"Svěřenský fond" – a new trust-like vehicle in Czech Civil law

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I. Introduction

In past few years, the attempt may be observed in continental Europe to respond to the perceived insufficiency consisting in the non-existence of instruments comparable to *trust*, or *trust-like* forms. The *trust* remains, in principle, a *common law* instrument which is difficult to transfer to the traditional frameworks and conceptualizations of *civil law*. On the other hand, the current convergence of legal cultures is necessarily associated with a changeof traditional approaches. Consequently, *civil law* has become receptive to concepts that it had previously resisted for many years, while also losing the strength of conceptual foundations which were by some criticised as too restrictive, and by others appreciated as elegant beams of a well-balanced structure. However, the latest development seems to confirm the reflections of J. Merryman, namely that the differences between the traditions of *civil law* and *common law* may not be as fatal as often implied.

The new Czech private law, being the result of discussions lasting for over 10 years, represents a legal regulation occurring not on the basis of any long-term doctrinal and case-law tradition, but a jump return to European traditions with a conscious declaration of discontinuity (although not complete) not only with the "socialist rule of law" governing the pre-1989 era, but also with its partially reformed "post"velvet"-revolution" continuation. To a large extent, it thus represents a certain step into "the unknown", when the performance of the new law "in action" may only be predicted with a substantial degree of uncertainty. This reflection also applies to such fundamental issues as the interpretation of legal transactions or their validity and effectiveness. Probably the most significant conceptual change is strengthening of the autonomy of the individual's will and increased possibility to live "one's own way" [2].

What is even less predictable is obviously the reaction of the Czech law, as a representative of the *civil law* tradition, to a concept that is essentially foreign to it - such as the *trust* based on anglo-americian legal tradition. In terms of theoretical reflections, one may fear the worst confusion and uncertainty. Nevertheless, a large amount of practical experience shows that if a certain legal regulation is functional enough, the legal practice lacks any significant motivation to deal with the reflections on its conceptual basis, and referring to these issues

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[2] From January, 1th 2014, the following are in effect: the new Czech Civil Code No. 89/2012 Coll., the new Business Corporations Act No. 90/2012 Coll. and the International Private Law Act No. 91/2012 Coll.,and many other laws. The key element is expressed in section 3 para 1 of the New Czech Civil Code: "*private law protects the dignity and freedom of the person as well as his natural right to pursue his own happiness and that of his family in a manner that does not unduly harm others*".

mainly on the pages of dissertations. In this respect, the Czech law will function as "an interesting laboratory"[3] whose results will possibly be of interest not only to its addressees.

We write a paper concerning the Czech legal regulation on trust funds two years after their introduction, so there is still not much practical experience in the application praxis.. For this reason, we prefer to merely provide an outline of the new legal regulation in the text below, pointing out certain reflections initiated by this legal regulation so far. Only the future will show to what extent these outlines will be preserved.

II. The concept of the Czech "svěřenský fond" (trust fund)

The regulation of the trust fund in the Czech Civil Code, adopted in 2012 and taking effect in January 2014 (further referred as "NCC"), represents one of the most important innovations introduced by the new code in the Czech law. Previously, the Czech law had only limited experience with the forms that could be even remotely perceived as comparable to the trust fund, although it knew various manifestations of *fiducie* (tacit assignment, security transfer of rights, deposit, etc.).

With certain materially more or less important variations, the new Czech Civil Code adopted the regulation of *fiducie (trust)* from the Civil Code of Quebec (further referred to as "CCQ"), enacted in 1994[4]. Apart from the regulation of *fiducie* (trust) itself, the Civil Code of Quebec also adopted a geneal regulation of of the administration of the property of others[5]. The main reason for this choice was the fact that Quebec represents a mixed jurisdiction combining the elements of *common law* and the French Civil Code (i.e. *civil law*).

In this context, we perceive it to be important to remember that the Czech regulation adopted the CCQ wording, but not its conceptual background. At the same time, for the purposes of further reflections, it should be noted that while the official French wording of the CCQ uses the concept of "*fiducie*", its English version already works with the concept of "*trust*", even though these two forms are not completely identical. Although it is probably possible to infer some common roots, it is necessary to distinguish between "*fiducie*" as conceived by *civil law* and "*trust"* in *common law*. In this respect, it needs to be said that fiducie pursuant to the CCQ is not a trust in *common law* but tends to consist in a functionally adapted concept of fiducie in *civil law*. At the same time, it is true that the general concept of fiducie in *civil law* is significantly broader than the regulation of fiducie in the CCQ[6]. However, for the purposes of clarity, our text will further only use the concept of "*fiducie*" for referring to the fiducie pursuant to the French wording of the CCQ.

Identically to the concept of *fiducie* in the Quebec Civil Code, the Czech legal regulation also conceives the trust fund as autonomous assets established upon earmarking the property/patrimony in order to serve a certain purpose. The property/patrimony in the trust fund are separate and independent. The law expressly stipulates that the trust fund property/patrimony is neither in the possession of the trustee, nor in the possession of the settlor or in the possession of the person intended as the trust fund's beneficiary. Non of the

[3] For more details, see Pihera, V. Nejpodivnější zvíře v lese – poznámky ke svěřenskému fondu, Obchodně právní revue, Vol. 10/2012, p. 278 et seq.

[4] See Art. 1260 to 1298 CCQ

[5] See Art. 1299 to 1370 CCQ

[6] cf. e.g. Graziadei, M., *The Development of Fiducia in Italian and French Law from the 14th Century to the End of the Ancien Régime* in Hemholz, R., Zimmermann, R. (eds.), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective*, Berlin: Duncker und Humblot, 1998, 328 et seq.

actors have an ownership. This solution of Lepaulle's, i.e. "*possession without the owner*", is unknown to the Czech law founded on the Roman and later Austrian conceptions.

Until now, it has managed to operate with the concepts of separate ownership, rather than with the existence of the "*subject-free*" ownership right. The ownership rights to the trust fund property are newly exercised by the trustee himself on behalf of the trust fund and to the benefit of the defined purpose[7]. Therefore, the position of the trustee conceptually differs from the owner, who is entitled, to the extent to which he is not particularly limited by the right of others, to own and dispose of his possession to his own benefit. The trustee is not an owner; for instance, he cannot acquire the trust fund property by prescription for himself, but he can acquire the property by prescription to the benefit of the trust fund. Following the Quebec model regulation, the general concept of (absolute) ownership, otherwise a defining sign of property/patrimony[8], has been suppressed in favour of the functional solution.

Thus, the Czech trust fund does not break the *numerus clausus* of substantive rights, otherwise traditional in a number of states, including the Czech Republic. In this respect, one may obviously raise the question of whether the trustee has not been factually granted the position corresponding to the concept of *legal title*, and thus a certain form of a special ownership right different from the "standard" ownership right. The argument behind this may be the fact that the Czech legislator, unlike the Quebec model, does not expressly exclude the existence of another substantive right to the trust fund property apart from ownership itself[9]. However, in our view, such reflections do not correspond to the concept of the legal regulation because, among other things, while using the argument *a fortiori*, the Czech rule may be interpreted in such a way that if there is a certain limitation applicable to the ownership right, it is even more applicable to substantive rights weaker in their character and definition. At the same time, however, it remains to be true that these questions are not of any significant practical importance.

The trust fund may be established for a private purpose on behalf of a certain or determinable person. Furthermore, the trust fund can also be established for charitable purposes. The purpose of a charitable trust fund is to contribute to the public good, for instance, in the sphere of culture, education, faith, and science or through other forms of philanthropic activities. The main purpose of a charitable trust fund cannot consist in engaging in entrepreneurial activities or any other ways of achieving profit; these activities, however, may be pursued in order to support the main activity of the trust fund.

III. Trust fund in the context of other vehicles

From the functional perspective, apart from common fiduciary contract-based relations, it is the foundation that is probably the closest nstitute of the Czech private law. The new Civil Code encompasses the foundation and the foundation fund, while the foundation-related legal regulation also covers the "ústav" (institution), i.e. a legal entity between the foundation and corporation.[10]

Unlike the corporation, consisting of an association of persons, the foundation is established through the property reserved for a certain purpose. In this respect, foundations are functionally similar to the trust fund, since they allow one, by means of the owner's will, to

[7] Art. 1448 NCC
[8] Art. 495 NCC
[9] cf. Art. 1261 CCQ
[10] In our view, however, the "ústav" (institution) tends to be, materially, a foundation, even though this was not expressly stipulated by the legislator.

achieve a certain level of "*independence of the property*" and its reservation for a defined purpose. However, unlike the trust fund, the foundation is a legal entity even despite the fact, in our view, that this conclusion has been debated (see below). As much as public service regulations in the field of accounting or taxes may perceive the trust fund as a (tax) subject of law (person), in the field of private law, the trust fund does not have the legal personality. This also applies to the field of Czech civil proceedings (including enforcement or insolvency proceedings). Differently from the foundation or legal entities in general, the trust fund is not provided with its own will either. Pursuant to the Czech Civil Code, legal entities do not have the capacity to express their own will, yet it is replaced and created by the members of their statutory bodies (the fictional theory of the legal personality), nevertheless, it may be inferred that legal entities do have inner will. However, this is not the case of the trust fund: it does not have any will.

The ownership rights to the trust fund property are exercised by the *trustee in his own name and by virtue of the discharge of his office*, i.e. not in the name of the trust fund (on behalf of the trust fund), since the fund itself does not have any ownership right to the trust fund property. On the contrary, in the case of a foundation, and other legal entities in general, the foundation is the owner of the property assigned to it, and whereas its bodies create its will, they still act on behalf of it. Unlike the foundation, whose creation is conditioned by recording an entry in a public register, the trust fund is (so far) not recorded in any public register. It seems like that this situation may be changed: at the present, Czech Parliament deals with the first amendment of the Czech Civil Code and will introduce particular changes also for the trust fund[11] – namely obligatory registration in the public registry (including similar foreign vehicles). It may be noticed also, that unlike the Quebec model, the Czech Civil Code requires that when establishing a trust fund, its statuses be made in writing and that this is identical to the regulation on foundations.

The new Civil Code admits that foundations are established, in principle, for any socially or economically beneficial purpose, yet it excludes that the primary object of the foundation's activity was conduct of business. This restriction will not be applicable to the trust fund. The contrary is true, and for this reason, while the term of the foundation may be indefinite, regardless of its purpose, the duration (or the usability for the beneficiaries) of the trust funds established for a private purpose is limited in time by the statute.

Many of these differences are blurred in relation to the so-called unincorporated foundations (*unselbständige Stiftungen*), i.e. the foundations without legal personality, unknown to the Czech law, but common mainly in the German jurisdiction.[12] However, the new Civil Code only provides for the "*affiliated*" or "*subsidiary*" fund of the foundation, bearing the elements of the unincorporated foundation in the sense that it comprises the property separated from the foundation's property itself; nevertheless, given the classical concept of a affiliated fund, this property always has an owner. The scanty regulation has so far given rise to certain ambiguities in terms of its character; nevertheless, it may be stated that at this point, the regulation of the trust fund and the foundation law end up in "*an immediate vicinity*", when the borders and functional distinction between them may not be obvious.

The new Civil Code also contains the provisions regarding other separated assets which should be mentioned here. Above all, it reintroduces the traditional form of

[11] See also Ronovská, K., Lavický, P. New Czech foundation and Trust (like) Law: initial experience and reactions, Trust and Trustees, Vo. 22, No. 6, 2016, p. 641- 646.

[12] cf. e.g. Havel, B., Ronovská, K. New Instruments of the Fiduciary Administration of Assets after the Recodification of Private Law in the Czech Republic – Foundation Fund, Trust Fund, Affiliated fund, Non profit law Yearbook 2013/2014, Hamburg: Bucerius Law School, 2014, p.177 ef.

fideicommissionary substitution into the Czech law, i.e. the testator's instruction by virtue of which the first heir instituted is entrusted with the obligation to preserve and transmit to a second heir the whole or part of the inheritance[13]. In fact, the inheritance property in this regime represents a separate part of the assets of the so-called "first heir" whose right to dispose of these assets may be limited (since it should be transmitted to someone else pursuant to the will of the deceased) up to the mere right of the beneficiary. Nevertheless, in contrast to the trust fund, the first heir, regardless of the limitations of their rights, is always in the position of the owner. In this case, the function of the administrator of the property of others is absent; the first heir always holds the inheritance for themselves, at least by virtue of the right of the beneficiary. Compared to the trust fund, the essential difference lies in the restricted purpose: it is exclusively maintaining patrimony and transferring it onto the specified person; no other separate purpose is possible. In this respect, the regime of acting *ultra vires* is different: whereas the first heir always acts as the owner and third persons are protected, the trustee does not act as the owner. For this reason, when exceeding the scope of authority, there are other defence schemes.

It is the *inheritance* that bears the traits of independent property as well. The ownership rights to the inheritance are exercised by the *executor of the will* or the administrator. In this context, we may point to the disputes taking place in the Austrian and German cultural environment in relation to the so-called "*succession in abeyance"* (*heredita siacens*). The separate inheritance also has a special character of independent property, being administered separately from the heir's assets if creditors request to do so in fear of his or her overindebtedness. In all these cases, however, the inheritance cannot be deemed as autonomous assets (unlike the trust fund), since there is always an heir who is, in the end, the owner of the relevant property (on the date of the testator's decease, i.e. without interrupting the continuous ownership right). In addition, these actually amount to partially instrumental regulations performing a significantly more narrow function than the trust fund. However, a more in-depth analysis of these institutes of inheritance law exceeds the scope of this paper.

In the new Civil Code, the trust fund is conceived as a special structure in obligation and material law. The trust fund is established and the trustee acquires the rights associated to his or her function originally on the basis of a separate act of earmarking certain assets as trust funds and the trustee's will to take charge of the office. This situation must be distinguished from the cases of mere representation, including indirect representation. Any form of representation is excluded in this case, since the trustee does not act on behalf of the trust fund (which is not a person) or on behalf of any other third party. Regardless of the fact that the trustee may take office on the basis of the contract with the settlor, their position cannot be confused with the position of the assignor or principal. The trustee is not in an assignment relationship with any party, performing his or her function "for the trust fund". The personal obligation of the trustee does not correspond to the right of the beneficiaries (or any other persons) to trust fund performance. This right may only be exercised against the person holding this office. Furthermore, the trust fund cannot thus be compared to the effects of a contract concluded to the benefit of the third party either. In this respect, the trust fund demonstrates a certain material-law character, which is the reason why it should be systematically classified among the regulation of absolute rights.

For that matter, one may also elaborate on the reflection that the trust fund is a "sum of things" (universality of property) in legal terms, just as the enterprise. The Civil Code expressly defines those "things" as a collection of individual things belonging to the same person, regarded as a single object and as such, bearing a common designation. Even though

[13] Art. 1512 to 1524 NCC

the ownership rights are absent in the case of the trust fund, it is a collection of assets made independent and intended for a defined purpose on the basis of the original owner's will. The essence of the trust fund lies in specifying the property, i.e. certainly a collection of things in legal terms, when under the Civil Code, the thing is anything different from the person and serving human needs.

It was argued (by some authors) that the trust fund (or the *trust*) was aggregate property whose purpose also includes that its establishment is not publicly disclosed, i.e. published[14]. The trust fund is provided with this "secrecy", and this is also the reason why, under the Czech law, it does not have a legal personality. At the same time, in terms of the content, the trust fund falls within the definition of a thing, and in our view, the definition of combined things as well. Within these reflections, however, it is also necessary to take into consideration that the essence of the trust fund structure also lies in defining the obligational relationships related to the trust fund property, including the property-law concept of the autonomous property. In a broader perspective, the concept of the trust fund thus oscillates between a propetry and an obligation, and for this reason, we believe it is more appropriate to emphasise its mixed character (in terms of propetry and obligation law).

Even though the matter was discussed in Quebec[15] on a number of occasions, or even assumed in the original wording of the CCQ draft, and similar reflections have also been made in the Czech Republic[16], in our view, the trust fund does not have a character of a legal person. On the one hand, the Czech Civil Code allows inferring the legal personality of a certain entity even without an express reference to the fact that it is a legal person[17], while on the other hand, the reasoned report to the statute adds that in such as case "the legal personality must be otherwise obvious without any doubt"[18]. Even though the Civil Code combines, when defining the legal person, fiction theory and reality theory, its overall structure tends to be dominated by fictional elements, i.e. the assumption that the (private) legal person is a normative construct which does not have its own will, nevertheless being established by means of the private will of others.

Although the trust fund exists as aggregate property, it has its trustee administering on his behalf, and it often has an inner organisation; it does not have the tort or civil capacity: economically, the trust fund property is always affected by the trustee's acts, yet it is not party to these relationships. Even under the systematic classification, the trust fund is an expression of obligational and material law, rather than personal law, being a mixed vehicle. In addition, in our view, what also applies is the assumption of the preference of the private will expressed by the settlor by means of establishing it. In fact, the settlor does not express the will to establish a legal person (otherwise they would establish a foundation or another legal person) but they obviously express the will of establishing a trust fund, and it would be inconsistent with the legal certainty if their will was subsequently re-characterised in the direction not

[14] Passos, J., R., *Commercial trusts, the growth and rights of aggregated capital: an argument delivered before the Industrial Commission at Washington, D.C., December 12, 1899*, New York & London: G.P. Putnam's Sons, 1901, 14.

[15] cf. Smith, L., *Re-imagining the trust* in Smith L., (ed.), *Re-imagining the trust*, Cambridge: CUP, 2012, 261 et seq; Becker, R., *Die fiducie von Québec und der trust*, Tübingen: Mohr Siebeck, 2007, 416 et seq.

[16] Havel, B. Právní osobnost (právní subjektivita) svěřenského fondu ve světle nového občanského zákoníku (Legal personality of the trust fund in the NCC), in: Tichý, L., Ronovská, K, Kocí, M. Trust a srovnatelné instituty v Evropě, CPK, Praha, 2014 p. 203; Pelikán, R., *Právní subjektivita [Legal Personality]*, Prague: Wolters Kluwer, 2012, footnote No. 60.

[17] The wording of the decisive Section 20 reads: "The legal person is an organised entity in relation to which the law prescribes that it has a legal personality or whose legal personality is recognised by the law."

[18] Eliáš, K., et al., *Občanský zákoník. Důvodová zpráva [Civil Code. Reasoned Report]*, Ostrava: Sagit, 77.

originally intended. Yet it is true that the trust fund certainly is, in terms of its function, an instrument functionally competing with legal persons.

IV. Establishing a trust fund

The trust fund is established by the settlor upon assigning their property to the trustee in order to hold and administer it for a certain purpose. The trust fund may be established *inter vivos* or *mortis causa*. The *inter vivos* trust fund is not established until the trustee has taken office, i.e. until he or she has expressed their will to hold the trust fund property and to administer it under the specified terms. However, if the trustee has not taken office for any reason, the settlor or the court may, upon the petition filed by the person showing interest in it, appoint a new trustee and thus ensure that the establishment of the trust fund is not thwarted on the side of the trustee. The situation is different in the case of *mortis causa* trust funds, which are established, pursuant to the requirements of the inheritance law, retrospectively at the moment of the testator's decease regardless of the moment when the trustee takes office.

Identically to the Quebec regulation, the Czech legal regulation is also based on the fact that the *inter vivos* trust fund is established exclusively by means of a contract (and judgements). Apart from that, it also prescribes that the trust fund has its statutes. In this respect, the concept of fiduciary relationships in the *civil law* tradition, as a primary contractual arrangement, collides with the concept of the foundation, which is established exclusively by means of unilateral actions. In addition, it is required that it had the statutes, just as the case of foundations, in the form of notarial deed. This was probably due to a deeper solidarity between the trust fund and the foundation probably sensed by the Czech legislator. Maintaining the requirement of the existence of the contract uselessly excludes the option to establish an *inter vivos* trust fund by means of unilateral actions, which is the standard in *common law* countries. The requirement of the existence of the statutes in the form of a public instrument in fact excludes the possibility that informal arrangements qualify as a trust fund. This significantly narrows the applicability of this vehicle in the Czech law.

The trust fund is established upon earmarking property for the benefit of the autonomous ownership or the trust fund. As a result of this, the settlor completely loses the ownership right to the earmarked property, i.e. they lose even *nuda proprietas*. If the property is earmarked on a contractual basis, then in relation to the property for which the statute conditions the acquisition of the ownership title to another term different from concluding a contract on transferring the ownership title, the translator effects do not take place until such a term has been met. However, this does not exclude establishing the *inter vivos* trust fund before the change of the property regime of the assigned property. The statute prescribes that the *inter vivos* trust fund is established when the trustee accepts the authorisation to administer the trust fund. For instance, in the event of assigning the real property to the trust fund on the basis of a contract concluded between the settlor and the trustee, the trust fund is established already upon concluding the contract, whereas the change of the beneficiary of the ownership titled to the assigned real property does not take place until recording it in the Land Registry. Within the proceeding concerning the registration in the Land Registry, the trustee acts as the trust fund administration within the discharge of office.

The trustee is obliged to act in compliance with the principle of transparency of administering the property of others, which is reflected both in proper maintenance of accounting or other records on the administered property, and in the physical separation of the administered property so that it could be clearly identified at any time. Even if such a duty is not imposed in the regulations concerning keeping the accounting records, the trustee is

always obliged to keep the records on the administered property, documenting both its status and the manner in which the administered property has been handled. The administered property must be separated from the trustee's own property (i.e. it must be held on separate accounts).This obviously applies also in the relationship to the trust fund property. The statute does not explicitly prohibit mixing multiple properties administered by the same trustee. However, the general principle of transparency implies that in relation to such properties, the trustee must proceed so that they can be mutually and securely distinguished one from another.

The reason for this transparency, and thus distinguishing the trust fund property from the trustee's own property, also lies in the fact that the Czech enforcement and insolvency law allows the enforcement against "the trust fund" to be declared or insolvency proceedings directed against it to be initiated, whereas it is the trustee who acts on behalf of the trust fund within the proceedings. As a consequence, this enables creditors to satisfy their debts from the property belonging to the trust fund, both partially within the enforcement, and in a collective manner within the insolvency proceedings. At the same time, a situation may occur when such proceedings will not be directed against the trust fund but only against the trustee and his or her property due to their personal debts.

V. Trust fund administration

The trust fund administration is assigned to the trustee. Any person enjoying full legal capacity may be appointed a trustee. The possibility of legal persons to act as a trustee is conditioned by the fact that they are explicitly permitted to do so by the law. At present, in relation to legal persons, the authorisation to act as trustees is contained only in the Act on Investment Companies and Investment Funds, which enables investment companies to perform these activities provided certain conditions have been met, and the Act on the Status of Non-Profit Organisations, which allows foundations with a charitable status recognised by the court to act as the trustee of a trust fund provided that the purpose of the trust fund is related to the foundation's activity. The settlor or the beneficiary may also act as the trustee, although in that case, the trust fund must have another "independent" trustee, who is neither the settlor, nor the beneficiary. In that case, the statute provides for an exemption from the general rule pursuant to which, in the event of multiple administrators of the property of others, the administrators act by means of the majority of votes, requiring that the trustees always act jointly.

Usually, the trustee is appointed by the settlor directly in the establishing legal act, which may, nevertheless, provide only for the manner of appointing a trustee. The Civil Code also authorises the trust fund's settlor to remove the trustee and appoint a new one, even during the existence of the trust fund, or possibly to set the rules for any subsequent removal and appointment of the trustee. There are no other limitations imposed on the settlor to determine the term of the trustee's office and subsequently to reappoint the trustee at regular intervals. This reflects the emphasis placed on the settlor's position within the Czech concept of the trust fund, being substantially different from the concept of the trust in *common law* countries. Even after establishing the trust fund, the settlor may maintain significant influence over the trust fund's administration. This position is enhanced even further by means of the right to the supervision of the trust fund administration, granted by the statute to the settlor and the beneficiary. The person with the right to supervision is entitled to check any documents related to the trust fund administration and request a statement of administration costs.

The trustee is entitled to the full administration of the trust fund property pursuant to the general regulation of the administration of the property of others, i.e. the concept that the new

Civil Code has also adopted from the Quebec Civil Code. Under the mode of the full administration of the property of others, the trustee may, when performing their obligations, "perform any necessary or useful act" in relation to attaining the trust fund's purpose. The trustee is obliged to perform their duties with due diligence. In Czech law (and particularly in the sphere of corporate law), this is a traditional concept which, in compliance with the traditional perception of this criterion, is newly defined by the Civil Code as a general requirement to act with necessary loyalty, as well as relevant knowledge and care. In contrast to the requirement to act honestly and diligently within the scope of one's abilities, which may be found, for instance, in the general provisions concerning orders, the due diligence requirement represents a more objective standard based on general requirements laid on the acts of honest and responsible persons. It needs to take into account that the due diligence concept assumes certain "knowledge", thus reflecting already at the moment of taking over the administration that the trustee must demonstrate the necessary skills for the specific trust fund administration. In this respect, it will be crucial whether it is simple or full administration, as the latter option requires significantly higher skills of the future trustee. However, the manner in which Czech law will approach, in particular, using family trust funds remains questionable. For instance, family trust funds established *mortis causa* may be, in this respect, contrasted with the above-mentioned instruments - trust fund succession, which does not burden the first heir with any special requirements concerning the quality of their inheritance administration.

These rules are developed further in the provisions concerning the administration of the property of others in the Civil Code, particularly by means of the requirement of equal treatment of beneficiaries and the rules aimed at limiting the conflict of interests. Unless otherwise implied in the rules of administration or general practices, the trustee must proceed so that the costs and profit (benefit) arising in the course of the administration are equally distributed among all the beneficiaries. This will obviously affect not only the manner when certain costs are carried out, but also the manner in which the costs are charged by the trustee. Similarly, the expected profits must also be adapted to the equality requirement, which will be of particular importance, for instance, in the situation when certain beneficiaries will contribute only to the profits made only in a certain period (in that case, for instance, giving preference to immediate profits to the detriment of long-term risks would be inconsistent with the requirement of equity). The trustee must take into consideration all these aspects when selecting an investment strategy or any other strategy of performing the administration. The requirements of equal treatment and equal sharing of costs and profits result in the need to create a portfolio always balanced in this respect, as this requirement applies regardless of the specific administration type (i.e. both in the case of simple and full administration.

Unless it is a matter of interest or right arising from the legal acts which established the administration, the administrator must, without undue delay, notify the beneficiary and the other persons with the right to the supervision of the trust fund administration of any interest in business or activity pursuing property advantage that could be in contradiction to the interest of the beneficiary, as well as any of their rights that they could exercise in relation to the beneficiaries or the trust fund. It does not matter whether the conflict of interests actually arises in the given case. The statute prescribes that the trustee, acting in due diligence, should recognise any imminent conflict of interests and notify the beneficiary without undue delay. The conflict of interest may arise either as a result of the existence of a certain property right which is beneficial for the trustee and which could be exercised to the detriment of the trust fund or the beneficiary, or as a consequence of a different interest in the result of the administration or any other administration-related acts. This interest may also be derived from the interest of the right of the person close to the trustee. The trustee may become a party to

the contract related to the trust fund property, acquire the title to this property on a contractual basis or acquire the right in relation to the trust fund only with the beneficiaries' consent. Similar restrictions are also applied to the trustee's possibility to enjoy the administered property or the information obtained in the course of the trust fund administration to their own benefit. Significant restrictions also apply to the possibility of gratuitous transfers.

VI. Protection mechanism in the event of violation of the trustee's duties and obligations

The trustee is thus obliged to perform their office with due diligence. For this reason, the trustee is obliged to compensate the trust fund for any damage caused by failure to comply with their duties when performing their office. In addition to that, the trustee is also obliged to hand over any profit which they have obtained as a result of violating their duties when administering the trust fund, particularly as a result of violating the rules of the prevention of the conflict of interests. Primarily, it is the trustee that is the person entitled to exercise such rights to the benefit of the trust fund, taking over the office after the trustee – the wrongdoer.

The beneficiary, as well as the settlor or "*any other person demonstrating a legitimate interest*" are entitled to seek to have certain acts of the trustee ordered or prohibited. If the trustee "fails to act without any sufficient reason", the court may also entrust the settlor, the beneficiary or any other person demonstrating a legitimate interest to litigate "in the interest of the trust fund", i.e. a dispute essentially based on the *actio pro socio* principle known to the Czech law. Furthermore, these persons may also seek to have the trustee removed or appointed, i.e. to have the trustee replaced by another trustee. Within the action filed "in the interest of the trust fund", the entitled persons may seek damages or for the proceeds from the trustee to be handed over, and possibly even against the trustee who has performed their office until now.

One of the most distinct trust elements in *common law* countries includes the rules generally labelled as "*tracing*" or the special duty of the trustee or the assignee of the thing to deliver the acquired thing provided that the acquisition took place in relation to violating the rules of the trust administration. Identically to Quebec law[19], Czech law has not accepted this concept, yet offers alternative ways of remedying these situations. In addition to the afore-mentioned rights, the new Civil Code entrusts the settlor, beneficiary or any other person demonstrating a legitimate interest with the direct right to seek the invalidity of the acts damaging the trust fund or the beneficiary's right to the trust fund performance. This right thus also includes the right to seek the invalidity of the transfer of the thing (property) from the trust fund onto the third party in contradiction with the trust fund rules. However, its conceptual understanding within the general concept of invalidity or the rules of acquiring ownership from the unlawful holder has remained ambiguous. Nevertheless, we do believe that also in respect to the regulation of the trustee's duties towards third parties, the third-party good faith should always be protected. Nonetheless, this does not affect the general possibility to seek the invalidity of the trustee's acts if they resulted in damage to creditors (*action Pauliana*).

In relation to third parties, the trustee is not personally liable for his acts only if it is obvious that they act for the trust fund's benefit, although the view of the third party acting in good faith will be decisive in this case. In other cases, creditors of such liabilities may be satisfied both from the trust fund, and the personal property of the trustee, since they are jointly and

19 Smith, L., Unauthorized Dispositions of Trust Property: Tracing in Quebec Law, Mc Gill Law journal, Volume 58, numéro 4, juin 2013, p. 795-809 dostuné na: http://lawjournal.mcgill.ca/userfiles/other/84604-Article__2___Smith.pdf, , 5.9. 2016

inseparably liable for fulfilling the duties. However, if they acted in excess of their competence and the third party could not be attributed with good faith in the proper performance of the trustee's competence, only the trustee is then personally liable for his or her acts, i.e. creditors cannot be satisfied from the trust fund.

VII. Termination and limitation of the term

The trust fund is dissolved upon the expiry of the period for which it was established or upon achieving the goal for which the trust fund was established. Furthermore, the trust fund may also cease to exist as a result of a court decision issued upon the petition of "the person demonstrating a legitimate interest". However, the court may issue a decision in this respect only if achieving the trust fund's goal is unfeasible or attainable with difficulty. When making a decision, it is the settlor's will that must remain the primary consideration. Terminating the trust comes into consideration as *ultima ratio*. In fact, it is a functional alternative to the *rebus sic stantibus* clause.

In addition to the trust fund's dissolution, the trustee may also decide to amend its statutes. If it is a trust fund established for a charitable purpose and if there are otherwise grounds for its dissolution, the court may decide to amend its purpose instead of that, replacing the existing purpose with a similar one. Also in this case, the court must respect the settlor's will in the sense that the similarity of the purpose must always be assessed primarily taking into account the settlor's will. In other cases, the court may only modify the statutes and only to such an extent in which it facilitates the achievement of the trust fund's purpose or being beneficial to it in compliance with the original intent of the settlor. In these cases, the purpose of the trust fund must be maintained.

The statute prescribes the limitation of the duration of a private trust fund established for the benefit of a certain person (i.e. not trust funds established for a non-personal purpose or a charitable purpose), by means of which it attempts to limit the longest possible term in which the trust fund property is not subject to the "standard" absolute ownership, without specifying its definite economic purpose.

There is an indirect limitation of the term of a private trust fund. The statute limits the period in which the right of the beneficiary of the trust fund performance may arise. It distinguishes between the right to the ordinary property and a "mere" right to the benefits of the ordinary property. The right to benefits must then emerge no later than one hundred years after establishing the trust fund, which will also be dissolved no later than upon the expiry of this period. However, this is fully applicable only if this right has been established for the benefit of the legal person. If such rights are established for the benefit of a person, it remains effective even upon the expiry of this period until his or her decease. Furthermore, the right to performance from the ordinary property in the trust fund must also arise no later than one hundred years after establishing a trust fund; however if the beneficiary is due to appear after the expiry of the last right to the benefits from such property, their right may arise even later; logically after the expiry of the right to benefits.

VIII. Concluding remarks

The trust fund belongs to the family of "*trust-like*" vehicles that can be best defined with reference to the "*trust*" characteristics under the Hague Convention on the Law Applicable to Trusts and on their Recognition, adopted in 1985.[20]

The Czech law thus responds to the general tendency occurring in the last few years, when these instruments have also been gradually introduced into the continental jurisdictions belonging to the *civil law* family. From the perspective of the Czech law tradition, however, the trust fund represents a discontinuous element. It is still an open question how the "*body of the new Czech private law*", as shaped by the new Civil Code, will deal with this "daring" legal transplant (cf. the thesis of creation expressed independently of one another by Otto Kahn-Freund[21] and A. Watson[22]), or even with the elements of a legal transfer[23], which has been imputed (implanted) into the Czech law without the certainty that all the consequences of *domestication* have been considered.

However, even that may not be perceived as a mistake, since "*trust-like*" vehicles are foreign within the regime of the continental law and their ability to adapt may only be predicted in terms of a possible comparison with the reaction of other continental legal orders to a similar situation.

At this point, it is also necessary to emphasise another change introduced by the recodification of the Czech private law in this respect. Following the requirements of the afore-mentioned Hague Convention on the Law Applicable to Trusts and on their Recognition, the Act on International Private Law, which has been adopted and will come into force together with the new Civil Code, provides that in the domain of Czech law, foreign trust and "*trust-like*" structures are also recognised ("*trust fund or any other similar instruments*"). This means that the Czech Republic will also recognise trusts and similar structures that should be governed by a foreign law pursuant to the instruction of the settlor. Time will show whether and to what extent this option will be used; nevertheless, foreign "*trust-like*" instruments already operate on the Czech territory.

However, one may refer, in particular, to the successful Italian experience with foreign trusts, labelled as *trust interno*, which could also serve as an inspiration in the Czech Republic.[24] In this respect, it is questionable what foreign "*trusts*" the Czech law will consider as "vehicles with an international element", in relation to which the scope of the Act on International Private Law has been defined. We do not believe that it is possible to rule out that such an element could also be seen only in the choice of the foreign legal order; nevertheless, it may be expected that more conservative streams in the Czech law will oppose this conclusion. Regardless of the answer to this question, the new legal regulation also opens a realistic possibility of choice between the domestic and foreign trust fund and a similar forms.

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[20] However, the Czech Republic has not ratified the Convention so far.

[21] Rehm, von G., *Rechtstransplantateals Instrument der Rechtsreform und – transformation*, RabelsZ Bd. 72 (2008), 4.

[22] *Legal Transplants. An Approach to Comparative Law*, Athens and London: UGP, 1974 (1993).

[23] cf. reflections in Legrand, P., Munday, R., (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge: CUP, 2003.

[24] cf. e.g. Lipoi, M., *Trusts in Italy as living comparative law laboratory*, Trusts & Trustees, Vol. 19, 2013, 302 – 308.