed: 27 July 2002). A monthly overview of legislative and non-legislative tasks undertaken by the Government and Parliament regarding European integration is available on the Office's website online: <http://www.vlada.cz>.

[95]Originally, the Department of Compatibility was organizationally a department of the Office for Legislation and Public Administration of the Czech Republic (see Verny, *supra* note 36 at 208-09).

[96] Resolution No. 1212, *supra* note 34 at para. V. 3.

ministries and central government agencies of any relevant new EC legislation that requires transposition.[97]Furthermore, the Department of Compatibility is charged with coordinating the revision of translations of EC legislation.[98]Finally, the Department maintains and regularly updates ISAP, the government's internal legal database on the approximation of law.[99]

B. BILATERAL INSTITUTIONAL FRAMEWORK

The Europe Agreement provides for the creation of three bilateral bodies at various levels aimed at implementing the provisions of the Europe Agreement, namely the Association Council, the Association Committee and the Parliamentary Association Committee.

Pursuant to Article 104 EA, the Association Council was created at the ministerial level as a supervisory body to oversee the implementation of the Agreement. It is comprised of members of the European Commission and the Council of the European Union as well as persons appointed by the government of the Czech Republic[100] and convenes at least once a year.[101]The Council is authorized to consider any significant issues arising from the Europe Agreement and to hear and resolve disputes between the parties.[102]The decisions of the Council are binding on

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[97] *Ibid.*, para. IV. 9.

[98] *Usnesení vlády ze dne 30. září 1998 č. 645 o zabezpečení oficialních překladů právních předpisech Evropských společenství*, as subsequently amended, at para. III.

[99] ISAP is an acronym for *Informační system pro aproximaci práva* (information system for the approximation of legislation). ISAP is comprised of several databases, including a database of existing EC legislation, a database of translations of EC documents, a lexis of legal terminology as well as a database of English translations of Czech legislation. ISAP also contains a directory of experts and contacts relevant to the process of approximation and a summary of abbreviations commonly used in EC legislation (A. Verny, *Právní aspekty přidružení a členství v EU se zvlaštní zřetelem ke sbližování práva*, vol. 2 (Prague: Vysoká škola ekonomická v Praze, 1999) at 394-95). ISAP is accessible to the public on a limited basis online: <http://www.isap.vlada.cz>.

[100] EA, art. 105(1).

[101] *Ibid.* art. 104 .

[102] *Ibid.*

both parties.[103] In practice, given the level and frequency of convening, the Council deals with the issue of approximation for the most part only at a general level.[104]

The second body provided for under the Europe Agreement is the Association Committee, which supports the Association Council in its activities.[105] Similar to the Association Council, the Association Committee is comprised of members of the European Commission and representatives of the Council of the European Union and the Czech Government.[106]

The Association Parliamentary Committee is the third body provided for under the Europe Agreement. The Committee serves the function of a forum for members of the European Parliament and the Parliament of the Czech Republic.[107]

In addition to the bodies outlined above, several subcommittees have been created to address specific issues arising from the Europe Agreement as provided for under Article 109 EA. Apart from the approximation of laws, subcommittees have been established for such matters as competition, economic policy issues, technical standards, customs and agriculture.[108] Members of the subcommittees are officials from the European Commission and the relevant ministries of the Czech Republic.[109]

C. EU FINANCIAL AND TECHNICAL ASSISTANCE FOR APPROXIMATION

As provided for by both the Europe Agreement[110] and the pre-accession strategy of the European Union,[111] the European Union has implemented several programs

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[103] *Ibid.* art. 106.
[104] Desny, *supra* note 91 at 51.
[105] *Europe Agreement*, art. 108(1).
[106] *Ibid.* art. 108 (1).
[107] *Ibid.* arts. 110, 111(1).
[108] Desny, *supra* note 91 at 51-52.
[109] *Ibid.* at 51.
[110] EA, art. 71.

granting both financial and technical support to assist the Czech Republic in the process of approximation.

The program PHARE is a crucial source of support and funding with respect to approximation.[112] Although the program was originally aimed at granting immediate financial assistance for the economic and political restructuralization of the Central and Eastern European states following the fall of communism, the focus of the program shifted in 1997 under the context of the pre-accession strategy.[113]At present, the program is targeted at aiding the candidate countries with the implementation of the *acquis* through assistance aimed at strengthening the administrative and institutional infrastructure of the candidate countries and by promoting the approximation of law.[114] The Czech Republic received a total amount of 756 million EUR under the PHARE program up to the year 2000.[115]

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[111] See EC, *Council Regulation No. 622/98 of 16 March 1998 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships* [1998] OJ L 85/1, as subsequently amended. Accession Partnerships form a key element of the pre-accession strategy of the European Union. Tailored to meet the needs of each individual candidate country, Accession Partnerships encompass all the programs of financial and technical support granted by the EU in a single framework and are targeted at priority areas outlined in the Commission's annual Regular Reports and the candidate countries' National Programs for the Adoption of the Acquis Communautaire. As such, the Accession Partnerships are regularly amended to take into account developments in the candidate countries' progress in fulfiling the requirements of membership, see *e.g.* EC, *Council Decision of 28 January 2002 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Czech Republic*[2002] OJ L 044/20 [hereinafter *Accession Partnership*]. For further details on the Accession Partnerships, see Baun, *supra* note 4 at 101. The Accession Partnerships are available online at the European Commission Directorate General – Enlargement website at: <http://www.europa.eu.int/comm/ enlargement>.

[112] PHARE is the French acronym for *Pologne et Hongrie Assistance à la Réstructuration Économique.*

[113] EC, Commission, "*What is PHARE*?" at 1.1; online: <http://www.europa.eu.int/comm/enlargement/pas/PHARE/intro.htm> (date accessed: 29 July 2002).

[114] *Ibid.* at 1.1.; *European Union: Still Enlarging, supra* note 10 at 14.

[115] Ministry of Foreign Affairs of the Czech Republic, "Finanční prostředky EU pro středoevropské kandidatské země" at 1, online: <http://www.euroskop.cz/page/render.vw/src=/site/cz/data/cr/pripravscr/finacnipomoc.html> (date accessed 28 July 2002)[hereinafter "EU Financial Assistance"].

Apart from funding of various projects directly related to approximation,[116] the European Union created within the framework of PHARE a twinning program which is specifically geared at providing technical and administrative assistance for the process of approximation. Under the twinning program, experts and officials from the European Commission and Member States (Pre-Accession Advisors) are assigned to various ministries and central government agencies to provide technical assistance on the implementation of the *acquis communautaire* in a given field as well as on administrational and institutional reforms.[117] In addition, the program may involve the provision of training and short-term expert missions.[118] Since 1998, forty-one twinning projects have been targeted at the Czech Republic.[119]

ISPA (*Instrument for Structural Politics for Pre-accession*) is another program, which is aimed at assisting associated countries in the implementation of the *acquis* communautaire. The program is, however, targeted primarily at developing the environmental and transport infrastructure.[120] With respect to the environmental infrastructure, ISPA provides support in the areas of water and air pollution, and waste management.[121] A similar program, SAPARD (*Special Accession Programmed for Agricultural and Rural Development*) has been created to assist the

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[116] For a detailed overview, see EC, Commission, *2001 Regular Report on the Czech Republic's Progress Towards Accession* (Brussels: EC, 2001) at 11-15 [hereinafter *2001 Regular Report*].
[117] EC, Commission, *Twinning in Action* (Brussels: European Commission, 2001) at 5, online: <http://www.europa.eu.int/comm./enlargement/pas/twinnign_en.pdf> (date accessed: 29 July 2002) [hereinafter *Twinning in Action*].
[118] *Ibid.* at 27.
[119] *European Union: Still Enlarging, supra* note 10 at 15.
[120] *Ibid.* During the period 2000 to 2006, the annual amount granted under ISPA will amount to approximately 70 million EUR ("EU Financial Assistance," *supra* note 115 at 1).
[121] "EU Financial Assistance", *supra* note 114 at 1.

candidate countries in preparing for the Common Agricultural Policy (CAP) and to promote rural development.[122]

Aside from the programs outlined above, the Commission established in January 1996 the Technical Assistance Information Exchange Office (TAIEX).[123] The main objective of TAIEX is to provide technical assistance relating to the approximation of law in the candidate countries.[124] As such, the Office provides assistance to the candidate countries with respect to the transposition and implementation of the *acquis*.[125] In addition, the Office provides database tools for monitoring the progress achieved in approximation. Moreover, the Office collects and disseminates information on the entire *acquis communautaire*.[126]

1.5 PROGRESS OF APPROXIMATION IN THE CZECH REPUBLIC

The process of approximating Czech legislation with EC law began as early as in the year 1991 prior to the conclusion of the Europe Agreement between Czechoslovakia and the European Communities and its Member States.[127] On 17 October 1991, the government passed the first in a series of resolutions providing for the approximation of Czechoslovak, and following 1 January 1993, Czech legislation

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[122] *Ibid.* Approximately 20 million EUR will be granted annually to the Czech Republic under SAPARD (*ibid.*).

[123] Organizationally, TAIEX falls under the European Commission Directorate-General Enlargement. (TAIEX, "About the Technical Assistance Information Exchange Office of the European Commission, DG Enlargement" at 1, online: <http://www.calboro.be/whatisTAIEX.asp> (last accessed: 27 July 2002).

[124] The purpose of TAIEX is to complement the other programs geared at the approximation of laws and differs from the other programs by its ability to respond rapidly to enquiries on issues relating to approximation (*ibid.* at 2).

[125] *Ibid.*

[126] *Ibid.* at 2.

[127] The Europe Agreement was signed on 16 December 1991. Similar agreements were concluded on that same day with Poland and Hungary. The Europe Agreement was preceded by the Agreement on Trade and Commercial and Economic Co-operation which was concluded between Czechoslovakia and the EC on 7 May 1990 (see Tichý & Arnold, *supra* note 35 at 782).

with that of the EC.[128] Nevertheless, although the process of approximation had in theory commenced even before the conclusion of the existing Europe Agreement in 1993, only marginal progress was achieved in the first five years following the conclusion of the Agreement. According to a statement by the Ministry of Justice reported in the local press on 18 July 1998, only twenty-five per cent of Czech legislation had been made compatible with that of the EC.[129]

There are several possible explanations for the slow progress that had been achieved during this period. First, it must be noted that the government was preoccupied with implementing ongoing economic and political reforms associated with the transition from communist rule. In addition, approximation was likely delayed by the Czech Republic's secession from Czechoslovakia. One further reason for the lack of significant progress in the field of approximation may be attributed to frequent organizational changes within the public administration infrastructure and the preceding governments' apparent lack of a coherent agenda for the process of approximation.[130]

However, the year 1999 marked a turning point in the process of approximation in the Czech Republic.[131] The Commission, in its Regular Report, repeatedly criticized the Czech Republic's progress. After noting the slow progress that had been

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[128] *Usnesení vlády České republiky ze dne 17. října 1991 č. 396 k usnesení vlády ČSFR č. 533/1991 o zabezpečení slučitelnosti československého právního řádu s právem Evropského společenství.*

[129] Ministry for Regional Development of the Czech Republic, *supra* note 23 at 9.

[130] V. Balaš, "Legal and Quasi Legal Thresholds of the Accession of the Czech Republic to the EC" in Kellermann, de Zwaan & Czuczai, *supra* note 2 at 277. See also generally Desný, *supra* note 91. Some commentators also point to the apprehensions the European Union held by Václav Klaus, a renown "Eurosceptic", who was Prime Minister until the fall of 1997, and thus may not have accorded sufficient priority to the process of approximation (see Dauderstädt, *supra* note 24 at 13, 24).

[131] R. Král, "K významu omezené působnosti některých komunártních předpisů pro sbližování práva ČR s právem ES" (2000) E.M.P. 9-10/2000 at 31[hereinafter "K významu omezené působnosti"].

achieved,[132] the Commission stated that: "[u]ntil a more coherent approach is adopted, there is a risk of a piecemeal approach to the alignment process.[...]The pace of alignment needs to pick up substantially across the board."[133] According to the Commission, progress in the area of approximation was hindered by the lengthy legislative procedure, the fact that the government had a minority in Parliament which required it to negotiate to acquire support of legislative proposals and that "certain priority policy areas had not received sufficient attention from previous governments".[134]

In response to the Commission's criticisms, the government implemented several measures aimed at accelerating the process of approximation.[135] In particular, the legislative procedure in the Chamber of Deputies was amended in order to enable accelerated passing of EC related legislation.[136] As a result, the Commission noted in its 2000 Regular Report an improvement in the pace of approximation.[137] According to the Czech government, by the end of the year 2001, approximately seventy per cent of legislation in the Czech Republic was fully compatible and a further twenty

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[132] EC, Commission, *1999 Regular Report on Czech Republic's Progress Towards Accession* (Brussels: EC, 1999) at 77.
[133] *Ibid.* at 77-78.
[134] *Ibid.* at 11.
[135] See Ministry of Foreign Affairs of the Czech Republic, *Národní program přípravy České republiky na členství v Evropské unii 2000* (Prague: Ministry of Foreign Affairs of the Czech Republic, 2000).
[136] See *zákon č. 47/2000 Sb., kterým se mění zákon č. 90/1995 Sb,, o jednacím řádu Poslanecké sněmovny.* In addition, the Prime Minister at the time, Miloš Zeman, proclaimed that the government was prepared to undertake a "legislative tornado" (Balaš, *supra* note 130 at 276).
[137] EC, Commission, *2000 Regular Report From the Commission on the Czech Republic's Progress Towards Accession* (Brussels: EC, 2000) at 17 [hereinafter *2000 Regular Report*]. According to the Report, the number of legislative acts passed in Parliament had increased significantly as 132 acts were promulgated during the period covered by the 2000 Regular Report as opposed to a mere 27 acts in the preceding period (*ibid.*).

per cent was partially compatible with EC law.[138] The most recent Regular Report issued by the Commission on 9 October 2002, which covers the period from the Commission's Opinion up to 15 September 2002, overall rates positively the progress that the Czech Republic has made during this time period by noting that, in general, a high degree of alignment achieved.[139] More importantly however, in the Report, the Commission affirms that, given the progress that the Czech Republic has achieved to date, the Czech Republic will be "able to assume the obligations of membership".[140] This finding is of crucial importance, as the 2002 Regular Reports will form part of the Commission's general assessment of whether or not a given candidate country is prepared for membership, and consequently, whether the Commission will recommend that it be invited to become a member of the European Union.[141]

1.6 CHALLENGES AND DIFFICULTIES OF APPROXIMATION

The process of approximating the legislation of the Czech Republic with that of EC is a formidable task given the scope and quantity of legislation that must be transposed. Not only is the Czech Republic required under the Europe Agreement to undertake efforts to approximate EC legislation pertaining to the internal market, but the Czech Republic must also be capable of taking over the full *acquis communautaire* as a condition of membership in the EU. This undertaking will invariably significantly affect the legal system and the institutional framework of the

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[138] Mission of the Czech Republic to the EC, *Internal Preparation for Membership*, available online on the Mission's website at <http://www.mzv.cz/missionEU/preperation.htm> (date accessed: 27 July 2002).
[139] EC, Commission, *2002 Regular Report on the Czech Republic's Progress Towards Accession* (Brussels: EC, 2002) [hereinafter *2002 Regular Report*] at 130, 134.
[140] *Ibid.* at 132.
[141] *Ibid.* at 8-9.

Czech Republic. As such, the process of approximating Czech legislation with EC law poses many challenges and difficulties for the Czech Republic. These include not only various technical difficulties, but also such broader issues as the impact of approximation on market transition and the effective implementation of the transposed norms.

A. TECHNICAL DIFFICULTIES OF APPROXIMATION

The nature and character of EC law is *sui generis* in that, although it is based on international law, it has specific attributes that have resulted in the creation of a "new international legal order", as was first pronounced by the European Court of Justice in the seminal case *Van Gend en Loos*.[142] At the same time, it is a legal system that has been formed gradually by drawing on and encompassing both civil law and common law legal institutes imported from the legal systems of its Member States, whose legal systems are based on varying legal traditions.

Given the unique nature of EC law, the process of approximation requires ensuring that the national legal order provides for the fundamental principles of Community law, in particular the principles of supremacy of EC law[143] and of direct effect.[144] Prior to its recent amendment, the Constitution of the Czech Republic did not provide for the supremacy of EC law nor for the principle of direct effect.

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[142] ECJ, Case 26/62, *NV. Algemene Transporten Expeditie Onderneming Van Gend en Loos* v. *Nederlandse Administratie der Belastingen* [1963] ECR 1; P. Craig & G. de Burca, *supra* note 79 at 255.

[143] The EC Treaty does not expressly provide for the supremacy of EC law. The supremacy of Community legislation over that of the national laws of Member States was confirmed by the Court of Justice in the case *Costa* v. *ENEL* (ECJ, Case 6/64, *Flaminio Costa* v. *ENEL* [1964] ECR 585 (Craig & de Burca, *supra* note 80 at 258-59).

[144] For a more detailed discussion of the principles of direct effect and supremacy, see Craig & de Burca, *supra* note 80 at 163 and 255.

However, this has changed with the amendment of Article 10 of the Constitution of the Czech Republic,[145] which came into effect on 1 June 2002.[146]

The nature and characteristics of EC norms must be taken into account when they are transposed to ensure that not only compability is achieved, but that the transposition of the EC norm does not exceed the scope required for proper approximation. This applies in particular to those directives that have a limited scope of application as such norms may only be applicable to activities that have a Community dimension.[147] Failure to take this properly into account may result in extending the scope of applicability of Community legislation to areas that should effectively remain governed solely by national legislation, thus forsaking the possibility of tailoring national legislation to the particular circumstances and needs of a given state.[148]

Moreover, some commentators have noted that EC norms generally follow a different content structure than corresponding Czech legislation in that EC legislation often regulates issues cross-sectorally.[149] This may result in conflicts of competencies between the ministries under which the given matter falls, thus

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[145] *Ústavní zákon č. 1/1993 Sb., Ústava České republiky*, as subsequently amended.

[146] *Ústavní zákon č. 395/2001 Sb.* For further details, see J. Vedral, "Několik poznámek k novému znění čl. 10 Ústavy ČR" (2002) Art. No. 17754, online: <http://www.epravo/index.html> (date accessed: 24 July 2002).

[147] An example of limited scope of applicability is EC, *Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings* [1989] OJ L 395/1, which expressly governs only those concentrations that fulfill the criteria provided for in the Regulation.

[148] Tichý & Arnold, supra note 80 at 817;"K významu omezené působnosti," *supra* note 131 at 32. For a more detailed discussion, see also R. Král, "K možnosti odchylek od směrnic ES při jejich tanspozici" (2001) Právník 5/2001; R. Král, "K přesahující transpozici směrnic ES" (2001) Právník 9/2001; R. Král, "K těžiště výkladu směrnic ES při jejich transpozici" (2001) Právník 12/2001.

[149] Ministry for Regional Development of the Czech Republic, *Aktuální otázky sbližování práva s právem ES*, svazek č. 18 (Prague: Ministry for Regional Development of the Czech Republic, 1999) at 37.

hindering the proper transposition and subsequent implementation of the EC legal norm.[150]

An additional technical difficulty that has been encountered in the process of approximation is acquiring adequate revised translations of EC legislation. Translations of EC legislation that have been reviewed for their accuracy are indispensable to the process of approximation. However, as of the beginning of the year 2001, approximately 45,000 pages of an estimated 80,000 pages of the Official Journal had been translated into the Czech language and of which only 16,500 pages had been revised.[151] Nevertheless, according to the Czech government, up to 65,000 pages of the Official Journal will be translated by mid 2002.[152]

B. IMPLEMENTATION OF TRANSPOSED NORMS

The requirement of transposing over 80,000 pages of EC legislation into the Czech legal system is an extraordinary undertaking and challenge in of itself. However, the Commission has repeatedly stated that merely formally transposing the *acquis communautaire* will not suffice and that the candidate countries must ensure that transposed legislation is effectively implemented.[153] The importance of duly implementing and enforcing the *acquis* has recently been reemphasized by the Commission and is demonstrated by the shift in the focus of Phare funding to the

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[150] *Ibid.*

[151] Ministry of Foreign Affairs of the Czech Republic, *Národní program přípravy České republiky na členství v Evropské unii* (Prague: Ministry of Foreign Affairs of the Czech Republic, 2001) at 36 [hereinafter *National Program 2001*].

[152] *Ibid.*

[153] See *e.g.* EC, Commission, White Paper, *supra* note 61 at para. 1.12; EC, Commission, *Agenda 2000*, *supra* note 68 at 34; EC, Commission, *2001 Regular Report on the Progress Achieved by the Czech Republic* (Brussels: EC, 2001) at 43.

strengthening of the judicial and administrative capacity of the candidate countries.[154]

Consequently, given the broad scope and complexity of the *acquis*, implementation and effective enforcement of the transposed norms may pose a greater challenge than the process of transposing the *acquis*. Approximation in its simplest form involves incorporating a given EC legal norm into national legislation. However, if the transposed norm is not properly implemented and enforced, then only formal compability will be achieved, thus having an effect similar to that of a "Potemkin village".[155] Such a situation would have severe ramifications not only for the legal order of the Czech Republic but also for the ability of the Czech Republic to function as a member of the European Union.

In addition, the issue of the implementation of the *acquis communautaire* poses a further challenge in that it will involve substantial amounts of investment on the part of both the public and the private sectors to duly implement the *acquis*.[156] In certain areas such as the environment, the costs could be exceedingly high, thus burdening both the state budget as well as the private sector.[157]

Not implementing or enforcing transposed legislation could negatively impact the functioning of the legal system of the Czech Republic as it would undermine one of the fundamental principles of a democratic state - the rule of law. Legal norms that are not implemented do not fulfill their primary function of governing and

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[154] EC, Commission, *Making a Success of Enlargement: Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries* (Brussels: EC, 2001) at 6; *European Union: Still Enlarging*, *supra* note 10 at 24.

[155] This analogy, made by Prof. Richard Janda, is illustrative of the possible outcome of the process of approximation if the transposed norms are not duly implemented as mere formal transposition would present a façade of compatibility.

[156] Dauderstädt, *supra* note 24 at 58.

[157] *Ibid.*

warranting the rights and obligations of persons. At best, non implementation hinders the proper and efficient functioning of state apparatus; at worst it infringes on the rights of persons within that state. Moreover, under certain circumstances, it may promote the development of corruption within the state apparatus; a problem that the Czech Republic has to date had limited success resolving.[158] Furthermore, non-implementation of norms may have the effect of undermining not only the legitimacy of the legal order in the eyes of the people, but the legitimacy of the state itself.[159]

In terms of the effects of non-implementation with respect to the European Union, the consequences of non-implementation and enforcement of transposed norms depend largely on whether or not the Czech Republic is a member of the EU. Failure to implement or enforce transposed norms prior to acceding to the EU would have mostly political consequences, most notably either delaying or preventing the Czech Republic from being invited to join the European Union.[160] Accordingly, given that

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[158] The Commission has, in its Regular Reports, repeatedly noted the existence of corruption in its assessment of the Czech Republic's fulfillment of the political criteria for membership. In the 2001 Regular Report, the Commission stated that corruption remains "a serious cause for concern" (*2001 Regular Report, supra* note 153 at 23;see also *2002 Regular Report, supra* note 139 at 24-25). Furthermore, the Commission also observed that there has been an increase in the perception of corruption in the Czech Republic. This is supported by the findings of Transparency International's annual Corruption Perceptions Index (CPI), where the CPI score of the Czech Republic has steadily declined from a CPI score of 5.37 in 1996 to 3.7 in 2002 (Transparency International, *TI Annual Corruption Perceptions Indexes 1996-2002*, online: <http://www.transparency.org/surveys/index.html#cpi> (last accessed: 12 November 2002).

[159] A similar effect occurred in the Czech Republic (then Czechoslovakia) under the communist regime. Both the state apparatus and the legal system lacked legitimacy in the eyes of the majority of the people. Accordingly, there was a general disrespect of both the legal order and the state administration and, although over ten years have elapsed since the Velvet Revolution, remnants of these sentiments persist within the civil society. Thus, it is all the more important that focus be made on the proper and effective implementation of the transposed norms.

[160] It should be noted that Article 117(2) EA provides a general mechanism for resolving and sanctioning the non-fulfilment of obligations ensuing from the Agreement. However, it has been questioned whether this procedure could in practice be viably applied to the Czech Republic's obligation to approximate its legislation with that of the EC under the Agreement (Verny, *supra* note 36at 203; see also Dauses, Verny & Zemánek, *supra* note 52 at 58-59.

the current proposed timeline calls for the signing of an accession treaty in April 2003, it is imperative that the Czech Republic continue its efforts in this respect [161]

In contrast, non-implementation of the *acquis communautaire* by the Czech Republic once it becomes a member of the European Union could entail serious repercussions. Failure to duly implement the *acquis* may negatively impede the proper functioning of the internal market. More importantly however, the European Commission and the Member States could take legal action against the Czech Republic, which may result in fines being imposed by the Court of Justice.

Pursuant to Article 226 EC Treaty, the Commission may bring an action against a Member State for breach of Community law. However, the Commission must first notify the Member State of its alleged infringement in writing and grant the Member State sufficient time to respond to the complaint. If the Member State fails to resolve the matter in the given time frame, the Commission may issue a reasoned opinion.[162] Should the Member State not remedy the alleged infringement within a period of two months following receipt of the opinion, the Commission may refer the case to the Court of Justice, which may impose a fine on the Member State under the procedure provided for under Article 228 EC Treaty.[163]

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[161] See Royal Danish Ministry of Foreign Affairs, *supra* note 7 at 26. According to the timetable, the final phase of pre-accession negotiations should be concluded under the Danish presidency before the end of the year 2002. See also EC, Commission, "Door Opens to Signature in Athens of an Accession Treaty, April 2003", in Europa - Enlargement Newsletter Weekly (29 October 2002), online: <http://www.europa.eu.int/comm/enlargement/docs/newsletter/weekly_291002.htm>) (date accessed: 4 November 2002) [hereinafter "Door Opens Signature 2003"].

[162] EC Treaty, art. 226, para. 1.

[163] A fine may be imposed by the Court only if the Member State does not comply with the Court's judgement and the subsequent measures outlined by the Commission in a reasoned opinion within a given time-period (Craig & de Burca, *supra* note 80 at 376-77). To date Greece has been the only Member State against which a fine for non-implementation of Community legislation has been imposed by the Court of Justice (see ECJ, Case C-387/97, *Commission* v. *Greece* [2000] ECR I-05047). For further details on the case, see EC, Commission, *Eighteenth Annual Report on Monitoring the Application of Community Law*, vol. I (Brussels: EC, 2001) at 16-17. This however,

In addition to the Commission initiating infringement proceedings, individual Member States may also file suit against another Member State which has failed to fulfill its obligations arising from the Treaty.[164] Prior to bringing the action before the Court of Justice, the Member State must submit the matter to the Commission, which will then issue an opinion on the matter after having heard both parties.[165] However, the failure of the Commission to issue an opinion does not preclude the Member States from bringing the matter before the Court of Justice.[166]Moreover, any person may lodge a complaint against a Member State for an alleged breach of Community legislation.[167] According to Commission findings for the year 2001, 59.66 per cent of infringement proceedings were initiated on the basis of complaints submitted by private individuals.[168]

Apart from the above infringement proceedings, one further risk ensuing from not implementing or improperly implementing Community legislation is that individuals could file suit for damages against the Czech Republic once it becomes a Member State. As established by the Court of Justice in the case *Francovich*[169] and

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does not mean that such proceedings are infrequent given that as of 31 December 2001, there were forty-seven cases under examination for Art. 228 EC Treaty proceedings of which twenty related to the environment sector and ten concerned the energy and transport sectors (see EC, Commission, *Table 2.3.4. Cases under examination as of 31/12/2001 for which the 228 procedure has been opened by Member State*; EC, Commission, *Table 2.4.4. Cases under examination as of 31/12/2001 for which a 228 procedure has been initiated by sector (graphic)*, online: <http://www.europa.eu.int/secret eriat_genera l/sgb/droit_comm/index_en>).

[164] *EC Treaty*, art. 227, para.1; Craig & de Burca, *supra* note 80 at 402.

[165] *Ibid.* art. 227, paras. 2, 3.

[166] *Ibid.* art. 227, para.4 .

[167] To this end, the Commission has made available a standard form for complaints, which is available on the website of the Commission Secretariat –General at: <http://www.europa.eu.int/comm/secreteri at_general/sgb/lexcomm/index_en.html>. It should be noted however, that private individuals are not a party to the proceedings, as such complaints merely form the basis on which the Commission may initiate proceedings under Art. 226 EC Treaty (Craig & de Burca, *supra* note 80 at 374).

[168] EC, Commission, Annex I, *Dix-neuvième rapport annuel sur le contrôle de l'application du droit communautaire*, vol.1 (2001) (Brussels: EC, 2001) at 3.

[169] ECJ, Joined Cases C- 6 & 9/90, *Francovich & Bonifaci* v. *Italy* [1991] ECR I-5357 at para. 37.

subsequently elaborated by the Court in its judgment in the cases *Brasserie du Pêcheur* and *Factortame III,*[170] a Member State may be held liable for damages incurred by individuals as a result of a State's failure to duly implement Community law.[171] Such liability may arise if three conditions are met: the Community legislation in question must confer rights to individuals; the infringement must be of a 'sufficiently serious' nature;[172] and finally, there must be a *causal nexus* between the infringement and the harm suffered by the individual.[173]

Taking into account the possible ramifications of inadequate implementation or non-implementation of Community legislation both prior to and following accession, and considering the effect that this would have on the legal order of the Czech Republic, it is evident that implementation presents a challenge equal if not greater than the task of transposing the *acquis communautaire.*

C. REFORM OF THE JUDICIARY AND PUBLIC ADMINISTRATION

Aside from technical difficulties and the challenges of implementing the *acquis*, one further hurdle of the process of approximating Czech law with Community legislation is the need to undertake extensive reforms of the judiciary and the

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[170] ECJ, Joined Cases C-46 & 48/93, *Brasserie du Pêcheur* v. *Federal Republic of Germany* and *R.* v. *Secretary of State for Transport, ex parte Factortame Ltd.* [1996] ECR I-1029 [hereinafter *Brasserie du Pêcheur /Factortame III*].

[171] Kent, *supra* note 3 at 74-75; Craig & de Burca, *supra* note 80 at 236-47.

[172] According to the Court of Justice, several factors may be taken into account in order to determine whether a breach is '*sufficiently serious*'. These include *inter alia* the degree of discretion accorded to the State in implementing the legislative instrument, whether the provisions of the legislation are clear and concise, and if the infringement was involuntary (*Brasserie du Pêcheur /Factortame III* at para. 56; cited in Craig & de Burca, *supra* note 80 at 236).

[173] *Ibid.* para. 51. For a discussion on recent developments in the field of Member States' liability for breach of Community legislation, see T. Tridimas, "Liability for Breach of Community Law: Growing Up and Mellowing Down?" (2001) 38 C.M.L.R. 301; K. Schlupková, "K problematice odpovědnosti členských států za škodu způsobenou jednotlivci porušením komunitárního práva" (2000), online: <http://www.integrace.cz> (date accessed: 4 September 2002).

administrative infrastructure.[174] It should be noted that reforms in these areas began shortly after the demise of the communist regime. The reforms have involved not only restructuring the existing administrative and institutional framework, but completely overhauling the entire legal system. Coupled with the need to undertake further reforms in order to enable the implementation of the *acquis communautaire* and prepare the institutional framework for accession to the European Union, reforms of the judiciary and public administration pose a significant challenge within the process of approximation.[175]

Given the crucial role of the judiciary in implementing and ensuring effective enforcement of national and Community law, it is imperative that the judiciary have both the capacity and the technical and material means of fulfilling its function. Accordingly, several measures have been taken to prepare the judiciary for accession to the European Union, including increasing the personnel infrastructure,[176] providing training in Community law[177] and ensuring that there is an adequate information technology infrastructure.[178]

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[174] See *e.g.* EC, Commission, 1999 Regular Report, *supra* note 132 at 10.

[175] See National Program 2001, *supra* note 151 at 7-12; for a broader discussion of the need for judicial reform, see generally Open Society Institute, *Monitoring the EU Accession Process: Judicial Independence* (Budapest: Central European University Press, 2001) at 115.

[176] During the period of 2000 to 2001, 308 positions for judges were created, bringing the total amount of judges to 2,893 (2001 Regular Report, *supra* note 116 at 22). Moreover, during the same period, there was an increase in the number of state prosecutors and higher court officials (*ibid.*). Furthermore, reform of the court execution system led to the creation of private executors (National Program 2001, *supra* note 151 at 9).

[177] Training in EC law for members of the judiciary used to be provided by the Ministry of Justice of the Czech Republic through the Institute for Continuing Education of Judges and State Prosecutors as well as through training programs and sessions organized through TAIEX (Ministry of Justice of the Czech Republic, *The Czech Judiciary Before the Accession to the European Union* (Prague: Ministry of Justice of the Czech Republic, 2001) at 9. However, a Judicial Academy for training members of the judiciary was created this year, as provided for under *zákon č.6/2002 Sb., o soudech a soudcích.*

[178] Through funding from the state budget and PHARE, more than 3,500 personal computers have been supplied to the courts. In addition, PHARE has provided funding for the creation of an internal judiciary information network linking the courts and the offices of the state prosecutors (*ibid.* at 9-10).

In addition to the measures outlined above, the government has undertaken the process of the recodification of four codes, namely the Civil Code,[179] the Code on Civil Procedure,[180] the Criminal Proceedings Code[181] and the Commercial Code.[182] The government estimates that the recodification should be completed by the end of the year 2005.[183]

Apart from the judiciary, proper transposition and implementation of the *acquis necessitates* a public administration that functions both effectively and efficiently. The process of approximation poses two distinct challenges to public administration in the Czech Republic. First, there is the need to develop the ability of the public administration to efficiently put into effect and manage the process of approximation and European integration.[184] Secondly, the approximation and accession process requires an independent, professional and modern administration capable of not only bringing the Czech Republic into the European Union, but more importantly, one that will enable the Czech Republic to function effectively within the European Union following accession.[185]

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[179] *Zákon č. 40/1964 Sb., občanský zákoník*, as subsequently amended.
[180] *Zákon č. 99/1963 Sb., občanský soudní řád*, as subsequently amended.
[181] *Zákon č. 141/1961* Sb., *trestní řád,* as subsequently amended.
[182] *Zákon č. 513/1991 Sb., obchodní zákoník*, as subsequently amended.
[183] National Program 2001, *supra* note 151 at 10. Recodification of the codes is critical given the frequency with which these codes have been amended and in light of the manner the amendments are effected, which has become commonly referred to as "*novely novel*" (amendments of amendments). Moreover, there has been an increase in the use of indirect amendments, which has further decreased the transparency of these codes. For a more detailed discussion, see Balaš, *supra* note 130 at 273-76. The author cites the Commercial Code as an example of legislation that lacks transparency given that to the year 2000 it was amended a total of twenty-eight times of which seven amendments occurred in that year alone (*ibid.* at 274).
[184] World Bank, *Ready for Europe: Public Administration Reform and European Union Accession in Central and Eastern Europe*, World Bank Technical Paper No. 466 (Washington: World Bank, 2000) at 68 [hereinafter *Ready for Europe*].
[185] *Ibid.*

As such, strengthening public administration and its institutional infrastructure has been one of the highest priorities of the government in preparation for membership in the European Union and is considered by the Commission to be in need of urgent action.[186] The ability to put into effect and manage European integration involves in part ensuring that the civil servants have the necessary technical skills and adequate knowledge of EC legislation and policy. Accordingly, this requires training civil servants not only in these matters, but also ensuring that they possess the necessary language skills.[187] To this end, a central institute for the continuous training of civil servants will be established within the Office for Government which will have the task of centrally coordinating all continuous education programs targeted at civil servants.[188]

The Commission has in its annual Regular Reports repeatedly emphasized the need to implement at the national level legislation governing the status of civil servants. Such legislation is seen as laying the legal framework for ensuring an independent, professional and efficient civil service.[189] In response, legislation governing the status of civil servants has recently been passed by Parliament and is to come into effect on 1 January 2004.[190] Its primary objective is to clarify the position of civil servants within public administration and to govern the recruitment and employment of civil servants within public administration.[191]

D. MANAGING TRANSITION

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[186] *National Program 2001*, *supra* note 151 at 7; *Accession Partnership*, *supra* note 111 at 8- 9.
[187] *Ready for Europe*, *supra* note 184 at 106.
[188] *National Program 2001*, *supra* note 151 at 259.
[189] *2001 Regular Report*, *supra* note 116 at 104; *2002 Regular Report*, *supra* note at 21.
[190] *Zákon č.218/2002 Sb. o službě státních zaměstnanců ve správních úřadech a oodměnování těchto zaměstnanců a ostatních zaměstnaců ve správních úřadech.*
[191] See M. Jurman, "Státní služba jako elitní zaměstnání?" (2002) Article No. 17869, online: <http://www.epravo.cz/index/html>.

Given the need to ensure not only the effective implementation of the *acquis* but also the reform of the judiciary and public administration, it is evident that the process of approximation both under the Europe Agreement and as a precondition to membership in the European Union is a magnificent task. The obligation to not only transpose the *acquis communautaire*, but to fulfill such broad and difficult conditions in order to acquire membership in the EU is unparalleled, given that candidates for membership under previous enlargements were not subject to such stringent conditions.[192]

It should however, be noted that the nature and character of the process of approximation will change following accession to the European Union as, once the Czech Republic becomes a member of the EU, it will be obligated to engage in the harmonization of its legislation. Although the terms "approximation" and "harmonization" are often used synonymously in relation to the enlargement process, a distinction may nevertheless be made between the two terms. The term "approximation of law" refers to the process whereby a state endeavors to align its legislation with that of another state, in this case the E.C., with the aim of gradually achieving compability.[193] As such, the process of approximation is foremost a unilateral undertaking. In contrast, the term "harmonization" generally refers to the process of creating a consistent set of legal norms and rules common to the national legislation of Member States with the objective of furthering the integration of these

[192] Inotai, *supra* note 21at 159.
[193] Tichý & Arnold, *supra* note 35 at 813; Ministry for Regional Development of the Czech Republic, *Cesta do Evropské unie: Sbližování práva České republiky s právem Evropských společenství* (Prague: Ministry for Regional Development of the Czech Republic, 1997) at 8.

states in a given field.[194] Within the EC, harmonization represents an important mechanism for implementing both the internal market as well as the economic and monetary union.[195]

Based on the general overview of approximation in the Czech Republic as outlined in the preceding sections, the analysis that follows examines the process of approximation in the fields of competition, the environment and company law. It will focus on the progress that the Czech Republic has achieved and the specific challenges posed by approximation these areas of law.

[194] Tichý & Arnold, *supra* note 35 at 183; Ministry for Regional Development of the Czech Republic, *supra* note 194 at 9. Harmonization is expressly provided for in Articles 94 and 95 EC Treaty.
[195] Tichý & Archold, *supra* note 35 at 813.

II. APPROXIMATION OF EC COMPETITION LAW

In order to fulfill the economic condition for membership in the European Union and its obligations ensuing from the Europe Agreement, the Czech Republic must align its competition legislation and policy with that of the E.C. Given the importance of competition law and policy for the proper functioning of the common market in the EU and for the ensuring a competitive business environment in the Czech Republic, the approximation of competition law is of particular importance in the Czech Republic's efforts both for meeting the criteria for membership in the European Union as well as for its transition to a market driven economy.

This chapter examines the progress that has been achieved in the process of approximating EC competition law in the Czech Republic. To this end, this Chapter begins with a summary of EC competition law, the purpose of which is to illustrate the underlying principles and the general structure of EC competition law and policy. This is followed by an overview of competition law in the Czech Republic as well as the progress that has been achieved in this field. Finally, the difficulties that the Czech Republic has encountered in the process are briefly examined.

2.1 EC COMPETITON LAW

Under the EC Treaty, the task of the Community is, through the establishment of a common market and an economic and monetary union, "to promote through out the Community a harmonious, balanced and sustainable development of economic activities, [...] a high degree of competitiveness and convergence of economic performance, [...]".[196]To this end, the EC Treaty provides that the activities of the EC will include a "system ensuring that competition in the internal market is not

[196] *EC Treaty*, art.2.

distorted"[197] as well as activities that are aimed at promoting the "competitiveness of Community industry".[198]

Accordingly, one of the primary objectives of EC competition law is to promote market integration.[199] Competition law furthers integration by ensuring that the activities of market participants do not impede the establishment and functioning of the common market[200] through the use of trade barriers between Member States.[201] Apart from the underlying objective of furthering integration, EC competition law also serves the purpose of promoting efficiency by optimizing economies of scale and scope to benefit consumers,[202] and of protecting small and medium-sized enterprises and consumers within the common market.[203]

Competition law in the EC comprises of six distinct areas: agreements and concerted practices that restrict competition; abuses of dominant positions within the common market; merger control; state aid control; liberalization pursuant to Article 86 EC Treaty and international cooperation.[204]

AGREEMENTS RESTRICTING COMPETITION

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[197] *Ibid.* art. 3(1)(g).
[198] *Ibid.* art. 3(1)(m).
[199] D. Gerber, "Modernising European Competition Law: A Developmental Perspective" (2001) 22 C.M.L.R. 122 at 122; see also M. Monti, "European Community Competition Law: European Competition Law for the 21st Century" (2001) 24 Fordham Int'l L.J. 1602 at 1604.
[200] It should be noted that the geographic scope of EC competition law is not only limited to the common market but also includes the territory of EFTA signatory states and that of the candidate countries under the Europe Agreements.
[201] Craig & de Burca, *supra* note 80 at 892.
[202] *Ibid.* at 891; Kent, *supra* note 3 at 226.
[203] Craig & de Burca, *supra* note 80 at 891. In this respect, EC competition law focuses particularly on preventing large enterprises from abusing their position in the common market to the detriment of other market participants and consumers (Kent, *supra* note 3 at 226).
[204] The later two areas are not discussed in greater detail in this overview. Article 86 EC Treaty governs special rights or privileges that are granted to public undertakings by the Member States, particularly with respect to state monopolies. For a more detailed discussion of public undertakings, see Craig & de Burca, *supra* note 80 at 1060; R. Whish, *Competition Law*, 4th ed. (Bath: Butterworths, 2001) at 189-212.

Pursuant to Article 81 EC Treaty,[205] all agreements between undertakings,[206] decisions by associations of undertakings and concerted practices,[207] which affect trade between Member States and which have the effect of restricting competition within the common market are prohibited.[208] In order for an agreement to fall within the ambit of Article 81(1) EC Treaty, it must fulfill two requirements. First, the agreement must be capable of affecting trade between Member States. Secondly, such agreements must have "as their object or effect the prevention, restriction or distortion of competition within the common market".[209] As a result, even those agreements that occur outside of the common market may nevertheless be subject to EC competition law if the effect of such activities is to restrict or otherwise distort competition in the common market.[210]

However, not all agreements that fulfill the above conditions will be prohibited under Article 81 EC Treaty. The Court of Justice has held that minor agreements having only a negligible effect on competition or inter-state trade will not be prohibited under Article 81 EC Treaty.[211] This principle, commonly referred to as the *"de minimis"* principle, has been further elaborated by the Commission in its

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[205] Formerly Article 85 EC Treaty, prior to renumbering by the Treaty of Amsterdam.

[206] The term '*undertaking*' is not defined in the Treaty. It was defined by the Court of Justice in *Höfner and Elster* v. *Macrotron* (ECJ, Case C-41/90[1991] ECR I-1979) as "every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed" (Whish, *supra* note 204 at 66-67, and for a more detail discussion of the term, *ibid.* at 66- 76).

[207] Hereinafter generally referred to as '*agreements*' unless specified otherwise.

[208] Pursuant to Article 81(2) EC Treaty, any such agreements are null and void.

[209] EC Treaty, art. 81(1); B. Rodger & A. MacCulloch, *Competition Law and Policy in the European Community and United Kingdom* 2nd ed. (London: Cavendish Publishing, 2001) at 134-35.

[210] This principle, commonly referred to as the '*effects doctrine*', was outlined by the Court of Justice in the case *Société Techique Miniere* v. *Maschinenbau* (ECJ, Case 56/65[1966] ECR 235)[hereinafter *STM*], and further elaborated by the Court in *Windsurfing International Inc.* v. *Commission* (ECJ, Case 193/83 [1986] ECR 611)(Kent, *supra* note 3 at 233-4; Craig & de Burca, *supra* note 80 at 914-15).

[211] See ECJ, Case 5/69, *Völk* v. *Etablissements Vervaecke SPRL* [1969] ECR 295 (only those agreements, which have an 'appreciable effect on competition' shall be prohibited under Art. 81 EC Treaty), (Kent, *supra* note 3 at 236).

Notice on Minor Agreements.[212] Moreover, certain agreements that would otherwise fall within the scope of Article 81(1) EC Treaty may nevertheless be exempted provided they meet the specific conditions outlined in Article 81(3) EC Treaty.[213]

The procedure for granting exemptions is based on a system of notification and authorization, which is governed by Council Regulation 17/62.[214] Under the Regulation, the Commission has sole jurisdiction for the enforcement of Article 81(3) EC Treaty.[215] Agreements may be exempted pursuant to Article 81(3) EC Treaty either through an individual exemption issued by the Commission or by means of a block exemption. Individual exemptions may be granted by the Commission on the basis of notification and an application.[216] In contrast, block exemptions do not require notification to the Commission.[217] Block exemptions have been issued generally for vertical agreements[218] and for various types of specialized

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[212] EC, *Commission notice of agreements of minor importance which do not appreciably restrict competition under Art. 81(1) of the Treaty establishing the European Community (de minimis)* [2001] OJ C 368/7 [hereinafter *De Minimis Notice*]. Under the Notice, parties to horizontal agreements whose combined market share in all relevant markets does not exceed ten per cent will be deemed not to appreciably affect competition in a given market. With respect to vertical agreements, such agreements are deemed not have an appreciable effect if the aggregate market share of the parties to the agreement is not greater than fifteen per cent (*ibid.* para. 7(a) and(b)).

[213] Under this provision, agreements within the meaning of Article 81(1) EC Treaty may be exempted if such an agreement "contributes to the production or distribution of goods or to promoting technological or economic progress" and, at the same time, such an agreement confers a fair share of the resulting benefits to consumers. In addition, such an agreement must not grant the parties to the agreement "the possibility of eliminating competition in respect of a substantial part of the products in question" and it must not impose on the participants restrictions that are not indispensable to the attainment of these objectives (*EC Treaty*, art. 81(3); Whish, *supra* note 204 at 124).

[214] EC, *Council Regulation No.17/62 First Regulation implementing Articles 85 and 86 of the Treaty* [1962] OJ L/.118 [hereinafter *Regulation 17*]; Rodger & MacCulloch, *supra* note 209 at 144.

[215] *Regulation 17*, art. 9(1).

[216] *Ibid.* art. 4 (2).

[217] Craig & de Burca, *supra* note 80 at 919.

[218] EC, *Commission Regulation No. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices* [1999] OJ L 336/21. This vertical block exemption regulation replaces a series of block exemption regulations that were issued for franchising agreements and exclusive purchasing and distribution agreements. For further details, see EC Commission, News Release, ip/00/520, "Commission finalises new competition rules for distribution" (24 May 2000).

agreements such as those relating to research and development[219] and technology transfers.[220] Moreover, the parties to an agreement may seek to have their agreement deemed by the Commission not to infringe Article 81(1) EC Treaty by means of a "negative clearance".[221] Finally, the undertakings concerned may seek confirmation that their agreement does not fall within the scope of Article 81(1) EC Treaty by requesting a "comfort letter".[222]

ABUSE OF DOMINANT POSITION

Article 82 EC Treaty[223] forms the basis for the second key area of EC competition law, which governs the conduct of undertakings[224] that comprises an abuse of a dominant position.[225] Accordingly, Article 82(1) EC Treaty prohibits the abuse by one or more undertakings of a dominant position within the common market and which may have an effect on inter-state trade. Similar to Article 81(1) EC Treaty, the provision contains a non-exhaustive list of prohibited conduct, which includes: imposing unfair trading conditions;[226] controlling or limiting production, technical development, investment or markets;[227] discriminating against trading partners[228] as

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[219] EC, *Commission Regulation No. 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements* [2000] OJ L 304/3.
[220] EC, *Commission Regulation No. 240/96 of 31 January1996 on the application of Article 85(3) of the Treaty to certain categories technology transfer agreements* [1996] OJ L 031/02.
[221] *Regulation 17*, art. 2; see F. Vogelaar, J. Stuyck & B. van Reeken, eds., *Competition Law in the EU, Its Member States and Switzerland* (The Hague: Kluwer Law International, 2000) at 96.
[222] Whish, *supra* note 204 at 217-8. Comfort letters are legally non-binding opinions issued by the Commission certifying that under the given circumstances there are no grounds for enforcement action under Art. 81 EC Treaty (*ibid.*).
[223] Formerly Article 86 EC Treaty, prior to renumbering by the Treaty of Amsterdam.
[224] For the purposes of Art. 82 EC Treaty, the term '*undertaking*' has the same meaning as under Art. 81 EC Treaty (Rodger & MacCulloch, *supra* note 209 at 79).
[225] Together with Article 81 EC Treaty, these provisions are often generally referred to as '*European antitrust law*'.
[226] *EC Treaty*, art. 82(1)(a).
[227] *Ibid.* art. 82(1)(b).
[228] *Ibid.* art. 82(1)(c).

well as certain forms of tying arrangements.[229] Article 82 EC Treaty has been used by the Commission to prohibit both exploitative and exclusionary forms of abusive practices.[230] Examples of anticompetitive conduct to which Article 82 EC Treaty has been applied include predatory pricing practices,[231] refusals to deal,[232] tying agreements[233] and exclusive purchasing agreements.[234]

Article 82(1) EC Treaty does not prohibit dominant positions as such, but rather is aimed at those undertakings which abuse their dominant position within a relevant market and thereby affect inter-state trade. [235] Accordingly, in order for there to be a violation of this provision, not only must there be abuse of a dominant position by one or more undertakings, but such abusive conduct must be capable of affecting trade within the common market.[236]

The provisions of Article 82 EC Treaty do not define the term '*dominant position*'. A dominant position is defined by the Commission as existing when "a firm or group of firms would be in a position to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers".[237]

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[229] *Ibid.* art. 82(1)(d).
[230] Rodger & MacCulloch, *supra* note 209 at 89-90.
[231] See *e.g.* ECJ, Case C-62/86, *AZCO Chemie* v. *Commission* [1991] ECR I-3359.
[232] See *e.g.* ECJ, Joined Cases 6 & 7/73, *Istituto Chemioterapico Italiano SpA and Commercial Solvents* v. *Commission* [1974] ECR 223.
[233] See *e.g.* EC, Commission Decision 88/518/EEC *Napier Brown/British Sugar* (1988) OJ L 284/41.
[234] See *e.g.* ECJ, Case 85/76, *Hoffman- La Roche & Co. AG* v. *Commission* [1979] ECR 461[hereinafter *Hoffman – La Roche*]. For a more detailed review of both forms of abusive conduct, see Rodger & MacCulloch, *supra* note 209 at 90-9.
[235]Craig & de Burca, *supra* note 80 at 941.
[236] Similar to Article 81 EC Treaty, it will suffice that such conduct may potentially affect trade between Member States (Whish, *supra* note 204 at 111).
[237]EC, *Commission notice on the definition of the relevant market for the purposes of Community competition law*, [1997] OJ C 372, available online at: <http://www.europa.eu.int/comm/competition/antitrust/relevma_en.html> (date accessed 26 March 2002) [hereinafter *Relevant Market Notice*] at 2. The concept of dominant position was first defined by the Court of Justice in the case *United Brands* (ECJ, Case 27/76 *United Brands Co. and United Brands Continentaal BV* v. *Commission* [1978] ECR 207 [hereinafter *United Brands*] and further elaborated by the Court in *Hoffman –La Roche* (*supra* note 234). For a more detailed review of the concept of dominance, see J. Azevedo & M. Walker

Thus, apart from a single undertaking independently exerting dominance, two or more undertakings may jointly unilaterally wield market power under the notion of *"collective dominance"*.[238]

Central to determining both forms of dominance is market power – the position of economic strength that an undertaking has in a given market.[239] However, the provisions of the EC Treaty do not stipulate thresholds at which dominance will be achieved, and thus it has been left to the Commission and the Courts to determine at what point one or more undertakings will be deemed to hold a dominant position within a given market. In general, a dominant position has been found to exist where an undertaking has a market share which exceeds forty per cent in a given relevant market.[240] Nevertheless, other factors must also be taken into account in assessing whether a dominant position exists,[241] therefore a market share in excess of forty per cent is not automatically indicative of a dominant position.[242]

The implementation and enforcement of Article 82 EC Treaty is governed by Regulation 17. In contrast to the provisions relating to restrictive agreements under Article 81 EC Treaty, there are no provisions that permit the granting of exceptions

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"Dominance: Meaning and Measurement" (2002) 23 ECL.R. 363; Craig & de Burca, *supra* note 80 at 942 -954.

[238] The notion of collective dominance was first recognized by the Court of First Instance in the case *Flat Glass* (CFI Joined Cases T-68,77-78/89, *Società Italiana Vetro* v. *Commission* [1992] ECR II-1403) and was subsequently confirmed by the Court of Justice (see ECJ, Joined Cases C-395 & 396/96P, *Compagnie Maritime Belge Transports SA and others* v. *Commission* [2000] ECR I- 1365). For a more detailed analysis of collective dominance, see generally G. Monti, "The Scope of Collective Dominance Under Articles 82 EC" (2001) 38 C.M.L.R. 131; G. Niels "Collective Dominance: More Than Just Oligopolistic Interdependence" (2001) 22 C.M.L.R. 168.

[239] Whish, *supra* note 204 at 152 citing *United Brands*, *supra* note 237.

[240] A firm with a market share varying between forty to forty-five per cent was deemed to hold a dominant position (see *United Brands*, *supra* note 237).

[241] Such factors include barriers to entry and the possibility of substitution, see Whish, *supra* note 204 at 156; *Relevant Market Notice*, *supra* note 237 at 10.

[242] This occurred in the case *Hoffman – La Roche* (see *supra* note 234) where the Court did not find that Hoffman- La Roche had a dominant position despite its market share of forty three per cent in the market for B3 vitamins (Craig & de Burca, *supra* note 80 at 951).

for the infringement of Article 82 EC Treaty.[243] However, an undertaking may apply to the Commission for a "negative clearance" pursuant to Article 2 of Regulation 17.[244]

MERGER CONTROL

The EC Treaty does not expressly provide for merger control.[245] Merger control at the EC level is governed by Council Regulation No. 4064/89[246] and Commission Regulation No. 447/98, on the basis of Article 83 EC Treaty.[247] One of the underlying principles of EC merger control is the *"one-stop shop principle"* whereby concentrations[248] that are deemed to have a "Community dimension" are subject to merger review only by the Commission and not the national competition authorities of Member States.[249] In order for a concentration to have such a

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[243] *Ibid.* at 975.

[244] See Vogelaar, Stuyck & van Reeken, *supra* note 221 at 96.

[245] Prior to the enactment of the Merger Regulation, certain forms of mergers were reviewed under the provisions of Art. 82 EC Treaty, see *e.g.* ECJ, Case 6/72 *Europemballage Corporation and ContinentalCan Co. Inc.* v. *Commission* [1973] ECR 215; Rodger & MacCulloch, *supra* note 209 at 204-05.

[246] EC, *Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings* [1989] OJ L395/1, as amended by EC, *Regulation No 1310/97 of 30 June 1997 amending Regulation No 4064/89 on the control of concentrations between undertakings*, [1997] OJ L 180/01 [hereinafter *Merger Control Regulation* or *MCR*].

[247] EC, *Commission Regulation No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation No 4064/89 of 21 December 1989* [1998] OJ L 61/1[hereinafter *Implementing Regulation*].

[248] The term '*concentration*' includes mergers between previously independent undertakings, acquisitions of control and full-function joint-ventures (see EC, *Commission notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings* (1998) OJ C 66/5).

[249] *MCR*, art. 21 (1) and (2); EC, Commission, *Merger control law in the European Union: situation in March 1998* (Brussels: EC, 1998) at 9 [hereinafter *EU Merger Control*]. There are however, three exceptions to the Commission's almost exclusive jurisdiction under the Merger Control Regulation. First, pursuant to Art. 9(1) MCR, a Member State may request the Commission to refer a concentration to its national competition authority if the concentration threatens to create or strengthen a dominant position or to affect competition in a distinct market within that Member State (this exception is commonly referred to as the '*German clause*'). Secondly, under Art. 22 (3) MCR, in an exception known as the '*Dutch clause*', one or more Member States may request the Commission to investigate a concentration that does not fulfill the turnover threshold criteria under Art 1 MCR, but which nevertheless may significantly impede competition within the territory of these Member States. Finally, pursuant to Art. 21(3) MCR, Member States may take such necessary

Community dimension, it must fulfill one of two turnover thresholds set forth in Article 1 MCR. The first set of turnover thresholds is outlined in Article 1(2) MCR, which provides that a concentration will have a community dimension if both the combined aggregate worldwide turnover of all the undertakings concerned[250] exceeds 5 billion EUR and the aggregate Community turnover of at least two of the undertakings concerned is greater than 250 million EUR, unless each party to the transaction achieves more than two-thirds of its aggregate turnover within the same Member State.

Under the second threshold, a community dimension is given if the combined aggregate worldwide turnover of the undertakings concerned exceeds 2 500 million EUR, and the combined aggregate Community turnover of all the undertakings exceeds 100 million EUR, and, in at least three Member States, the combined aggregated turnover of at least two of the undertakings is greater than 25 million EUR and the aggregate community turnover of each of at least two of the undertakings concerned is more than 100 million EUR, unless each of the undertakings achieves more than two-thirds of its aggregate Community turnover in a single Member State.[251] Provided that all of the above conditions are fulfilled, the

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measures so as to protect their legitimate interests. The legitimate interests expressly provided for under the Merger Control Regulation are public security, plurality of media and prudential rules. All other legitimate interests are subject to prior approval by the Commission (P. Verloop, ed., *Merger Control in the EU: A Survey of European Competition Laws* (The Hague: Kluwer Law International, 1999) at 11-12).

[250]The term '*undertakings concerned*' is defined in EC, *Commission notice on the concept of undertakings concerned under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings* (1998) OJ C 66/14 at para. 5. If a concentration involves a merger, the undertakings concerned will be the undertakings that are merging (*ibid.* at para. 6).

[251] *MCR*, art. 1(3).

concentration will be deemed to have a community dimension for the purposes of Article 1(3) of the Merger Control Regulation.[252]

Agreements involving a concentration that fall within the ambit of the Merger Control Regulation as outlined above must be jointly notified[253] within one week[254] to the Merger Task Force (MTF) in Directorate General IV of the Commission for assessment prior to implementing the transaction,[255] unless the parties obtain a derogation from the obligation to suspend the merger pursuant to Article 7(4) MCR.[256] Generally, merger review is conducted by the Merger Task Force in either a one or two phase investigation, depending on whether or not the concentration raises competition concerns.[257] The receipt of a notification triggers the first phase of the merger review in which the Commission must decide within a one month time-period whether the concentration is compatible with the common market.[258] Should the Commission find that the concentration raises doubts as to its compability with the common market, the investigation will proceed to Phase II.[259] The Commission

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[252] Articles 81 and 82 EC Treaty are not applicable to those concentrations that have a community dimension within the meaning of MCR as Art. 22(1) MCR excludes the application of Regulation 17 to such concentrations (see Verloop, *supra* note 249 at 13; Whish, *supra* note 204 at 735-38).

[253] *MCR*, art. 4(2).

[254] *Ibid.* art. 4(1).

[255] *Ibid.* art. 7(1).

[256] Implementing a concentration prior to approval by the Commission or failing to notify such a transaction may lead to a fine of up to 10 per cent of the aggregate turnover of the undertakings concerned for the former (Art.14 (2)(b) MCR) and a fine of up to 50,000 EUR for the later (Art.14 (1)(a) MCR).

[257] The majority of notifications are reviewed and decided in Phase I proceedings. This is demonstrated by the fact that during the years 1990 to 31 December 1999, the MTF issued a total of 1,099 Phase I decisions, while during the same period it issued 60 Phase II decisions (J. Rivas, *The EU Merger Regulation and the Anatomy of the Merger Task Force* (London: Kluwer Law International, 1999) at 56 -57).

[258] *MCR*, arts. 6(1), 10(1).

[259] *Ibid.* art. 6(1)(c). See also EC, Commission, *Merger Control Law in the European Union: Situation in March 1998*, *supra* note 251 at 13.

must then determine, within a four-month time period, based on an in-depth analysis whether or not the concentration is compatible with the common market.[260]

The notion of dominance and its effect on competition is the decisive criterion in merger review under the Merger Control Regulation.[261] As under Article 82 EC Treaty, the Commission has extended the notion of dominance to include collective dominance, which has been upheld by both the Court of First Instance and the Court of Justice.[262] The test that is applied by the Commission to assess a proposed concentration is set forth in Article 2(3) MCR. Under this provision, the Commission must determine whether the concentration will create or reinforce a dominant position and whether it will have the effect of significantly impeding effective competition in the common market.[263] In the event the Commission finds that a concentration is likely to impede competition in the common market, the parties to the concentration may submit contractual undertakings to the Commission to remedy the perceived threat to competition.[264] If the Commission is satisfied that they

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[260] *MCR*, art.10(3). It should be noted that certain concentrations may qualify for review under a simplified procedure thus avoiding the lengthy notification process. Pursuant to the Commission Notice on Simplified Procedure, concentrations in which none of the parties are involved in horizontal or vertical relationships and those concentrations that are but where their combined market share does not exceed fifteen per cent for horizontal relationships and twenty five percent for vertical relationships respectively, may be reviewed under the simplified procedure (see EC, *Commission Notice on a simplified procedure for the treatment of certain concentrations under Council Regulation (EEC) No 4046/89* (2000) OJ C 217/32 at para. 4).

[261] Rivas, *supra* note 257 at 129. Although the definition of dominance largely corresponds to the meaning applied under Article 82 EC Treaty, it differs in that under merger review the analysis focuses on the perceived effect a concentration will have on competition in a given market as opposed to the existing position in a given market under Article 82 EC Treaty (Whish, *supra* note 204 at 770).

[262] See EC, Commission Decision COMP/M.190 *Nestlé/Perrier* [1992] OJ L 356/1; CFI, Case T-102/96 *Gencor* v. *Commission* [1999] ECR II-753, ECJ, Joined Cases C-68/94 & 30/95 *France* v. *Commission* [1998] ECR I -1375. For a more detailed analysis of the application of the notion of collective dominance in merger review, see V. Korah, "Gencor v. Commission: Collective Dominance (1999) 20 ECL.R. 337; also G. Niels, *supra* note 238.

[263] *MCR*, art. 2.

[264] Contractual undertakings may be either of a behavioral or structural nature (Whish, *supra* note 204 at 784).

sufficiently remedy the threat, it may declare the concentration compatible with the common market.[265]

STATE AID CONTROL

Articles 87 to 89 EC Treaty form the basic provisions that govern state aid control.[266] The underlying principle of EC state aid control is that certain forms of state aid[267] impede the development and functioning of the common market by distorting competition through the granting of subsidies or otherwise economically favoring certain goods or market participants.[268] Nevertheless, it is recognized that some forms of state aid may be beneficial and even necessary for the proper functioning of the common market.[269]Accordingly, not all types of aid granted by Member States are prohibited under the Treaty as only such aid which affects trade between Member States and threatens to distort competition is prohibited under Article 87(1) EC Treaty.[270] Pursuant to Article 87(2) EC Treaty, aid of a social nature that is non-discriminatory granted to individual consumers[271] and aid that is

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[265] *MCR*, arts. 6(2) and 8(2). The Commission has issued a notice elaborating what forms of commitments are acceptable, see EC, *Commission notice on remedies acceptable under Council Regulation (EEC) No.6064/89 and under Commission Regulation (EC) No. 447/98* (2000) OJ C 68/3.

[266] There are however, other provisions in the Treaty that govern specific forms of state aid, such as Art. 36 EC Treaty, which relates to state aid for the production and trade of agricultural products in the common market (see EC, Commission, *Competition Law in the European Communities, volume IIA Rules Applicable to State Aid* (Luxembourg: Office for Official Publications of the European Communities, 1999) at 15).

[267] The terms '*state aid*' and '*aid*' are not defined in the Treaty. They have been interpreted broadly by the Commission and the Courts. Aid is defined under Art. 1(a) of Regulation 659 (*infra* note 276) as "any measure fulfilling all the criteria laid down in Article 92(1) [*sic* 87(1)] EC Treaty". Generally, aid is interpreted as state aid if it is provided by a Member State and confers an "economic or financial advantage on a firm that it would not otherwise have enjoyed" (Rodger & MacCulloch, *supra* note 209 at 247).

[268] *Ibid.* at 245.

[269] *Ibid.*

[270] Article 87(1) EC Treaty reads: "Save as otherwise provided under this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market".

[271] *EC Treaty*, art. 87(2)(a).

targeted at providing assistance for damage caused by natural disasters or exceptional occurrences[272] as well as aid granted to the economic regions of former East Germany is deemed compatible with the common market.[273] Furthermore, Article 87(3) EC Treaty outlines certain types of aid, which may, at the discretion of the Commission,[274] be deemed compatible with the common market, such as aid targeted at remedying economic disparities or serious distortions in the economy of a Member State, provided that such aid does not negatively affect trade and competition pursuant to Article 87(1) EC Treaty. Moreover, the Council, on the basis of a Commission proposal, may deem other forms of state aid compatible with the common market.[275]

The procedure for implementing the substantive provisions of Article 87 EC Treaty is provided for under Articles 88 and 89 EC Treaty and Council Regulation 659/1999.[276] Pursuant to Article 88(1) EC Treaty, the Commission must monitor all systems of aid granted by Member States.[277] In turn, Member States must notify the Commission of any plans to grant or alter state aid prior to their implementation.[278]

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[272] *Ibid.* art.87(2)(b).
[273] *Ibid.* art. 87(2)(c).
[274]The Commission has discretion with respect to Art. 87(3) EC Treaty both in terms of deciding individual cases and, more broadly, in relation to its position on exceptions in general (Craig & de Burca, *supra* note 80 at 1083).
[275] *EC Treaty*, art. 87(3)(e).
[276] EC, *Council Regulation No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Art. 93 of the EC Treaty* [1999] OJ L 83/1 [hereinafter *Regulation 659/1999*]. For a detailed review of the regulation, see A. Sinnaeve & P.J. Slot, "The New Regulation on State Aid Procedures" (1999) 36 C.M.L.R. 1153.
[277] To this end, and in an effort to increase the transparency of the system of EC state aid control, the Commission created the State Aid Register and the State Aid Scoreboard (see R. Joels, "Two new transparency instruments: the State Aid Register and the State Aid Scoreboard" (2001) *Competition Policy Newsletter*, October 2001 at 64). The Register contains information on all state aid cases under review by the Commission as well as all decisions relating to state aid issued by the Commission after 1 January 2000 (*ibid.*). The State Aid Scoreboard monitors state aid within the EU and the activities of the Commission relating to state aid control (*ibid.* at 65). Both the Register and the Scoreboard are accessible online: <http://www.europa.eu.int/competition/index_en.html>.
[278] *EC Treaty*, art. 87(3); *Regulation 659/1999*, art. 2(1).

The Commission has issued under Regulation 659/1999 block exemptions for state aid targeted at small and medium enterprises[279] and training.[280] Accordingly, such aid programs need not be notified to the Commission if they fulfill the conditions stipulated in the block exemption regulations.[281] Moreover, according to the Commission's regulation on *de minimis* aid,[282] state aid programs that do not exceed 100 000 EUR per recipient over a period of three years do not fall within the ambit of Article 87(1) EC Treaty.[283]

Once the Commission receives notification by a Member State of a proposed grant of aid, it must determine within a time-period of two months whether or not the aid is compatible with the common market.[284] In the event that a Member State implements aid prior to obtaining a decision by the Commission, such aid will be considered unlawful.[285] Nevertheless, the Commission must still review the aid to determine if it is compatible with the common market. Should the aid be found incompatible, the Commission will issue a decision to this effect and the Member State will be required to either abolish or alter the aid.[286] Finally, it should be noted

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[279] EC, *Commission Regulation (EC) No. 70/2001 of 12 January 2001 on the application of Arts.87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises*[2001] OJ L 10/33.
[280] EC, *Commission Regulation (EC) No. 68/2001 of 12 January 2001 on the application of Art. 87 and 88 of the EC Treaty to State aid to training aid* [2001] OJ L 10/20.
[281] A. Sinnaeve, "Block Exemptions for State Aid: More Scope for State Aid Control by Member States and Competitors" (2001) 38 C.M.L.R. 1479 at 1480, [hereinafter "Block Exemptions"].
[282] EC, *Commission Regulation No. 69/2001 of 12 January 2001 on the application of Arts. 87 and 88 of the EC Treaty on de minimis aid* [2001] OJ L 10/30.
[283] *Ibid.* art. 2.
[284] *Regulation 659/1999*, art. 6.
[285] See ECJ, Case C-301/87 *France* v. *Commission (Boussac)* [1990] ECR I-307; see also EC, *Commission Communication to the Member States on the recovery of unlawful aid of 22 June 1995* (1995) OJ C 156/5.
[286] *EC Treaty*, art. 88(2).

that Article 88(3) EC Treaty has direct effect and thus may be relied upon by individuals before the national courts of Member States.[287]

2.2 COMPETION LAW IN THE CZECH REPUBLIC

In the Czech Republic, competition law is primarily governed by the Act on the Protection of Economic Competition[288] and the Act on State Aid.[289] The enforcement of competition provisions is carried out by the Office for the Protection of Economic Competition.[290] The Office is the central government administrative agency charged with overseeing the enforcement of competition law in the Czech Republic.

Competition law in the Czech Republic is modeled broadly on EC competition law. Both the Competition Act and the Act on State Aids are relatively new Acts that are based on Community competition law principles and are the result of efforts to achieve a greater degree of compability with EC competition law. In particular, one of the fundamental aims of the new Competition Act was to achieve full compability with EC competition law, as provided for under the provisions of the Europe Agreement and the Implementation Rules relating to competition.[291]

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[287] See ECJ, Case 120/73, *Gebrûder Lorenz GmbH* v. *Germany* [1973] ECR 1471.

[288] *Zákon č. 143/2001 Sb., o ochraně hospodářské soutěže* [hereinafter *Competition Act* or *CA*]. The Competition Act came into effect on 1 July 2001. The Act replaces the previous Act on the Protection of Economic Competition of 1991 (*zákon č. 63/1991 Sb., ve znění zákona č. 495/1992 Sb. a zákona č. 286/1993 Sb.*).

[289] *Zákon č. 59/2000 Sb., o věřejné podpoře* [hereinafter *State Aid Act* or *SAA*].

[290] The Office was established by *zákon č.273/1996 Sb., o působnosti Úřadu pro ochranu hopsodařské soutěže,* as subsequently amended.

[291] Poslanecká sněmovna České republiky, *Důvodová zpráva k návrhu zákona o ochraně hospodařské soutěže a o změně některých zákonu č. 704/2000* (author's note: the explanatory notes accompanying the draft bill of the Act) at 1[hereinafter *Důvodová zpráva CA*]; Office for the Protection of Economic Competition, *2001 Annual Report on Competition Policy Developments in the Czech Republic* (Brno: Office for the Protection of Economic Competition, 2002) at 2 [hereinafter *2001 Competition Policy Report*].

The Competition Act governs the following areas of competition law: agreements restricting competition; abuse of dominant positions and merger review.[292] Moreover, the Act governs certain procedural issues, such as conducting investigations, sanctions and specific provisions relating to confidentiality of information.[293] Incorporated in the Act are definitions of various key terms such as "*relevant market*" and "*dominant position*" which are directly based on definitions developed by the Commission and the European courts.[294]

AGREEMENTS RESTRICTING COMPETITION

Agreements between competitors, decisions of associations of competitors and concerted conduct of competitors are prohibited and deemed void unless otherwise provided for under the Act or another law, or unless they are exempted by a decision or block exemption issued by the Office for the Protection of Economic Competition.[295] The Act enumerates non-exhaustively certain forms of conduct which may be deemed to be agreements restricting competition and which includes price-fixing; limiting or controlling production, distribution, research or development and investment; market allocation, tying arrangements; price and other forms of discrimination and group boycotts.[296] The Act differentiates between vertical and horizontal agreements and incorporates the *de minimis* thresholds of the

[292] Provided that the effects of such conduct do not occur solely outside the territory of the Czech Republic (art. 1(1) and (4) CA).
[293] See *CA*, arts. 9,15-16, 21 and 22.
[294] A. Schwarz & Z. Palkinas, "Czech Republic: New Antitrust Law" (2001) Eastern European Forum Newsletter, December 2001 at 5.
[295] *CA*, art. 3(1).
[296] *Ibid.* art. 3(2) (a) to (f).

De Minimis Notice[297] of five percent and ten percent respectively for horizontal and vertical agreements.[298]

Parties to an agreement that would otherwise be prohibited may request an individual exemption from the Office provided the agreement fulfils the conditions set forth in Article 8 CA.[299] In addition, such an agreement may be exempted under a block exemption. Pursuant to Article 26(1) CA, block exemptions may be granted by means of decrees, which correspond to the E.C. block exemption regulations.[300] To date, the Office has issued such decrees for certain types of vertical agreements,[301] specialization agreements,[302] research and development,[303] technology transfers,[304] the distribution and servicing of motor vehicles,[305] insurance[306] and transport.[307] Moreover, the Office is authorized to issue additional decrees governing block exemptions for certain agreements if the negative effect on competition would outweigh the benefits that it would confer on other market participants, in particular consumers.[308] The Act also provides for the creation of a cartel register, which

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[297] See *De Minimis Notice*, *supra* note 212.
[298] *CA*, arts. 5 and 6(1).
[299] In order to qualify for an individual exemption, such an agreement must contribute to improving production or distribution or promoting technical or economic development while conferring on consumers a fair portion of the ensuing benefits and not imposing unnecessary restrictions on competitors (art. 8 CA).
[300] *Důvodová zpráva CA*, *supra* note 291 at 3,6.
[301] *Vyhláška č. 198/2001 Sb., o povolení obecné vyjímky pro určité druhy vertikálních dohod.*
[302] *Vyhláška č. 201/2001 Sb., o povolení obecné vyjímky pro určité druhy dohod o specializaci.*
[303] *Vyhláška č. 199/2001 Sb., o povolení obecné vyjímky pro určité druhy dohod o výzkumu a vývoji.*
[304] *Vyhláška č. 200/2001 Sb., o povolení obecné vyjímky pro určité druhy dohod o poskytování technologií.*
[305] *Vyhláška č. 204/2001 Sb., o povolení obecné vyjímky pro určité druhy dohod o distribuci a servisu motorových vozidel.*
[306] *Vyhláška č. 202/2001 Sb., o povolení obecné vyjímky pro určité druhy dohod v oblasti pojišťovnictví.*
[307] *Vyhláška č. 203/2001 Sb., o povolení obecné vyjímky pro určité druhy dohod o cenách v osobní letecké dopravě; Vyhláška č. 205/2001 Sb., o povolení obecné vyjímky pro určité druhy dohod v oblasti drážní, silniční a vodní dopravy.*
[308] *CA*, art. 26(2).

contains a list of all agreements which were granted an exemption by the Office as well as agreements that were prohibited under the Act.[309]

ABUSE OF A DOMINANT POSITION

Pursuant to Article 11(1) CA, the abuse of a dominant position to the detriment of other competitors or consumers is prohibited. The term '*dominant position*' (*dominantní postavení*) is defined under the Act as such a degree of market power[310] held by one competitor or jointly by two or more competitors, which enables these competitors to act to a large extent independently of other competitors or consumers.[311] Accordingly, the definition of dominance under Article 10(1) CA explicitly provides for the notion of collective dominance.[312] In order to increase legal certainty, the Act also provides for a legal presumption that, unless proven otherwise, a dominant position will not be deemed to exist where one or more competitors jointly have a market share of less than forty percent.[313]

The Act outlines non-exhaustively certain types of conduct that will be deemed to constitute an abuse of a dominant position and which includes: predatory pricing; certain forms of tying-arrangements; price discrimination and pre-emption of facilities.[314] An application may be made to the Office for an advisory opinion stating whether or not given conduct would be considered by the Office to constitute

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[309] *Ibid.* art. 25(1). The register is accessible to the public online at the website of the Office at: <http://www.compet.cz>.

[310] According to the *Důvodová zpráva CA*, market power was chosen as the criterion for determining the existence of a dominant position in keeping with the jurisprudence of the Court of Justice (*Důvodová zpráva CA, supra* note 291 at 3). Under the Act, market power is to be determined by the market share of the undertakings concerned together with other factors including the economic and financial strength of competitors, the structure of the relevant market as well as the degree of vertical integration (Art. 10(2) CA); T. Fiala, Dominantní postavení v soutěžním právu ES jako inspirační zdroj pro aplikaci nového zákona o ochraně hospodářské soutěže" (2001) E.M.P. 4/2001 at 29.

[311] *CA*, art. 10(1).

[312] *Důvodová zpráva CA, supra* note 291 at 3.

[313] CA, art. 10(3).

[314] *Ibid.* art. 11(1).

an abuse of a dominant position under the Act.[315] In the event the Office ascertains that an abuse of a dominant position has occurred, it will issue a declaratory decision to this effect and the competitor is prohibited from engaging in such conduct in the future.[316] However, in contrast to the provisions governing agreements restricting competition, there is no exemption for abuses of dominant positions available under the Act.

MERGER CONTROL

Merger control in the Czech Republic is based on a system on pre-notification and authorization similar to that in the EC under the Merger Control Regulation.[317] Under the Competition Act, a merger may occur either through the merging of two previously independent competitors or through the acquisition of a firm or a firm's assets.[318] The scope of application of the Competition Act to mergers is determined by means of turnover thresholds. Accordingly, a merger will be subject to review by the Office if the aggregate worldwide turnover of all undertakings concerned for the last accounting period exceeds 5 billion CZK,[319] or, if the combined net revenue of all the undertakings concerned achieved in the last accounting period in the Czech Republic is greater than 550 million CZK and at least two of the undertakings concerned each achieved a gross revenue of at least 200 million CZK for the last accounting period.[320] Thus, proposed mergers that occur outside the territory of the

[315] *Ibid.* art. 11(3).
[316] *Ibid.* art. 11(2).
[317] See *Důvodová zpráva CA*, *supra* note 291 at 3-4.
[318] *CC,* art. 12. Co-operative joint ventures whose main objective is the coordination of the competitive behavior of its founders will be assessed not as a merger but under the provisions governing agreements restricting competition (Art. 12 (5) CA).
[319] *Ibid.* art. 13(a).
[320] *Ibid.*, art. 13(b).

Czech Republic yet which may nevertheless affect competition within the Czech Republic will be subject to review by the Office.[321]

The parties to a proposed merger must notify the Office within seven days of concluding the agreement establishing the merger or the acquisition of the assets,[322] and the transaction may not be implemented prior to obtaining approval from the Office.[323] However, the parties to the transaction may notify the Office of the intended transaction at any time prior to concluding the agreement.[324]

The review and investigation of merger notifications is conducted by the Office in either a one or two-phase investigation. The first phase of the merger review begins with the receipt by the Office of a notification submitted by the parties to the proposed transaction. The Office must determine within a thirty day time-period following receipt of the notification whether or not the proposed transaction is subject to approval by the Office and, if so, whether the transaction will result in a dominant position that would substantially restrict competition.[325] If the Office finds that the proposed transaction is likely to raise competitive concerns, the investigation proceeds into the second phase in which the Office will conduct an in-depth analysis of the proposed merger.[326] The Office must determine within a five month time-

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[321] *Ibid.*, art. 1(3); see also Office for the Protection of Economic Competition, *Výkladové stanovisko k povinné notifikaci spojení uskutečněných v zahraničí*, available online at the Office's website at <http://www.compet.cz/Zakony/VyklStan.htm> (date accessed: 14 May 2002).

[322] *CA*, art. 15(1) - (3).

[323] *Ibid.* art. 18(1). However, pursuant to Article 18(3), the Office may, at the request of the parties concerned, grant an exception if delaying the implementation of the merger threatens to cause substantial damages to the parties or to third persons.

[324] *Ibid.* art. 15(5). Although not expressly provided for in the Act, this provision has been seen by some commentators to permit preliminary consultations. For a more detailed discussion, see M Nedelka & J. Němec, "K tzv. předběžným konzultacím soutěžního orgánu v řízení o povolení spojení podniků dle práva ES a dle českého práva" (2001) Právní rozhledy 11/2001 at 540.

[325] *CA.* art. 16(2). It should be noted that the Act does not define the term '*substantially affect competition*' (*podstatné narušení hospodářské soutěže*).

[326] *Ibid.* art. 16(2).

period whether or not the transaction will give rise to a dominant position and thus substantially affect competition within a given market.[327]

In order to determine whether a merger raises competitive concerns, the Office must take into account several factors including the need to ensure and develop effective competition in the relevant markets affected by the proposed transaction, the market share of the parties to the transaction in these markets, as well as barriers of entry and the possibility of substitution.[328]In the event that a proposed merger is implemented prior to obtaining approval from the Office, the Office may order that the merger be dissolved and divested.[329] In addition, the Office may impose fines of up to ten million CZK or an amount representing ten per cent of the net revenues acquired in the last calendar year.[330]

STATE AID CONTROL

State aid control in the Czech Republic is broadly based on the EC concept of state aid in order to ensure compatibility of aid granted by the government of the Czech Republic and thus fulfill the obligations of the Czech Republic ensuing from the provisions of the Europe Agreement and the implementation rules relating to state aid.[331] Accordingly, state aid[332] which distorts or may distort competition by conferring an advantage on certain undertakings or the production of certain goods in so far as to affect trade between the Czech Republic and the Member States of the

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[327] *Ibid.* art. 16(4).
[328] *Ibid.* art. 17(1).
[329] *Ibid.* art. 18(2).
[330] *Ibid.* art. 22(2).
[331] Poslanecká sněmovna České republiky, *Důvodová zpráva k vládnímu návrhu zákona o věřejné podpoře č.n. 378/00* at 1[hereinafter *Důvodová zpráva SAA*].
[332] The Act employs term '*public aid*' (*věřejná podpora*), which is defined pursuant to Article 3(a) SAA as being any form of aid or advantage conferred to a competitor by the Czech Republic, a ministry, government administrative agency, autonomous administrative body or which is granted from public funds. In this Chapter, the term '*state aid*' is used synonymously with that of public aid.

European Union is prohibited.[333] However, certain forms of aid may be exempt from the general prohibition of state aid either under a general exemption or by means of an individual exemption granted by the Office for the Protection of Economic Competition.

The Act expressly provides for three categories of general exemptions from the prohibition of granting state in Article 4 SAA. The first category relates to aid that is granted within a period of three years and which does not exceed a total amount of 100 000 EUR.[334] The second general exemption category applies to aid of a social nature which is granted to individual consumers provided that it is offered without discriminating against the origin of products.[335] Finally, the third category includes aid which is aimed at remedying damages caused by natural disasters or other extraordinary events.[336] In addition to the above categories of aid which may qualify for general exemption pursuant to Article 4 SAA, the Office may grant block exemptions by means of a decree for other forms of state aid.[337] Aid which qualifies under the general exemption or which fulfills the conditions outlined in the block exemption decrees issued by the Office does not require approval.[338]

Apart from the general exemptions provided for under Article 4 SAA, the Office may, upon application, grant an individual exemption for certain forms of state aid.

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[333] SAA, art. 1(1).
[334] *Ibid.* art. 4(1)(a). However, this general exemption does not apply to state aid which is granted to coal and steel industries, as well as the transport sector and the boat construction industry (*ibid.*).
[335] *Ibid.* art. 4(1)(b).
[336] *Ibid.* art. 4(1)(c).
[337] *Ibid.* art. 4(2). The Act lists as an example aid which is granted to small and medium-sized enterprises, research and development, the protection of the environment, employment and training as well as aid of a regional character. The block exemption decrees are to be modeled on the block exemptions issued by the Commission (*Důvodová zpráva SAA*, *supra* note 331 at 7).
[338] T, Mužík, "Zpráva o zákonu č. 59/2000 Sb. o věřejné podpoře, který nabyl účinnosti k 1. květnu 2000" (2000) E-právo, at 2 (accessed online: <http://www.compet.cz); see also *Důvodová zpráva SAA*, *supra* note 331 at 6.

Pursuant to Article 5 SAA, individual exemptions may be granted for aid targeted at the economic development of regions with exceptionally low standards of living or high rates of unemployment; the promotion of an important project of common interest to the Czech Republic and the European Union or aid targeted at rectifying a serious distortion in the economy of the Czech Republic.[339] An individual exemption may also be granted for aid which is targeted at promoting the development of certain economic activities or sectors, provided that such aid does not affect trade between the Czech Republic and the Member States to an extent that would be incompatible with the common interest of the Czech Republic and the Member States of the European Union.[340] One further example of state aid which may qualify for individual exemption is aid which is geared at promoting and preserving cultural heritage, provided such aid does not have an impact trade between the Czech Republic and the Member States of the European Union.[341]

Individual exemptions may be granted by the Office on the basis of an application for exemption submitted by the grantor of the proposed aid. Aid that is subject to approval by the Office must not be granted prior to obtaining clearance by the Office.[342] All grants of state aid, regardless of whether or not they are exempt, must be notified to the Office.[343] Accordingly, the Office must maintain a record of all

[339] *SAA*. art. 4(a) and (b).
[340] *Ibid.* art. 4(c).
[341] *Ibid.* art. 4(d).
[342] *Ibid.* art. 10(4)(b).
[343] *Ibid.* art. 9(1); see also *Důvodová zpráva SAA*, *supra* note 331 at 9.

state aid that has been granted and it must oversee that such aid is provided in accordance with the provisions of the Act on State Aid.[344]

2.3 APPROXIMATION OF COMPETITION LAW IN THE CZECH REPUBLIC

As outlined generally in the preceding chapter, Article 69 of the Europe Agreement calls for the Czech Republic to undertake efforts to align its legislation with that of the EC. One of the areas expressly provided for under the Europe Agreement is competition law including state aid.[345] Competition law and the control of state aid is governed under the Europe Agreement by the provisions of Article 64.

ANTITRUST UNDER THE EUROPE AGREEMENT

Pursuant to Article 64(1) EA, agreements within the meaning of Article 81(1) EC Treaty and abuses of dominant positions as understood under Article 82(1) EC Treaty, which distort or threaten to distort competition and thus may affect trade between the Czech Republic and the Community, are deemed "incompatible with the proper functioning of the Agreement".[346] Agreements or conduct that falls within the scope of Article 64(1) EA are to be assessed according to the criteria used for applying the provisions of Articles 81, 82 and 87 EC Treaty.[347] Implementing rules

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[344] *Ibid.* art. 9(2). To this end, the Office is authorized under Article 9 SAA to audit grantors of state aid in accordance with the Act on State Controls (*zákon č. 552/1991 Sb., o státní kontrole,* as subsequently amended) and to impose fines for violations of the Act (Art.11(1),(2) and (3) SAA).

[345] *EA*, art. 70.

[346] Accordingly, such agreements and conduct are not expressly prohibited under the Europe Agreement. This contrasts with the prohibition provided for under the corresponding provisions of the EC Treaty (M. Ojala, *The Competition Law of Central and Eastern Europe* (London: Sweet & Maxwell, 1999) at 42).

[347] *EA*, art. 64(2). However, it should be noted that Article 64(1) EA does not apply to products enumerated in Protocol 2 of the Treaty establishing the European Coal and Steel Community (Art. 64(8) EA).

have been adopted for both the antitrust provisions and the provisions relating to state aid to implement the provisions of Article 64 of the Europe Agreement.[348]

IMPLEMENTING RULES FOR ANTITRUST

The implementation rules adopted for antitrust[349] provide a mechanism for settling cases involving agreements or conduct that fall within the scope of Article 64(1) EA.[350] Moreover, with respect to agreements restricting competition, the rules expressly provide an obligation for the Czech Republic to ensure that "the principles contained in the block exemption regulations in force in the Community are applied in full".[351] In addition, although merger control is not included in the areas of competition law covered under the provisions of Article 64(1) EA nor elsewhere within the Agreement, it is expressly provided for in the implementation rules for antitrust.[352] Pursuant to Article 7 IRA, the Office for the Protection of Competition may express its views to the Commission on mergers that fall within the scope of the Merger Control Regulation and which have a "significant impact on the Czech economy".

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[348] The adoption of implementing rules for antitrust and state aid is provided for under Art. 64(3) EA.

[349] *Implementing rules for the application of the competition provisions referred to in Article 64(1)(i), (1)(ii) and (2) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part, and in Article 8(1)(ii) and (2) of Protocol 2 on ECSC products to that Agreement*, as adopted by Decision No 1/96 of the Association Council of 30 January 1996 [hereinafter *implementation rules for antitrust* or *IRA*].

[350] In particular, the rules provide a mechanism for resolving cases that fall within the competency of both regulatory bodies, those that fall within the jurisdiction of one of the regulatory body and cases which fall outside the competency of both regulatory bodies. The aim of the rules is to establish a framework for cooperation between the Commission and the Office and to promote the exchange of information between the two regulatory bodies (Office for the Protection of Economic Competition, *Cesta do Evropské unie* (Brno: Office for the Protection of Economic Competition, 1999), online: <http://www.compet.cz> (date accessed: 16 January 2002) at 11-12 [hereinafter *Cesta do EU*].

[351] IRA, art. 6.

[352] Ojala, *supra* note 346 at 42.

The implementing rules for antitrust incorporate the *de minimis* principle in so far as anticompetitive conduct, which affects trade between the Czech Republic and the Member States of the European Union only negligibly, will not fall within the scope of Article 64(1) EA.[353] Pursuant to Article 8(2) IRA, agreements will be deemed to have a 'negligible effect' if the combined annual turnover of all the undertakings involved is not greater than 200 million EUR and the market share of the goods or services involved, including all the undertakings' goods or services which may be substitutes for such goods or services, does not exceed five per cent of the total market of such goods in the area of the common market or the Czech Republic affected by such an agreement.[354]

STATE AID UNDER THE EUROPE AGREEMENT

Pursuant to Article 64(1)(iii) EA, any state aid which favors certain undertakings or the production of certain goods and that distorts or threatens to distort competition and thus may affect trade between the Czech Republic and the Community will be deemed incompatible with the Europe Agreement. For the purposes of assessing state aid under the Europe Agreement, the Czech Republic is to be categorized for the first five years following the enactment of the Agreement as an area within the meaning of Article 87(3)(a) EC Treaty.[355] Moreover, in order to ensure transparency

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[353] *IRA*, art.8(1).

[354] It should be noted that the *de minimis* threshold applied under Article 81 EC Treaty differs from that provided for under the implementation rules for antirust as the criteria under the *De Minimis Notice* are market share thresholds of ten percent for horizontal agreements and fifteen per cent for vertical agreements (*De Minimis Notice*, *supra* note 212 at para. 7). As a result, the thresholds differ for agreements assessed under Article 81 EC Treaty and those assessed under the Europe Agreement (*Cesta do EU*, *supra* note 350 at 17).

[355] *EA*, art. 64(4)(a). Article 87(3)(a) EC Treaty provides the possibility of granting an exemption to aid targeted at areas with unusually low standards of living or underemployment. The aim of this provision is to facilitate the granting of state aid in the Czech Republic in light of the general prohibition of state aid under the Europe Agreement (Ojala, *supra* note 346 at 59).

in the area of state aid, both the Commission and the Office for the Protection of Economic Competition will exchange reports detailing the amounts and distribution of state aid granted in a given year.[356] In addition, more detailed information on individual grants of state aid will be provided if requested by one of the regulatory bodies.[357]

IMPLEMENTING RULES FOR STATE AID

As with the antitrust provisions of the Europe Agreement, the Association Council has adopted procedural rules for the implementation of the provisions of Article 64 EA relating to state aid.[358] The granting of state aid is monitored by the Commission and the Office for the Protection of Competition and assessed for its compability with the Europe Agreement.[359] Moreover, the Czech Republic is to compile and maintain a comprehensive inventory, based on the format followed by the Commission, of all individual grants and schemes of state aid.[360]

Pursuant to Article 2 SAIR, the compability of state aid with the provisions of the Europe Agreement is to be determined according the rules applicable to state aid under Article 87 EC Treaty.[361] However, certain grants of aid will nevertheless not be subject to assessment under the state aid implementation rules. Individual grants or schemes of state aid that do not exceed a total amount of 100 000 EUR within a

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[356] *EA*, art. 64(4)(b).
[357] *Ibid.*
[358] *Implementation rules for the application of the provisions on state aid referred to in Article 64(1)(iii) and (2) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part, and in Article 8(1)(iii) and (2) of Protocol 2 in ECSC products to that Agreement, as adopted by Decision No. 2/96 of the Association Council* [hereinafter *State Aid Implementation Rules* or *SAIR*].
[359] *SAIR*, art. 1.
[360] *Ibid.* art. 10.
[361] *Ibid.* art. 2(1). These include all existing and future secondary legislation; administrative guidelines and frameworks; relevant jurisprudence of the Court of First Instance and of the Court of Justice; as well as guidelines issued pursuant to Article 4(1) SAIR.

period of three years will be deemed to have a negligible effect on trade and as a result will not fall within the scope of the implementation rules.[362] In addition, the Commission and the Office for the protection of Economic Competition may issue guidelines on the assessment of aid targeted at remedying specific problems the Czech Republic faces as a result of its transition to a market economy.[363]

State aid programs or individual grants of state aid which exceed the amount of 3 million EUR may be submitted for review to the Subcommittee for Approximation of Legislation. The Subcommittee will submit a report regarding such aid to the Association Council which may take the necessary decisions or recommendations regarding the compability of such aid with the Europe Agreement and the state aid implementing rules.[364]

COMMISSION WHITE PAPER

Apart from the relevant provisions of the Europe Agreement and the accompanying implementation rules, further guidance for the approximation of E.C. competition policy and legislation is set forth in the Commission White Paper.[365] The White Paper provides an overview of EC competition policy as well as a framework for approximating the various fields of EC competition law.[366] In addition, the White Paper emphasizes the importance of competition policy for the functioning of the common market without which "the system would be

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[362] *SAIR*, art. 3. However, the *de minimis* threshold does not apply to grants of state aid for the purposes of export nor does it apply to industrial sectors governed by the Treaty on the European Coal and Steel Community; ship building; transport; agriculture or fisheries (*ibid.*).
[363] *Ibid.* art. 4(3).
[364] *Ibid.* art. 5(1).
[365] See *White Paper*, *supra* note 61.
[366] *Ibid.* at paras. 2.27 – 2.30; *White Paper,* Annex, *supra* note 61 at 57.

unworkable".[367] Moreover, the White Paper underlines the necessity of properly enforcing and implementing competition legislation through appropriate administrative and judicial bodies.[368] Although the candidate countries are under an obligation to fully take over EC competition policy, they may "adopt the monitoring and enforcement structures that best serve their purpose."[369] Thus, at least in theory, a certain degree of flexibility is accorded for the approximation of certain procedural aspects of EC competition law.[370]

The Annex to the White Paper outlines a general framework for the process of approximating the relevant Community legislation. Included is an overview and description of the relevant legislation for each field of EC competition law by outlining the key elements and the substantial and procedural aspects of Community legislation. In addition, it summarizes the conditions necessary for the effective implementation of the transposed legislation. However, unlike the other areas of the *acquis* which are addressed in the Annex, the section relating to competition does not provide a comprehensive list of all the relevant legislation subject to approximation.[371] It should be noted that the White Paper repeatedly states that the "EU experience" with respect to competition law may only be "considered of indirect relevance" given that the Member States of the European Union are under

[367] *Ibid.* at para. 2.27.
[368] *Ibid.* at para. 2.30.
[369] *Ibid.* at para. 4.22.
[370] Presumably the underlying rational for this is that, on accession, the monitoring and enforcement of EC law will, for the most part, be taken over by the Commission. However, this may not be the case if the current reform proposals will be implemented.
[371] This may be due to the vast scope of secondary legislation and guidelines as well as voluminous case law in this area of European law.

no legal obligation to harmonize their national competition legislation with that of the EC.[372]

2.4 PROGRESS ACHIEVED IN THE PROCESS OF APPROXIMATION

Efforts to align the competition policy and legislation of the Czech Republic began as early as in 1991 with the enactment of the first Act on the Protection of Economic Competition.[373] Although the Act incorporated certain principles of EC competition law and was amended numerous times, it nevertheless had certain shortcomings and as a result was not fully compatible with EC competition law. In particular, the provisions relating to abuse of dominant positions and merger control did not fully correspond with EC law and practice.[374] As a result, in 2001 the Act was repealed and a new Competition Act[375] was enacted mirroring more closely EC competition rules and relevant case-law and which was enacted with the aim of achieving full compatibility with EC competition law in the field of antitrust and merger control.[376]

Although the pre-accession negotiations for Chapter 6 - Competition Policy were opened on 19 May 1999, the chapter was closed provisionally only on 24 October 2002.[377] In its position document for the negotiations on competition policy, the Czech Republic did not request any transitional periods with respect to

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[372] White Paper, Annex, *supra* note 61 as concerns state aid at 60; with respect to merger control at 62; and as concerns restrictive practices and abuse of dominant positions at 63. Thus, candidate countries are under a greater obligation in terms of transposing and implementing EC competition law than existing Member States.

[373] *Zákon č. 63/1991 Sb. o ochraně hospodářské soutěže ve znění zákona č. 495/1992 Sb. a zákona č. 286/1993 Sb.*

[374] *Důvodová zpráva CA*, *supra* note 331 at 2.

[375] See *Competition Act*, *supra* note 288.

[376] *2001 Competition Policy Report*, *supra* note 291 at 2; *National Program 2001*, *supra* note 151 at 78.

[377] P. Pavlík, "Jak se změnil obraz České republiky v poslední Hodnotící zprávě Evropské komise" (2002), online: <http://www.integrace.cz> (date accessed: 4 November 2002).

competition.[378] Moreover, the Czech Republic stated that it "accepts and will be ready to implement the Community *acquis* including state aid" on its accession to the European Union.[379]

The Commission, in its 2001 Regular Report, noted the progress that the Czech Republic has achieved with respect to competition policy. In particular, it stated that "the Czech Republic has advanced significantly in addressing the remaining legislative gaps identified in the 2000 Regular Report and the Czech Republic's legislation is now largely in line with the *acquis*".[380]

In its assessment, the Commission also stated that the Czech Republic has made progress in the field of state aid particularly with respect to the monitoring and assessment of state aid.[381] However, the Commission emphasized the need to undertake further efforts for the effective enforcement of competition policy. As concerns antitrust, the Commission underlined the need to focus on cases that pose a serious threat to competition while at the same time pursing a more "deterrent sanctioning policy".[382] With respect to the enforcement of state aid, the Commission noted that more "rigorous and effective" enforcement in this area was required, particularly in sensitive areas such as the banking and steel sectors.[383] In its most recent Regular Report, the Commission notes that legislation in the field of antitrust

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[378] Ministry of Foreign Affairs of the Czech Republic, *Position Paper of the Czech Republic Chapter 6: Competition Policy*, submitted to the Commission on 29 January 1999, online: <http://www.mzv.cz/missionEU/negotiations.htm> (date accessed: 12 September 2002).
[379] *Ibid.* The year 2003 was used as the reference date for the accession of the Czech Republic to the EU (*ibid.*).
[380] *2001 Regular Report, supra* note 116 at 57.
[381] *Ibid.* at 56-7.
[382] *Ibid.* at 57.
[383] *Ibid.* at 57.

is "largely compatible with the *acquis*".[384] With respect to state aid, the Report states that the Czech Republic has "already incorporated the basic principles of the *acquis*."[385] Although the Commission generally commends the progress that the Czech Republic has achieved in the field of competition, it reiterates the need to improve enforcement both in the areas of antitrust and state aid.[386]

The Czech Republic has been required under the process of approximation to takeover and implement a competition policy that mirrors that of the EC. In certain areas, such as antitrust and merger control, approximation with the competition *acquis* was alleviated by the fact that the corresponding legislation in the Czech Republic already incorporated certain principles of EC competition law. However, in the area of state aid, alignment has shown to be more difficult to achieve given both the role of state aid in the restructuralization of the economy and the evolution of this field at the Community level.[387]

In practice, the process of approximation of the competition *acquis* has meant that more stringent requirements have been placed on the Czech Republic in this area than are required of existing Member States,[388] with the result that the Czech Republic has not adapted its national legislation to reflect the particular needs of transition. At the same time, however, approximation in this field has contributed to the development and implementation of a functioning regulatory regime in the Czech Republic. Moreover, if the current plans to reform EC competition law which

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[384] 2002 Regular Report, *supra* note 139 at 65.
[385] *Ibid.*
[386] *Ibid.* at 66.
[387] P. Schütterle, "State Aid Control – An Accession Criterion" (2002) 39 C.M.L.R. 577 at 577,582.
[388] See discussion, above, at note 372.

focus on decentralization are adopted[389] the process of approximation will enable the Czech Republic to function effectively in a more decentralized EC competition law on its accession to the EU.

Nevertheless, it is clear that, despite the considerable progress that the Czech Republic has achieved in formally transposing the competition *acquis*, certain difficulties remain to be resolved in this area, in particular with respect to implementing and enforcing the transposed legislation. As noted by the Commission, the Office for the Protection of Economic Competition must undertake further efforts aimed at effectively implementing the transposed legislation. Not only should greater attention be paid to implementation, but the Office must, in order to achieve greater alignment, ensure that the implementation and enforcement of the transposed norms corresponds to the Commission practices in enforcing the antitrust and merger control rules. Failure to do so will not only hamper the process of approximation, but it will also hinder the development of a competitive business environment in the Czech Republic.

Furthermore, the Office should focus more attention on competition advocacy. Although the Office has issued guidelines for assessing various forms of state aid, similar guidelines and information notices could feasibly be issued for the areas of

[389]See EC, *Commission White Paper on modernization of the rules implementing Article 81 and 82 EC Treaty* (1999) OJ C 132/1; EC, *Commission Proposal for a Council Regulation on the implementation of the rules laid down in Article 81 and 82 of the Treaty* COM(2000)582; EC, *Commission Green Paper on the Review of Council Regulation (EEC) No 4064/89*, COM(2001) 745/6 Final. For a review of the reforms, see C. Ehlermann, The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution" (2000) 37 C.M.L.R. 537; A. Schaub, "EC Competition System – Proposals for Reform" (1999) 22 Fordham Int'l L.J. 853 M. Todino, "Modernisation from the Perspective of National Competition Authorities: Impact of the Reform on Decentralised Application of EC Competition Law (2000) 21 ECL.R. 348; W. Wils "European Community Competition Law: The Modernization of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for A New Council Regulation Replacing Regulation No.17 (2001) 24 Fordham Int'l L.J. 1655.

antitrust. This would increase both public awareness and the transparency of competition policy and legislation in the Czech Republic, thus promoting compliance with competition rules as well as aiding in their enforcement.

III. APPROXIMATION OF ENVIRONMENTAL LAW

Environmental law is one further area of EC law which is subject to approximation both explicitly under the Europe Agreement and, more generally, as a precondition for the Czech Republic's membership in the European Union. Although the field of the environment has only relatively recently become expressly provided for under EC primary law, a significant body of environmental law and policy has developed over the decades at the EC level. Similarly, although environmental legislation existed in the Czech Republic during the communist regime, only following its demise did the protection and improvement of the environment truly become a focus of government efforts.

Decades of favoring heavy industry over the environment under the communist regime has resulted in significant environmental devastation.[390] The task of implementing the relevant EC provisions relating to the environment *acquis* poses significant hurdles for the Czech Republic given, on the one hand, the broad scope of EC environmental legislation and policy and, on the other, the significant costs and administrative measures necessary for implementing the *acquis*.

The objectives of this chapter are to ascertain the progress of the Czech Republic in the process of approximating the environmental *acquis*, as well as to outline the challenges of approximation in the field of the environment. Accordingly, the chapter begins with a general overview of EC environmental law and policy to provide an outline of the main objectives and regulatory framework of this field of EC law. This is followed by a summary of existing environmental legislation in the

[390] For an overview of the state of the environment in the Czech Republic, see generally Ministry of the Environment of the Czech Republic, *Report on the Environment in the Czech Republic in 2000* (Prague: Ministry of the Environment of the Czech Republic, 2001)

Czech Republic. Finally, the legal basis and the progress achieved in the process of approximating EC environmental law in the Czech Republics examined.

3.1 EC ENVIRONMENTAL LAW

Prior to the enactment of the Single European Act (SEA),[391] there were no provisions in the EC Treaty expressly governing the environment[392] Despite the lack of express provisions, legislation governing the environment was adopted for such diverse areas as waste management, air and water quality, the protection of fauna and flora, noise and chemical control all under the premise that such legislation was necessary for achieving the aims of the common market.[393]

A turning point in the development of EC environment law occurred in 1985, when the Court of Justice ruled for the first time that the environment was an "essential objective" of the Community.[394] The following year, the Single European Act inserted a title on the environment into the EEC Treaty.[395] Moreover, the environment was expressly recognized as a fundamental principle and objective under the EC Treaty. As subsequently amended by the Treaty of Amsterdam in 1997, Article 2 EC Treaty provides that one of the tasks of the Community is, through the establishment of a common market and economic and monetary union "a high level of protection and improvement of the quality of the environment." In addition, "a policy in the sphere of the environment" has been expressly designated

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[391] See *supra* note 5.
[392] J. Scott, *EC Environmental Law* (London: Longman, 1998) at 4.
[393] D. Woolley *et al*, eds., *Environmental Law* (Oxford: Oxford University Press, 2000) at 106. Such legislation was adopted on the basis of Articles 94 and 308 EC Treaty.
[394] See ECJ, Case C-240/83, *Procureur de la République* v. *Association de Défense des Bruleurs d'Huiles Usagées* [1985] ECR 531; see also M. Dillon, "The Mirage of EC Environmental Federalism in a Reluctant Member State Jurisdiction (1999) 8 N.Y.U. Envtl L.J. 1 at 5.
[395] Originally Title VII under the Single European Act, the title on environment was subsequently renumbered to Title XIX under the Treaty of Amsterdam (L. Krämer, *EC Treaty and Environmental Law*, 3d ed. (London: Sweet & Maxwell, 1998) at 1.

as an activity of the Community.[396] Likewise, pursuant to Article 6 EC Treaty, requirements for the protection of the environment must be taken into account and integrated into the policies and activities of the Community, particularly with respect to sustainable development. Apart from the provisions on the environment in the EC Treaty, the Preamble of the Treaty on European Union calls for economic and social progress to be achieved while taking into account the protection of the environment and sustainable development.[397] Moreover, Article 2 TEU calls for achieving a "balanced and sustainable development."[398]

Accordingly, the legal basis for environmental law and policy at the Community level is found in Title XIX of the EC Treaty. Pursuant to Article 174 EC Treaty, EC environmental policy aims at furthering the following objectives: namely improving and protecting the environment;[399] protecting the health of humans; utilizing natural resources in a rational and prudent manner; and promoting, at the international level, measures targeted at regional and environmental problems.[400] Furthermore, Article 174 EC Treaty provides for the general principles of EC environmental policy, which include: ensuring a high level of protection of the environment, the

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[396] *EC Treaty*, art. 3(l).
[397] *TEU*, Preamble 8.
[398] It should be noted that aside from the provisions governing the environment in the EC Treaty and the Treaty of the European Union, specific reference to the environment is also made in the Treaty establishing the European Atomic Energy Community (EURATOM) with respect to radioactive materials and the protection of public health (see in particular Articles 30-32 and 37 EURATOM Treaty (Woolley, *supra* note 393 at 106; J. Jans, *European Environmental Law* (London: Kluwer Law International, 1995) at 47-50)).
[399] It should be noted that the Treaty does not define the term "*environment.*" It is generally understood to broadly encompass all aspects of the environment - the climate, flora and fauna and includes "humans, town and country planning land use, waste and water management and use of natural resources, in particular of energy"(Krämer, *supra* note 495 at 52). The precise definition of the environment however varies in regulations and directives depending on the given subject mater of a norm (*ibid.* at 53).
[400] *EC Treaty*, art. 174 (1); see L. Krämer, *Focus on European Environmental Law*, 2d ed. (London: Sweet & Maxwell, 1997) at 319.

precautionary principle and the principle of preventive action.[401] Moreover, the Article provides for the principle of "*polluter pays*"[402] and that damage caused to the environment should be "rectified at source."[403] In addition, measures aimed at harmonizing environmental protection requirements are to include a "safeguard clause" which would enable Member States to take provisional measures for environmental reasons "subject to a Community inspection procedure."[404]

Pursuant to Article 174(3) EC Treaty, the Community must take into account the following factors when devising environmental policy: existing technical and scientific data; the environmental conditions present in the various regions of the Community; the potential costs and benefits of action or inaction; and finally, the social and economic development of the Community as well as the "balanced development of its regions." Although these factors are not binding for individual legislative measures given that the provisions make express reference to EC environment policy-making, it does require that they be considered not only by the Commission but also by the European Parliament and the Council.[405]

Both the Member States and the Community are to cooperate with the relevant international bodies in the field of the environment "within their respective spheres

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[401] *Ibid.* art. 174(2). The precautionary principle, is very broad and permits measures to be taken preventatively even where scientific evidence is lacking (Krämer, *supra* note 395 at 65). In contrast, the principle of preventative action, calls for measures to be taken to protect the environment at an early stage. Accordingly, it is key to ensuring an effective environmental policy (*ibid.* at 66; see also Jans, *supra* note 398 at 20).

[402] The '*polluter pays*' principle is further elaborated in EC Council Recommendation 75/436 [1975] OJ L194/1. In essence, means that the costs of rectifying damage incurred to the environment should be born by those persons who caused the pollution (Krämer, *supra* note 395 at 69).

[403] *EC Treaty,* art. 174(2); see also Jans, *supra* note 398 at 19.

[404] *Ibid.* The aim of the provision is to enable Member States to take urgent measures to protect the environment (for a more detailed discussion of this provision and its relation to Article 176 EC Treaty, see Jans, *supra* note 398 at 30-32). Nevertheless it should be noted that, unlike other areas of Commission competency such as competition, the investigative powers of the Commission with respect to the environment are limited as the Commission may only request information (*ibid.* at 149).

[405] Krämer, *supra* note 395 at 78

of competence."[406] In practice, the EC has become, along side the Member States, a signatory party to several international conventions specifically dealing with the environment.[407] In order to act in such a capacity however, the Community must obtain authorization from the Council by means of the procedure provided for under Article 300 EC Treaty.[408]

The implementation of EC environmental law and policy is primarily the task of the Member States.[409] It should be noted that prior to amendment by the Treaty on European Union, the principle of subsidiarity only applied to measures relating to the environment.[410] However, the TEU extended the application of subsidiarity to all Community action by incorporating the principle into Article 5 EC Treaty.[411]

Member States may, in implementing Community measures relating to the environment, obtain temporary derogations or financial assistance through the Cohesion Fund if the costs involved are "disproportionate for the public authorities."[412] Moreover, pursuant to Article 176 EC Treaty, Member States may maintain or implement more stringent environmental protective measures at the

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[406] *EC Treaty*, art. 174(4).
[407] Krämer, *supra* note 395 at 11. Examples of such conventions include the Rio de Janeiro Convention of 5 June 1992 on biological diversity (OJ L 309/1) and the New York Convention of 16 July 1992 on climate change (OJ L33/11) (*ibid.* at 12).
[408] *Ibid.* at 12.
[409] *EC Treaty*, art. 175(4).
[410] Originally, the principle of subsidiarity was provided for under Article 130r(4) EEC Treaty (Krämer, *supra* note 395 at 72). Under the principle of subsidiarity, action should be taken at the EC level if the objectives can be better achieved at this level as opposed to action taken at the Member States' level (*ibid.* at 72-73).
[411] J. Casalino, "Shaping the Environmental Law and Policy of Central and Eastern Europe: The European Union's Critical Role" (1995) 14 Temp. Envtl. L. &Tech. J. 227 at 235-236; for a general discussion of the principle of subsidiarity, see R. von Borries & M. Hauschild, "Implementing the Subsidiarity Principle" (2001) 5 Columb. J. Eur. L. 369; and for a critical review of the role of subsidiarity in the environment, see Dillon, *supra* note 394 at 11-18.
[412] *EC Treaty*, art. 175(5). As provided for under Article 161 EC Treaty, the Cohesion Fund is aimed at financing project that are related to the environment. Apart from the Cohesion Fund, financing for the environment is provided for under the Structure Funds (Article 159 EC Treaty) (see Jans, *supra* note 398 at 270-72).

national level than those adopted under Article 175.[413] However, such measures must be compatible with the provisions of the Treaty, in particular with those relating to the free movement of goods and competition.[414] In addition, pursuant to Article 176 EC Treaty, such measures must be notified to the Commission.[415]

ENVIRONMENTAL ACTION PROGRAMS

Apart from the Treaty provisions expressly providing for the environment as outlined above, EC environmental policy is provided for under environmental action programs.[416] Beginning with the first action program in 1973,[417] six environmental action programs have been issued to date.[418] Originally used as a policy devising instrument when there was a lack of express authorization for EC environment measures under the EC Treaty, environmental action plans continue to play a key role in delineating the objectives of EC environmental policy.[419] Accordingly, the environmental action programs generally provide the framework for the objectives

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[413] The provision incorporates the principle of minimum harmonization. In contrast, measures for full harmonization in the environment sector are adopted either under Article 95 or Article 235 EC Treaty (Jans, *supra* note 398 at 90, 103-4). Pursuant to Article 176 EC Treaty, Member States are free to implement more stringent measures than those adopted pursuant to Article 175 EC Treaty, they may not, however, adopt measures that are more lenient (*ibid.* at 103).

[414] *EC Treaty*, art. 176; Jans, *supra* note 398 at 103. Such measures must not result in the restriction of trade between Member States nor represent latent quantitative restrictions of trade within the meaning of Article 28 EC Treaty.

[415] Nevertheless, failure to notify such measures by a Member State will not render the measure ineffective, as Article 176 EC Treaty does not provide a "standstill clause" similar to that provided for under Article 95(4) EC Treaty (J. Jans, *European Environmental Law* (Groningen: Europa Law Publishing, 2000) at 120-121; Scott, *supra* note 392 at 42-43).

[416] The legal basis for environmental action programs is provided for under Article 175(3) EC Treaty. Under this provision, action programs are adopted by means of the co-decision procedure (see Krämer, *supra* note 395 at 2)

[417] [1973] OJ C 112/1.

[418] The second environmental action program was published as [1977] OJ C 139/1; the third as [1983] OJ C46/1; the fourth as [1987] OJ C 328/1; the fifth as [1993] OJ C 138/1 and the sixth as [2002] OJ L 242/1 (see Krämer, *supra* note 395 at 2).

[419] Krämer, *supra* note 400 at 321.

that are to be achieved at the Community level in the environment sector for a given period.[420]

The current environmental action program entitled '*Environment 2010: Our Future, Our Choices*', was formally adopted on 22 July 2002[421] and extends to the year 2010.[422] The sixth environmental action program focuses on four priority areas: climate change; environment and public health; natural resources and waste management; as well as the protection of nature and of biodiversity.[423] In addition, the action program identifies five key approaches that are to be undertaken. These include: integrating environment issues into all policy areas; ensuring that existing environmental legislation is duly implemented; developing more environmentally friendly attitudes towards the use of land; involving both consumers and businesses in order to devise solutions; and finally, enabling greater access to information on the environment for the general public.[424]Although the sixth action program reiterates the objectives outlined in the fifth action program, unlike the preceding environment action program, it refrains, for the most part, from setting specific targets that are to be reached.[425]

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[420] *Ibid.*

[421] EC, *Decision No. 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environmental Action Programme* [2002] OJ L 242/1.

[422] EC, Commission, *Sixth Environment Action Programme 'Environment 2010: Our Future, Our Choice* (EC: Brussels, 2001) COM (2001)31 at 3, online: <http//:www.europa.eu.int/comm/environment/newprg/index.htm> (date accessed: 11 October 2002) [hereinafter *Sixth Environment Action Program* or *SAP*].

[423] *Ibid.* at 12.

[424] *Ibid.* at 13.

[425] EC, Commission, News Release IP/01/102, "Commission proposes new action programme for the environment" (24 January 2001) at 2; P. Třešňák, "Evropské životní prostředí pro příští dekádu – Nový akční program EU musí zajímat i Českou republiku" (2001) Integrace č.7/2001 at 1-2, online: <http://www.integrace.cz> (date accessed: 4 September 2002). The preceding environmental action program was greatly criticized for setting ambitious targets that were in practice unattainable. In fact, in its first assessment of the implementation of the fifth action program three years following its adoption, the Commission conceded that many of its targets would not be achieved (*ibid.* at 1).

It should be noted that the candidate countries were invited to participate in the drafting of the current environmental action program.[426] Moreover, the sixth action program specifically addresses the issue of enlargement and the action program explicitly appeals to the candidate countries to duly implement the environmental *acquis*.[427] Furthermore, the environmental action plan calls for increased dialogue not only between the government institutions and bodies of the candidate states, but also among environmental non-governmental organizations and business communities within these states.[428]

SUBSTANTIVE EC ENVIRONMENTAL LAW

As noted above, an extensive body of secondary legislation has developed at the EC level that relates to the environment. Recent estimates of the number of legislative measures adopted that concern the environment place the number between two to three hundred legal norms.[429] It is difficult to quantify the exact number of legislative norms adopted in this sector given the lack of an express definition of environment and that such norms often involve multiple sectors.[430] Nevertheless, the scope of EC environmental law extends broadly to encompass such

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Conversely, the current environmental action program has been criticized for not setting forth specific quantitative targets for individual sectors or Member States (*ibid.* at 2).

[426] Ministry of the Environment of the Czech Republic, "Ministr Kužvart jednal o 6.EAP" (2001) Zpravodaj MŽP č. 4/2001 at 7.

[427] *Sixth Environmental Action Program*, *supra* note 422 at 57.

[428] *Ibid.* at 58.

[429] EC, 'The Czech Republic – Adoption of the Community *Acquis*' (2002) at 2, online: <http://www.europa.eu.int/scadplus/leg/en/lvb/e15107.htm> (date accessed: 13 October 2002)[hereinafter "Adoption Community Acquis"]; Woolley, *supra* note 393 at 118; Ministry of the Environment of the Czech Republic, *Aproximační strategie pro oblast životní prostředí* (Prague: Ministry of the Environment of the Czech Republic, 1999)at 4 [hereinafter *Aproximační strategie 1999*]; E. Veverková, "Příprava České republiky na vstup do EU v oblasti životního prostředí" (2001) Integrace č. 7/2001 at 2, online:<http://www.integrace.cz> (date accessed: 4 September 2002).

[430] Krämer, *supra* note 400 at 113 and n.1.

areas as: air[431] and water[432] quality; waste management;[433] chemicals;[434] noise;[435] genetically modified organisms;[436] industrial pollution control and risk management;[437] nature conservation;[438] and nuclear safety and radiation protection.[439] In addition, horizontal legislation has been adopted at the Community level which regulates the environment cross-sectoraly.[440] An example of such legislation is the Environment Impact Assessment Directive according to which certain projects, such as the construction of airports and auto routes must be assessed to determine what impact that they will have on the environment.[441]

Unlike the field of EC competition law where the competencies of the Community and the Member States are relatively clearly defined, the competencies

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[431] See *e.g.* EC, *Directive 94/63/EC of the European Parliament and of the Council of 20 December 1994 on the control of volatile organic compound (VOC) emissions resulting from the storage of petrol and its distribution from terminals to service stations* [1994] OJ L 365/24.

[432] See *e.g.* EC, *Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water* [1976] OJ L31/1.

[433] See *e.g.* EC, *Council Directive 75/442/EEC of 15 July 1975 on waste* [1975] OJ L194/23, as subsequently amended.

[434] See *e.g.* EC, *Council Directive 67/548 of 27 June 1967 on the approximation of laws, regulations, and administrative provisions relating to the classification, packaging and labeling of dangerous substances* [1967] OJ 196/1, as subsequently amended.

[435] See *e.g.* EC, *Council Directive 86/594/EEC of 1 December 1986 on airborne noise emitted by household appliances* [1986] OJ L344/24.

[436] See *e.g.* EC, *Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms* [1990] OJ L 117/1, as subsequently amended.

[437] See *e.g.* EC, *Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (IPPC)* [1996] OJ L 375/1 [hereinafter *IPPC Directive*].

[438] See *e.g.* EC, *Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds* [1979] OJ L 103/1, as subsequently amended.

[439] See *e.g.* EC, *Council Directive 97/43/EURATOM of 30 June 1997 on health protection of individuals against the dangers of ionizing radiation in relation to medical exposure and repealing Directive 84/466/EURATOM* [1997] OJ L 180/22.

[440] Jans, *supra* note 398 at 279. Given the voluminous body of the environmental *acquis*, a detailed analysis of the relevant legislation is outside the scope of this paper. For a comprehensive summary of the legislation that comprise the environmental *acquis*, see T. Gremlica, *Přehled environmentálního práva ES, právní úpravy a technických norem v obslati ochrany životního prostředí ČR: Sborník pracovních materiálů Konzultačního fóra MŽP pro vstup do EU* (Prague: Ministry of the Environment of the Czech Republic, 2002); and for a more detailed discussion of the various sectors of Community environmental legislation, see Jans, *supra* note 398 at 273*ff.*

[441] EC, *Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment* [1985] OJ L 175/40, as amended by Council Directive 97/11 [1997] OJ L73/5.

of the Community versus that of Member States in the field of environmental law are not as clearly delineated.[442] This may be due in part to the broad scope and range of measures that may fall within the field of the environment, but also to the fact that both EC environmental law and the field of environmental law are continuously evolving. Given the absence of express delineation of competencies for the environment in Community primary legislation, the basis for Community action in the field of the environment is defined in part by the principles of subsidiarity and proportionality as provided for under Article 5 EC Treaty.[443] Moreover, the delineation of Community and Member States competency within the field of the environment largely depends on whether Community legislation has been adopted in a given sector and the degree of harmonization provided for by such legislation.[444] Thus, if a given EC environmental legislative norm calls for full harmonization, Member States are generally not entitled to implement environment measures more stringent than those provided for under the directive.[445]

In contrast, if such a measure only calls for minimal harmonization of a given sector or area of the environment, then Member States may introduce more stringent environmental measures at the national level for such a sector or area, provided that such measures are compatible with the EC Treaty.[446] However, such measures must be notified to the Commission.[447] Finally, in the event that a given field is not

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[442] Jans, *supra* note 398 at 9-13.
[443] *Ibid.*
[444] Woolley, *supra* note 393 at 137.
[445] Jans, *supra* note 415 at 108. It should be noted however that the Community measure may provide for the possibility for derogations. Total harmonization is often used to align product standards and is generally used 'where there is a definite relationship with the free movement of goods' (*ibid.*).
[446] Scott, *supra* note 392 at 40.
[447] *Ibid.* Depending on whether the Community measure was adopted pursuant to Article 95 or Article 175 EC Treaty, the more stringent measures adopted by the Member States may be subject to

regulated by EC environmental legislation, Member States may implement national environmental legislation regulating such a sector provided that such legislation is not contrary to EC law.[448]

Initially, EC legislation was generally aimed at achieving full harmonization of the national legislation of Member States, particularly with respect to quality and performance standards.[449] At present, however, there is a greater trend towards minimal harmonization in EC environmental legislation, which enables the setting of uniform targets for environmental protection within the Community, while granting the Member States greater discretion in determining the appropriate means for implementing the measures.[450] This is also reflected in the apparent shift in the method of regulating environmental issues at the Community level. In the past, Community legislation was influenced by the German approach of 'command and control' regulation, which placed greater emphasis on regulating sources of pollution by setting strict emission standards.[451]

In contrast, it now appears that more policies embody the British approach to environmental regulation, which focuses more on general environmental targets with an emphasis on broadly improving the quality of a given sector of the environment instead of merely setting fixed target standards.[452] Accordingly, this second approach

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approval by the Commission prior to taking affect. This requirement applies to those measures adopted pursuant to Article 95 EC Treaty.

[448] Woolley, *supra* note 393 at 137.

[449] Tichý & Arnold, *supra* note 80 at 185.

[450] *Ibid.* at 193; Scott, *supra* note 392 at 31.

[451] P. Jehlička, "Politika životního prostředí v procesu evropské integrace – Environmentální otázky rozšíření EU na východ" (2001) Integrace č. 7/2001 at 3. An example of such legislation is the EC, *Council Directive 88/609/EEC of 24 November1988 on the limitations of emissions of pollutants into the air from large combustion plants* [1988] OJ L 336/1, as subsequently amended.

[452] *Ibid.*; Scott, *supra* note 392 at 31.The *IPPC Directive* (*supra* note 437) is an example of such legislation (*ibid.*).

promotes greater involvement of all levels of government and a greater "mixing of actors and instruments."[453]

3.2 ENVIRONMENTAL LAW IN THE CZECH REPUBLIC

Although certain legislation aimed at protecting the environment was enacted under the communist regime, both the lack of effective enforcement of such legislation as well as a focus on heavy industry lead to significant devastation of the environment in the Czech Republic.[454]Only after the demise of the communist regime did the protection of the environment become a priority.[455]The increased importance of the protection of the environment is illustrated in that both the Constitution of the Czech Republic[456]and the accompanying Charter of Fundamental Rights and Freedoms [*Listina základních práv a svobod*][457]explicitly refer to the environment, thus laying the legal basis for environmental legislation in the Czech Republic. Accordingly, the Preamble of the Constitution provides for the will of the people to commonly protect and develop the environment. In addition, Article 7 of the Constitution reads "The State shall endeavor to ensure the prudent use of natural resources and the protection of the natural wealth."[458]Article 35 of the Charter of Fundamental Rights and Freedoms provides that each person is entitled to a

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[453] Scott, *supra* note 392 at 31.

[454]D. Earnhart, "Enforcement of Environmental Protection Laws Under Communism and Democracy" (1997) 40 J. Law & Econ. 377 at 379, 381.

[455] *Ibid.* at 382.However, in the mid – 1990s the improvement of the environment was sidetracked when the government shifted its focus on privatization and other economic reforms, see Charles University Environment Center & Gabal Analysis & Consulting, *Posilování připravenosti ČR k implimentaci norem EU v oblasti životního prostředí* (2001) at 3, online: <http://www.gac.cz/files /rep_czhtml> (date accessed: 18 October 2002).

[456]*Supra* note 144. An English translation is available online at: <http://www.concourt.cz/angl_verze/ constitution.html>.

[457] *Usnesení předsednictvs ČNR ze dne 16. prosince 1992 o vyhlašení Listiny základních práv a svobod jako součásti ústavního pořádku České republiky*, promulgated as No. 2/1993 Coll. [hereinafter *Charter of Fundamental Rights and Freedoms* or *Charter*].

[458] [author's translation].

favorable environment.[459]Moreover, under the Charter, every person is entitled to timely and accurate information on the status of the environment and of natural resources.[460]Furthermore, under Article 35 of the Charter, no one shall, in exercising their rights, endanger or damage the environment, natural resources and diversity of species above levels permitted by law.[461]

STATE ENVIRONMENTAL POLICY

The objectives and principles of environmental policy of the Czech Republic are outlined in the State Environmental Policy (*Státní politika životního prostředí*).[462] The State Environmental Policy provides the fundamental framework for the government in addressing the issue of the environment.[463]Accordingly, the Environmental Policy outlines priority areas and the problems facing the environment; the fundamental principles of environment policy in the Czech Republic; the objectives and measures that are to be taken under the Environmental Policy; as well as the instruments that are to be employed to achieve the objectives. As such, it addresses the environment both from a horizontal, cross-sectoral approach as well as focusing on various government policy sectors.[464]The Environmental Policy covers the years 2001 to 2005, and is to be updated two years

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[459] *Charter*, art. 34(1). The provision reads: "*Každý má právo na příznivé životní prostředí*".
[460] *Ibid.* art. 34(2).
[461] *Ibid.* art. 34(3).
[462] Ministry of the Environment of the Czech Republic, *Státní politika životního prostředí* (Prague: Ministry of the Environment of the Czech Republic, 2001), online: <http://www.env.cz> [hereinafter *Environmental Policy* or *SEP*].
[463] *SEP*, at 6.
[464] The Environmental Policy specifically targets the following sectors: mining of non-renewable resources; industry and commerce, energy; waste management; transportation; agriculture and forestry management; water management and protection; public health and the environment; tourism; regional development and the educational system (see *SEP* at 24 -35).

following its adoption.[465] In addition, the Environmental Policy specifically addresses the obligations of the Czech Republic ensuing from its application for membership in the EU as well as the financial implications of transposing the environment *acquis*.[466] According to the Environmental Policy, it is estimated that the total cost of expenditures on the environment may reach as high as 280 billion CZK.[467]

The Environmental Policy is based on the following principles of environmental protection: ensuring sustainable development;[468] promoting public participation in formulating and implementing environment policy in the Czech Republic;[469] and integrating environmental protection into other government sector policies.[470] Furthermore, the Environmental Policy explicitly recognizes the following principles of environmental protection: precaution and prevention; the polluter pays; preventing harm at the source; and shared and differentiated liability for damage caused to the environment.[471] In addition, the Environmental Policy also acknowledges the principles of integration and subsidiarity; substitution and best available technology.[472]

The objectives that are to be achieved within the five year time frame of the Environmental Policy are outlined as two contrasting development scenarios with

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[465] *Ibid.* at 6.
[466] *Ibid.* at 12-13, 47-49.
[467] *National Program 2001*, *supra* note 151 at 212; SEP at 47.
[468] *Ibid.* at 15.
[469] *Ibid.*
[470] *Ibid.* at 16.
[471] *Ibid.*
[472] *Ibid.* According to the Environmental Policy, these are principles that are reflected in environmental policies adopted at the international level (*ibid.*). Similarly, may of these policies are also found in EC environment policies. As a result, and as the Environmental Policy incorporates generally many of the policy objectives and instruments of the Sixth Environmental Action Program, the Environment Policy has been held to be largely compatible with the Sixth Environment Action Program(Ministry of the Environment of the Czech Republic, "Informace o kompabilitě Státní politiky životního prostřdí s 6. Akčním programem EU pro životní prostředí" (2001) Zpravodaj MŽP č. 7/2001 at 13.

the understanding that the "specific aims will fall somewhere in between the minimal and optimal scenarios."[473]The first scenario, which is the minimal scenario entitled *'Europe 1990-1995'*, calls for the Czech Republic to achieve by 2005 a degree of environmental quality standards and infrastructure that corresponds to the average among Member States in the middle of the 1990s.[474]In contrast, under the second optimal scenario '*Europe 2005*', the Czech Republic would attain environmental quality and infrastructure standards that represent the average among Member States in the year 2005.[475]Nevertheless, the aims and objectives of the Policy are to be further specified on a continual basis and the entire Environment Policy is to be updated three years following its adoption.[476]

SUSBTANTIVE ENVIRONMENTAL LAW IN THE CZECH REPUBLIC

Environmental law in the Czech Republic is comprised of both horizontal legal norms, which regulate the environment cross-sectorally, and legislation which governs the particular sectors of the environment. At the beginning of 2002, there were approximately 145 legislative norms governing the environment, of which more than 45 have taken effect since 1 January 2000.[477]Generally, several acts will outline broadly the objectives, instruments and measures of environmental regulation within a given sector of the environment. Detailed provisions are then provided for and specified in ministerial decrees (*vyhlášky*) and in government decrees (*nařízení vlády*). Nevertheless, there is a recent trend towards codifying all legislative

[473] *SEP* at 50 [author's translation].
[474] *Ibid.*
[475] *Ibid.*
[476] *Ibid.*
[477] Ministry of the Environment, "Zákony a směrnice v oblasti životního prostředí"avaible online at the website of the Ministry at: <http://www.env.cz> (date accessed: 17 October 2002) [hereinafter "Zákony a směrnice"].

measures falling within a sector into a single code.[478]The following ten sectors relating to the environment have been identified: water management; protection of the air; waste management; nature protection; geology and mining; protection of soil and forests; environment impact assessments; chemicals; prevention of serious accidents; and genetically modified organisms.[479]

Both the concept of the environment as well as the general principles underlying the protection of the environment in the Czech Republic are defined in the Act on the Environment.[480]Moreover, the Act provides for the basic duties of natural and legal persons in protecting and improving the state of the environment as well as in using natural resources.[481]The term "*environment*" is defined under the Act as 'all which creates natural conditions of existence of organisms including humans and which is a prerequisite to its further development'.[482]Under the definition, the elements of the environment include air, water, soil and non-renewable resources, organisms, ecosystems and energy.[483]

Moreover, the Act on the Environment sets forth generally four fundamental principles of environmental protection in the Czech Republic. The first principle explicitly provides for is sustainable development.[484]The second principle provides that permissible levels of polluting the environment are to be determined by

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[478] Ministry of the Environment, "Přehled stavu legislativy resortu MŽP v období II. pololetí 2001 – 2002" at 3, available online at the website of the Ministry at:<http://www.env.cz> (date accessed: 17 October 2002). An example of such a codex is the draft of the Act on the Protection of Air, which will replace the three existing acts relating to air quality protection (*ibid*).
[479] "Zákony a směrnice", *supra* note 477; see also Gremlica, *supra* note 440 at 50.
[480] *Zákon č. 17/1992 Sb. o životním prostředí*, as subsequently amended by Act No. 123/1998 Coll. and Act No. 100/2001 Coll.[hereinafter *Act on the Environment* or *AE*].
[481] *AE*, art.1.
[482] *Ibid.* art.2. [author's translation].
[483] *Ibid.*
[484] *Ibid.* art. 11.

legislation and that such levels are to be set so as to ensure that the public health, other organisms as well as the other elements of the environment are not endangered.[485]The preventative principle is the third principle underwhich doubts as to whether the environment will incur damage are not grounds for delaying implementing protective measures.[486]Finally the fourth principle under the Act provides that every person is entitled to claim, before the appropriate agencies, rights ensuing under the Act as well as other legislation governing the environment.[487] Moreover, under the Act, education and training are to be undertaken in such a manner so as to promote conduct and modes of thought that are compatible with the principle of sustainable development.[488]

In addition to defining the key terms of environmental protection and outlining the basic principles of environmental protection, the Act on the Environment also provides for specific duties that relate to the environment. In particular, the Act states that all persons are to minimize the negative effects of their conduct on the environment and to prevent polluting or damaging the environment.[489] Furthermore, every person who by their conduct pollutes or damages the environment or who uses renewable resources, must at their expense, ensure the monitoring of the effects of such conduct and must be aware of the consequences of such action.[490] Finally, under the Act, every person who discovers there is a threat of harm occurring to the environment or that such harm has already occurred must inform the authorities

[485] *Ibid.* art. 12(1).
[486] *Ibid.* art. 13.
[487] *Ibid.* art. 15.
[488] *Ibid.* art. 16.
[489] *Ibid.* art. 17(1).
[490] *Ibid.* art. 18(1).

without undue delay and take the necessary measures to mitigate such harm or the possibility of such harm occurring.[491]

Apart from the Act on the Environment, other horizontal legislation on the environment include the Act on the Assessment of the Impact of Development Plans and Programs on the Environment,[492] the Act on the Right to Information on the Environment,[493] and the Environment Impact Assessment Act.[494]

3.2 APPROXIMATION OF EC ENVIRONMENTAL LAW

EUROPE AGREEMENT

As noted above, the Czech Republic must endeavor, both under the Europe Agreement and as one of the preconditions for membership in the EU, to align its environmental legislation with that of the EC. Apart from being specifically stated in the general provisions relating to approximation,[495] the environment is expressly provided for in Article 81 EA. Pursuant to Article 81(1) EA, the Czech Republic and the EC, together with the Member States, are to "develop and strengthen" their cooperation in maters relating to the environment and public health. Such cooperation is to span the various sectors of the environment[496] and should be carried out, amongst other, through the approximation of EC legislation and

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[491] *Ibid.* art.19.
[492] *Zákon ČNR č. 244/1992 Sb. o posuzování vlivů rozvojových koncepcí a programů na životní prostředí*, as subsequently amended.
[493] *Zákon č. 123/1998 Sb. o právu na informace o životním prostředí*, as subsequently amended.
[494] *Zákon č. 100/2001 Sb. o posuzování vlivů na životní prostředí a o změně některých souvisejícíh zákonů.*
[495] *Europe Agreement, supra* note 25 art. 70.
[496] *Ibid.* art. 81(2).

standards.[497] In addition, Article 81(3) provides for cooperation within the framework of the European Environment Agency.[498]

COMMISSION WHITE PAPER

Further guidance for the approximation of environmental legislation is provided by the Commission White Paper of 1995.[499]Chapter Eight of the Annex of the White Paper specifies eleven areas relating to the environment that are subject to approximation. These include the contamination of foodstuffs by radioactive materials;[500] protection against radiation;[501] chemical substances;[502] the control of risks associated with existing substances;[503] the import and export of certain dangerous chemicals;[504] the consequences of deliberately releasing genetically modified organisms into the environment;[505] waste management;[506] noise emissions from construction sites and equipment;[507] air pollution caused by the content of lead in petrol and of sulfur in certain liquid fuels;[508] air pollution from volatile organic

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[497] *Ibid.* art. 81(3).

[498] The European Environment Agency (EEA) was established in 1990 to provide the Member States and the general public with greater access to information on the environment. The main objective of the Agency is to promote the protection of the environment and to promote access to information on the state of the environment and issues that relate to it. As such, the Agency collects and disseminates information on the state of the environment and monitors environmental measures. In addition, the Agency manages and coordinates the European Environment Information and Observation Network (EIONET) - a network linking over 300 hundred environmental agencies, bodies and research centers in Europe. The Agency was established by EC, *Council Regulation (EEC) No 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European environment information and observation network* [1990] OJ L120/1 as amended by EC, *Council Regulation (EC) No. 933/1999 of 29 April 1999*[1999] OJ L 117/1.

[499] See *White Paper*, *supra* note 61.

[500] *White Paper*, Annex, Chapter 8, s. I.

[501] *Ibid.* s. II.

[502] *Ibid.* s. III.

[503] *Ibid.* s. IV.

[504] *Ibid.* s. V.

[505] *Ibid.* s. VI.

[506] *Ibid.* s. VII.

[507] *Ibid.* s. VIII.

[508] *Ibid.* s. IX.

compounds[509] and the control of substances that cause ozone depletion.[510] Nevertheless, it should be noted that the scope of environmental issues under the White Paper is limited and does not fully reflect the scope of the environmental *acquis*, as the White Paper focuses primarily on those aspects of the environment that are related to the free movement of goods, namely product – related environmental standards.[511]

APPROXIMATION GUIDE

In order to provide further assistance in the process of approximation with respect to the environment, the Commission issued in 1997 a Guide for the approximation of Community environmental legislation.[512]The aim of the Guide is to provide a "road map to the approximation of environmental legislation."[513]The Guide elaborates the term '*approximation*' by stressing that it involves not only the transposition of legislation, but also the implementation and enforcement of the transposed legislation.[514]Accordingly, the Approximation Guide provides a general overview of the process of approximation and identifies the steps that must be undertaken in the process of approximating the environmental *acquis*.[515]In addition, the

[509] *Ibid.* s. X.
[510] *Ibid.* s. XI.
[511] White Paper, Annex, at 203; "Adoption Community *Acquis*" *supra* note 429 at 2; see also P. Tichotová, "Ochrana životního prostředí - sbližování legislativy České republiky s legislativou EU" (1996) EMP č.3-4/1996 at 53 .
[512] EC, Commission, *Guide to the Approximation of European Union Environmental Legislation* (1997) COM SEC(97) 1608, as subsequently revised in 1998 [hereinafter *Approximation Guide*].
[513] *Approximation Guide*, at 3.
[514] *Ibid.* at 7-8.
[515] *Ibid.* at 7-24.

Approximation Guide contains a detailed overview of the horizontal and individual sectors of Community environmental legislation.[516]

IMPLEMENTATION HANDBOOK

In addition to the Approximation Guide, the Commission has issued a handbook for the implementation of environmental legislation aimed at assisting the candidate countries in the process of implementing transposed Community legislation.[517]The Implementation Handbook provides a detailed framework for planning the implementation of transposed legislation as well as detailed information on the legislative acts outlined in the Guide.[518]

3.4 PROGRESS ACHIEVED IN THE PROCESS OF APPROXIMATION

In 1997, the Commission noted in its Opinion on the Czech Republic's application for membership in the EU, that the Czech Republic had made progress in achieving formal compliance with the environmental *acquis*.[519]Nevertheless, the Commission noted that the framework directives for the air, water and waste sectors as well as legislation relating to integrated pollution prevention and control needed to be transposed.[520]Moreover, gaps remained in the legislation with respect to implementation and enforcement as well as economic instruments.[521]

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[516] *Ibid.* at 25ff. The Guide also contains four Annexes. Annex 1 provides guidelines on interpreting EU environmental legislation and Annex 2 contains a summary of the environmental *acquis*. Annex 3 provides a sample table on concordance and, finally, definitions relating to approximation are summarized in Annex 4.

[517] EC, Commission, *Handbook for the Implementation of EU Environmental Legislation* (Brussels: EC, 1999)[hereinafter *Implementation Handbook*].

[518] *Ibid.* at 1.

[519] *Commission Opinion*, *supra* note 29 at 90.

[520] *Ibid.*

[521] *Ibid.*

Negotiations on Chapter 22 – the Environment commenced on 7 December 1999.[522]The Czech Republic had declared, in its initial position paper, that it was familiar with the environmental *acquis* and that it would be, for the most part, capable of fulfilling its obligations with respect to the approximation of EC environmental legislation.[523]However, the Czech Republic outlined seven areas in which it was requesting a transitional period. The transitional periods related to the implementation of EC directives governing integrated pollution prevention and control, urban waste water management, the release of dangerous substances into water, the quality of drinking water, packaging and packaging waste, and nature conservation and wild birds.[524]Following lengthy negotiations, the Commission granted the Czech Republic two transitional periods. The first transitional period concerns Directive 94/62/EC,[525]and the second is for achieving the target values for recovering and recycling on packaging and for the construction of urban waste water treatment plants as required under Council Directive 91/271/EEC.[526]The negotiations concerning Chapter 22 – the Environment were concluded on 1 June 2001, thus provisionally closing the environment chapter.[527]

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[522] Ministry of Foreign Affairs of the Czech Republic, "Negotiations on Membership" available online:<http://www.mzv.cz/missionEU/negotiations.htm> (date accessed: 27 July 2002).

[523] Ministry of Foreign Affairs of the Czech Republic, "Position Paper on Chapter 22 – the Environment" (1999), online: <http://www.mzv.cz/missionEU/negotiations.htm> (date accessed: 12 September 2002) at 1.

[524]Ibid. at 12-13; for a more detailed discussion of the negotiations on the transitional periods, see B. Moldan, "Vyjednávání o kapitole Životní prostředí dospělo do obtížné faze" (2001) Integrace č.7/2001.

[525]EC, *Directive 94/62/EC of the European Parliament and of the Council of 20 December1994 on packaging and packaging waste* [1994] OJ L 365/10.

[526]EC, *Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment* [1991] OJ L 135/40; Ministry of the Environment of the Czech Republic, Příprava na vstup do EU, *supra* note at 1.

[527] Ministry of the Environment of the Czech Republic, "Kapitola Životní prostředí uzavřena" (2001) zpravodaj MŽP č. 7/2001 at 7.

In June 1998, the Ministry of the Environment submitted the Approximation Strategy for the Environment to the government.[528]The document outlined the objectives and measures that were to be achieved in the process of approximation with respect to the environment.[529]The Commission's Regular Report of 1999[530] severely criticized the lack of progress that had been achieved in the field of the environment. The Commission noted that "[l]egislation remains insufficiently aligned in many important areas. [...]No major legislative progress has been made."[531]In the following 2000 Regular Report, the Commission estimated that merely a quarter of the EC environmental *acquis* had been completely transposed.[532] As previously noted, this served as a catalyst for renewed efforts to be undertaken in the process of approximation, and as of the year 2000 over 45 legislative norms have been enacted in order to align environmental legislation in the Czech Republic with that of the *acquis*.

In its most recent report issued on 9 October 2002, the Commission noted that "since the Opinion, the Czech Republic has achieved considerable progress in the alignment of legislation with the *acquis* in most environmental sectors, in particular in the past few years."[533]Nevertheless, the Czech Republic has yet to achieve compatibility in the fields of horizontal legislation, water quality, nature protection,

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[528] *Aproximační strategie*, *supra* note 429.
[529] The Approximation Strategy was replaced in the year 2000 with the Implementation Plan for the Environment, which outlines the specific measures that were required in order to implement EC environmental legislation in the individual sectors of the environment were outlined specifically for each EC environmental norm (see Ministry of the Environment of the Czech Republic, *Implementační plan pro oblast Životní prostředí* (Prague: Ministry of the Environment, 2000)).
[530] *1999 Regular Report*, *supra* note 132.
[531] *Ibid.* at 49.
[532] *2000 Regular Report*, *supra* note 137 at 84.
[533] *2002 Regular Report*, *supra* note 139 at 109.

waste and integrated pollution prevention and control.[534]Moreover, the Czech Republic must focus on strengthening enforcement as well as administration at the local and regional levels.[535]

Given the complexity of the environmental *acquis* and EC environmental law's broad scope of sectors ranging from air and water quality protection to waste management and the protection of nature and biodiversity, the implementation of the environmental *acquis* poses significant challenges for the Czech Republic, in particular the administrative infrastructure for enforcing environmental measures and the high costs associated with implementing the *acquis*

The administrative infrastructure in the field of the environment is comprised of multiple tiers of public administration at the national, regional and municipal levels. However, the recent broad reform of the structure of public administration created a new level of public administration at the regional level (*kraje*), which altered the division of competencies in the field of the environment by reorganizing and decentralizing the implementation and enforcement of environmental policy.[536]As a result of the reforms, conflicts have arisen between the various levels of government, which could significantly hinder both the implementation and the enforcement of environmental legislation and polices, as has been noted by the Commission.[537] Moreover, it appears that that there is a large discrepancy in the knowledge of EC environmental policy in the various administrative organs, in particular at the

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[534] *Ibid.*
[535] *Ibid.*
[536]See *ústavní zákon č. 347/1997 Sb, o vytvoření vyšších územních samospravných celků*; *zákon č. 129/2000 Sb., o krajích*; *zákon č. 123/2000 Sb.*; see R. Cidlinová, "Kotrmelce veřejné správy v českých zemích aneb o reformě veřejné správy v souvislosti se vstupem do Evropské unie" (2001) at 2 -4, online: <http://www.integrace.ca> (date accessed: 4 September 2002).
[537] *2002 Regular Report*, *supra* note 139 at 107.

municipal level.[538]Given that the vast majority of environmental measures are carried out at the local and regional levels and this will continue after the Czech Republic accedes to the EU, it is imperative that these issues be resolved to ensure that these administrative bodies have the capacity to effectively implement the transposed norms.[539]

Moreover, the implementation of the environmental *acquis* will require the introducing new technical infrastructures and adapting existing ones, such as water treatment plants and technology for the regulation of emissions. Accordingly, the costs for implementing the environment acquis was estimated at ranging between 56-58 billion CZK for the year 2001, which represents roughly three percent of the GDP of the Czech Republic for that given year.[540] As noted above, the government has estimated that the costs of fully implementing the environmental *acquis* may reach as high as 280 billion CZK.[541] Not only does the implementation of the environmental *acquis* require substantial investments on the part of the state, but the private sector will also have to bear a portion of the costs as well.

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[538] See Charles University Environment Center & Gabal Analysis & Consulting, *Posilování připravenosti ČR k implimentaci norem EU v oblasti životního prostředí* (2001) at 21-23, online: <http://www.gac.cz/files/rep_cz.html> (date accessed: 18 October 2002).

[539]Cidlinová, *supra* note 536 at 6.

[540] *Environment Policy*, *supra* note 462 at 47.

[541] Ibid. at 47. According to the *Environment Policy*, investments in environmental protection equate to approximately 2.0 per cent of the GDP of the Czech Republic, which is greater than the amounts spent on environmental protection by Member States (*ibid.* and n 4)

IV. APPROXIMATION OF EC COMPANY LAW

Company law is another area in which the Czech Republic must undertake approximation of its legislation with that of the EC both generally as a precondition for membership in the EU and specifically under the terms of the Europe Agreement. Since the 1960s, beginning with the adoption of the First Company Directive in 1968, significant efforts have been undertaken at the EC level to harmonize the national company law rules of the Member States. As a result, Community legislation has been adopted for such various areas as minimum capitalization requirements, the regulation of mergers and accounting standards.

The objective of this chapter is to ascertain the progress of the Czech Republic in approximating EC company law. Accordingly, the chapter begins with a brief summary of EC company law. This is followed by an outline of company law in the Czech Republic. Next the legal basis for the approximation of EC company law in the Czech Republic is summarized, followed by an assessment of the progress that has been achieved in this field.

4.1 EC COMPANY LAW

Company law at the Community level is expressly provided for under Title III, Chapter 2 of the EC Treaty, which relates to the free movement of persons, services and capital. [542]Pursuant to Article 43 EC Treaty, freedom of establishment includes the right to 'set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48 [EC Treaty] under the conditions laid down for its nationals by the law of the country where such establishment is

[542] *EC Treaty*, *supra* note 25, art. 43*ff*.

effected'.[543] To this end, the Council may, on the basis of co-decision as provided for under Article 251 EC Treaty, following consultation with the Economic and Social Committee, adopt directives aimed ensuring the freedom of establishment.[544] Moreover, the Commission and the Council are to coordinate 'to the necessary extent the safeguards which, for the protection of the interests of members and other, are required by Member States of companies or firms within the meaning of the second paragraph of Article 48 with a view to making such safeguards equivalent throughout the Community'.[545]

Pursuant to Article 48 EC Treaty, companies or firms that are established in accordance with the laws of a Member State and have their seat or principal place of business 'within the Community' are to be treated in the same manner as natural persons who are citizens of a Member State.[546]

Apart from the provisions of Articles 44 and 48 EC Treaty, the Treaty also provides for the possibility of concluding conventions between Member States that govern trans-border mergers of companies, the retention of legal personality of companies during transfers between Member States and the mutual recognition of companies or firms.[547]

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[543] Article 48 para. 2 EC Treaty provides a definition of the terms '*company*' and '*firms*'. Accordingly, the provision reads: "'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."

[544] *EC Treaty*, art. 44(1).

[545] *Ibid.* art. 44(2)(g). It should be noted that the provision refrains from using the term 'harmonization' or 'approximation' as is the case for example under Articles 94 and 95 EC Treaty.

[546] *Ibid.* art. 48 para.1.

[547] *EC Treaty,* art. 293. Only one such convention has been concluded under the provision, which is the *1968 Convention on the Mutual Recognition of Companies and Bodies Corporate* (see EC, Commission Bull. Suppl. No.2-1969 at 7-14). However, the Convention has not been ratified by all the signatories and as such is not legally binding (K. Hopt, "Company Law in the European Union: Harmonization or Subsidiarity" (1997) Centro di studi e ricerche di diritto comparato e straniero, at 3 accessed online at <http://www.cnr.it/CRDCS/frames31.htm> (date accessed: 14 October 2002).

Given the broad scope and vague delineation of the aims to be achieved under Article 48 EC Treaty, the Commission initially interpreted the provision as broadly encompassing the various aspects of company law, ranging from the right of establishment to the internal functioning and structure of companies.[548] As a result, beginning in the 1960s, several initiatives were put forth by the Commission to "coordinate" the company law of Member States. To date, fourteen proposals for directives have been tabled by the Commission, of which nine have been adopted.[549]

COMPANY LAW DIRECTIVES

As noted above, the first Council directive in the field of company law was adopted in 1968 and relates to publicity and disclosure rules for both public and private limited liability companies and partnerships.[550] Moreover, the Council Directive also governs the issue of the legality of contracts concluded by the company[551] and the nullity of companies.[552]

In 1976, the Council Directive on capital formation was adopted.[553] The aim of the Second Council Directive is to coordinate the rules relating to capital formation

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[548] J. Wouters, "European Company Law: Quo Vadis?" (2000) 37 C.M.L.R. 257 at 268. The author identifies three aims pursued by the Commission within the sphere of company law at the Community level, namely ensuring freedom of establishment for companies formed within Member States; increasing legal certainty in commercial relations; and finally pursuing harmonization with the aim of avoiding the risk of a 'Delaware' effect from occurring (*ibid.* at 269-70).

[549] D. Medhurst, *A Brief and Practical Guide to EU Law* 3d ed. (London: Blackwell Science, 2001) at 180.

[550] EC, *First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of the safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community* [1968] OJ L 65/8, as subsequently amended [hereinafter *First Council Directive*].

[551] *Ibid.* arts. 7- 9. In this respect, the Directive does not incorporate the common law doctrine of *ultra vires*, but adopts the German model of *prokura*, see Wouters, *supra* note 548 at 270, but compare L. Mrázková, "Členství České republiky v Evropské unie a některé otázky práva obchodních společností" (1999) Právník č. 138/99 at 754.

[552] *Ibid.* arts. 10 -12.

[553] EC, *Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of*

and protection of public limited liability companies. In particular, the Second Council Directive provides for the minimum capital requirements for this form of company, which is currently set at 25 000 EUR.[554] Moreover, rules relating to non-capital contribution are provided for under the Directive[555] and the Directive sets limitations on a company acquiring its own shares.[556]

The regulation of mergers of public limited liability companies is provided for under the Third Council Directive.[557] Nevertheless, it should be noted that the scope of the Directive is limited as it only relates to public limited liability companies and only to those mergers occurring within a given Member State.[558] As such, the aim of the Directive is to ensure that the national legislation of Member States provides for mergers of such companies and that certain safeguards for shareholders and third parties are implemented in all Member States.[559]

That same year, the Fourth Council Directive was adopted on the basis of then Article 54(3)(g) EC Treaty. The Fourth Council Directive governs the annual accounts of both private and public limited liability companies.[560] As such, the

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companies within the meaning of the second paragraph of Article 58 of the Treaty in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1976] OJ L 26/1, as subsequently amended by EC, *Council Directive 92/101/EEC of 23 November1992* [1992] OJ L 347/64 [hereinafter *Second Council Directive*].

[554] *Ibid.* art.6 (1). Pursuant to Article 6(3), the amount may, if necessary, be revised periodically.

[555] See *ibid.* arts. 7, 9, 10; for further details, see Mrázková, *supra* note 551 at 754-55.

[556] See *Second Council Directive*, *e.g.* arts. 18 and 19.

[557] EC, *Third Council Directive 78/855/EEC of 9 October 1978 based on article 54(3)(g) of the Treaty concerning mergers of public limited liability companies* [1978] OJ L 295/36, as subsequently amended [hereinafter *Third Council Directive*].

[558] *Ibid.* art. 1(1), art. 2. Although some of the directives relating to company law are limited in scope in so far as they expressly only relate to public limited liability companies, in practice there has been a trend of *de facto* harmonization by Member States in that the provisions of the directives are extended to other forms of companies (Wouters, *supra* note 548 at 265).

[559] *Third Council Directive*, Preamble.

[560] EC, *Fourth Council Directive 78/660/EEC of 25 July 1978 based on article 54(3)(g) of the Treaty on the annual accounts of certain types of companies* [1978] OJ L 222/11, as subsequently amended [hereinafter *Fourth Council Directive*], art.1(1).

Directive is to ensure that uniform accounting rules are applied these forms of companies throughout the Community in order to ensure 'minimum equivalent legal results as regards the extent of the financial information that should be made available to the public'.[561] Accordingly, the annual accounts of a company are to give a 'true and fair view' of the financial situation of a company.[562]

Four years later, in 1982, the Sixth Council Directive was adopted, which relates to the division of certain companies.[563] As with the Third Council Directive, however, the scope of the Directive is limited to public limited liability companies.[564] The aim of the Directive is to ensure equivalent provisions on divisions of these companies where the assets are acquired by other companies, thus granting a certain degree of protection to shareholders, creditors and employees affected by the division.[565]

The following year, the Seventh Council Directive was adopted and which governs the consolidated accounts of groups of companies.[566] Like the Fourth Council Directive, the principal objective of the Seventh Council Directive is to ensure the harmonization of accounting standards, namely the consolidated accounts of parent companies in Member States, thus providing a greater degree of protection

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[561] *Ibid.*, Preamble.
[562] *Ibid.*, art.2(3).
[563] EC, *Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty concerning the division of public limited liability companies* [1982] OJ L 378/47 [hereinafter *Sixth Council Directive*].
[564] *Ibid.* art.1(1).
[565] *Ibid.* Preamble.
[566] EC, *Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts* [1983] OJ L 193/1, as subsequently amended [hereinafter *Seventh Council Directive*].

for both shareholders and creditors.[567] The Eighth Council Directive, adopted in 1984, aims at further harmonizing the accounting practices of companies within Member States, by stipulating the rules applicable to financial auditors of accounting documents as required by the Fourth and Seventh Council Directives.[568] Accordingly, the Directive outlines generally the minimum qualification requirements for financial auditors.[569]

The Eleventh and Twelfth Council Directives were adopted in December 1989. The Eleventh Council Directive[570] relates to disclosure requirements for branches created in a Member State by public and private limited companies incorporated in other Member States, whereas the Twelfth Council Directive concerns single member limited liability companies.[571] Following the adoption of these directives, no significant new measures were adopted relating to company law at the Community level for over a decade. This lacuna sparked much debate as to the future of harmonization of European company law.[572] Nevertheless, despite the narrow defeat

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[567] *Ibid.* Preamble. As under the Fourth Council Directive, the Seventh Council Directive incorporates the principle of 'true and fair view' of the accounts of a group of companies (*ibid.* art.16(3), for a more detailed discussion, see E. Werlauff, "The Development of Community Company Law" (1992) 17 E.L.R. 207 at 217-18).

[568] EC, *Eighth Council Directive 84/253/EEC of 10 April 1984 based on article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents* [1984] OJ L 126/20 [hereinafter *Eighth Council Directive*].

[569] See *ibid.* arts. 2 -22.

[570] EC, *Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State* [1989] OJ L 395/36 [hereinafter *Eleventh Council Directive*].

[571] EC, *Twelfth Council Directive 89/667/EEC of 21 December 1989 on single-member private limited -liability companies* [1989] OJ L 395/40, as subsequently amended [hereinafter *Twelfth Council Directive*].

[572] See *e.g.* Wouters, *supra* note 548 at 257; E. Wymeersch, "Company Law in Europe and European Company Law" (2001) Working Paper No 2001-06 Financial Law Institute, online: <http://www.law.rug.ac.be/fli> (date accessed: 3 October 2002) at 16-17; P. Hommelhoff, "Corporate and Business Law in the European Union: Status and Perspectives 1997" in A. Hartkamp *et al.*, eds., Towards A European Civil Code, 2ed. (The Hague: Kluwer Law International,1998) at 585*ff*; J. Salač, "Perspektivy evropského práva obchodních společností" (2001) Právní rozhledy, příloha Evropké právo č.5 at 1. For a discussion of the viability of a company law at the Community level,

of the proposal for a Thirteenth Directive last year, a significant achievement has been recently achieved in this field with the adoption of the regulation on the European Company (*Societas Europea*).[573]

In addition to the directives outlined above, numerous proposals for additional company directives have been set forth. These include a proposal for a Fifth Council Directive concerning the internal structure and organs of public limited liability companies;[574] a proposal for a Ninth Council Directive on groups of companies;[575] a proposal for a Tenth Council Directive concerning cross-border mergers of public limited liability companies;[576]as well as an informal draft proposal for a Fourteenth Council Directive on the cross-border transfer of a company's seat.[577] Furthermore,

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see V. Magnier, *Rapprochements des droits dans l'Union européenne et viabilité d'un droit commun des sociétés* (Paris: Librairie Générale de Droit et de Jurisprudence, 1999).

[573]See *infra* note 602.

[574] EC, Commission, *Amended proposal of 20 November 1991 for a Fifth Directive on Article 54 (3)(g) of the Treaty concerning the structure of public limited liability companies and the powers and obligations of their organs* (1991) OJ C 321/9. However, the prospects of the proposal being adopted are doubtful due to the opposition of some Member States to the inclusion of provisions on employee co-determination based on the German model (Medhurst, *supra* note 549 at 183; E. Werlauff, *supra* note 567 at 218-19).

[575] The draft proposal has however not been officially published by the Commission (Wouters, *supra* note 548 at 262). Recently, the academic consortium *Forum Europaeum* submitted a draft report on this subject to the Commission, part of which is summarized in 'Un droit des groupes de sociétés pour l'Europe' (1999) Revue des sociétés vol. 1, no. 1 at 43-80. Like the proposal for the Fifth Council Directive, this proposal has encountered significant opposition from some Member States as it is modeled largely on German law governing groups of companies (*konzernrecht*) (Hopt, *supra* note 547 at 4-5).

[576]EC, Commission, *Proposal for Tenth Council Directive based on Article 54(3)(g) of the Treaty concerning cross-border mergers of public limited liability companies* (1985) OJ C 23/11.

[577] As with the proposal for the Ninth Council Directive, the draft has not been published officially by the Commission (see Wymeersch, *supra* note 572 at 11 and n. 52). The draft is seen as a response to the need to reconcile differences which arise between Member States as a result of variations between the incorporation theory and the real seat theory, as illustrated in the *Daily Mail* case (see *infra* note 595; Wouters, *supra* note 548 at 286-87). For a discussion of these theories and their impact on Community company law from a German perspective, see H. Halbhuber, "National Doctrinal Structures and European Company Law" (2001) 38 C.M.L.R. 1385.

the Commission has recently issued an amended draft of the Thirteenth Council Directive concerning takeovers.[578]

COMPANY LAW REGULATIONS

Apart from measures adopted at the Community level in the form of directives, legislation relating to company law at the Community level has also been implemented by means of regulations.[579] To date, two such regulations have been adopted, namely the Council Regulation governing the European Economic Interest Grouping (EEIG)[580] and the abovementioned Council Regulation relating to the European Company (*Societas Europea*).[581] Both regulations provide for the creation of pan-Community corporate forms, although both rely substantially on the national legislation of Member States.[582] The Regulation on European Economic Interest Groupings concerns provisions for the establishment of a grouping[583] in order to 'facilitate or develop the economic activities of its members'.[584] However, the EEIG

[578] See EC, Commission, News Release IP/02/1402, "Company law: Commission proposes a transparent framework for takeover bids" (2 October 2002) at 1; EC, Commission, *Proposal for a Directive of the European Parliament and of the Council on takeover bids* (2002) COM(2002) 0534, online: <http://europa.eu.int/eur-lex/en/com/reg/en_register_1710.html> (date accessed: 28 October 2002).

[579] Some commentators contend that these regulations are the only form of 'genuine' substantive European company law, given that they apply directly and, as a result, uniformly in the Member States (Hopt, *supra* note 547 at 2).

[580] EC, *Council Regulation (EEC) 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG)* [1985] OJ L 199/1 [hereinafter *Regulation EEIG*].

[581] EC, *Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE)* [2001] OJ L 294/1 [hereinafter *Regulation SE*].

[582] See Wouters, *supra* note 548 at 260; M. Nedelka, "Znovurození evropské akciové společnosti" (2001) Právní rozhledy, příloha Evropké právo č.5/2001 at 2.

[583] The EEIG resembles a partnership in that it is formed of members who share unlimited joint and several liability (Regulation EEIG, art. 24(1); see Werlauff, *supra* note 567 at 221-22).

[584] *Regulation EEIG*, art. 3(1).

may not be established solely for the purpose of creating profits and the number of its members is limited to five hundred.[585]

In contrast, the European Company represents a form of a public limited liability corporation with a minimum capital requirement of 120 000 EUR.[586] Unlike the initial proposals for the European Company, the Regulation does not contain any provisions governing employee co-determination.[587] Nevertheless, it should be noted that the possibility of establishing a European Company is in general limited to existing companies that are incorporated and that have their seat and commercial operations located within a Member State.[588] Given that the Regulation is to come into effect only on 8 October 2004, it remains to be seen how successful the European Company will prove to be.[589]

Apart from the above forms of pan-Community corporate bodies, the Commission has issued proposals for regulations that would govern the statutes of other corporate

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[585] *Ibid.* art. 3(1) and art. 3(2)(c). In practice, the use of the EEIG varies significantly from Member State to Member State, such that in 1998 there were 242 such groupings registered in Belgium, as opposed to 85 in Germany and 3 in Denmark (Wouters, *supra* note 548 at 261 and n. 21).

[586] *Regulation SE*, art. 4(2).

[587] Previous draft proposals of the regulation contained provisions on employee co-determination based on the German model, which was unacceptable to some Member States (Nedelka, *supra* note 582 at 2). As a result, the issue of employee co-determination was transferred into a supplementing directive (*Regulation SE*, art. 1(4); see also EC, *Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees* [2001] OJ L 294/22).

[588] *Regulation SE*, art. 2. For a more detailed overview of the European Company, see generally Nedelka, *supra* note 582; A. Kellerhals & D. Trüten, "The Creation of a European Company" (2002) 17 Tul. Eur. & Civ. L.F. 71.

[589] *Regulation SE*, art. 70.

forms, including a European mutual society,[590] a European cooperative society[591] and a European association.[592]

EC COMPANY LAW CASES

The case-law of the Court of Justice, albeit limited in this field, has played a significant role in the development of EC company law.[593] Beginning with the Court's pronouncing of the direct effect of Article 43 EC Treaty in *Reyners,*[594] followed by its judgment in *Daily Mail*[595] and more recently *Centros,*[596] the Court of

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[590] EC, Commission, *Amended proposal for a Council regulation (EEC) on the Statute for a European mutual society* (1993) OJ C 236/40.

[591] EC, Commission, *Amended proposal for a Council regulation (EEC) on the Statute for a European cooperative society* (1993) OJ C 236/17.

[592] EC, Commission, *Amended proposal for a Council regulation (EEC) on the Statute for a European association* (1993) OJ C 236/1.

[593] Wymeersch, *supra* note 572 at 7-8. As a detailed overview of the case-law in this field is outside the scope of this paper, only certain cases are highlighted below.

[594] ECJ, Case 2/74 *Reyners* v. *Belgium* [1974] ECR 631. The case involved a Dutch national, who had completed a law degree in Belgium but was refused admission to the Belgium Bar as he was not a citizen of Belgium. The Court of Justice held, that in the absence of implementing provisions at the Community level ensuring the equal treatment of nationals of one Member State in another Member State, these provisions could be directly relied on by nationals of a Member State (see Craig & de Burca, *supra* note 80 at 734) In the case .

[595] ECJ, Case 81/87 *R.* v. *H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust* [1988] ECR 5483. This case concerns the right of establishment of companies. The case involved a British company operating in the UK, which planned to transfer its operations to the Netherlands and only establish a branch in the UK. However, under UK law, such transactions were subject to authorization from the Treasury. The Court of Justice held that the Treaty does not provide for an unconditional right of establishment for domestic companies with respect to transfers of seat and as a result Member States may impose restrictions on such transfers in the absence of Community legislation governing such matters (Craig & de Burca, *supra* note 80 at 760). Notably, the Court alluded to the need to adopt measures at the Community level concerning transfers of seat (Wouters, *supra* note 548 at 303).

[596] ECJ, Case C-212/97, *Centros* v. *Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459. This recent case has been heralded as one of the most important cases for the development of EC company law. The case involved two Danish nationals who established a private limited company in the U.K. as the minimum capital requirements for such forms of companies were considerably lower in the U.K with the intent of conducting business solely in Denmark. When they applied to have a branch of the company registered in the Denmark, the Danish authorities denied registration. The Court held that a company duly established under the laws of one Member State may not be barred from operating in another Member State solely on the grounds that it did not satisfy minimum capital requirements in that Member State. The case has stirred a debate on whether the Court has thus implicitly accepted the incorporation doctrine and on the general implications of the Court's judgment for Community company law. For a more detailed discussion, see *e.g.* W. Ebke, "Centros – Some Realities and Some Mysteries" (2000) 48 Am. J. Comp. L. 632; C. Holst, "European Company Law After Centros: Is the EU on the Road to Delaware" (2002) 8 Columb. J. Eur. L 323; P. Rose, "EU Company Law Convergence Possibilities After Centros" (2001) 11 Transnat. L. & Contemp. Probs. 121; M. Siems,

Justice has furthered the development of Community company law by clarifying both the relevant Treaty provisions and the secondary legislation.[597]

4.2 COMPANY LAW IN THE CZECH REPUBLIC

Under the communist regime, there was in essence no equivalent of company law in the Czech Republic (what was then Czechoslovakia), given that the state had a centrally planned economy.[598] Following the Velvet Revolution in November 1989, it was necessary to enact legislation governing commercial relations and in particular, which govern company forms and structures. To this end, the Commercial Code was adopted in 1991 and came into effect on 1 January 1992.[599]

The Commercial Code is the primary act which governs the various forms of business companies and cooperatives, their creation, internal structure and functioning.[600] Moreover, the Commercial Code also governs commercial contractual relations as well as other relations related to commercial transactions.[601]

Accordingly, pursuant to Article 1(1) CC, the scope of the Commercial Code governs entrepreneurs, commercial contractual relations as well as other relations

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"Convergence, Competition, Centros and Conflict of Law: European Company Law in the 21st Century" (2002) 27 E. L. Rev. 47.

[597] See Werlauff, *supra* note 567 at 208; Wouters, *supra* note 548 at 302. According to the later, the Court has also played a role in delineating the limitations of the company directives (*ibid.*).

[598] In the 1960s, Czechoslovakia adopted under the influence of Soviet law, what was then known as '*hospodářské právo*' which may be roughly translated as 'economic law' (there is no equivalent in the civil or common law traditions). It was considered to form a distinct area of law, which was aimed at regulating relations between socialist organizations in a socialist economy (see I. Pelikánová, Obchodní právo, vol.1 (Prague: Codex Bohemia, 1998) at 38). Nevertheless, international commercial relations were governed by *zákon č. 101/163 Sb., zákoník mezinárodního obchodu*, which later served as a model for the current Commercial Code (P. Raban, "K poslední velké novele obchodního zákoníku" (2001) Právník č. 6 at 521).

[599] *Zákon č. 513/1991 Sb., obchodní zákoník*, as subsequently amended [hereinafter *Commercial Code* or *CC*].

[600] See *CC*, Part I and II (arts. 1- 260). Unlike in other states, there are no other special acts or legislative measures that govern the individual forms of companies. Accounting procedures as well as general securities law are, however, governed by separate acts.

[601] See *ibid.* Part III (arts. 261- 755).

related to commerce. Commercial activity or business (*podnikání*) is defined under the Code as "a continuous activity undertaken independently by an entrepreneur in its name and on its own account for the purpose of achieving profit."[602] Consequently, the following persons are deemed an entrepreneur (*podnikatel*) for the purposes of the Code, namely persons registered in the Commercial Register; those persons engaged in commerce on the basis of a trade authorization (*živnostenské oprávnění*);[603] persons who engage in commerce on the basis of an authorization other than entrepreneurial; and natural persons which engage in agricultural production and which are registered under another act.[604]

Foreign persons[605] may generally engage in commercial activities in the Czech Republic under the same conditions and to the same extent as Czech persons.[606] Accordingly, foreign persons are authorized to engage in commercial activities in the Czech Republic upon their registration in the Commercial Register. Foreign persons may also become a member of an existing Czech legal entity or its may establish a Czech legal entity,[607] however, such legal entities may only be founded under Czech law.[608]

A legal entity formed according to the law of another state, which has its seat in another state may transfer its seat to the Czech Republic if it is provided for under an

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[602] *Ibid.* art.2(1) [author's translation].
[603] Trade authorization is governed under a separate act, see *zákon č. 455/1991 Sb., o živnostenském podnikání*, as subsequently amended.
[604] *CC*, art. 2(2).
[605] Pursuant to article 21(2) CC, a '*foreign person*' (*zahraniční osoba*) is defined as either a natural person residing in the Czech Republic or a legal entity that has its seat outside the territory of the Czech Republic. Conversely, a '*Czech legal entity*' is defined for the purposes of the Commercial Code as a legal entity whose seat is located in the Czech Republic (*ibid.*).
[606] *Ibid.* art. 21(1).
[607] *Ibid.* art. 24(1).
[608] *Ibid.* art. 24(2).

international treaty binding on the Czech Republic and which was published either in the Collection of Laws or the Collection of International Treaties. The same applies to legal entities established under Czech law.[609] Following such a transfer of seat, the internal functioning of the legal entity will remain governed by the law of the state in which it was incorporated. This also applies to the liability of its members towards third parties, which however may not be less than that permitted under Czech law for that form of company or its equivalent.[610] Any such transfers of seat will be effective on registration in the Commercial Register.[611]

THE COMMERCIAL REGISTER

The Commercial Register (*obchodní rejstřík*) is a public register maintained by commercial registry courts, which contains information on natural persons and legal entities incorporated in the Czech Republic and on persons that conduct business in the Czech Republic.[612] Following amendment by Act No.370/2000 Coll.,[613] the Commercial Code provides detailed provisions on disclosure requirements for information entered into the Commercial Register. In particular, the provisions incorporate the principle that entries in the Commercial Register are effective on

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[609] *Ibid.* art. 26(1).
[610] *Ibid.* art. 26(3).
[611] *Ibid.* art. 26(2).
[612] *Ibid.* art. 27(1). The Commercial Register is accessible to the public online at: <http://www.justice.cz>. The current system has been criticized as being overly cumbersome, ineffective and as hindering business activities in the Czech Republic (see M. Výborný, "Reforma ochodního rejstříku a její evropská dimenze" (2001), online: <http://www.integrace.cz/integrace/clanek.asp?id=437> (date accessed: 31 October 2002) at 2). Furthermore, there have been allegations as to corruption (*ibid.*). As a result, a draft bill was introduced which would deregulate the management and administration of the registers, thus transferring them into the private sector (see *Poslanecky návrh zákona o registrátorech, sněm. tisk č. 1049*(2001), online: <http://www.psp.cz> (date accessed: 31 October 2002). The draft legislation has however not been adopted to date.
[613] *Zákon č. 370/2001, Sb. kterým se mění zákon č. 513/1991 Sb., obchodní zákoník* [hereinafter *Act No 370/2000 Coll.*].

publication.[614] A business company is created on the day that it is registered in the Commercial Register.[615] The disclosure requirements for both foreign and national natural persons and legal entities are provided for under Article 28 CC.[616] Apart from information related to the incorporation of a business company, the Commercial Register also contains a register (*sbírka listin*) in which important documents must be filed, in particular copies of documents related to the constitution of business companies, decisions relating to the internal structure of the company and the members of the internal organs and annual accounting reports.[617]

GENERAL PARTNERSHIPS

The Commercial Code provides for four forms of business companies, namely, general partnerships, limited partnerships, limited liability companies and stock corporations.[618] A general partnership (*věřejná obchodní společnost*)[619] is a legal entity which comprised of at least two or more persons which conduct business together and who are liable for the debts of the partnership jointly and severally.[620] Both natural persons and legal entities may form a general partnership.[621] Unlike

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[614] CC, art. 27(3).
[615] *Ibid.* art. 62(1).
[616] The scope of the provisions relating to disclosure requirements were also significantly extended under the amendment of the Commercial Code by Act No. 370/200 Coll. (*supra* note 613). In this respect, special provisions relating to disclosure requirements were introduced for branches and subsidiaries of legal entities that have their seats in a Member State of the European Union (see arts. 27a (4) and art. 28 (4) *CC*). These provisions will come into effect on the Czech Republic's accession to the EU
[617] See *CC*, arts. 27a - 29.
[618] *Ibid.* art. 56(1). The Commercial Code defines a business company (*obchodní společnost*) as 'a legal entity established for the purpose of conducting business' (*ibid.* [author's translation]). Apart from the above four forms of business companies, the Commercial Code also governs cooperatives, which are legal entities that may also be formed for the purpose of conducting business (*ibid.* art. 221).
[619] Abbreviated as either *'veř. obch. spol.'* or *'v.o.s.'*.
[620] The equivalent of this form of company in France is the *société en nom collectif* and in Germany the *Offene Handelsgesellschaft*. Nevertheless, this form of business company is not deemed a legal entity under German law (Pelikánová, *supra* note 598 at 257-58).
[621] CC, art. 76(2),(3).

other forms of business companies under the Commercial Code, there are no minimum capital requirements for a general partnership.[622] Moreover, the Commercial Code does not prescribe the creation of any particular formal internal organs.[623]

LIMITED PARTNERSHIP

A limited partnership (*komanditní společnost*)[624] is a company which is constituted by one or more limited partners and one or more general partners, whereby limited partners (*komandiste*) are liable for the debts of the company only to the extent of their unpaid capital contribution to the minimum capital of the limited partnership as entered in the Commercial Register.[625] Pursuant to Article 97a CC, each limited partner must make a capital contribution as provided for under the articles of association, but which must amount to at least 5 000CZK.[626] In contrast, general partners (*komplementáři*) of the company bear unlimited personal liability for the debts of the limited partnership.[627] Only the general partners are entitled to manage the corporate affairs of the limited partnership.[628] In all other matters,

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[622] *Ibid.* art. 58(2). The legal institute of '*minimum capital*' (*základní capital*) traditionally has had no equivalent in Anglo-American company law (in the U.K. however, minimum capital requirements have been implemented for public companies as a result of the *Second Council Directive*, see Hopt, *supra* note 547 at 6). In essence, minimum capital is the aggregate sum of all the monetary and non-monetary contributions made by the members of a company and which forms the assets of the company. As such, it must be denominated in the currency of the Czech Republic (*CC*, art 58(1)). Minimum capital is to serve the purpose of protecting the creditors of a given company in place of the personal liability of the company's members (Pelikánová, *supra* note 598 at 298). Its effectiveness in this respect is, however, in practice debatable.

[623] Pelikánová, *supra* note 598 at 260.

[624] Abbreviated as either '*kom. spol.*' or '*k.s.*'.

[625] CC, art. 93.

[626] *Ibid.* art. 97a. Originally, the Commercial Code did not prescribe a minimum amount for capital contributions by limited partners. This requirement was recently inserted by Act. No. 370/2000 Coll. However, it is unclear why the minimum capital contribution was set at such a low level (*cf.* Parliament of the Czech Republic, *Důvodová zpráva k vládnímu návrhu č. 476 na vydání zákona kterým se mění zákon č.513/1991 Sb.* (1999)[hereinafter *Důvodová zpráva k z.č. 370/2000 Sb.*].

[627] *CC*, art. 93(1).

[628] *Ibid.* art. 97(1).

however, the limited partners and the general partners decide by majority vote, unless otherwise provided for under the articles of association.[629]

LIMITED LIABILITY COMPANIES

The third form of company provided for under the Commercial Code is the limited liability company (*společnost s ručením omezeným*).[630] The limited liability company is a company whose registered capital is comprised of the capital contributions of its members. The members are liable for the debts of the company up to the day that the full payment of the capital contribution is registered in the Commercial Register.[631] A limited liability company may be established by a single person.[632] However, a limited liability company that has only one member may not establish another limited liability company.[633] A natural person may not be a single member of more than three limited liability companies.[634] Moreover, a limited liability company may have a maximum of fifty members.[635]

The minimum capital requirement for this form of company is 200 000 CZK, whereby the capital contribution of each member must be at least 20 000 CZK.[636] As noted above, the members are liable jointly and severally only for the unpaid amount of their capital contribution to the minimum capital.[637] Members' liability for the

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[629] *Ibid.* art. 97(2).
[630] Abbreviated as either '*spol. s r.o.*' or '*s.r.o.*'.
[631] CC, art. 105(1).
[632] *Ibid.* art. 105(2).
[633] *Ibid.*
[634] *Ibid.*
[635] *Ibid.* art. 105(3).
[636] *Ibid.* arts. 108(1) and 109(1). It is possible for members to make non-monetary capital contributions. Such contributions must however be assessed and certified by an independent expert pursuant to Article 59(3) CC.
[637] *Ibid.* art. 106(2). Members' capital contributions must be paid by the date provided for in the articles of association, however no later than within five years of incorporation or of increasing the minimum capital. (*ibid.* art. 113(1)).

debts of the company ceases on the day that it is registered in the Commercial Register that all capital contributions have been paid.[638]

Under the Commercial Code, the internal organs of a limited liability company are the general assembly, the authorized officers (*jednatele*) and if provided for under the articles of association, a supervisory board. The general assembly is the supreme organ of a limited liability company and is comprised of its members.[639] In contrast, the authorized officers manage the business of the company.[640]

STOCK CORPORATIONS

The stock corporation (*akciová společnost*) is the fourth form of company governed by the Commercial Code.[641] It is a legal entity whose capital is composed of shares, and whereby the shareholders are not liable for the debts of the company.[642] The minimum capital requirement for a stock corporation is 20 million CZK if the corporation is formed on the basis of a public offering of shares, otherwise the minimum capital requirement is 2 million CZK.[643] A stock corporation may be established by a single person provided that such a person is a legal entity. Nevertheless, full ownership of the shares by a single natural person is not grounds

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[638] *Ibid.* art. 106(2).
[639] *Ibid.* art. 125(1).
[640] *Ibid.* art. 134. The authorized officers act in the name of the stock corporation. In the event there are more than two authorized officers, each officer is authorized to act on behalf of the corporation unless the articles of association provide otherwise (*ibid.* art.133(1)). The general assembly, articles of association or the statute of the stock corporation may limit the scope of the officers authorization, however, any such limitations are not binding on third parties (*ibid.* art.133(2)).
[641] *Ibid.* arts. 154 – 220zb.
[642] *Ibid.* art. 154(1). *Akciová společnost* is abbreviated as either '*akc. spol.*' or simply '*a.s.*'. The *société anonyme* is the equivalent under French law and *Aktiengesellshaft* is the equivalent to this form of company under German law (see Pelikánová, *supra* note 598 at 331).
[643] *CC* art. 162(3). Stock corporations are differentiated under the Commercial Code on the basis of whether or not they are formed by means of a public offering of shares. More stringent provisions apply to those that are formed on the basis of a public offering.

for winding-up the company nor does it entail nullity of the company.[644] The internal organs of stock corporations include the general assembly, the board of directors and the supervisory board.[645]

Acquisitions of registered shares that exceed certain limits provided for under the Commercial Code must be disclosed to the corporation in question, the Securities Commission and the Securities Center within three working days of ascertaining that the limits were achieved.[646] Failure to notify will result in a prohibition of exercising the voting rights attached to such shares.[647]The provisions relating to stock corporations also govern takeover offers. A mandatory takeover offer must be made to the shareholders of a corporation when a person or persons acting in concert[648] acquire registered shares that represent a controlling interest in a corporation.[649] Such an offer must be made to all remaining shareholders within 60 days of acquiring the controlling interest.[650]The obligation to make a mandatory takeover offer also applies to persons who acquire two thirds or three-quarters of the voting

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[644] *Ibid.* art. 162(1).

[645] See *ibid.* arts. 184 to 190 with respect to the general assembly; arts. 191 to 196a as concerns the board of directors and arts. 197 to 201 for the supervisory board. The supervisory board must have a minimum of three members. If a stock corporation has more than fifty employees, then one third of the board members must be elected by the employees. The statute of a stock corporation may provide for a greater number, however, it may not exceed the number of supervisory board members elected by the general assembly (*ibid.* art. 200(1)).

[646] *Ibid.* art. 183d(1),(2). The notification requirement applies to both acquisitions and sales of shares. The incremental limits for the notification obligation are as follows: 5%,10%,15%,20%,25%,30%, one third, 40%,45%,50%,55%,60%,two thirds,70%,75%,80%,90%, and 95% of all voting rights (*ibid.* art. 183d(1)). According to the explanatory notes to the draft bill, the aim of the provision is to promote greater transparency of the ownership structures of stock corporations whose shares are publicly traded (see *Důvodová zpráva k z.č. 370/2000 Sb, supra* note 626 at 234).

[647] *Ibid.* art. 183d(2).

[648] Pursuant to art. 66b(1), '*acting in concert*' is defined for the purposes of the Commercial Code as the conduct of two or more persons acting on the basis of a mutual agreement to acquire or to exercise voting rights in a given legal entity or to exercise these rights in such a manner so as to effect a common influence on a company.

[649]*Ibid.* art. 183b(1).

[650] *Ibid.*

rights associated with the shares of a given corporation.[651] Such an offer must be made at a fair price. In the event of a mandatory takeover offer tendered as a result of acquiring a controlling interest, the price must reflect the average weighed market value of the shares within the last six months from the date on which the obligation arose.[652]

MERGERS AND DIVISIONS

The Commercial Code provides for the transformation of existing companies that have their seat in the Czech Republic either by merger, by means of a transfer of a company's assets to a sole member, by division or by altering the corporate form of an existing company.[653] A merger (*fúze*) of a company may occur either through an acquisition of an existing company (*sloučení*), in which case the acquired company is incorporated into the acquiring company, or by means of amalgamation (*splynutí*), whereby the existing companies fuse to form a new legal entity.[654] In contrast, the division (*rozdělení*) of a company may occur through the creation of a new business company, through an acquisition or by means of a combination of the later two.[655] In general, all forms of companies under the Commercial Code may be subject to mergers and division.[656]

GROUPS OF COMPANIES

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[651] *Ibid.*

[652] However, if the price at which the takeover offer is made is not fair, this in of itself does not result in the nullity of the offer. A shareholder may bring a claim before the courts for the difference in price (*ibid.* art. 183c(5)).

[653] *Ibid.* art. 69(1).

[654] *Ibid.* art. 69(3).

[655] *Ibid.* art. 69(4).

[656] See *ibid.* arts 92a -92d with respect to general partnerships, arts. 104a-104d for limited partnerships, arts. 153a – 153d as concerns limited liability companies and arts. 220a - 220za with respect to stock corporations. In contrast, the scope of the *Third Council Directive* is limited to the equivalent of public limited liability companies (see *Third Council Directive*, art. 1(1))

The Commercial Code provides, as a result of recent amendments to the Commercial Code,[657] elaborate provisions relating to groups of companies, which are largely modeled on the German model of law on groups of companies *(konzernrecht)*.[658]Under the Commercial Code, a group of companies (*koncern*) exists where one or more persons are submitted to unified management by another person.[659]Article 66a CC provides for a rebuttable presumption that a controlling entity and a controlled entity form a group of companies. Similar to German *konzernrecht*, the Commercial Code provides for both *de facto* and legal forms of groups of companies.[660]A *de facto* group of company exists where a person acquires control of a legal entity. In contrast, a legal group of company may be formed on the basis of a control agreement (*ovládací smlouva*).[661]

4.3 APPROXIMATION OF EC COMPANY LAW IN THE CZECH REPUBLIC

[657]See in particular *Act No.370/200 Coll.*, which inserted the following provisions into the Commercial Code: arts. 66a-66c, 183b-183h and 190a-190d.

[658] P. Tomaštík, "Smluvni ovládání v České republice" (2001), online: <http://www.epravo.cz> (date accessed: 14 September 2002) at 1. German *konzernrecht* is governed by the German Stock Corporation Act (*Aktiengesetz*) of 1965. The provisions also incorporate certain aspects of French law on groups of companies as governed by *Loi n°66-657 du 24 juillet 1966 sur les sociétés commerciales*, such as the definition of term '*acting in concert*' (article 356) and the 40 per cent limit at which control is achieved (art. 355)(see *Důvodová zpráva k z.č. 370/2000 Sb*, *supra* note 626 at 187). Given the differences in the German and French approaches to regulating groups of companies, some commentators have questioned how this unique medley of two different regulatory regimes introduced by the amendment will function in practice (see *e.g.* M. Černý, "České koncernové právo podle evropského vzoru" (2001) accessed online at: <http://www.epravo.cz> (date accessed: 10 May 2002) at 2).

[659] *CC*, art. 66a(7). The Commercial Code also expressly cites the English term '*holding*' (*ibid*).

[660] See Černý, *supra* note 658 at 1.

[661]*CC*, art. 190b(1). Under a control agreement, the controlled entity is subjected to the uniform management (*jednotné řízení*) of the controlling entity. The controlling entity may issue directions to the controlled entity which are disadvantageous for the controlled entity provided that such instructions benefit the controlling entity or an entity with which it forms a group. However, the controlling entity must act with the standard of care of a diligent and prudent manager (*s péči řádného hospodaře*)(*ibid.* art.190b(2)).

As has been outlined in preceding chapters, the Czech Republic is required to approximate its legislation with that of the EC both under the terms of the Europe Agreement and in order to fulfill the Copenhagen criteria for membership in the EU Given that divergent national company law legislation of the Member States may hinder the free movement of persons and as such significantly impact the functioning of the common market, it is important for the Czech Republic to ensure its company law legislation is compatible with that of the EC

EUROPE AGREEMENT

Company law is one of the fields expressly provided in Article 70 EA in which the Czech Republic must undertake efforts to approximate its legislation with that of the EC. Apart from this provision, the Europe Agreement further provides certain provisions aimed at promoting the free movement of companies between the Czech Republic and the EC. Pursuant to Article 45(1) EA, the Czech Republic is to "facilitate the setting up of operations on its territory by Community companies"[662]by according treatment no less favorable to Community companies than that granted to its own companies for the establishment and operation of Community companies in the Czech Republic.[663]In particular, the Czech Republic is

[662]Pursuant to article 49(1) EA, the terms '*Community company*' and '*Czech Republic company*' are both defined for the purposes of the Europe Agreement as a company or firm established according to either the laws of a Member State or the Czech Republic and which has its registered office, principal place of place of business, and central administration in the territory of a Member State or the Czech Republic. Nevertheless, if such a company has only its registered office in the territory of one of these states, then its operations must have a 'real and continous link with the economy' of one of these states in order to be deemed such a company (*ibid.*).

[663] However, this regime goes not generally apply to the areas and sectors provided for in Annexes XVIa to XVIc (arts. 45(1)(i) and 45(6) EA). Annex XVIa concerns companies that provide financial services whereas Annex XVIb outlines sectors and areas which are not subject to this provision and which include, the steel and arms sectors, as well as acquiring ownership of state property that is being privatized, the lease and purchase of real estate and natural resources. Finally, Annex XVIc provides for the purchase and sale of agricultural land, forests and natural wealth as well as national cultural or historical sites and buildings (see Tichý & Arnold, *supra* note 80 at 800).

bound not to adopt any new legislation or measures that discriminate against Community companies.[664] Article 45(3) EA provides the obligation of each Member State to grant treatment to Czech Companies that is no less favorable than that which it grants its own companies. Nevertheless, the provisions of the Europe Agreement relating to the freedom to establish may be subject to limitations on the grounds of public security, public health and public policy.[665] Unlike the fields of competition law and environmental law, the Europe Agreement does not, apart from Article 70 EA, provide any further provisions that elaborate the Czech Republic's obligation to approximate its company law with that of the EC.[666]

COMMISSION WHITE PAPER

Apart from the provisions of the Europe Agreement, the Commission's White Paper on preparation for integration into the common market[667] provides a general framework for the approximation of EC company law in the candidate countries. The White Paper underlines the importance of adopting company law at the Community level in so far as it "irons out some of the major differences in national laws" with respect to the company law legislation of Member States.[668] Nevertheless, the White Paper specifically acknowledges that EC company law has not succeeded in ensuring "full 'free-movement' for companies" particularly with respect to transfers of seat, inter-state mergers and takeovers.[669]

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[664] EA, art. 45(2).
[665] *Ibid.* art. 54(1).
[666] Contrast *e.g.* with the field of accounting practices where, pursuant to Article 84(1)(a) EA, cooperation is to include 'the adoption of a common accounting system compatible with European standards'.
[667] *White Paper*, *supra* note 61.
[668] *Ibid.* para. 2.25.
[669] *Ibid.*

Given that the White Paper is addressed generally to the candidate countries of Central and Eastern Europe, it does not provide an assessment of the current status or progress in approximation that has been achieved by the individual candidate states. As such, the White Paper merely notes that although most candidate countries have adopted company law legislation modeled on that of Member States and thus is "broadly in line" with that of the Community, "the coverage is in most cases incomplete."[670] Accordingly, Chapter 15 of the White Paper's Annex outlines a detailed outline plan for the candidate countries in approximating EC company law.[671] Following a brief overview of the principal objectives and approaches used in adopting Community legislation in this field, the Annex summarizes four requirements that are prerequisites to undertaking approximation in this area of law, namely the existence of an administrative or judicial body charged with "the control of the incorporation of a company or the legality of certain acts;" the necessity of training "modern business administrators;" the existence of a companies register and national gazette; as well as the existence of independent financial auditors.[672]

It is interesting to note that the White Paper Annex specifically states that the "coordination" of Member States' company laws has not in general caused problems given that, with the exception of employee co-determination, "the national company law systems and theories within the EU were more or less interrelated."[673] This, however, appears to be somewhat of an oversimplification, for if this were the case,

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[670] *Ibid.* para. 4.13.
[671] According to the White Paper Annex, the purpose of coordinating the company law of Member States is to ensure that creditors, shareholders, and employees of companies as well as third parties are afforded the same degree of protection and to ensure the freedom of establishment for companies within the common market (*White Paper,* Annex, *supra* note 61 at 288).
[672] *Ibid.* at 287-88.
[673] *Ibid.* at 288.

the degree of coordination achieved at the Community level would be greater, and the proposals for the Fifth, Ninth, Thirteenth and Fourteenth Council Directives would not be so troublesome to adopt.[674]

The framework for the approximation of company law outlined by the Annex of the White Paper is divided into two consecutive stages. The first stage involves transposing the First and Second Council Directives as these measures lay the necessary framework for the protection of both foreign and national investors and creditors.[675]The second stage expressly calls for the transposition of the Third, Eleventh, Twelfth Council Directives as well as the Council Regulation concerning the European Economic Interest Grouping.[676]Apart from the legislative instruments identified in the two stages, the White Paper Annex also provides for the draft proposals for the Fifth, Sixth, Tenth and Thirteenth Council Directives as well as the proposal for the Regulation on the European Company.[677]

4.4 PROGRESS ACHIEVED IN APPROXIMATING EC COMPANY LAW

As noted above, the demise of the communist regime in 1989 necessitated the adoption of a new regulatory framework for company law in the Czech Republic, which was carried out by the adoption of the Commercial Code in 1991. However, time constraints in the preparation of the Commercial Code resulted in a legislatory

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[674] Some authors contend that the recent slow progress in coordinating Member State legislation in this field may be attributed to the fact that whereas the earlier directives governed areas of company law that were more or less similarly present in the legislation of Member States, the remaining proposals concern areas which substantially affect the core of national regimes of company law and as a result there is greater resistance to adopting them (see *e.g.* H. de Kluiver, "European and American Company Law. A Comparison after 25 Years of EC Harmonization" (1994) 1 Maastricht J. Eur. & Comp. L.139 at 153; also Wymeersch, *supra* note 572 at 15-16).

[675] *White Paper,* Annex, *supra* note 61 at 289-90.

[676] *Ibid.* at 291-92.

[677] These measures are however identified as '*non-key*' and thus, according to the White Paper Annex, priority should be given to transposing the legislation listed in the two stages (*ibid.* at 292).

framework that was drawn up hastily and unsystematicaly.[678]Moreover, the subsequent conclusion of the Europe Agreement meant that a revision of company law legislation would have to be undertaken. The first major overhaul of company law legislation occurred in 1996 with the objective of achieving compability of Czech company law with that of the EC.[679]Nevertheless, although the amendment aimed at incorporating the provisions of the Community company directives, only partial compability was achieved and many differences remained.[680]

The Commission, in its Opinion on the Czech Republic's application for membership in the EU,[681]noted that the 1996 amendment of the Commercial Code had resulted in some progress in terms of alignment with the First and Second Council Directives.[682]However, the Commission stated that further efforts needed to be undertaken, in particular with respect to the Third and Eleventh Council Directives.[683]

In December 1998, the Czech Republic submitted its Position Paper on company law in which it declared that the Czech Republic "accepts and is ready to implement the Community *acquis* concerning Company Law."[684]Moreover, it noted that there would be no foreseen difficulties with respect to both the enactment and the implementation of the relevant legislation. As such, no transitional periods were

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[678] Mrázková, *supra* note 551 at 740; Raban, *supra* note 598 at 521.
[679] See *zákon č. 142/1996, kterým se mění zákon č. 513/1991 Sb., obchodní zákoník.*
[680] Pelikánová, *supra* note 598 at 334-35.
[681] See *Commission Opinion*, *supra* note 29 at 29.
[682] *Ibid.* at 36.
[683] *Ibid.* at 36- 37.
[684] Ministry of Foreign Affairs of the Czech Republic, *Position Paper of the Czech Republic on Chapter 5: Company Law*, corrected version – January 1999, available online:<http://www.mzv.cz/missionEU/negotiations.htm> (date accessed: 12 September 2002) at 1.

requested.[685]According to the Position Paper, "full alignment with the *acquis* is foreseen by 1/1/2001."[686]

The negotiations on the chapter concerning company law were opened on 19 May 1999.[687]In its 1999 Regular Report, the Commission noted that no progress had been achieved in the field of company law and that "considerable effort" needed to be undertaken.[688]In an effort to achieve full compability of Czech company law legislation with that of the EC, an amendment to the Commercial Code was enacted in 2000 and which came into effect on 1 January 2001.[689]The amendment extensively overhauled both the general provisions relating to companies as well as the provisions governing the individual forms of companies.[690]As a result, the

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[685] *Ibid.*

[686] *Ibid.*

[687] See Ministry of Foreign Affairs of the Czech Republic, *The Czech Republic and the European Union: Negotiations on Membership*, *supra* note 549 at 1. The negotiations on Chapter Five were concluded on 29 March 2001 (*ibid.*).

[688] *1999 Regular Report, supra* note 132 at 29, 34.

[689] *Act No 370/2000 Coll.*; see *Důvodová zpráva k z.č. 370/2000 Sb*, *supra* note 626 at 170-71. According to these explanatory notes to the draft bill, the provisions of the Commercial Code that were incompatible with EC company law included, amongst other, the following areas: 1) the Commercial Register in terms of the publicity principle and the requirements for the registration of foreign companies and their branches and agencies; 2) the requirements of commercial documents used by limited liability companies and stock corporations as well as foreign companies and their branches and agencies; 3) the provisions that govern acts undertaken in the name of a company from its establishment prior to its incorporation; 4) the consequences of concluding commercial contracts prior to obtaining the relevant entrepreneurial authorization; 5) the provisions governing the nullity of companies; 6) the form of the articles of association or founding charter of stock corporations and limited liability companies; 7) the concepts of controlling and controlled persons; 8) non-monetary capital contributions and the methods for assessing them; 9) certain forms of share acquisitions, notably a company's acquisition of its own shares and interim share certificates; 10) asset transfers to shareholders and members of the internal organs of a company; 11) increases and decreases of minimum capital; 12) commercial agency; 13) notification requirements for acquisitions of shares; 14) mergers; 15) divisions; and 16) takeover offers (*ibid.*).

[690] However, a subsequent amendment was required to rectify certain technical difficulties and inconsistencies that were introduced by the amendment. This amendment, promulgated under Act No 501/2001 Coll. and commonly referred to as the 'technical amendment', came into effect on 31 December 2001. For a discussion of the technical amendment, see J. Dědič, "Tzv. technická novella ObchZ prináší pozitiva i problemy"(2002) Právní zpravodaj č. 1/2002.

Commission commended the progress achieved in aligning company law by the amendment in its Regular Reports for both the years 2000 and 2001.[691]

Nevertheless, although the Commission noted in the 2001 Regular Report that there was a need to increase the protection of minority shareholders, the Commission stated for the first time that the company law legislation in the Czech Republic was "now largely in line with the *acquis*."[692]The Commission's most recent Regular Report of 9 October 2002 largely confirms this finding.[693]However, at the same time, the Commission notes that, despite the recent amendments, problems persist with the Commercial Register as the incorporation procedures for companies remain unnecessarily lengthy and "continue to be marred by unequal treatment and lack of transparency."[694]

Although efforts to align company law in the Czech Republic began several years ago, most notably with the first major amendment of 1996, the path to achieving compatibility has been not been simple as demonstrated by the need for subsequent amendments to the Commercial Code. The current problems with the Commercial Register serve as an illustration that, despite having achieved a substantial degree of formal compability with the company *acquis*, simple transposition of the relevant legislation does not suffice. Without a functioning judicial and administrative infrastructure, the objectives of the transposed norms, namely ensuring a sound business environment for both foreign and domestic companies and according

[691] *2000 Regular Report*, *supra* note 137 at 49; *2001 Regular Report*, *supra* note 116 at 51.
[692] EC, Commission, *2001 Regular Report*, *supra* note 116 at 109.
[693] EC, Commission, *2002 Regular Report*, *supra* note 139 at 131.
[694] *Ibid.* at 43.

protection for creditors and shareholders that is equivalent to that in Member States, will not be not be achieved.

Not only is a company law that conforms with the company *acquis* a fundamental precondition for membership in the EU, but it is also a requirement for ensuring that the Czech Republic has a functioning and efficient business environment, one which is attractive for both foreign and domestic investors. Thus, although substantial alignment has been achieved in this field, this does not mean that work in this field of Czech law is complete. Frequent amendments to the Commercial Code have resulted in a Code which is unsystematic, not transparent and plagued with technical inconsistencies.[695] In order ensure that the efforts that have been undertaken with respect to approximation are not negated, a complete overhaul of the existing Commercial Code is warranted.[696]

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[695] I. Pelikánová, "Obchodní zákoník drcený novelami novel" (2001) Právní zpravodaj č. 3/2001 at 3; see also generally Dědič, *supra* note 690.

[696] To this end, the Ministry of Justice of the Czech Republic is drafting a proposal for a new commercial code that would replace the existing Code. A summary of the proposed legislation '*Věcný záměr zákona – návrh pro jednání vlády*' is available online at the Ministry's website at: <http://jusitce.cz/justice/ms.nsf/Dokumenty/F1E623CD7D877D07C1256B3C003E1911>.

V. IMPLICATIONS OF APPROXIMATING EC LAW

As outlined in the preceding chapters, the Czech Republic has undertaken considerable efforts, most notably in the last three years, to fulfill its obligation to approximate Czech law with that of the EC. The Commission has, in its regular assessments, acknowledged the progress that the Czech Republic has achieved in this respect. In its most recent Regular Report, the Commission notes that "overall, the Czech Republic has achieved a high degree of alignment with the *acquis* in many areas." [697] Thus, it is clear that the Czech Republic has made significant strides in approximating its legislation with the *acquis communautaire*. Nevertheless, this raises the question whether, as noted in Chapter I, this mass of transposed legislation is being substantively implemented or merely formally transposed. Chapter I identified implementation as one of the fundamental challenges posed by the process of approximation. Accordingly, the risk of not implementing and enforcing the transposed legislation was illustrated using the allusion of the Potemkim village.[698]

The review of the legislation of the Czech Republic in the three respective fields does not indicate that EC legislation has been merely formally transposed. However, what is clear is that the implementation and enforcement of the transposed Community norms is proving to be a task which is equally, if not more, difficult than the process of transposing the norms. In all of the examined areas, the Commission has repeatedly indicated the need for increased efforts in implementing and enforcing the transposed norms. With respect to competition law for example, the Commission has noted the need to focus on effective enforcement of competition

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[697] *2002 Regular Report*, *supra* note 139 at 130.
[698] See discussion, above, in Chapter I at n. 154.

provisions by the Office for the Protection of Economic Competition. Similarly, the Office for the Protection of Economic Competition has identified implementation as one of the greatest challenges of the process of approximation of the competition *acquis*.[699]

Likewise, in the field of environmental law, the implementation of Community legislation has presented a significant challenge in the process of approximation. This is particularly the case with respect to the significant costs associated with introducing the necessary measures, which must be borne not only by the government but also by the public sector.[700] Moreover, the implementation of environmental *acquis* has required modification of the administrative infrastructure which has been complicated by the concurrent reforms of the public administration, most notably at the regional level. Similarly, implementation of the company law *acquis* has not been unproblematic, as demonstrated by the difficulties encountered with the Commercial Register.

Consequently, it is clear that the process of approximation is a monumental task unprecedented both in scope and in breadth. The Czech Republic's obligation to approximate the *acquis* as a precondition to membership is unprecedented in that never have such exhaustive conditions been imposed on candidate countries aspiring for membership in an international organization.[701] Moreover, in certain cases, more stringent conditions are being imposed on the Czech Republic than on the existing

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[699] Interview with Ing. R. Gadas, Director of the Department for European Integration (14 May 2002).
[700] As noted above in Chapter III, the costs of implementing the environmental *acquis* have been estimated by the Czech government to amount to approximately 280 billion CZK.
[701] This enlargement poses a greater challenge to the candidate countries than under the previous enlargements, as not only has the *acquis* evolved since the last enlargement, but because of the broad and complex conditions that have been imposed in order to qualify for membership (see Grabbe & Hughes, *supra* note 13 at 1; Inotai, *supra* note 21 at 159).

Member States. For example, in competition law, the Czech Republic was obligated to transpose and implement an antitrust and merger regulation framework that mirrors that of the EC, whereas the Member States have not been required to do so.[702]

Invariably, given the scope and breadth of the *acquis communautaire*, the process of approximation will have significant implications on the legal order of the Czech Republic. However, these implications are not merely limited to the State, but will also irrefutably significantly affect civil society. Moreover, the process of approximation will continue to not only have immediate implications for the State and citizens of the Czech Republic. These effects will be felt for many years to come and will continue well beyond the Czech Republic's accession to the European Union.

A. CATALYSIST FOR REFORM

Following the collapse of the communist regime, the Czech Republic was faced with the task of completely overhauling its legal system. This required not only enacting new legislation that would fulfill the needs of a democratic state with a market driven economy, but also a restructuralization of the state administrative infrastructure. Accordingly, new legal institutes and principles needed to be introduced. Even prior to the conclusion of the Europe Agreement, the legislation of both the EC and of its Member States served as models on which new legislation in the Czech Republic was based. Thus, for example, the Act on the Protection of

[702] Ojala, *supra* note 346 at 74-75.

Economic Competition of 1991 incorporated certain principles of EC competition law with respect to abuse of dominant positions and restrictive agreements.[703]

Likewise, certain environmental legislation that was enacted immediately following the revolution was broadly based on comparable legislation in the Community and Member States. Hence, the Waste Act of 1991[704] and the Air Protection Act of 1991[705] both took into account the relevant corresponding EC legislation.

Nevertheless, the process of approximation has without doubt acted as a catalyst for reforming the Czech Republic in its transition to a democratic market oriented economy. Although the reform in the Czech Republic (then Czechoslovakia) began immediately following the demise of the communist regime, it is unlikely that the reforms would have been as comprehensive and extensive as that which have occurred as a result of the process of approximation. Moreover, had it not been for the process of approximation, certain sectors would probably not have been reformed so quickly. Environmental law is one such area that initially was a focus of reform immediately after the revolution but in which reforms were suspended in the middle 1990s in favor of focusing on those areas that were perceived to be more important, namely economic development.[706] In this respect, it should also be noted, that criticisms have been voiced that the process of approximation has, in terms of

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[703] *Zákon č.63/1991 Sb. o ochraně hospodářské soutěže*; see also I. Pelikánová, *Obchodní právo*, vol. 2 (Prague: Codex Bohemia, 1998) at 103, 105.

[704] *Zákon č.309/1991 Sb., o ochraně ovzduší před znečišťujícími látkami*; see also Federální shromáždění České a Slovenské Federativní Republiky, *Důvodová zpráva k vládnímu návrhu zákona o ochraně ovzduší před znečišťující látkami*, sněmovní tisk č.695 at 4.

[705] *Zákon č.238/1991 Sb., o odpadech*; see also Federální shromáždění České a Slovenské Federativní Republiky, *Důvodová zpráva k vládnímu návrhu zákona o odpadech*, sněmovní tisk č. 590 at 3.

[706] See *supra* note 455 at 3.

legislative reform, caused the neglect of areas that are not directly related or associated with the *acquis communautaire*.[707]

The process of approximation has in varying degrees been a catalyst for reform in two respects. First, as mentioned above, the process of approximation instigated extensive reform of the vast majority of legislation of the Czech Republic in order to achieve compability with the *acquis*. Secondly, the process of approximation has had the broader effect of serving instigating the reform of the state administration and judiciary.

Furthermore, the process of approximation has invariably had an impact on civil society in the Czech Republic. Although this effect has been limited to date given the relatively short time period of approximation, nevertheless, the process of approximation has and will increasingly continue to act as a propellant for changes within society, in particular in the mentality of the general public. This is due to the introduction of new legal institutes and principles. For example, the approximation of EC environmental law and policy and their implementation and enforcement will gradually help foster both greater environmental awareness and environmentally friendly modes of conduct in a society, which is still marked by the relics of the negation and destruction of the environment under the communist regime.

The same applies to the field of competition law. Under the communist regime, there was no need for competition law or policy given the existence of state sanctioned monopolies and a centrally directed economy.[708] Following the collapse of the communist regime, however, it was necessary to introduce a regulatory

[707] See *e.g.* I. Pelikánová, "Vliv harmoniace s evropským právem na české právo, zejména na právo obchodní" (2000) Acta Universitatis Carolinae –Iuridica 3-4/2000 at 25.
[708] Pelikánová, *supra* note 703 at 102-3.

framework that corresponded to the shift to a market oriented economy and that would promote a competitive business environment. Thus, provided that the transposed competition *acquis* is enforced and the norms are embraced by the business sector, the transposed norms will aid in the development of a competitive business environment in the Czech Republic.

B. INABILITY TO ADAPT LEGISLATION

One of the implications of the process of approximating EC legislation in the Czech Republic flows directly from the nature of the process of approximation. Given that both the obligation to approximate and the process of approximation are largely unilateral in nature and that the Czech Republic is obliged to takeover the entire *acquis communautaire*, the Czech Republic is not in a position to decide which norms to transpose. Accordingly, the obligation to approximate its legislation with the legislative norms of the EC necessarily entails that the Czech Republic takeover and implement the norms, standards and methods of regulating sectors as adopted by the EC. In the process, however, the Czech Republic loses the ability tailor its national legislation to the specific conditions present in the Czech Republic, namely that it is in a transition from a communist regime.

Moreover, this is highlighted by the fact that Community norms have generally not been drawn up to accommodate such needs, as they are generally targeted at furthering the integration and proper functioning of the common market. Given that both the economic position and administrative infrastructure is more developed in these states than in the candidate countries, the standards and norms of EC law presuppose the existence of an effective and efficient functioning state infrastructure.

In contrast, the Czech Republic is still in the process of reforming its state infrastructure and certain deficiencies in the public administration and the judiciary remain, which can hamper the proper implementation of the transposed norms. This is illustrated in the field of company law with the difficulties that persist with the Commercial Register.[709]

With respect to the divergent aims of EC and national legislation, antitrust and merger control is one example of an area of legislation and policy at the EC level that was conceived with a different objective. In Chapter II, it was outlined that one of the primary objectives of EC competition law is furthering the integration of the common market. Moreover, the scope of antitrust and merger control are only subject to regulation by the Commission if the conduct or transaction involves a Community dimension. In the event this condition is not met, the national competition regimes of the Member States apply. Although Member States have voluntarily moved towards aligning certain aspects of their competition legislation with that of the EC, they are under no obligation to do so and as such are free to devise their own regulatory regimes. In contrast, the Czech Republic is obliged to transpose these Community antitrust rules into its national competition legislation. Accordingly, the new Competition Act is largely modeled on the principles of EC competition law. However, the question remains whether a competition regulatory regime based on the EC model fulfils the needs of transitional economies given the particular specifics of these markets, namely a high degree of concentration.[710] Some

[709] *2002 Regular Report, supra* note 139 at 24.

[710] For a broad overview of the challenges faced in the development of competition policy in post-communist economies, see generally E. M. Fox, "The Central European Nations and the EU Waiting Room – Why Must the Central European Nations Adopt the Competition Law of the European

commentators have noted that since EC merger and antitrust legislation is limited in scope, the Czech Republic could adopt a separate national regime that reflects more closely its the particular needs for those activities that are purely national in scope.[711] However, the new Competition Act does not provide for any distinctions between these two regimes.

Similarly, given the degree of devastation of the environment and the high costs associated with its revitalization and the implementation of the environmental *acquis*, the question arises whether EC environmental policies and legislation are the optimal means of addressing the environmental problems present in the candidate countries, most notably those with significant environmental challenges like the Czech Republic. It has been argued that the "command and control" style of environmental regulation, which in the past significantly influenced Community environment regulation, may not be viable in transition economies.[712]

In order to alleviate the difficulties associated with implementing the *acquis* in the candidate countries, in theory, candidate countries were granted the opportunity to negotiate transitional periods for the implementation of the *acquis* in the pre-accession negotiations. However, in practice, the Commission has been reluctant to grant any transitional periods. Thus, for example in the field of the environment,

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Union" (1997) 23 Brook. J. Int'l L. 351; A. E. Rodriguez & M. B. Coate, "Limits to Antitrust Policy for Reforming Economies" (1996) 18 Hous. J. Int'l L. 311; W. E. Kovacic "Getting Started: Creating New Competition Policy Institutions in Transition Economies" (1997) 23 Brook. J. Int'l L. 403; T. Virady, "The Emergence of Competition Law in (Former) Socialist Countries" (1999) 47 Am. J. Comp. L. 229; W. E. Kovacic, "Institutional Foundations For Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement" (2001) 77 Chi.-Kent L. Rev. 265.

[711] See Ojala, *supra* note 346 at 74-75; Tichý & Arnold, *supra* note 80 at 817.

[712] See *e.g.* D. Lu, "Air Pollution Regulation in the Czech Republic: Environmental Protection in the Context of Political and Economic Transition" (1995) 13 Wis. Int'l L. J. 565 at 576. However, as noted above, Community environmental policy is increasingly influenced by the market incentives approach.

although the Czech Republic had initially requested seven transitional periods relating to the environment at the beginning of the negotiations on the chapter on the environment, it only succeeded in acquiring two.[713] This illustrates the prevailingly unilateral character of both the process of approximating the *acquis* as well as the pre-accession negotiations.

C. AFFECT ON TYPE OF MEMBER THE CZECH REPUBLIC WILL BE

Not only is the degree and success the Czech Republic achieves in approximating its legislation with that of the *acquis communautaire* a determining factor for its goal of becoming a member in the European Union, but it will also inevitably have an effect on the type of member the Czech Republic will be. Incomplete transposition as well as inadequate implementation of the transposed norms could seriously hamper the Czech Republic's position as a member of the European Union.

A recent example of the implications of insufficient preparation for membership can be illustrated on the case of the Czech Republic becoming a member of NATO. When the Czech Republic became a member in 1999, it was not sufficiently prepared to fulfill the obligations of membership, which significantly hampered its ability to function within the organization when it first joined NATO[714]Accordingly, if the Czech Republic succeeds in adequately transposing and implementing the *acquis communautaire*, this will help ensure that the legislation and state infrastructure are in place and capable of functioning within the European Union framework. Not only is this imperative for the effective enforcement of the

[713] As outlined in Chapter III, transitional periods have been granted for urban waste water management and packaging and packaging waste.
[714] I. Gabal *et al.*, *Česká republika a Evropská unie: přišel čas změny priorit - od vyjednávání ke členství* (2001), online:<http://www.gak.cz/files/rep_cz.html> (date accessed: 18 October 2002) at 4.

transposed legislation, but it will enable the public administration to play an active role in formulating policies at the Community level. Otherwise, there is a risk that the Czech Republic will remain in a passive role, incapable of effectively voicing its opinion and positively contributing to policies in the European Union. Moreover, this could have the effect that Community policies will be regarded by the general population as being "superimposed" on them, reminiscent of what occurred under the communist regime when Czechoslovakia was perceived as a "satellite country" of the Soviet Union. In turn, this could have irreparable consequences for the future development of the nascent democratic culture in the Czech Republic, as it would foster not only disenchantment with the government but with the concept of democracy as a whole.

D. TRANSPOSITION OR TRANSFORMATION

As outlined above, the obligation of the Czech Republic to transpose the *acquis communautaire* both under the Europe Agreement and generally as a precondition to membership in the European Union is a tremendous task, particularly in light of the current proposed time frame for enlargement foreseen for the beginning of 2004.[715] The simple task of transposing such a broad spectrum of legislation is in of itself an immense undertaking. However, as the Commission has repeatedly emphasized, the process of approximating the *acquis communautaire* by candidate countries is not limited to simply transposing the relevant measures into national legislation. Instead, as noted in the preceding chapters, approximation also involves both the

[715] See EC, Commission, "Door Opens to Signature in Athens of an Accession Treaty, April 2003", in Europa – Enlargement Weekly Newsletter (29 October 2002), online: <http://www.europa.eu.int/comm/enlargement/docs/newsletter/weekly_291002.htm> (date accessed: 4 November 2002).

implementation of the norms and the effective enforcement of the transposed measures.

Likewise, it has already been noted that the process of approximation has served as a catalyst for reform, one that has led to not only the reform of the legislation in the Czech Republic, but one which has also had an impact on the public administration, the judiciary and to a certain degree civil society. The approximation of the *acquis communautaire* in the Czech Republic has required transposing a vast quantum of EC legislation estimated to involve over 4 340 Community measures. As discussed in Chapter I, the Community norms subject to approximation directly involve over twenty nine sectors ranging from transport, agriculture and industry to social policy, employment and the four fundamental freedoms of movement.[716]

Nevertheless, certain areas that are generally perceived outside the scope of the Community *acquis* have been either indirectly been subject to approximation or have amended in light of the need to accommodate the transposed norms into the legal order of the Czech Republic. For example, the Code on Civil Procedure was amended to provide for the recent amendments to the Commercial Code.[717] Likewise, although constitutional law is generally considered to be outside the scope of the *acquis*, the Constitution had to be amended in order to provide for the application of Community law in the Czech Republic.

Apart from the broad scope of the sectors subject to alignment with the *acquis*, the process of approximation has necessitated the complete reform of both the

[716] See Chapter I, *supra* note 78 for a listing of the chapters.
[717] See *e.g. Zákon č.30/2000 Sb., kterým se mění občanský soudní řád*, amending the provisions govering proceedings relating to the Commercial Register; for a discussion of proposed amendments, see H. Pípková, "Vláda schválila euronovelu ObchZ a OSŘ" (2001) Právní zpravodaj č. 8.

judiciary and public administration. This, coupled with the introduction of new legal institutes and methods of regulation, has in practice meant that the process of approximation involves not only transposition, but in reality a complete transformation of the legal order in the Czech Republic. This transformation is not limited to adapting national legislation and the state infrastructure, but will invariably have an impact on each and every person in the Czech Republic. Hence, not only is the process of approximation a transformation of the legal order, it is also an implicit transformation of civil society in the Czech Republic.

Nevertheless, there are limits to the extent that legislation as a normative means of governing society's behavior may effect change in a given society, particularly one which is in a transition from a communist regime.[718] Simply stated, altering the legislation in a given society does not guaranty that that the adopted norms will in practice be implemented and enforced. Although it is role of the State to enforce legislation equally on all its subjects, a democratic state has only a limited ability to enforce legislation in so far as it cannot police all of the actions of the people. Accordingly, the due enforcement of legislation is inherently dependent on a society's acceptance of the norms. If this does not occur, then not only does the legal order not function properly, but there is the risk that the norms will only formally exist as a mere legal construction. This would not only impair the rule of law within

[718] See V. Cepl, "Bottlenecks in the Transformation of Eastern Europe" (2000) 4 Wash. U. J. L. & Pol'y 23 at 24-25. For a discussion on the role of habit and parallel cultures in the transition of Central and Eastern Europe states, see R. Janda, "Something wicked That Way Went: Law and the Habit of Communism" (1995) 41 McGill L.J. 253.

the state, but it would also lead to an increased risk that 'grey markets' and corruption will develop.[719]

This broader transformation of society in the Czech Republic, which began following the demise of the communist regime, has been fueled by the process of approximation. It is a transformation which will take many years if not decades to complete and the accession of the Czech Republic will by no means mark the end of this transformation. That a state adopts a constitution and a charter of rights and freedoms does not in of itself guaranty democracy.[720] Democracy and a functioning market economy can only be achieved by a change in the mentality of the people, as it is this which forms the backbone of democracy and a market economy.[721] As has the development of democracy and rule of law has taken many decades to achieve in developed democratic states, so will it take many years to achieve in the Czech Republic.

The process of approximation of EC law in the Czech Republic has transposed legal institutions, principles and norms embodying democratic ideals and aimed at promoting and ensuring the development of a common market. In the process, approximation has resulted in the transformation of not only of the legal order in the Czech Republic, but also of public administration and the judiciary. It is clear that the Czech Republic has made significant progress in aligning its legislation with that of the EC and, as a result, a legal framework has largely been put into place that ought to enable the Czech Republic to function as a member of the European Union.

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[719] In its 2002 Regular Report, the Commission notes the persisting problems of corruption in the Czech Republic, see *2002 Regular Report*, *supra* note 139 at 24-25.

[720] One has only to look at the names of former communist states, such as the Democratic Republic of Germany.

[721] See Cepl, *supra* note 718 at 32.

Nevertheless, given the difficulties that the Czech Republic continues to encounter with implementing and enforcing transposed EC norms, it must now focus its attention on ensuring that its state regulatory infrastructure is able to function effectively within the EU institutional framework. Only then will the Czech Republic be able to play a constructive role in the European Union and close the door on its communist past.

CONCLUSION

In order to fulfill its obligations ensuing from the Europe Agreement and to satisfy one of the conditions for membership in the European Union, the Czech Republic must align its legislation with that of the EC. Although initially more limited under the Europe Agreement, the scope of approximation has, as a precondition to membership in the European Union, been broadened to encompass areas that are not directly related to integration into the common market. The process of approximation involves not only the transposition of legislation, but also ensuring that the transposed norms are implemented and enforced. As a result, the process of approximation necessitates that the public administration and judiciary be adapted to accommodate the transposed norms. Given that the Czech Republic is undergoing a transition to a democratic market-based economy, the approximation of EC law has not only served as a catalyst for reform, but it has also resulted in the transformation of the legal order of the Czech Republic, one which will have a profound impact on the character of its emerging democracy.

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1968 Convention on the Mutual Recognition of Companies and Bodies Corporate, Comm. Bull. Suppl. No.2-1969 p. 7-14.

Single European Act (1986) OJ L 169/1.

Treaty on European Union of 7 February 1992, OJ C 224/1.

Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part (1993) OJ L 360/2.

Treaty of Amsterdam of 2 October 1997 OJ C 340/1.

Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (2001) OJ C 80/01.

Implementing rules for the application of the competition provisions referred to in Article 64(1)(i), (1)(ii) and (2) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part, and in Article 8(1)(ii) and (2) of Protocol 2 on ECSC products to that Agreement, as adopted by Decision No. 1/96 of the Association Council.

Implementation rules for the application of the provisions on state aid referred to in Article 64(1)(iii) and (2) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part, and in Article 8(1)(iii) and (2) of Protocol 2 in ECSC products to that Agreement, as adopted by Decision No. 2/96 of the Association Council.

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EC, *Council Regulation (EEC) No. 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European environment information and observation network* [1990] OJ L120/1 as amended by EC, *Council Regulation (EC) No. 933/1999 of 29 April 1999*[1999] OJ L 117/1.

EC, *Commission Regulation No. 240/96 of 31 January1996 on the application of Article 85(3) of the Treaty to certain categories technology transfer agreements* [1996] OJ L 031/02.

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EC, *Commission Regulation No. 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements* [2000] OJ L 304/3.

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EC, *Fourth Council Directive 78/660/EEC of 25 July 1978 based on article 54(3)(g) of the Treaty on the annual accounts of certain types of companies* [1978] OJ L 222/11, as subsequently amended.

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EC, *Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds* [1979] OJ L 103/1, as subsequently amended.

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