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REPORT

THE SCOPE OF PROTECTION OF ELECTORAL RIGHTS UNDER ARTICLE 3 OF PROTOCOL NO. 1

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Article 3 of Protocol No. 1 reads as follows:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

1. Individual rights or an institutional obligation?

The confusion came out from the wording of the provision. Namely, where nearly all the other substantive clauses in the Convention and in its Protocols use the words "Everyone has the right" or "No one shall", Article 3 (P1-3) uses the phrase "The High Contracting Parties undertake". Consequently, the European Commission of Human Rights has initially come up with a conclusion that Article (P1-3) does not give rise to individual rights and freedoms "directly secured to anyone" within the jurisdiction of these Parties (see decision of 18 September 1961 on the admissibility of application no. 1028/61, *X v. Belgium*, Yearbook of the Convention, vol. 4, p. 338;) but solely to obligations between States *(Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 91, § 239).

With such an interpretation, a question would then arise as to the practicability and effectiveness of the protection afforded by Article 3 of Protocol No.1. It would indeed be a very difficult thing to imagine situations where one contracting State would complain to the Court about another Contracting State fails to secure elections.

In order to put Article 3 of Protocol No. 1 into practice, the Court had to come up with another interpretation which would confer upon individuals the necessary victim status under the above provision.

This was done in the case of *Mathieu-Mohin and Clerfayt v. Belgium* (judgment of 2 March 1987, Series A no. 113), where, having regard to the preparatory work to Article 3 of the Protocol and the interpretation of the provision in the context of the Convention as a whole, the Court has established that it guarantees individual rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, pp. 22-23, §§ 46-51).

As to the above-mentioned unique phrasing of the provision, it was intended to give greater solemnity to the Contracting States' commitment and to emphasise that this was an area where they were required to take positive measures as opposed to merely refraining from interference (*Mathieu-Mohin*, § 50).

In reaching this conclusion the Court used a very interesting reasoning, stating, first, that "an institutional obligation to hold free and fair elections" include the principle of "universal suffrage". The latter principle in itself conveys the idea of participation of individuals in elections. Consequently, individual rights merited protection under the Convention system (see in particular the decision of 30 May 1975 on the admissibility of applications nos. 6745-6746/76, W, X, Y and Z v. Belgium, op. cit., vol. 18, p. 244).

In *Mathieu-Mohin*, the Court acknowledged that, in the light of the Preamble to the Convention, Article 3 of Protocol No. 1 (P1-3) enshrines fundamental human rights the principle "an effective political democracy". Later on the Court has had frequent occasion to underline the importance of democratic principles underlying the interpretation and application of the Convention (see, among other authorities, *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, § 45) and that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (*Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 58, ECHR 2005-…

2. Compatibility of individual complaints under Article 3 of Protocol No. 1

i. Ratione temporis - Ukraine ratified the Convention and Protocol No. 1 on 11 September 1997. Elections held since that date under the provision.

ii. Ratione materiae - "choice of legislature"

The fact that the Court recognised the existence of the right to vote and the right to stand for election does not yet mean that any kind of elections fall under the protection of Article 3 of Protocol No. 1. Following the literal reading of Article 3 of Protocol No. 1, it applies only to legislative elections.

However, in order to ensure "effective political democracy", a characteristic enshrined in Article 3 of Protocol No. 1, regard must be had not only to the strictly legislative powers which a body has, but also to that body's role in the overall legislative process (see *Matthews v. the United Kingdom* [GC], no. 24833/94, §§ 42 and 49, ECHR 1999-I).

The term "legislature" in Article 3 of Protocol No. 1 does not necessarily mean the national parliament: it has to be interpreted in the light of the constitutional structure of the State in question. In the case of *Mathieu-Mohin and Clerfayt v. Belgium*, the 1980 constitutional reform had vested in the Flemish Council sufficient competence and powers to make it, alongside the French Community Council and the Walloon Regional Council, a constituent part of the Belgian "legislature", in addition to the House of Representatives and the Senate (see *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, p. 23, § 53). In the case of *Matthews v. the United Kingdom* ([GC], no. 24833/94, § 40, ECHR 1999-I), European Parliament was recognised as falling under the applicability of the above term "legislature".

(a) Municipal elections

On the other hand, the Convention organs have found that local authorities, such as the municipal councils in Belgium, the metropolitan county councils in the United Kingdom and the regional councils in France, did not form part of the "legislature" within the meaning of Article 3 of Protocol No. 1 (see *Clerfayt, Legros v. Belgium*, no. 10650/83, Commission decision of 17 May 1985, Decisions and Reports 42, p. 212; *Booth-Clibborn v. the United Kingdom*, no. 11391/85, Commission decision of 5 July 1985, DR 43, p. 236; and *Malarde v. France*, (dec.) no. 46813/99, 5 September 2000).

Furthermore, the power to make regulations and by-laws which is conferred on the local authorities in many countries is to be distinguished from legislative power, which is referred to in Article 3 of Protocol No. 1 to the Convention, even though legislative power may not be restricted to the national parliament alone (see *Cherepkov v. Russia* (dec.), no. 51501/99, ECHR 2000-I; *Salleras Llinares v. Spain* (dec.), no. 52226/99, ECHR 2000-XI; *Gorizdra v. Modlova* (dec.) 2 July 2002). The municipal councils, district councils and regional assemblies are the repositories of powers of an administrative nature concerning the organisation and provision of local services. These powers are granted by statute or other subordinate legislation which defines closely and restrictively their field of application. Consequently, the municipal councils, district councils and regional assemblies do not exercise legislative power within the meaning of the Constitution of the Republic of Poland.

ii. Elections of the Head of State

Should it be established that the office of the Head of the State had been given the power to initiate and adopt legislation or enjoyed wide powers to control the passage of legislation or the power to censure the principal legislation-setting authorities, then it could arguably be

considered to be a "legislature" within the meaning of Article 3 of Protocol No. 1 (see *Boškoski v. "the former Yugoslav Republic of Macedonia"* (dec.), no. 11676/04, ECHR 2004-...).

The President's powers to issue decrees, edicts, orders and ordinances, as well as the power to sign or provisionally veto legislative acts adopted by Parliament, has to be distinguished from the legislative power (see *mutatis mutandis, Guliev v. Azerbaijan* (dec.), no. 35584/02, 27 May 2004). Nor was the President granted enough powers to control the passage of legislation or the power to censure the principal institutions responsible for initiating and adopting legislation (see *Boškoski*, decision cited above).

In the case of *The Georgian Labour Party v. Georgia* (no. 9304/04, 22 May 2007), the Court was very cautious. It considered in detail the powers of the Georgian President and the reasoning could implicitly disclose that the Court was not that sure that the presidential would fall outside Article 3 of Protocol No. 1. In any case, the applicant party, the Georgian Labour Party, was found to lack victim status to complain about the presidential elction.

iii. Ratione Personae

(a) *Can a political party have a victim status?*

"The Court notes, in this regard, that the applicant party, being a corporate entity, could not run for the presidential election; nor did its Chairperson or any other ordinary party member. Consequently, the applicant was not actually affected by the contested electoral mechanisms and results of the presidential election (see Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, no. 25, §§ 239-240; Klass and Others v. Germany, judgment of 6 September 1976, Series A, no. 28, § 33). This fact was also duly noted by the Tbilisi Regional Court in its decision of 15 December 2003. The Court observes that the applicant's complaints about the electoral mechanisms of the presidential election rather express concern on behalf of the electorate at large and constitutes therefore a clear instance of actio popularis, the institution of which is not provided for under the Convention system (see Norris v. Ireland, judgment of 26 October 1988, Series A, no. 142, § 31; Sanles Sanles v. Spain (dec.), no. 48335/99, 26 October 2000)."

(b) Is an individual an absolute victim?

As regards the absence of the individual's standing to claim a violation under Article 3 of Protocol, No.1, an interesting insight is offered in the case of the *Russian Conservative Party of Entrepreneurs and Others v. Russia*, (nos. 55066/00 and 55638/00, § …, ECHR 2007-…). Here a problem of the so-called "frustrated voting intention**"** arises.

The Court stated that an allegedly frustrated voting intention cannot, by itself, be a ground for an arguable claim of a violation of the right to vote. It noted, firstly, the obvious problem of laying down a sufficient evidentiary basis for demonstrating the nature and seriousness of such an intention. An intention to vote for a specific party is essentially a thought confined to the *forum internum* of an individual. Its existence cannot be proved or disproved until and unless it has manifested itself through the act of voting or handing in a blank or spoiled paper (see *X v. Austria*, Commission decision of 22 March 1972, Yearbook 15, p. 474). Moreover, a voter's preference is not static but may evolve in time, influenced by political events and electoral campaigning. A sudden and sweeping change in voters' intentions is a well-documented political and social phenomenon.

> "On a more general level, the Court is mindful of the ramifications of accepting the claim of a frustrated voting intention as an indication of an interference with the right to vote. Such acceptance would confer standing on a virtually unlimited number of individuals to claim

that their right to vote had been interfered with solely because they had not voted in accordance with their initial voting intention."

In the light of the above considerations, the Court concluded that the right to vote cannot be construed as laying down a general guarantee that every voter should be able to find on the ballot paper the candidate or the party he had intended to vote for.

3. The right to vote

To start with, the right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion. Universal suffrage has become the basic principle (*Hirst*, § 59, *Mathieu-Mohin*, § 51, citing *X. v. Germany*, no. 2728/66, Commission decision of 6 October 1967, Collection 25, pp. 38-41). Nonetheless, the rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be given a margin of appreciation in this sphere. There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision (*Mathieu-Mohin*, § 52, and more recently, *Matthews v. United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999-I; *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV, and *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II).

It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with. In doing so the Court employs the free tier test:

- First, the Court has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness.
- Second, that they the limitations are imposed in pursuit of a legitimate aim, and
- Third, that the means employed are not disproportionate (see *Mathieu-Mohin*, § 52).

It has to be noted that when examining the alleged violations of the right to vote, the Court usually holds regard to the common principles of the European constitutional heritage (i.e. Resolution of the Parliamentary Assembly on the Code of Good Practice in Electoral Matters; Declaration by the Committee of Ministers on the Code of Good Practice in Electoral Matters, and the Guidelines on Elections). Relying on the above documents, the right to vote has been itemised by the Court in terms of the possibility to cast a vote in universal, equal, free, secret and direct elections held at regular intervals. Article 3 of Protocol No. 1 explicitly provides for the right to free elections at regular intervals by secret ballot and the other principles have also been recognised in the Convention institutions' case-law.

Freedom of suffrage is the cornerstone of the protection afforded by Article 3 of Protocol No. 1. The Court considers, as did the Commission, that the words "free expression of the opinion of the people" primarily signify that "the elections cannot be made under any form of pressure in the choice of one of more candidates, and that in this choice the elector [may] not be unduly induced to vote for one party or another" (see *X. v. the United Kingdom*, no. 7140/75, Commission decision of 6 October 1976, Decisions and Reports 7, p. 96). The principle of equality of treatment of all citizens in the exercise of their right to vote has been recognised. It does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate "wasted votes" (see *Mathieu-Mohin*, cited above).

With the freedom of suffrage another electoral principle is closely intertwined – universal suffrage. In the case of *Aziz v. Cyprus* (as well as in *Hirst*), the Court held that any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws which it promulgates. Exclusion of any groups or

categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, *mutatis mutandis*, *Aziz v. Cyprus*, no. 669949/01, § 28, ECHR 2004-V).

From a voter's perspective, free suffrage comprises two aspects: freedom to form an opinion and freedom to express that opinion (see the Explanatory Report, § 26).

As regards the freedom of voters to form an opinion, the Court notes that the Council of Europe's institutions have primarily described it in terms of the State authorities' obligation to honour their duty of neutrality, particularly where the use of the mass media, billposting, the right to demonstrate and the funding of parties and candidates are concerned (see, for example, the Guidelines on Elections, § 3.1 (a), and the Explanatory Report, § 26 (a)). In addition, this freedom has been considered to imply certain positive obligations on the part of the authorities, such as the obligation to submit the candidatures received to the electorate and to make information about candidates readily available (see the Guidelines on Elections, § 3.1 (b), and the Explanatory Report, § 26 (b)).

The freedom of voters to express their wishes, on the other hand, has been understood in terms of strict observance of the voting procedure. The electors should be able to cast their votes for registered lists or candidates in conditions shielding them from threats or constraints liable to prevent them from casting their votes or from casting them as they wish, whether such threats come from the authorities or from individuals (see the Guidelines on Elections § 3.2, and the Explanatory Report, § 27).

Nonetheless, the right to votes is not absolute. There is always a room of implied limitations. Thus, for example, the Court has found that domestic legislation imposing a minimum age or residence requirements for the exercise of the right to vote is, in principle, compatible with Article 3 of Protocol No. 1 (*Hilbe v. Liechtenstein* (dec.)**,** no. 31981/96, ECHR 1999-VI; see also the *Hirst* case cited above, ibid.). The Convention institutions have also held that it was open to the legislature to remove political rights from persons convicted of serious or financial crimes (see *Patrick Holland v. Ireland*, no. 24827/94, Commission decision of 14 April 1998, DR 93, p. 15; and *M.D.U. v. Italy* (dec.), no. 58540/00, 28 January 2003). In the above-mentioned *Hirst* case**,** however, the Grand Chamber underlined that the Contracting States did not have *carte blanche* to disqualify all detained convicts from the right to vote without having due regard to relevant matters such as the length of the prisoner's sentence or the nature and gravity of the offence. A general, automatic and indiscriminate restriction on all detained convicts' right to vote was considered by the Court as falling outside the acceptable margin of appreciation (ibid., § 82).

2. Right to stand for election

The Convention institutions have had fewer occasions to deal with an alleged violation of an individual's right to stand as a candidate for election, i.e. the so-called “passive” aspect of the rights under Article 3 of Protocol No. 1. In this regard the Court has emphasised that the Contracting States enjoy considerable latitude in establishing constitutional rules on the status of members of parliament, including criteria governing eligibility to stand for election. Although they have a common origin in the need to ensure both the independence of elected representatives and the freedom of choice of electors, these criteria vary in accordance with the historical and political factors specific to each State. The multiplicity of situations provided for in the constitutions and electoral legislation of numerous member States of the Council of Europe shows the diversity of possible approaches in this area. Therefore, for the purposes of applying Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned (see *Mathieu-Mohin and Clerfayt v. Belgium*, cited above*,* pp. 23-24, § 54, and *Podkolzina v. Latvia*, ibid.). The above-mentioned three tier test applies with respect to the right to stand for election as well.

In the *Podkolzina* case, the Court found a violation of Article 3 of Protocol No. 1 with regard to restrictions on an individual's eligibility to stand as a candidate for election. In that case, the applicant was removed from the list of parliamentary candidates on account of her allegedly insufficient knowledge of the official language of the State. The Court acknowledged that a decision determining a parliament's working language was in principle one which the State alone had the power to take, this being a factor shaped by the historical and political considerations specific to the country concerned. A violation of Article 3 of Protocol No. 1 was found however because the procedure applied to the applicant for determining her proficiency in the official language was incompatible with the requirements of procedural fairness and legal certainty, with the result that the negative conclusion reached by the domestic authorities in this connection could be deemed deficient (cited above, §§ 33-38).

In the *Melnychenko v. Ukraine* judgment (no. 17707/02, §§ 53-67, 19 October 2004), the Court also recognised that legislation establishing domestic residence requirements for a parliamentary candidate was, as such, compatible with Article 3 of Protocol No. 1. At the same time, the decision of the Ukrainian authorities to deny the applicant registration as a parliamentary candidate was found to be in breach of the above provision, given that the domestic law governing proof of a candidate's residence lacked the necessary certainty and precision to guarantee the applicant adequate safeguards against arbitrary treatment. The Court underlined in that case that, while the Contracting States have a wide margin of appreciation when establishing eligibility conditions in the abstract, the principle that rights must be effective requires that the eligibility procedure itself contains sufficient safeguards to prevent arbitrary decisions (cited above*,* § 59).

In certain older cases, the former Commission was required on several occasions to consider whether the decision to withdraw an individual's so-called “active” or “passive” election rights on account of his or her previous activities constituted a violation of Article 3 of Protocol No. 1. In all those cases, the Commission found that it did not. Thus, in the cases of *X. v. the Netherlands* (no. 6573/74, Commission decision of 19 December 1974, DR 1, p. 88) and *X. v. Belgium* (no. 8701/79, Commission decision of 3 December 1979, DR 18, p. 250), it declared inadmissible applications from two persons who had been convicted following the Second World War of collaboration with the enemy or “uncitizen-like conduct” and, on that account, were permanently deprived of the right to vote. In particular, the Commission considered that “the purpose of legislation depriving persons convicted of treason of certain political rights and, more specifically, the right to vote [was] to ensure that persons who [had] seriously abused, in wartime, their right to participate in the public life of their country are prevented in future from abusing their political rights in a manner prejudicial to the security of the State or the foundations of a democratic society (see *X. v. Belgium,* ibid.).

In the case of *Van Wambeke v. Belgium* (no. 16692/90, decision of 12 April 1991), the Commission declared inadmissible, on the same grounds, an application from a former member of the *Waffen-SS*, convicted of treason in 1945, who complained that he had been unable to take part in the elections to the European Parliament in 1989**.** In the case of *Glimmerveen and Hagenbeek v. the Netherlands* (nos. 8348/78 and 8406/78, decision of 11 October 1979, DR 18, p. 187), the Commission declared inadmissible two applications concerning the refusal to allow the applicants, who were the leaders of a proscribed organisation with racist and xenophobic tendencies, to stand for election. On that occasion, the Commission referred to Article 17 of the Convention, noting that the applicants “intended to participate in these elections and to avail themselves of the right [concerned] for a purpose which the Commission [had] found to be unacceptable under Article 17” (ibid.). In that case it was also underlined that the standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol No. 1, which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions

on electoral rights are imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations (ibid.).

It is also relevant in this context to note that Article 3 of Protocol No. 1, or indeed other Convention provisions, do not prevent, in principle, Contracting States from introducing general policy schemes by way of legislative measures whereby a certain category or group of individuals is treated differently from others, provided that the interference with the rights of the statutory category or group as a whole can be justified under the Convention (see, in the context of a legislative ban on a police officer from engaging in political activities, examined by the Court under Articles 10 and 11 of the Convention, the *Rekvényi v. Hungary* judgment, cited above, §§ 34-50 and 58-62).

4. The test under Article 3 of Protocol. No.1

Article 3 of Protocol No. 1 is akin to other Convention provisions protecting various forms of civic and political rights such as, for example, Article 10 which secures the right to freedom of expression or Article 11 which guarantees the right to freedom of association including the individual's right to political association with others by way of party membership. There is undoubtedly a link between all of these provisions, namely the need to guarantee respect for pluralism of opinion in a democratic society through the exercise of civic and political freedoms. However, where an interference with Article 3 of Protocol No. 1 is at issue the Court should not automatically adhere to the same criteria as those applied with regard to the interference permitted by the second paragraphs of Articles 8 to 11 of the Convention, Because of the relevance of Article 3 of Protocol No. 1 to the institutional order of the State, this provision is cast in very different terms from Articles 8-11. Article 3 of Protocol No. 1 is phrased in collective and general terms, although it has been interpreted by the Court as also implying specific individual rights. The standards to be applied for establishing compliance with Article 3 of Protocol No. 1 must therefore be considered to be less stringent than those applied under Articles 8-11 of the Convention.

The concept of “implied limitations” under Article 3 of Protocol No. 1 is of major importance for the determination of the relevance of the aims pursued by the restrictions on the rights guaranteed by this provision. Given that Article 3 is not limited by a specific list of “legitimate aims” such as those enumerated in Articles 8-11, the Contracting States are therefore free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a case.

The “implied limitations” concept under Article 3 of Protocol No. 1 also means that the Court does not apply the traditional tests of “necessity” or “pressing social need” which are used in the context of Articles 8-11. In examining compliance with Article 3 of Protocol No. 1, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people. In this connection, the wide margin of appreciation enjoyed by the Contracting States has always been underlined. In addition, the Court has stressed the need to assess any electoral legislation in the light of the political evolution of the country concerned, with the result that features unacceptable in the context of one system may be justified in the context of another (see, *inter alia*, the *Mathieu-Mohin* and *Podkolzina* cases, cited above, ibid.).

In the case of *Zdanoka*, the Court held that the need for individualisation of a legislative measure alleged by an individual to be in breach of the Convention, and the degree of that individualisation where it is required by the Convention, depend on the circumstances of each particular case, namely the nature, type, duration and consequences of the impugned statutory restriction. For a restrictive measure to comply with Article 3 of Protocol No. 1, a lesser degree

of individualisation may be sufficient, in contrast to situations concerning an alleged breach of Articles 8-11 of the Convention.

Finally, As regards the right to stand as a candidate for election, i.e. the so-called “passive” aspect of the rights guaranteed by Article 3 of Protocol No. 1, the Court has been even more cautious in its assessment of restrictions in that context than when it has been called upon to examine restrictions on the right to vote, i.e. the so-called “active” element of the rights under Article 3 of Protocol No. 1. In the *Melnychenko* judgment cited above (§ 57), the Court observed that stricter requirements may be imposed on eligibility to stand for election to Parliament than is the case for eligibility to vote. In fact, while the test relating to the “active” aspect of Article 3 of Protocol No. 1 has usually included a wider assessment of the proportionality of the statutory provisions disqualifying a person or a certain group of persons from the right to vote, the Court's test in relation to the “passive” aspect of the above provision has been limited largely to a check on the absence of arbitrariness in the domestic procedures leading to disqualification of an individual from standing as a candidate.

(*Note*: In the light of the last chapter concerning the test under Article 3 of Protocol No. 1, the following cases will be discussed: *Yumak and Sadak v. Turkey*, no. 10226/03, ECHR 2007…; *Krasnov and Skuratov v. Russia*, nos. 17864/04 and 21396/04, 19 July 2007; *Sukhovetskyy v. Ukraine*, no. 13716/02, § ECHR 2006…).