Caucasus Journal of Social Sciences

Volume 10

Issue 1

The University of Georgia Press

Tbilisi

2017

Caucasus Journal of Social Sciences

Volume 10

Issue 1

Contents

Business and Economics

Law

Linguistics and Literature

Business and Economics

Lemonjava Givi,
The University of Georgia, Georgia

Forecasting of Currency Exchange Rates Variance

The report reviews currency exchange rate forecast issues. For this reason, corresponding time series have been studied based on which features of this type of series have been determined. Taking into account nature of these features, several models have been processed for currency exchange rate forecasting. Comparing the results of the models, the best model is selected and used for estimate currency exchange rate's future movements.

Key words: forecasting, currency exchange rates; ARCH and GARCH models

Introduction

Trading currency positions can be considered to be a financial instrument. In financial trading, one of the key tasks is to try to capture the movement of the underlying asset, which is usually known as volatility. The volatility is the conditional standard deviation of the underlying assets return (r_t) and denoted by σ_t. This volatility depends on the trading each day and some previous days [1]. As with other financial time series, one of the main characteristics of the volatility of currency exchange return is that it appears in clusters (see Figure 1, 2 and 3). The second is that the volatility changes over time and in most cases stays within some spans. In other words, this kind of data suffers from heteroskedasticity.

In recent years, especially with regard to financial applications, ARCH [2] and Generalize ARCH (GARCH) models have received ample attention for dealing with heteroskedasticity [3]. The aim in this paper is to assess empirically the adequacy of this class of models in currency exchange return volatility forecasting. To accomplish this, we consider three currencies (USD, EUR and Georgian LARI) exchange rate sequences and evaluate how well the Generalized Autoregressive Conditional Heteroskedasticity (GARCH) model replicates the empirical nature of these sequences.

To assess the forecast accuracy of the GARCH model we need the time series to be stationary. One way to make financial time series stationary is to use continuously compound rate of return. If we denote the exchange rate at time t by P_t, we can transform the sequence of exchange rates as follows:

$$r_t = \ln\left(\frac{P_t}{P_{t-1}}\right) = \ln\left(P_t\right) - \ln\left(P_{t-1}\right),$$

where r_t - the continuously compound rate of return at time t. The compounded daily return, r_t can be computed simply by taking first difference of the natural logarithms of daily prices.

The GARCH (n, m) model can be expressed as:

$$\eta_t = \sigma_t \varepsilon_t,$$
$$\sigma_t^2 = \omega + \sum_{i=1}^{n} \alpha_i \eta_t^2 + \sum_{j=1}^{m} \beta_j \sigma_{t-j}^2, \qquad (1)$$

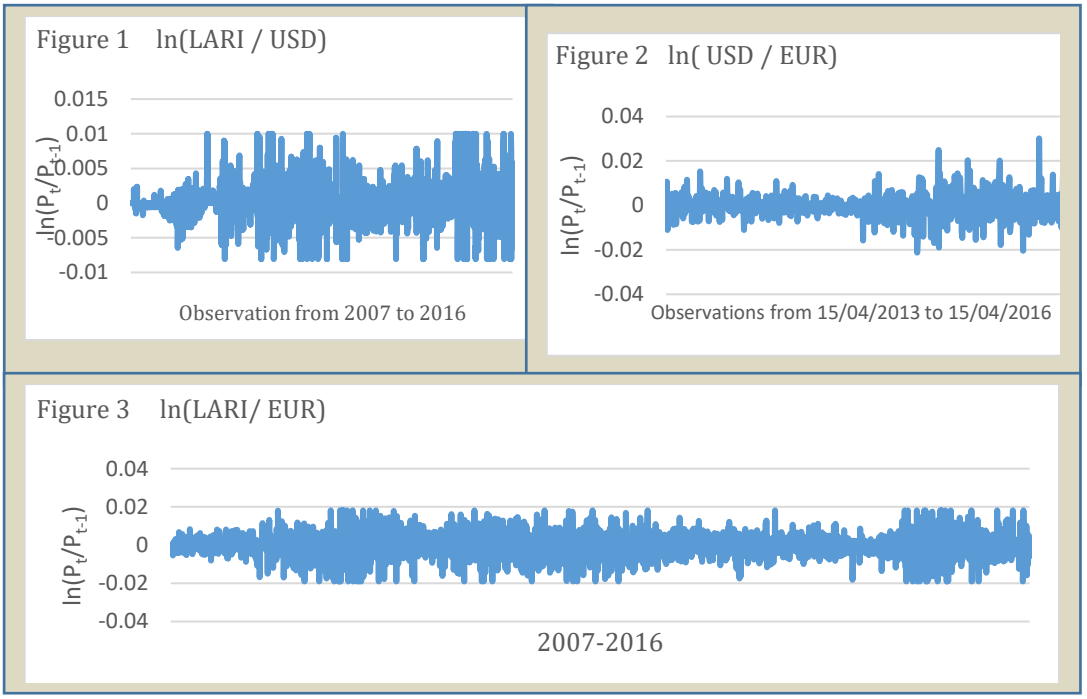
where $\varepsilon_t \approx N(0,1)\, iid$, $\eta_t = r_t - \mu_t$, the parameter α_i is the ARCH parameter and β_j is the GARCH parameter and

$\omega \geq 0, \alpha_i \geq 0, \beta_j \geq 0$ *and* $\sum_{i=1}^{\max(n,m)} (\alpha_i + \beta_i)$.

In this paper we use a large sample size (more than 2 300 observations) in order to get the best results when estimating standard errors even with heteroskedasticity. We will investigate if our large set of financial data can be fit to a time series model, and which model will provide the best fit. Figure 1, 2 and 3 show the continuously compounded daily returns, respectively, from XE: (1) (LARI / USD), (2) (USD / EUR), (3) (LARI / EUR). These figures show behavior of currency trading return and clearly demonstrate some kind of dependence between conditional variances in consecutive moments. In other words, there is an ARCH affect and we will examine GARCH model for these time series.

The GARCH model also takes into account volatility clustering and tail behavior, which are important characteristics of financial time series. It provides an accurate assessment of variances and covariances through its ability to model time-varying conditional variances. GARCH allows for modeling the serial dependence of the volatility. Due to the conditional property of GARCH, the mechanism depends on the observations of the immediate past, thus including past variances into explanation of future

variances. Financial return volatility data is highly influenced by time dependence, which can cause volatility clustering. Time series such as this can be parameterized using the Generalized Autoregressive Conditional Heteroskedasticity (GARCH) model, which can then be used to forecast volatility.



All these three figures indicate that there are ARCH effects and there are some stationary parts and much more stationary parts. The financial return volatility data is highly influenced by time dependence, which, in these cases, evidenced in volatility clustering. We use GARCH class models for time series such as and parameterize it and forecast these three currencies volatility.

We could have easily performed a transformation on a non-stationary data set to make it stationary. This process is called differencing. The most basic method of differencing consists of simply taking the difference between consecutive observations.

USD/EUR Exchange Rate

We used GARCH (1, 1), GARCH (1, 2), GARCH (2, 1) and GARCH (2, 2) models and have obtained following results:

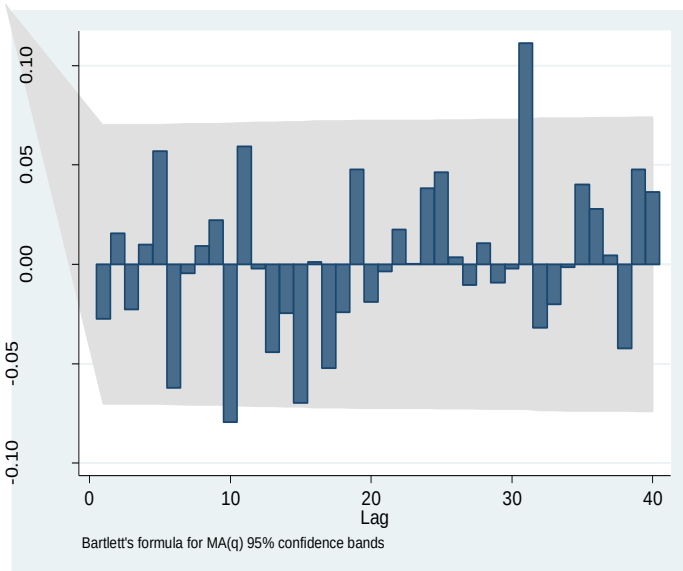
1. GARCH (1, 1): $\sigma_t^2 = 0.0011093 + 0.0354899\ \eta_{t-1}^2 + 0.9612536\ \sigma_{t-1}^2$

2. GARCH (2, 1):
$\sigma_t^2 = 0.0010388 + 0.0868201\ \eta_{t-1}^2 - 0.0560561\ \eta_{t-2}^2 + 0.9660324\ \sigma_{t-1}^2$

3. GARCH (1, 2):
$\sigma_t^2 = 0.0020431 + 0.0628202\ \eta_{t-1}^2 + 0.1186592\ \sigma_{t-1}^2 + 0.8124835\ \sigma_{t-2}^2$

4. GARCH(2,2):
$\sigma_t^2 = 0.0012239 + 0.0894452\ \eta_{t-1}^2 - 0.0526774\ \eta_{t-2}^2 + 0.78835538\ \sigma_{t-1}^2 + 0.1711424\ \sigma_{t-2}^2$

All these model have the same ACF functions as shown in next figure:



Except for two residuals, all others are within 2 standard deviations of the sample autocorrelation. GARCH (1, 2) and GARCH (2, 2) do not fit the conditions given in (1). For the left, now we have to check normality of these models residuals distribution. If we look at their residuals skewness and kurtosis, we will see that both are slightly skewed to the right side (0.03), but both have about the same kurtosis of about 2.77 which do not give enough arguments to reject formality of their residuals.

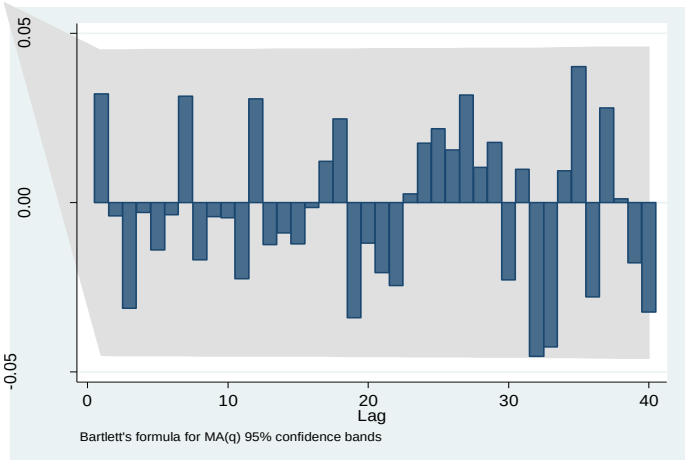
LARI/EUR Exchange Rate

Let consider the same GARCH models as previous.

1. GARCH (1, 1): $\sigma_t^2 = 0.0019377 + 0.0473765\ \eta_{t-1}^2 + 0.9486566\ \sigma_{t-1}^2$
2. GARCH (2, 1):
   $\sigma_t^2 = 0.0019363 + 0.0484219\ \eta_{t-1}^2 - 0.0011433\ \eta_{t-2}^2 + 0.9487533\ \sigma_{t-1}^2$
3. GARCH (1, 2):
   $\sigma_t^2 = 0.0019851 + 0.0484657\ \eta_{t-1}^2 + 0.9234984\ \sigma_{t-1}^2 + 0.0239673\ \sigma_{t-2}^2$
4. GARCH(2,2):

$$\sigma_t^2 = 0.0034587 + 0.0444576\ \eta_{t-1}^2 + 0.04026644\ \eta_{t-2}^2 + 0.16149546\ \sigma_{t-1}^2 + 0.7466865\ \sigma_{t-2}^2$$

Following figure of ACF Plots of the Residuals is:



For all these GARCH models residuals' skewness are almost the same with negative sign (-0.098) and kurtosis – 2.93. Hypothesize that residuals of these models follows a normal distribution we can't reject based on these evidences. In this case, only GARCH (1, 1) model is appropriate.

LARI/USD Exchange Rate

The ACF, as the name implies, shows a self (auto) correlation or relationship among the observations. The next Figure 4 gives evidence that shows the existence of autocorrelation in this time series. In other words, there is a serial dependence in the variance of the data. A geometrically decaying ACF plot would indicate that we should use some possibly a combination of an AR and MA model. Notice that the fist lag of the ACF plot is close to zero, indicating that our data set does not appear to have much correlation between observations. The PACF (see Figure 5) is used to determine the appropriate order of a fitted ARIMA data set. The PACF is used to determine the appropriate order of a fitted ARIMA data set. We can check this by looking at the plot of the partial autocorrelation function (PACF). The most we could expect from an ARIMA model would be MA (2) function.

Figure 4 The autocorrelation function

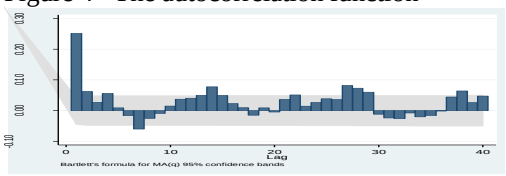
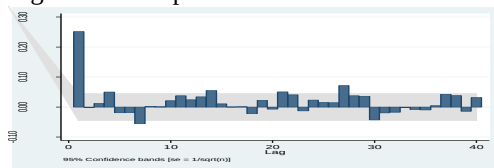


Figure 5 The partial autocorrelation function



The autocorrelation function of MA (2) model's residuals is shown in Figure 6. By viewing the ACF and PACF, the evidence is weak towards finding a good fitting AR model for the data. According to the ACF and PACF the data looks almost random (see Figure 7) and certainly shows no easily discernible patterns. This would support the appearance of the time series plot since the plot looks a lot like white noise except for the change in the spread (variation) of observations. Such heteroskedasticity would most likely not be evident in a truly random data set.

Figure 6 MA (2): Moving Average Models

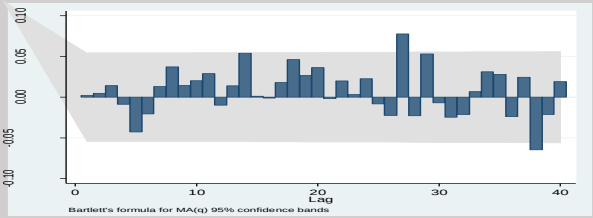
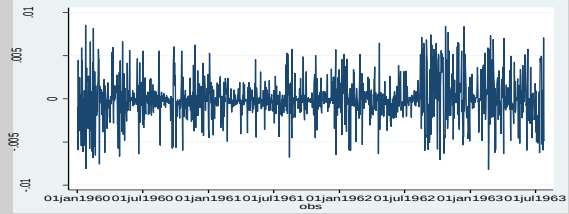


Figure 7 MA (2): The plot of residuals



Now we will combine GARCH model with MA (2). The results of this are:

MA (2) & GARCH (1, 1):

$$r_t = 0.01094 + 0.3245992\ \varepsilon_{t-1} + 0.1330251\ \varepsilon_{t-2}$$

$$\sigma_t^2 = 0.000146 + 0.1258626\ \eta_{t-1}^2 + 0.8883365\ \sigma_{t-1}^2$$

We don't represent other models because of their parameters some of which is insignificant and their less fitted characteristics to given time series patterns.

Our choices for the best models in above sections are based on assessing the residuals of the considered models. For this goal, we looked up the ACF plots of residuals, probability plots of the residuals and assessed each model with respect to the Ljung – Box statistic. Then, to check the normality assumption of the errors, we used the normal probability plots and histograms of the fitted GARCH models which showed that their errors are very close to normal distribution. The skewness and kurtosis values did not show exactly symmetric matters of errors but tails are not too much heavier than normal distribution. In addition, we simulated data from all GARCH models and evaluated the simulation data with respect to the given empirical time series. The comparison of these characteristics of considered models shows that in common, the GARCH (1, 1) model was the best in all cases.

References

Bollerslev, T. (1986). Generalized Autoregressive Conditional Heteroscedasticity. *Journal of Econometrics, 31*, 307-327.

Engle R.F. (1982). Autoregressive Conditional Heteroscedasticity with Estimates of the Variance of United Kingdom Inflation. *Econometric, 50*, 987-1007.

Ruey, Tsay S. (2005). *Analysis of Financial Time Series*. Hoboken, New Jersey: John Wiley and Sons, Inc., pp. 98 – 130.

Tchitchinadze Revazi,
The University of Georgia, Georgia

Stock Market Development In Georgia

The goal of this paper is to review the development prospects of stock market in Georgia. The change of economic system in Central and Eastern Europe in 1990s resulted in rapid economic growth. This led to the rise of various financial institutions, especially the development of stock markets. The existence of stock markets in the developing countries is associated with the establishment of free market system and democracy. Therefore, developed countries attach significant importance to the development of stock markets in third countries.

Influence of internal and external factors on Stock market development in third countries is reviewed in this paper. External factors include the establishment of successful economic models through international financial institutions, financial aid, and sharing of best practices in the field. Internal factors include the impacts of sustainable banking systems, pension funds, and insurance companies on stock market operation in developing countries

Keywords: Georgian Stock Market; Coercion, Emmulaton; learning; Emerging market.

Economic globalization creates opportunities and challenges for developing countries. The main problem for policy makers is which type of economic structure they should adopt to promote economic prosperity.

Empirical knowledge shows the existence of a strong correlation between stock market development and economic growth, since well-developed stock markets can significantly increase a company's capital and ability to implement their future projects (Guglielmo Maria Caplare, Peter G. A. Howells, and Alaa M. Soliman, 2004, pp. 34-36). If we go through the literature, a considerable amount of research suggests that the relationship between stock markets and economic growth is positive and that stock markets often work as a barometer of business direction (Gerald, Weber, & Lounsbury, pp. 1323-1324) . There are some economists who are critical of stock markets, though. Many times stock markets have been blamed for economic crises, like the Great Depression in 1929 and Credit Crunch in 2008. The main attack against the stock market came from John Maynard Keynes; he termed the stock market as a gambling casino where players are coming to place bets, and called for fundamental reforms. Despite Keynes's theory about stock markets, a growing literature argues that stock markets provide financial and economic growth. Research shows stock market development can facilitate investment in different sectors of economy (Smith & Greenwood, 1996, pp. 146-148).

Role of Economic Policy in Local Market Development

For past decade, emerging markets have surged not only in Eastern Europe and Asia, but in Africa too. According to the IMF, stock market development is a core component of most domestic financial liberalization programs. In other words, without the development of stock markets, any financial liberalization program is incomplete. (Simmons, Dobbin, & Garrett, pp. 781-787). Research shows that countries with well-developed stock markets have strong banking systems, strong property policies, and low political risk. This last factor is

especially important in investment decisions as it has strong effects on the cost of equity.

At the end of 70's commercial banks played an important role, because only they had the resources to finance companies' growth. At the same time, a huge amount of money was lent, long term, to the governments of developed countries. This bank lending process ended in 1982 when the Mexican government stopped paying debts. This was a signal of the beginning of the debt crises throughout the developing world. The rest of 80's was called the "failure decade" in development world (Manzocchi, 1999, pp. 52-65).

In response to these failures, the "Globalization Project" encouraged market-based economic development (McMichael, 1996, pp. 61-65). This model was based on using private investment funds for developing economies. Therefore, in 1990s, there was a stream of market liberalization. This gave opportunities to the foreign investors to buy domestic equity. The stocks of emerging markets became attractive to institutional investors from the countries with advanced economies (Bekaet, Harvey, & Lundblad, 2005, pp. 21-30). As a result, stock exchanges spread around the world. According to the World Bank in 1986 there were 19 emerging market country funds and 9 global market funds. Even investors were aware of emerging market funds because of the high level of risk and price volatility and by 1995 this number increased and there were over 500 country funds and 800 regional or global funds.

Some markets had significant growth while others were not so successful. For example in 2000 the trading at the Swaziland stock exchange was limited to a total of 50 transactions for the five listed equities. At the same time, the Shanghai stock exchange had rapid growth with 100 million transactions as China became of the world's largest development economies. Creating a new stock exchange requires attention to detail as well as internal and external factors. Internal factors are: economic development, political

system, ideology and prior institutional endowment. These ideas are based on several hypotheses proposed by Weber:

> "1. The more financially dependent country is, on its aid from the IMF and the World Bank, the more, likely it is to create stock exchange, and this stock exchange is smaller, then those which was created without such aid. 2. Stock exchanges in the countries favoring investor based systems (characterized by Protestantism, British colonial influence, political democracy, and non socialist ideology) increase the likelihood of stock exchange adoption. 3. The more a country's regional neighbors and partners have adopted stock exchanges, more likely the county is to create a stock exchange." (Gerald, Weber, & Lounsbury, pp. 1323-1324) .

External Factors that Affect Development of Financial Markets

In his their review Simmons, Dobbin and Garrett analyzed external attributes and described four mechanisms of international diffusion: coercion, competition, learning and emulation (Simmons, Dobbin, & Garrett, 2009, pp. 790-798) . **Coercion** occurs when states with strong economy impose their models on countries with weaker economy. In this case motivation, experience and sometimes financial assistance come from outside of the country. These factors impact diffusion either directly or through the nongovernmental organizations. **Competition** occurs when state adopts a policy thought to provide advantages relative to competitors. It's a more decentralized strategy for policy diffusion. In this case policy helps governments to compete with each other for foreign capital and export market share. To achieve this goal, governments should simplify regulatory requirements, reduce tax and improve the investment environment. Sometimes to attract foreign investment they slash social spending and environmental and labor regulations. **Learning** is a third mechanism diffusion. The idea is that the experience of others provides information on

the effectiveness of policies. The rationality for this action rests on exploring effective solutions to given problems. Learning mechanisms are frequently used by governments to build new effective domestic policy. Organizations like the IMF, and the Organization for Economic Cooperation and Development analyzed different reports, reviews, and identify best practices which then became then powerful policy instruments for countries with developing economies. Usually learning takes place when successful policy changes in one country stimulates similar changes in other countries. **Emulation** is a forth mechanism for diffusion. The basic idea behind emulation is: "the desire of actors to conform of widespread norms and socially valued policies" (Torben, 2011, pp. 7-9). In other words, developing countries may adopt policies and create new institutions just for global legitimacy, and in this case the technical functionality of policies is unimportant or they just have symbolic purpose. (Polillo & Guille´n, pp. 1766-1768). Western countries' economy models served as templates for how developing countries should manage their economies. Most of western countries created their stock exchanges in the 19th century and they are considered to be core institutions. The expansion of core institutions in the 1990s stimulated the huge spread of exchanges in developing countries. Often famous economic experts, policy makers, NGO-s could influence developing countries governments by just making arguments for stock exchanges.

The United States played a main role in the economic liberalization of Latin American countries, but their influence operated through the preference of government leaders who sent financial ministers to train in the United States, rather than through young economists educated at the best U.S. universities. Whereas the logic of development suggests that countries should adopt certain programs when they are ready for them, word polity theorists have found that countries adopt policies that they cannot carry out in reality.

Emerging Stock Markets and Economic Growth

Above we discussed the impact of external factors on stock market development, but internal factors also play a huge role in stock market growth in developing countries. A strong banking sector, well-developed pension funds, insurance companies and other financial institutes play a significant role in stock market development.

The process of stock market development has been quite different in developing countries. Over the past few decades, the world stock market have surged, and emerging market have huge stake in this process. New markets have been established in Eastern European, Asian and African countries (Charles Amo Yartey, 2007, pp. 13-16). Some of those countries have made great progress in developing their stock markets. Financial markets of advanced economies for past 30 decades have become increasingly integrated due to a number of internal factors: 1.deregulation and internationalization of financial markets in well-developed countries; 2. Introduction new financial instruments allowing more risky and bigger financial investments, (like stock options, futures) 3. The increasing role of institutional investors on the stock market.

Later we will discuss stock market development in Eastern European countries using market indicators and theories of stock market development (Butsa, 2008, pp. 15-20). In order to measure the development of stock markets, Butsa used some market indicators like the **market capitalization** ratio-the value of listed stock exchange shares to the GDP of the country. This ratio shows the relative weight of the stock market in the country's economy. **Total value traded/ GDP** – calculated by dividing the total shares traded by GDP. **Turnover ratio -** calculated by dividing total shares traded by market capitalization. This measures trading relative to the size of stock market and it helps to identify small stock market with high growth potential. **Volatility –**statistical measure of the dispersion of returns for the stock market index**. Institutional and regulatory indicators** shows the level of development of

regulatory and market institutions, which is crucial factor for successful stock market development. Now we will take a look at how stock markets in developing countries are organized and explore some of the differences between them.

Polish Stock Exchange

The first stock exchange in Poland opened in Warsaw on May 12, 1817. The exchange traded primarily in bills of exchange and bonds. The exchange started full-scale trading in the second half of the 19th century. After the Germany- Russian invasion of 1939, the stock exchange in Poland was closed. In 1991 after the fall communism, the Warsaw Stock Exchange was founded again. In the early 1990's the privatization process used in Poland did not require mandatory listing of companies on the stock exchange. The Warsaw Stock Exchange had only nine listed companies its first year of operation. After five years this number increased to 83, by the end of 2007 there were 351. Now there are more than 400 listed firms including Italian bank Unicredit. Another 220 smaller companies are listed on New Connect, Warsaw's equivalent of London's Alternative investment market. The advantage to being listed on this market is better visibility if they are not also listed among thousands of others on the NYSE or LSE. This stock market has grown rapidly benefiting from Poland's privatization program. As a result, hundreds of state owned businesses have been auctioned on the stock market including big energy companies which have sold for $2 billon (Kollewe, 2011).

In 2013 at the Warsaw IPO summit, Georgian companies made a request to be listed on the Warsaw Stock Exchange. They represented several sectors of Georgian economy. They expected to raise their capital and extend businesses. The Georgian companies major problems included that Georgia is not a member of European Union, which meant that there was a more complicate process for listing their securities on the WSE. Before 2012, the strategy of WSE was concentrated on domestic market. The new CEO Pawel Tamborski designed a new strategy oriented on rapid grow. He prefers

foreign listings and this gave Georgian companies a good opportunity to reach foreign investors. It was not easy to execute this plan. Both countries need to create an operational link for a Central Security Depository (CSD), but Georgia at this moment does not have technical capabilities to do so. Georgia could only build a CSD link indirectly.

The Warsaw Stock exchange uses the WIG20 index to measure market performance, which is a capitalization-weighted index. It contains the 20 biggest and most traded companies. To be included in the WIG20 basket, companies have to meet several requirements including that the number of shares in the free float should exceed 10% and that the value of the shares that free float should be larger then €1,000,000. The first value of the index was 1000. The highest level 4000 was reached on October 9 2007. (Figure 1) This index was used until the end of 2015 after which the WIG30 will take its place (Warsaw Stock Exchange, 2014) .

Index calculation

$$WIG20 = \frac{\mathrm{P(i)} * \mathrm{S(i)}}{(\mathrm{P(0)} * \mathrm{S(0)})} * 1000{,}00$$

S(i) – Weighting of an index 'i' participant during a certain session

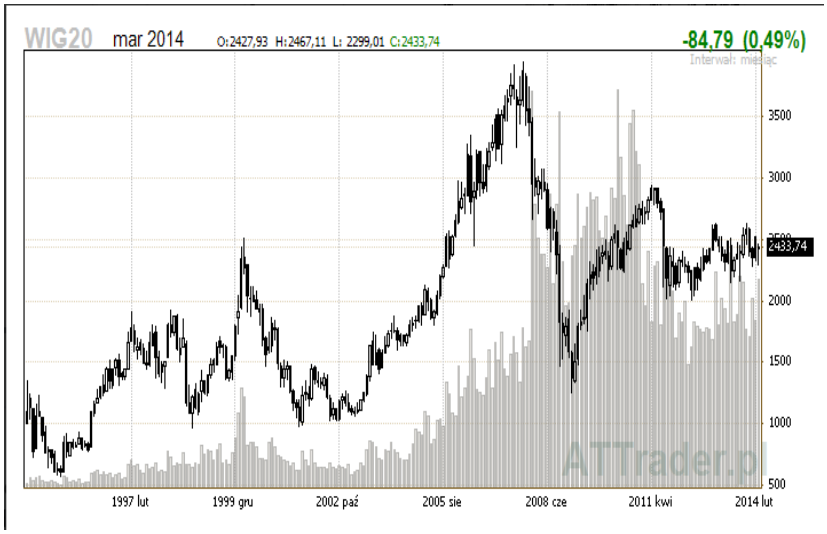
P(i) – Price of an index 'i' participant during a certain session

S(0) – Weighting of an index 'i' participant during a session at baseline date

P(0) – Price of an index 'i' participant during a session at baseline date

K(t) - Index adjustment factor during a certain session

Figure 1



One of the reasons behind the Warsaw Stock Market's performance was the pension reform made in the country (Butsa, 2008, pp. 21-24) As a result, pension funds became big institutional investors, as they were investing 95% of their funds into domestic securities.

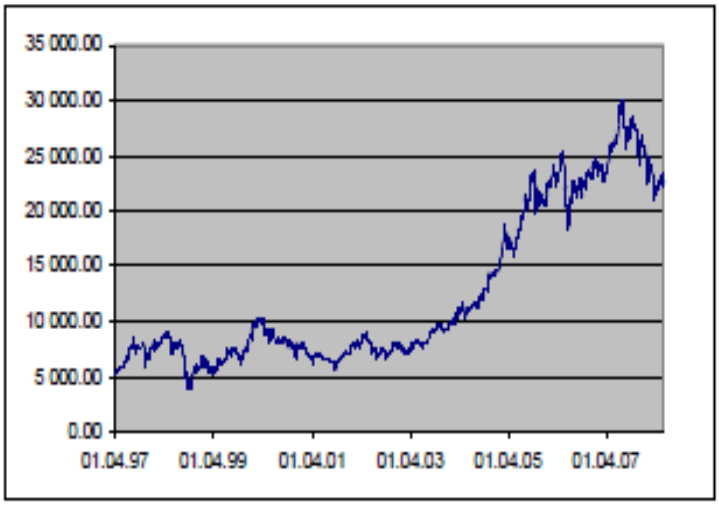
Today the exchange has a market value of €142bn which is bigger than the much older Viennese stock exchange, as well as stock markets in Prague and Budapest. High shares of foreign investors are trading on the Warsaw Stock Exchange and this gives it its international status. The stock exchange is close to achieving its ambition of becoming a regional hub in Eastern Europe.

Hungarian Stock Exchange

The predecessor of today's Budapest Stock Exchange started on January 18, 1864 in Pest. Starting in 1889 BSE became international stock exchange and stock prices of the companies listed on the BSE were also published in Vienna, Frankfurt, London and Paris. After World War II, the Hungarian government nationalized most companies and closed the Budapest Stock Exchange. On June 21 1990 the Budapest Stock Exchange was reopened with 41 founding members and just single equity trade.

In April 2000, the BSE Council decided to convert into a business association. In 2004 major changes happened in the ownership structure of the BSE. A majority stake in the BSE was purchased by Austrian Banks and Vienna Borse. Since 2010, the BSE has been a subsidiary of the CEESEG AG holding company, which owns 50.45 % of the BSE. This has given them an opportunity to integrate into larger European family.

The BSE index is a capitalization-weighted index adjusted for free float. This index tracks the daily price performance of only large, actively traded shares on the BSE. The shares account for 58% of the domestic equity market capitalization. The index has a base value 1000. (http://www. loomberg.com/ quote/BUX:IND) (Budapest Stock Exchange Budapest Stock Index, 2014)



Source: Homepage of the Budapest Stock Exchange.

Georgian Stock Market

The Georgian Stock Exchange is the only organized security market in Georgia. The Georgian Stock Exchange (GSE) was established in 1999, by a group of security market professionals, leading banks investment, and insurance companies with the assistance of the USAID. Official trading at the GSE began in March 2000. In 1999, through the EU-Georgia Association Agreement, the Law on Securities Market of Georgia (LSM) was adopted. LSM provides investors with proper and accurate information. (The Capital Markets Working Group, 2015, pp. 9-11).

The number of companies trading increased significantly and at the end 2004 reached 277. In 2006, Bank of Georgia (GSE:BOG), listed at the GSE since 2001, issued an IPO at the London Stock Exchange and raised $160 million. In 2007 a remote system was implemented at the GSE. In 2010 the stock exchange indicator G&T Index was introduced. This is a price-weighted index which includes 8 listed companies. Even though there are more than 2000 companies listed on stock exchange, just some of them regularly trade on the stock exchange. This means that GSE is an undeveloped stock market. The total market capitalization is almost $1 billion and the daily turnover is $2,000 (Loladze, 2012). GSE operates on two levels A and B. GSE had significant growth through 2007 with trade sessions increasing and the number of successful IPOs hit the market. The situation changed in 2008 when an amendment to the Law on the Security Market legalized over-the-counter trading. This gave companies listed on the GSE the chance to trade outside of exchange.

Table №1. represents companies' performance listed on GSE. (The Capital Markets Working Group, 2015, pp. 45-54)

LISTED COMPANIES - LIST A

Code	Title	Number of Issued Securities	Nominal Value		Charter Capital	ISIN	Comment
#EBR03L	European Bank for Reconstruction and Development	107	GEL	1000000.000	0	GE8790603384	
GEB	Bank of Georgia	27,821,150	GEL	1.000	43,308,125	GE1100000276	

LISTED COMPANIES - LIST B

Code	Title	Number of Issued Securities	Nominal Value		Charter Capital	ISIN	Comment
#GWP01H	Georgian Water And Power	2,600	GEL	1000.000	208,469,000	GE2700603329	
$GLC01H	Georgian Leasing Company	10,000	USD	1000.000	10,000,000	GE2700603246	
$m203H	m2 Real Estate	20,000	USD	1000.000	3,524,058	GE2700603295	
$M204J	m2 Real Estate	25,000	USD	1000.000	4,179,947	GE2700603436	
$MCE01H	JSC "Medical Corporation EVEX"	15,000	USD	1000.000	24,165,000	GE2700603303	
$NKR01I	LTD Nikora Trade	5,000	USD	1000.000	11,175,000	GE2700603360	
BANK	Liberty Bank	5,502,254,354	GEL	0.010	75,000,000	GE1100000300	
WINE	Teliani Valley	369,404,255	GEL	0.010	4,000,000	GE1100003130	

There are some serious reasons for the low level of development of the stock market in Georgia. First of all, high interest rates force investors to deposit money in banks (some commercial banks have 8% return on long-term deposits). The Georgian banking sector is distinguished from the European banking system firstly, by the small role of its banking activities, like deposit, loans and payments. Secondly, the government's economic policy actively interferes in the existing financial relationships instead of strengthening regulatory institutions. As a result, companies protected by the government have no desire to be listed on a stock market. Moreover they use their connections with the government and banking sector against the stock exchange.

Some essential steps should be taken to build a well-developed financial market in Georgia: 1. To improve the reputation of GSE, the government should increase EU regulation on LMS. 2. For companies listed on GSE, the dividend and capital gains tax should be eliminated. 3. There needs to be a significant increase in state owned companies shares traded on GSE. (Georgian Railway; Georgian Oil and Gas Corporation; Telasi; TBIL-AVIAMSHENI; Electricity System Commercial Operation). 4. Reporting requirements should be improved. (The Capital Markets Working Group, 2015, pp. 72-73)

References

Bekaet, G., Harvey, C., & Lundblad, C. (2005). Does financial liberalization spur growth? *Journal of financial economics, 77*, 3-55.

Budapest Stock Exchange Budapest Stock Index. (2014, September 08). Retrieved from bloomberg: http://www.bloomberg.com/quote/BUX:IND

Butsa, Y. (2008). *Stock markets development in Eastern European Evidence from Poland Hungary, Russia and Ukraine*. Budapest: Central European University, Department of Economics.

Charles Amo Yartey, C. k. (2007, August). Stock Market Development In Sub-Saharah Africa: Critical Issues and Challenges .

Gerald, D. F., Weber, K., & Lounsbury, M. (n.d.). Policy as math and ceremony? The global spread of stock exchanges, 1980-2005.

Guglielmo Maria Caplare, Peter G. A. Howells, and Alaa M. Soliman. (2004). Stock Market Development And Economic Growth: The Causal Linkage. *Journal Of Economic Development 33 Vol. 29, #1, June* , 33-36.

Kollewe, J. (2011, April 5). *Warsaw stock exchange turns 20 with more than 400 listed firms*. Retrieved from World Affairs: http://www.theguardian.com/world/2011/apr/05/warsaw-stock-exchange-poland

Manzocchi, S. (1999). Capital Flows To Developing Economies Throughout The Twentieth Centuary. . *Finencial Globalization and Democracy In Emerging Markets*, 51-73.

McMichael, P. (1996). Development and social change: A global perspective. *Thousand oaks*.

Polillo, S., & Guille´n, M. (n.d.). Globalization pressures and the state: the wordwide spread of central bank independence. *American jounal of sociology, 110*, 1764-1802.

Simmons, B. A., Dobbin, F., & Garrett, G. (2009). *Introduction: The International Diffusion of liberalism* .

Simmons, B., Dobbin, F., & Garrett, G. (n.d.). Introduction: the international diffusion of liberalism. *International organization, 60*, 781-810.

Smith, B., & Greenwood, J. (1996). Financial markets in development, and the development of financial markets.

The Capital Markets Working Group. (2015). *The Georgian Capital Market.* Tbilisi: Strengthening Domestic Resource Mobilization.

Torben, H. (2011, December). Mechanism-based thinking on policy diffusion. *A review of current approaches in political science, 34*.

Warsaw Stock Exchange. (2014, October 27). Retrieved from Warsaw Stock Exchange: http://www.warsawstockjournal.com/

Law

Bobokhidze Mariami,
The University of Georgia, Georgia

The Concept of the "Best Interests" of the Child and its Application in Family Affairs

The article will illustrate an important role of the "best interest" concept of the child regarding realization and protection of children's rights. It will concentrate on the way of its practical application together with the difficulties arising around the concept, particularly in family related cases, where a child is in a need of special care and treatment. After determining the role of the "best interest" concept regarding realization of children's rights, its subsequent problems of interpretation and determination, the paper will try to answer the question whether the concept is in fact an effective mechanism in guaranteeing protection of their rights.

Keywords: family affairs, child, special care, rights.

Introduction

The concept of the "best interests" of the child has existed for a long time; however, its importance has grown since it has been established in several basic international legal instruments designed to protect rights of children. The notion has been developed after recognition on international level, as well as by a number of jurisdictions, of the fact that children indeed can be regarded as possessors of rights. The Convention on the Rights of the Child, adopted by United Nations (UNCRC) in November 20, 1989, accepted to be one of the fundamental international legal instruments in protecting rights of children, is a prominent example of acknowledging children as holders of rights. The concept of the best interests of the child in UNCRC serves exactly the purpose to lead to recognition that children possess rights, similarly as adults do (however the list of rights children acquire is limited in comparison with adults). Correspondingly, it is not surprising that the term – "best interests" of the child first time has been adopted by UNCRC, which has become not only provision leading to a fundamental right, but also a principle that must be applied by contract states in realization of rights of children (Council of Europe, 2016, p. 33). The aim of the establishment of the notion of best interest is to build up boundaries and frameworks for parents or other persons, empowered to make decisions on behalf of children (Council of Europe, 2016, p.31). Thus, the best interest principle is of fundamental importance designed to ensure the overall well-being of children. Furthermore, it has been recognized universally as a general principle (Council of Europe, 2016, p.19).

The first reported cases date back to the 18th century, when English law gave fathers the possibility to appoint guardians, bestowing them with decision-making powers on behalf of their children and the Chancery courts could supervise these guardians "for the benefit of the infant" (June Carbone, 2014, S111).

Today, the concept of the best interests of the child is widely applied by international, as well as, domestic courts as one of the decisive criteria used in deciding family related cases. The present paper is designed to demonstrate, on the one hand, problematic points related to the determination of the child's best interest conceptually and on the other hand, its application in practice, mainly in child removal cases, where difficulty with respect to adoption of the concept is still in progress.

It is notable that in international law, among generally right holders, the notion of best interests as a basic tool of realizing human rights applies solely to children. In addition, we can find references to best interests in international human rights treaties in very special cases, such as with regard to disabled persons (Convention on the Rights of Persons with Disabilities, 2006, Article 23(2)). In the case of children, the reason is likely to lie in considering the special position of a child, taking into account, for instance, their vulnerability, and the same time can be applied to the disabled, as well. However, one may ask, why exactly the notion of "best interests"? Does it really serve its intended purposes efficiently - guaranteeing high level of security to children's rights? To this extent, it might be surprising that the first fundamental instrument in respect to the protection of children's rights - the 1924 Declaration of the Rights of the Child – does not establish or mention "best interests" at all. But it is regarded to be one of the fundamental legal tools for protecting children's rights by providing general guidelines for ensuring the well-being of a child (Geneva Declaration of the Rights of the Child, 1924). On the other hand, as it is acknowledged, the principle of best interests under UNCRC considers mainly the well-being of a child, but importantly the Convention gives more specific determination of wellbeing, presuming that best interests must be interpreted in deliberation of age, level of maturity, vulnerability of a child, his or her environment and views, the presence and absence of parents, etc. (United Nations Refugee Agency, 2008, p.14). Thus, it seems that the clearer the main principles interpreted leading

to secure children's rights are, the more it is possible to ensure overall well-being of a child.

But still, what is exactly meant by the notion of the "best interest of the child" and is it possible to interpret this at all? How is it applied in practice and what does it do to protect children's rights particularly in family affairs? The following discussion will try to answer these questions, or at least to demonstrate meaning, importance and difficulties arising around the concept of "best interests", focusing on the application of the concept in practice, mainly in "family affairs" with respect to child removal cases, where the child in question is in a great need of special care and treatment.

1. Determination of the Concept of "the Best Interests" of the Child

Before proceeding to the first main part of the present article – meaning, importance and implementation in practice of the aforementioned concept, it would be expedient for clarity to say a little about who children are, what rights do they hold or whether they can be possessors of rights at all.

Article 1 of UNCRC defines a child as "*every human being below the age of eighteen years…"* As Archard states in his work, "*children are young human beings… some children are very young human beings*" (Archard, 2014, pg. 1). Bearing in mind children's low awareness of the world around them, lack of capacity in deciding or making choices on their own, there is a much debate in legal literature around the question whether children should acquire rights. Some scholars think that children, as human beings, obviously have rights, while others maintain that given the nature of childhood and rights themselves, suggests that children cannot possess rights. (See: Archard, 2014). For instance, children, lacking certain abilities of agency, must not have rights similarly as adults have. (See Griffin, 2002, pp. 19–30). However, despite the assumption that children lack agency, they nevertheless have

basic interests deserving protection and they should be accorded at least welfare rights (Brighouse, 2002, pp. 31–52). Furthermore, bearing in mind that children gradually become adults, rights should be given to them accordingly. (Brennan, 2002, pp. 53–69). There are also Child 'liberationists', who claim that children should acquire all the rights similarly to adults. (See: Archard, 2014). These issues are beyond the scope of this article, thus, it is sufficient to note fact that in the contemporary world children are usually recognized as holding rights or, at least, they acquire fundamental rights and freedoms e.g., by UNCRC, listing a number of children's rights, such as a child's right to be treated without any discrimination (art. 2.1); ensuring the child's care (art. 3.2); right to life (art. 6.1.); ensuring overall development of a child (art. 6.2); right to preserve a child's identity (art. 8.2); right to be protected from any physical violence, abuse, neglect, maltreatment (art. 19.1); right to express own views according to capabilities (art. 12.1); right not to be separated from parents (art. 9.1), etc. Thus, another question to refer to is determination of the concept of the best interests of the child.

1.1 Interpretation under UNCRC - The Concept of the "Best Interests" of the Child – an Adaptable to Every Single Case or a Determinate One?

Article 3.1 of UNCRC provides the term "best interests" of the child as following: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." For a better understanding of the notion of the best interests, in 2013 the Committee on the Rights of Children established General Comment #14, which has been accepted universally as the greatest contribution in determining the best interests' concept. On the other hand, it has been argued that the concept established in CRC has not been sufficiently foreseen and has not been critically discussed despite of adoption of General Comment #14 of the Committee on the Rights of the Child (Council of Europe,

2016, p.18). Although, the concept of the best interests of the child has been recognized as one of the most essential concepts in the contexts of protecting children's rights, its application in practice has shown to be one of the most difficult concepts to realize.

Nevertheless, the interpretations provided by the Comment have become the primary guidelines for courts, both at international and national levels. The Committee in the Comment interprets the sentence given in Article 3.1 of UNCRC – "…the best interests of the child shall be a primary consideration" in detail. According to the Committee, the words "shall be" should be understood as "a strong legal obligation on States" to resolve cases considering at first the best interests of a child (Committee on the Rights of the Children, (2013), the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) General Comment No. 14, CRC/C/GC/14, paragraph 36); the expression "primary consideration", means that "the child's best interests may not be considered on the same level as all other considerations" (Committee on the Rights of the Children, 2013, para. 37); and finally, the term "primary" means that children's interests must be prior to any other interests in all circumstances (Committee on the Rights of the Children, 2013, para. 40). The Committee suggested a number of circumstances, elements and safeguards for states to take into account while assessing the best interests of a child, such as a child's care, protection, safety; their view; identity; situations of vulnerability; their rights to health and education; preservation of family environment and family relations. Still, however, the listed elements are not exhaustive which actually makes it possible to go beyond them and taking into account the fact that the content of each listed element vary from child to child and from case to case, decision should be made in every case considering individual and each specific circumstances and other factors that might be relevant in every single case (Committee on the Rights of the Children, 2013, para. 80).

As we have seen, the Committee gave quite broad guidelines that the first and foremost factor in decision making process in child related cases must be consideration of the best interests of the child. And because of its broad interpretation, the main difficulty concerns the issue of assessing and determining children's best interests in the case of the adoption of general measures. In other words, how should the concept of best interest be determined or assessed in a case of children and not a particular child? Here the problem refers to the question of how it is possible to apply general measures of best interest if, for instance, there are two children, although in similar circumstances, but whose best interests differ from each other? Obviously, the significant problem in applying the concept of the best interest in practice is the vagueness of the assessment itself. Taking into account the fact that the concept cannot be determined precisely because in each case the application of the concept requires its determination according to individual circumstances, it seems unlikely to agree on a particular definition of the concept. The concept has been criticized by a number of scholars due to its indeterminate nature, its vagueness and uncertainty that leads to different approaches. According to Eveline van Hooijdonk, a member of the Children's Rights Knowledge Center, the principle of the best interests of the child is "inevitably indeterminate, flexible, dynamic, developmentally dependent and context specific" (Council of Europe, 2016, p.41). Furthermore, the best interest principle can be dangerous and give rise to threats to children's rights if the concept is understood or applied wrongly (Council of Europe, (2016, March), p.31).

So, what can we do when scholars claim there is no precise criteria for determining the legal concept of the best interests of a child and that the concept is indeterminate? Jorge Cardona Llorence, a professor of public international law at the University of Valencia and a member of the Committee on the Rights of the Child, suggests that a primary consideration while assessing, determining and interpreting the concept must be objective criteria (Council of Europe, 2016, p.12). In Llorence's view, the concept is

designed to guarantee that all fundamental rights of children provided by the UNCRC are protected, effectively realized and pursued to ensure a child's overall development. Thus, the concept of the best interest should not be understood as what is best for a child in every single case, but as an instrument of ensuring a child's overall development and the full and effective realization of their rights established under the Convention (Council of Europe, 2016, p.12).

Another suggestion is that the child's best interest principle should be adopted and applied together with the UNCRC as a whole and not as an isolated principle (Council of Europe, 2016, p. 35). This offer has been widely considered by European Court of Human Rights by interpreting the European Convention on Human Rights in light of the terms provided by the UNCRC. The European Convention on Human Rights is regarded as one of the fundamental international instruments ensuring basic civil and political rights to all persons, including children. Although not specifically focused on the rights of children, a number of its provisions make reference to the protection of the rights of children and among them is Article 8, guaranteeing the right to respect for private and family life. It is worth mentioning that the Convention says nothing about the best interests of the child, but the case law of the European Court of Human Rights reveals a number of decisions concerning the best interests' concept in respect of rights of children, that will be discussed later in this paper.

Thus, bearing in mind the valuable contribution of the Committee in trying to provide clear and precise guidelines with respect to the concept of the best interests of the child, one will not be able to find perfect and more or less specific criteria for determination of concept neither in the General Comment, not in UNCRC itself.

1.2. Collision of Interests

A further question is about what should be done or what criteria should be applied in cases when a child's best interests are in conflict with other interests, such as public interests, interests of other children, parents, other persons, etc.? The Committee in its General Comment suggests that in both cases, when a child's best interests come into conflict with another child's or children's best interests and in cases when a child's best interests conflict others interests, for instance public, parents interests or so on, a decision must be made on a case-by-case basis. (Committee on the Rights of the Children, 2013, para. 39.) But what happens if achieving a fair decision is very difficult in a particular case? Here the Committee answers the question as following:

"*If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and are not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.*" (Committee on the Rights of the Children, 2013, para. 39.)

The UNCRC provides not only individual right of the child, but also gives guidance of the child's relationship to others, especially to his or her family. Unfortunately, in practice, the main standard of the UNCRC – taking the child's best interests as a primary consideration is often violated by a number of factors such as financial interests of adults, their selfishness, immigration policy, purported imperatives of security and social defense, all these factors are leading to destruction of consideration of the child's best interests (Council of Europe, 2016, p.37). Correspondingly, these reasons give rise to the ill-treatment of children by families, institutions, their separation from families, and in certain cases they are put in prison.

Some scholars argue that due to the requirement of taking the child's best interests as a primary consideration, other parties' interests involved in a particular case are likely to be violated. On the other hand, there are facts that illustrate how the concept of the best interests of the child can be misused and thus violated rights of a child. One of the clearest examples relates to a child's custody in divorce cases, where it is quite possible that interests of parents and the child or children can conflict. In these kind of cases parents, caretakers, or other family members might have different opinions on what is the best for the child or children. Moreover, as already mentioned, due to existing possibility of misuse the child's best interests in order to secure other parties' or parents' interests, children's interests and their parents' or others' interests should be strictly separated from each other (Council of Europe, 2016, p.42). In addition, while determining the best interests of the child no less attention should be paid to the child's own views, in other words, it is important to consider what the child considers to be his or her best interests. With this regard, in order to arrive at correct and fair best interest decisions, the child's thoughts, feelings, beliefs, his or her perspectives must be taken into consideration, together with their age, maturity and capacities (Council of Europe, 2016, p.42). In fact, it is possible that none of the mentioned criteria can be sufficient in the decision-making process for every individual case.

Fortunately, there are cases where difficulties regarding vagueness do not require the help of the CRC, namely, by setting strict criteria that a child's best interests must be given greater weigh in comparison with other interests. Such cases concern matters of adoption (Article 21), where it is stipulated for states to recognize that the best interests of the child shall be "the paramount consideration," which means that in adoption cases the basic and decisive criteria in decision making is a particular child's best interest. This principle is provided also in further Articles of the Convention – Article 9 – separation from parents, Article 10 – family reunification, Article 37 – separation of children from adults while being in detention, Article 40 – procedural guarantees, such as parents' presence at hearings in criminal cases.

But still, some scholars think that resolving conflicts between a child's interests and the interests of other persons or other interests is vague and still leaves significant room for manipulation. Due to the concepts' very broad nature, it can be applied by individual estimation that is likely to lead to a great threat of applying the principle in a wrong way and thus we arrive to the main difficulty arising from its assumption as a discretionary concept.

2. Applying the Concept of the Best Interests of the Child in Family Affairs

A number of international human rights instruments, including the 1948 Universal Declaration of Human Rights, namely Article 16.3 states that "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Article 18 of the UNCRC requires the State to support parents and legal guardians in performing their parenting responsibilities (as provided in Articles: 3.2, 7, 9, 10, 18 and 29). In the United States, the significance of family integrity and preference for removing a child from his or her family only as a last resort is provided in the statutes of around twenty-eight States as a primary guideline concerning family-related cases (Gateway Children's Bureau/ACYF, 2012, p.2). While almost twelve States additionally highlight the importance of guaranteeing special care, treatment of the children removed from their families (Gateway Children's Bureau/ACYF, 2012, p.2). For the development of the child, respect for and support to the family is generally recognized as a key element of a states' actions. Support to the families include not only requiring parents to realize the needs and rights of their children by knowing their children's basic needs, but to raise awareness of the significance of involvement of both parents in the child's upbringing, development and care (United Nations Committee on the Rights of the Child, United Nations Children's Fund, Bernard van Leer Foundation, 2006, p.13). The European Court of Human Rights is also not an exception in stressing the importance of a family. The Court has established a certain standard by ruling in custody and access rights cases that the

fundamental element of family life is preserving the close relationship between a child and parents even in cases when parents are separated (see, for example, *Diamante and Pelliccioni v. San Marino*, 27 September 2011, No. 32250/08, paragraph 170; and *Qama v. Albania and Italy,* January 2013, *No. 4604/09*, paragraph 79). Considering this, it can be easily said that the interests of the child are generally best met when the child remains with or joins his or her family.

2.1 Concept of the Best Interests of the Child in the Child Removal Cases

There are cases where decision makers face serious challenges. For instance, one might say that poor environment and poverty are not conditions where a child's best interests can be met. However, would it be rational to decide strictly that in such cases, for the purposes of the best interests of the child concerned, the child should be removed from a poor family? The difficulty in child removal cases come from various factors such as leaving children in some cases in abusive families, sometimes it takes too long to put a child into care or even sometimes they are not taken into care at all. Correspondingly, all these strains lead to breaches of children's rights. Additionally, there is another factor to be taken into account - in securing the rights of children not to be separating from their parents, showing that the child will be placed in a beneficiary environment is not sufficient.

Article 9 of the UNCRC puts an obligation on the state parties that "*a child shall not be separated from his or her parents against their will, except … that such separation is necessary for the best interests of the child.*" In other words, the best interests of the child must be a decisive factor in the decision making process with respect to cases concerning the removal of a child from his or her family. The Committee also stated in the General Comment that a child should only be separated from his or her parents as a measure of last resort,

and that separation should not take place if less intrusive measures could protect the child (Committee on the Rights of the Children, 2013, para. 61).

Cases that concern removing a child from his or her family and placement in care represent one of the domains where the European Court significantly applies the concept of the best interests of the child. In cases when the European court has ruled that decisions to remove children from poor families (and place them in care) was not in the best interests of the concerned, the court has ruled that authorities should have ensured that the families received the proper support instead of removing children from their families (W*allová and Walla v. the Czech Republic*, 26 October 2006, no. 23848/04;. *Saviny v. Ukraine*, 18 December 2008, no. 39948/06). The importance of the Court's approach is derived from the establishment of a particular standard with this regard; that is, the child's best interests in cases concerning placement in care comprises two parts: first, guaranteeing the child's development in a sound environment and second, preserving the child's ties with biological family, except of the cases where it is not in the best interests of the child. (See *Gnahoré v. France*, 2000, No. 40031/98, paragraph 59.) The Court reiterates that in the decision making processes everything possible must be done to "rebuild" the family, (*Gnahoré v. France*, 2000, paragraph 59) which follows from the interests of both parents and children. A quite different decision to the latter case has been made in Levin v. Sweden (*Levin v. Sweden*, 15 March 2012, No. 35141/06) where the Court found no breach of Article 8 in respect to an applicant suffering from insufficient contact with her three children placed in public care. The Court's decision was based on the evidence brought before the Court by the national authorities that contact with the mother caused a significant harm to the children and restricting the relationship between the children and the parent was necessary to avoid further obstruction to their development and injury to their health. It is worth noting that the Court came to the decision after carefully examining the relationship between the children and the parent with the help of relevant experts and professionals.

While assessing cases generally with respect to the best interests of the child, the European Court always takes all possible measures to conduct a careful examination of all circumstances in order to make a fair decision, including, of course, the involvement of the children, obtaining all possible evidence and so on. The attitude of the Court is explicitly shown in B.B. and F.B. v. Germany (*B.B. and F.B. v. Germany*, 14 March 2013, Nos. 18734/09 and 9424/11). In the present case the national authorities rely on a 12-year –old girl, claiming that she and her younger brother had been permanently beaten by their father, placed the children in a care home. After a year it turned out that the girl had lied about being beaten from her father. After investigating all the circumstances of the case, the Court found that the national court had not taken into account evidence made by medical professionals, refuting the girl's claims. Therefore, the Court found a violation of Article 8 by ruling that decision was made upon the insufficient reasons. Family ties may be severed in very exceptional circumstances, when maintaining family ties would cause serious harm to the child and demonstrating that the child concerned will be placed in a more beneficial environment is not enough. The main point again and again lies in the careful examination of what is best for the child.

Taking family ties as one of the decisive factors for determining the best interests of the child is widely established in the United States, as well. In the decision making process relating to child removal cases, among a number of factors, in around twenty-one States and the District of Columbia in the United States, the courts apply one of the fundamental principles, implemented in the States' statues, that is – "the emotional ties and relationships between the child and his or her parents, siblings and household members or other caregivers" (Gateway Children's Bureau/ACYF, 2012, p. 4).

Another example can be taken from Canadian legislation, specifically, Canadian Family Law sees the best interests of the child as one of the main principles. (Feldstein, 2014, p.6). The principle accords rights to children and on the other hand, puts obligations on parents towards their children. "You

can separate and live apart from your spouse or common-law partner, but you cannot divorce your children… Once you are a parent, you are a parent for life" (Feldstein, 2014, p.6). As in various jurisdictions described above, the Canadian Court does not suggest any precise criteria for assessing and determining the concept of the best interests, rather according to the court, what is the best for every child is decided upon an individual interpretation (Feldstein, 2014, p.6).

An interesting decision was delivered in recent case by the European Court against Georgia. Before discussing the judgment, it is notable that the notion of the best interests of the child was adopted for the first time in Georgia in 2016 with the adoption of the Juvenile Justice Code of Georgia, which is related solely in cases concerning criminal cases. With respect to family affairs, Georgian legislation says nothing about the best interests of the child. However, as a Member State, Georgia is compelled to ensure full harmonization of the national legislation with the fundamental provisions of the European Convention and to consider the decisions of the European Court on the national level. The case was brought before the Court by the aunt of three children, whose residence was registered at their father's place after the death of their mother. Accordingly, local authorities while deciding child-related cases especially cases concerning removal of children, the principle of the best interests of the child should be taken in to primary consideration. In the recent judgment, delivered in 2016, the Court ruled that the current legislation of Georgia with respect to the right of a child to be guaranteed legal representative, who will be responsible for defending his or her interests, does not correspond to international standards. The Court followed that no clear references are considered in the current legislation about powers and functions of legal representatives. The Court reiterated that the legal representative has to provide the child concerned with the adequate information about the courts process and a decision should be made by considering the child's views and desires. Due to the lack of involvement of the child in the decision making procedure and the fact that the national court

had not taken into account the children's best interests and their will to stay with their aunt, the Court found a violation of Article 8 (see *N.Ts. and Others v. Georgia,* 10 Feb, 2016, No.71776/12).

2.2 Conflicting Interests of Children and Parents in Child Removal Cases

Generally, the notion of the best interests of the child takes into account where conflict arises between the interests of children and those of parents, first of all, interests of the children should be taken into consideration. It can be justified, as mentioned above, by the vulnerability and lack of capabilities of children to have agency of their own. The European Court in its case law often highlights this approach: the child's best interests may override those of the parents (see e.g. *Krisztian Barnabas Toth v. Hungary,* 12 February 2013, no. 48494/06, paragraph 32).

Another domain where the European Court examines the best interests of the child concerns identity issues, where conflict of interests between the child and the parent or parents in question arises. The approach of the Court is interesting with this regard because, typically, in these kind of cases the competing interests of the child concerned and putative parent or parents are at stake. In such cases the Court frequently recalls that one has right to know their origins and personal identity (See *Odièvre v. France,* 2003, No. 42326/98, paragraph 29; See *Mikulic v. Croatia*, 2002, No. 53176/99, paragraph 64), while on the other hand, there is a putative parent's interest, as well of being protected from revealing his or her past. In one of the cases against Hungary (*Krisztián Barnabás Tóth v. Hungary*, 12 February 2013, No. 48494/06), the Court has found no violation of Article 8 where the national authorities refused the applicant's requirement on establishing his biological paternity action of a child who had already been adopted by his wife and recognized by another man. The Court's approach with this regard has been based on the best interests of the child, namely, the Court has been satisfied with the

evidence that the child had developed emotional ties with the adoptive family who provided her with necessary care and support and the establishment of the biological father's paternity would give rise to serious injury to the child. However, the Court has highlighted that the applicant's interest in establishing paternity cannot be denied and should be taken into consideration, but in this particular case this interest could not overcome the best interests of the child. Thus, according to the Court, in the decision-making process in these kind of cases, the important point is to find a fair balance between the competing interests of children and parents by weighing up these interests, but if harmonization cannot to be achieved, the best interests of the child prevails. An interesting decision has been carried out in Kruškovic v. Croatia, where the Court found violation of Article 8 with respect to an applicant who was refused by the national authorities to register as a father of his biological child, born out of wedlock, because of the deprivation of legal capacity. The Court's main point was that the children "born out of wedlock also had a vital interest in receiving information necessary to uncover the truth about an important aspect of their personal identity, that is, the identity of their biological parents" (*Kruškovic v. Croatia,* 21 June 2011, No. 46185/08, paragraph 41). A similar approach has been developed by the Court in Godelli v. Italy, (*Godelli v. Italy,* 25 September 2012, No. 33783/09) where the applicant, abandoned at birth, was refused to access information about her origins due to the birth mother's choice not to disclose her identity.

The European Court applies similar approach in respect of adoption cases. In Aune v. Norway (*Aune v. Norway*, 28 October 2010, No. 52502/07) the Court found no violation of Article 8 in respect to an applicant, being addicted to drugs and committing serious abuses to her 5 month-old son after which the child had been adopted by his foster parents. Despite the fact that the applicant's situation improved the Court ruled that she was still unable to care for her son. Considering that the child did not have any emotional or social ties to her biological mother, but instead was vulnerable, taking into account the best interest of the child, the Court justified the national authorities'

decision on placing the child into foster care. Thus, the decision represents a clear example of when the family ties can be severed upon primarily considering the child's best interests. In Pini and Others v. Romania, the applicants were an Italian couple, complaining that the domestic court's decisions on the adoption of two Romanian children were not executed. In fact, the children had been placed in a private institution which refused to hand over the children and the children themselves expressed unwillingness to leave the institution. The Court, interpreting Article 8 in the light of UNCRC and the Hague Convention on Protection of Children and Cooperation concerning Intercountry Adoption, found no violation of Article 8, relying its decision mainly on the best interests of the children and maintaining that in adoption cases, considering its purposes to provide a child with family and not a vice versa, the child's interests must always prevail those of the parents (*Pini and Others v. Romania,* 2004, Nos. 78028/01 and 78030/01).

In some cases, however, the European Court sometimes gives a wide margin of interpretation to Member States that in particular cases can be somewhat dangerous with respect to considering the best interests of the child. For instance, in Harroudj v. France (*Harroudj v. France,* 4 October 2012, No. 43631/09) the applicant who had taken Algerian girls into legal care was unable to adopt her because of the family law of the child's country of origin. Legal care is not regarded as an equal measure to adoption, even though there are similar effects with respect to guardianship. Taking into account a wide margin for interpretation by Member States on these matters, the Court found no breach of Article 8. Obviously, one may assume that such a decision raises questions with respect to primarily considering the best interests of the child.

As evidenced in this article, the principle of the best interests of the child is significantly applied in family affairs with respect to child removal cases. The Parliamentary Assembly of the Council of Europe adopted Resolution 2049 and Recommendation 2068, "Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe

member states" in April, 2015. According to the report of the Parliamentary Assembly, national legislation of member states mainly meet the key requirements of international law. Member states while deciding cases concerning removing a child from a family, are applying high standards in order to maximize the protection of the child's best interests and with this regard, they generally use the concept of serious harm. Although the wording can vary from state to state, generally, the concept of serious harm may consider different kinds of abuse, such as physical, sexual, emotional or psychological abuse.

The Parliamentary Assembly set several principles based on the case law of the European Court in respect of child removal cases, as guidelines for member states. The first principle is preserving family ties, trying to "rebuild" family and to use removal of a child from families only as a last resort. The second principle obliges the contract states to give families appropriate support, first of all, in order to avoid the removal of a child from a family and, furthermore, to maintain and increase the number of family reunifications. The third principle calls on member states to minimize and where possible to eradicate practices concerning severing family ties completely, namely removing a child from parental care at birth, adoption of a child without parental consent, and when that is not possible, avoid unreasonable lengths of time for taking a child into care. The fourth principle makes it clear that it is essential that the persons responsible for removal and placement decisions to be properly qualified and well-trained in order to make appropriate decisions in every single case; it is important that these persons are not overloaded with their work. The final principle involves data collection, specifically, collecting data from member states on ethnic minority status, immigrant status, socio-economic background, and the length of time spent in care until family reunification. This will lead to taking proper measures in the problematic fields of violations of children's rights.

Conclusion

In conclusion, it can be said that the notion of the best interests of the child, designed as a standard for deciding cases concerning rights of children, serves as a basic tool for securing fundamental rights and freedoms of children. Difficulties arising around its determination might not be surprising considering its abstract nature and the fact that for every single child their best interests must be determined individually, on case-by-case basis. This paper shows that the concept has become a universally accepted principle by international legal instruments, basically by UNCRC and accordingly, has made a significant positive contribution in the decision-making process with respect to child related cases both at international and national levels.

On the other hand, the vagueness of the concept of the best interests of the child might serve not always as a tool protecting the rights of children, but instead as a threat violating them if the concept is applied in a wrong way and is based solely on one's estimations. Because of its broad interpretation, there is significant room for the decision makers to manipulate and apply the principle according to their own views. As this paper has tried to demonstrate, the notion of the best interests of the child considers the overall well-being of the child that can be understood in various ways. Although, the United Nations Committee has established General Comments aiming at setting clear guidelines for the application of the best interests' notion, evidence show that this is not sufficient.

The best interests of a child should be a primary consideration for everybody including judges, medical professionals, psychologists, educators and other professionals and institutions that are working with children and youth. Therefore, the concept of the best interests must be clear enough in order for them to assess and determine children's interests and make right decisions with respect to children's human rights generally.

Although the concept is still broad and vague, its proper application effectively serves the basic aim of its existence – securing rights of children. Despite the existing critiques, the effectiveness of the concept is clearly seen from the case law discussed above. In order to preserve the well-being of children and to protect their rights, I think, it is of vital importance that the concept of the best interests of the child be interpreted in accordance with the terms of UNCRC and the guidelines set by the UN Committee. Obviously, it is much fairer to assume that the concept of the best interests of the child makes positive contribution; I would say, it is a basic mechanism to provide security for children, who are in the need of special care and treatment, so as described above. Leaving aside its vagueness and broad nature, as scholars suggest, the best solution in this situation is the permanent training of the persons, professionals, working on child right cases in order them to be capable to make fair and correct assessment and determination of each single child's best interests in every individual case.

References

Archard, D. W. (2002, substantive revision 2014). *Children's Rights,* Stanford Encyclopedia of Philosophy.

Brennan, S., 2002, 'Children's Choices or Children's Interests: Which do their Rights Protect?' D. Archard and C. Macleod (eds.), in *The Moral and Political Status of Children: New Essays*, Oxford: Oxford University Press.

Brighouse, H., (2002), 'What Rights (if any) do Children Have?' D. Archard and C. Macleod (eds.), in *The Moral and Political Status of Children: New Essays*, Oxford: Oxford University Press.

Carbone, J. JD, (2014*). Legal Applications of the "Best Interest of the Child" Standard: Judicial Rationalization or a Measure of Institutional Competence?* University of Minnesota Law School, Minneapolis, Minnesota.

Committee on the Rights of the Children, (2013), *the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* General Comment No. 14, CRC/C/GC/14.

Council of Europe, (2016, March). *The best interests of the child – a dialogue between theory and practice*, Council of Europe Publishing, F-67075 Strasbourg Cedex, http://book.coe.int.

Feldstein, A. (2014), *In the Best Interests of the Children,* It's Time For Justice, Change Family Law In Canada, Feldstein Family Law Group; Toronto - Markham – Vaughan – Mississauga.

Gateway Children's Bureau/ACYF, (2012), *Determining the Best Interests of the Child*; *Child Welfare Information.*

Griffin, J., (2002), 'Do Children Have Rights?' D. Archard and C. Macleod (eds.), in *The Moral and Political Status of Children: New Essays*, Oxford: Oxford University Press.

United Nations Committee on the Rights of the Child, United Nations Children's Fund, Bernard van Leer Foundation, (2006), *A Guide to General Comment 7: 'Implementing Child Rights in Early Childhood*', The Hague.

United Nations Refugee Agency (UNHCR), (2008), *Guidelines on Determining the Best Interests of the Child*.

Legal Documents:

Convention on the Rights of Persons with Disabilities, 2006.
Convention on the Rights of the Child, 20 November 1989.
Geneva Declaration of the Rights of the Child, 1924.
Universal Declaration of Human Rights, 1948.

Table of Cases:

Diamante and Pelliccioni v. San Marino, (27 September 2011), No. 32250/08.
Qama v. Albania and Italy, (January 2013), No. 4604/09.
W*allová and Walla v. the Czech Republic*, (26 October 2006), no. 23848/04.
Saviny v. Ukraine, (18 December 2008), no. 39948/06.
Gnahoré v. France, (2000), No. 40031/98.
Levin v. Sweden, (15 March 2012), No. 35141/06.
B.B. and F.B. v. Germany, (14 March 2013), Nos. 18734/09 and 9424/11.
N.Ts. and Others v. Georgia, (10 Feb, 2016), No.71776/12.
Krisztian Barnabas Toth v. Hungary, (12 February 2013), no. 48494/06.
Odièvre v. France, (2003), No. 42326/98.
Mikulic v. Croatia, (2002), No. 53176/99.
Krisztián Barnabás Tóth v. Hungary, (12 February 2013), No. 48494/06.
Kruškovic v. Croatia, (21 June 2011), No. 46185/08.
Godelli v. Italy, (25 September 2012), No. 33783/09.
Aune v. Norway, (28 October 2010), No. 52502/07.
Pini and Others v. Romania, (2004), Nos. 78028/01 and 78030/01.
Harroudj v. France, (4 October 2012), No. 43631/09.

Goshadze Kakhaberi,
The University of Georgia, Georgia

The Principle of Secure Processing of Personal Data

Data protection is an emerging field of law that is challenging for legislators and the actors from public and private sector. It establishes standards for processing personal information and sets certain requirements to any party which is handling one's personal data. The article is oriented on the issues regarding the security of data, namely to keep personal data safe and secure in an organization, public or private, if they are using such data. The emphasize is made on the features of organizational and technical security measures and on their role in processing operations. The aim of this article is to show that these measures are not only mere rules, instead, they deserve to be considered as the data processing principles alongside with the five universally acknowledged principles of data handling. Additionally, to reach the high standards of security, the government should prescribe the standards of security for both private and public actors.

Keywords: Personal Data, personal information, organizational and technical security measures, high standards of security, government, private and public actors.

Introduction

In a modern society, personal data is widely used in many situations and for various purposes. It is not hard to imagine that technical development triggers new and complicated means and methods for data processing. A few decades ago, special legal acts regarding data processing came into place on a national as well as on an international level. The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal data, known as Convention #108 entered into force in 1981. It is the very first international, legally binding document which prescribes general principles and rules for personal data processing. Since then European countries have been passing legal acts establishing rules for data processing practices.

Today we have a reality where legal norms are keeping up with data processing methods step by step. The vast majority of economic and professional business activities are based on the usage of personal data. Moreover, this kind of data is often considered to be a commodity, which can be used by enterprises and companies for trade purposes. The need to have a strong legal basis for developed processing practices is continuous, as the IT technology creates new challenges for the legal background of data processing. To address this issue effectively, one must assume that legal norms cannot regulate every detail in this complicated process and therefore it depends on how general norms, known as principles, would be interpreted in order to serve the best interests of individuals and data controllers.

Law of Georgia on Personal Data Protection establishes 5 general principles for handling and using personal data in various circumstances. The rule, which obliges any data controller to process personal data securely is not regarded as a principle in this act; it is a separate norm (see art. 17). By carefully reading this norm, one will understand that data security is required at every step of processing, starting with collecting personal data to the point when the data is no longer needed and has to be deleted or destroyed.

Additionally, this act (see art. 17 (5)) prescribes that the *"data security measures must be established by legislation of Georgia."* By making this mandatory requirement, it is worth searching if there such standards for every type of private and public data controllers have been established so far.

This article aims to review several issues: 1.) Understanding data security requirements as a principle, along with five general ones; 2.) Describing what kinds of methods do the rules of secure processing include; 3.) To inquire what kind of standards for security have been established and adopted for legal and private entities and to find out if these security measures are applicable to every data controller.

1. The Five General Principles of Personal Data Processing and the Rule of Secure Processing

In data protection law, there are internationally acknowledged principles, which should always be adhered to when the data processing starts. These principles form one of the main parts of legislation on data protection. The importance of them is evident from the general conception of processing, in other words, if a data controller has legal grounds for processing, but he fails to ensure principles, the process cannot be started. For further clarification, let's discuss each of them briefly.

- **General principle of fairness, lawfulness and dignity.** Law of Georgia on Personal Data Protection, art. 4 (a), states that *"data must be processed fairly and lawfully, without impinging on the dignity of a data subject;"* This requirement can be considered as the most general principle, as it defines that the prerequisite for every single aspect of data processing should be those mentioned above. By this prescription, norms require general standards, such as equality, impartiality and etc. to be in place. The fact that this prescription mentions the word "dignity", indicates a dual purpose of the act, that

is, not only the protection of personal data, as a part of the right to privacy, but also it ensures that the fundamental right of the protection of dignity is guaranteed.

- **Purpose specification principle**. Art. 4 (b) establishes as follows: *"data may be processed only for specific, clearly defined and legitimate purposes. Further processing of data for purposes that are incompatible with the original purpose shall be inadmissible;"* Purpose specification or as it is also called purpose limitation principle is the one which must not be avoided, due to the simple consideration that if a data controller has not specified the purpose in advance, processing cannot commence.

- **Proportionality principle.** The requirement of proportionality is prescribed in art. 4 (c) of the act, *"data may be processed only to the extent necessary to achieve the respective legitimate purpose. The data must be adequate and proportionate to the purpose for which they are processed;"* This principle has strong connection with the previous one, as it requires the processing of only those data which are needed for the purpose specified in advance. Accordingly, processing excessive data can be considered as not only violating the proportionality principle, but as a breach of the purpose limitation principle by simply assuming that there is no purpose for processing excessive data.

- **Accuracy principle.** The fourth data protection principle in art. 4 (d) states that *"data must be valid and accurate, and must be updated, if necessary. Data that are collected without legal grounds and irrelevant to the processing purpose must be blocked, deleted or destroyed;"* Any modification of already processed data is required if it is "necessary". There is no further definition of "necessity", but to analyze this norm in connection with the purpose specification principle, it is clear that any modification is only permissible if there is such purpose;

- **Timely deletion principle.** It is obvious that data no longer needed must be deleted or destroyed in order to avoid the violation of other principles as well. Art. 4 (e) of the Law of Georgia on Personal Data Protection prescribes that *"data may be kept only for the period necessary to achieve the purpose of data processing. After the purpose of data processing is achieved, the data must be locked, deleted or destroyed, or stored in a form that excludes that identification of a person, unless otherwise determined by Law."* Timely deletion principle is the last principle of our act, which requires that data controllers delete/destroy or depersonalize data if there is no need to keep it in a manner which enables the identification of a data subject. Of course, we have to see this in light of the purpose specification, according to which keeping data that is no longer needed would be a violation of a second principle – purpose limitation.

As we see through the analysis of the legal prescriptions these principles apply on the overall process of data processing, starting with gathering personal information onward to the point where it should be deleted and disposed of. Now, if we turn to the previous norm, stating the requirement of secure processing, we may find common points with the principles discussed. Law of Georgia on Personal Data Protection, art. 17.1, points out that *"A data controller shall be obliged to take appropriate technical measures to ensure protection of data against accidental or unlawful destruction, alteration, disclosure, collection or any other form of unlawful use, and accidental or unlawful loss."* According to this norm, the requirement covers all the activities made upon personal data, from collection to any other form of use, and ending with destruction. So, taken together, these activities can be regarded as processing, upon which security is an unavoidable prerequisite. Considering all of this together, secure processing can be regarded as a principle, due to the fact that it applies on every stage of the process in a same way as principles apply on every step of data processing. Moreover, for example, in the Data Protection Act of 1998 of the United Kingdom (part I,

schedule I), data security is already mentioned as a principle, it states that *"Appropriate technical and organizational measures shall be taken against unauthorized or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data."*

Finally, we should also mention the three characteristics of data protection principles, these are: 1. Cumulative approach – mostly, in data processing there is more than one principle involved at the same time, for example, purpose limitation and proportionality are always together at place; 2. Ensuring principles in advance – it means that data controller who wishes to use data, should always define in advance the purposes of processing and quantity of data; 3. Lifecycle coverage – principles cover all stages of data processing, from collection to disposal.

It is evident that, all three characteristics are relevant to data security. Therefore, it can be easily regarded as a principle, which is an indication of logical approach to regulate data protection practices.

2. Organizational and Technical Security of Personal Data and Respective Standards

Data security can be ensured in a two-way approach. This approach involves establishing organizational and technical measures. These two sub-division of data security have different aspects and definitions. Let's describe each of them.

2.1. Organizational Security of Personal Data

Under the notion of organizational data security, we may assume that there are activities which effectively address these issues. This approach depends on the ways of processing the data, stages of it and the persons involved in it. It is hard to stipulate and describe all possible ways of ensuring organizational

data security, besides they may differ, as the approach must be shaped differently for every particular situation, but for clarification purposes, a few examples are needed, which are general by their nature.

If the data is being processed without using automated means, these activities apply to organizational measures. For example, in a company, papers containing personal files should not be left without a control on a desk to which every person, including, staff and other individuals doing business with the company would have access. Therefore, repositories of personal files containing hard copies should be locked when they are not in use to avoid data security breaches. To ensure an advanced level of protection, one has to distinguish sensitive and non-sensitive personal data from each other and apply stricter security to the papers with sensitive data, say simply, lock them in a more secure manner, for example in a safe to which access is restricted. Here, we can mention filing systems as well, best practice of handling filing systems, requires to keep sensitive data apart from an ordinary ones, if possible. The Council of Europe recommends that *"health data covered by medical secrecy should be separate from other categories of personal data held by the employer. Security measures should be taken to prevent persons outside the medical service having access to the data"* (Council of Europe, Committee of Ministers, Recommendation no. R (89) 2 of the Committee of Ministers to Member states on the Protection of Personal Data Used for Employment Purposes, 1989, art. 10 (5)).

To raise awareness about organizational security issues, newcomers and members of a company's staff should have specific trainings on these matters; there will be even better outcomes if such trainings are mandatory. It is important to consider that these procedural activities are not a mere everyday routine occurring inside of a company. It is important to think that having these activities in place leads us to ensuring that we meet legal requirements.

Organizational security measures are not methods of securing company's personal data from the "rest of the world." Accordingly, data must be

protected inside an organization, between departments and divisions of an institution. For example, if a client in a bank decides to sign a loan and mortgage agreement, the information held about this individual should not be communicated, for instance, to the deposits department and vice versa.

Finally, those measures of organizational security would be ineffective if there is not a requirement of confidentiality. Law of Georgia on Personal Data Protection, art. 17.4 states that *"Any employee of a data controller and of a data processor, who is involved in processing of data, shall be obliged to stay within the scope of powers granted to him/her. In addition, he/she shall be obliged to protect data secrecy, including after his/her term of office terminates."* As we see, this confidentiality clause covers all kinds of employees, that is, of both private and public legal entities.

2.2. Technical Security of Personal Data

Today, when we are talking about data security, we mostly are referring to IT systems and measures taken to protect data electronically. It is not uncommon to think this way, because a vast majority of personal data held by organizations are being processed by automated means. As time goes by, these means are developing, raising new challenges for legislators to effectively address complicated issues. Technical security measures can vary company to company, but let's review some basic approaches that every data controller should take into consideration.

Using information technologies for data processing most commonly means using computers, internet, smartphones and other portable technology. It is obvious that the simple security of data requires having antivirus software installed and relevant firewalls activated. Further, if a company has its own server room, access to it should be restricted to avoid any unauthorized data processing. Every employee who works on his computer or any other

automated mean to process data, should always use a password and user name combination to keep the data safe. The more digits that are used for creating a password combination, the stronger the protection will be. Using an email can also have issues if an employee is not properly informed, for example, for communicating files containing personal data one must not use Gmail, Yahoo or any kind of email which is out of the control of the employee, rather, for purposes mentioned above, the organization should use its own email, which is protected by special measures to avoid unauthorized access. For those employees who are using special software for data processing, additional features, such as logging of activities must be at place. This logging enables a company to trace any use and modification of personal data in order to asses whether it was done in accordance with data protection principles and the legal grounds for processing. Additionally, the existence of an IT audit department will be efficient in controlling activities done by employees via automated means (for more information visit these web-pages: ttps://www.dataprotection.ie/docs/Data-security-guidance/1091.htm; http://www.infosec.gov.hk/english/technical/guidelines.html#id2; http://www.bu.edu/infosec/howtos/how-to-choose-a-password/).

Both for organizational and technical data security there are additional measures which strengthen the methods in place: 1.) The Georgian data protection act requires that *"Measures taken to ensure data security must be adequate to the risks related to processing of data."* For example, if an organization processes sensitive and non-sensitive data, measures taken to protect sensitive data should be stricter than those for "ordinary" information; 2.) Having a data protection officer at an organization is a good way to ensure that data processing practices are compatible with the provisions of legislation. But in contrast to the first method, this is not established by the Law of Georgia on Personal Data Protection. However, in Germany data protection audit is prescribed by law as follows *"in order to improve data protection and data security, suppliers of data processing systems and programs, and bodies conducting data processing may have independent*

and approved experts examine and evaluate their data protection strategy and their technical facilities and may publish the results of this examination. [...]" (Federal Data Protection Act of 2009 of Federal Republic of Germany, section 9a). Additionally, the German data protection act states what kind of security measures should be taken to meet the requirements of legal provisions, they should be in a manner to:

"*1.* Prevent unauthorized persons from gaining access to data processing systems for processing or using personal data (access control); 2. Prevent data processing systems from being used without authorization (access control); 3. Ensure that persons authorized to use a data processing system have access only to those data they are authorized to access, and that personal data cannot be read, copied, altered or removed without authorization during processing, use and after recording (access control); 4. Ensure that personal data cannot be read, copied, altered or removed without authorization during electronic transfer or transport or while being recorded onto data storage media, and that it is possible to ascertain and check which bodies are to be transferred personal data using data transmission facilities (disclosure control); 5. Ensure that it is possible after the fact to check and ascertain whether personal data have been entered into, altered or removed from data processing systems and if so, by whom (input control); 6. Ensure that personal data processed on behalf of others are processed strictly in compliance with the controller's instructions (job control); 7. Ensure that personal data are protected against accidental destruction or loss (availability control); 8. Ensure that data collected for different purposes can be processed separately." (Ibid, annex to section 9, first sentence).

3. Standards for Ensuring Data Security

There are variety of ways according to which data security standards can be shaped. This is due to the fact that each company, enterprise or any other organization needs standards that are suitable for each particular entity's situation and needs. Therefore, measures guaranteeing data security cannot be shaped in a detailed way. But in any case, general requirements must be

established and are welcomed to serve as guidelines for more detailed internal security provisions.

Law of Georgia on Personal Data Protection, art. 17 (5) mandates as follows *"the data security measures shall be defined by the legislation of Georgia."* This legal provision obliges the legislature to establish standards for data security. In 2012, the Law of Georgia on Information Security was passed. In the first article of the act we read *"this Law aims to promote efficient and effective maintenance of information security, define rights and responsibilities for public and private sectors in the field of information security maintenance, and identify the mechanisms for exercising state control over the implementation of information security policy."* As it is described, the act covers activities done both by private and public actors, but let's see if this law is fully applicable on every activity performed by those entities.

For further examination, we need to mention two definitions offered by this act:

1. Critical information system – an information system whose uninterrupted operation is essential to national defense and/or economic security, as well as to normal functioning of the state authority and/or society (art. 2 (f));

2. Critical information system subject – a state body or a legal person whose uninterrupted operation of the information systems is essential to the defense and/or economic security of the state, as well as to the maintenance of state authority and/or public life (art. 2 (g)).

As we see, this act covers entities which hold information that can be mentioned under one header "information of public importance". Then, we have to find out how far the applicability of this act extends. On this issue answer is given in art. 3 (1) *"This Law shall apply to all legal persons and state authorities that are critical information system subjects. This law shall also apply to the organizations and agencies that are subordinated or related to*

critical information system subject through labor, internship, contractual, or other relationships and that provide access to information assets under such relationships." This means that the law obliges only those entities, which hold and use "information of public importance." It is obvious that the notion of "information" contains various kinds of data, including, personal data, therefore, the act is applicable to personal data processing only if it is regarded as a part of critical information system, that is, "information of public importance." However, if we continue to discuss the issue of applicability, art. 3 (6) gives us following regulation: *"the provisions of this law shall not affect the application of the norms provided for by the legislation of Georgia that governs […], personal data processing, […]."* At first, it may seem that this norm excludes the applicability of this act on personal data processing, but from a teleological and systematic interpretation of the norms, it is clear that this act does not affect the rules of data processing which are given by another legal act, but at the same time ensures security measures for information, including, personal data, if it is a part of critical information system. Additionally, this act does not apply to mass media, editorial offices of publishing houses, scientific, educational, religious and public organizations, as well as to political parties regardless of the importance of their activities to the national defense and/or economic security and to the maintenance of state authority and/or public life (see art. 3 (3)). The main idea behind excluding these entities and activities done by them, was not to impede freedom of expression generally, and more interesting is that *"any legal person and public authority that is not a critical information system subject may voluntarily assume the obligations deriving from this Law."* It simply gives an opportunity to every entity to adhere stated norms, but this is not mandatory. We cannot say that this act applies to all public and private sector entities; therefore it can't be regarded as establishing personal data protection mandatory standards of data security for every entity.

Moreover, in 2013, the President of Georgia issued an Edict #157 on the Approval of the List of Critical Information System Subjects, according to

which these subjects were defined. By reading this list one will clearly see that entities mentioned in an edict are public organizations, such as, ministries, public legal entities and private organizations, which are functioning as public entities and are established by the state. Therefore, the Law of Georgia on Information Security does not provide sound basis for organizational and technical data security for every data controller.

The issues of information security are addressed in the Order #2 on Minimal Requirements of Information Security Standards issued by the Chairman of Data Exchange Agency, in which measures of security are described. It also includes best practices of the ISO 27001 standard, which is on information security. However, this document can't be seen as a remedy for data security, due to the fact that by this order it only applies to the critical information system subjects, which were recently mentioned.

As we see, there is no mandatory minimal requirements for data security established by legislation to every data controller. The remedy may be found in the international standard, namely, ISO 27001, which is on information security management. It helps organizations to keep information assets secure, such as financial information, intellectual property, employee details or information entrusted to data controllers by third parties. It can be applied to small, medium and large business in any sector for data security (http://www.iso.org/iso/iso27001).

Another way to ensure data security is to implement a modern approach for data processing practices, namely, conception of Privacy by Design, introduced by Ann Cavoukian – former Information and Privacy Commissioner of Ontario, Canada. This conception lies on seven general principles, which are flexible for any institution to be adopted. These seven principles can be seen as a rephrase of data protection principles, but gives us explanations and definitions from the different angle. Let's review only those, which have relation to the data security to see how useful they are for maintaining effective protection of data in IT systems.

- *Proactive and preventive approach* – This is the first principle of PbD. In order to avoid any risks to be materialized, data controllers should shape and implement measures in advance that will prevent privacy invasive events (Privacy by Design in Law, Policy and Practice, Cavoukian, A., Ontario, Canada, 2011, 20). These measures can easily be regarded as ensuring data security too, because preventing risks, among other things, includes safeguarding personal data from unauthorized access and use.

- *Privacy as the default* – It aims to deliver the maximum degree of privacy protection by automatically protecting it in any IT system or business practice (ibid.). This principle requires that a data controller put in place measures that will form a sound basis for data security as it is oriented on information technology issues. Therefore, a data controller should not only establish default rules for security, but also think of the adequacy of protection for various kinds of data, particularly, for non-sensitive and sensitive information.

- *Privacy embedded into Design* – The main idea of this principle is that privacy should be an essential component of the core functionality being delivered (ibid.). This is not meant to diminish the productivity of a service. The essential point of this principle is to maintain efficiency alongside with securing the data in IT systems. Therefore, it can serve as a requirement for data security.

- *End-to-end lifecycle protection* – This principle mandates protection of data from the time when it is collected to the end of the process, when it should be timely deleted (ibid.). Of course, this principle can be regarded as a main requirement for data security, due to the idea of the security itself – measures guaranteeing security, should cover every aspect of data processing, that is, to extend on entire lifecycle of the process.

Conclusion

The aim of this article was to examine ways for ensuring organizational and technical data security. As it appeared, the requirement established by the Law of Georgia on Personal Data Protection to ensure data security can easily be regarded as the principle requirement with 5 general principles of data protection. So, the importance of these mandatory requirements is evident. By guaranteeing data security, data controllers are guaranteeing that the five general principles of data protection, provided for by law, will be complied with and data processing practices will be in accordance with the requirements established by these general provisions.

Another important aim was to find legal regulations for establishing mandatory standards on organizational and technical data security. However, such standards are provided only for public legal entities and government organizations, such as, ministries. It somehow seems that the Georgian legislature has avoided regulating private organizations, which results in an approach, when every private entity establishes such standards which are suitable according to their own considerations.

Georgia shares a European model of data protection and according to the EU-Georgia Association Agreement (art. 14), Georgia is obliged to establish the same level of data protection that it is in European Union, particularly, as guaranteed by the Directive 95/46/EC, but the fact is that overall data protection culture is not at the same high level in Georgia as it is in European Union. Even the Law of Georgia on Personal Data Protection, which was passed at the end of 2011, entered into force in its entirety in 2013, but still today data controllers are still having issues with the implementation of this act in their everyday processing activities (see Annual Report of Personal Data Protection Inspector's Office on the State of Personal Data Protection and Activities of the Inspector of Georgia, 2015, p. 9). Accordingly, it is now legislators turn to regulate this new field of law efficiently. It worth noting that at first prescribing minimum security standards for every data controller may

not be easy to implement, but doing so, we can achieve the standards of data protection which have been established in the European model and therefore protect one of the most important human rights – privacy

References

Publications:

Cavoukian, A. (2011). Privacy by Design. Ontario, Canada. Information Commissioner's Office.

Annual Report of Personal Data Protection Inspector's Office on the State of Personal Data Protection and Activities of the Inspector of Georgia. (2015). Tbilisi, Georgia. Personal Data Protection Inspector's Office of Georgia.

Webpages:

Data Protection Commissioner of Ireland. (2016). Data Security Guidance. Retrieved 07/20/2016 from: https://www.dataprotection.ie/docs/Data-security-guidance/1091.htm.

InfoSec. (2016). IT Security Standards and Best Practices. Retrieved 06/16/2016 from: http://www.infosec.gov.hk/english/technical/guidelines.html#id4.

Boston University Information Services & Technology. (2016). Information Security. Retrieved 06/29/2016 from: http://www.bu.edu/infosec/howtos/how-to-choose-a-password/

International Organization for Standardization. (2016). ISO/IEC 27001 – Information Security Management. Retrieved 07/07/2016 from: https://www.iso.org/isoiec-27001-information-security.html.

Legal Acts:

Chairman of Data Exchange Agency. (2013). Order #2 on Minimal Requirements of Information Security Standards. Retrieved 07/05/2016 from: http://dea.gov.ge/?action=page&p_id=127&lang=geo.

Council of Europe, Committee of Ministers. (1989). Recommendation no. R (89) 2 of the Committee of Ministers to Member states on the Protection of Personal Data Used for Employment Purposes. Retrieved 07/01/2016 from: http://www.coe.int/t/dg3/healthbioethic/texts_and_documents/Rec(89)2E.pdf.

Data protection Act of the United Kingdom. (1998). Retrieved 06/30/2016 from: http://www.legislation.gov.uk/ukpga/1998/29/contents.

EU-Georgia Association Agreement. (2014). Retrieved 07/20/2016 from: https://eeas.europa.eu/sites/eeas/files/association_agreement.pdf.

Federal Data Protection Act of Federal Republic of Germany. (2009). Retrieved 07/15/2016 from: https://www.gesetze-im-internet.de/englisch_bdsg/.

Law of Georgia on Information Security. (2012). Retrieved 06/24/2016 from: https://matsne.gov.ge/ka/document/view/1679424?impose=translateEn.

Law of Georgia on Personal Data Protection. (2011). Retrieved 07/01/2016. From: https://matsne.gov.ge/ka/document/view/1561437?impose=translateEn.

President of Georgia. (2013). Edict #157 on Approval of the List of Critical Information System Subjects. Retrieved 07/07/2016 from: https://matsne.gov.ge/ka/document/view/1867646.

The Council of Europe. (1981). Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Retrieved 07/20/2016 from: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680078b37.

Mirianashvili George,
Grigol Robakidze University, Georgia

Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms: The Second Unsuccessful Attempt

The article provides an overview of the impediments of the European Union accession process to the European Convention for the Protection of Human Rights and Fundamental Freedoms and assesses the prospects of completion of this process. Accession of the EU to the European Convention is the substantive issue of the European political agenda. It is going on for about 45 years. The first attempt of accession of the EU to the European Convention failed. Significant political and legal steps were taken within the frameworks of the COE and the EU for provision of accession. Notwithstanding the fact that the political decision on accession is already made, the legal systems of the European Convention and the EU are harmonized, accession cannot be completed in legal manner yet. Failure of the second attempt of accession of the EU to the European Convention is due to the European Court of Justice.

Keywords: European Union, European Convention, draft accession agreement, European Court of Justice

Introduction

Political and scholarly discussions concerning the accession of the European Union (hereinafter – the EU) to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - the European Convention) have been going on for about 45 years. The first attempt of the accession of the EU to the European Convention failed. In 1996, the European Court of Justice decided that the basic Treaties of the European Union did not grant it with explicit and implicit internal competence in the area of human rights; therefore, the EU had no authority to enter into international agreements concerning its accession to the European Convention [20, paragraph 27] [33] [1]. According to the Court, accession to the Convention meant the entry of the EU into another international legal order, on the one hand, and the integration of its rights and fundamental freedoms into the Community Law, on the other hand, which necessarily required appropriate changes to the founding treaties of the EU [21, paragraphs 34–35].

Significant political and legal steps were taken within the frameworks of the Council of Europe and the EU for provision of accession. In 2004 the Additional Protocol No.14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted, which awarded the EU with the right of accession to the European Convention and its additional protocols [24, article 17]. In 2007, the EU member states signed the "Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community" agreement in Lisbon (Portugal) (hereinafter – the Lisbon Treaty), which entered into force on December 1, 2009. The Lisbon Treaty explicitly granted the EU the competence of accession to the European Convention [31, Eighth paragraph of article 1]. In addition, the EU's primary law defined the accession conditions. Given the fact that for provision of accession the primary law systems of the European Convention and the European Union were adapted, the negotiations were held in the bilateral cooperation format of the Council of Europe and the EU concerning drafting

the legal document – the accession agreement, which ended on April 5, 2013. By the initiative of the European Commission, the draft agreement was sent to the

European Court of Justice in order to assess its compliance with the primary law of the EU. Scholars of the International Law assumed that the prolonged process of accession had reached its final stage [8] [3]; however, according to the Opinion 2/13 of the European Court of Justice, dated December 18, 2014, the second attempt of the EU concerning the accession to the European Convention was unsuccessful. According to the opinion of the Court, the draft agreement on the accession of the EU was announced incompatible with the founding treaties and the accession process was postponed indefinitely.

Immediately after the announcement of the initiative concerning the accession of the EU to the European Convention, this issue became particularly urgent in the literature of the international law. It has been the object of research of scholars over the decades [2] [25] [14] [26] [11] [15] [4] [9] [10] [28] [27]. Unfortunately, this issue is not discussed in the Georgian legal literature. The article hereof is the first attempt to discuss this topic.

The aim of the present article is to review the Opinion 2/13 of the European Court of Justice, dated December 18, 2014, as well as the draft agreement on the accession of the EU to the European Convention in a critical section and to assess the accession prospects taking the identified problematic issues into account.

The article hereof consists of three parts. The second part deals with the second unsuccessful attempt of accession, identifies the factors impeding the accession process, proposes criticism of the draft agreement on accession and the opinion of the European Court of Justice. The conclusion summarizes the issues raised in the article, discusses them in common context and provides their systemic presentation.

Opinion 2/13 of the European Court of Justice – the Second Unsuccessful Accession Attempt

According to the Opinion of the European Court of Justice, dated December 18, 2014, the draft agreement on accession was announced as incompatible with the founding treaties of the EU and the accession process was delayed once again. During the discussion of the draft agreement, the Court assessed whether the draft agreement had negative effects over the specific characteristics of the EU law and how the institutional and procedural mechanisms corresponded to the terms and conditions provided for by the founding treaties of the EU [20, paragraph 178].

The Court recognized that following the accession to the European Convention, EU institutions, including the European Court of Justice would be subject to the foreign control of the European Court of Human Rights (hereinafter - ECtHR), which would exercise jurisdiction according to the first article of the European Convention [20, paragraph 181]. In addition, the Court pointed out again that signing the international agreements by the EU, which establishes a special court for the purpose of interpretation and application of such an agreement, does not contradict EU Law in principle, if the founding treaties explicitly awards the EU with the competence of signing such agreements [20, paragraph 182]. It can be said, that accession of the EU to the European Convention is not contested by the European Court of Justice, as according to the founding treaties, the EU explicitly possesses such competence. Nevertheless, the EU Supreme Court expressed such comments in its opinion concerning the draft agreement, which excludes accession on the terms of the European Convention and the current system of the EU Law. The problematic issues illustrated in the opinion of the European Court of Justice refer to:

Absence of provisions regarding the coordination between article 53 of the European Convention and article 53 of the Charter of Fundamental Rights of the European Union in the draft agreement on accession;

Absence of a rule concerning the principle of so-called "mutual trust" among the EU member states in the draft agreement on accession;

Absence of a rule concerning the mechanism stipulated by the Additional Protocol No. 16 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the preliminary ruling procedure;

An instrument of participation of the European Court of Justice in the proceedings of the European Convention – prior involvement procedure;

Interaction of the co-defendant mechanism and autonomy of the legal order of the European Union;

Incompliance of the article 5 of the draft agreement on accession with the article 344 of the Treaty on the Functioning of the European Union;

Jurisdiction of the ECtHR in the area of common foreign and security policy.

Consideration of the comments of the European Court of Justice is especially important for assessing the prospects of accession of the EU to the European Convention. Accession of the EU to the European Convention shall not be possible without their consideration and adoption. Above impediments shall be discussed within the chapter hereof.

Coordination of the European Convention and the Charter of Fundamental Rights of the European Union - criticism of the draft agreement

The first circumstance that led to the incompatibility of the draft agreement with the law is related to the absence of a provision regarding the

coordination between the article 53 of the European Convention and the article 53 of the Charter of Fundamental Rights of the European Union (hereinafter – the Charter) in the draft agreement. The Court begins to address this issue through the discussion of the immanent features of external control. According to it, the innate characteristic of external control is that the content of interpreted provisions of the European Convention is binding for EU institutions (including the European Court of Justice), on the one hand, and the ECtHR does not have the obligation to consider the performed interpretation of the rights and freedoms protected under the European Convention by the European Court of Justice into account, on the other hand [20, paragraph 185]. According to the Court, such a rule does not apply to the interpretation of the EU Law, including the Charter by the European Court of Justice. The Court considers that the ECtHR should not have the authority to determine the scope of applicability of the basic rights provided for by the EU Law, including the Charter [20, paragraph 186]; it is obliged to take the practice of the European Court of Justice into account in this direction [20, paragraph 186]. The EU Supreme Court declared in the *Melloni case*, that application of the national standard of the basic right shall not prejudice the use of the standard of this right on the level set by the Charter, on the one hand, and the primacy, unity and effectiveness of EU law [19, paragraph 60], on the other hand. According to the Court, authority granted under the article 53 of the European Convention to the EU Members States is limited for the provision of the standards set by the Charter and the EU Law [20, paragraph 189]. There is no common position in relation to coordination of the article 53 of the Charter and the article 53 of the European Convention in the literature of the international law. Some scholars believe that there is no necessity of coordination for maintaining the harmonious relations of the above provisions. In their view, the article 53 of the European Convention authorizes the Contracting Parties to establish the higher standards than those of the European Convention for the Protection of Human Rights and shall not preclude the obligation of the EU member states before the EU Law, in particular the Charter [6, p. 11]. The scholars believe, that need for

coordination of the Charter and the European Convention is "invented" by the European Court of Justice [6, p. 11]. *Krenn* considers approach of the European Court of Justice as appropriate and believes that absence of the provision concerning coordination shall be the threat for unity, efficiency and primacy of the EU Law [13, p. 166]. According to him, after accession, the European convention will acquire the status of the source of the EU Law in line with the article 216 of the Treaty on the Functioning of the EU, correspondingly the court of the EU member state will be entitled to apply the standard (national or international) higher than the that set forth in the Charter for the Protection of Human Rights on the basis of the article 53 of the European Convention (i.e. the source of the EU Law) and not to apply the European Court of Justice within the scope of the preliminary ruling procedure [13, p. 158]. *Krenn's* position should be shared, as the international agreement of the EU has the power of direct effect and use [18]. The draft agreement must include a provision concerning coordination of article 53 of the European convention and tarticle 53 of the Charter, which will ensure the common standards of human rights within the frameworks of the EU. In other cases, on the basis of the article 53 of the European convention, the internal court will be authorized to carry out such interpretation of the national acts (e.g. the Constitution) per case, in order to create standards higher than the EU Law on Human Rights, which will have the negative impact on the unity of the EU legal order, as well as its primacy.

Principle of the duty of mutual trust VS practice of the ECtHR

According to assessment of the European Court of Justice, the second impediment for the accession of the EU to the European Convention is the absence of a so-called "mutual trust" principle between the EU member states in the draft agreement. According to this principle, in the process of implementation of a legal act related to the area of justice, freedom and security, the EU member state shall:

assume that the regime of protection of the human rights in other EU member states are in line with the standards established by the EU Law;

Not request from other EU member states the establishment of the standards higher than the human rights standards in the EU;

except for in exceptional cases, not examine whether the existing human rights standards in such States are in compliance with those of the EU system [20, paragraph 191].

The position of the European Court of Justice directly contradicts to the principle developed by the ECtHR in the *M.S.S. case,* which Belgium became liable for violation of the article 3 of the Convention. In the case, Belgium transmitted an asylum-seeker to Greece, in accordance with the Dublin Regulations. In Greece, the asylum-seeker was placed in a pre-trial detention center and was not provided with adequate subsistence conditions. In addition, the Greek legislation did not envisage appeal against the decision on the placement of a person in a pre-trial detention center. The applicant complained that Belgium was aware of the gaps existing in Greek's asylum system, including the risk of detention of asylum-seekers, nevertheless, it took the decision on transmission. The ECtHR shared the applicant's arguments and stated that Belgium should have taken the inefficiency of the Greek asylum system into account and should not have assumed that the asylum-seeker would be treated in Greece in accordance with standards established by the European Convention [17, paragraph 353]. In this decision, the Court points out that the EU member states shall be obliged to evaluate the human rights standards available in other member states.

ECtHR is focused on the creation of an effective system of human rights and the European Court of Justice is constantly trying to get the supranational cooperation concerning any other issue, including human rights. There is no doubt that the presumption of protection of human rights in line with the European Convention is in contrary with the purpose of the Convention, the

principle of equality of the Contracting Parties and the practice of the ECtHR; however, the EU cannot join the European Convention if the draft agreement does not take into account the opinion of the European Court of Justice. Therefore, it is legitimate to ask the question - which is more important – the effectiveness of the European system of human rights or the accession of the EU to the European Convention?

Additional Protocol No. 16 of the European Convention for the Protection of Human Rights and Fundamental Freedoms - the threat of the replacement of the preliminary ruling procedure?

The Additional Protocol No. 16 of the Convention was opened for signature on October 2, 2013, according to which the supreme court or tribunal of the Contracting Parties of the European Convention will be entitled to apply the ECtHR for submission of the opinion in relation to use and interpretation of the rights and freedoms set forth in the European Convention or its protocols during the proceedings [23, article 1]. According to the current situation, the Protocol is not in force. The European Court of Justice declared in its decision that there was a real risk of limiting the preliminary ruling procedure and requested the coordination of the Additional Protocol No. 16 and this procedure [20, paragraphs 198-199]. According to the Court, given the fact that after accession the Convention will be integrated in the EU legal system, the national Supreme Court will be entitled to use the mechanism established under the Additional Protocol No. 16 for the interpretation of the EU law provision and to refuse application to the European Court of Justice, which will negatively impact the autonomy and efficiency of preliminary ruling procedure [20, paragraph 196]. It should be noted that the preliminary ruling procedure is the cornerstone of the EU justice system [12, p. 258]. Through cooperation of the courts of the EU and the member states, this mechanism will promote uniform application and interpretation of EU Law [12, p. 259]. Absence of the provision of coordination between the Additional Protocol No.

16 of the European Convention and the preliminary ruling procedure may be considered a drawback of the draft agreement. Current wording of the draft agreement does not rule out the possibility that the national Supreme Court could apply to the ECtHR, on the one hand, and the European Court of Justice, on the other hand, for interpretation of the rights declared in the Convention or its additional protocol. In this case, there is the risk of different interpretation of the European Convention, which of course will not be positively reflected on the European System for the Protection of Human Rights. In order to resolve this legal problem, it is recommended to award the European Court of Justice with the authority of preliminary participation in the process stipulated by the Additional Protocol No. 16 of the Convention and to consider the question of the national courts prior to submission of the opinion by the ECtHR.

The procedure for the prior involvement of the European Court of Justice

The decision of the European Court of Justice concerning the prior involvement procedure identifies two problematic issues. The first comment refers to availability of interpretation of the practice of the EU courts by the ECtHR. As mentioned above, the court of the member state is entitled and in some cases, is even obliged to ask the question to the European Court of Justice within the scope of the preliminary ruling procedure in relation to interpretation of sources of primary and secondary law of the EU and validity of only secondary legal acts. However, the national court has the right not to apply the preliminary ruling procedure, if such issue has been decided by the European Court of Justice, or the interpretation of the relevant provision of the EU legal act is clear [12, p. 257]. This issue is relevant in the accession process, as the national courts may consider on the basis of the aforementioned during the proceedings, that there is no need for use of the preliminary ruling mechanism and to make a decision without applying to the EU court. If a person believes that his legal interests are not complied with on

the national level and the rights stipulated by the Convention were violated, he may appeal against the EU and its member states to the ECtHR. In practice, of course, in addition to an individual application, other relevant documents, including the judgments of internal courts will be sent to the ECtHR, containing the arguments about inexpediency of use of the preliminary ruling instrument. Given the fact that the draft agreement on accession and its explanatory note does not discuss such cases, the ECtHR turns out to be in dilemma. The ECtHR will send the case for consideration within the frameworks of the prior involvement procedure to the European Court of Justice or will take the justification of the national court concerning non-use of the preliminary ruling procedure into account and will discuss the case directly. According to the EU Supreme Court, awarding such authority to the ECtHR will be equivalent to the interpretation of the practice of the European Court of Justice, which explicitly contradicts to the basic treaties of the EU [20, paragraph 239]. *Krenn* agrees with the Court's opinion and believes that granting such authority to the ECtHR "is not the best solution" [13, p. 154]. According to the European Court of Justice, the draft agreement on accession must provide full information about similar cases to the appropriate EU institutions, which will judge whether the European Court of Justice has carried out interpretation of the disputed act. He believes that only after the completion of this procedure, taking the opinion of the appropriate EU authority into account, the ECtHR will be entitled to make the decision on the initiation or refusal on the initiation of the prior involvement procedure.

The position of the European Court of Justice should be shared, as the idea of introducing the prior involvement mechanism, in addition to the fact that it means respect of the subsidiary nature of the ECtHR, aims not to grant an exclusive opportunity of the interpretation of the EU legal act to the ECtHR. Therefore, it is logical that the ECtHR should not possess the right to interpret the practices of the Court of Justice of the EU.

The European Court of Justice considers it to be disadvantageous that in the draft agreement on accession, according to the explanatory note within the frameworks of the prior involvement procedure, it holds the competence of discussion of compliance of the EU secondary legal act with the European Convention and its additional protocol and not its interpretation [20, paragraph 242]. The Court considers that the current wording of the draft agreement limits its jurisdiction. In its opinion, if it fails to submit the final version of interpretation of the EU secondary legal act to the ECtHR and only declares compliance of the disputable act with the European Convention, the ECtHR will be entitled to interpret the disputable act of the EU in the case discussion process, which directly contradicts the principle that entitles the right of final interpretation of the EU Law only to the European Court of Justice [20, paragraph 246]. The opinion of the Court was criticized in the literature of international law. The position of those scholars should be shared, who believe that the Court possesses especially formal approaches to the draft agreement on accession [6, p. 12]. The comment of the European Court of Justice is unreasonable given to the fact that discussion of compliance of the EU legal act with the European Convention means interpretation of this act itself. It is impossible to imagine the case, when the Court does not carry out interpretation of the disputed provision and establishes its compliance or incompliance with the Convention without justification. It is obvious that the European Court of Justice considers legal truth as disputed for "protection" of its jurisdiction. However, in order to ensure legal certainty, in the process of preparation of the explanatory note of the draft agreement on accession, more distinct formation of the authorities granted to the European Court of Justice was available within the frameworks of the prior involvement procedure.

Interaction of co-defendant mechanism and autonomy of the legal order of the European Union

The European Court of Justice expressed its comments regarding the mechanism of the co-defendant. First of all, its dissatisfaction is related to the case when the EU or its member state applies to the ECtHR for awarding the status of co-defendant. According to the EU Supreme Court, despite the fact that in such situations the ECtHR will not assess the actual circumstances of the case and will review the justification and compliance of the request submitted by the EU or its member state with the appropriate criteria established for awarding the status of co-defendant to the contracting party of the European Convention, it will also be entitled to discuss the issue of distribution of the competences between the EU and its member state on the basis of the EU Law [20, paragraph 224]. According to the EU Supreme Court, discussion of this issue by the ECtHR shall mean interference in its exclusive competence [20, paragraph 225]. It is interesting that the European Court of Justice only reviews this problem and does not suggest possible solutions. *Lazowsky and Wessel* partially agree with the Court's position. According to their opinion, the protection of competence of the European Court of Justice is one of the core preconditions for provision of autonomy of the EU Law [16, p. 198]; however, they believe that in the process of fulfillment of the external control, absolute prohibition of interpretation of the EU Law for the ECtHR does not comply with the Strasburg System [16, p. 199]. Integration in the Convention system shall mean recognition of the fact that the court of the contracting party does not have the power to say the "final word" concerning interpretation of the internal legal act in relation to the European Convention [16, p. 199]. Accordingly, threatening efficiency of the Convention system at the expense of the provision the autonomy of the EU Law is wrong. In addition, the absolute limitation of the jurisdiction of the ECtHR for the protection of the competencies of the European Court of Justice is not the best solution.

According to the judgment of the EU Supreme Court, the second impediment for accession is the current wording of the clause 7, article 3 of the draft agreement. According to the Court, the above provision will not prejudice the liability of the EU and its member states on the basis of the article hereof, on which the EU member states carried out reservation in line with the article 57 of the European Convention [20, paragraph 227]. The Court's opinion is completely shareable. The clause 7, article 3 of the draft agreement completely contradicts to the article 2 of the Protocol No. 8 of the EU basic treaties, clearly stating that the accession agreement should not have an impact on the reservations of the member states in relation to the European Convention and its Protocols.

The third comment stated in relation to the co-defendant mechanism shall refer to the issue of imposing liability to the defendant and the co-defendant. According to the draft agreement, joint liability shall be imposed to the defendant and the co-defendant for violations of the Convention. In addition, the ECtHR is authorized to impose liability to either defendant or co-defendant only on the basis of the request of the defendant and the co-defendant and taking the opinion of the applicant into account. The European Court of Justice considers that in such cases the ECtHR can discuss the issue of distribution of competences between the EU and its member state. It believes that liability for violation of the European Convention may be imposed to the defendant or the co-defendant only on the basis of the relevant provisions of the EU Law, which, if needed, must subject the jurisdiction of the European Court of Justice [20, paragraph 234]. The EU Court expressly states, that granting such right to the ECtHR will be equivalent to replacement of the competence of the European Court of Justice [20, paragraph 234]. *Krenn* agrees with the EU Court's position. He believes that the EU member states will be interested in the approach of the ECtHR within the framework of the EU in relation to distribution of competences [13, pp. 152-153]. Opinions of the Court and *Krenn* are difficult to share. In cases if the EU or its member state assumes liability for violation of the Convention, in expressing its

readiness for compensation of damages, of course it is necessary to execute such agreement by the ECtHR and to finish the judicial proceeding.

Disputes among the parties – the article 5 of the draft agreement vs. the article 344 of the Treaty on the Functioning of the European Union

Article 5 of the draft agreement is not enough for the European Court of Justice for the provision of the principles set forth by the article 344 of the Treaty on the Functioning of the European Union. It believes that consideration of a dispute between the EU and its member states or between EU member states concerning application or interpretation of the Convention is the exclusive authority of the European Court of Justice [20, paragraph 204]. According to the Court, article 5 of the draft agreement reduces the scope of applicability of article 55 of the European Convention; however, it does not exclude the possibility of submission of the application by the European Union or its member state against other member state in the ECtHR [20, paragraph 207]. According to the Court's assessment, the existence of such risk does not comply with article 344 of the Treaty on the Functioning of the European Union [20, paragraph 214].

In the opinion of Mrs. Kokott, the Advocate General of the European Court of Justice, the draft agreement on accession should contain a provision, which will grant primacy to the EU system of justice with regard to the ECtHR [32, paragraph 115]. In this regard, the EU Supreme Court clearly stated that it is necessary to indicate in the draft agreement obviously that the ECtHR has no jurisdiction in the disputes between the EU and its member states or between the EU member states concerning *ratione materiae* use of the Convention in the EU Law [20, paragraph 213]. It can be said that the Court suggested its own version of the accession agreement to the Contracting Parties of the Convention.

Certain scholars do not consider the opinion of the European Court of Justice as appropriate; they believe that the accession agreement should not include issues related to the internal regulations of the EU [6, pp. 11-12]. It should be noted that the comment of the EU Supreme Court is justified. Article 5 of the draft agreement does not consider the court system as the mechanism for the consideration of disputes concerning application and interpretation of the European Convention. Accordingly, in the terms of current edition of article 33 of the Convention and the explanatory note of the draft agreement, the EU or its member states shall have the right to file an application with the ECtHR against another member state. Therefore, the neutral approach proposed by the authors in the draft agreement is not consistent with article 344 of the Treaty on the Functioning of the European Union.

Area of common foreign and security policy – accession excluding provision

The common foreign and security policy of the EU is a serious challenge to the accession process; moreover, its current situation excludes accession of the EU to the European Convention. So-called "Intergovernmental cooperation method" is applied in the area of common foreign and security policy, which means unanimous decision-making in the format of the Council of the EU and the existence of the limited jurisdiction of the European Court of Justice [12, p. 110]. In addition, the adoption of the EU legislative acts in this area is prohibited [29, First paragraph of the article 24]. According to EU primary law, the jurisdiction of the European Court of Justice over common foreign and security policy is limited. It only carries out the monitoring of compliance of the activities of the EU institutions with the competencies granted under the founding treaties of the EU [29, First paragraph of the article 24] and discusses the legality of restrictive measures applied to individuals and legal entities by the Council of the EU [30, Article 263]. The court does not have the competence for assessment of compliance of the legal acts adopted in the area of common foreign and security policy with basic treaties of the EU [30, Article

275]. Therefore, within the scope of the prior involvement procedure, the Court cannot consider the compliance of legal acts related to common foreign and security policy, actions and omissions with the European Convention. In this case, it will go beyond the scope of its jurisdiction and violate Protocol No. 8 of the basic treaties of the EU. Accordingly, the ECtHR will face a version of assessment of interpretation of the EU legal provision or action proposed by the national court. The European Court of Justice acknowledged the situation and declared that competence of assessment of legality of the EU legal acts, actions and omissions (including with respect to basic human rights) should not be exclusively awarded to the body, which is not the part of the EU institutional system [20, paragraph 256]. It supports the discussion of compliance of the EU legal acts, actions and omissions with the European Convention by the ECtHR in such conditions when the European court of justice does not possess such authority, will contradict to the requirements stipulated by Protocol No. 8 of the basic treaties [20, paragraph 257]. The legal literature discusses a solution to the problem related to common foreign and security policy as "mission impossible" [6, p. 14]. *Pierce* does not share the Court's opinion. According to him, the European Court of Justice does not consider the principle of rule of the law and develops abstract concepts [22, p. 222]. It indicates that the basic treaties of the EU do not stipulate the issue of prohibition of certification of the legality of the EU legal acts, actions and omission by the international court [22, p. 221]. According to *Pierce*, under the decision of the European Court of Justice, the aim of accession of the EU to the European Convention has lost its importance due to the fact that it will have a negative impact on the effectiveness of the European Convention system [22, p. 222].

The European Court of Justice perfectly used the procedure of discussion of the draft agreement in accession in order to expand its competencies. For completion of the accession process it is necessary either to review the basic treaties of the EU and grant overall competence to the European Court of Justice in the area of common foreign and security policy, or to amend article

57 of the Convention, on the basis of which the EU will exercise a general reservation. It is obvious, that the member states of the Council of Europe will not accept amendments to the Convention. In this case, unlike the other contracting parties, the EU will prevail. In addition, the efficiency of the European System of Human Rights will be seriously threatened, as the ECtHR and the European Court of Justice will not be able to the carry out control over compliance of the actions of the EU in the area of common foreign and security policy with the human rights. The only solution for the provision of accession of the EU to the European Convention is to reflect the position of the European Court of Justice in the basic treaties, which is a difficult task from a political as well as legal standpoint. It will be difficult for the EU member states to achieve a consensus on granting the supranational status of the area to common foreign and security policy, despite the fact that accession to the European Convention is the obligation of the EU.

According to the decision of the European Court of Justice, the accession process "went into deadlock" and its completion is a distant prospect. The European Court of Justice and the ECtHR have an informal relationship, which is primarily aimed not at the formation and uniform development of the common European System of Human Rights, but at a "harmonious" coexistence of the EU legal system and the European Convention.

Conclusion

This article provides an overview of the impediments of the EU accession process to the European Convention and assesses the prospects of completion of this process. Accession of the EU to the European Convention is the substantive issue on the European political agenda. Notwithstanding the fact that the political decision on accession has already been made, the legal systems of the European Convention and the EU are harmonized, accession cannot be completed in legal manner yet. The failure of the second attempt of

accession of the EU to the European Convention is due to the EU Supreme Court. It is clear that the European Court of Justice is trying to impede this process. It is important to note that several comments of the European Court of Justice concerning the draft agreement on accession – the need for coordination of article 53 of the European Convention and article 53 of the Charter of Fundamental Rights, limitations on the scope of the Additional Protocol No. 16 of the Convention, limitations on the jurisdiction of the ECtHR concerning the disputes between the parties - should be shared. Their solution is not particularly difficult. The authors of the draft agreement on accession had an opportunity to predict such issues and to arrange them in line with the EU primary law. However, comments on the dissemination of the jurisdiction of the ECtHR over the common foreign and security policy, the prevailance of the "mutual trust" principle between the EU member states over the convention system, the prior involvement system and the imposing of individual liability by the ECtHR to the co-defendant and the defendant, is unjustified. Certain comments can be easily provided, however at the expense of the reduction of the effectiveness of the European Convention, the issue of the declaration of the "mutual trust" principle in the draft agreement will be disputable between the member states of the Council of Europe and the European Commission.

The limitation of the jurisdiction of the ECtHR in the area of common foreign and security policy is the unfulfilled task. Making general reservations is prohibited by the Convention. At the same time, amending to the European Convention and granting the right to make such reservations to the EU is contrary to the principle of the equality of the Contracting Parties of the Convention. Consequently, there is only one legal way to ensure accession – amendment to the founding treaties of the European Union and overall dissemination of the competencies of the European Court of Justice in the area of common foreign and security policy. This area is a particularly important part of the sovereignty of the EU member states; it is difficult to imagine that the member states will give up their power in this regard. In addition, the

amendments to the basic treaties of the EU are related to their prolonged terms. Therefore, in the terms of the current edition of the primary law of the EU and the European Convention, there is no prospect for the accession of the EU to the European Convention.

References

Beaumont, P. (1997). European Community cannot accede to the European Convention on Human Rights. *The Edinburgh Law Review*, *1,* 235-249.

Brown, L. N. & McBride, J. (1981). Observations on the proposed accession by the European Community to the European Convention on Human Rights. *American Journal of Comparative Law, 29*, 691-705.

Conforti, B. (2010). Comments on the accession of the European Union to the ECHR [comments]. *Italian Yearbook of International Law, 20*, 83-86.

Defeis, E. (2012). Treaty of Lisbon and accession of the European Union to the European Convention on Human Rights. *ILSA Journal of International and Comparative Law, 18*, 387-394.

Editorial Comments. (2015). The EU's accession to the ECHR – a "NO" from the ECJ!. *Common Market Law Review*, 1–16.

Gragl, P. (2014). A Giant leap for European Union Human Rights? The final agreement on the European Union's accession to the European Convention on Human Rights. *Common Market Law Review, 51*, 13–58.

Gragl, P. (2012). Strasbourg's external review after the EU's accession to the European Convention on Human Rights: A subordination of the Luxembourg court. *Tilburg Law Review, 17*, 32-62.

Hert, P. & Korenica, F. (2012). Doctrine of equivalent protection: Its life and legitimacy before and after the European Union's accession to the European Convention on Human Rights. *The German Law Journal*, *13*, 874-895.

Jacqué, J. P. (2011). The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms. *Common Market Law Review, 48*, 995–1023.

Kaczorowska, A. (2011). *European Union law, second edition.* New York.

Krenn, C. (2015). Autonomy and effectiveness as common concerns: A path to ECHR accession after Opinion 2/13 [comments]. *German Law Journal, 16*, 147-168.

Kruger, H. C. (2002). Reflections concerning accession of the European Communities to the European Convention on Human Rights. *Penn State International Law Review, 21*, 89-100.

Kuijer, M. (2011). Accession of the European Union to the ECHR: A gift for the ECHR's 60th anniversary or an unwelcome intruder at the party. *Amsterdam Law Forum, 3*, 17-32.

Lazowski, A. & Wessel, R. A. (2015). When caveats turn into locks: Opinion 2/13 on accession of the European Union to the ECHR. *German Law Journal, 16,* 179-212.

Martines, F. (2014) Direct effect of international agreements of the European Union. *The European Journal of International Law, 25*, 129-147.

Peers, S. (2015). EU's accession to the ECHR: The dream becomes a nightmare. *German Law Journal, 16*, pp. 213-222.

Quintin, Y. (1983). Analysis of the proposition of accession of the European Communities to the European Convention on Human Rights. *Vanderbilt Journal of Transnational Law, 16*, 887-912.

Quirico, O. (2010). Substantive and procedural issues raised by the accession of the EU to the ECHR. *Italian Yearbook of International Law, 20*, 31-54.

Schilling T. (2014). On equal footing: The participation rights envisaged for the European Union after its accession to the European Convention on Human Rights. *Human Rights Law Review,* 197–229.

Stubberfield, C. (2012). Lifting the organizational veil: Positive obligations of the European Union following accession to the European Convention on Human Rights. *Australian International Law Journal, 19,* 117-142;

Ward, Alysa J. (1999). Opinion of the Court of Justice regarding accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Redirecting the development of fundamental rights within the European Union. *Georgia Journal of International and Comparative Law, 27*, 635-654.

Legal acts:

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950;

TEU Treaty (Treaty on the European Union) (Maastricht Treaty) 1992;

Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention 2004;

TFEU (Treaty on the Functioning of the European Union) 2007;

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (The Reform Treaty) 2007;

Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2013.

Decisions of the European Court of Justice:

Opinion 2/94 Re European Convention on Human Rights [1996];

Melloni v. Ministerio Fiscal, C-399/11, [2013];

Peers, S.: EU's Accession to the ECHR: The Dream Becomes a Nightmare, German Law

View of Advocate General Kokott, opinion procedure 2/13, 2014 (available at: http://curia.europa.eu/juris/document/document.jsf?docid=160929&doclang=EN);

Opinion 2/13 pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties, [2014].

Decision of the European Court of Human Rights:

M.S.S. v. Belgium and Greece, no. 30696/09, Grand Chamber, [2011].

Proposed legal act:

Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.

Linguistics and Literature

Chkheidze Maia,
The University of Georgia, Georgia

Lingual Worldview and Cognition

The systematic character of the universe and the nature of synchronic level give rise to the possibility of identifying similarities and differences between invariant and variant relations, while the diachronic level provides the possibility of defining the relationship between the system elements and the potential of historical development of the mentioned elements. Any language possesses its own style of conceptualization. Accordingly, each language creates its own worldview. The language represents the essential means of developing the knowledge about the universe. In reflecting the reality, the speaker manifests the results of the word cognition. The sum of the knowledge represented in the lingual form is considered to be "the lingual representation of the world", in other words, "lingual world model" or "lingual worldview".

Keywords: symbolic structures, lingual world, cognition, conceptualization, synchronic, diachronic.

Introduction

Our existence starts with the creation of our worldview. We need special symbolic structures (language, mythology, religion, arts, and science) to orientate ourselves in the universe. These structures regulate our existence in the universe; their unity creates a fundamental and global view that helps us to perform in the universe. Any major transformation causes changes in the regulation of human activities - ideals and principles of perception, activities, values and spiritual orientation. These regulators vary across time and space.

The indispensable condition of human existence is the rationalization of the world. The process of rationalization of the world implies the process of thinking about the threats of the universe, identifying their causes, developing the mechanisms to tackle threats, and creating the principles of communication. A worldview creates the prism through which people see the world and themselves.

We settle in the real world by naming objects, events and determining their place in the real world. The systematic character of the universe and the nature of the synchronic level give the possibility of identifying similarities and differences existing between invariant and variant relationships, while the diachronic level provides the possibility of defining relationships existing between system elements and the potential of historical development of these elements.

The problem of modeling the worldview is connected with world perception. Generally, a world model is defined as a condensed and simplified reflection of particular views existing within the premise of certain traditions.

Language is integrated into the system of culture. To analyze the relationship between language and culture we should realize the function of language in the cultural-creative process. When we speak about the relationship between

language and culture, we mean natural or national languages. The diversity of national languages is due to the fact that they are fundamental for people - this is the freedom of choice.

A definition of the language as a system of signs is an imperfect description of language. Of course, language is a system of signs but it is much more than a sign. Language is connected to the perception of the world, ideology and the way people, the creators of the language, think. Language determines not only certain fragments of culture but it also determines everything that exists in it in the form of culture. Language is the form of the existence of culture. Language is one of the main identifiers of national and cultural mentality.

Any language possesses its own style of conceptualization. Accordingly, each language creates its own worldview. Language represents the essential means of developing the knowledge about the universe. In reflecting reality, the speaker manifests the results of word cognition. The sum of the knowledge represented in the lingual form is considered to be “the lingual representation of the world,” in other words, the “lingual world model” or “lingual worldview”.

Despite the fact that the concept of "worldview" is widely used in different scientific fields (philosophy, psychology, cultural studies, linguistics), it still remains a metaphor which often lacks clear and unambiguous definition even within the premises of one particular scientific field.

In our opinion, a main problem concerning the worldview is associated with the incompleteness of the specification of the technique relevant to the problem of modeling the lingual worldview. It is also clear that by identifying the main components of the worldview, the amorphism of the mentioned concept has not vanished yet.

It should be mentioned that while sharing other scholars points of view, we admit the validity of some essential markers of the worldview. These markers are:

1. Worldview determines the peculiarity of perception and interpretation;
2. Being historically preconditioned, worldview implies a constant change of the worldview and its subjects;
3. Worldview gives impetus to values, hierarchy and thinking paradigms.

We fully agree with the following statements:

1. A man depicts the universe as an image (icon);
2. A man perceives the universe as an image (icon);
3. The universe is transformed into an image (icon);
4. Having conquered the universe, a man, conquers the image (icon).

And finally, we share the following views:

1. The number of the worldviews equals to the number of people observing the universe and interacting with it;
2. The number of the worldviews equals to the number of the versions produced as a result of world perception;
3. The number of the worldviews equals to the number of the universes under human observation.

The article aims at giving answers to the following questions:

1. How can we shape a most adequate and objective worldview?
2. What type of unit is highly effective for modelling a lingual view of the universe?

An analysis of the problem of worldview modeling is essential in terms of accesibility to the hierarchy of separate sign systems and social and historical roots of different cultures. Language symbolizes intentions of national and individual mentality. The analysis of modeling lingual worldview comprises the research of the contexts of culture, where different sign systems have been molded and developed.

We consider it reasonable to present our point of view in the form of questions and answers, highlighting the peculiarities of the problems revealed at different stages of our research.

What should be reflected in a lingual worldview? – The worldview should reflect the peculiarities of human positions, ideals, and principles of perception, activities, values and spiritual orientations. Worldview, being a complex structural unity, should comprise three basic components: world outlook, perception and disposition.

Each language creates its own worldview through which a speaker organizes content of the expression. Language is a means of forming human knowledge about the universe. While reflecting reality, a human being translates perception outcomes into words. The sum total of the knowledge, accumulated through linguistic forms, is the phenomenon we call "lingual representation of the world" or "lingual worldview."

From the perspective of the anthropocentric paradigm a man perceives the universe, in other words, a man creates an anthropocentric center in his consciousness which determines his spiritual essence, the intentions of his actions and a hierarchy of values.

The human perception of the world is far from being error-free. That's why our conceptual system is constantly changing. The process of human cognition implies a process of forming the knowledge about objects. The information concerning the state of the objects existing in the world is

regarded as a "concept". We talk about concepts when it is necessary to characterize the units of a mental process. Accordingly, the process of cognitive structure, creating the concept is called conceptualization. The conceptual process aims at segmenting human experience into minimal units. A conceptual system represents the system of knowledge expressing cognitive experience of human being.

In the premises of the lingual-cultural approach, a concept presents a multidimensional mental unit including valuable, conceptual and image elements. A cultural concept differs from other types of concepts – a cultural concept is multidimensional. The formation of a concept implies the process of generalizing data derived from the cognition of reality. The mentioned process also includes the process of linking cognition data to the dominant values existing in religion, ideology and art. The functioning process of the concept implies a process of selection and usage of the language meanings.

Every direction of anthropocentric linguistics aims at studying and describing the following correlation – "a man in the language and the language in a man." Anthropocentricism offers new challenges: anthropocentric research requires new descriptive methods and new approaches to the phenomenon of categorization.

The basic thesis of linguistic anthropocentrism is the following: the world is a unity of facts not objects and research should be centered on speakers. This means that modern linguistics tries to cross its borders, in other words, modern linguistics tries to go beyond itself.

Different directions have developed in modern linguistics within the premises of the anthropocentric paradigm. Our interest is focused on cognitive linguistics.

Cognitive Linguistics analyzes language as a cognitive mechanism involved in the process of transformation and coding the language. The aim of cognitive

linguistics is the study of the processes of the perception of the universe, categorization and classification, in other words, cognitive linguistics aims at understanding the process of knowledge accumulation.

The research horizon of complex relationships existing between language and thought is evidenced in Cognitive Linguistics. This research horizon covers the following issues: language and thought, human's role in language and the role of language for human. Cognitive Linguistics aims at describing systems of knowledge representation. Semantic frames represent the conceptual models of the structure of knowledge representation and the organization of the human memory. The basis of the human thinking process is represented by accumulated structures in his memory - frames. A frame is considered to be the unit of knowledge representation, which describes the relationship between objects and events. Semantic frames create a repertory grid, which is considered to be a matrix of knowledge. One can imagine a frame as a net consisting of certain nodes. Each node must be filled with its "mission" - in other words, with the typical characteristics of a particular situation. There are several levels in frames and they are hierarchically connected to each other. Top-level nodes are general by their nature - they are always "correct" - typical for a certain situation. The nodes of lower level are not usually filled with a "mission". These types of empty units are called terminals. They should be filled with specific data representing some possible task that can emerge in a frame of particular situation. Representing the knowledge about the world with the help of frames is an effective way to understand the essence of the mechanism of natural language.

The approaches connected to the problem of constructing semantic frames can be divided into two major types:

a) Structural (systemic) approaches or analyses - based on the idea of decomposition. In this context each element presents one of the most important components of the entire construct;

b) Objective approaches – connected to the idea of decomposition of objects: each object represents the element of a certain class. Objects, classes and heredity of hierarchy properties are the notions the mentioned approach is based on.

To sum up, constructing semantic frames aims at building a pyramid of knowledge comprising the concepts of hierarchical construction. The relationship existing between some concepts is evidenced within each level of the pyramid as well as between its levels. A pyramid connects all notions and relationships. One of the types of relationships is the relationship between extensional and intentional units. An extensional unit represents basic concepts and correlations, describing sets of objects, things and events in the set. An intentional unit represents particular feature of the elements, concepts and relationships relevant to the set.

At first glance, a semantic frame is characterized by almost mystical firmness and order. We have to answer the following question: Does this order limit free individuality? We will try to answer this question.

To our mind, scenarios of mental models create a predictable, safe and orderly-arranged universe. Freedom and necessity are correlative notions in semantic frames. The mentioned elements are characterized by coexistence of individual and non-individual aspects in them.

A combination of elements verbalizing the concept represents the nominative - lexical- semantic field - of the concept. The scientific situation related to the theory of a lingual field provoked some definite questions:

Do the three terms used in linguistic literature as synonyms (field, thematic group, and synonymic set) serve to only create an abundance of terminology?

Or may be:

Different types of lexical – semantic groups really do occur in the language;

If this is the case, what is the source of their difference and can the above-mentioned terms be applied to the different types?

To answer these questions, we constructed several groups of lexical units denoting different contents and tested these groups from the following points of view:

From the point of view of their structure, i.e., the type of semantic relationships between the word-identificator of the group and the elements comprising this group;

From the point of view of the casual relation between the nature of the content of the group word–identificator and the type of the group structure.

Some definite regularity has been observed:

The causal relation between the nature of the content of the group word-identificator and the type of the group structure is evident;

Specificity of the group structure is the immediate result of the nature of the word-identificator's content, namely its subjectivity in one case and objectivity in another.

This characteristic is relevant to the type of structure, since the integral feature of the subjective content is, so to say, graduality and non-graduality, on the contrary, being the integral feature of the objective content.

The lingual expression of the graduality of the word-identificator's content is considered to be its dynamism.

A word-identificator is dynamic if it changes its value, i.e., the status of the main components of meaning in the semantic structure of some group elements.

The word–identificator is considered to be static if its value is stable in the semantic structure of all of the group elements.

The dynamism of the word-identificator, being the lingual expression of its content's graduality, conditions the variety of semantic relations. In other words, the inequalities of the distance between the word-identificator and different elements of the group result in the graduality of the structure, more precisely, in the existence in the group structure of dominant segments (with respect to one another and to the word-identificator) – center, transitional sphere, periphery.

We consider this, and only this, type of a structure to be the lexical-semantic field.

However, the non-dynamism of the word-identificator, being the lingual expression of its content's non-graduality, conditions the uniformity of the semantic relationship, in other words, the equality of the distance between the word–identificator and the group of elements which, in its turn, results in non-graduality – a linear structure (its two variants: one-linear or two and three linear structure), more precisely, in the non-existence in the group structure of dominant segments with respect to one another and to the word–identificator.

We believe such a structure is not identical to its gradual counterpart - to the field structure - hence, denoting both of them by one and the same term – field, thematic group, synonymic set - cannot be justified: the term "synonymic set" denotes one-linear variant of non–gradual structure, where the relationship between the word-identificator and each lexical unit is synonymic, while the term "thematic group" denotes two and three–linear variants of a non-gradual structure, where the relation between the word-identificator and each lexical unit is based on the relation called " thematic analogy".

There are many problems concerning the theory of lingual fields; there are many questions to be answered but we have singled out the following question: What type of unit ensures adequate modeling of lingual worldview? - We believe that:

1. The unit should reflect the system of images (icons) and interconnection between the images (icons);

2. The unit should reveal the specificity of event perception and interpretation;

3. The unit should combine linguistic and extra linguistic synthesis;

4. The unit should represent the construct formed on the basis of perception, where numerous world "images" (icons) are coded;

5. The unit should involve components, such as: linguistic knowledge; extra linguistic knowledge (knowledge about the situational context and recipient); general knowledge. Integrity of the mentioned types of knowledge and the total sum of all the aspects of human perception create the unit being of individual and social nature.

What are the basic fundamental principles for conceptual field modeling? - We have identified the following principles:

1. Meaning should be derived from the regularity of the entire structure;

2. Each element, being the member of the value system, should be determined by other elements, in other words, the system should determine its elements;

3. A conceptual field should be regulated by the law of organic separation;

4. The members of the organic entity should affect each other.

Is the analysis of the word semantic structure sufficient for forming entity? - The answer is definitely negative: the mentioned type of analysis doesn't

focus on identifying the concepts that determine the existence of cognitive structures. At first glance, conceptual analysis seems to be similar to semantic analysis, but the objective of semantic analysis is to explain a word's meaning, while the conceptual analysis deals with representation of the knowledge about the universe. Adequate and objective modeling of lingual worldview is possible only through the paradigm synthesis.

A complex correlation is observed between the world image and lingual image of the world: the borders seem to be unsustainable and vague. Lingual world images precede conceptual images and helps to shape them. A man can perceive himself and the universe by means of a language. It is language that preserves historical experience.

References

Corson, D. (1995). World view, cultural values and discourse norms: The cycle of cultural reproduction. *International Journal of Intercultural Relations*, *19*(2), 183-195.

D'Andrade, R. G. (1984). Cultural Meaning Systems. In eds. RA Shweder and R. LeVine *Culture Theory: Essays on Mind, Self, and Emotion*. Cambridge: Cambridge University Press. 88-119.

Jackendoff, R. (1992). What is a Concept?. *Frames, Fields, and Contrasts: New Essays in Semantic and Lexical Organization*, 191.

Ekaterine Kutalia,
The University of Georgia, Georgia

Maka Kutalia
The University of Georgia, Georgia

Corpus-based Approaches in Teaching ESP Terminologies (Medical terminology)

The paper is devoted to corpus-based approaches to teaching ESP terminologies. The most essential advantage of applying corpora in foreign language teaching is its empirical basis, constant updating, and availability of proof of using a lexical unit in different meanings. All of these factors positively affect the process of learning, stimulate students to enhance their knowledge of language, show them and teach them vital self-education skills. The given work deals with teaching ESP terminologies via monolingual and multilingual corpora, work with parallel corpora containing frequency and collocation related data.

This paper is also devoted to some theoretical considerations and practical suggestions that can be applied in any other field of teaching specialized vocabulary, since teaching specialized vocabulary/ terminology is an integral, and probably the most important, part of ESP lessons where students study English through a field that is already known and relevant to them to a certain degree – depending on their educational level.

Problems of selecting, presenting and practicing terms will be approached from both theoretical and practical points

of view. Examples and conclusions will be based on teaching ESP terminologies.

Most of the linguists and methodologists point to the following important considerations when discussing ESP teaching in general:

- *differences between General English and Specialized English;*
- *importance of corpus-based approaches in teaching ESP terminologies*
- *approaches to effective learning and roles of the teacher;*

Keywords: ESP terminology, context; miscommunication; Interdisciplinary approach; Teaching terminology, Corpus-based approach;

Introduction

Specialists underline that "specific" in ESP refers to the specific *purpose* for learning English. "'Tell me what you need English for and I will tell you the English that you need' is the guiding principle of ESP", state Hutchinson and Waters (1987, p. 8); The fact that "ESP is designed to meet specific needs of the learner" is the most important characteristic according to Dudley-Evans and St John (1998, p. 4).

This article focuses on the frequent use of ESP terminologies, especially medical terminology within corpus-based approaches and identifies difficulties related to the process of teaching them.

Medical terminology is the study of words used to communicate facts and ideas particular to medicine and is chiefly concerned with the present use and meaning of such words. Over the past few decades, many changes in medical education, particularly at the undergraduate level, have been introduced. Increasingly, innovative curricula, methods and educational tools were developed due to the cooperation of medical professionals with pedagogues, sociologists, psychologists, information specialists and those in many other related professions. This cooperation helped bring to medical education various concepts, definitions and vocabularies not previously known to medical professionals.

With continued increase of international contacts in various fields, much attention has been attached to the design of ESP/ English for Medical Purposes (EMP) courses that can prepare students for professional communication with colleagues of other countries. However in the practice of teaching English medical terminologies, questions have been raised by teachers and educators again and again, such as: Where should the teachers start? What can be done about students' poor motivation? How should teaching materials be selected? Does an interdisciplinary approach make it easier to teach terminologies? Designing a course that can best serve

students' interests and needs is a challenge for many teachers of EMP in Georgia. Therefore, in brief, this research attempts to clarify the difficulties found most and least frequently by the learners and the role of corpus-based approaches of teaching terminologies.

Medical terminology is the standard vocabulary used in the health care field. With this terminology, medical professionals can easily and accurately describe anatomy, procedures, diseases and conditions. Physicians and nurses use this type of terminology extensively. Those who work in medical billing and assisting must also have a basic understanding of medical terminology to communicate. Learning medical terminologies can be challenging to those entering the health care field. Doctors consistently use special terms as a result patients fail to disclose significant meanings. Patients should ensure that there is neither miscommunication nor mismatch between what the patient wants and what doctors assume the patient wants. According to Gylys and Wedding, medical terminology is a specific terminology used to achieve the purpose of communication in the health care field efficiently and precisely, such as in writing diagnosis and doctors' notes (1983, p.89).

Our research involved gathering data on learners' views on their learning needs and expectations, on encountered difficulties in learning Medical English terminology in a university setting, the degree of importance of proficiency in medical areas of language, and collecting and analyzing learners.

Building an ESP Corpus

Several factors are significant when building a corpus. Pearson (1998, p. 78) discusses several relevant factors that need to be taken into account when building special purpose corpora, such as size, text type and origin, authorship, factuality, technicality, audience, intended outcome, setting and

topic. In an ESP corpus, the selection of the topics depends on the learners' field of knowledge. The criteria of authorship and audience are very important, since these will determine the degree of technicality of the texts. Not all these aspects are equally significant, and ESP teachers have to make learner-oriented decisions since the optimal design of a corpus is highly dependent on the purpose for which it is intended to be used.

The aims of corpus-based linguistics in teaching can be summarized as follows: teaching about (i.e., the principles and theory triggering the use of corpora), teaching to exploit (i.e., the practical, methodology-oriented aspects of corpus-based analyses), exploiting to teach (i.e., using corpora as a resource to enhance teaching), and teaching to establish resources. Despite criticisms of corpora use in teaching, such as atomized descriptions of language use or ignorance of contextual aspects of texts (which can still be counterbalanced).

Methods and Materials

Participants in the current study were 100 intermediate and upper intermediate students at Tbilisi State Medical University and at the University of Georgia. The categories of medical terminologies were arranged according to the medical books they were studying each semester. Our goal was to help them learn the tools of word analysis that will make the understanding of complex terminologies easier. Medical terms are very much like puzzles. This empirical research illustrates the use of such a questionnaire as a tool to:

A. To define the importance of teaching medical terminology based on corpus-based approaches.

B. To explore the problems students are facing while studying ESP terminologies.

C. If the corpus-based approaches make methods of teaching terminologies easier.

In order to explore the problems empirical research was done included the following questions:

1. How many terminologies are recommended to study during one lecture? Why?
2. Is it possible to communicate with a doctor without a basic knowledge of medical terminology?
3. Does professional knowledge help you to catch the meaning of ESP terminology?
4. Is it possible to get the meaning of the ESP terminologies without taking a special course?
5. Is it possible to catch the meanings of ESP terminologies based on corpus-based approaches?

a. Smoking ------- The tobacco industry constantly and aggressively seeks new users to replace the ones who quit and the current users -up to half-who will die prematurely from, **heart attack, stroke** or other **tobacco**-related disease.

b. Healthcare in the USA ----- Being a highly –industrialized nation, finding a doctor in the United States is not difficult at all. There are hundreds of **medical practitioners** to be found in every state.

c. Drug Use ------- There is currently no **coordinated registration system** for these users in Georgia, and the difference between the number who have been registered and the actual **observed users** is quite high.

d. Epidemiology ------ The science of epidemiology was first developed to discover and understand possible causes of **disease like smallpox, typhoid and polio among humans**.

6. Can you catch the meanings of ESP terminologies without a context and define their difficulties?

a. contagious diseases b. health care utilization c. top statistic
d. drug innovation

7. Is it possible to get the meaning of the ESP terminology based on their definitions?

a. The branch of medical science dealing with the transmission and control of disease.

b. Social insurance for the ill and injured

8. Does the corpus-based approach make it easy to study ESP terminologies?

Results and discussion

We defined four types of groups according to the students' answers. Questions dealt with the difficulties of teaching terminologies and revealed the role of terminologies in enriching the vocabulary and motivation for learning the language. Some interesting conclusions can be drawn:

- 70% percent of students prefer studying terminologies based on the context
- 90% percent out of the students consider the corpus-based approach as one of the easiest way of teaching special terminologies.

- 85% percent of students have come to the conclusion that professional knowledge helps them catch the meaning of ESP terminologies easier.

- 95% percent of students consider the knowledge of medical terminologies as one of the most significant aspects in the medical fields.

Having selected the new terminology to be introduced, the next step is presenting it in such a way so that it can be understood and memorized easily by students. The best way for doing this depends on the terms themselves. As there are the following possible situations:

1. In some circumstances, **a term is cognate** and does not cause difficulty. In many cases there is a one-to-one relationship between the terms in English and the learners' L1, and so it will be enough to translate the term into the L1 after a brief explanation.

2. If the **term is not cognate** and is unfamiliar, then it may need to be introduced and explained before the exercise is tackled. The best teaching situation would be one in which the new term is presented with its definition.

3. In some situations, learners start a new course that is completely new for them. One approach is for the language teacher and the subject expert to prepare **a glossary of new terms** with straightforward explanations of the terms.

In all of the above cases, introduction of the new vocabulary should be inseparable from explaining a words meaning in the context of the real life in a simple and interesting way.

Verbal techniques of explanation can include, but are not limited to:

Presenting the new term with its **synonym** or **antonym**,

Presenting the new term **in a scale**,

matching/labeling – when students match to their definition,

This technique belongs to discovery techniques which activate the learner's previous knowledge of a language and initiate work with the new vocabulary. Discovery techniques requires an autonomous students with higher knowledge of English.

Another possible approach for introducing new terminology is by presenting terms in a **systematic way**. This approach requires coordinated efforts by multiple specialists (both subject specialists and linguists) in order to collect, present and analyze the system relations between the main concepts, respectively ESP terms. Moreover, this approach requires language items to be classified not on the basis of their overt formal properties, as, for example, in an alphabetical order, but according to the properties of the concepts to which they refer. One of the possible ways of applying a systematic approach is by representing 'whole-part' relationships between terms and indicating the connections between concepts consisting of more than one part and their constituent parts.

The choice of one of the above-mentioned methods of presenting terms will depend on students' level and interests, as well as on the context (terminologically loaded or of a general nature) in which terms to be studied and memorized appear. With intermediate to advance students it will be beneficiary for them to receive a more complete picture of a set of terms presented as a system with hierarchical relations between them.

Conclusion

Our empirical research has shown the great importance of medical terminologies to conduct professional communications. With the help of an interdisciplinary approach it makes easy to catch the meanings of unknown terminologies. Medical terminology covers the specific words and phrases

you will need to learn to function effectively and understand the "language" of healthcare. Whether you deal with the clinical side or the administrative side, everyone involved in healthcare uses various terms to describe procedures and office practices. Many of the terms used in healthcare are "built up," which means they are formed from word parts. You must learn how to understand words by breaking them down into parts.

An important achievement occurs when students are able to make intelligent guesses about the meaning of special terminologies. The results of the experiment indicate that knowledge of English medical terminologies is foundational in learning medical English to provide optimal care for patients in their future career.

It is not enough to learn lexical units separately; learners also have to know how to combine those units. Therefore, ESP teachers have to draw learners' attention to collocations. A collocation is the occurrence of two or more words within a short space of each other. Collocations can be dramatic and interesting because they can be unexpected, or they can be important in the lexical structure of the language because of being frequently repeated.

The easiest way to identify collocations is by checking the frequency of a given group of words in a corpus. Obviously, a thorough analysis of the data should be done because that group may occur more often simply because it is composed of very common words. A large part of our mental lexicon consists of combinations of words that customarily co-occur. The occurrence of one of the words in such a combination can be said to predict the occurrence of the other(s).

Native speakers have a natural tendency to combine words in pre-defined chunks that are easily recognizable by their listeners. Curado Fuentes classifies those groups of words in relation to their internal degree of cohesion in a continuum from what is totally unknown to fixed expressions (2010, p.67). The identification of this special language is made by inferring idiomatic

constructions from concordance samples. According to Fuentes the aim is to perceive the fixation of long compounds, and to appreciate the value of this lexical restriction in the subjects (2010, p.118). By identifying and studying collocations learners will form their mental lexicon not only from isolated independent units, but also from pre-combined units, thus consolidating a conceptual system that will allow them to become more proficient at an initial stage of learning.

References

Dudley-Evans, T., & St, J. M. J. (1998). *English for specific purposes*. Cambridge: Cambridge University Press ELT.

Fang, F. S. (1985). The investigation and evaluation of the teaching methods on medical terminology. In *Second National Conference on TESOL, Taipei, Taiwan*.

Fuentes, A. C. (2010). An approach to corpus-based language and multimodal features in communicative exchanges at an early age for adapted hypermedia content design. *Language Value*, *2*(1), 27-50.

Gylys, B. A., & Wedding, M. E. (1983). *Medical terminology: A systems approach*. Philadelphia: F.A. Davis Co.

Hutchinson, T., & Waters, A. (1987). *English for specific purposes: A learning-centred approach*. Cambridge [Cambridgeshire: Cambridge University Press.

Kennedy, G. (1998). *An introduction to corpus linguistics*. London: Longman.

McCleery, J. (2002). *Medical terms & abbreviations*. Philadelphia: Lippincott Williams & Wilkins.

Nation, I. S. P. (1995). The word on words: An interview with Paul Nation. Interviewed by N. Schmitt. *The Language Teacher*, *19*(2), 5-7.

Pearson, J. (1998). *Terms in Context*. John Benjamins Publishing Company.

Schmitt, N. (2010). *Vocabulary in language teaching*. Cambridge: Cambridge University Press.

Shiland, B. J. (2003). *Mastering healthcare terminology*. St. Louis: Mosby.

Yang, M. N. (2005). Nursing pre-professionals' medical terminology learning strategies. *Foreign Language Annals*, *22*(1), 13-24.